H. P. Hansen

SELECT CASES

ON THE

LAW OF EVIDENCE

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ON THE

LAW OF EVIDENCE

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PREFACE

TO THE SECOND EDITION

In this second edition a number of radical changes have been made.

(1) *The preliminary statements of fact,* as found in the original reports, have been included.

(2) *The arguments of counsel,* whenever published in the original reports, have been included, in salient extracts.

(3) Some *history* of each principal rule, as well as some *modern critical comment* on it, has been given a place, by short extracts printed in smaller type.

(4) The *total number* of cases and extracts has been increased by more than one fifth; the total number of pages has been increased by more than one half.

(5) Perhaps one half of the former cases have been replaced by *different cases.*

(6) The *distribution* of the cases, in time and locality, has been changed. About one fourth are English, and three fourths are American. Of the American cases, two fifths are dated since 1895, one quarter since 1904, and one tenth since 1908. The attempt has been to represent all the masters of judicial opinion-writing, of whom so many have in recent years arisen to give distinction to our Supreme Courts.

(7) *Statutes* are represented in thirty-eight passages. Illustrative dialogues from *trials* are represented in fifty-eight passages.

(8) In the Appendices are placed two sets of *practical exercises.* Experience has shown that, after a scientific study of the individual rules, the student still needs (and can profitably seek in a law-school course) two sorts of practical exercise. (1) He needs to *study and discuss problems* which range indefinitely over the whole mass of the rules and conceal within themselves multiple possibilities. Thus only can he meet the rules under the guise in which they really present themselves at a trial. (2) He needs to *do something* himself, by way of making or opposing an offer of evidence, as

he would be doing it at an actual trial. Thus only can he test whether he has grasped the rule as something to be used, not merely to be learned.

The use of this volume, as planned by the compiler for his own classes, is to furnish materials for the study and teaching of the Rules of Evidence strictly so called, *i.e.*, the rules of law for Admissibility, as determined by the Court. This is the orthodox subject of the traditional law-school course in Evidence.

But there is another and equally important part of the advocate's task of proving a case of facts, viz., the process of reasoning upon the evidence to persuade the jury, — the process of Proof. The weight of the evidence — each separate piece of it, groups of such pieces, and the whole mass — must be analyzed and reasoned upon, so as to make the jury believe or disbelieve the facts alleged and disputed. This is something quite different from the artificial rules of Admissibility, as applied by the Judge. It is, in truth, the culminating process of the whole trial. It involves the main art of reasoning to the truth about human affairs in litigation.

Yet it has never been systematically studied in law schools. It ought to be. There is plenty of science in it; and there are abundant materials for study. It involves logic, psychology, and the general science of human nature. To ignore this great part of the advocate's work is unnatural. Should we not do something to cultivate this part of the field?

A collection of materials, texts, illustrations, and problems, has been made for this purpose in a separate volume, entitled "The Principles of Judicial Proof, as contained in Logic, Psychology, and General Experience, and illustrated in Judicial Trials."

That volume, it is believed, can best be used first, before the present one, — in either a separate or an introductory course. Its materials are the natural ones for a student to begin on. They represent what the layman always conceives as the chief thing in a trial, viz., the reasoning to the jury on the persuasive effect of the admitted evidence. They serve to train the student to analyze and correct his loose lay notions of proof, to dissect the logic of circumstances, to estimate the credit of witnesses, and to weigh the total effect of a mass of mixed evidence. Moreover, by first working upon that volume, and thus becoming acquainted with the various sorts of evidence, he gains this additional advantage, viz., that when he then proceeds to study the artificial rules of Admissibility, the materials to which those rules apply are already familiar to him.

He is thus spared that oppressive sense of strangeness and futility which usually attends him in his first (and even later) wrestlings with those rules; and he can make rapid progress with them. Thus, as a help to the more efficient study of the rules of Admissibility, the prior study of the Principles of Judicial Proof is much to be desired.

That volume, and the present one, are constructed independently, and either can be used without the other. But the Compiler is convinced that a future generation will see the present rules of Admissibility much simplified and their importance reduced; while the field for the systematic study of the principles of Proof will be recognized and its field enlarged, — as it ought to be. In that view, he has tried to help forward the arrival of the coming science.

J. H. W.

Northwestern University Law School,
Chicago, March 4, 1913.

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INTRODUCTORY TOPICS

1. HISTORY.[1] The marked divisions of chronology, for our law of evidence, may be said to be seven, — from primitive times to 1200 A.D., thence to 1500, thence to 1700, to 1790, to 1830, to 1860, and to the present time:

(1) *A. D. 700–1200.* Up to the period of the 1200s, the history of the rules of evidence, in the modern sense, is like the chapter upon ophidians in Erin; for there were none. Under the primitive practices of trial by ordeal, by battle, and by compurgation, the proof is accomplished by a *judicium Dei*, and there is no room for our modern notion of persuasion of the tribunal by the credibility of the witnesses;[2] for the tribunal merely verified the observance of the due

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[1] From the Compiler's "Treatise on the System of Evidence," 1905, Vol. I, § 8.

For further reading on the history of the law of Evidence, Anglo-American and Continental, consult the following works:

James Bradley Thayer, "A Preliminary Treatise on Evidence at the Common Law" (1898), cc. i–iv (on "The Older Modes of Trial" and "Development of Trial by Jury");

Sir James Fitzjames Stephen, "A History of the Criminal Law of England" (1883), Vol. I, cc. vii, viii, xi; reprinted in Vol. II of "Select Essays in Anglo-American History" (1908), No. 34 ("Criminal Procedure from the 13th to the 18th Century");

Wm. S. Holdsworth, "A History of English Law" (1909), Vol. III, c. vi ("Procedure and Pleading in the Medieval Law");

Sir F. Pollock and Frederic Wm. Maitland, "The History of English Law before the Time of Edward I" (2d ed., 1899), Vol. II, c. ix, § 4 ("Pleading and Proof");

A. Esmein, "History of Continental Criminal Procedure" (1913; Continental Legal History Series, Vol. V), Part II, title II, c. iii ("The Theory of Legal Proofs"), and Appendix II ("A Brief History of the Law of Evidence").

The Continental system in its history may be more fully studied in the work of *Raoul de la Grasserie*, "De la Preuve au Civil et au Criminel, en droit français et dans les législations étrangères; Evolution, Comparaison, Critique, Réforme" (2 vols. 1912).

[2] This is indeed elaborately denied by *Déclareuil*, in "Nouvelle revue hist. du droit fr. et étr.," 1898, XXII, 220 ff.; but all prior students have assumed the contrary. It is no doubt difficult to replace ourselves in the primitive mental attitude.

formalities, and did not conceive of these as directly addressed to their own reasoning powers. Nevertheless, a few marks, indelibly made by these earlier usages, were left for a long time afterwards in our law. The summoning of attesting witnesses to prove a document, the quantitative effect of an oath, the conclusiveness of a seal in fixing the terms of a documentary transaction, the necessary production of the original of a document, — these rules all trace a continuous existence back to this earliest time, although they later took on different forms and survived for reasons not at all connected with their primitive theories.

(2) *A. D. 1200–1500.* With the full advent of the jury, in the 1200s, the general surroundings of the modern system are prepared; for now the tribunal is to determine out of its own conscious persuasion of the facts, and not merely by supervising external tests. The change is of course gradual; and trial by jury is as yet only one of several competing methods; but at least a system for the process of persuasion becomes possible. In this period, no new specific rules seem to have sprung up. The practice for attesting witnesses, oaths and documentary originals is developed. The rule for the conclusiveness of a sealed writing is definitely established. But during these three centuries the general process of pleading and procedure is only gradually differentiated from that of proof, — chiefly because the jurors are as yet relied upon to furnish in themselves both knowledge and decision; for they are not commonly caused to be informed by witnesses, in the modern sense.

(3) *A. D. 1500–1700.* By the 1500s, the constant employment of witnesses, as the jury's chief source of information, brings about a radical change. Here enter, very directly, the possibilities of our modern system. With all the emphasis gradually cast upon the witnesses, their words and their documents, the whole question of admissibility arises. One first great consequence is the struggle between the numerical or quantitative system, which characterized the canon law and still dominated all other methods of proof, and the unfettered system-less jury trial; and it was not for two centuries that the numerical system was finally repulsed. Another cardinal question now necessarily faced was that of the competency of witnesses; and by the end of the 1500s the foundations were laid for all the rules of disqualifications which prevailed thenceforward for more than two centuries, and in part still remain. At the same time, and chiefly from a simple failure to differentiate, most of the rules of privilege and privileged communication were thereby brought into existence, at least in embryo. The rule for attorneys, which alone stood upon its own ground, also belongs here, though its reasons were newly conceived after the lapse of a century. A third great principle, the right to have compulsory attendance of witnesses, marks the very beginning of this period. Under the primitive notions, this all rested upon the voluntary action of one's partisans; the calling of compurgators and documentary attestors, under the older methods of trial, was in effect a matter of contract. But as soon as the chief reliance came to be the witnesses to the jurors, and the latter ceased to act on their own knowledge, the necessity for the provision of such information, compulsory if not otherwise, became immediately obvious. The idea progressed slowly; it was enforced first for the Crown, next for civil parties; and not until the next period was it conceded to accused persons. Thus was laid down indirectly the general principle that there is no privilege to refuse to be a witness; to which the other rules, above mentioned, subsequently became contrasted as exceptions. A fourth important principle, wholly independent in origin, here also arose and became fixed by the end of this

period, — the privilege against self-crimination. The creature, under another form, of the canon law, in which it had a long history of its own, it was transferred, under stress of political turmoil, into the common law, and thus, by a singular contrast, came to be a most distinctive feature of our trial system. About the same period — the end of the 1600s — an equally distinctive feature, the rule against using an accused's character, became settled. Finally, the "parol evidence" rule enlarged its scope, and came to include all writings and not merely sealed documents; this development, and the enactment of the statute of frauds and perjuries, represent a special phase of thought in the end of this period. It ends, however, rather with the Restoration of 1660 than with the Revolution of 1688, or the last years of the century; for the notable feature of it is that the regenerating results of the struggle against the arbitrary methods of James I and Charles I began to be felt as early as the return of Charles II. The mark of the new period is seen at the Restoration. Justice, on all hands, then begins to mend. Crudities which Matthew Hale permitted, under the Commonwealth, Scroggs put aside, under James II. The privilege against self-crimination, the rule for two witnesses in treason, and the character rule — three landmarks of our law of evidence — find their first full recognition in the last days of the Stuarts.

(4) *A. D. 1700–1790.* Two circumstances now contributed independently to a further development of the law on two opposite sides, its philosophy and its practical efficiency. On the one hand, the final establishment of the right of cross-examination by counsel, at the beginning of the 1700s, gave to our law of evidence the distinction of possessing the most efficacious expedient ever invented for the extraction of truth (although, to be sure, like torture, — that great instrument of the continental system, — it is almost equally powerful for the creation of false impressions). A notable consequence was that by the multiplication of oral interrogation at trials the rules of evidence were now developed in detail upon such topics as naturally came thus into new prominence. All through the 1700s this expansion proceeded, though slowly. On the other hand, the already existing material began now to be treated in doctrinal form. The first treatise on the law of evidence was that of Chief Baron Gilbert, not published till after his death in 1726. About the same time the abridgments of Bacon and of Comyns gave many pages to the title of Evidence;[1] but no other treatise appeared for a quarter of a century, when the notes of Mr. J. Bathurst (later Lord Chancellor) were printed, under the significant title of the "Theory of Evidence." But this propounding of a system was as yet chiefly the natural culmination of the prior century's work, and was independent of the expansion of practice now going on. In Gilbert's book, for example, even in the fifth edition of 1788, there are in all, out of the three hundred pages, less than five concerned with the new topics brought up by the practice of cross-examination; in Bathurst's treatise (by this time embodied in his nephew Buller's "Trials at Nisi Prius") the number is hardly more; Blackstone's Commentaries, in 1768, otherwise so full, are here equally barren. The most notable result of these disquisitions, on the theoretical side, was the establishment of the "best evidence" doctrine, which dominated the law for nearly a century later. But this very doctrine tended to preserve a general consciousness of the supposed simplicity and narrowness of compass of the law of evidence. As late as the very end of the century

[1] Hawkins, in 1716, and Hale, in 1680, in their treatises on the criminal law, had had short chapters on evidence at these earlier dates.

Mr. Burke could argue down the rules of evidence, when attempted to be enforced upon the House of Lords at Warren Hastings' trial, and ridicule them as petty and inconsiderable.[1] But, none the less, the practice had materially expanded during his lifetime. In this period, besides the rules for impeachment and corroboration of witnesses (which were due chiefly to the development of cross-examination), are to be reckoned also the origins of the rules for confessions, for leading questions, and for the order of testimony. The various principles affecting documents — such as the authorization of certified (or office) copies and the conditions dispensing from the production of originals — now also received their general and final shape.

(5) *A. D. 1790–1830.* The full spring-tide of the system had now arrived. In the ensuing generation the established principles began to be developed into rules and precedents of minutiæ relatively innumerable to what had gone before. In the Nisi Prius reports of Peake, Espinasse, and Campbell, centering around the quarter-century from 1790 to 1815, there are probably more rulings upon evidence than in all the prior reports of two centuries. In this development the dominant influence is plain; it was the increase of printed reports of Nisi Prius rulings.[2] This was at first the cause, and afterwards the self-multiplying effect, of the detailed development of the rules. Hitherto, upon countless details, the practice had varied greatly on the different circuits; moreover, it had rested largely in the memory of the experienced leaders of the trial bar and in the momentary discretion of the judges. In both respects it therefore lacked fixity, and was not amenable to tangible authority. These qualities it now rapidly gained. As soon as Nisi Prius reports multiplied and became available to all, the circuits must be reconciled, the rulings once made and recorded must be followed, and these precedents must be open to the entire profession to be invoked. There was, so to speak, a sudden precipitation of all that had hitherto been suspended in solution. This effect began immediately to be assisted and emphasized by the appearance of new treatises, summing up the recent acquisitions of precedent and practice. In nearly the same year, Peake, for England (1801), and MacNally, for Ireland (1802), printed small volumes whose contents, as compared with those of Gilbert and Buller, seem to represent almost a different system, so novel were their topics. In 1806, Evans' Notes to Pothier on Obligations was made the vehicle of the first reasoned analysis of the rules. In this respect it was epoch-making; and its author in a later time once quietly complained that its pages were "more often quoted than acknowledged." The room for new treatises were rapidly enlarging. Peake and MacNally, as handbooks of practice, were out of date within a few years, and no new editions could cure them. In 1814, and then in 1824, came Phillipps and Starkie, — in method combining Evans' philosophy with Peake's strict reflection of the details of practice. There was now indeed a system of evidence, consciously and fully realized. Across the water a similar stage had been reached. By a natural interval Peake's treatise was balanced, in 1810, by Swift's Connecticut book, while Phillipps and

[1] As to rules of law and evidence, he did not know what they meant; . . . it was true, something had been written on the law of Evidence, but very general, very abstract, and comprised in so small a compass that a parrot he had known might get them by rote in one half-hour and repeat them in five minutes" (1794, Hastings' Trial, Lords' Journal, Feb. 25).

[2] Compare Campbell's account of the conditions when he began to report in 1807 ("Life," I, 214).

Starkie (after a period of sufficiency under American annotations) were replaced by Greenleaf's treatise of 1842.

(6) *A. D. 1830–1860.* Meantime, the advance of consequences was proceeding, by action and reaction. The treatises of Peake and Phillipps, by embodying in print the system as it existed, at the same time exposed it to the light of criticism. It contained, naturally enough, much that was merely inherited and traditional, much that was outgrown and outworn. The very efforts to supply explicit reasons for all this made it the easier to puncture the insufficient reasons and to impale the irrational rules. This became the office of Bentham. Beginning with the first publication, in French, of his Theory of Judicial Evidence, in 1818, the influence of his thought upon the law of evidence gradually became supreme. While time has only ultimately vindicated and accepted most of his ideas (then but chimeras) for other practical reforms, and though some still remain untried, the results of his proposals in this department began almost immediately to be achieved. Mature experience constantly inclines us to believe that the best results on human action are seldom accomplished by sarcasm and invective; for the old fable of the genial sun and the raging wind repeats itself. But Bentham's case must always stand out as a proof that sometimes the contrary is true, — if conditions are meet. No one can say how long our law might have waited for regeneration, if Bentham's diatribes had not lashed the community into a sense of its shortcomings. It is true that he was particularly favored by circumstances in two material respects, — the one personal, the other broadly social. He gained, among others, two incomparable disciples, who served as a fulcrum from which his lever could operate directly upon legislation. Henry Brougham and Thomas Denman combined with singular felicity the qualities of leadership in the technical arts of their profession and of energy for the abstract principles of progress. Holding the highest offices of justice, and working through a succession of decades, they were enabled, within a generation, to bring Bentham's ideas directly into influence upon the law. One who reads the great speech of Brougham, on February 7, 1828, on the state of the common law courts, and the reports of Denman and his colleagues, in 1852 and 1853, on the common law procedure, is perusing epoch-making deliverances of the century.[1] The other circumstance that favored Bentham's cause was the radical readiness of the times. The French Revolution had acted in England; and as soon as the Napoleonic wars were over, the influence began to be felt. One part of public opinion was resolved to achieve a radical change; the other and dominant part felt assured that if the change did not come as reform, it would come as revolution; and so the reform was given, to prevent the revolution. In a sense, it did not much matter to them where the reform came about, — in the economic, or the political, or the juridical field, — if only there was reform. At this stage, Bentham's denouncing voice concentrated attention on the subject of public justice, — criminal law and civil procedure; and so it was here that the movement was felt among the first. As a matter of chronological order, the first considerable achievements were in the field of criminal law, beginning in 1820, under Romilly and Mackintosh; then came the political upheaval of the Reform

[1] "The great controversy now [1851] is upon the Evidence Bill, allowing the parties to be examined against and for themselves. . . . If it passes, it will create a new era in the administration of justice in this country" (*Campbell's* "Life," II, 292). "Our new procedure (which is in truth a juridical revolution) is now [1854] established, and people submit to it quietly" (*Ibid.*, II, 328).

Bill, in 1832, under Russell and Grey; next the economic regeneration, beginning with Huskisson and culminating with Peel in the Corn Law Repeal of 1846. Not before the Common Law Procedure Acts of 1852 and 1854 were large and final results achieved for the Benthamic ideas in procedure and evidence. But over the whole preceding twenty years had been spread initial and instructive reforms. Brougham's speech of February 7, 1828, was the real signal for the beginning of this epoch, — a beginning which would doubtless have culminated more rapidly if urgent economic and political crises had not intervened to absorb the legislative energy.

In the United States, the counterpart of this period came only a little later. It seems to have begun all along the line and was doubtless inspired by the accounts of progress made and making in England, as well as by the writings of Edward Livingston, the American Bentham, and by the legislative efforts of David Dudley Field, in the realm of civil procedure. The period from 1840 to 1870 saw the enactment, in the various jurisdictions in this country, of most of the reformatory legislation which had been carried or proposed in England.

(7) *A. D. 1860.* After the Judicature Act of 1875, and the Rules of Court (of 1883) which under its authority were formulated, the law of evidence in England attained rest. It is still overpatched and disfigured with multiplicitous fragmentary statutes, especially for documentary evidence. But it seems to be harmonious with the present demands of justice, and above all to be so certain and settled in its acceptance that no further detailed development is called for. It is a sub-stratum of the law which comes to light only rarely in the judicial rulings upon practice.

Far otherwise in this country. The latest period in the development of the law of evidence is marked by a temporary degeneracy. Down to about 1870, the established principles, both of common law rules and of statutory reforms, were re-stated by our judiciary in a long series of opinions which, for careful and copious reasoning, and for the common sense of experience, were superior (on the whole) to the judgments uttered in the native home of our law. Partly because of the lack of treatises and even of reports, — partly because of the tendency to question imported rules and therefore to defend on grounds of principle and policy whatever could be defended, — partly because of the moral compulsion upon the judiciary, in new communities, to vindicate by intellectual effort its right to supremacy over the bar, — and partly also because of the advent, coincidently, of the same rationalizing spirit which led to the reformatory legislation, — this very necessity of restatement led to the elaboration of a finely reasoned system. The "mint, anise, and cummin" of mere precedent [1] were not unduly revered. There was always a reason given, — even though it might not always be a worthy reason. The pronouncement of Bentham came near to be exemplified, that "so far as evidence is concerned, the English practice needs no improvement but from its own stores. Consistency, consistency, is the one thing needful. Preserve consistency, and perfection is accomplished." [2]

But the newest States in time came to be added. New reports spawned a

[1] Lumpkin, J., in 33 Ga. 306.

[2] "Rationale of Judicial Evidence," b. X, conclusion. Bentham never failed to preach the impropriety of not furnishing reasons. "'I think, therefore I exist,' was the argument of Descartes; 'I exist, therefore I have no need to think or be thought about,' is the argument of jurisprudence" (b. II, c. x, § 12; so also in b. III, c. iv, note).

multifarious mass of new rulings in fifty jurisdictions, — each having theoretically an equal claim to consideration. The liberal spirit of choosing and testing the better rule degenerated into a spirit of empiric eclecticism in which all things could be questioned and requestioned ad infinitum. The partisan spirit of the bar, contesting desperately on each trifle, and the unjust doctrine of new trials, tempting counsel to push up to the appellate courts upon every ruling of evidence, increased this tendency. Added to this was the supposed necessity in the newer jurisdictions of deciding over again all the details that had been long settled in the older ones. Here the lack of local traditions at the bar and of self-confidence on the bench led to the tedious re-exposition of countless elementary rules. This lack of peremptoriness on the supreme bench, and (no less important) the marked separation of personality between courts of trial and courts of final decision, led also to the multifarious heaping up, within each jurisdiction, of rulings upon rulings involving identical points of decision. This last phenomenon may be due to many subtly conspiring causes. But at any rate the fact is that in numerous instances, and in almost every jurisdiction, recorded decisions of Supreme Courts upon precisely the same rule and the same application of it can be reckoned by the dozens and scores. This wholly abnormal state of things — in clear contrast to that of the modern English epoch — is the marked feature of the present period of development in our own country.

Of the change that is next to come, and of the period of its arrival, there seem as yet to be no certain signs. Probably it will come either in the direction of the present English practice — by slow formation of professional habits — or in the direction of attempted legislative relief from the mass of bewildering judicial rulings — by a concise code. The former alone might suffice. But the latter will be a false and futile step, unless it is founded upon the former; and in any event the danger is that it will be premature. A code fixes error as well as truth. No code can be worth casting, until there has been more explicit discussion of the reasons for the rules and more study of them from the point of view of synthesis and classification. The time must first come when, in the common understanding and acceptance of the profession, "every rule is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words." [1]

[1] Mr. Justice Holmes.

2. Definitions. In *Procedure, i.e.*, the method of enforcing legal relations, one of the stages is the *Trial, i.e.*, the parties' attempt to demonstrate to the tribunal the correctness of their respective legal positions. In the trial, the materials used comprise *Evidence* and *Argument*. The term *Evidence* is applied to all adduced materials outside of the tribunal's own mental operations; the term *Argument* is applied to the parties' words invoking those mental operations upon the evidence adduced.

Evidence may concern either *law* or *fact*, so-called, but in common usage is applied to the latter only. Evidence may be offered to either *Judge* or *Jury*, — commonly to the latter.

Evidence, as applied to the persuasion of a jury on facts, has three aspects:

(*a*) The *Evidence*, strictly so-called, *i.e.*, the materials, data, or "facts," as offered, and each piece of such materials.

(*b*) The *Inference, i.e.*, the persuasive effect supposed to belong provisionally to each piece of these materials; and

(*c*) The *Proof, i.e.*, the total persuasive effect of the whole mass of data on the issue before the tribunal.

In the Anglo-American system of procedure, the parties to the cause are expected to obtain the evidence and present it to the tribunal; rarely does the tribunal itself search for evidence. Hence, the rules of evidence are commonly regarded from the party's point of view. Thus regarded, they fall naturally into five broad divisions (here entitled Books):

Book I. *What Evidence may be presented* (Rules of Admissibility).

Book II. *What is the Procedure for presenting Evidence* (Offers, Objections, and Rulings).

Book III. *To Whom the Evidence is to be presented* (Judge or Jury; Law and Fact).

Book IV. *By Whom the Evidence is to be presented* (Burdens of Proof; Presumptions).

Book V. *Of What Matters No Evidence need be presented* (Judicial Admissions; Judicial Notice).

BOOK I. RULES OF ADMISSIBILITY OF EVIDENCE

2. Definitions (continued). When Evidence is presented, the main object is, of course, to persuade the jury with it. Hence, the logical (or, probative; or, persuasive) power of the evidence (each piece and the whole mass) on the jury's belief, *i.e.*, the Weight of the evidence, its Proof, would naturally be supposed to be the sole consideration. But it is not. Before the evidence is allowed to be presented to the jury, the Judge determines, under the law, its Admissibility; and often rejects it.

This is because long experience in millions of trials has shown plainly the abuses and dangers of unrestricted admission. In the first place, the jurors are untrained in the science and art of estimating evidence, and need to be protected by the law from those dangers. In the next place, the Jurors, and all men, are too susceptible to the false force of some kinds of evidence. In the third place, there are clients and counsel in all epochs and communities, who are unscrupulous or careless or lazy or ignorant enough to present all sorts of false or misleading evidence; and thus the safeguards tested by experience must be uniformly applied in all cases, to prevent the risk of erroneous verdicts. The policies or principles thus found useful in experience are applied to restrict the kinds of evidence that may be used, or to impose conditions on their use. Thus arise the Rules of Admissibility.

These rules of Admissibility therefore are not based on the intrinsic persuasive (logical, probative) effect of the evidence itself. That is, those rules do not exclude the evidence because it does not logically prove or persuade the mind; nor even because its probative value is small. Some of the rules, to be sure, are applied only to evidence having small probative value; but there is always some other special policy combining therewith to justify the rule. Hence, the principles of Logic and Psychology (as examined in the present Compiler's "Principles of Judicial Proof") furnish little or no basis for those Rules of Admissibility. Most of them are based mainly on a broad experience, in trials, of the dangers of misuse of evidence by jurors and parties. The others are based on other policies of civic importance, which override for the time being the quest for truth in trials.

In studying the Rules of Admissibility, therefore, the *first* caution is, *Not to regard them as synonymous with the principles of Proof, or Weight of Evidence;* and the *second* caution is, *To look for the practical policy or*

principle of safeguard, based on trial experience, which is at the basis of each one.

The Rules of Admissibility fall into two groups, according to the purpose of the policy which dictates the rule.

The first group (here termed Part I), *Rules of Auxiliary Probative Policy*, aim to safeguard against risks of erroneous verdicts. They have regard only for the ascertainment of the truth in litigation. They assume that truth, in the long run, will best be attained by the exclusions or conditions which they impose.

The second group (here termed Part II), *Rules of Extrinsic Policy*, are based, on the contrary, on outside considerations. They frankly admit that they will hamper the inquiry into truth, but maintain that other interests are paramount, for the time being. They do not carry their scope so far as to stifle the truth; they merely exclude a small part of the materials available for getting at it. And they do this because the incidental loss, viz., the risk of blocking the truth, is small as compared with the gain to the extrinsic interests thereby protected. This group of rules comprises the various so-called Privileges, — husband and wife, attorney and client, State secrets, self-crimination, etc.

PART I. RULES OF AUXILIARY PROBATIVE POLICY

2. Definitions (continued).

The Rules of Auxiliary Probative Policy may best be classified, not according to the kinds of policy involved (which are more or less conglomerate and inseparable), but according to what each rule *actually does to the evidence.* There are thus five groups (here termed Titles): Eliminative, Preferential, Analytic, Prophylactic, Synthetic.

Title I: Eliminative Rules. These rules simply shut out certain kinds of evidence. The rules are numerous; but the policies which underlie them are mainly three: Undue Prejudice, Unfair Surprise, and Confusion of Issues.

Undue Prejudice. This policy rests on the danger, shown by experience, that juries will be moved by prejudice or ignorance to give inordinate weight to evidence which intrinsically should not persuade them, and that parties will take advantage of this trait. For instance, the jurors, on hearing of an accused's criminal record, may find him guilty of the act now charged, without actually believing that he did it, and merely because he seems a fit man to be punished generally.

Unfair Surprise. This policy rests on the danger, shown by experience, that an opponent may be overcome by false evidence, merely for lack of an opportunity before trial to prepare to refute it. The mere surprise is of no account; but when a man is surprised to find false evidence produced, it might be unfair to him to admit it, if he could not have known in advance the tenor of the false evidence.

Confusion of Issues. This policy rests on the danger, shown by experience, that a cumulation of complex and controverted details on collateral issues may so distract the attention of the jurors that the real issue will be lost from sight, and they will be moved to render their general verdict by some of these collateral details, not by the evidence on the main issues of the case.

These three policies, expressed or implied, appear again and again as the source of most of the rules in this group.

Nevertheless, the slight probative value of certain kinds of evidence enters often as a part of the reason for the rule. *I.e.,* the above policies would not avail to exclude the evidence unless it had been in itself of slight probative value. Thus in many cases, notably under Circumstantial Evidence, the judge will be found discussing the slight probative value of the evidence offered, because the policies of exclusion would otherwise not be applied.

In Testimonial Evidence (Sub-title II), to be sure, there is little said by the judges about the three policies above named; the slight probative value of the testimony is apparently the main consideration. Yet,

underlying and unexpressed, is a general policy, allied to that of Undue Prejudice, which fears the danger of the jury being misled by a plausible witness who really is of a class deemed untrustworthy. This policy, being rarely expressed, cannot be given a name. And it tends to be less and less considered; so that testimonial evidence is now more freely admitted than formerly. Nevertheless, in these rules, as in those for Circumstantial Evidence, the distinction should always be looked for between excluding the evidence solely for slight probative value and excluding it because of known dangers of fraud, prejudice, etc.

Title II: Preferential Rules. These rules, declaring one kind of evidence preferable to another, insist that the former must be produced, if it can be; or, otherwise put, they refuse to admit the latter unless the former is shown to be not obtainable. They rest on the known risks of error in the latter sort. Such are the rules for producing the original of a document (instead of a copy), and for producing the attesting witness to a will (instead of a mere bystander).

Title III: Analytic Rules. This type of rule requires that the evidence be tested, to expose its possible weakness, at the time of its admission. There is but one rule exclusively of this type, — the Hearsay rule, *i.e.*, requiring that testimony be delivered in court, where the opponent can cross-examine the witness and the tribunal can observe his demeanor under examination. The benefits of this process are the same that we obtain in chemistry by testing an unknown liquid with litmus-paper or by roasting a salt in a test-tube. The actual process is therefore one of *analysis*, — separating into plain view the strong or weak elements hitherto lying hidden in the testimony and otherwise unascertainable.

Title IV: Prophylactic Rules. These rules apply to certain kinds of evidence an extra measure of precaution which will counteract its possible dangers. The oath, the separation of witnesses, etc., belong here. The policy of these rules recognizes that there are special dangers of falsity, but realizes that we cannot expect always to detect the falsity, and endeavors to protect against it by an appropriate safeguard; the oath, for instance, is expected to check the witness who might have contemplated telling a falsehood.

Title V: Synthetic Rules. These rules require that two or more kinds of evidence shall be produced together, *i.e.*, that one of them alone shall not be used. Their policy rests on the known experience of weakness in a certain kind of evidence, and seeks protection by uniting other evidence to strengthen it. There now remain but few of these rules, *e.g.*, the rule requiring two witnesses for an act of treason.

TITLE I. ELIMINATIVE RULES

2. Definitions (continued). In taking up the Eliminative Rules, it is necessary to distinguish between the three kinds of evidential materials: Circumstantial Evidence, Testimonial Evidence, and Autoptic Proference. The difference of the materials gives rise to entirely different rules.

Autoptic Proference. This occurs when the tribunal observes the thing with its own senses. The more common name (invented by Bentham, but afterwards misapplied) is *Real Evidence, i.e.*, the evidence furnished by a view of a "res," or thing itself. As a term correct in etymology and analogous usage, *Autoptic* (autopsy) indicates that the tribunal uses its own senses to observe the thing, and *Proference* (profert) indicates that the parties produce the thing for that purpose to the tribunal. When a bloody knife is in issue, the Autoptic Proference of it is to be distinguished from Circumstantial Evidence about it (*e.g.*, a cut-mark or blood-stain left on a garment by the knife) and from Testimonial Evidence about it (*e.g.*, a witness' assertion that he saw it).

Autoptic Proference is, in one sense, not evidence *of* a thing; it *is* the thing. But that is a matter of theory, and is not important, except in the interpretation of statutes.

Testimonial Evidence. This includes all assertions made by a human being, as a source of the tribunal's belief in the fact asserted. An assertion made out of court before trial is testimonial evidence, as well as an assertion made in court on the witness-stand; the hearsay rule may exclude the former (though not always), but that does not alter its nature.

Circumstantial Evidence. This comprises all evidence not testimonial. The term is an unfortunate one, but cannot be dislodged from usage. Common examples are: the contour of a flesh-wound, as evidencing the kind of bullet that caused it; the occurrence of a storm, as evidencing the probable sinking of a ship; the moral character of a man, as evidencing his probable doing of an act.

The distinction of testimonial from circumstantial evidence is of great practical importance. Testimonial evidence (human assertions) is one general class having more or less common and constant features and conditions, and hence many of the teachings of experience as to its trustworthiness can be reduced to rules fairly applicable to all testimony. But circumstantial evidence is of infinite variety, and precisely the same conditions seldom recur; hence, general rules can seldom be formulated. Moreover, so far as they can be, they deal with a class of materials essentially different from that of testimonial evidence, and therefore form a different branch of learning and can be studied separately.

In the following pages, it will be desirable to take up these three classes in the following order: Autoptic Proference; Circumstantial Evidence; Testimonial Evidence.

SUB-TITLE I. RULES EXCLUDING AUTOPTIC PROFERENCE (REAL EVIDENCE)

3. Ings' Trial. (1820. Howell's State Trials, XXXIII, 1051.) [The "Cato-street conspiracy." High treason; the defendant claimed that he was ignorantly drawn into the movement and did not know of the specific murderous designs of the leaders. A constable produced the conspirators' weapons.]

Mr. *Gurney.* — Are there now placed upon the table the things which were taken in Cato-street? — Yes.

You gave us an enumeration yesterday of thirty-eight ball-cartridges, fire-lock and bayonet, one powder-flask, three pistols, and one sword, with six bayonet spikes, and cloth belt, one blunderbuss, pistol, fourteen bayonet spikes, and three pointed files, one bayonet, one bayonet spike, and one sword scabbard, one carbine and bayonet, two swords, one bullet, ten hand-grenades; I do not see them? — Here they are, (producing a bag.)

We must have them on the table (they were emptied out.)

There is one hand-grenade much larger than the rest; that is what you call the large hand-grenade? — Yes.

Show the jury the fuse to it? (it was shown to the jury.) — There are some iron spikes tucked in.

Hand one of the small hand-grenades to the jury with a fuse? (it was handed to the jury.)

Are there any fire balls there? (one was shown to the jury.) — I will give you an account, gentlemen, by another witness, of the composition of these. I observe here are some bayonets with screws at the end, and some sharpened files with screws at the end? — There are (they were shown to the jury.)

Produce the pike staves? — (they were produced.) Take one of the pike staves from the rest, and show the adaptation of it. (the witness screwed in one of the pike heads.) They are all made to receive a screw? — Yes.

Have they a ferrule at the top? — They have.

Will you produce the belt and the knife-case found upon the prisoner? (they were produced.) Hand that knife with the knife-case and the belt to the jury: you observe, gentlemen, the knife-case and the belt are of the same cloth.

Ings. — The knife was not found upon me, my lord.

Mr. *Gurney.* — You observe the handle of the knife, gentlemen, is bound round with wax-end? (it was shown to the jury.) Where are the two haversacks that were found upon the prisoner? (they were handed to the jury.) Show the jury the brass-barrelled blunderbuss (it was shown to the jury.) — Which were the pike staves found in Cato-street? — The bundle I have just shown. . . .

Mr. *Gurney.* — Now produce to us the things out of the basket covered with the blue apron? — These are flannel bags full of gunpowder; there are also some empty (producing them).

A *Juryman.* — There is powder in those bags. There is. (One of the bags was opened, and the contents shown to the jury).

Mr. *Gurney.* — The bags contain one pound each, I believe? — Yes.

Are there four hand-grenades? — There are. (they were handed to the jury). . . .

You found also sixty-three bullets? — I did; here they are. (producing them). . . .

You stated that in a haversack, there were 434 balls; 171 ball cartridges, and 69 without powder (the witness produced the same.) There were three pounds of gunpowder? — There were. (producing them.) . . .

Produce the box you found with the ball cartridges (it was produced). There are 965 ball cartridges in that box, are there? — There are. . . .

Take one of the hand-grenades; you have examined two of them before? — Yes, I have.

Take that to pieces, and show us of what it is composed (it was taken to pieces in the presence of the jury). . . .

Take out the nails and see whether you find a tin case filled with gunpowder? — Here is part of a blanket covering the tin case. . . .

Is it good gunpowder? — Very good.

That would be a quantity of gunpowder sufficient to cause the explosion you speak of? — Yes, there is rather more than we put to burst a nine-inch shell.

I need scarcely ask you, whether that grenade would be a most formidable and destructive instrument? — It certainly would.

Mr. *Attorney-General.* — That, my lord, is the case on the part of the Crown.

. . . . . .

Mr. *Adolphus* [counsel for the defence, in his address to the jury].

You have had that which produces always a sort of mechanical effect. I do not mean to pay an ill compliment to your understandings; but you have had a display of visible objects, pikes and swords, guns and blunderbuses, have been put before you, to the end that this feeling may be excited in every man's mind, "How should I like to have this sort of thing put to my breast! How should I feel if this were applied to my chimney! and that to my stair-case!" and so on; this is, that the individual feeling of each man may make him separate himself from society, — may make him, through the medium of his own personal hatred of violence or apprehension of danger, think that this contemptible exhibition of imperfect armoury could operate on a town filled by a million of loyal inhabitants or could give the means of overwhelming the empire. When touched by reason, they shrink to nothing, and will never produce a verdict contrary to the evidence of facts. It is like displaying the bloody robe of a man who has been stabbed or murdered; it is like the trick practised at every sessions, where we see a witness pull out some cloak or handkerchief dipped in blood of the person, to produce conviction through the medium of commiseration. They do not trust to description, but rely upon display. That is the effect of the production of these arms.

4. David Paul Brown ("The Forum," 1856. vol. II. p. 448). [This famous Philadelphia advocate is recounting the story of a celebrated trial, in 1834, for the homicide, by a disappointed lover, of the woman he loved]: During the course of the trial there was an occurrence which is entitled to notice. When I first called upon the prisoner, after he had furnished me with some of the prominent details, I asked him how the deceased was dressed at the time of the blow. He said, "in black." I observed, "that was better than if the dress had been white." Upon which the prisoner turned hastily round, and asked what difference that could make. The reply was, "No difference in regard to your offense, but a considerable difference in respect to the effect produced upon the jury by the exhibition of the garments, which, no doubt, will be resorted to." And so upon the trial it turned out. The black dress was presented to the jury, — the

eleven punctures through the bosom pointed out; but no stain was observable, no excitement was produced. At last, however, they went further, and produced some of the white undergarments — corsets, etc., all besmeared with human blood. Upon this exhibition there was not a dry eye in the courthouse. And the current of opinion continued to run against the defendant from that moment until the close of the case, and finally bore him into eternity.

5. STATE *v.* MOORE

SUPREME COURT OF KANSAS. 1909

80 *Kan.* 232; 102 *Pac.* 475

APPEAL from District Court, Cowley County; C. L. SWARTS, Judge.

John C. Moore was convicted of murder in the first degree, and he appeals. Affirmed.

See, also, 77 Kan. 736, 95 Pac. 409.

John W. Adams, Geo. W. Adams, and *L. C. Brown,* for appellant. *F. S. Jackson,* Atty. Gen. (*Ed. J. Fleming* and *Jackson & Noble,* of counsel), for the State.

BURCH, J.— On Sunday, December 27, 1906, appellant waylaid his wife as she was returning from church, shot her twice through the body, and killed her on a public street in the city of Arkansas City. He was convicted of murder in the first degree, but the judgment was reversed because of the admission of irrelevant and prejudicial evidence. State *v.* Moore, 77 Kan. 736, 95 Pac. 409. He was tried a second time, was again convicted of murder in the first degree, and again appeals. . . .

Error is assigned because the jacket which the deceased wore when she was shot was introduced in evidence. It was fully identified, was pierced in the back by two bullet holes, and its lining was stained with blood. When the jacket was offered, counsel for appellant sought to forestall its exhibition to the jury by the statement to the Court that no evidence would be introduced on the part of the defense concerning the shooting. In the case of State *v.* Jones, 89 Iowa, 182, 56 N. W. 427, the syllabus reads: "The fact that the defendant, in a prosecution for homicide, admits the killing, is not a ground for the exclusion of the weapon with which the crime was committed from evidence." This is true for two reasons: The bare admission of the killing subtracts little from the issues, and it may be very important for the State, with the burden resting upon it to establish all the charges of the indictment or information beyond a reasonable doubt, to make its own case in its own way, and the evidence may be very valuable in illustrating or establishing other material facts. Beyond this, the statement under consideration was too carefully guarded. It did not admit the shooting or any other fact connected with the homicide, not even that appellant's wife was dead. Its import was merely that whatever the State proved relating to the shooting would not be contradicted, and the burden still rested on

the State to prove every fact alleged in the information beyond a reasonable doubt. . . . The inanimate garment told clearly and truthfully the story of a woman shot twice in the back, and hence, by legitimate inference, maliciously, willfully, deliberately, premeditatedly, and without justification or excuse. It had a rightful place among the accusing witnesses, none of whom could be set aside at appellant's option because they were numerous.

It is argued that the introduction in evidence of the dead woman's bloody jacket destroyed the mental poise of the jury by riveting their minds upon a scene of carnage, to the exclusion of any calm consideration of appellant's sanity, the only matter finally disputed by way of defense. The State rested under the necessity of establishing a tragedy involving the violent death of a human being from mortal wounds deliberately inflicted with malice aforethought — a thing most likely to include some blood along with the wickedness, perhaps, too, the terrifying report of pistol shots in a peaceful street on a Sunday just after church, the piteous appeals for life, and the agonized death screams of a defenseless woman as she is being shot down, and other shocking things. Such a subject is never a nice one to investigate. Any of the details have a decided tendency to horrify and to appall, but a court cannot arrange for lively music to keep the jury cheerful while the State's case in a murder trial is being presented, and grewsome evidence cannot be suppressed merely because it may strongly tend to agitate the jury's feelings. In the case of Turner *v.* State, 89 Tenn. 547, 15 S. W. 838, a section of the murdered man's ribs and vertebra was introduced in evidence. Objection was made because the object was calculated to inspire the jury with such horror as to influence their verdict. The purpose of the evidence was to show the direction and lodgment of the bullet, and it was held to be clearly admissible. . . . Innumerable cases might be quoted to the same effect. Generally physical objects, which constitute a portion of a transaction, or which serve to unfold or explain it, may be exhibited in evidence, if properly identified, whenever the transaction is under judicial investigation.

Appellant has cited some cases in which it seems to be indicated that the exhibition of bloody garments serves no purpose when the condition and location of wounds made through them have been described by witnesses. This Court prefers to abide by the well-established rule that, ordinarily, whatever the jury may learn through the ear from descriptions given by witnesses, they may learn directly through the eye from the objects described. State *v.* Stair, 87 Mo. 268, 273, 56 Am. Rep. 449. Of course spectacular exhibitions may be framed for the purpose of arousing prejudicial emotions, and all such improprieties should be thwarted or promptly suppressed. The production of real evidence should not be permitted to exaggerate, and should not be allowed, through cunning presentation, to stir up passion or unduly excite sympathy or pity, and so lead the jury to act upon sentiment, instead of

proof. But the proceeding is always under the control of the trial judge, who has authority to confine the use of such evidence to proper purposes and to regulate the time, manner, and extent of its presentation, and his discretion will not be interfered with unless abused with prejudicial consequences. The chief objection to the exhibition of weapons, wounds, bloody clothing, and the like is that the jury may be led to associate the accused with the atrocity under investigation without sufficient proof. Prof. Wigmore disposes of this objection in the following way: "No doubt such an effect may occasionally and in an extreme case be produced, and no doubt the trial Court has a discretion to prevent the abuse of the process; but, in the vast majority of instances where such objection is made, it is frivolous, and there is no ground for apprehension. Accordingly, such objections have almost invariably been repudiated by the Courts" — citing many cases. Wigmore on Evidence, vol. 2, §§ 1157, 1354. . . . Judgment affirmed.

6. Mansfield, L. C. J. *Rules for Views.* (1757. Burr. 252). Before the 4 & 5 Anne, c. 16, § 8, there could be no view till after the cause had been brought on to trial. If the Court saw the question involved in obscurity which might be cleared up by a view, the cause was put off, that the jurors might have a view before it came on to be tried again. The rule for a view proceeded upon the previous opinion of the Court or judge, at the trial, "that the nature of the question made a view not only proper but necessary"; for the judges at the assizes were not to give way to the delay and expense of a view unless they saw that a case could not be understood without one. However, it often happened in fact that upon the desire of either party causes were put off for want of a view upon specious allegations from the nature of the question that a view was proper, — without going into the proof so as to be able to judge whether the evidence might not be understood without it. This circuity occasioned delay and expense; to prevent which the 4 & 5 Anne, c. 16, § 8, impowered the Courts at Westminster to grant a view in the first instance previous to the trial. . . . [He then refers to the other statute of 3 G. II, and to the supposed rule as to the number of viewers necessary.] Upon a strict construction of these two acts in practice, the abuse which is now grown into an intolerable grievance has arisen. Nothing can be plainer than the 4 & 5 Anne, c. 16, § 8. . . . The Courts are not bound to grant a view of course; the Act only says "they *may* order it, where it shall appear to them that it will be *proper and necessary.*" . . . [He then refers to the abuse of repeated postponement of trial to obtain a view.] We are all clearly of opinion that the Act of Parliament meant a view should not be granted unless the Court was *satisfied* that it was proper and necessary. The abuse to which they are now perverted makes this caution our indispensable duty; and, therefore, upon every motion for a view, we will hear both parties, and examine, upon all the circumstances which shall be laid before us on both sides, into the propriety and necessity of the motion; unless the party who applies will consent to and move it upon terms which shall prevent an unfair use being made of it, to the prejudice of the other side and the obstruction of justice.

7. SPRINGER *v.* CHICAGO

SUPREME COURT OF ILLINOIS. 1891

135 *Ill.* 553; 26 *N. E.* 514

APPEAL from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook County; the Hon. R. S. TUTHILL, Judge, presiding.

Messrs. *Knight & Brown*, and Mr. *E. H. Gary*, for the appellant: It was error to permit the jury to inspect the premises. Doud *v.* Guthrie, 13 Bradw. 656. . . .

Mr. *Jonas Hutchinson*, Mr. *Clarence S. Darrow*, Mr. *Byron Boyden*, and Mr. *H. H. Martin*, for the appellee: . . . The order for viewing the premises was proper. . . . It is within the discretion of the trial judge to allow the plaintiff in an accident case to exhibit his injured limb or body to the jury. . . .

Mr. Justice CRAIG delivered the opinion of the Court:

This was an action to recover damages alleged to have been caused to the property of appellant by the construction of Jackson-street bridge and viaduct, and the approach on Canal street, by the city of Chicago. On a trial the jury returned a verdict in favor of defendant, the city of Chicago. The Court overruled a motion for a new trial, and rendered judgment on the verdict. On appeal to the Appellate Court the judgment was affirmed. . . .

After the jury was impaneled, and before the trial commenced, the Court, on motion of defendant, permitted the jury, in charge of an officer, to go upon and view the premises in controversy, and this ruling is relied upon as error. It is not claimed that in the conduct of the men there was any misbehavior on the part of the officer in charge, or on behalf of any of the jury, or on behalf of either representative of the respective parties who accompanied the jury. The naked claim is a want of power on the part of the Court to permit the view. The viaduct was completed in August, 1888, and the trial occurred, and the view was had, in December, 1889. . . .

If the parties had the right to prove by oral testimony the condition of the property at the time of the trial, (and upon this point we think there can be no doubt,) upon what principle can it be said the Court could not allow the jury in person to view the premises, and thus ascertain the condition thereof for themselves? The premises in view may be regarded, as it is termed in the books, "real evidence," and oral testimony in reference to the premises could not be as satisfactory in its character as the real evidence. In 1 Best, Ev. (Morgan's Ed.), § 197, it is said: "Real evidence is either immediate or reported. Immediate real evidence is where the thing which is the source of evidence is present to the senses of the tribunal." In section 198 it is said: "Reported real evi-

dence is where the thing which is the source of the evidence is not present to the senses of the tribunal, but the existence of it is conveyed to them through the medium of witnesses or documents. This sort of proof is, from its very nature, less satisfactory and convincing than immediate real evidence." See, also, Tayl. Ev. (8th Ed.), § 554; 1 Whart. Ev. (3d Ed.), § 345. It is a common practice in the trial of causes in the Circuit Court to permit parties to produce things before the jury for their inspection, and that practice has been approved. Thus, in Iron Works *v.* Weber, 129 Ill. 535, which was an action to recover for a personal injury, we held that the torn clothing which plaintiff was wearing when injured might properly be shown to the jury. In Express Co. *v.* Spellman, 90 Ill. 455, — an action against a carrier for the loss of a can of yeast, — it was held to be proper to allow plaintiff to put in evidence a can similar to the one in which the yeast was shipped for the examination of the jury. In Jupitz *v.* People, 34 Ill. 516, when defendant was on trial for receiving stolen brass couplings, a brass coupling similar to those alleged to have been received was allowed to be submitted to the jury. In other States numerous cases may be found where the same rule of evidence has been adopted. Thus, in an accident case, it is held to be within the discretion of the Court to allow the plaintiff to exhibit to the jury his injured limb or body. Barker *v.* Town of Perry, 67 Iowa, 146; Railroad Co. *v.* Wood, 113 Ind. 548, 549; Mulhado *v.* Railroad Co., 30 N. Y. 370; Hatfield *v.* Railroad Co., 33 Minn. 130. The clothes of the accused were held admissible in People *v.* Gonzalez, 35 N. Y. 49, and Drake *v.* State, 75 Ga. 413; the weapon used by the accused, in Wynne *v.* State, 56 Ga. 113; surgical instruments in a trial under an indictment for illegal operations on a woman, Com. *v.* Brown, 121 Mass. 69; the stick with which a burglar struck the prosecutor in a trial on charge of burglary, State *v.* Mordecai, 68 N. C. 207; tools used, where a burglary has been committed, People *v.* Larned, 7 N. Y. 445. In State *v.* Woodruff, 67 N. C. 89, it was held in a bastardy case, that the mother of a bastard child might hold it up for the inspection of the jury. It was also held in Hatfield *v.* Railroad Co., 33 Minn. 130, on the trial of an accident case, the trial Court had the power to require the plaintiff to walk across the court-room in the presence of the jury, in order that the jury might see how he had been affected by the injury. It is there said: "As the object of all judicial investigations is, if possible, to do exact justice, and obtain the truth in its entire fullness, we have no doubt of the power of court, in a proper case, to require the party to perform a physical act before the jury that will illustrate or demonstrate the extent and character of his injuries." This is in accordance with analogous cases in other branches of the law. When a view of real estate will aid the jury in reaching a conclusion, it is within the discretion of the Court to permit it. When an inspection of an article of personal property will aid them, it is not infrequent to cause the article to be brought into court for the same purpose. Line *v.* Taylor, 3 Fost. & F. 731; Lewis *v.* Hartley, 7 Car. & P. 405. The practice

in patent and in certain equity cases, of allowing tests to be applied before the court, is somewhat analogous in principle. So is the practice of divorce courts, of ordering an examination of the person of the party in certain cases. . . . In Nutter *v.* Ricketts, 6 Iowa, 92 where there was a controversy in regard to two horses, and the trial Court allowed the jury to go in the court-house yard and inspect the horses, the action of the Court was sustained. It is there said: "There is no objection, in principle, to a jury seeing an object which is the subject of testimony. By this means they may obtain clearer views, and be able to form a better opinion." See, also, 1 Hale, P. C. 635.

Other cases might be cited where the same doctrine is laid down, but we have referred to enough to establish the rule that on a trial, in a proper case, things may be exhibited to the jury. And, if evidence of that character may be brought before the jury, upon the same principle we perceive no good reason why a jury may not, under proper regulations established by the Court, go upon and view premises which are the subject-matter of the litigation. Had the plaintiff procured a careful survey and plat of the premises, showing the location with reference to streets and alleys, showing the location of all buildings, and showing the improvement made by the city, such a paper would have been competent evidence to go to the jury. Had a photograph or picture of the premises been taken, it would have been competent evidence to go to the jury. If a plat or photograph of the premises would be competent evidence, why not allow the jury to look at the property itself instead of a picture of the same? There may be cases where a trial Court should not grant a view of the premises, where it would be expensive, or cause delay, or where a view would serve no useful purpose. But this affords no reason for a ruling that the power to order a view does not exist or should not be exercised in any case. If the appellant desired to control the effect the view might have on the jury in connection with the other evidence introduced, that might have been done by an appropriate instruction; but, as no instruction was asked on that point, he is in no position to complain.

In what cases a view was allowed at common law is a subject upon which the authorities we have examined are not yet very clear. But a view by jury, as we understand the subject, is sanctioned by the common-law practice. In Stearns on Real Actions, 102, the author says: "In the ancient practice there were two kinds of view on real actions: (1) View by the party; (2) view by the jury." The author further says: "View by the jury was allowed in several real actions, as assize of novel disseisin, waste, and assize of nuisance. In these cases, therefore, a view by the party, being rendered unnecessary, was not permitted by the law. 8 Hen. VI. 27; 50 Edw. III. 11. The design of this proceeding was to enable the jury better to understand the matter in controversy between the parties. It was not confined to real actions, but was allowed in several personal actions for an injury to the realty, as trespass quare

clausum fregit, trespass on the case, and nuisance." In Burrow's note in 1 Burrow, 253, [*ante*, No. 6] the practice in regard to jury views, as settled upon by the King's Bench, is stated. If at common law, independent of any English statute, the Court had the power to order a view by jury, as we think it plain the Court had such power, as we have adopted the common law in this State our Courts have the same power. . . .

Here it is apparent that the jury could obtain a much better understanding of the issue presented by the pleadings by a view of the premises, and, in the exercise of a sound legal discretion, we think the Court did not err in allowing the view. The judgment of the Appellate Court will be affirmed. Judgment affirmed.

Bailey and Wilkin, JJ.: We do not concur with that portion of the foregoing opinion which relates to the action of the Court in permitting the jury to go upon and view the premises. In our opinion such view by the jury was improper.

SUB-TITLE II. RULES EXCLUDING CIRCUMSTANTIAL EVIDENCE

Topic 1. Moral Character as Evidence[1]

Sub-topic A. Accused's Character as Evidence of an Act

9. Thomas Brewster's Trial. (1663. Old Bailey Sessions. Howell's State Trials, VI, 513, 546). [The defendant, a bookseller, was charged with sedition, in printing and selling the dying speeches of the regicides, executed for sharing in the judgment and execution of King Charles I.]

Justice Tyrrel. — You speak of your behaviour, have you any testimony here?

Brewster. — I do expect some neighbors; Major-General Brown knows me, Capt. Sheldon, Capt. Colchester, and others; I can give a very good account as to my behaviour ever since. . . . My lord, here are now some neighbors to testify that I am no such person as the indictment sets forth, that I did maliciously and seditiously do such and such things.

L. C. J. Hyde. — We will hear them, though I will tell you it will not much matter; the law says it is malice.

Capt. *Sheldon* sworn. — My Lord, all that I can say is, he was ready at beat of drum upon all occasions. What he has been guilty of by printing or otherwise, I am a stranger to that. I know he was of civil behaviour and deportment amongst his neighbors.

Just. Keeling. — It is very ill that the king hath such trained soldiers in the band.

Capt. *Hanson* and others, offered to like purpose.

L. C. J. Hyde. — If you have a thousand to this purpose only, what signifies it? . . . I will tell you: Do not mistake yourself; the testimony of your civil behaviour, going to church, appearing in the trained-bands, going to Paul's, being there at common service, — this is well; but you are not charged for this; a man may do all this, and yet be a naughty man in printing abusive books, to the misleading of the king's subjects. If you have anything to say as to that, I shall be glad to find you innocent.

Brewster. — I have no more to say.

10. William Turner's Trial. (Special Commission at Derby. 1817. How. St. Tr. XXXII, 957, 1007.) [Charge of seditious publication.] Mr. *Elijah Hall* senior, cross-examined for the defendant by Mr. *Cross.*

You have known William Turner for some years? — I have.

You are acquainted with his general character? — Yes.

He has worked with you I understand? — Yes.

For how many years do you think you have known him? — I have known him twenty years.

He has frequently worked with you? — He has worked with me for these three or four years back at different times.

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[1] For the principles of Logic and Psychology here applicable, see the present Compiler's "Principles of Judicial Proof" (1913), Nos. 84–99.

What has been his general character as far as you have known him? —

Mr. *Gurney.* — I submit to your lordships that the proper question is as to loyalty.

Mr. *Cross.* — I submit to your lordships that there is no objection to the question as to his general character.

Mr. *Denman.* — If he is generally a respectable man, an inference arises that he is a loyal man.

Mr. *Cross.* — It would be a most extraordinary thing if I might put that question generally in case of felony and not on an indictment for high treason.

Mr. *Gurney.* — If a man is indicted for felony, evidence is produced to his honesty; if for rape, to his chastity, and so on.

Mr. *Denman.* — Your lordships recollect that in the case of Horne Tooke, evidence as to his writings many years before were received in evidence in order to show it improbable that he should commit treason.

Mr. Justice ABBOTT. — As far as my experience goes, the inquiry into character is always adapted to the charge. . . . The question was objected to as too general and therefore not applying; it was not whether he was a peaceable man, but as to his general character.

11. CANCEMI *v.* PEOPLE

COURT OF APPEALS OF NEW YORK. 1858

16 *N. Y.* 501

WRIT of error to the Supreme Court. Michael Cancemi was indicted, at the New York General Sessions, for the murder of Eugene Anderson, a policeman. One count of the indictment charged that Cancemi, being engaged in burglariously entering, in the day time, a shoe store, with intent to steal, encountered Anderson, who was about to arrest him, when he was shot with a pistol by the defendant. The indictment was removed to the Oyer and Terminer, and the trial there resulted in a disagreement of the jury. . . . Nineteen witnesses were called by the defendant, all of whom testified to the general good character of the defendant, for peace and quietness, and for honesty and industry, and proved it to have been unexceptionable from his youth upwards. The judge charged the jury, in reference to the evidence of character, in the words of Chief Justice SHAW, of Massachusetts, in the case of Dr. Webster (5 Cush. 325), as follows:

"Where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things, and beyond human experience, it is so manifest that the offence, if perpetrated, must have been influenced by motives not frequently operating upon the human mind, that evidence of character and of a man's habitual conduct, under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade. Against facts strongly proved, good character cannot avail. It is therefore in smaller offences, in such as relate to the actions of daily and common life, as where one is charged with pilfering and stealing, that evidence

of a high character for honesty would satisfy a jury that he would not be likely to yield to such a temptation. In every case where the evidence is doubtful, proof of character may be given with good effect, and should preponderate in his favor. But still, even with regard to the higher crimes, testimony of good character, though of less avail, is competent evidence to the jury."

The prisoner excepted to this charge. He was found guilty. The record of proceedings at the circuit ("postea") was sent to the Supreme Court at general term, and judgment was there pronounced. The defendant sued out a writ of error.

Edmon Blankman and *John W. Ashmead*, for the plaintiff in error. *A. Oakey Hall*, for the People.

By the Court, STRONG, J. . . . Another question in the case arises upon the charge to the jury in relation to the evidence given by the defendant of his previous good character. A large number of witnesses had testified to the general good character of the defendant for peace and quietness, honesty and industry, and that it had been unexceptionable from his youth upwards. In respect to this evidence, and in connection with many just observations as to the importance and effect of proof of good character by a defendant in criminal cases, the justice stated to the jury that where the question was one of great and atrocious criminality, evidence of good character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instances of accusations of a lower grade; but still, even with regard to the higher crimes, testimony of good character, though of less avail, was competent.

The principle upon which good character may be proved is, that it affords a presumption against the commission of crime. This presumption arises from the improbability, as a general rule, as proved by common observation and experience, that a person who has uniformly pursued an honest and upright course of conduct will depart from it and do an act so inconsistent with it. Such a person may be overcome by temptation and fall into crime, and cases of that kind often occur, but they are exceptions; the general rule is otherwise. The influence of this presumption from character will necessarily vary according to the varying circumstances of different cases. It must be slight when the accusation of crime is supported by the direct and positive testimony of credible witnesses; and it will seldom avail to control the mind in cases where the testimony, though circumstantial, is reliable, strong, and clear. But in cases where the other evidence is nearly balanced, but slightly preponderating against the defendant, the presumption from proof of good character is entitled to great weight; and will often be sufficient to turn the scale and produce an acquittal.

I am unable to perceive why this presumption may not, and should not, as a general rule, be as controlling in cases of high crimes as in those of smaller ones. In a case of murder, arson, robbery, or any other great offense, when it is apparent that it must have been planned and com-

mitted with great deliberation and the evidence against the accused is uncertain, why should not proof of good character influence the judgment as powerfully as in any case? I can readily see that in cases of great crimes, evidently perpetrated with but little if any forethought, under the influence of some sudden and powerful motive, such proof will be comparatively weak, but it will be so in reference to any other crime with similar circumstances. The attending circumstances must, I think, determine the degree of force which evidence of good character should have; it is not in ordinary cases affected by the grade of the offense. Formerly, such evidence was admissible in capital cases only, but now it will be received in criminal cases generally. (1 McNally's Ev., 320–323; 2 Mass. 317; 18 Ala. 720; 2 Starkie, 303; 2 Bennet & Heard's Leading Criminal Cases, 159, 160; Burrill's Circumstantial Evidence, 530, 532.) The doctrine of the charge which has been considered was stated to the jury in such a manner as to be, if not in effect an instruction controlling the weight of the evidence, calculated to mislead the jury as to the weight which the evidence should receive; and affords, therefore, good ground, under the act of 1855 (Laws of 1855, ch. 337, p. 613), for a new trial. . . . The judgment must be reversed and a new trial be directed. Ordered accordingly.

12. STATE *v.* SURRY

SUPREME COURT OF WASHINGTON. 1900

23 *Wash.* 655; 63 *Pac.* 557

APPEAL from Superior Court, King County. — Hon. ORANGE JACOBS, Judge. Affirmed.

The appellant was charged by information, under § 23 of Hill's Penal Code (Ballinger's Code, § 7058) with an assault with a deadly weapon (a revolver) upon one Edward May, with intent to do bodily injury, no considerable provocation appearing therefor. On the trial upon the information, the jury returned a verdict of guilty of assault and battery, and the Court, after denying his motion for a new trial, sentenced the appellant to pay a fine and to imprisonment in the county jail. It appears from the record that about two o'clock on the morning of October 7, 1898, the appellant, who was then a "merchants' patrolman" and deputy sheriff, and two police officers, discovered the prosecuting witness, Edward May, then a youth of the age of seventeen years, together with three companions, in or about a vacant lot near Madison street and Second avenue, in the city of Seattle. Suspecting from their movements that these four young persons were about to engage in some unlawful transaction, appellant and the two policemen concluded to apprehend them and ascertain what they were doing at that place. . . . One of the officers went down to the lot, and very soon thereafter the complaining

witness, May, came up the steps to the sidewalk not far from where the appellant was standing, and ran down Madison street towards First avenue. The appellant ran after him and, as he says, called upon him several times to stop. After he had pursued May for some distance without overtaking him, appellant drew his revolver, while he was running, and fired. After firing the shot he continued the pursuit for the distance of a block and a half, and then gave up the chase. May continued running until he reached the residence of his mother, where he informed her that he had been shot. Physicians were immediately summoned, and, upon examination, it was ascertained that the bullet from the pistol struck May in the back part of the thigh, and, passing upwards, lodged near the groin. . . . It was admitted by the appellant at the trial that he fired the shot that struck May, but he claimed as a defense that he did not shoot, or intend to shoot, at him; that he fired at the sidewalk, and that May's injury was caused by the accidental glancing of the ball.

William Parmerlee, for appellant. *James F. McElroy*, Prosecuting Attorney, *John B. Hart* and *Walter S. Fulton*, for the State. The opinion of the Court was delivered by ANDERS, J. . . .

Complaint is made of the action of the Court in refusing to permit the appellant to prove his reputation as a careful, conservative, and conscientious peace officer in the community in which he resided; and it is insisted that the particular trait of character sought to be proved was in issue, and hence admissible in evidence. But we are unable to assent to that proposition. It is a general rule in criminal cases that evidence of the character of the accused, when offered by him, is relevant and therefore admissible. But the character or reputation he is entitled to prove must be such as would make it unlikely that he would commit the particular offense with which he is charged. Wharton, Criminal Evidence (9th Ed.), § 60. In this case the appellant's character as a peace officer was not involved, but his character as an individual was involved in the offense charged against him, and therefore evidence of his reputation as a peaceable and quiet citizen in the community where he resided would have been admissible. But no such evidence was offered. State *v.* King, 78 Mo. 555. . . . The judgment is affirmed. FULLERTON and REAVIS, JJ., concur. DUNBAR, C. J., dissents.

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13. REGINA *v.* ROWTON

CROWN CASES RESERVED. 1865

Leigh & Cave 520; 10 *Cox Cr. C.* 25

THE following case was stated by the Deputy Assistant Judge of the county of Middlesex.

James Rowton was tried before me, at the Middlesex Sessions, on the

30th of September, 1864, on an indictment which charged him with having committed an indecent assault upon George Low, a lad about fourteen years of age. On the part of the defendant, several witnesses were called, who had known him at different periods of his life; and they gave him an excellent character, as a moral and well-conducted man. On the part of the prosecution, it was proposed to contradict this testimony; and a witness was called for that purpose. This was objected to by the defendant's counsel, who contended that no such evidence was receivable, and cited the case of Regina *v.* Burt. I thought the evidence was admissible; and, after the witness had stated that he knew the defendant, the following question was put to him: "What is the defendant's general character for decency and morality of conduct?" His reply was, "I know nothing of the neighborhood's opinion, because I was only a boy at school when I knew him; but my own opinion, and the opinion of my brothers who were also pupils of his, is that his character is that of a man capable of the grossest indecency and the most flagrant immorality." It was objected that this was not legal evidence at all of bad moral character. I considered that it was some evidence; and I left the weight and effect of it, as an answer to the evidence of good character, to be determined by the jury. The defendant was convicted, and is now in prison awaiting the judgment of your Lordships. The questions upon which I respectfully request your decision are: — *First*, — Whether when witnesses have given a defendant a good character, any evidence is admissible to contradict? *Secondly*, — Whether the answer made by the witness in this case was properly left to the jury?[1] This case was argued on the 19th of November, 1864, before POLLOCK, C. B., WILLES, J., CHANNELL, B., BYLES, J., and SHEE, J., by *Sleigh*, for the prisoner, and *Tayler*, for the Crown. At the conclusion of their argument the Court took time to consider their judgment; but, there being a difference of opinion among the Judges, a rehearing before the full Court was directed; and accordingly, on the 21st and 28th of January, 1865, the case was again argued before COCKBURN, C. J., ERLE, C. J., POLLOCK, C. B., WILLIAMS, J., MARTIN, B., WILLES, J., CHANNELL, B., BYLES, J., BLACKBURN, J., KEATING, J., MELLOR, J., PIGOTT, B., and SHEE, J.

Sleigh, for the prisoner. — Evidence is not admissible in reply to evidence of good character. . . . Such evidence is inadmissible on the broad principle that character forms no part of the issue on the record. . . .

Tayler, for the Crown. — Evidence in reply to evidence of good character is clearly admissible. . . . (COCKBURN, C. J. — We require no argument upon that point. . . . POLLOCK, C. B. — There is no doubt that evidence of bad character could not be given, unless the prisoner had himself raised the issue by calling witnesses to show he bore a good one.)

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[1] [The argument and the opinion on this second point — the Opinion rule — are printed *post*, as No. 173.]

COCKBURN, C. J. . . . There are two questions to be decided. The first is whether, when evidence of good character has been given in favor of a prisoner, evidence of his general bad character can be called in reply. I am clearly of opinion that it can be. It is true that I do not remember any case in my own experience where such evidence has been given; but that is easily explainable by the fact that evidence of good character is not given when it is known that it can be rebutted; and it frequently happens that the prosecuting counsel, from a spirit of fairness, gives notice to the other side, when he is in a position to contradict such evidence. But, when we come to consider whether the evidence is admissible, it is only possible to come to one conclusion. It is said that evidence of good character raises only a collateral issue; but I think that, if the prisoner thinks proper to raise that issue as one of the elements for the consideration of the jury, nothing could be more unjust than that he should have the advantage of a character which, in point of fact, may be the very reverse of that which he really deserves. . . .

[But on the second question, the evidence having been erroneously admitted, the conviction must be set aside.]

ERLE, C. J. [concurring on the first question]. I concur with the Chief Justice of England on many points of the judgment that he has just delivered. The admissibility of evidence of character for the prisoner stands on peculiar grounds. The question of the admissibility of evidence that the good character given to the prisoner is undeserved is now brought for the first time before us for adjudication. The progress of our law should be adapted to the interests of society; and the rules relating to the admissibility of evidence should be regulated by attending carefully to the interests of truth. If the prisoner, having a bad character, misleads the Court by calling witnesses to say that he has a good one, in the interests of truth and justice the false impression should be removed; and I quite agree with the Chief Justice of the Queen's Bench upon the first question, that evidence was admissible in this case to rebut the good character given to the prisoner. . . .

WILLES, J. I am of opinion that . . . the ruling of the judge was right. . . .

The other learned judges concurred in the judgment delivered by the Lord Chief Justice of England.

14. STATE v. LAPAGE. (1876. New Hampshire. 57 N. H. 245, 289). CUSHING, C. J. . . . I think we may state the law in the following propositions: It is not permitted to the prosecution to attack the character of the prisoner, unless he first puts that in issue by offering evidence of his good character. . . . It is a maxim of our law, that every man is presumed to be innocent until he is proved to be guilty. It is characteristic of the humanity of all the English speaking peoples, that you cannot blacken the character of a party who is on trial for an alleged crime. Prisoners ordinarily come before the Court and the jury under manifest disadvantages. The very fact that a man is charged with a crime is sufficient to create in many minds a belief that he is guilty. It is quite incon-

sistent with that fairness of trial to which every man is entitled, that the jury should be prejudiced against him by any evidence except what relates to the issue; above all should it not be permitted to blacken his character, to show that he is worthless, to lighten the sense of responsibility which rests upon the jury, by showing that he is not worthy of painstaking and care, and, in short, that the trial is what the chemists and anatomists call "experimentum in corpore vili." Of course, if the respondent sees fit to put his character in issue by offering evidence tending to show that it is good, it is then permitted to the prosecution to rebut this testimony by showing that it is bad.

15. William Trickett. *Character-Evidence in Criminal Cases.* (1904. The Forum, Dickinson College of Law, vol. VIII, p. 121.) Character, in a wide sense, imports the sum of the mental and corporal qualities of a man. In a narrower sense, it signifies the moral tendencies, which evince themselves in habitual action. . . . The persistent drifts or tides of emotion, appetite, passion, which characterize men, are equally evidential of their doing or not doing specific acts congenial or uncongenial to them. One whose cupidity has always been feeble, and whose respect for law has been strong, will, with some difficulty, be believed guilty of a crime of which cupidity was the only instigation, be it theft, embezzlement, robbery, burglary or murder. "Evidence of good character," says Rice, P. J., (Commonwealth *v.* Weathers, 7 Kulp 1; Commonwealth *v.* Irwin, 1 Cl. 329), "does not operate as a bar to a prosecution (*e.g.*, for murder). It is not of itself a defence. It is simply an item of evidence. The argument to be drawn from it is, that it is improbable that a person of good character for peace and quietness would commit an act of violence," etc. "If you were told," observed McClure, P. J., "some one you knew was honest had been guilty of larceny, you would be slow to believe; your belief would yield to proof, but with reluctance." (Commonwealth *v.* Kuhn, 1 Pitts. 13.) . . .

It is evident that while a good character makes improbable an act not consonant with it, a bad character lessens the improbability of an act which accords with it. When, however, an act, *e.g.*, of cruelty, is done, and the question is, did A do it, the fact that A had been uniformly kind and gentle for many years more strongly persuades that he did *not* do it, than the fact that he had been very often cruel persuades that he did it. That the act was done by a cruel man is much more nearly certain, than that it was done by a particular man who is cruel. The cruelty of the act tends to negative the agency of a generally kind man, but it does not negative the existence of many other cruel men than the defendant, or the agency of some unknown one of these men. That he has the congenial trait of character does not tend to show that others have it not, and that some other, having it, has not done the deed. It is a well-established principle, therefore, that the defendant in a criminal case is permitted to prove his character in order to negative his participation in the crime, but the Commonwealth *is not permitted in the first instance* to show that his character is bad in order to diminish the jury's difficulty in concluding him to be guilty (Commonwealth *v.* Weber, 167 Pa. 153).

This, perhaps, is an anomaly. It is permissible to the Commonwealth to show that the defendant is of the class, a member of which must have committed the act. It can show, *e.g.*, that he was near the place at the time of the occurrence, and so put him in the class of the possibly guilty. It can prove that he had an instrument, *e.g.*, a gun, a quantity of poison, by the like of which only the crime could have been done, in order to put him within the comparatively small class

of the possibly, or probably, guilty. Nobody poisons who does not have poison. When it is proved that A had the poison, he is put into the comparatively small class of persons one of whom must have done the act. . . . The courts, however, will not allow evidence that A is of the cruel, or vindictive, or life-despising class — a comparatively small class — some member of which, in all likelihood, did the deed. The justification for the exclusion is stated by Greenleaf to be "that such evidence is too likely to move the jury to condemnation, irrespective of his actual guilt of the offense charged." (Greenleaf, Evidence, p. 39, 16th ed. Boston. This is not the only rule based on the assumption of the fatuousness of juries.)

Sub-topic B. Character as Evidence of an Act, in Other Cases

16. RUAN *v.* PERRY

Supreme Court of New York. 1805

3 *Caines R.* 120

This was an action of trespass brought against the defendant, who was commander of the United States frigate General Green, for seizing and taking the Danish schooner William and Mary and her cargo, the property of the plaintiff. The declaration contained two counts; one charging the defendant with seizing, arresting, and for a long time detaining, the vessel and cargo, and conveying them towards Jacmel in Hispaniola, out of the course of the voyage on which bound, by means whereof they were attacked, seized, and carried away as prize, by persons on board a French barge, in the service of Toussaint, [the French governor], in consequence of which they became totally lost to the plaintiff. The other with doing the same, and delivering up the vessel and cargo to the barge of Toussaint, by which, etc. The cause was tried before Mr. Justice Livingston, at the New York sittings, in January, 1805.

At the trial the plaintiff examined his captain as a witness, and read the deposition of one of the crew of the schooner, from which it appeared that the vessel and cargo, both the bona fide property of the plaintiff, a Danish subject, sailed from St. Croix bound to Acquim, a port in Hispaniola, about ten leagues from Jacmel, and had arrived within four or five leagues of their destination, when they were brought to by the General Green, a boat from which boarded the William and Mary, took possession of her, ordered out all her hands but the mate, and carried them on board the defendant's ship. That, immediately after this was done, the frigate proceeded in company with the schooner towards Jacmel, and having arrived off that place, fired some guns, within an hour after which an armed barge came out from that port, commanded by a white officer in uniform, said to be Toussaint's, and manned with negroes. That the officer came on board the frigate, delivered letters to the defendant, and received some from him. That the French officer

commanding the barge, the master of the William and Mary, and the captain of another Danish vessel brought to by the defendant, dined with him. That about two hours after dinner was over, the defendant gave back the papers of the William and Mary to her captain, and sent him in the frigate's boat on board his own vessel. . . . Upon this the schooner and her cargo were, by the crew of the barge who had taken possession of her, carried into Hispaniola where they were shortly after condemned as prize to a privateer, to which the barge that had taken them belonged. . . .

On the part of the defendant was exhibited a part of his instructions from the navy department, by which he was directed, in order to carry into effect the act "for suspending the commercial intercourse between the United States and France and the dependencies thereof," to take and send in vessels covered by Danish and other papers, if suspected to be really American. Testimony of the defendant's general character was then offered, and objected to, but admitted, because the imputation of a gross fraud was attempted to be proved by mere circumstances, and, therefore, evidence of general character certainly admissible. The defendant then adduced testimony, fully establishing a fair and good reputation.

The learned judge summed up in favor of the defendant, and charged the jury that . . . the defendant was, by his instructions, warranted in examining the William and Mary, and not liable for taking her out of her course during the time necessary for that purpose. That it was doubtful whether Captain Perry had a right to afford protection against the barge of Toussaint; but allowing he had, he certainly was not bound to do so; but if they thought that there was any collusion between the defendant and Toussaint, they ought to decide in favor of the plaintiff. The jury having found a verdict for the defendant, it was submitted, without argument, to the Court, whether it ought not to be set aside and a new trial granted, on some one or all of the following grounds: (1) Because the evidence of character was inadmissible; (2) Because the judge misdirected the jury; (3) Because the verdict was against evidence.

Tompkins, J., delivered the opinion of the Court. . . . The judge directed them, that if they should be of opinion that Captain Perry acted in collusion with the Frenchmen, they should find for the plaintiff. This direction was undoubtedly proper, and affords no ground to support the point of misdirection by the judge. The evidence of character was also, in my opinion, properly admitted. In actions of tort, and especially charging a defendant with gross depravity and fraud upon circumstances merely, as was the case here, evidence of uniform integrity and good character is oftentimes the only testimony which a defendant can oppose to suspicious circumstances. We cannot say we are dissatisfied with the verdict of the jury, or that the same is against the weight of evidence.

Postea to the defendant.

17. Gough v. St. John. (1837. New York. 16 Wend. 645, 652. Action for false representation as to solvency). Cowen, J. Another conclusive ground for a new trial is the admission of testimony to character. Such evidence is, in general, confined to criminal prosecutions involving the question of moral turpitude. To this there is, I apprehend, a chain of authority unbroken in every common law country except New York. The case of Ruan *v.* Perry, 3 Caines, 120 [*ante*, No. 16], is to the contrary; but that is virtually exploded by later authorities in this court, and, I should presume, has not for many years been followed at the circuit to any considerable extent. I have never followed it in any instance, but have always confined such proof to the criminal side. Indeed I have hardly heard the case insisted on by any of the bar.

I mean to be understood as speaking of the general distinction. I know there are exceptions. They lie in that class of actions or rather of issues where general character is drawn in question by the pleadings or the points involved in a cause. In slander, the plaintiff's general moral character is an object of inquiry, with a view to the amount of damages which he is entitled to claim. Cases of criminal conversation and breach of marriage promise, also present frequent exceptions. There are some other instances which it is unnecessary to mention. But where a civil action is brought for an injury to property, though the injury was legally criminal and involved moral turpitude, in so much that, on an indictment, character would be obviously receivable, there is no authoritative case, save Ruan *v.* Perry, which favors its admissibility. The Attorney General *v.* Bowman, 2 B. & P. 532, note *a*, is the leading English case. It settles the distinction, and has uniformly been followed at Westminster Hall.

18. Wright v. McKee. (1864. Vermont. 37 Vt. 161). [Action of trover for a package of money]. Aldis, J. Many considerations concur in rejecting such evidence [of character] in civil cases. Evidence of this character has but a remote bearing as proof to show that wrongful acts have or have not been committed, and the mind resorts to it for aid only when the other evidence is doubtful and nicely balanced. It may then perhaps serve to turn the wavering scales. Very rarely can it be of substantial use in getting at the truth. It is uncertain in its nature — both because the true character of a large portion of mankind is ascertained with difficulty, and because those who are called to testify are reluctant to disparage their neighbors, — especially if they are wealthy, influential, popular, or even only pleasant and obliging. It is mere matter of opinion, and in matters of opinion men are apt to be greatly influenced by prejudice, partisanship, or other bias, of which they are unconscious; and in cases which are not quite clear they are apt to agree with the one who first speaks to them on the subject, or to form their opinions upon the opinions of others. The introduction of such evidence in civil causes, wherever character is assailed, would make trials intolerably long and tedious and greatly increase the expense and delay of litigation. It is a kind of evidence that might be easily manufactured — is liable to abuse, and if in common use in the courts, as likely to mislead as to guide aright. The authorities are quite unanimous in excluding such testimony.

19. TENNEY *v.* TUTTLE

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1861

1 *All.* 185

TORT for an injury received from a collision of carriages in the highway. At the trial in the superior court the plaintiffs' offered evidence tending to prove, that the defendant left his horses, harnessed to a wagon, standing on his own land within about fifteen feet of his house and within the enclosure adjoining the same, without being tied, or under the charge of any person; and went into the house, out of sight of the horses, to give directions to the workmen employed therein; and that the horses started and ran into the road and against the wagon in which the plaintiffs were riding, and thereby injured the female plaintiff. The defendant offered evidence tending to control and vary this evidence of the plaintiff, and also offered to show his own character as a careful, prudent, and cautious man, as bearing on the question of whether he used ordinary care on this occasion. To this last the plaintiffs objected, and MORTON, J., rejected the evidence. The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

G. M. Brooks, for the defendant, cited Adams *v.* Carlisle, 21 Pick. 146; Baldwin *v.* Western Railroad, 4 Gray, 333. *W. P. Webster*, (*B. F. Butler* with him,) for the plaintiffs.

METCALF, J. — This action is brought to recover damages for an injury caused by reason of the negligence of the defendant, and can be supported only by proof of such want of care as constitutes actionable negligence. At the trial the only fact offered in proof of the alleged cause of action was the defendant's leaving his horses, that were harnessed to a wagon, standing on his land near his house, without tying them or leaving them under the charge of any other person. The verdict shows that this fact, though there was conflicting testimony concerning it, was found by the jury, and that they also found that it was legal proof of such want of care as rendered the defendant liable for the injury sustained by the female plaintiff. And the Court are of opinion that evidence of the defendant's being a careful, prudent, and cautious man was not admissible for the purpose of showing that he used, in this instance, such care of his horses as the law requires in order to exempt him from responsibility for the mischief produced by their escape into the highway. When the precise act or omission of a defendant is proved, the question whether it is actionable negligence is to be decided by the character of that act or omission, and not by the character for care and caution that the defendant may sustain. If such evidence as was offered and rejected at the trial is ever admissible, in a case like this, we incline to the opinion that it is only when the plaintiff attempts to prove the defendant's negligence by merely circumstantial evidence, or, perhaps, by witnesses shown

to be of doubtful veracity. These exceptions do not show, nor was it suggested in argument, that the excluded evidence was admissible on either of these grounds. . . . Exceptions overruled.

20. FONDA *v.* ST. PAUL CITY RY. CO.

SUPREME COURT OF MINNESOTA. 1898

71 *Minn.* 438; 74 *N. W.* 166

APPEAL by defendant from an order of the district court for Ramsey county, WILLIS, J., denying its alternative motion for judgment notwithstanding the verdict, or for a new trial, after a verdict for the plaintiff for $17,640.30. Reversed and a new trial granted.

Munn & Thygeson, for appellant. . . . The Court below erred in admitting evidence of the general incompetency of the motorman. It makes no difference how negligent he may have been at other times prior to the accident. If, as a matter of fact, he handled the car in a prudent and proper manner at the time of the accident, the defendant would not be liable. . . .

Stevens, O'Brien, Cole & Albrecht, for respondent. . . . Evidence is admissible of the general incompetency of the motorman when such incompetency is radical, inherent, and natural, arising out of constitutional defects which render him unfit to perform the duty assigned. . . .

MITCHELL, J. — The plaintiff, a stranger to and not an employee of, the defendant, recovered a verdict for personal injuries caused by the alleged negligence of defendant's servants; and from an order denying its motion for judgment notwithstanding the verdict, or for a new trial, the defendant appealed. . . . The accident occurred at or near the easterly intersection of Walnut and Seventh streets, in the city of St. Paul. . . . In the forenoon of the day of the accident, plaintiff had traveled southerly, down Walnut street, to Seventh, for the purpose of taking an east-bound car going down town. He had reached the northeast corner of Walnut and Seventh, and then started to cross the latter, for the purpose of getting on the south side of the southerly track in order to take his car. His testimony as to what occurred is as follows:

"Just as I left the sidewalk to cross Seventh street, I looked up, and looked both ways. I saw a car approaching from the east over a block away, and I also looked the other way towards the west, and there was a car coming from that way too; and I walked out on the rails, and my intention was, as I walked out there, to get across the rails, before the east-bound car got down there (the car I was going to take). As I walked out on the track, that east-bound car got down there, and I couldn't cross it. So I hesitated a minute as the car got down by me. Then I started to walk around the tail end. Just as I started to walk around the tail end, and took a few steps, this west-bound car came along, and struck me, and knocked me down." . . .

The conjuncture of circumstances was such as to require peculiar caution on the part of the motorman on the west-bound car. . . . The jury were abundantly justified in finding that he was guilty of negligence. . . .

Upon the trial, the Court, against the objection of defendant, admitted evidence of the general incompetency of the motorman, based on the observations of witnesses who had seen him operate his car on prior occasions. We think this was error. . . . The sole issue, aside from that as to plaintiff's contributory negligence, was whether or not the motorman was guilty of negligence at the time of the accident. When the act or omission is proved, whether it be actionable negligence is to be determined by the character of the act or omission itself, and not by the character of prior acts of the party committing it. If the plaintiff could offer testimony as to the general incompetency or as to prior negligent acts or omissions of the motorman, then with equal propriety the defendant, upon the issue of contributory negligence, might offer evidence of plaintiff's general carelessness, or of his negligent acts on other occasions. Indeed, we do not see why the plaintiff would not, upon the same principle, have the right to introduce evidence that he himself was an habitually careful and cautious man. As the liability of a master for the acts of his servant rests upon the doctrine of respondeat superior, it can make no difference as to the admissibility of such evidence whether the alleged negligent act was committed by the servant or by the master in person. Hence, if the offered evidence was admissible in this case, it would have been equally competent had the defendant been a natural person, and operating the car himself, to prove that he was incompetent to perform such work, or had performed it negligently on former occasions.

There *are* some cases which hold that where the person injured was killed, and there were no eye-witnesses of the occurrence, the general character of the deceased as a careful and prudent man may be shown for the purpose of raising a presumption that he was not negligent on the occasion in question. But this rule is based upon the supposed necessities of the case, and is repudiated by very eminent authorities. . . . Many of the authorities cited by plaintiff's counsel are cases where a servant brought an action against his master for injuries caused by the negligence of a fellow servant. In such cases the doctrine of "respondeat superior" does not apply, the gist of action being the negligence of the master in employing or retaining an incompetent servant. A moment's reflection will show that such cases are not at all in point. . . .

We have examined all of the numerous cases cited on this question, and find that, aside from obiter remarks in one or two in which the question was not involved or raised, only the following at all tend to support plaintiff's contention, viz.: Vicksburgh *v.* Patton, 31 Miss. 156; State *v.* Manchester, 52 N. H. 528; Craven *v.* Central, 72 Cal. 345, 13 Pac. 878; State *v.* Boston, 58 N. H. 410. But a careful examination of these cases shows that all they hold (unless it is the first) is that when

evidence is conflicting as to whether a person, in conducting his business or performing his services, performed a particular act, or performed it in a particular way, it is competent to show that he was in the *habit* of performing the act, or performing it in that peculiar way, — not as evidence of *character* or of fitness or unfitness, but simply as having some tendency to show that on the particular occasion in question he probably did the act, or did it in a peculiar way, in accordance with his general habit or custom. Whether this rule is correct or incorrect, it falls short of sustaining the contention of plaintiff's counsel in the present case. The evidence introduced was not directed or limited to showing that the motorman was in the habit of doing or omitting to do some particular act which the other evidence tended to prove that he did or omitted to do on the occasion in question. It was to the effect that he was generally incompetent, as shown in a variety of ways, by his method of managing his car on former occasions. In brief, the inference sought to be drawn is that, if he was generally incompetent, it was more probable that he operated the car improperly on this occasion. Such an inference might at first blush seem to be a legitimate one, but it is too remote and conjectural to be permissible. Any such rule of evidence would drag innumerable collateral issues into the trial of a case; for evidence of general incompetency would necessarily result in the introduction of evidence of particular acts. . . .

For the errors already referred to, the order appealed from must be reversed, and a new trial granted. So ordered.

21. HEIN *v.* HOLDRIDGE

SUPREME COURT OF MINNESOTA. 1900

78 *Minn.* 468; 81 *N. W.* 522

ACTION in the District Court for Olmsted County to recover $5,031.50 damages for seduction of plaintiff's daughter. The case was tried before SNOW, J., and a jury, which rendered a verdict in favor of plaintiff for $531; and from an order denying a motion for a new trial, defendant appealed. Reversed.

James E. Bradford and *Webber & Lees,* for appellant. . . . Evidence of defendant's reputation for chastity and good moral character was admissible. Schuek *v.* Hagar, 24 Minn. 339; Bingham *v.* Bernard, 36 Minn. 114. . . .

H. A. Eckholdt, for respondent. . . . Defendant's character was not put in issue, nor impeached. Until attacked, he must rely on the general presumption of good character. Cochran *v.* Toher, 14 Minn. 293 (385); Lotto *v.* Davenport, 50 Minn. 99. Schuek *v.* Hagar, 24 Minn. 339, is contrary to the overwhelming weight of authority elsewhere, and should not be followed. . . .

START, C. J. — This is an action by a father for the alleged seduction of his daughter by the defendant. Verdict for the plaintiff in the sum of $531, and the defendant appealed from an order denying his motion for a new trial. The assignments of error present two general questions for our decision. . . . (2) Did the trial Court err in excluding evidence offered by the defendant to show that his general reputation for chastity was good?

The only evidence as to the alleged acts of sexual intercourse between the defendant and the plaintiff's daughter was the testimony of the daughter and of the defendant. They flatly contradicted each other. The daughter, who was at that time a servant in the family of the defendant, testified to such acts, and that the defendant was the father of her illegitimate child. The defendant, who was a married man, positively denied her testimony. Thereupon the defendant offered to show, by witnesses who had known him from his birth, and lived near him, that his general reputation for chastity was good. The Court excluded the evidence, and the defendant duly excepted. Was the ruling correct?

The charge against the defendant involved the commission of a crime by him, and, if this were a criminal case, it is certain that the excluded evidence would have been admissible. The accused in a criminal case, whether the charge be a felony or a misdemeanor, may always prove his previous good character, of which his general reputation is evidence, as tending to disprove the commission of the offense; that is, as tending to show the improbability of a person of his previous character committing the act charged. The rule is not limited to cases where the probative force of the evidence against the accused is weak. There would seem to be no logical reason why the same rule should not apply to civil actions in which the defendant is charged with a crime.

But the accepted general rule is that evidence of the general character of parties to civil actions, where character is not a part of the issue, is inadmissible. The rule seems to be one of practical convenience, for the purpose of avoiding the confusion of issues. 1 Greenleaf, Ev. (16th Ed.), § 14b, subd. 4.

On principle, however, it would seem that there ought to be exceptions to this general rule. In this State, whatever may be the case in other jurisdictions, such exceptions are recognized. Inasmuch as the general rule is not based upon any philosophical reason, but is merely one of convenience, it ought not to be applied to cases where justice to the defendant requires that the inconvenience arising from a confusion of the issues should be disregarded, and he be permitted to give evidence of his previous good character; or, in other words, such evidence ought to be received in a civil action when it is of a character to bring it within all of the reasons for admitting such evidence in criminal cases. Civil actions for an indecent assault, for seduction, and kindred cases, are of this character; for such cases are not infrequently mere speculative and blackmailing schemes. The consequences to the defendant of a ver-

dict against him in such a case are most serious, for the issue as to him involves his fortune, his honor, his family. From the very nature of the charge, it often happens that an innocent man can only meet the issue by a denial of the charge, and proof of his previous good character. Ought a defendant in such a case be deprived of the right to lay before the jury evidence of his previous good character, because it will tend to confuse the issue, while a defendant in a case where the State charges him with a simple assault, involving no more serious consequences than the payment, perhaps, of a fine of five dollars, is accorded the absolute right to give such evidence? The question has been answered in the negative by this Court. If evidence of the previous good character of a defendant is admissible in a civil action for an indecent assault, it necessarily follows that such evidence is admissible in a civil action for seduction, for the cases in this respect cannot be distinguished.

Now, in the case of Schuek *v.* Hagar, 24 Minn. 339, which was a civil action to recover damages for an indecent assault, the defendant offered evidence of his previous good character; and this Court, reversing the trial Court, held, without dissent, that such evidence was admissible. In the case of Bingham *v.* Bernard, 36 Minn. 114, 30 N. W. 404, which was a similar action, it was assumed by Court and counsel that the rule of Schuek *v.* Hagar was correct, and evidence of defendant's good character was received without objection. If the doctrine of Schuek *v.* Hagar is to be adhered to, it necessarily follows that it is decisive of the question we are now considering. . . . It therefore ought to be adhered to on the ground of "stare decisis," if for no other, and we so hold. We are also of the opinion that the doctrine of that case ought not to be extended to civil actions where the issue relates to a simple assault, or to the fraud, deceit, or negligence of the defendant, or to similar actions, for they are not within the reasons we have suggested for the admission of evidence of good character in exceptional civil actions. Our conclusion is that the trial Court erred in ruling out the proffered evidence.

Order reversed, and a new trial granted.

Collins, J. — The universal rule is that the character of a party to a civil action is not admissible in evidence as tending to prove that he did not do the act in question. The nature of every transaction involved in such an action is to be determined by its own facts and circumstances, and not by the character of the parties. But this rule was departed from by this Court, in 1877, in Schuek *v.* Hagar, 24 Minn. 339. And, to be consistent, the doctrine of that case should be applied whenever the charge made in a civil action imputes any kind of moral turpitude to a defendant, such as fraud or falsehood or kindred delinquencies; for, whenever the character of a defendant for fraudulent or deceitful practices or for truth or honesty is at issue, he, for the same reasons exactly, ought to be permitted to lay before the jury evidence of his previous good character, as tending to show that he was not morally delinquent, and not inclined to fraud or falsehood. This would be a departure from the

well-settled rules of evidence not to be thought of, and yet, on principle, not a step in advance of, or materially different from, that laid down, without discussion and without citation of authority, in the Schuck case. I am convinced that the Court was radically wrong in that case. But on the ground of "stare decisis" I concur in the main opinion.

I am authorized to say that Justice BROWN coincides with these views.

22. McCLURE *v.* STATE BANKING CO.

COURT OF APPEALS OF GEORGIA. 1909

6 *Ga. App.* 303; 65 *S. E.* 33

ERROR from City Court of Hall County; J. C. BOONE, Judge.

Action by the State Banking Company against J. M. McClure. Judgment for plaintiff, and defendant brings error. Reversed.

The bank sued McClure on a note made payable to one Turner and indorsed by him to the bank. The defendant claimed that the note was a forgery, and that Turner had committed the forgery. He offered to prove, in support of this contention, that the general reputation of Turner was very bad and that he bore the general reputation of having been engaged in the business of committing forgeries. The Court declined to allow the proof. There was a verdict for the plaintiff, and the defendant excepts to the overruling of his motion for a new trial.

Geo. K. Looper and *B. P. Gaillard, Jr.*, for plaintiff in error. *W. I. Hobbs* and *H. H. Perry*, for defendant in error.

POWELL, J.—The rule prevailing in England and in most of the American States, that evidence of character is not usually received when offered for the purpose of throwing light on the probability of the doing of a certain act by the person whose character is in question, is not of force in this state. The contrary doctrine has been recognized in our jurisprudence from a very early date. Civil Code 1895, § 5159, provides: "The general character of the parties, and especially their conduct in other transactions, are irrelevant matters, unless the nature of the action involves such character and renders necessary or proper the investigation of such conduct." The rule is especially applicable to, if not confined to, cases where a particular trait of the person whose conduct is under investigation is involved, or the alleged conduct is such that no person of good character would likely commit it. If only a particular trait is involved, the testimony should be limited accordingly. On the subject generally, see McNabb *v.* Lockhart, 18 Ga. 496, 512 (in which the party's character for honesty and general trustworthiness was involved); Planters' Bank *v.* Neel, 74 Ga. 576, 581 (in which a person's character as a man of close attention to business was involved); Falkner *v.* Behr, 75 Ga. 672, 676 (in which the general character of one of the parties was involved); Du Bose *v.* Du Bose, 75 Ga. 753 (in which the

husband's character for decency was involved in a divorce action); Columbus Ry. Co. *v.* Christian, 97 Ga. 56 (in which the character of the defendant's agent as a dangerous man was involved); German American Life Ass'n *v.* Farley, 102 Ga. 720 (in which the plantiff's character was involved on an issue as to whether he had committed fraud in procuring a policy of insurance). In all of these cases it was held that evidence as to the particular or general traits of character involved in the respective actions, was admissible.

Frequently this kind of evidence has a distinct relevancy and a high degree of probative value, because it tends to make the question involved in the issue more or less probable in favor of one side of the case or the other. Even those Courts and text-writers who support and lay down the proposition that the evidence is not admissible do not put it on the ground that the evidence lacks relevancy or probative value, but rather rely on the ancient and well-established character of the rule itself. The Courts of this state, out of deference to the policy expressed in the maxim "Let there be light," have rejected the old rule, which has long outlived the reason from which it sprang.

In the case at bar the maker of the note claimed that Turner had forged his signature. Now, if Turner were a man of good character, this fact would have made the defendant's contention very improbable. Unquestionably the plaintiff would have had the right to prove that Turner was a man of good character, and it was not even necessary for him to prove this to get the benefit of it in the argument; for there is a presumption, until the contrary appears, that every person has a good character, and this presumption is strong enough to afford a basis for argument by counsel and for action by the jury. Goggans *v.* Monroe, 31 Ga. 331; Bennett *v.* State, 86 Ga. 404; Ga. Ry. & Elec. Co. *v.* Dougherty, 4 Ga. App. 614, 616, 618. On the other hand, proof that Turner was a man of bad character, and especially that he had the general reputation of being a frequent and notorious forger, would tend to make the defendant's contention that the signature to the note was a forgery more probable. The conduct charged to Turner in the present inquiry was such as to involve his general bad character, and also his special bad character, as we may call it, and the rule limiting the evidence to a particular trait (Anderson's Case, 107 Ga. 506) was not applicable.

Judgment reversed.

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23. THE QUEEN *v.* RYAN

CENTRAL CRIMINAL COURT. 1846

2 *Cox Cr.* 115

THE prisoner was indicted for rape. The prosecutrix was an idiot, and when asked questions in the witness-box, was evidently unconscious of their purport, and not in a condition to understand right from wrong.

PLATT, B., interrogated her father as to her general habits, whether they were those of decency and propriety, and an answer in the affirmative was returned.

PLATT, B., in summing up. — The question is, Did the connection take place with her consent? It seems that she was in a condition incapable of judging; and it is important to consider whether a young person, in such a state of incapacity, was likely to consent to the embraces of this man; because if her habits, however irresponsible she might be, were loose and indecent, there might be a probability of such consent being given, and a jury might not think it safe to conclude that she was not a willing party. . . . The prisoner was convicted.

24. FRANKLIN *v.* STATE

SUPREME COURT OF ALABAMA. 1856

29 *Ala.* 14

FROM the Circuit Court of Pike. Tried before the Hon. E. W. PETTUS. Indictment against Philemon J. Franklin for the murder of his brother, Christopher Franklin, by shooting him with a gun. The only evidence in relation to the killing was the testimony of a young man, then about sixteen years of age, who was an eye-witness of it, and whose testimony, in substance, is stated in the opinion of the Court. On the part of the prisoner, evidence of his peaceable character was introduced. . . . The prisoner then offered to prove, "that the general character of the deceased was that of a turbulent and dangerous man"; but this evidence also was excluded by the Court, and the prisoner excepted. . . .

E. C. Bullock, for the prisoner. While the bad character of the deceased, *per se*, does not in the slightest degree affect the character of the homicide, it yet becomes a legitimate and important subject of inquiry, where the circumstances make the precise grade of the crime doubtful, and where the ferocious temper of the deceased might furnish a key to the whole transaction. . . .

M. A. Baldwin, Attorney-General, *contra*. The character of the deceased can never become a matter of controversy, under an indictment for homicide, except when involved in the res gestae. When a homicide is committed under such circumstances as tend to show that the prisoner acted in self-defense, then the conduct of the person slain, construed with reference to his known character, becomes a part of the transaction; but, when the evidence not only fails to show any conduct on the part of the deceased which could raise the question of self-defense, but affirmatively shows (as it does here) that his situation and position precluded that question, his bad character cannot be received to mitigate the offense. . . .

WALKER, J. — It has been twice decided in this State, and must now

be regarded as law, that the testimony, in prosecutions for murder, may be such as will justify the admission of the bad character of the deceased as evidence for the accused. Quesenberry *v.* The State, 3 S. & P. 308; Pritchett *v.* The State, 22 Ala. 39. . . . In both cases, it is carefully and properly denied that the bad character of the deceased can, of itself, lessen the criminality of his murder. The rule is laid down in Oliver's case (17 Ala. 599) that "the necessity which exculpates the accused from guilt, need not be actual; that if the circumstances be such as to induce a reasonable belief that such necessity exists, the law will acquit the slayer of all guilt." It seems to result as a sequence from this principle, that the character of the deceased for turbulence, violence, revengefulness, blood-shed, and the like, where it qualifies, explains, and gives meaning and point to the conduct of the deceased, should be proper evidence. Conduct of a man of peaceable character and harmless deportment might pass by without exciting a reasonable apprehension of impending peril; while, on the other hand, the same conduct, from a man of notoriously opposite character and habits, might reasonably produce a consciousness of the most imminent peril, and a conviction of the necessity of prompt defensive action. Whenever such bad character on the part of the deceased thus illustrates the circumstances attending a homicide, and the circumstances, *so illustrated*, tend to produce a reasonable belief of imminent danger in the mind of the slayer, the character, as mingled with the transaction, is a part of it, and is indispensable to its correct understanding. Such we understand to be, in effect, the decisions in Quesenberry's and Pritchett's cases. To avoid detriment in the practical application of the rule, it must be understood neither, on the one hand, to excuse the taking of one's life because he is a bad man, nor, on the other, to be limited to those cases where the facts are such as to make it doubtful whether the homicide was committed "se defendendo." The law cannot apportion the criminality of the homicide to the character of the deceased, and it cannot confine the rule to cases of doubt; because, in such cases, the defendant is entitled to an acquittal, and therefore to so limit it would deny to it all practical effect. . . .

We now turn to the testimony, for the purpose of inquiring whether the circumstances were such that, under the rule we have laid down, the character of the deceased, "as a turbulent and dangerous man," ought to have been admitted in evidence. The prisoner and the deceased were brothers, and worked together in a blacksmith shop. The deceased went to the prisoner's house, with a loaded gun, late in the evening, and near the door of the prisoner's house, used reproachful and angry words for some time, but did not use any language of menace, or indicating an intention, either present or prospective, to perpetrate violence upon the prisoner. The deceased afterwards went into the house, where the prisoner was at the time lying upon a bed. Immediately afterwards, the prisoner said to the deceased, "You have come here with your arms, and I have nothing to defend myself." The deceased then placed his

gun on the bed on which the prisoner was lying, and turned and walked off about ten feet to a table, and turned and sat down on the table, with his face to the prisoner. As the deceased turned to walk off from the bed, the prisoner seized the gun, cocked and presented it; and at the instant when the deceased sat down on the table, the gun fired, and the load entered the breast of the deceased, who fell forward, with his head towards the bed, and his feet three or four feet from the table, and expired in about half an hour. . . . There was not a word spoken, not an act done, which, illustrated by the character of the deceased, and construed by the prisoner in the light of that character, could tend to produce a reasonable belief of imminent peril. Nor was there any act or word from the prisoner, which, explained by his character, could aggravate his conduct into such a provocation as to mitigate the offense to a lower degree. . . .

The judgment of the Court below must be affirmed, and its sentence executed.

25. WILLIAMS *v.* FAMBRO

SUPREME COURT OF GEORGIA. 1860

30 *Ga.* 232

TRESPASS vi et armis, in Pike Superior Court. Tried before Judge CABANNIS, at October Term, 1859. This was an action brought by Allen G. Fambro against Richard W. Williams, for the recovery of damage for killing a negro man slave, named Jim, alias Jim Sheet, the property of plaintiff. The declaration alleged that the negro was worth $1,200, and that he came to his death by wounds inflicted upon him by the defendant. The defendant pleaded the general issue. Upon the trial it appeared from the testimony, that at the time the negro was killed, March 23, 1857, the defendant was overseeing for plaintiff; that the plantation upon which the negro was killed, was in the county of Crawford, and that plaintiff resided about thirty miles distant. None of the witnesses examined was present at the killing; the negro was found dead — stabbed in the left side; the wound having the appearance of having been inflicted with a long knife. . . . When the case was called for trial and plaintiff announced ready, defendant moved for a continuance, on the ground of the absence of a witness who resided in the county, and had been duly subpoenaed, and by whom defendant expected to prove that the negro killed was of bad character, turbulent, and unruly; plaintiff objected to the showing as insufficient; the testimony of the absent witness, as stated by defendant, if procured, being immaterial and inadmissible. The Court held the showing insufficient, and refused the motion to continue, and defendant excepted.

The plaintiff having closed his testimony, the defendant offered to read the depositions of one Robert D. Walker, a witness examined by

commission. The substance of the answers of this witness was, that he knew the boy, Jim; that his character in the neighborhood was, that he was hard to manage and control, and of a violent disposition. . . . Nat Lucas and Frank Bacon told witness that the character of the negro was bad, and they wanted him to keep Jim away from their plantations; they said he was a dangerous negro, and of bad habits; witness considered him dangerous. Plaintiff's counsel objected to the reading of these depositions, upon the ground that the testimony was irrelevant and immaterial. Defendant's counsel stated that this testimony was offered for two purposes: (1) To show the character and conduct of the negro. (2) To mitigate the damages. The Court sustained the objections and ruled out the depositions, so far as they went to prove the general character of the negro for violence, unless some act of violence was shown to defendant, or knowledge on his part of the negro's character for violence. To which ruling defendant excepted. . . . The jury found for the plaintiff twelve hundred dollars. Whereupon defendant moved for a new trial, on the ground that the verdict was contrary to law and evidence, and because of error in the rulings, decisions, charges, and refusal to charge above stated and excepted to. The Court overruled the motion, and defendant excepted.

Peeples & Smith, for plaintiff in error. *Gibson & Floyd, contra.*

By the Court. — STEPHENS, J., delivering the opinion. We think the plaintiff in error was entitled to the continuance to get the benefit of Bacon's testimony, and that he ought also to have had the benefit of Walker's testimony, which was offered but ruled out. We think the testimony of these two witnesses was material and admissible, so far as it related to their own general knowledge of the negro's disposition. . . . The thing to be proven in this case was, not the negro's reputation, but his character, his disposition or nature, and especially his aptness for strife and his proneness to insubordination — a fact which ought to be proven by witnesses who know it, or by the admissions of the opposite party. The fact, if proven from the proper sources, ought to have gone to the jury for two purposes, as tending to aid the theory of the defense that the negro was killed in an act of insubordination, and as tending to lessen the value of the negro, and so to mitigate the damages.

To prove a proneness to insubordination, to be sure, does not prove an act of insubordination, but it does increase the probability of the story when there is, as there was in this case, other evidence suggestive of such an act. Such a story of rebellion, if told by a witness, or indicated by circumstances, ought to be more easily believed concerning a violent, turbulent negro, than concerning a meek, humble one. I think that any mind in search of truth in such a case, or finding itself in *doubt*, would want to know the character of the negro.

The presiding Judge intimated that he would have allowed this evidence, if it had been shown that this character had been *communicated* to Williams before he killed the negro. His knowledge or ignorance has

nothing to do with that bearing of the character which I have pointed out. The sole purpose for which character was admissible, in *this case*, on the question of justification, was from the negro's general readiness for rebellion, to render more probable the evidence which tended to show an act of rebellion at the time when he was killed; and this probability is evidently not affected in the slightest degree by Williams' previous knowledge. The light comes from the *fact* that the negro was one who was apt or likely to do such an act as the one imputed to him, and not from Williams' *knowledge* of the fact.

As to the bearing of the negro's character upon the question of damages, it is very obvious that a negro's bad character detracts from his value, and ought to lessen the damages for killing him. . . .

Judgment reversed.

26. STATE *v.* KENNADE

SUPREME COURT OF MISSOURI. 1894

121 *Mo.* 405; 26 *S. W.* 347

APPEAL from St. Louis Criminal Court, — Hon. H. L. EDMUNDS, Judge. Affirmed. The defendant, a German, indicted for the murder of Cora Thompson, a negress, by shooting her with a pistol, was convicted of that crime in the second degree, his punishment being assessed at twenty years' imprisonment in the penitentiary, and he appeals to this Court.

The testimony on behalf of the prosecution was substantially this: On the afternoon of March 20, 1893, defendant was in a saloon on Eighth street, near Clark avenue, in the city of St. Louis. . . . A young negro named Morris came in and was challenged to play by defendant; upon his declining on the score of having no money, defendant agreed to pay for the game, and they began to play. Morris won, and defendant proposed to play for a quarter. Another negro present "staked" Morris, and they played several games, doubling the stakes each time, Morris winning every game, until the amount at stake was four dollars, and the stakeholder paid over the money to Morris, who started to leave the saloon. Defendant went up to him, and without saying a word, slapped him, knocked off his hat, and, putting his hand into his hip pocket, drew out a pistol. Morris ran out the rear door, through a gangway, into the alley near deceased's house. . . . Defendant immediately started toward him, putting his hand in his pistol pocket, and Morris ran past the deceased's house to a vacant lot, and thence back to Eighth street. The deceased was in her room at the time, entertaining a visitor, a negro woman named Reynolds. The door of the room was immediately on the alley, about a foot above the level of the pavement, and had a single stone step in front of it. Hearing a noise in the alley, and some one

shouting, "Run, run!" both women went to the door, and just then defendant came up to the door and cried out, "Let me in!" Deceased said, "What do you want in here?" Defendant replied, "I want to get that nigger out of here." Deceased said, "There is no nigger in here; you may look in, but you can't come in." He tried to force his way in, placing his foot on the stone step, when deceased picked up a seashell from her bureau, and raising it in her hand, said, "If you come in here, I'll knock you in the head." Defendant stepped back, and the woman closed the door; he drew out his pistol, advanced, fired twice through the door, and then forced the door open and fired directly at the woman, who fell, shot through the heart, and died almost instantly. . . .

Charles T. Noland, for appellant.

R. F. Walker, Attorney-General, and *C. O. Bishop*, for the State. . . . The question by appellant of the officer as to what was the reputation of deceased, while she was alive, for peacefulness, as a law-abiding citizen, was properly objected to and the objection rightfully sustained. . . . *Second*. Because in this case her reputation was immaterial. The mere fact that one is a bad or quarrelsome person is no excuse for killing him. State *v.* Hardy, 95 Mo. 455. The theory on which the quarrelsome or dangerous character of a deceased may be shown is that, because of defendant's knowledge of that fact, he may more reasonably apprehend danger to life or limb by reason of threats or demonstrations made against him by deceased. . . .

SHERWOOD, J. . . . Even if deceased had a reputation for being quarrelsome and dangerous, evidence of it could not have been received unless it had been previously shown that defendant *knew it*, and therefore might more reasonably apprehend danger in certain circumstances, than if that reputation had been different. As this knowledge of defendant of the reputation of deceased is affirmatively shown by his own testimony not to have existed, an answer to the question asked the officers was correctly denied. State *v.* Hicks, 27 Mo. 590. . . .

Judgment affirmed. All concur.

27. PEOPLE v. LAMAR. (1906. California. 148 Cal. 564, 83 Pac. 993). LORIGAN, J. It is the rule in this State that threats of hostile intention made by a deceased, whether communicated or uncommunicated, are admissible evidence for the said purpose when the evidence is equivocal. People *v.* Scoggins, 37 Cal. 686; People *v.* Travis, 56 Cal. 251; People *v.* Tamkin, 62 Cal. 468; People *v.* Thomson, 92 Cal. 506, 28 Pac. 589. The philosophy which supports this rule as to the admissibility of evidence of such threats, where it is otherwise in doubt from the evidence who was the assailant, is that it is more probable that one who has made threats of hostile intention towards another would, when opportunity permits, attempt to carry such threats into execution and become the assailant, than would one who has made no such threats, or declared no such intention. So, too, with reference to the admissibility of evidence of the reputation of deceased as being a violent, turbulent, dangerous man, such proof, when the evidence as to who was the assailant is in doubt, for a similar philosophic reason

should be permitted; it being more probable that one bearing such a reputation would precipitate a deadly contest than would one having no such reputation. Hence, we think the rule should be that whenever the circumstances of a case permit of the admission of evidence of threats made by the deceased against the defendant, either communicated or uncommunicated, evidence of the reputation of the deceased as being a violent, quarrelsome, dangerous man, *either known or unknown* to the defendant, is equally admissible; the consideration of the jury to be limited by proper instructions of the Court, where the reputation is unknown to defendant, to the same extent that the law limits the consideration by them of uncommunicated threats — to the question solely as to who was the assailant in the fatal encounter. The rule as to such limitation when applied to uncommunicated threats is declared in People *v.* Scoggins, 37 Cal. 686.

Sub-topic C. Character as an Issue in Civil Cases

28. BUFORD *v.* M'LUNY

Constitutional Court of South Carolina. 1818

1 *Nott & McC.* 268

This case was submitted without argument; and the only question for the consideration of the Court was, whether, in an action of slander, the general bad character of the plaintiff may be given in evidence, by way of mitigating the damages? The opinion of the Court was delivered by

Nott, J. — This question may be considered in a two-fold point of view: 1. Whether evidence of plaintiff's character, *generally,* is admissible, without regard to the particular nature of the offense with which he is charged? And, 2. If that is not to be allowed, whether such evidence may be given, so far as regards his character in that respect, in *particular?*

1. It is a little remarkable that such a question should have remained so long undecided in our Courts; and it is not less so, that so little is to be found on the subject in the English books. Enough, however, is to be found to satisfy my mind that, upon both principle and authority, such testimony ought to be allowed. It seems to be a rule of law, that what a party cannot plead by way of justification, he may give in evidence by way of mitigation. Buller, 298; Phillipps, 139; and it is admitted, that this matter cannot be pleaded by way of justification. I consider it also to be a rule of law, that character may be given in evidence where it is directly in issue. And I can conceive no case where it is in issue, if it be not in action of slander. In every action of law, the object is to recover reparation for some injury sustained. And, where the injury is to property, the value of the article is the principal object of inquiry. And I can see no good reason why the value of character may not be investigated, as well as that of any other commodity, when the reparation of character is the object of this suit. In other personal actions, such as false imprisonment, assault and battery, and the like, the actual injury

sustained, although not the only rule by which damages are to be estimated, always constitutes a necessary ingredient in the question; and it would seem reasonable that the same rule should apply in an action of slander, as in other personal actions. A plaintiff is permitted to give his good character in evidence, by way of enhancing the damages, and, upon the principle of reciprocity, the defendant ought to be permitted to prove the contrary.

If we consider the case upon authority, we are led to the same conclusion. The whole current of American cases, I may almost say, goes to support this opinion. . . .

It is said it would be taking a person by surprise thus to permit an inquiry into his character. But . . . he commences with stating that he is a person of good name, fame, and reputation, and he ought to be prepared to prove that allegation. A person is presumed to be always prepared to defend his general character, if he has a good one; if he has not, it ought to be exposed. . . .

2. On the second question, I apprehend there can be no doubt. . . . In the case of Leicester *v.* Walter (2 Camp. 251) the defendant was allowed to show that, before and at the time of the publication of the supposed libel, the plaintiff was generally suspected of the crime imputed to him, and that his friends had ceased to associate with him on that account.

In every point of view, I am of opinion, the testimony ought to be allowed, and therefore a new trial must be granted.

Justices Colcock and Johnson concurred.

Mr. Justice Cheves dissented, as follows:

In this case I differ from the majority of the Court. The question is simply, shall the defendant, under the plea of not guilty, be permitted to give the general character of the plaintiff in evidence? The prominent arguments, in support of the affirmative of this question, are:

1. That the pleadings put the character of the plaintiff in issue.

2. That the foundation of damages is the actual injury suffered by the plaintiff in his character, and that where he had no character to lose, he can have sustained no injury.

3. That as the plaintiff may give in evidence his rank and condition in life in aggravation, the defendant may do the same in mitigation. It is believed that all the arguments in the affirmative of this question may be brought under one or other of these three heads; which we will now consider:

1. It is alleged that the pleadings put the character of the plaintiff in issue; now it is not true, in point of law, that the character of the plaintiff is put in issue. . . . Mr. Justice Buller, in Janson *v.* Stewart, 1 T. Rep. 748, says: "It is not true that the general character of the plaintiff is put in issue"; and a better pleader than he never sat on the English bench; vide also 1 Chitty on Plead. 226, 364.

2. But it is said that the foundation of the damages given in actions

of slander is the actual injury suffered by the plaintiff in his character. This is not true. It is upon the presumption of loss (little more than a legal fiction), and not upon the actual loss, that actions of slander are principally founded; and the experience of the profession abundantly attests the fact, that the heaviest damages are often given where the slightest injury is sustained. Are not the heaviest damages given when the slander is uttered against unsullied and impregnable character; where the malice of the calumniator has been shot, "like a pointless arrow from a broken bow?" To the tottering and questionable character, the shafts of the slanderer are fatal and ruinous. In this case, the damage is above compensation. Not only the wreck of reputation is swept away, but hope itself, which sustains us when "we are ready to perish," is not allowed to cheer the sufferer. In such cases, we know that the damages are usually nominal, though the injury is immeasurable and intolerable. . . .

3. The last general ground on which it is supposed this evidence ought to be received, is, that as the plaintiff is permitted to give in evidence his rank and condition in life in aggravation of damages, the defendant should be permitted to do the same in mitigation of damages; this is the point decided in Larned *v.* Buffinton, 3 Mass. Rep. 546. But I cannot imagine that the rank and condition in life of a man involves his good or bad character in a moral point of view. . . . Rank and condition in life merely, should, perhaps, neither increase or diminish the damages in an action of slander under this government. On the whole, I am clearly and decidedly of opinion that the evidence is inadmissible, and that a new trial ought not to be granted.

Mr. Justice GANTT concurred with Mr. Justice CHEVES.

Gunning, for the motion; *Clarke*, Solicitor, *contra*.

29. WILLIAM TRICKETT. *Character-Evidence in Civil Cases.* (1904. The Forum, Dickinson College of Law, vol. VIII, p. 165.) *When character is in issue.* — There are civil actions in which the character of a party, or of another specially connected with him, is said to be in issue, and in such cases, this character may be put in evidence. "Putting character in issue," says TILGHMAN, C. J., "is a technical expression and confined to certain actions, from the nature of which the character of the parties, or some of them, is of particular importance. Such is the action brought by one man against another, for seducing his wife, and having criminal connection with her. There the injury done to the plaintiff consists mainly (sic?) in the good conduct of his wife, before her seduction, and, therefore, the defendant is permitted to show that she was unchaste. So in an action of slander, the plaintiff in his declaration, asserts his own good character, and avers the intent of the defendant to rob him of it. He puts his character in issue, therefore, and the defendant is at liberty to impeach it." (Anderson *v.* Long, 10 S. & R. 55; Porter *v.* Seiler, 23 Pa. 424.)

When the action seeks to recover damages, altogether or in part for injury to a *reputation*, the question is, what is the value of that reputation? It is competent for the defendant to disclose any defects in it, prior to his having done the act which is the gravamen of the complaint, in order to show that the reputa-

tion he damaged had less than the normal value. . . . By actions for *seduction*, whether of daughter or other female, damages are in part sought for the injury to the social position and reputation of the plaintiff, through the injury to the reputation of the female. . . . The damages are for injury to the reputation. It matters not whether this reputation is better than is deserved or not. . . . The sexual character of a party to a *contract to marry*, is relevant in an action on that contract for breach of it. By character here is not meant reputation but conduct. A woman might conceivably have a bad reputation without deserving it. Her misfortune would probably be no bar to an action by her. But if without the knowledge of the man, that she has been lewd and immoral, he contracts to marry her, his subsequent discovery of this fact will excuse him from performing the contract. . . . A *slander or libel* is a tort which injures or tends to injure reputation, and the action founded upon it seeks to recover compensation for this injury. The character of the plaintiff is therefore in issue in such an action, unless the plea of the defendant excludes it from the issue. The plea of justification confines the defendant to the proof of the truth of his charge, and he is precluded from showing that that character of the plaintiff which the defamation touches, was before the defamation, not good. (Drown *v.* Allen, 91 Pa. 393.) But when the plea of "not guilty" is pleaded, either alone or in conjunction, as it may be, with that of justification, the defendant may, for the purpose of mitigating the damages, prove the badness of the plaintiff's reputation, prior to the slander or libel. . . . It is pertinent to the issue to inquire whether he had a good character; for if he did not, he could not lose it by the act of the defendant.

30. CLEGHORN *v.* NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

COURT OF APPEALS OF NEW YORK. 1874

56 *N. Y.* 44

APPEAL from judgment of the General Term in the fourth judicial department, affirming a judgment in favor of plaintiff entered on a verdict, and affirming an order denying motion for a new trial.

This was an action to recover for injuries alleged to have been occasioned by defendant's negligence. On the 17th of September, 1869, plaintiff was a passenger upon a train upon defendant's road. A switchman at Lyons station left the switch open on to a side-track, but gave the signal indicating that all was right; in consequence the train was run off upon the side-track and collided with another train standing there. Plaintiff was seriously injured.

Evidence was given tending to show that the switchman was intoxicated at the time; also that he was a man of intemperate habits, which was known to the station agent, who was authorized to and did hire and discharge the men there employed. This evidence was objected to and received under objection. Further facts appear in the opinion.

Samuel Hand, for the appellant. It was error to receive evidence of the intemperate habits of the switchman. . . .

John F. Seymour, for the respondent. Evidence as to the switchman's intemperance was admissible with a view to punitive damages. . . .

CHURCH, Ch. J.—The accident was caused by the carelessness of the switchman, in neglecting to close the switch after the stock train had passed on to the side-track, and in giving a false signal to the approaching passenger train, that the track was all right. It was a clear case of negligence; and for the injury to the plaintiff produced thereby the defendant is liable in this action.

It is insisted that the Court erred in admitting evidence of the intemperate habits of the switchman, and that the case of Warner *v.* N. Y. C. R. R. Co. (44 N. Y. 465) is a direct authority against it. That was a case of injury at a road crossing. It was proved that the flagman neglected to give the customary signal, and was intoxicated at the time. The Commission of Appeals held it error to show previous habits of intemperance known to the officers of the company, upon the ground that such evidence had no bearing upon the question of negligence at the time. In that view the decision was right. Previous intoxication would not tend to establish an omission to give the signal on the occasion of the accident. In *this* case it was sought to be proved, not only that Hartman was intoxicated at the time of the accident, but that he was a man of intemperate habits, which were known by the agent of the company, having the power to employ and discharge him and other subordinates, with a view of claiming exemplary damages. For this purpose the evidence was competent. It is unnecessary in this connection, to speak of the strength of the proof upon which a claim for exemplary damages was made in this case. It is sufficient to say that the evidence was competent upon the question of gross negligence on the part of the defendant in employing or continuing the employment of a subordinate known to be unfit for his position by reason of intoxication.

A more serious question arises upon the charge of the judge in relation to exemplary damages. . . . For the error in the charge, the judgment must be reversed, and a new trial granted, costs to abide the event.

All concur. Judgment reversed.

Topic 2. Conduct as Evidence of a Human Quality or Condition

SUB-TOPIC A. CONDUCT AS EVIDENCE OF ACCUSED'S MORAL CHARACTER [1]

31. ROBERT HAWKINS' TRIAL. (1669. Howell's State Trials, VI, 921, 935, 949). [One Larimore charged the accused, a clergyman, with burglary, by breaking into his house and taking some rings and money. After adducing his evidence to the burglary charged in the indictment, the prosecutor went on to prove other felonies against the accused].

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[1] For the principles of Logic and Psychology here applicable, see the present Compiler's "Principles of Judicial Proof" (1913), Nos. 84–99.

L. C. B. HALE. — Larimore, have you any more? . . . Call them, for I will hear all, if I sit until night.

Then Larimore called Dodsworth Croke, William Croke, John Stop, Thomas Welch, Samuel Salter, and William Sanders; all these being sworn, the sum and substance of their evidence was to this effect: That they had heard John Chilton say, that Mr. Hawkins had stolen a pair of boots from him. . . .

L. C. B. HALE. — What, more boots still? Come, Larimore, have you any more?

Larimore said, Yes, my lord, one Mr. *Boyce*. Who, being sworn, said, That at a certain time, he coming into a house at Chilton, found this Mr. Hawkins, now the prisoner at the bar, and one James Noble (which Noble was then drunk, and asleep upon a bed), and I saw Mr. Hawkins have his hand in Noble's pocket, and the said Noble told me, that at that time he lost a gold ring and a piece of gold out of his pocket. . . .

Hawkins. — Boyce, you might have done well, to have told Mr. Noble of this, when he told you that he had lost his ring and piece of gold; but can you say anything touching Larimore's being robbed, or do you know that I am the person that robbed him?

Boyce. — No, not I, my lord, I cannot charge him. . . .

My Lord Chief Baron HALE's Directions to the jury were to this effect:

L. C. B. said, — You that are of the jury, the prisoner at the bar stands indicted for robbing this Larimore, and you have heard at large both the prosecutor's evidence to prove him guilty (which if you do believe) I never heard a fuller. And 2dly, You have also heard the prisoner's defence, wherein (as I think) he hath as fully answered the same charge. I shall, First, repeat the evidence against him, which consists of two branches; the first is the prosecutor's proof of this indictment; and secondly, his charging him with other crimes of the like nature, as the stealing of Chilton's boots, and the picking of Noble's pocket. . . . Secondly, He seems to charge him with other acts of the like nature; as 1, — He brings in one Chilton to swear, that the prisoner at the bar did steal a pair of boots from him, and four or five persons swear, that they did hear Chilton say he did. 2, — He brings in one Boyce from London (a person, I think, of no great credit); who swears, that he saw the prisoner at the bar about two years ago, have his hand in the pocket of one James Noble, and that Noble said, that he lost a gold ring, and a piece of gold at the same time. This (if true) would render the prisoner now at the bar obnoxious to any jury.

32. JOHN CAMPBELL. *Lives of the Chief Justices of England*. (Vol. III, p. 24, Amer. ed.) Lord Holt [1688 +] put an end to the practice which had hitherto prevailed in England, and which still prevails in France, of trying to show the probability of persons having committed the offense for which they are tried by giving evidence of former offenses of which they are supposed to have been guilty. Thus, on the trial before him of Harrison, for the murder of Dr. Clench,[1] the counsel for the prosecution calling a witness to prove some felonious design of the prisoner three years before, the Judge indignantly exclaimed, "Hold, Hold! what are you doing now? Are you going to arraign his whole life? How can he defend himself from charges of which he has no notice? and how many issues are to be raised to perplex me and the jury? Away, away! that ought not to be; that is nothing to this matter."

[1] 12 How. St. Tr. 833, 874.

33. Alexander Davison's Trial. (King's Bench, 1808. Howell's State Trials, XXXI, 187.) [Fraud in public accounts, by a former commissary-general.]

Lord *Moira* (formerly general-in-command), sworn for the defense: "I never had the remotest ground for suspicion [against the accused]. . . . Shall I state the particulars?"

L. C. J. Ellenborough: "One is very unwilling to diminish the scope of these inquiries, but the general inquiry is as to the general character."

John Martin Leake sworn; examined by Mr. *Holroyd:* "I believe you are one of the comptrollers of the army accounts?" "I am."

"In that character have you at any time had Mr. Davison's accounts before you?" "Yes;"

"Have those been examined by you?"

L. C. J. Ellenborough: "I really must interfere. It would be dangerous as a precedent to permit particular instances to be given in evidence where there can have been no notice. General evidence of general character is admissible; but this is certainly contrary to all rule."

Mr. *Holroyd:* "I ask this question to show Mr. Leake's means of knowledge."

L. C. J. Ellenborough: "You ask as to his knowledge of the examination of public accounts. Now would it be proper to try a collateral issue for which the other side cannot be prepared? It is as clear a rule of evidence as can be that you must not examine to particular facts." . . .

Mr. *Holroyd:* "I ask this only as introductory of general character."

L. C. J. Ellenborough: "If you mean only to ask whether the witness has had such means of knowing him as to form the judgment he is about to give, I have no objection to that."

Mr. *Holroyd:* "Had you opportunities, from examining Mr. Davison's accounts, of knowing his general character?" "I have seen many of his accounts, and many of them were extremely regular; in the years 1794, 1795, and 1796, they were before the comptrollers."

L. C. J. Ellenborough: "I cannot admit this; you must go into general character."

34. PEOPLE *v.* WHITE

Supreme Court of New York. 1835

14 *Wend.* 111

The prisoner was tried at the Washington Oyer and Terminer in 1834, before the Hon. Esek Cowen, one of the circuit judges, on an indictment for having in his possession counterfeit bank bills with the intent to pass the same.

M. Strong, a witness for the prosecution, testified to a conversation between him and the prisoner, in which he inquired of the prisoner about some money which had been stolen from the Rutland Bank, and the prisoner declared his innocence of any participation in the robbery. The witness was proceeding to detail the further conversation of the prisoner at the same time, when the prisoner's counsel objected to his proceeding in the same, unless the district attorney would state his precise object in calling for the confessions of the prisoner. The district

attorney stated that a part of the prisoner's conversation was already out, and that he claimed the whole, without apprising the prisoner's counsel of the use he intended to make of it. The judge decided that the witness might state all the conversation of the prisoner at the time alluded to by the witness. To which decision the prisoner's counsel excepted. The witness then stated that the prisoner said he should never have been suspected of robbing the Rutland Bank, if it had not been his misfortune to have once been in the State prison in Massachusetts. Previous and also subsequent to the testimony of Strong, proof was exhibited in support of the prosecution which it is not necessary to detail. When the proofs were closed, the jury were charged, and the judge who delivered the charge commented upon the evidence, and among other things observed that the jury had a right to notice that the prisoner had not given any proof of good character; that he probably could not produce such proof, judging from the circumstances of his former conviction; at any rate, he had not done so. The prisoner's counsel excepted to the charge, and the jury pronounced a verdict of guilty. The indictment and bill of exceptions signed in this case were brought up by certiorari.

D. Russell & S. Stevens, for the prisoner. *Green C. Bronson* (Attorney general), for the People.

By the Court, SUTHERLAND, J.—The material question presented by this bill of exceptions is, whether the testimony of Moses Strong, to the prisoner's confession that he had been in the State prison in Massachusetts, ought to have been received. . . . The declarations or confessions of the prisoner are competent evidence to establish any fact which could be legally proved in any other manner.

The question then arises, whether the public prosecutor could have proved by the record of conviction, or by the testimony of witnesses, that the prisoner had been in the State prison in Massachusetts. He was on trial upon an indictment for having counterfeit money in his possession, knowing it to be counterfeit, with intent to pass it. The fact of his having been in the State prison in Massachusetts had certainly no direct bearing upon the issue joined in the case; and the general rule is, that the evidence is to be confined to the point in issue; and this rule is applied more rigidly, if possible, in criminal than in civil cases. 1 Phil. Ev. 442.

The only point of view in which it can be contended that it would have been competent for the public prosecutor to prove this fact is, that it went to show the bad character of the prisoner. But the general rule in criminal as in civil cases is, that the prosecutor cannot enter into the defendant's character, unless the defendant enable him to do so, by calling witnesses in support of it; but even then the prosecutor cannot examine to particular facts, the general character of the defendant not being put in issue, but coming in collaterally. . . . Here the prisoner had called no witnesses to support his character, nor was it put in issue

by the prosecution. The prosecutor therefore had no right even to impeach his general character, much less to prove specific facts against him.

The evidence seems to have been admitted by the judge, on the ground that the witness had stated a part of the conversation or confession of the prisoner before any objection was made. . . . The district attorney contended, that as part of the conversation had been given in evidence without objection, he had a right to give the whole, and of course that the whole conversation was proper evidence in the case. And so the Court, I think, must have intended to decide. If not, they would have told the jury that the fact that the prisoner had confessed that he had been in the State prison in Massachusetts, ought to be excluded from their consideration in making up their verdict. . . .

I think it highly probable that the prisoner's confession turned the scale against him. The evidence was entirely circumstantial, sufficient perhaps to raise a strong probability of the prisoner's guilt of the crime for which he was indicted; but certainly leaving the fact involved in so much doubt, that the jury might well have come to a different conclusion. It is precisely one of those cases in which the fact that the prisoner had already been convicted of an infamous crime, and been sent to the State prison, would be likely to operate with decisive effect against him. I think the evidence was improperly admitted, and that a new trial should be granted. . . . New trial granted.

35. PEOPLE v. STOUT. (1858. New York. 4 Park. Cr. C. 97). Mr. John Norton *Pomeroy* [arguing for the defendant]: In its administration of criminal jurisprudence, the Civil [Continental] law allows and requires such evidence. It investigates the antecedent character, disposition, habits, associates, business, — in short, the entire history of an accused person, to discover whether it is probable that he would commit the alleged crime. English and American criminal law, in its practical administration, confines itself to the investigation of the very crime charged, and restricts judicial evidence to circumstances directly connected with and necessary to elucidate the issue to be tried. These two systems are diametrically opposed to each other, and whatever may be said of their comparative merits, the rule of the common law is so firmly established that it lies at the very foundation of criminal procedure, as an inseparable element of trial by jury. Trained judicial minds may be able to eliminate from a mass of irrelevant and general criminative facts those which directly bear upon the crime charged against the prisoner; but the very character of juries, and the theory of trial by jury, require that all prejudicial evidence tending to raise in their minds an antipathy to the prisoner, and which does not directly tend to prove the simple issue, should be carefully excluded from them.

36. STATE v. LAPAGE. (1876. New Hampshire. 57 N. H. 275, 299). [On a charge of murder committed in an attempt to rape, the fact of the defendant's prior rape of another person was offered.]

Mr. *Norris* [arguing for the defence]: "Making no point of remoteness in time or space, let us see how well this evidence will bear analyzing. Premise

to be proved: he committed a rape, in no way, except in kind, connected with this crime. Inference: a general disposition to commit this kind of offence. Next premise this general disposition in him. Inference: he committed this particular offence. . . . It may be tried by the common test of the validity of arguments. Some men who commit a single crime have, or thereby acquire, a tendency to commit the same kind of crimes; if this man committed the rape, he might therefore have or thereby acquire a tendency to commit other rapes; if he had or so acquired such a tendency, and if another rape was committed within his reach, he might therefore be more likely to be guilty; if more likely to be guilty of rape, and if there was a murder committed in perpetrating or attempting to perpetrate rape, he might therefore be more likely to be guilty of this rape, and hence of this murder; a sort of an ex-parte conviction of a single rape, from which the jury are to find a general disposition to that kind of crimes in order to help them out in presuming the commission of another rape as a motive or occasion of the murder. We can find nothing like it in the book.

Ladd, J.: It is argued on behalf of the State (if I have not wholly misapprehended the drift of the argument) that the evidence was admitted because, as matter of fact, its natural tendency was to produce conviction in the mind that the prisoner committed rape upon his victim at the time he took her life. . . . I shall not undertake to deny this. If I know a man has broken into my house and stolen my goods, I am for that reason more ready to believe him guilty of breaking into my neighbor's house and committing the same crime there. We do not trust our property with a notorious thief. We cannot help suspecting a man of evil life and infamous character sooner than one who is known to be free from every taint of dishonesty or crime. We naturally recoil with fear and loathing from a known murderer, and watch his conduct as we would the motions of a beast of prey. When the community is startled by the commission of some great crime, our first search for the perpetrator is naturally directed, not among those who have hitherto lived blameless lives, but among those whose conduct has been such as to create the belief that they have the depravity of heart to do the deed. This is human nature — the teaching of human experience. If it were the law, that everything which has a natural tendency to lead the mind towards a conclusion that a person charged with crime is guilty must be admitted in evidence against him on the trial of that charge, the argument for the State would doubtless be hard to answer. If I know a man has once been false, I cannot after that believe in his truth as I did before. If I know he has committed the crime of perjury once, I more readily believe he will commit the same awful crime again, and I cannot accord the same trust and confidence to his statements under oath that I otherwise should. . . . Suppose the general character of one charged with crime is infamous and degraded to the last degree; that his life has been nothing but a succession of crimes of the most atrocious and revolting sort: does not the knowledge of all this inevitably carry the mind in the direction of a conclusion that he has added the particular crime for which he is being tried to the list of those that have gone before? Why, then, should not the prosecutor be permitted to show facts which tend so naturally to produce a conviction of his guilt?

The answer to all these questions is plain and decisive: The law is otherwise.

37. People v. Shay. (1895. New York. 147 N. Y. 78, 41 N. E. 508). Peckham, J.: Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trials have existed for many years. One of these

methods favors this kind of evidence in order that the tribunal which is engaged in the trial of the accused may have the benefit of the light to be derived from a record of the whole past life of the accused, his tendencies, his nature, his associates, his practices, and, in fine, all the facts which go to make up the life of a human being. This is the method which is pursued in France, and it is claimed that entire justice is more apt to be done where such course is pursued than where it is omitted. The common law of England, however, has adopted another, and, so far as the party accused is concerned, a much more merciful doctrine. . . . In order to prove his guilt, it is not permitted to show his former character, or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question.

38. William Trickett. *Character-Evidence in Criminal Cases.* (1904. The Forum, Dickinson College of Law, vol. VIII, p. 127.) *How Character is to be Proven.* The mental drifts of a human being are revealed to himself only by the thoughts, feelings and volitions which they cast into his consciousness. No other human being can know them, except from his observation of their effects in words and acts. That A is kind can be known to B only by B's having watched him in a variety of circumstances, and seen how he has acted towards other sentient beings within his reach; or by his having learned from one who has thus observed. The tendencies which are secluded in a piece of iron are detected by observation of its behavior in a variety of conditions. No other method discovers the properties of a man. If, then, the question is, is A a chaste man, how is it to be answered but by learning what his words and acts are? If the question is, is he honest, the answer must come from observing how he acts respecting the property of others, his contracts with them, etc. If he is always careful to pay what he owes, if he never seeks to deceive or defraud, if he never appropriates that which is another's, he will be inferred to be honest. . . .

A conceivable way, therefore, of establishing a defendant's character would be the testimony of persons who knew him, to his specific acts, or to so many of them as might be deemed decisive of tendency. The objection to this mode of proof is similar to that which is suggested by Mitchell, J., then in the Common Pleas of Philadelphia, to the proof of the character of the deceased in a murder case: "Evidence of a specific act is not admissible. It would lead to a collateral inquiry, into which we could not enter, to-wit: the circumstances of that case. Nothing could be more unfair than to give in evidence a single act as proof of a brutal and dangerous disposition, without inquiring into all the circumstances of that act. . . . This would be impossible, and without it, the evidence of a specific act would be worse than useless; it would be dangerous." (Commonwealth *v.* Richmond, 6 W. N. C. 431.) This, the most scientific method, is for the Courts impracticable.

39. French Trials. (1) Trial for the Murder of the Baroness de Valley. (1896. Paris. *Albert Bataille.* "Causes Criminelles et Mondaines." 1896, p. 249). [On June 16, 1896, Baroness de Valley was found strangled in her apartment in Paris. She was rich, and made a business of lending her money at usurious rates. Robbery was the object of her murderers. A party of several young fellows, Kiesgen, Ferrand, Lagueny and Truel, were charged with the murder. One of them, Kiesgen, son of a merchant, appeared well dressed and well brought up; he had no occupation and his father furnished him with

pocket-money. The others were of not so respectable surroundings. Presiding Judge POUPARDIN thus conducted the opening examination at the trial, on November 24.]

JUDGE. — None of you have a criminal record; but that is far from saying that you have a good record.

You, Kiesgen, seem to have a mode of life not at all creditable. You frequent the low saloons of the Latin Quarter. You were an habitué of the Harcourt Café. You have been getting all the money you could from women. Your mistress, Jeanne Prevost, alias Margot, gave you 15 francs a day from her earning as a prostitute. You are a panderer of the worst sort. In your cell at Mazas Prison, you kept writing to Margot, asking her to send you cash. Unfortunately for you, she was at that time herself in St. Lazare Prison. (Laughter in the audience).

As for you, Truel, alias Julien, alias Curlyhead, you are the son of a mechanical draftsman at Charenton. After having a job as apprentice-draftsman in a factory, you were discharged for a brutal assault. After that you lived off your mother, who . . .

Then you became an habitué, like Kiesgen, of the saloons and women of the Latin Quarter. You seem to have been one of a gang of bicycle thieves. In short, after starting as an honest workingman, you gave up that pursuit, and became an agent for houses of ill-fame. You see what you have been brought to by bad company.

You, Lagueny, like your fellow-defendants, are scarcely twenty years old. You are the natural son of an unfortunate woman who died insane, two years ago, at the St. Anne Asylum. During all your boyhood you were left by her to loaf on the streets. You picked up a living by hawking things now and then; selling newspapers, sometimes dogs, sometimes peddling olives at restaurant-doors; sleeping in the public refuges. At twelve years of age, a charitable society had you baptized in the Sacred Heart Church at Montmartre, and next day you partook of your first communion. Your mother seems to have done some questionable errands for Baroness Valley, and told you that the Baroness was your godmother. You, ever since you became a young man, have been an agent for the assignations of girls in the Latin Quarter. That was where you made the acquaintance of Kiesgen and of Julien the Curlyhead. To them you made the proposal to go and rob the Baroness. She had always showed a kind interest in you; she used to give you odd change.

Lagueny. — Gave me money? Well, I guess not! The old skinflint! She would even pick up old crusts of bread in the street.

JUDGE. — Well, at any rate, your mother used to be her housekeeper, and the Baroness sometimes gave you a lunch.

. . . . . .

[Then the evidence directly to the crime was put in.]

Nov. 25. The jury found three of the defendants guilty. But in view of the youth and lack of a criminal record for Kiesgen and Truel (the two who did the actual killing), they recommended those two for lenieney. Both were sentenced to hard labor for life. . . .

Lagueny, who had proposed the robbery, was sentenced to ten years' imprisonment, Ferrand to five years, and Durlin was acquitted.

40. French Trials. (2) Trial for Blackmailing Max Lebaudy. (1896. Paris. *Albert Bataille*. "Causes Criminelles et Mondaines," 1896, p. 95). [Max Lebaudy was a young millionaire, foolish and extravagant. About the years 1894–5, he became the prey of a number of blackmailers, some of them journalists, some ex-military men, some mere adventurers. Several different widespread intrigues against him were unearthed. He was bled for various sums,— fr. 30,000; 10,000; 40,000; etc. Various well-known personages, political, literary, and dramatic, more or less innocent, were more or less involved in the scandals.

On March 30, 1896, the trial began, under Presiding Judge Planteau.]

Examination of Viscount *Ulrich de Civry*.

Judge. — You took part in the war of 1870, and I am bound to say that you behaved very creditably. Leaving the army in 1873, with the rank of cavalry quartermaster, you went back to journalism, and were at last accounts chief editor of the *Army Echo*. You also went into politics; and were candidate for the Assembly at Yvonne in 1893.

But I am obliged to remind you that you have a record in the criminal court. In 1876, the Paris Court of Appeals sentenced you to one year's imprisonment for illegally wearing military uniform. In 1880, the same Court sentenced you to two months for unlawful eloignment of goods under attachment.

Civry. — My counsel will explain about those convictions.

Judge. — But those are not all. You were convicted by default, in 1877, at the Seine Assize Court, of robbery, and were sentenced to twenty years' imprisonment with hard labor. They had to extradite you from England, and the penalty was commuted to three years. But the judgment was set aside on technical grounds; you had a new trial at Melun, and the public prosecutor withdrew his charge, and you were of course acquitted.

To get the money for your legal expenses, you had borrowed large sums, through several notaries. One of these notaries has himself just been convicted by the Seine Assize Court. The sums you thus borrowed amounted in notes to more than fr. 1,000,000, nominally, though you yourself received only some fr. 500,000.

[The judge then entered into details of the Hennion case, reading from the records. Hennion was a young man of means from the provinces, who had become entangled in the usurers' and speculators' clutches by the medium of Viscount Civry, and the Viscount had narrowly escaped another criminal sentence.]

Judge. — The judgment of the Court there said: "Hennion's ruin was obviously due to the machinations of unscrupulous adventurers, among whom figured Ulrich de Civry. Unfortunately, the Penal Code does not reach all forms of dishonesty."

Well, in spite of these unsavory incidents in your past, you maintained something of a position in a certain section of Parisian society. When you left your regiment in 1891, you were adjutant. What is your business now?

Civry. — Horse-trading.

Judge. — That is not a business. It is reported that you do not do much of anything, and are living as a parasite off other persons. You spent two years in Normandy with an old chum from your regiment, Mr. Davout, but he finally gave you to understand, in correct but unmistakable manner, that you had reached the limits of his hospitality. You then came back to live in Paris, where you ran up debts, even with the house-porter.

Civry. — That was for my room-breakfasts. And I did not have time to pay him; they arrested me too soon. (Laughter in the audience).

JUDGE. — You are still owing two months' rent, besides fr. 170 to that house-porter for breakfasts. You have no regular occupation.

. . . . . .

[The examination of the next accused, *de Cesti*, was thus conducted by the judge.]

JUDGE. — Your name is not "de Cesti," but just "Cesti." Your birth-registry has never been discovered. It is known, however, that you took employment in 1863 by the name of Lionel Werther de Cesti. You were a lieutenant, but were in 1876 placed on the retired list because of unpaid debts. Creditors sued you on all hands, and in 1877 you resigned from the service, — doubtless on request. After that, you went into politics, and were actively mixed up in the Norton scandal.

Cesti. — My only share in that was to lend my office to Mr. Millevoye to arrange a duelling affair with Mr. Clémenceau. That was all I had to do with the Norton scandal.

JUDGE. — You are next found making one of the parties who helped to ruin the unfortunate Hennion [above-mentioned]. A woman friend of his mother testified before the magistrate that you had bled that unfortunate youth unmercifully; she wanted to lay charges against both Mr. Civry and yourself.

Cesti. — Yes. That was the lady who was then going with General Boulanger. I do not know what basis she could have for such testimony.

JUDGE. — You were also mixed up in the affairs of another youth of good family, Mr. Carnegie, whom you also helped to ruin.

Advocate JULLEMIER (for the defense). But Mr. Carnegie himself repudiated that charge.

. . . . . .

[The examination of another of the accused, *Armand Rosenthal*, came on March 12.]

JUDGE. — Your name is Armand Rosenthal. You were born in Paris?

Rosenthal. — Yes, in Paris, Nov. 9, 1853, and I want that fact to be publicly recorded. There has been a good deal of slander about my being born somewhere else.

JUDGE. — You have gone under the alias of Jacques Saint-Cère. You served your army-term first in the 24th Line Regiment, then in the 19th. It is said against you that as a young man you were extravagant with your money. In 1879 your family had to appoint a conservator for you. . . . About that time you left Paris and lived in Germany, where you helped edit a review.

Rosenthal. — It was a Francophile Review, — published in Germany, but aiming to spread French principles in Austrian Poland. Its columns were inspired from France. My associate, Mr. Sacher Masoch, even earned for his services the distinction of being decorated with the Legion of Honor.

JUDGE. — . . Why did you leave France? I am obliged to remind you of a serious incident of the year 1879: You were convicted, by default, of breach of trust and attempt at cheating, and were sentenced by the Seine Police Court to three months in jail. You never served that sentence?

Rosenthal. — I swear that I never even knew a thing about what had been done in that case. The first news I ever had of the astounding affair was from Magistrate Meyer, when he examined me on the present charge. If I had known about that judgment, rendered in my absence, do you suppose that I should have been bold enough to go into Parisian journalism and write such combative

articles as I did? That charge in 1879 was concocted by a money-lender who took advantage of my absence from this country.

JUDGE. — But the peculiar thing is that you left France that very year and did not come back till 1884, when the five-year statute of limitations had released you.

Rosenthal. — Excuse me, I did come back to Paris in the interim, several times; and my counsel will prove it. I wish also to say that in 1886 I obtained an order releasing me from the conservatorship, and when I was in Court then, the judge who examined me never said a word about that default-sentence.

JUDGE. — Well, I have the record of that case here in front of me, and I am bound to say that some of the testimony in it has given me a strong impression about you.

[Assistant-Judge PEZOUS then proceeded to read some of the testimony from Rosenthal's above trial in 1879.

The first was that of a cabman, who testified that Mr. Rosenthal had once ridden with him for an entire afternoon in Paris in the Bois, and that Mr. Rosenthal had then gone off without paying, stating that he had lost his purse and had no money.]

Rosenthal. — But see here, Mr. Presiding Judge, how can you expect me to answer to this? You are asking me about a matter that goes back more than sixteen years. How can I remember what I said to some cabman in 1879?

[Assistant Judge PEZOUS next read the testimony in 1879 of another cabman; who testified that Mr. Rosenthal on one occasion when the cabman had taken him to a certain house and was on orders awaiting him, had gone off through the back door of the house and never returned to pay him. The cabman also alleged that Mr. Rosenthal had a habit of cheating cabmen in one way or another.

The deposition was then read of a barmaid in the Place de la Madeleine, Miss Elena, who charged that Mr. Rosenthal had once got from her a watch, to be sold for her, but had never returned either watch or proceeds.

. . . . . .

On March 26, the verdict and judgment were rendered.

Joseph de Civry, Georges de Labruyère, Chiarosolo, Rosenthal, and Carle des Perrières were acquitted.

Ulrich de Civry and Cesti were found guilty, and sentenced to thirteen months in jail and 500 francs fine.]

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41. HALL *v.* COMMONWEALTH

COURT OF APPEALS OF KENTUCKY. 1899

106 *Ky.* 894; 51 *S. W.* 804

APPELLANT was found guilty of grand larceny, under an indictment which, in addition to the charge of grand larceny, alleged that she had been twice theretofore convicted of felonies, the punishment of which was confinement in the penitentiary, setting forth the terms and courts at which the former convictions had been had. The evidence of her guilt was circumstantial. It was shown that the prosecuting witness, having divided his money, put thirty-two dollars of it in a sock, which he

concealed in a tub in the yard of the house where he was staying; that he slept in the same room with appellant, another woman, and two children; that appellant went out in the yard about four o'clock in the morning; and made purchases of furniture and other things, and paid her rent, on that day. Evidence was also introduced as to two former convictions, which were both for grand larceny. Objection was made both to the admission of this testimony, and to the unofficial character of the person by whom the records of the former conviction were produced; he being a son of the clerk of the penitentiary, and acting as clerk during the clerk's sickness. Appellant testified to the fact that she found the money, not in a sock, but lying in the path leading through the back yard; that she did not know it was the property of prosecutor, and, from his statement made the night before, thought he had no money.

The Court gave the ordinary instruction as for grand larceny; directing the jury that, if they found her guilty, they should fix her punishment at confinement in the penitentiary for not less than one nor more than five years, and gave in addition an instruction that if they found her guilty under the first instruction, and should further believe that she had been twice theretofore convicted of felony, as charged in the indictment, they should so find and state in their verdict.

DURELLE, J., for the Court (after stating the case as above). . . . It is earnestly urged that it was error to permit the introduction of evidence of former convictions at all until the jury should have first found her guilty under the charge for which she was then being tried; that it amounted to the admission of testimony to impeach her general character, which she had not put in issue, and enabled the Commonwealth to show her to the jury in the light of a common thief, and rebut the presumption of innocence which the law gives her by evidence in chief upon a trial for grand larceny.

It is painfully apparent that, with the circumstances shown as to the loss of the money, and evidence of two former convictions for grand larceny, the accused, who is an ignorant negro woman, had not the slightest chance that an average jury would entertain a reasonable doubt of her guilt; while, without the evidence of former convictions, there was a possibility that they might do so. There is considerable force, therefore, in the proposition urged, that this procedure denied the accused a fair trial of the offense whereof she was accused. But the statute as to habitual criminals (Kentucky Statutes, § 1130) seems to have created an additional and higher degree of offense, viz., the commission of a felony having been theretofore twice convicted of a felony, etc. To show the accused guilty of this degree of the offense charged, it is necessary to show the former convictions; and this, of course, is bound to prejudice the accused, — just as evidence showing malice is bound to prejudice the defendant in a murder case, — but it may be shown to make out the higher degree of the offense, which authorizes the severer punishment. The statute has been held constitutional, and it has been held essential

to allege the former conviction or convictions in the indictment. Stewart *v.* Com., 2 Ky. Law Rep. 386; Mount *v.* Com., 2 Duv. 93; Taylor *v.* Com., 3 Ky. Law Rep. 783; Boggs *v.* Com., 9 Ky. L. R. 342, (5 S. W. 307).

The statute requires the jury to find the fact of the former convictions. There is no provision for a separate trial of the fact of former conviction, nor do we think the statute intended there should be one. The law seems to work a hardship, but it is a hardship the Legislature alone can remedy.

Sub-topic B. Conduct as Evidence of Accused's Intent, Knowledge, Motive[1]

42. Hathaway's Trial. (Surrey Assizes, 1702. Howell's State Trials, XIV, 639, 635, as quoted by J. G. Phillimore, "History and Principles of the Law of Evidence," 1850, p. 493.) . . . A very grotesque trial, which illustrates the gross superstition of our forefathers, took place before Lord Holt, in the year 1702. It was that of John Hathaway, for a cheat and impostor. This wretch had pretended to be bewitched, and under that pretence had committed many savage outrages on a helpless old woman, named Morduck, against whom he had done his best to inflame the populace. The imposture was detected once by the good sense of a physician. But, notwithstanding this, the people were dissatisfied, and the patrons of Hathaway, irritated by his detection, pursued the poor old woman with more malice than before; they used her so barbarously, that she was forced to leave Southwark. . . .

[On Hathaway's trial, it was alleged that] one of the impostor's tricks was fasting. To prove this, his counsel called Dr. Hamilton. . . . In order to shew the fraud, evidence was offered of Hathaway's conduct after the time mentioned in the indictment. This was objected to. Again, under the auspices of Holt, common sense obtained a victory.

Serjt. Jenner. — "My Lord, the record bears date the first day of Term: all this [proposed testimony] is since the record."

L. C. J. Holt. — "It is to prove the imposture committed before now. What Mr. Kenry says of his pretending to fast twelve weeks, though two or more be not within the time of the information, I hope they may give it as evidence subsequent to prove what was done before. . . . It is an evidence of his cheating since that time, and that out of the information; but it is evidence also to prove that his pretended fasting was a mere deceit; for he then pretended to have fasted ten weeks before he came thither, and after pretends to continue fasting in the same manner. If that be proved to be a fraud, it is strongly to be inferred that this pretended fasting before was so too."

Serjt. Jenner. — "But then they may not give evidence in matter after."

L. C. J. Holt. — "Matter afterwards, that proves a thing done before." . . .

Serjt. Jenner. — "And will that prove what was before?"

L. C. J. Holt. — "It is certainly so. The thing is, whether I can give in evidence anything after to prove what was done before? If he pretends to fast twelve weeks, ten weeks before he came there and the two weeks after, he did

[1] For the principles of Logic and Psychology here applicable, see the present Compiler's "Principles of Judicial Proof" (1913), Nos. 30–50, 101–129.

not fast but only pretended it. Whether what he did after, be not evidence of what he did before? Sure, it is. For he that cannot hold out fasting two weeks, but was glad to eat, though he pretend to fast, may strongly be presumed to have eaten during the ten weeks, though then he pretended to fast."

43. VAUGHAN'S TRIAL (1696. Howell's State Trials, XIII, 485, as quoted by J. G. Phillimore, "History and Principles of the Law of Evidence," 1850, p. 483). [At least one overt act was essential to a charge of treason, by the statute 7 Wm. III, c. 3 (1695), and such overt act or acts must be alleged in the indictment. The overt act charged against Vaughan, as an act of levying war, and adhering to the King's enemies, was his cruising and marauding in a ship called the Loyal Clancarty.] The counsel for the Crown offered evidence of hostile acts committed in another boat: this was objected to. . . .

L. C. J. HOLT. — "Consider: if it be not a good indictment without alleging particular acts, then it necessarily follows, that if particular acts are alleged, and you do not prove them, as is alleged, you have failed in the indictment, and so his objection will lie upon you."

The act was read.

L. C. J. HOLT. — "You may give evidence of an overt act that is not in the indictment, if it conduce to prove one that is in it. You cannot give evidence of a distinct act that has no relation to the overt act mentioned in the indictment, though it shall conduce to prove the same species of treason."

The counsel for the Crown argued, that they might give in evidence other acts in other ships.

L. C. J. HOLT. — "I cannot agree to that. . . . Because a man has a design to commit a depredation on the King's subjects in one ship, does that prove he meant to do it in another? Go on, and shew what he did in the Clancarty."

The evidence that the prisoner had gone cruising in the Custom House barge was then rejected. I quote the commentary of the wise, learned, and humane Foster, on this decision: "The rule of rejecting all manner of evidence in criminal prosecutions that is foreign to the point in issue, is founded on sound sense and common justice. For no man is bound, at the peril of life or liberty, fortune or reputation, to answer at once and unprepared for every action of his life. Few, even of the best of men, would choose to be put to it. And had not those concerned in state prosecutions, out of their zeal for the public service, sometimes stepped over this rule in the case of treasons, it would, perhaps, have been needless to have made an express provision against it in that case."

44. REGINA *v.* DOSSETT

NISI PRIUS. 1846

2 *C. & K.* 306

ARSON. — The prisoner was indicted for having, on the 29th of March, 1846, feloniously set fire to a rick of wheat-straw, the property of William Cox.

It appeared that the rick was set on fire by the prisoner's having fired a gun very near it; and it was proposed on the part of the prosecution

to go into evidence to show that the rick had been on fire on the 28th of March, and that the prisoner was then close to it with a gun in his hand.

J. Jefferys Williams, for the prisoner. — I submit that this evidence is not admissible. It is seeking to prove one felony by another; and it is in effect asking the jury to infer that the prisoner set fire to the rick on the 29th, because he did so on the 28th. The firing of the rick on the 28th, if wilfully done, was a distinct felony.

Maule, J. — Although the evidence offered may be proof of another felony, that circumstance does not render it inadmissible, if the evidence be otherwise receivable. In many cases it is an important question whether a thing was done accidentally or wilfully. If a person were charged with having wilfully poisoned another, and it were a question whether he knew a certain white powder to be poison, evidence would be admissible to show that he knew what the powder was because he had administered it to another person, who had died, although that might be proof of a distinct felony. In the cases of uttering forged bank notes of knowing them to be forged, the proofs of other utterings are all proofs of distinct felonies. I shall receive the evidence.

The evidence was given.

45. BOTTOMLEY *v.* UNITED STATES

United States Circuit Court. 1840

1 *Story* 135; 3 *Fed. Cas.* 971

This is a writ of error to a judgment of condemnation *in rem* by the District Court upon an information of seizure of two cases and one hundred and fourteen pieces of broadcloth seized on land at Boston, forfeited to the United States, and claimed by James Bottomley, Jr., as owner. The cause was tried by a jury, and a verdict found for the United States, upon the issue on the first count in the information, and upon this verdict the judgment of forfeiture was pronounced by the District Judge. A bill of exceptions was filed at the trial, and upon that bill of exceptions the present writ of error was brought by the claimant to reverse the judgment. . . .

Upon the first count the claimant filed a plea, alleging that the goods were not unladen or delivered from any ship or vessel within the United States, without a permit or special license for such unlading and delivering, in manner and form, as in the first count was alleged. . . . In point of fact, the goods in the present case were unladen and delivered at the port of New York, upon a permit, regular in form, granted by the deputy collector, to the claimant. But the United States contended, and offered proof, that the permit was obtained by the claimant by a fraudulent conspiracy with the bribery of the deputy collector of the port of New York, and by false and fraudulent invoices produced by the claim-

ant; and the United States contended, that if this state of facts was established in evidence, then the permit was a mere nullity. . . . And for the purpose of explaining and showing the said system of fraudulent collusion and bribery, . . . the counsel for the government further proposed to show, that certain broadcloths of the same character, cost, and value as those imported by claimant in the Roscoe, were shipped in England at or about the time when said claimant's goods by the Roscoe were shipped; that said goods were shipped by the same persons in Liverpool as had shipped the claimant's goods by the Roscoe, and all the other goods of claimant contained in said twenty-three entries before described; that the marks on the cases containing said goods were identical with the marks on the cases of claimant's goods by the Roscoe; that the numbering on said cases was an exact and progressive continuation of the numbering on the cases containing claimant's said goods by the Roscoe; that said goods arrived by four distinct importations at New York, soon after the seizure of the claimant's goods per Roscoe, and before notice of said seizure could possibly have reached England; that said goods, on their arrival, were not entered, but sent to the custom-house stores, where they lay several months; but they were eventually entered by one William Bottomley, as being the property of James Bottomley, Sr., that the invoices had no exporter's oath at the time of shipment, as is usual, but the same was taken in England several months afterwards, and after a lapse of time fully sufficient for the transmission of intelligence to England of said seizure of claimant's goods by the Roscoe; that the said invoices and oaths (when thus after the said lapse of time produced) set forth the cost of said goods at a greatly higher rate and sum than said goods so imported by claimants in the Roscoe, and proposed to submit this evidence to the jury, as tending to show that the said goods in fact belonged to the claimant, and that the cost of said goods, as set forth in the invoices and entries thereof, thus eventually made, show that the cost of the goods by the Roscoe, as entered by the claimant, was knowingly and fraudulently set forth in the entry thereof. . . .

The cause was argued by *Mills*, District Attorney, and *Fletcher* and *Bartlett*, for the United States, and by *Sprague* and *Gray*, (with whom was *Miller*, of New York). . . .

STORY, J.: . . . In respect to the evidence admitted at the trial, I am clearly of opinion that the whole of it was admissible to substantiate the fraud. It divides itself into four heads: . . .

(4) The evidence of the importation of other goods of the same character, cost, and value, as those imported by the claimant in the Roscoe, shipped about the same time with those in the Roscoe, marked with the same marks, and numbered in an exact and progressive continuation of the cases of the goods of the claimant in the Roscoe; and, also, evidence, that the same goods arrived in four different shipments soon after the seizure of the claimant's goods in the Roscoe, and before the news of the

seizure could have reached England; that the same goods were not then entered at the custom house, but were entered by one William Bottomley, as being the property of James Bottomley, Sr., after full knowledge of the seizure must have been known in England; and that they were then entered at a greatly enhanced price and rate beyond those imported in the Roscoe. This last evidence was avowedly offered as tending to establish two important facts: 1, That the claimant was the real owner of these shipments; 2, that the cost of the goods by the Roscoe, as entered by the claimant, was knowingly and fraudulently set forth in the entry.

The objection taken to all these three last portions of the evidence excepted to, is, that it is "res inter alios acta," and upon other occasions; and therefore, not properly admissible to establish a fraud in the case of the importation of the goods now before the Court. But it appears to me clearly admissible upon the general doctrine of evidence in cases of conspiracy and fraud, where other acts in furtherance of the same general fraudulent design are admissible, first, to establish the fact that there is such a conspiracy and fraud; and, secondly, to repel the suggestion that the acts might be fairly attributed to accident, mistake, or innocent rashness or negligence. In most cases of conspiracy and fraud, the question of intent or purpose or design in the act done whether innocent or illegal, whether honest or fraudulent, rarely admits of direct and positive proof; but it is to be deduced from various circumstances of more or less stringency and often occurring, not merely between the same parties, but between the party charged with the conspiracy or fraud and third persons. And in all cases where the guilt of the party depends upon the intent, purpose, or design with which the act was done, or upon his guilty knowledge thereof, I understand it to be a general rule that collateral facts may be examined into, in which he bore a part, for the purpose of establishing such guilty intent, design, purpose, or knowledge. Thus, in a prosecution for uttering a bank note, or bill of exchange, or promissory note, with knowledge of its being forged, proof, that the prisoner had uttered other forged notes or bills, whether of the same or of a different kind, or that he had other forged notes or bills in his possession, is clearly admissible as showing, that he knew the note or bill in question to be forged. The same doctrine is applied to a prosecution for uttering counterfeit money, where the fact of having in his possession other counterfeit money, or having uttered other counterfeit money, is proper proof against the prisoner to show his guilty knowledge.

Many other cases may be easily put, involving the same considerations. Thus, upon indictment for receiving stolen goods, evidence is admissible that the prisoner had received, at various other times, different parcels of goods, which had been stolen from the same persons, in proof of the guilty knowledge of the prisoner. In short, wherever the intent or guilty knowledge of a party is a material ingredient in the issue of a case, these collateral facts, tending to establish such intent or knowledge, are proper evidence. Exceptions overruled.

46. STATE *v.* LAPAGE

SUPREME COURT OF NEW HAMPSHIRE. 1876

57 *N. H.* 245

INDICTMENT, charging respondent with the murder of Josie A. Langmaid, who was killed October 4, 1875, about nine o'clock in the morning, while passing over the Academy road, in Pembroke, on her way to school. . . .

The government claimed that the murder was committed in perpetrating or attempting to perpetrate rape. As tending to show that the prisoner had an intent to commit such a crime, . . . Julienne Rousse testified that she resided in Joliet, Canada, and was a sister of Joseph Lapage's wife, and knew him; . . . went to a pasture to milk cows while living at St. Beatrice, Canada, and met Lapage there; when she arrived at the pasture the cows were not there; . . . it was seven o'clock in the morning, June, 1871; he tried to catch her; she shouted and tried to run away; after she had gone four or five rails he overtook her, caught hold of her, . . . after she was choked and lost her strength he outraged her; . . . he did not strike her with the stick, but committed rape upon her. . . . To the admission of all the foregoing testimony the respondent excepted. . . .

Concerning the foregoing evidence, the Court charged the jury as follows:

"You have heard the testimony of Julienne Rousse to the effect that in June, 1871, this prisoner committed a rape upon her. In considering this evidence (if you believe the witness), you will be required to use careful discrimination of the way and manner in which it is to be applied to this case, if it is to be applied at all. We have admitted the evidence, not because it is *necessarily* connected with the issue which you are to try, — which is, the guilt or the innocence of the prisoner of the offence with which he is here and now charged, — but because it *may* have a legal bearing upon that issue. . . . It is a fundamental principle of law, that evidence that a defendant committed one offence cannot be received to prove that he committed another and distinct offence. This principle we must take care not to violate. And, therefore, you are not to regard the evidence of Julienne Rousse as any proof or evidence that the prisoner killed Josie Langmaid. Therefore, unless you find from *other* evidence, entirely independent of that of Julienne Rousse, that the prisoner killed and murdered Josie Langmaid, you must reject her evidence altogether. . . . If you find, from other evidence in the case than that of Julienne Rousse, that the defendant killed Josie Langmaid deliberately and premeditatedly, or in perpetrating or attempting to perpetrate rape, you may and your duty is to reject her testimony altogether. But if you are not so satisfied by all the other evidence and circumstances of the case, you may consider her evidence. . . . The evidence you see, therefore, bears only upon the question of the *intention* of the prisoner in killing Josie Langmaid, and thus upon the *degree* of guilt, *i.e.*, whether the offence is murder

of the first or second degree. . . . The principle upon which such evidence is admitted is, that, 'though the prisoner is not to be prejudiced in the eyes of the jury by the needless admission of testimony tending to prove another crime, yet, whenever the evidence which tends to prove the other crime tends also to prove this one, not merely by showing the prisoner to be a bad man, but by showing the particular bad intent to have existed in his mind at the time when he did the act complained of, it is admissible. . . . Does the testimony of Julienne Rousse, or any other evidence in the case, tend to show the existence in the mind of the prisoner of a motive or passion which would render the commission of, or an attempt to commit, a rape upon Josie Langmaid more probable than it would otherwise seem to you? Does it or not tend to show that such a lustful intent existed in the heart of the prisoner at the time as would render the commission of a rape more probable? Does this evidence supply a motive for the commission of the offence? The *crime committed upon Julienne Rousse was four years and more antecedent* to the offence under consideration. Since that time a change may have taken place in his mind. There has been time for repentance; and the lustful disposition he bore then may have been eradicated. The more remote the evidence of this mental condition, the less force and weight belong to it. . . ."

The respondent was convicted of murder in the first degree, and sentenced to be hanged.

Lewis W. Clark, Attorney General (with whom were *W. W. Flanders*, solicitor, and *C. P. Sanborn*), for the State. . . . The only question of law raised by the bill of exceptions is, whether the evidence objected to is admissible for any purpose. Does this evidence have a legal tendency to show that the defendant killed the deceased, or that he intended to commit a rape upon her? . . . Although evidence offered in support of an indictment for felony be proof of another felony, that circumstance does not render it inadmissible. If the evidence offered tends to prove a material fact, it is admissible, although it may also tend to prove the commission of another distinct and separate offense.

Suppose the defendant were tried for breaking and entering the store at the north end of Elm street in Manchester — the most northern of all the stores on that street — with intent to steal; suppose it were proved that he broke and entered that store; that he was arrested as soon as he entered it, and the only question was whether he intended to steal; suppose there were one hundred other stores on that street, and he had broken and entered every one of them, and stolen something in every one of them, beginning at the south end of the street and taking the stores in succession, on his burglarious march from one end of the street to the other; suppose he did all this in one night, and was completing his night's work when arrested; on the question of his intent in entering the one hundred and first store, would any one think of objecting to evidence of his one hundred larcenies in the other one hundred stores? His robbing one hundred stores would tend to show that he intended to rob the one hundred and first, just as his passing counterfeit money in the one hundred would tend to show that he intended to pass counterfeit money found in

his possession in the one hundred and first. There would be no difference between his presence in the one hundred and first store, and his having counterfeit money in his pocket in that store, that would, on the question of intent, affect the admissibility of the evidence of what he had done in the other hundred stores.

Suppose, instead of robbing stores, he had robbed persons, going from one end of the street to the other, and knocking down and robbing one hundred men, one after the other, and not touching a single woman; suppose when he had knocked down the one hundred and first man, and before he had had time to rob him, he had been arrested, and the question were whether he intended to rob him, — whether his last offense were an attempt to rob, or a mere assault, or an assault with intent to kill; would anybody suppose his robbing the other hundred men, after he knocked them down, was no evidence of the intent with which he knocked down number one hundred and one? Suppose the one hundred and one persons whom he assaulted were women; suppose he touched no man; suppose he had unsuccessfully attempted to ravish one hundred of them, and were arrested at the instant of his knocking down the one hundred and first, and the question were whether his last assault were a mere assault, or an assault with intent to commit a robbery, or an assault with intent to commit a rape; suppose the last woman assaulted should die of her injuries, and the defendant were indicted for her murder; . . . how would you expect, if you were the prosecuting officers, to find any better evidence of the defendant's intent than his attempts upon the other one hundred women? . . .

If a ship-master lands in Congo, obtains a cargo of blacks, and carries them to Cuba, and four years and four months afterwards he is found at another place on the African coast, as far from Congo as Pembroke Academy is from St. Beatrice, with a hundred blacks in his possession, — would anybody think that his proved intent on the former occasion had, as a matter of fact, no tendency to show what he intended to do on the latter occasion? . . . No man on earth would refuse to hear it, or to consider it, unless he were bound by some arbitrary and irrational rule overriding his understanding, and dictating a course at war with his common sense. . . .

The jury having found, on other evidence than that of Julienne Rousse, that the defendant committed the homicide, her testimony was competent to show the intent with which he committed it. . . . If a man's intent to pass counterfeit money at one time is evidence of his intent to pass other counterfeit money found in his possession at another time; if his intent to sell liquor at one time is evidence of his intent to sell other liquor at another time; if his intent to send one negro boy into slavery is evidence of his intent to make the same disposition of another found in his possession, — why is not his intent to commit a rape upon Julienne Rousse, when he took possession of her, evidence of his intent to make the same disposition of Josie Langmaid, when he took possession

of her? Manifestly the only objection to this evidence is the remoteness of the rape in point of time and place. . . .

W. T. Norris (with whom were *S. B. Page* and *H. W. Greene*), for the respondent, . . . [argued as quoted in part *ante*, No. 36.]

Cushing, C. J. . . . The admission of the testimony of Julienne Rousse gives rise to by far the most important question in the case. The testimony tended to prove that the prisoner, about four years and a half before the trial, at a place beyond the jurisdiction of the United States, committed the crime of rape upon a person other than the deceased; and the question is, whether that bald, naked fact, being put in evidence, had any tendency to prove any matter in issue between the State and the defendant.

. . . I think we may assume, in the outset, that it is not the quality of an action, as good or bad, as unlawful or lawful, as criminal or otherwise, which is to determine its relevancy. I take it to be generally true, that any act of the prisoner may be put in evidence against him, provided it has any logical and legal tendency to prove any matter which is in issue between him and the State, notwithstanding it might have an indirect bearing, which in strictness it ought not to have, upon some other matter in issue. . . .

I think we may state the law in the following propositions:

(1) It is not permitted to the prosecution to attack the character of the prisoner, unless he first puts that in issue by offering evidence of his good character.

(2) It is not permitted to show the defendant's bad character by showing particular acts.

(3) It is not permitted to show in the prisoner a tendency or disposition to commit the crime with which he is charged.

(4) It is not permitted to give in evidence other crimes of the prisoner, unless they are so connected by circumstances with the particular crime in issue as that the proof of one fact with its circumstances has some bearing upon the issue on trial other than such as is expressed in the foregoing three propositions. . . . The cases of this sort cited by counsel for the government admit of being classified into several distinct groups.

In the first place is the class of cases in which other offenses are shown for the purpose of proving guilty *knowledge*. To this class belong those cases in which, in the trial of indictments for uttering forged bank notes, or counterfeit coin, the proof of other offenses of the same kind is admitted. It might well happen that a person might have in his possession a single counterfeit bill or coin without knowing it to be such; but he would be much less likely to do so twice, and every repetition of such an act would increase the probability that he knew that the bills or coins were counterfeit. . . .

Another class of cases consists of those in which it becomes necessary to show that the act for which the prisoner was indicted was *not accidental*, — *e.g.* where the prisoner had shot the same person twice within a short

time, or where the same person had fired a rick of grain twice or where several deaths by poison had taken place in the same family, or where children of the same mother had mysteriously died. In such cases it might well happen that a man should shoot another accidentally, but that he should do it twice within a short time would be very unlikely. So, it might easily happen that a man using a gun might fire a rick of barley once by accident, but that he should do it several times in succession would be very improbable. So, a person might die of accidental poisoning, but that several persons should so die in the same family at different times would be very unlikely. So, that a child should be suffocated in bed by its mother might happen once, but several similar deaths in the same family could not reasonably be accounted for as accidents. So, in the case of embezzlement effected by means of false entries, a single false entry might be accidentally made; but the probability of accident would diminish at least as fast as the instances increased. . . .

There is another class of cases in which proof of the commission of one crime tends to show a *motive* for the commission of the crime with which the prisoner is charged. . . . So, in Com. *v.* Ferrigan, the adulterous intercourse of the defendant with the wife of the deceased tends to show a motive for the murder. . . .

Another class of cases consists of those in which the evidence tends to show a *general plan* or conspiracy, one act of which was that which is in issue. . . . If the indictment were for being a common seller of spirituous liquor, the charge could be proved in hardly any other way than by showing many specific acts; and conversely, if a man were proved to be a professional counterfeiter, that would be evidence tending to show his guilty intent. . . .

It should also be remarked that this being a matter of judgment, it is quite likely that Courts would not always agree, and that some Courts might see a logical connection where others could not. But, however extreme the case may be, I think it will be found that the Courts have always professed to put the admission of the testimony on the ground that there was some logical connection between the crime proposed to be proved other than the tendency to commit one crime as manifested by the tendency to commit the other. In the case under consideration, I cannot see any such logical connection, between the commission of the rape upon Julienne Rousse and the murder of Josephine Langmaid, as the law requires. I am unable to see any connection by which from the first crime can be inferred that the respondent was attempting the commission of a rape when he committed the murder, if he did it, other than such inference as I understand the law expressly to exclude. . . . I think a careful examination of that part of the charge which relates to this evidence will show that it really, in substance, amounted to instructing the jury that they were to find the *character* of the prisoner from the fact proved by Rousse, and infer from such character that he would be likely to be actuated by passion and lust. It was really instructing the jury

that they might find, from a particular act proved, the prisoner's character as a man possessed by unlawful and lustful passion, and infer from that that he was actuated by such passion in his conduct to the deceased. The matter really reduces itself to attacking the prisoner's character by the proof of particular acts, which the authorities clearly show to be inadmissible. . . .

LADD, J. . . . I think the admission of the testimony of Julienne Rousse was error, because it violated the fundamental principle of law, that evidence that a defendant committed one offense cannot be received to prove that he committed another and distinct offense. The other exceptions, I think, should be overruled, for the reasons given by the attorney general in his brief.

SMITH, J. . . . The whole answer to the position, that the evidence of Julienne Rousse was relevant to the issue tried, is, that it does not show or tend to show that the prisoner perpetrated or attempted to perpetrate a rape upon Josie Langmaid. . . . No one will pretend that evidence that the prisoner had committed another murder, in Canada, or Texas, or Europe, could be shown on this trial. One cannot be convicted of murder, by showing that he has at some time and somewhere else committed another murder; or of larceny, by showing that he has committed the crime before, and therefore has an evil disposition inclining him towards that particular crime. The trouble with the position of the State is, that it is not here a question of *motive* or *intent*. Certainly, committing a rape in Canada in 1871, would not show any motive for committing a rape in New Hampshire in 1875; nor does it disclose any intent so to do. . . .

Because of the admission of the testimony of Julienne Rousse, there must be a new trial granted.

47. COMMONWEALTH *v.* ROBINSON

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1888

146 *Mass.* 571; 16 *N. E.* 452; *and Official Report of Trial, passim*

INDICTMENT for the murder of Prince Arthur Freeman by poisoning. At the trial, before FIELD and KNOWLTON, JJ., there was evidence tending to prove the following facts:

In February, 1885, Freeman occupied a tenement in South Boston with his wife, Annie Freeman, who was a sister of the defendant, and their two children. On February 20, 1885, the defendant called upon her sister, staying but a short time, and on February 23, 1885, again went to her sister's house to take care of her, and there stayed until Mrs. Freeman died on February 26, 1885, after an illness of about three weeks. The children had been taken to the defendant's house in Cambridge on February 22, and, immediately after the death of his wife, Freeman went

to live with the defendant, and there remained, with his children. The baby died in April, 1885. In 1882 Freeman had taken out a certificate of insurance for $2,000 in the United Order of Pilgrim Fathers, his wife being the beneficiary named in the certificate, and after her death, on or about May 13, 1885, appointed the defendant his beneficiary under the certificate, as authorized by the by-laws of the order. Freeman, while still an inmate of the defendant's family, died, on June 27, 1885, after an illness of about six days, from the effects of arsenic administered to him by the defendant. On July 23, 1886, the boy, Thomas Arthur, died. From a period prior to 1885, the defendant had been indebted to different persons to the amount of six or seven hundred dollars, which she was unable to pay, and for which she had been hard pressed by her creditors, and this indebtedness she paid off out of Freeman's insurance, which she duly received from the order on September 23, 1885.

(1) The prosecution offered, for the sole purpose of establishing the defendant's motive in killing her brother-in-law, to prove that prior to the death of Annie Freeman the defendant had formed the plan and intention of securing to her own use the $2,000 of insurance, and as a means of accomplishing this result, and as a part of the scheme, determined first to kill her, then to induce Freeman to make her the beneficiary under the certificate, and then to kill him. Mr. *Stevens*, District Attorney, stated the object of the offer. . . .

FIELD, J.: Do you offer it for the purpose of rendering it more probable that she committed the murder charged, or for the purpose of showing the intent of the murder with which she is charged, six months before committing; for the purpose of showing the same motive operating?

Mr. *Stevens:* I put it as the strongest piece of evidence which has a tendency in this case in showing what was the motive. . . .

FIELD, J.: Does the force of the evidence stop with proving that she formed the intent of killing her brother-in-law before her sister died?

Mr. *Stevens:* Certainly. . . .

FIELD, J.: But the fact that she killed her sister, is that offered for any purpose except to show that she had the intent of killing her brother-in-law at that time? Is it offered to show if she killed her sister, she killed her brother-in-law?

Mr. *Stevens:* Not in the slightest degree. . . .

The Court, by FIELD, J., admitted this evidence, in the following terms: . . . If evidence, direct or circumstantial, is offered and admitted tending to show that this defendant knew before her sister's death of the existence of the insurance, and that it could be transferred on the death of her sister to herself and made payable to herself on the death of her brother-in-law; and that she, before the sister's death, had formed in her own mind a plan or intention to obtain this insurance for her own benefit, and this plan or intention continued to exist and be operative up to the time of the death of her brother-in-law; then we are of the opinion that evidence may be offered that her sister died of poison and that this

defendant administered it as a part of the method employed by her to carry this plan or intention into effect, in connection with evidence that she administered poison to her brother-in-law as another part of the same plan or intention.

(2) [The prosecution afterwards offered further to prove that after the death of her brother-in-law and her receipt of the insurance money in her own right, as beneficiary, she poisoned the remaining child, Thomas Arthur, in July, 1886. This offer was stated and opposed in the following terms]:

Mr. *Stevens:* The government has already offered evidence that this money was received for the purpose of taking care of Thomas Arthur Freeman, and the position of the government is that the motive which induced this woman to kill Prince Arthur Freeman was for the purpose of getting two thousand dollars to use for her own benefit. . . . Now, this testimony of the death of Thomas relates back and explains more fully the real motive and the strength of the motive which induced her to kill Prince Arthur. It shows that she did not receive the money for the purpose of using it to take care of Thomas Arthur, but has a tendency to show that the real purpose and the real motive was, not the alleged motive by which she had received it, for the purpose of taking care of Thomas Arthur, but was for her own personal benefit. . . .

Field, J.: Does it not amount to this, that you show she killed Thomas Arthur for the purpose of getting rid of the burden of supporting him?

Mr. *Stevens:* Not entirely. I do not think it would be admissible simply for that purpose. I do not think it is admissible except on the ground that it relates back to the original motive. . . .

Field, J.: Suppose you prove that she wanted the money for the purposes of the expenses of the family generally, then can the death of any member of her family at any subsequent time be shown in order to relate back and help to prove the original motive? . . .

Mr. *Stevens:* I should say no, on general principles, unless there was some particular circumstance. It seems to me that that differs from this case. . . .

Field, J.: You know the rule of law is, that you shall not submit the evidence of one crime to prove another. The general rule of law is undoubtedly against it. If you are indicted for assaulting A, it is not competent to prove that you have assaulted B, C, and D.

Mr. *Stevens:* Because ordinarily it has not any natural tendency to satisfy the reasonable mind that the prisoner committed that crime.

Field, J.: It has some tendency to show that he is a man who is habitually assaulting people.

Mr. *Stevens:* I tried to argue, — but I did not argue successfully, — in the former trial, that under certain combinations I thought that was admissible, but the Court overruled it, and of course I cannot argue that now.

FIELD, J.: Suppose you are indicted for cheating A in a horse trade, the fact that you have cheated twenty-seven other persons within three months, is, independently of legal rules, some evidence to the point that you have cheated the last person; but yet, it is not admissible if there is no connection between the different acts.

Mr. *Stevens:* I don't know about that; but the Court says it is not. But if I pass a piece of counterfeit money, and if it is a fact that I had another piece of counterfeit money in my possession, that would be evidence against me. I do not think the rules of law are always consistent.

FIELD, J.: That is an exception, and it goes simply to the point of whether you knew it was counterfeit. The ground is that a man may have one counterfeit half-dollar and not know it; but if he has a good many in his possession and on successive days, it is evidence that he knows that the money is counterfeit.

Mr. *Stevens:* Where a distinct crime is committed, we do not put it in that position. But does it not have a natural tendency, and is it not connected circumstantially, with the principal fact, in so far as it tends to go back and explain the motive?

FIELD, J.: Is it not more reasonable, on general principles, that if there be any evidence that she killed the son, the motive to do that was formed after the death of the father, than that it was formed before, — on general principles? Is it not merely collateral as connected with the original motive?

Mr. *Stevens:* I do not think it is, if you go along step by step. . . .

Mr. *Goodrich* [for the defense]: It is admitted that there was no contract in writing, there was no trust created by any instrument, but she simply acknowledged that she had the care and the charge of the child and was to take care of the child, and she recognized the expense of it. . . . If evidence of the death of Thomas Arthur Freeman is competent in this case, it is because that death was a part of the original scheme. Now, if the original scheme was to get possession of the money, then to make this evidence competent it must appear that it would serve that end, — the scheme of getting the money. Therefore it would be material whether or not the money had been got and spent; because if the prisoner had obtained the money at the time of Thomas Arthur Freeman's death, and had spent it and it was gone, then some other motive except the obtaining of the money must have been the motive for Thomas Arthur's death. Now, in point of fact, it is proper for me to say that the money had been spent and was gone; and, therefore, her only object and motive in committing the murder of Thomas Arthur Freeman must have been to get rid of her responsibility of taking care of him. . . .

[The justices went out for consultation. They then returned and said, by]

FIELD, J.: The justices have considered the question submitted to them and are divided in opinion. The result is that in a capital case,

where the point does not concern the general administration of justice, but is dependent upon the particular facts of a particular case, *in favorem vitae*, the evidence must be excluded.

[In the Supreme Court, the admission of the first part of the evidence above was held proper, in the following terms]:

C. ALLEN, J.: While it is well settled in this Commonwealth that on the trial of an indictment the government cannot be allowed to prove other independent crimes for the purpose of showing that the defendant is wicked enough to commit the crime on trial, this rule does not extend so far as to exclude evidence of acts or crimes which are shown to have been committed as part of the same common purpose or in pursuance of it. In such cases there is a distinct and significant probative effect, resulting from the continuance of the same plan or scheme and from the doing of other acts in pursuance thereof. It is somewhat of the nature of threats or declarations of intention, but more especially of preparations for the commission of the crime which is the subject of the indictment. If, for example, it could be shown that a defendant had formed a settled purpose to obtain certain property which could only be got by doing several preliminary things, the last of which in the order of time was criminal, the government might show, on his trial for the commission of that last criminal act, that he had formed the purpose to accomplish the result of obtaining the property, and that he had done all of the preliminary things which were necessary to that end. This would be quite plain if the evidence of the purpose were direct and clear, — as, if a letter in the defendant's handwriting should be discovered, stating in terms to a confederate his purpose to obtain the property by the doing of the several successive acts the last of which was the criminal act on trial. In such case, no one would question that proof might be offered that the defendant had done all the preliminary acts referred to, which were necessary steps in the accomplishment of his purpose. But such purpose may also be shown by circumstantial evidence. It is, indeed, usually the case that intentions, plans, purposes, can only be shown in this way. Express declarations of intention, or confessions, are comparatively rare; and therefore all the circumstances of the defendant's situation, conduct, speech, silence, motives may be considered. The plan itself, and the acts done in pursuance of it, may all be proved by circumstantial evidence, if they are of themselves relevant and material to the case on trial. In such a case it makes no difference whether the preliminary acts are criminal or not; otherwise, the greater the criminal, the greater his immunity. Such preliminary acts are competent because they are relevant to the issue on trial; and the fact that they are criminal does not render them irrelevant. Suppose, for further example, one is charged with breaking a bank, and there is evidence that he had made preliminary examinations from a neighboring room; that his occupation of such room was accomplished by a criminal breaking and entering would not render the evidence incompetent. It is sometimes said that such evidence may be introduced

where the several crimes form part of one entire transaction; but it is perhaps better to say, where they have some connection with each other, as a part of the same plan or induced by the same motive.

. . . The ruling at the trial, therefore, was correct, that if evidence should be offered and admitted tending to show that the prisoner knew before her sister's death of the existence of the insurance, and that it could be transferred on the death of her sister to herself, and made payable to herself on the death of Freeman, and that before her sister's death she had formed a plan or intention to obtain this insurance for her own benefit, and this plan or intention continued to exist or be operative up to the time of Freeman's death, then that evidence might be offered to show that her sister died of poison, and that the prisoner administered it as a part of the method employed by her to carry this plan or intention into effect, in connection with evidence that she administered poison to Freeman as another part of the same plan and with the same general intention. The Court therefore properly held that evidence of this knowledge and plan or intention on the part of the prisoner should first be offered. . . .

We are further of the opinion, that the preliminary evidence which was before the Court . . . certainly tended to show a scheme and plan, entered into before Mrs. Freeman's death, to have the insurance money made payable to the prisoner. Exceptions overruled.

48. PEOPLE *v.* MARRIN

COURT OF APPEALS OF NEW YORK. 1912

205 *N. Y.* 275; 98 *N. E.* 474

APPEAL from Supreme Court, Appellate Division, Second Department.

Frank C. Marrin was convicted of forgery in the first degree. From a judgment of the Appellate Division, Second Department (147 App. Div. 903, 131 N. Y. Supp. 1134) affirming the conviction, he appeals. Affirmed.

On the 3d day of May, 1895, the defendant was indicted for the crime of forgery in the first degree, in that on the 9th of November, 1893, in his capacity as commissioner of deeds, he willfully, falsely, and feloniously certified that a mortgage "purporting to have been made and executed by one James Cahill to one Caroline Barry in the sum of $4000 . . . was acknowledged by a party thereto, to wit, the said James Cahill, . . . whereas in truth and in fact . . . such certifying by him, the said Frank C. Marrin, as such commissioner of deeds, was in all respects false, fraudulent, and spurious, as he, the said Frank C. Marrin, then and there well knew." . . .

The jury found him guilty as charged in the indictment, and the judgment entered on the verdict was unanimously affirmed on appeal to the Appellate Division.

William Travers Jerome, of New York City, for Appellant. *John M. Perry*, of New York City, for the People.

VANN, J. (after stating the facts as above). Upon the charge that the defendant, as a commissioner of deeds, "willfully certified falsely" that the mortgage in question was duly acknowledged before him, a serious difference of opinion has arisen in regard to the admission of certain evidence given in support of the accusation. The circumstances under which that evidence was received were as follows: The defendant, a practicing lawyer in the city of Brooklyn, had as a client an old lady named Caroline Barry, a resident of that city, who on or about the 3d of November, 1893, gave him $4000 to invest for her. In a short time he delivered to her the paper set forth in the indictment purporting to be a mortgage duly acknowledged before himself as commissioner of deeds and to have been executed by James Cahill, as mortgagor, to Caroline Barry, as mortgagee, to secure the payment of $4000 in three years from date with interest payable semiannually. There was a false certificate of record indorsed on the mortgage, which purported to cover the adjoining halves of two lots in Brooklyn; the division lines passing nearly through the center of the buildings thereon. It was shown that no person named James Cahill had ever been connected with the record, title, or possession of either piece of property. Several persons of that name were called by the prosecution, each of whom swore that he was not the James Cahill named in the instrument, that the signature thereto was not that of any James Cahill known to him, and that he neither signed nor acknowledged it himself. The defendant embezzled said money, but from time to time paid Mrs. Barry what purported to be the interest upon the mortgage as it fell due.

Thereupon, in order to show that James Cahill was a myth, that if any one acknowledged the instrument the defendant knew it was not the person described therein, and that the transaction was part of a continuous scheme to defraud Mrs. Barry, eight similar mortgages were offered and received for that purpose only. At the time they were received, as well as in the charge, the Court carefully instructed the jury to that effect and distinctly told them that such mortgages could not be considered as any evidence of an independent crime or for any purpose except the one thus announced.

These mortgages purported to have been given within a period of less than two years, being dated two or three months apart, and they were all actually recorded, except the last two, which were dated after the one in question and bore false certificates of record. Each was delivered by the defendant to Caroline Barry as evidence of an investment made by him for her of money intrusted by her to him, to be invested in mortgages in her name, shortly before the date of each instrument, but in each case the money, instead of being invested in any way, was converted by him to his own use. Each ran to her as mortgagee, and each covered no unit of realty, but parts of houses on adjacent lots belonging

to different owners, or rear ends or sides of lots. In each instance the person named as mortgagor was unknown and could not be found after diligent inquiry. Each was a stranger to the record, title, and possession of the premises covered by the mortgage. Each mortgage was certified by the defendant to have been acknowledged before him as commissioner of deeds, and he paid the interest on each as it became due from money intrusted to him by Mrs. Barry for investment. He used all the money, amounting to over $30,000, for his own purposes.

It was not enough for the people to show simply that the certificate in question as made by the defendant was false. It was necessary for them to go further and show that he knew it was false, as the statute condemns one who "wilfully certifies falsely." "Wilfully," as thus used, means intentionally, so that proof of intention to make a false certificate is expressly required. . . . In order to show knowledge, intention, and the absence of mistake, the district attorney had the right to prove similar acts, done under similar circumstances at about the same time, with intent to defraud the same person by the same means. The common method, purpose, and victim formed the connecting links which strung together the nine successive and successful efforts to defraud pursuant to a common scheme. People *v.* Dolan, 186 N. Y. 4, 10. The mortgagor named in the indictment may or may not have been a myth; but when eight similar myths appeared as mortgagors in eight similar mortgages, some dated before and some after the one in question, but no two far apart, each given to and used to defraud the same person and each acknowledged before the defendant who received the proceeds of the fraud in each case, the probability that the mortgagor in question was a myth was greatly strengthened. The probative force of such evidence bore logically on the question whether the defendant knew that James Cahill was a myth, and with cumulative power in proportion to the number of instances, tended to exclude the possibility of mistake on his part in that regard. It also tended to show his intention to make a false certificate.

The suggestion that evidence could not be received to show that the same man picked the pocket of the same person on several successive occasions near together does not apply to this case, because the pickpocket knows when he steals. There can be no mistake about it; whereas here there may have been a mistake. James Cahill may not have been a myth. Some one may have assumed to be James Cahill and may have convinced the defendant that he bore that name and was in fact the mortgagor, so that while the certificate was false the defendant may not have known it was false. The people did not know how much evidence might be presented by him tending to show that he was mistaken, and the way was open to the prosecution to reduce the possibility of mistake to a minimum by proving eight similar and connected transactions, each of which as well as the one in question was part of a general scheme to defraud Mrs. Barry by means of spurious

mortgages certified by the defendant in the same way and under similar circumstances.

2. The evidence also bore upon intent, not merely the intention of the defendant to make the certificate, but with a special weight upon his intention to commit a crime in making it. If one plan ran through all the transactions and was worked out in the same way, at nearly the same time, by the same means, with intent to defraud the same person, with the same effort to conceal by payment of interest, and a common method, agency, and purpose welded all the mortgages together, all were competent to show that the defendant was not mistaken in doing the single act for which he was tried, because nine mistakes of the same kind, each of which put a large sum of money in his pocket, are impossible of belief.

It is conceded that, where knowledge is a necessary ingredient of a crime, evidence of similar acts by the defendant at or about the same time is admissible. It is further conceded that proof of scienter was necessary in order to show that the defendant knew that any person who may have appeared before him was not the James Cahill described in the mortgage. And, finally, it is conceded that if the eight mortgages had all purported to have been executed by James Cahill, they would have been competent to show knowledge and improbability of deception or mistake.

It seems to me that the distinction between the case and the concession is too narrow for practical use in administering the law. If all the mortgagors in the eight mortgages were myths, the mythical names they bore were of slight importance. The false name was not the material fact, but the false man and the furtive intent in certifying that he was a true man and the mortgagor. If the eight mortgagors were myths, it was probable that the ninth was also, and equally probable that the defendant knew it, whether they bore the same name or different names. The theory of the prosecution was not that because the defendant forged on eight occasions he forged on the ninth, but that on the ninth he was not mistaken, deceived, or misled.

Such evidence has been sanctioned for time out of mind in cases involving the uttering of forged instruments, counterfeiting, obtaining money by false pretenses, receiving stolen property, setting buildings on fire with intent to defraud insurance companies, sexual crimes, violation of the excise law, gambling, and other offenses. People *v.* Molineux, 168 N. Y. 264; People *v.* Harris, 136 N. Y. 423; People *v.* Doty, 175 N. Y. 164; Rex *v.* Dossett, 2 C. & K. 307 [*ante*, No. 44]; Rex *v.* Cooper, 3 Cox Cr. 547; State *v.* Lapage, 57 N. H. 345 [*ante*, No. 46].

See, also, the interesting and instructive chapter of Prof. Wigmore on "Other Offenses, or Similar Acts, as Evidence of Knowledge, Design or Intent." 1 Wigmore on Evidence, c. 12.

The defendant relies upon a case which I regard as a direct authority against him. People *v.* Weaver, 177 N. Y. 434. The indictment in that

case contained two counts, the first for forging the name of one Davis as indorser on a promissory note made by the defendant, and the second for uttering the note so indorsed with intent to defraud. The defendant testified that she believed she had implied authority from Davis to indorse his name on notes made by herself. Evidence given by the prosecution that she had indorsed the name of Davis on another note made by herself was held competent to prove scienter; but evidence that she had forged or uttered other notes which did not purport to have been indorsed by Davis, and which had no connection with the transaction in question, was held incompetent. The evidence held competent in that case was the same in principle as the evidence involved in this, while that held incompetent was clearly so, for it simply tended to prove an independent crime, which had no connection whatever with the crime charged. As was said in People *v.* Dolan, 186 N. Y. 4, 9, the Weaver Case has not changed the rule upon the subject as laid down in the previous cases.

I think that no error was committed by receiving in evidence the eight mortgages, under the restrictions laid down by the trial court, and, as no other question requires discussion, the judgment should be affirmed.

CULLEN, C. J. (dissenting). On the trial no evidence was given in behalf of the defendant, but against his objection and exception the prosecution was allowed to prove the certification of several other mortgages purporting to be made by persons other than said Cahill to said Caroline Barry, as follows: By David Teare, dated June 15, 1892, for $3000; by John MacKay, dated August 8, 1892, for $2500; by Frederick Hoffman, dated September 7, 1892, for $5000; by William J. Driggs, dated April 21, 1893, for $6000; by Horace J. Tindall, dated June 15, 1893, for $5000; by James Gillen, dated August 5, 1893, for $5500; by Robert F. Griffen, dated December 9, 1893, for $3500; and by Peter V. Ross, dated March 27, 1894, for $2000. As to these evidence was given tending to show that the mortgagors named in them were fictitious persons and that the defendant had falsely certified to the acknowledgments thereof and had embezzled or misappropriated the money represented by them. The only question raised on this appeal is the admissibility of these last-named securities and of the testimony given concerning them.

The general rule of law is well established. Testimony which fairly tends to establish the commission by a defendant of the particular crime for which he is on trial is admissible even though such testimony also tends to prove that the defendant was guilty of 1 or 20 other crimes. But no testimony which does not tend to connect the defendant with the particular crime on trial is admissible on the theory that, because the defendant has been guilty of 1 or 20 crimes, even of the same character, it is probable that he committed the crime charged. Where knowledge is a necessary ingredient of the crime, evidence of similar acts by the defendant at or about the same time is admissible.

So also it would be competent and necessary to prove scienter in

this case. But we should not hide ourselves behind generalities. We should analyze and see the exact scienter that could in any view of the case be material. The defendant could be convicted by the jury only upon the prosecution satisfying it of one of two things, either that Cahill was a myth and that no one acknowledged the execution of the mortgage before the defendant, or that, if any one did acknowledge the instrument, it was not the person described in it, and the defendant knew it. As to the first of these no possible scienter could be necessary, for if no one appeared before the defendant to make the acknowledgment, then his certificate was not only necessarily false, but equally necessarily he knew it was false. As to the second theory, that though somebody might have acknowledged the instrument before the defendant, that person was not the person described in the mortgage, proof of scienter doubtless was necessary; that is to say, it was necessary to establish that the defendant knew that the person who appeared before him was not the same James Cahill described in the mortgage. On either of these theories other mortgages purporting to be executed by James Cahill than the one specified in the indictment would have been competent, because they would have tended to show knowledge by the defendant of the personality of Cahill and his ability to produce him or account for him unless he was a myth, or if a person did actually appear before the defendant and acknowledge the instrument, the improbability of the defendant being deceived as to the identity of the person making the acknowledgment, and the more numerous such instruments, the stronger and more convincing would be the evidence. But evidence that the defendant certified to false acknowledgments purporting to be made at other times and by other parties would not in any manner tend to establish either that the defendant did not take the acknowledgment of any one to the instrument charged in the indictment, or that if he did he knew that person was not Cahill, except on the general principle that a man who had committed one crime would very probably commit another. I do not deny the probative force of such evidence to the lay mind and possibly to all minds. If we know of a theft and that several persons have had an opportunity to commit it, if we also know that one of such persons has been a thief, we would very naturally suspect him of the crime. But our law has always been careful to exclude evidence of that character.

I have already said that we should not be misled by generalities. "Error lurks in generalities." Something has been said about the necessity of proving criminal intent. It is not necessary to establish any criminal intent in this case other than to do the act made criminal by the statute; that is to say, to knowingly certify falsely to the acknowledgment. Nor is there any force in the argument that the defendant's acts were part of a general scheme to defraud. Each offense was complete in itself. They were no more parts of a single crime than might be said of the action of a professional thief or pickpocket that it was part of a general scheme to take the money of any one from whose pockets he

could successfully extract its contents and whose appearance indicated sufficient prosperity to make the booty worth the risk of detection.

It is not necessary, however, to rest the conclusion which I have reached on principle alone. Authority sustains it. I insist we have decided the exact question in the case of People *v.* Weaver, 177 N. Y. 434, 447. In that case the defendant was indicted and convicted of having forged the name of one Martin Davis as indorser on her note. On the trial of the action she claimed that she believed that she had Davis' authority to indorse her own note in his name. Other notes negotiable by the defendant with indorsements claimed to have been forged by her were put in evidence by the prosecution. One of these notes purported to bear the indorsement of Davis; the others that of other parties. It was held: "(1) That the $5000 note, purporting to bear the indorsement of Davis, was competent evidence to prove scienter on the part of the defendant. (2) That it was error to allow the witness Davis to testify or refer to the other notes alleged to be forged but which did not purport to be indorsed by Davis. (3) That the admission in evidence of such alleged forged notes was error." For this error the conviction was reversed.

This judgment should be reversed, and a new trial ordered.

HAIGHT, HISCOCK, and CHASE, JJ., concur with VANN, J. WILLARD BARTLETT and COLLIN, JJ., concur with CULLEN, C. J.

Judgment of conviction affirmed.

SUB-TOPIC C. CONDUCT AS EVIDENCE OF CHARACTER IN OTHER CASES

49. MORRIS *v.* EAST HAVEN

SUPREME COURT OF ERRORS OF CONNECTICUT. 1874

41 *Conn.* 252

CASE, for an injury to the plaintiff's intestate, through the negligence of the defendants, by which he lost his life; brought to the Superior Court in New Haven County, and tried to the jury, on the general issue, before PARDEE, J.

On the trial the plaintiff claimed to have proved that on the evening of the 12th of November, 1871, Adam Lamb, the intestate, with his daughter, started from Montowese, in North Haven, for New Haven, riding in a business wagon, and that while they were approaching a bridge in East Haven the horse backed over the embankment on the east side of the bridge, at a place where there was no railing, and they were drowned in the Quinnipiac River.

The plaintiff, for the purpose of proving that the deceased was free from negligence, called several witnesses, and after they had stated that they had often seen him drive horses, inquired of them if he was a careful and prudent driver; to which inquiry the defendant objected on the

ground that it was irrelevant, and calling for the expression of an opinion, but the Court overruled the objection and permitted the question to be put, to which the defendants excepted. The jury having returned a verdict for the plaintiff, the defendants moved for a new trial for error in the rulings of the Court.

C. Ives and *Doolittle*, in support of the motion. *Watrous*, with whom was *Morris*, *contra*

Park, C. J. It was incumbent upon the plaintiff in this case to prove, as in all other cases of a like character, that on the occasion complained of his intestate exercised reasonable care to avoid the injury which he received. This he attempted to do by means of witnesses who had on other occasions seen the intestate drive horses, and who, upon their knowledge thus obtained, testified that he was a careful and prudent driver. The question is, whether such evidence tends legitimately to prove that the intestate drove his horse with reasonable care on the occasion complained of. The defendants objected to the admission of this evidence upon two grounds; — first, that the manner in which the intestate drove horses on other occasions had no relevancy to the question how he drove at this time. . . .

First, then, was the evidence irrelevant? All that the witnesses could say was, that on the different occasions that they had seen the intestate drive horses, he drove them carefully and prudently. Whether this comes up to the standard that the law requires, which is reasonable care under all the circumstances, we will not stop to inquire. It is obvious that there are many degrees of care, from the slightest to the greatest, which may be exercised. Care varies in different cases, and the proper degree of it is determined by the danger to be reasonably apprehended, and is affected by the character of the horse driven and by all the other circumstances. Every case has of course its peculiar circumstances, and these must be taken into consideration in determining whether or not in that particular case reasonable care was exercised. Hence, what would be reasonable care in one case might fall far short of it in another, and consequently the question whether it was exercised in one case, would throw no light upon the question whether it was exercised in another. We think it clear that, where the question is how in a particular case a man managed a restive horse in the midst of danger and difficulties, nothing could be gained by ascertaining how he had driven a gentle horse upon some country road, where no danger or difficulties existed. It might as well be proved that a party was negligent on a certain occasion, by showing that he had been negligent on other occasions whether other parties had been injured. And, furthermore, in each instance that either of the witnesses had seen the intestate driving a horse, there might be made a question whether in fact care was exercised by him, involving a long investigation, thus calling the minds of the jury from the main issue in the case to the examination of interminable collateral questions. We think the first ground of objection taken to the

evidence was well founded. . . . We think the evidence should have been rejected; and we advise a new trial.

In this opinion the other judges concurred; except PARDEE, J., who having tried the case in the Court below, did not sit.

50. FONDA *v.* ST. PAUL CITY R. CO.

SUPREME COURT OF MINNESOTA. 1898

71 *Minn.* 438; 74 *N. W.* 166

[Printed *ante*, as No. 20]

51. McQUIGGAN *v.* LADD

SUPREME COURT OF VERMONT. 1906

79 *Vt.* 90; 64 *Atl.* 503

EXCEPTIONS from Chancery Court, Orange County; GEORGE M. POWERS, Chancellor. Action by James McQuiggan against John Ladd and others. There was a verdict and judgment for defendants, and plaintiff brings exceptions. Reversed and remanded. Argued before ROWELL, C. J., and TYLER, MUNSON, WATSON, and MILES, JJ.

Harvey, Harvey & Harvey, for plaintiff. *Richard A. Hoar,* for defendants.

MILES, J. This is an action for an assault and battery against John Ladd, Daniel Ladd, and Eugene Spicer. John Ladd and Eugene Spicer pleaded the general issue. Daniel Ladd pleaded the general issue and also son assault demesne, to which last plea the plaintiff replied de injuria. The case was tried by jury and comes to this Court on exceptions to the admission of certain evidence, and to the charge of the Court upon the matter of self-defense. It was claimed on the part of the defendants, and their evidence tended to show, that what was done on the occasion complained of was done in self-defense, and that no more force was used by Daniel Ladd, the only defendant who used any actual force upon the plaintiff, than he reasonably believed was necessary under all the circumstances. The defendants further claimed, and their evidence tended to prove, that the plaintiff was under the influence of intoxicating liquor at the time of the alleged assault and battery, which Daniel then detected, and that Daniel knew at that time, by reputation and observation, that when the plaintiff was under the influence of intoxicating liquor he was a quarrelsome and dangerous man. . . . As bearing upon the reasonableness of the force used by Daniel in repelling the claimed assault of the plaintiff, the defendants claimed and gave evidence tending to prove that Daniel knew by observation and reputation at the time of the assault that the plaintiff when under the influence of intoxicating liquor,

was a quarrelsome and dangerous man, and that on the occasion in question the plaintiff was under the influence of intoxicating liquor which was then detected by Daniel, and that, in consequence thereof, and having in mind what he knew and had heard of the plaintiff's character under such circumstances, he was afraid of him. It therefore became important for the defendant to show that the plaintiff was under the influence of intoxicating liquor at the time of the alleged assault, and that when under the influence of intoxicating liquor he was a quarrelsome and dangerous man, or was reputed to be such, and that the defendant Daniel Ladd had knowledge of such facts or report at the time of the alleged assault, and believed them to be true.

The plaintiff's first exception is to the admission of the testimony of Mrs. Ladd, Brown, and McCormick, wherein they testify that they had seen the plaintiff on different occasions under the influence of intoxicating liquor at times previous to the assault in question, and that on those occasions he was cross and ugly, as stated above. The plaintiff urges that this was error, because it was an attempt to prove character by specific instances, and he cites numerous authorities outside of this State in support of his contention, and two cases from this State, some of which support his contention and many of which do not. Among those cases which do not support his claim are the two cases cited from our own State, and these cases illustrate the error into which the profession are liable to fall if distinctions are not carefully observed.

The word "character" has an objective as well as a subjective meaning, which is quite distinct. As applied to man, objective character is his actual character. Subjective character is such character as he possesses in the minds of others, and is the aggregate or abstract of other persons' opinions of him. Powers *v.* Leach, 26 Vt. 270–278. In cases of impeachment, where the question of character most frequently arises, the subjective character is the only one involved; for the law is settled that to create impeachment one must have been so untruthful as to create a reputation in the community where he resides, and hence only general reputation is admissible to establish it. But in a case like the one at bar, where the actions of a third person are to be affected by a knowledge of another's character, not only may the subjective character be involved, but the objective may be as well, for the action of one, influenced by the character of another, is affected to the same extent by a belief in the truth of general report as it is by a knowledge of the fact; because in either case he believes he knows the fact, and it is that *belief* which is important.

This principle is not new. It was sanctioned in Harrison *v.* Harrison, 43 Vt. 417–424, a case cited by the plaintiff. . . . The admissibility of evidence tending to show objective character or disposition is also sanctioned in State *v.* Meader, 47 Vt. 78–81, wherein the rule laid down in Harrison *v.* Harrison, *supra*, is approved. The defendant in that case offered to show that the person claimed to have been assaulted, was a

quarrelsome, fractious man, which was excluded, because the offer was not accompanied by the further offer to show that the defendant had knowledge of that fact at the time of the alleged assault, and this Court sustained the ruling of the Court below; but the opinion clearly indicates that, had the offer contained a statement of knowledge on the part of the defendant, the evidence would have been admissible. . . .

We are not unmindful of the fact that cases can be found outside of this State somewhat in conflict with the views above expressed; but the admissibility of such evidence is so well settled in our own jurisdiction and upon such well-grounded reasons that we do not feel inclined to depart from former holdings of this Court, and we think that the tendency of the Courts is to extend the rule governing the reception of specific instances in the proof of character, upon the idea expressed by Mr. Wigmore in volume I, §198, of his excellent work on Evidence, wherein he says: "There is no substantial reason against it."

From the foregoing conclusions, it follows that it was admissible for the defendants to show what was observed as to the character of the plaintiff, as to being cross and ugly when under the influence of intoxicating liquor at a time previous to the alleged assault. And, in order to show that, it was necessary to show that he was under the influence of intoxicating liquor on those occasions. And, as the case tends to show that the defendant Daniel knew of those traits of character at the time of the alleged assault and battery, it was not necessary that every occasion observed, which went to make up and establish the existence of those traits of character, should be brought to the *knowledge* of the defendant in all their details. It was enough that he knew that such traits of character existed, communicated to him by the witnesses who testified respecting them or coming to him from other sources. The evidence objected to was for the jury to say whether such objective character existed as the defendant's evidence tended to show. The plaintiff's first exception, therefore, was not well taken. . . .

The plaintiff's fourteenth exception is to the refusal of the Court to charge as requested and to the charge as made upon that point. Without deciding whether there was or was not error in the Court's omission to charge in the language of the request, we hold that there was error in the charge as made. . . . As the result of our decision sends the case back to the County Court for another trial, we have considered all the exceptions raised on the former trial, notwithstanding that the case could have been disposed of upon the fourteenth alone.

Judgment reversed, and cause remanded.

52. STATE *v.* GREENE

SUPREME COURT OF NORTH CAROLINA. 1910

152 *N. C.* 835; 68 *S. E.* 16

APPEAL from Superior Court, Mitchell County; COUNCILL, Judge. Woodfin Greene was convicted of murder in the second degree, and he appeals. Affirmed. Indictment for murder tried before COUNCILL, J., and a jury at November term, 1909, of the Superior Court of Mitchell County. The prisoner was convicted of murder in the second degree, and from the judgment of the Court appealed.

The evidence tended to prove that the prisoner shot and killed Ed. L. Young on September 9, 1909, about 12 o'clock in the day; that prisoner entered the house of the deceased while he was asleep, shot twice in the ceiling of the room, presumably to awaken the deceased, and then shot him four times. Death resulted in a few minutes. As prisoner walked out of the house he was asked what was the matter, and he replied that "there was a man hurt and hurt bad, and that I had better come and take care of him." The prisoner, not having offered himself as a witness, rested his defense upon the plea of insanity — transitory insanity; that this condition of irresponsibility was occasioned by a statement to the prisoner by his wife a few hours before the homicide. The prisoner was engaged in working at night at, in, or about the Cranberry mines, and on the morning of the 9th of September, about 6 o'clock, he came to his home, met the deceased at his gate, and walked with him to his home, a distance of about 300 yards; in a short time prisoner's wife came for him; they went to their house, ate breakfast, and, as was his custom, prisoner went to his bedroom to sleep. In a short time prisoner's wife came in the room, lay down on another bed, and, thinking the prisoner asleep, began to cry. The prisoner was not asleep, but upon his inquiry as to what was the matter the wife narrated this occurrence: "Fin, Ed. Young made me drunk last night and overpowered me, and threw me back on the bed, and in spite of my efforts and my telling him to leave, he accomplished his purpose." "Young said to me, 'God damn you, I have fixed you.'" That the prisoner jumped up in the floor, wringing his hands and saying, "I want my pistol, I want my pistol! My life is wrecked! My home is ruined." That she refused to give him the pistol, having hidden it; that prisoner demanded it and struck her; that she ran to her sister's, and then to her father's; that prisoner followed her demanding his pistol; that she had a difficulty with him, and threw an ax at him; that finally she told him where his pistol was, when he left her, and the next thing she heard was that he had killed deceased. There was much evidence of prisoner's excited condition, and his wild looks and his open threats to kill Young. There was evidence on the part of the State tending to prove that prisoner had been drinking that morning;

that he said he was two-thirds drunk, and that when drunk he was very rowdy. The testimony of prisoner's unusual condition came from non-expert witnesses — his kinpeople who saw him that day before the homicide. Immediately after the homicide the insanity seems to have passed away as he was apparently as rational as ever, and escaped to the woods, where he remained for a day, when he surrendered himself. There was evidence of previous threats made by prisoner against deceased; and there was also evidence of very friendly relations between them. Both men drank whisky to excess. The contest between the State and the prisoner was over the defense of insanity, and both State and prisoner offered much evidence tending to support the one theory or the other.

Chas. E. Greene and *S. J. Ervin*, for appellant. The Attorney General, *Geo. L. Jones*, and *W. C. Newland*, for the State.

MANNING, J. . . . The errors assigned by the prisoner are directed solely to the admission of incompetent, and the rejection of competent, testimony. The trial judge permitted the prisoner's wife to rehearse to the jury, in minute detail, everything she told the prisoner about the conduct of the deceased the night before. The prisoner offered to prove as a substantive and independent fact the truth of the narrative by the wife, but this was excluded by his honor.

His honor's ruling is, we think, clearly sustained by the decision of this Court in State *v.* Banner, 149 N. C. 519, 63 S. E. 84, in which this Court held:

"When the defense is a plea of insanity and not self-defense, a witness may not testify, as tending to show self-defense, that he had seen deceased armed, on a dark night, at a place where the prisoner would likely pass, some two weeks before the occurrence, though he may testify that he had told the prisoner concerning it, and what the prisoner said and did in consequence, only so far as it may affect the question of insanity, and for that purpose alone."

In People *v.* Wood, 126 N. Y. 249, 27 N. E. 362, Judge PECKHAM, in a learned and elaborate opinion, held that it was competent for a defendant to offer evidence of communication made to him (in that case the communications offered were of a similar character to those in this case), "for the purpose of showing an adequate cause for the state of mind existing subsequent to the communication." This being the sole purpose of the evidence, the truth or falsity of the communication is not material, and it is not competent to inquire into it. It is, of course, competent to challenge the *fact* of communication, but not its *truth* or falsity.

In the present case, his honor permitted the prisoner to show in minute detail the communication to him by his wife, and his conduct, appearance, utterances, and acts immediately thereafter and to the time of the homicide. This was, in our opinion, as far as it was permissible to go. There was no evidence of any disorder of the brain prior to the morning of September 9th, the day of the homicide; the evidence tended to show the prisoner to be a man possessed of an ordinarily normal mind, except

occasional outbursts when intoxicated. In a few hours after the homicide the prisoner's mind seemed to recover its balance and to resume its normal condition. It was the contention of the prisoner that the sudden "brain storm," which was so violent as to dethrone reason and make him irresponsible for his acts, was caused by his wife's communication. Of its truth or falsity he could know nothing, and could not have been influenced by such knowledge. The theory of the defense and its plea is that he believed it so strongly and so absolutely that the prisoner was made insane. If the purpose was to show the character of the deceased for violence, it was inadmissible because it did not fall within one of the exceptions to the rule settled in this State for admitting such evidence. State *v.* Banner, *supra;* State *v.* Turpin, 77 N. C. 473, 24 Am. Rep. 455; State *v.* Byrd, 121 N. C. 688, 28 S. E. 353; State *v.* McIver, 125 N. C. 646, 34 S. E. 439. In our opinion, therefore, the offered testimony of the wife that the occurrence communicated by her to the prisoner, her husband, was true as an independent and substantive fact was properly excluded. . . . Judgment affirmed.

53. NOYES *v.* BOSTON & MAINE R. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1912

213 *Mass.* —; 99 *N. E.* 457

EXCEPTIONS from Supreme Judicial Court, Worcester County.

Action by Emma L. Noyes against the Boston & Maine Railroad. Judgment for plaintiff, and defendant excepts. Exceptions overruled.

This was an action of tort brought to recover damages for the loss of a barn, and the personal property contained therein, by fire communicated by a locomotive engine of the defendant on August 12, 1908. The evidence introduced by the plaintiff on the issue of the cause of the fire included the testimony of several reputable witnesses; the following was a representative one: Miss Anna Blodgett testified that she was out on the porch and saw a train go by the Noyes place towards Worcester five or ten minutes before the fire; that she watched it for quite a way; that she saw a lot of sparks thrown by the engine and called to her sister, who was with her, "see the sparks"; that soon after she saw a bright spot and called to her father to "see the red moon"; that this bright spot turned out to be a small spot of fire on the roof of the Noyes barn; and that she had often noticed engines throw sparks high up in the air while passing the barn. This evidence was also corroborated by the witness's sister.

The defendant, for the purpose of showing other possible or probable causes for the fire, made the following offer of proof: Emma L. Noyes, the plaintiff in the case, had a son, Leroy Noyes, who was at home on the day when the fire which destroyed the Noyes barn took place, and the defendant offers to show was there at the time of the fire. And the

defendant further offers evidence tending to show that when he was a young boy he had a strong inclination to set fires, and did set several fires; that in the fall of 1908 several fires occurred within a radius of a mile from the Noyes homestead. The evidence offered in regard to these fires would tend to show that this boy, Leroy, was very near the place where the fires took place at the time when the fires were discovered. He was arrested by a constable, and admitted to the constable that he set several of these fires. The District Court of Clinton ordered an examination by two physicians, who committed him to the hospital on the ground that he had a mania for setting fires. Said admission to the constable did not in any way refer to the fire mentioned in the plaintiff's declaration.

The plaintiff objected to the admission of any such evidence, and the Court sustained the objections, to which ruling the defendant excepted.

Charles M. Thayer and *Alexander H. Bullock*, both of Worcester, for the defendant. In the absence of direct evidence it was clearly competent for the plaintiff to endeavor to show by circumstantial evidence the cause of the fire. If such evidence was competent for the plaintiff the only way it could be controlled by the defendant, in the absence of direct evidence, was by evidence tending to show that the fire may have originated in other ways, and such evidence has been repeatedly admitted.

If the foregoing principles are correct the only questions open are, 1. Whether the fact that there was on the premises, at the time of the fire, an uncontrolled fire setting machine, was one from which the jury might properly infer that the fire came from such a source. 2. Whether the evidence offered was of such a nature that even though relevant its admission would complicate to an unwarranted extent the trial of the issue.

1. On the first point the defendant maintains that from the presence of such a person the jurors might as logically draw inferences which would rebut the plaintiff's theory as from the presence of a commodity, like cotton seed, which might ignite from spontaneous combustion, and the right to show the presence of such a commodity in cases of this character has never been questioned. In the absence of direct evidence, the most that can be said about the locomotive, the cotton seed, or the insane man, is that the presence of either one may furnish a satisfactory explanation of the fire. Anything which would give the jury the true nature of the dangerous element must be relevant. It is important to show, as far as possible, the mechanism of this boy, with an established mania, in order that the jury may judge of the strength and activity of his mania, its transient or permanent qualities. And it was competent to show this by evidence of what the boy had done previously. And if the acts thus shown had a tendency to prove a mental condition not, in its nature, temporary or transient, the jury might assume, in the

absence of testimony to the contrary, that the condition was the same at the time of the fire for which damage is here claimed.

2. On the second question, the evidence offered divides itself into two parts: the first showing that a man, with a mania for setting fires, was on the premises at the time the fire was discovered; the second, showing certain acts which this man had done. The first proposition was not dependent on the second, and its proof could not have complicated the trial by diverting it into side issues. It should, therefore, have been admitted, whether the other part of the offer was admitted or excluded. It is further submitted that the evidence of the acts done was not properly excluded, if the ground for such ruling was the complication of the trial. The inclination of his boyhood must have been proved by the statement of some person who knew him at that time, and presents none of the features of evidence which would divert the trial from the main issue. The proof of the later fires could not require the attorney for the plaintiff, in order to protect the interests of his client, to investigate the circumstances of each fire; for it is clear that from the fact that a man sets several fires in a short period of time, one of two conclusions must follow, either he has a mania for setting fires or he is a criminal.

If the trial judge had the right to exercise his discretion in regard to this evidence, it was not an absolute discretion, and can and should be revised by this Court.

Webster Thayer, Geo. A. Drury, Fred A. Walker, all of Worcester, for the plaintiff.

1. Even if the defendant had offered legal evidence tending to prove that the young man had set other fires in the vicinity, the Court would have been obliged to exclude such evidence. The other occurrences were "res inter alios." The Court was not called upon to try in this case the question whether previous fires had occurred, whether they were incendiary, or whether other fires were set by Leroy or by the defendant, or by some other person. The questions are collateral and immaterial and would not aid the jury. The only effect of such evidence would be to prejudice the jury, and to compel the plaintiff to try out various other issues.

2. The Court, at least in its discretion, could rightly exclude the evidence regarding the inclination of the boy as too remote both in time and in fact.

3. An inclination to set fires when young has no tendency to prove that in later years a person did climb upon a roof to set a particular fire for which no motive is shown. Even if the son at other times set fires, that fact would have no tendency to prove that he set this fire at this time and that defendant did not set it.

4. There was no evidence to show that the fires mentioned in the offer were of incendiary origin (unless the confession of Leroy is evidence), or upon buildings, or similar in any respect to this fire, and no

claim can be made that the fires were a part of a common scheme or occasioned by any peculiar device or method. Further, the alleged admission did not in any way refer to this fire.

5. The admission of proposed evidence would have compelled the plaintiff to explain all the circumstances of the other fires. It might have created an issue regarding each fire. Not only would the whereabouts of the son at the time of the other fires be in issue, but the place, character, means, motives, circumstances, times and causes would be involved. If an inclination to set fires could be shown and could have any bearing, the limitations of that inclination would have to be shown. The evidence offered would not only have created various collateral issues to the confusion of the real issue, but would have prejudiced the jury.

Braley, J. — The plaintiff seeks under St. 1906, pt. 2, § 247, to recover damages for the destruction of a barn with its contents, alleged to have been caused by fire directly communicated by the locomotive engine of the defendant. But, if the loss is unquestioned, the parties were at issue as to the origin of the fire. The defendant could show, by relevant testimony, that it originated from other independent causes; even if the circumstantial evidence introduced by the plaintiff seems to have been clear and abundant, that the ignition of the roof, from which apparently the fire spread through the building, must have been from sparks emitted by the engine. Perley *v.* Eastern Railroad Co., 98 Mass. 414.

The defendant contends that, if its offer of proof had been admitted in evidence, the jury would have been warranted in finding the fire had been set by a son of the plaintiff, or at least sufficient doubt would have been raised as to its liability to have overcome the burden of proof. But in the absence of any direct evidence connecting him with the occurrence, the defendant endeavored to show, from incidents in his early life, that he had acquired a disposition which had ripened into a habit to set incendiary fires whenever the opportunity offered. A habit of this character is abnormal, and it may be criminal. The defendant was required to satisfy the presiding judge that the course of conduct on which it sought to predicate the commission of an affirmative wrongful act of the character claimed had become so continuous and systematic that the setting of the fire in question would follow as a reasonable and probable consequence. Shailer *v.* Bumstead, 99 Mass. 112; Thayer *v.* Thayer, 101 Mass. 111, 113, 114; Com. *v.* Abbott, 130 Mass. 472, 473; Hathaway *v.* Tinkham, 148 Mass. 85; Lane *v.* Moore, 151 Mass. 87, 90; Edwards *v.* Worcester, 172 Mass. 104; Wigmore on Evidence, §§ 92, 376. If as a young boy he exhibited a strong inclination to set fires, and while still a youth did in several instances set them, proof of these instances would not raise a reasonable presumption that he had destroyed his mother's property wantonly, even if at the time he is shown to have been living at home. It would not follow from common experience, that because on some occasions in the past he may have done a particular thing in a particular manner, that upon another and different occasion he would

act in the same way. Robinson *v.* Fitchburg & Worcester Railroad, 7 Gray 92, 95; Lewis *v.* Smith, 107 Mass. 334; Peverly *v.* Boston, 136 Mass. 366. It is because of this variability and uncertainty in the manifestations of individual conduct, even where the circumstances may be more or less uniform, that while an employee's general reputation for incompetency in the performance of work for which he has been engaged is admissible, if the employer knew or by the exercise of reasonable diligence should have known of it, single instances of carelessness are inadmissible. Cooney *v.* Commonwealth Avenue Street Railway, 196 Mass. 11, 14, and cases cited. The defendant, moreover, if it had been permitted to litigate the likelihood of his conduct by going at large into proof of alleged instances of previous fires, would have presented collateral issues which would have seriously embarrassed and prejudiced the plaintiff, and tended to confuse and mislead the jury. Emerson *v.* Lowell Gaslight Co., 3 Allen 410, 417; . . . Com. *v.* Hudson, 185 Mass. 402. The subsequent incendiary fires for which the son may have been responsible, as well as his admission of having set some of them, were occurrences having no connection with the plaintiff's cause of action. Com. *v.* Campbell, 7 Allen 541. . . .

We are therefore of opinion that the judge in his discretion properly excluded the offer of proof. Exceptions overruled.

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54. CLARKE *v.* PERIAM

HIGH COURT OF CHANCERY. 1741

2 *Atk.* 333

THIS was a bill brought by the plaintiff, to establish a bond for securing an annuity of sixty pounds per annum given her as a "praemium pudicitiae"; the defendant by a cross-bill insists the plaintiff was a lewd woman and a common prostitute, and for that reason was not entitled to have the annuity established, and therefore prays that the security may be delivered up. . . .

The counsel for the defendant offered evidence to prove the plaintiff guilty of acts of lewdness with a particular person, one Mr. Abingdon, before she was acquainted with Periam. An objection was taken by the plaintiff's counsel, that the charge in the cross-bill is only that Mrs. Clarke was a lewd woman of an infamous character, and that the bill does not require any answer to this, and therefore the defendant in the evidence ought to confine himself to a general character, and not to particular instances, according to the rule of law upon examining to characters; for the charge here is so loose and general, that it was impossible for the plaintiff to know at what time or place, or with what person, they intended to charge her with acts of lewdness. And that, in order to let them into this evidence, they ought to have charged that she was kept by the person they pretend to have had criminal conver-

sation with her. The allegation is general, that she is a lewd woman, but the evidence goes to particular instances of prostituting her chastity. Mr. *Murray*, on the same side, argued, that they ought to be confined to evidence as general as the allegation; in every case at law, where the character of a person is called in question, there the examination must be general; and goes on good grounds, because they will not suffer witnesses to come upon surprise, with particular instances, where the party is not prepared to answer. . . .

Mr. *Attorney General* insisted, in support of the propriety of this evidence: . . . It has been said no evidence must be read in this court, unless the nature of the evidence itself is put into issue. Where lewdness is charged upon the woman, is it necessary to set forth at what particular tavern, or with what particular gentleman, she has been guilty of lewdness? Besides, this would be attended with ill consequences, because it would lay open the case too much, and put the adversary party upon their guard, and give them an opportunity of squaring their own evidence, by the proofs of the other side. In cases of insanity, the court never expect particular acts to be charged, and yet the evidence goes to particular instances. . . .

Lord Chancellor HARDWICKE. — The original bill is brought to have satisfaction out of the personal estate of the late Mr. Periam, for the bond. The cross-bill is brought by the widow of Mr. Periam, and is to be relieved against this bond, and to have it cancelled; and the equity is founded upon this, that it was given by Mr. Periam to Mrs. Clarke, "ex turpi causa," and that she was a lewd woman of an infamous character, and therefore it is insisted the Court should relieve against it. . . . The question, upon which this cause stood over, was whether the deposition of one Rogers, taken in behalf of the defendant in the original cause, ought to be read; it is an attempt to prove that Mrs. Clarke, before the time of Periam's giving the bond to her, was kept by a particular person, one Mr. Abingdon, and had criminal conversation with him. The objection is, that the particular facts to which Rogers is examined should have been put in issue specially, and that they are not sufficiently so in this cause. As to the nature of the suits, the original bill is brought to have satisfaction out of the personal estate of the late Mr. Periam, for the bond. The cross-bill is brought by the widow of Mr. Periam, and is to be relieved against this bond, and to have it cancelled; and the equity is founded upon this, that it was given by Mr. Periam to Mrs. Clarke, "ex turpi causa," and that she was a lewd woman of an infamous character, and therefore it is insisted the Court should relieve against it. The counsel for the plaintiff in the original bill insist, that under this allegation in the cross-bill, the plaintiff there is not entitled to examine to anything but her character in general, because it is impossible for Mrs. Clarke to be prepared to give an answer to the particular facts charged; for though everybody is supposed to be ready to support a general character, yet not a particular fact.

But I am of opinion the present case differs from all those cases relating to examinations to general characters, both as to the reason of the thing, and as to the authorities. . . .

From all the authorities may be gathered the uniform sense in those determinations, that it was sufficient to put in issue a general charge of lewdness, and that under this you may give particular evidence; and I think I have heard it laid down so by Sir Joseph Jekyll. . . .

Secondly, as to the reason of the thing. The cases urged by the plaintiff's counsel in the original cause relating to criminal prosecutions, must be allowed to be law; for in examining to characters you can only enter into general facts. . . . In criminal prosecutions it comes in only collaterally and incidentally and is not the particular thing to be tried; and when that is the case, they are not supposed to be prepared with evidence. But compare this with cases where the character is the particular issue to be tried; suppose in the case of an indictment for keeping a common bawdy-house, without charging any particular fact; though the charge is general, yet at the trial you may give in evidence particular facts and the particular time of doing them; the same rule as to keeping a common gaming-house. This is the practice in all cases where the general behavior or quality or circumstance of the mind is in issue; as for instance, in "non compos mentis," it is the experience of every day, that you give particular acts of madness in evidence, and not general only, that he is insane; so where you charge that a man is addicted to drinking, and liable to be imposed upon, you are not confined in general to his being a drunkard, but particular instances are allowed to be given. . . . Wherever the general life or conversation is put in issue, it is notice to the person who is charged that she should be prepared to take off the weight of that evidence; but where it comes in collaterally you shall be confined to general evidence. This seems to me to be the distinction, and the grounds of it; and if I was of a different opinion, I should overturn the constant course of this Court and make the greatest confusion. . . .

The next day, by the consent of the parties in both causes, Lord HARDWICKE ordered that a perpetual injunction be awarded to stay the proceedings at law of the plaintiff in the original cause on the bond in question.

55. MILLER *v.* CURTIS

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1893

158 *Mass.* 127; 32 *N. E.* 1039

TORT, for an assault and battery on three separate occasions, the first in March, 1889, at Worcester, and the other two in May, 1889, at Spencer. Answer, a general denial. Trial in the Superior Court, before CORCORAN, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff's evidence showed that an assault and battery was

made by the defendant upon the plaintiff, who is a married woman, and attempts by him to have sexual intercourse with her without her consent, at Worcester and at Spencer. The plaintiff and her husband were both witnesses, and, after they had testified, the following evidence was admitted, against the objection of the plaintiff, all of which related to transactions unconnected with and over twenty years before the alleged assaults. . . . Charles Tenney of Westborough, testified that he was eighty years of age, and very deaf; that he worked for the Millers in Westborough twenty-five years ago; that on one occasion he was called down cellar by the plaintiff to do some work, and soon after they got down she rushed up again and complained to her husband that she had been assaulted; and that he was obliged to leave his place without receiving his wages. Patrick Gately of Spencer, testified that he worked for the Millers in Spencer sixteen years ago. He related a conversation with the plaintiff, the details of which were unfit for publication; and which was to the effect that the plaintiff told him that, when they lived in Westborough, her husband got $18 out of a man who assaulted her, and she was so mad because he did not get more that she threw the money in the fire. Charles M. Fay of Westborough, testified that, in 1867, he worked for one Winslow in Westborough, and the Millers lived near them; that the plaintiff at one time told him that she was going to sue Winslow for insulting her; and that the witness told that to Winslow. . . .

The plaintiff and her husband had both been cross-examined regarding each of the incidents testified to by these witnesses, and had denied them wholly. The judge, in admitting the evidence, instructed the jury that it was to be considered only on the question of damages. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

The case was argued at the bar in October, 1892, and afterwards was submitted on the briefs to all the judges.

W. A. Gile (*C. S. Forbes* with him), for the plaintiff. *W. S. B. Hopkins* (*F. B. Smith* with him), for the defendant.

Knowlton, J. . . . The defendant was allowed to introduce evidence of several transactions and conversations with the plaintiff, all occurring more than twenty years ago, which tended to show that she had repeatedly made false charges of indecent assaults upon her, with a view to extort money from innocent men. The defendant denies the charge made against him in the suit, and contends that the plaintiff is trying unjustly to obtain money from him. In any case, where the question is whether the defendant has committed a crime, it would naturally affect the opinion of jurors to know that he had often committed similar crimes; but evidence of such facts is never admitted to prove a defendant's guilt. That a person has committed one crime has no direct tendency to show that he committed another similar crime which had no connection with the first; and a person charged with one offense cannot be expected to come to Court prepared to meet a charge of another. If the doing of one wrongful act should be deemed evidence to prove the doing of another

of a similar character which has no connection with the first, issues would be multiplied indefinitely without previous notice to the defendant, and greatly to the distraction of the jury. It is too clear for argument, under the authorities, that most of the evidence excepted to was not competent on the question of liability, and the defendant does not seriously contend that it was.

It is argued, however, that it was competent on the question of damages, and the jury were instructed to consider it only on that question. There is much authority for the proposition, that in a suit of this kind, when a plaintiff seeks damages for an injury to her feelings, growing out of the indecency of the defendant's conduct, her character in regard to chastity is in issue, and her damages depend somewhat on the question whether she is a virtuous woman, who would be greatly shocked at the peculiar nature of the assault, or a woman who is accustomed to yield herself to illicit intercourse. If it were permissible to show specific acts of criminal intercourse on the part of the plaintiff to affect the damages to be awarded in actions for an indecent assault, it would not follow that the evidence excepted to in the present case should have been admitted. Most, if not all, of this testimony tended to prove, not that the plaintiff had had criminal intercourse with other men, but that she had falsely pretended that others had indecently assaulted her, with a view to extort money from them. The rule contended for certainly should not be extended so far as to admit testimony of common crimes and ordinary wrongful acts, merely to show general depravity.

But we are inclined to hold the evidence incompetent on broader grounds. It is a general rule, which has been adhered to with great strictness in this Commonwealth, that when character is in issue, it may be shown only by evidence of general reputation, and not by proof of specific acts. . . . The principal reason for this rule is that a multiplicity of issues would be raised if special acts, covering perhaps a lifetime, could be shown. It might be necessary to go into the circumstances attending each act before it could be determined what its nature was and what effect should be given it. It would be impossible for the opposing party to come prepared to meet evidence upon matters in regard to which he had no notice, and great injustice might be done by bearing biased and false testimony to which no answer could be made. . . .

Exceptions sustained.

56. CUNNINGHAM *v.* AUSTIN & NORTHWESTERN RAILWAY CO.

Supreme Court of Texas. 1895

88 *Tex.* 534; 31 *S. W.* 629

Certified question from Court of Civil Appeals for Third District, in an appeal from Travis County.

Appellant sought to recover damages for the death of her husband, James Cunningham, a conductor on one of appellee's trains, caused by a wreck occasioned by the breaking of a car-wheel running from Llano to Austin on the 22nd day of December, 1892. The petition charged the negligence to consist in the fact that the wheel had a crack or flaw in it, which was known to appellee, or could have been known by the use of ordinary care; and that appellee's car inspector (Rownie) at Llano, whose duty it was to carefully inspect wheels before the same left Llano, was incompetent to perform the duties required of him, and that on the day of Cunningham's death he did not inspect said wheel, as was his duty.

There was testimony tending to show that there was an old crack in the wheel, and that it could have been discovered by an inspection made by a competent inspector. The witness Rownie, for defendant, testified, that he inspected the wheel on the morning of the accident, at Llano, he being the only inspector on the road outside of Austin, and during the time inquired about hereafter, and it being his duty to inspect the cars at Llano on said dates, and that at the date of such inspection he could discover nothing wrong with the wheel. On cross-examination the witness Rownie testified, that the reason he said he inspected it on December 22nd was because he understood the accident was on that date, and because he inspected that car every day it was in Llano, and that he did not think there was any other reason for his remembering it, only that he knew he inspected it every day; that he knew it was 7 o'clock that he looked over the coach on that morning, because that was the hour he always went to work. Counsel for appellant thereupon asked the witness whether he inspected the cars at Llano on the 23rd and 27th days of December, 1892; January 6, 1893; February 21, 1893; March 9, 1893, and April 4, 1893, all subsequent to the date of the accident; counsel stating, that the object of the question was to prove by Rownie that on said dates he had not inspected the wheels of appellee's trains at Llano, and if he stated that he had inspected them on any one or all of the above dates, then to offer witnesses who would testify that he did not inspect them on either of said dates. Counsel for appellee objected to this testimony as being incompetent, irrelevant, and immaterial, and not tending to prove any issue in the case, and that, since appellant was seeking to recover for an injury inflicted on the 22nd of December, 1892, anything that Rownie may or may not have done after that date was wholly irrelevant and immaterial, and that on such matters the witness could not be impeached.

The Court sustained the objections, and refused to allow the questions.

J. L. Peeler, for appellant. Where a person is charged with negligently omitting to perform a certain duty, it is competent to show that he omitted such duty in the same way afterwards, as tending to show that he omitted the duty at the time in question. . . .

Fisher & Townes, for appellee. The question may be thus stated: Is it permissible, on the cross-examination of a servant shown to be

competent and efficient, to make inquiry as to his acts or omissions, transpiring subsequently to the act or omission complained of, where they are similar to, but in nowise connected with, the act or omission, or one of the acts or omissions, relied upon as constituting the negligence contributing to or causing the injury complained of? . . . Similarity of a fact in issue to a disconnected fact sought to be proven will not render admissible evidence of such disconnected fact. The relation between the two must be something in addition to mere similarity. It must amount to causal connection. There is no such connection between the fact in issue in this case and the fact sought to be proven in the testimony excluded. While it may be true, in some sense, that proof of neglect of duty by the inspector on dates subsequent to the 22nd of December, 1892, might have a tendency to prove his neglect of duty on that day, the law does not recognize this as a reason for opening up the interminable issues that would grow out of the adoption of a rule which would permit such testimony. The relation between the facts is merely one of similarity; that is, if he neglected the duty on subsequent dates, similar neglect of duty might be inferred on that date. This is the extent to which the argument in favor of the admission of the testimony could go, and this we see from the authorities is not sufficient. There is no causal connection between the fact in issue and the fact sought to be established by the offered proof. . . .

DENMAN, J. . . . If there was no issue in this case as to Rownie's competency, we are of the opinion that there would be no causal connection between the negligence of Rownie on days subsequent to the injury and the death of Cunningham. Such subsequent neglect of duty to inspect cars might raise a moral probability that he failed to inspect the car on the morning of the accident, but such probability alone would not connect such negligence with the chain of circumstances resulting in the death. In order to prevent confusion and surprise in the trial of causes of this character, Courts have, as a general rule, confined the evidence to circumstances tending to establish facts constituting links in the chain of circumstances having a causal connection with the injury.

The pleadings and evidence, however, raise the issue as to Rownie's competency as a car inspector which involves, first, his skill; and, second, his attentiveness to duty. If he was lacking in either of these qualities, he could not be said to be competent to perform the important duties required of him. It is a matter of common knowledge that some persons are by nature inattentive or thoughtless, and, as a result thereof, frequently neglect the performance of important duties, without any intention so to do. This mental quality can only be evidenced by the outward acts of the person, and, where its existence or non-existence is in issue, evidence of such acts is admissible. If Rownie was an inattentive or thoughtless person, such mental quality was a relevant fact upon the issue as to whether he probably inspected the cars on the particular morning of the accident. . . . Thus it seems that frequent failures to

perform this duty at different times would be competent evidence tending to prove this mental condition, and we see no reason why such omissions subsequent to the time of the accident would be less competent than similar omissions prior to the time of the accident. The question here is the existence or non-existence of a mental condition or quality of the servant; inattentiveness or thoughtlessness, rendering him incompetent, such incompetency being direct evidence on the main issue in the case. We see no reason why specific acts cannot be given in evidence upon such issue, just as they could upon the issue of testamentary or contractual capacity.

. . . In the case of Frazier *v.* Railway, 38 Pa. St. 104, one of the issues being negligence of the company in employing a careless conductor, "the plaintiff offered to prove by the conductor that he had had several collisions on the road before, for which he was fined by the company, and that the agents, etc., of the company knew this; that the former collisions were caused by his carelessness; that they were known to the company, and were so treated by them." Defendants objected, on the ground that previous acts of negligence are not matters for the jury as to general character, and the Court below having admitted the evidence over such objection, the Supreme Court held it error. . . . We are not disposed to follow this case. . . . The question here is the existence or non-existence of a mental condition or quality of the servant, inattentiveness or thoughtlessness, rendering him incompetent, such incompetency being direct evidence on the main issue in the case. We see no reason why specific acts cannot be given in evidence upon such issue, just as they could upon the issue of testamentary or contractual capacity. Brown *v.* Mitchell, 87 Texas, 140. We are aware of the fact that the Pennsylvania case above cited was referred to, without approval or disapproval, in the case of Railway *v.* Scott, 68 Texas, 694, and that such reference was treated by Judge Marr as a strong intimation of approval thereof, in Railway *v.* Rowland, 82 Texas, 171. . . .

It results, from the principles expressed above, that we must answer the question propounded in the affirmative. Exception sustained.

57. FONDA *v.* ST. PAUL CITY R. CO.

Supreme Court of Minnesota. 1898

71 *Minn.* 438; 74 *N. W.* 166

[Printed *ante*, as No. 20]

58. PITTSBURGH RAILWAYS COMPANY *v.* THOMAS

UNITED STATES CIRCUIT COURT OF APPEALS. 1909

174 *Fed.* 591

IN Error to the Circuit Court of the United States for the Western District of Pennsylvania. Action by David T. Thomas against the Pittsburgh Railways Company. From a judgment for plaintiff, defendant brings error. Reversed.

James C. Gray, for plaintiff in error. *Rody P. Marshall*, for defendant in error. Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

GRAY, Circuit Judge. The defendant in error, David F. Thomas (hereinafter called the plaintiff), brought suit against the Pittsburgh Railway Company, the plaintiff in error (hereinafter called the defendant), to recover damages for injuries to the said plaintiff, occasioned by the alleged negligence of the defendant. There was a verdict, and judgment thereon, in favor of the plaintiff. From the record brought up by the writ of error sued out by the defendant, it appears that the defendant was a corporation of the state of Pennsylvania, operating certain electric street railways in what was formerly called the city of Allegheny, but what is now a part of the city of Pittsburgh. On the 27th day of November, 1907, the plaintiff was a conductor on a motor car on one of the lines in said city. When he arrived at the end of said line, it became his duty to attach a trailer car, which was standing there, to what was then the front of his car but which would be the rear of his car on the return trip to the city. The motorman, one Conway, having stopped the car a distance of from two and a half to five feet from the trailer car, the plaintiff went between the two cars for the purpose of coupling them, and, standing somewhat to one side and holding the drawhead and pin, one in each hand, made a signal to the motorman to move his car up in order to make the coupling. The plaintiff says that after the signal was given, the car came so quickly that he remembered nothing, except that it caught him and crushed him between it and the trailer.

The negligence charged by the plaintiff's statement of claim is the primary negligence of the defendant, as master, in employing Conway, the motorman, who, it was alleged, was incompetent, to the knowledge of the defendant, or in retaining him in its employ after it had, or should have had, knowledge of his incompetence.

The third specification of error raises the interesting question, whether prior specific acts of alleged negligence on the part of the motorman can be submitted to the jury, in order to establish his incompetency or unfitness. This question is a difficult one, and the decisions of the courts have not been uniform in regard to it. On the one hand, it is held that only evidence of general reputation of incompetency or unfitness, and not knowledge of specific acts of negligence, can be admitted

to make a master amenable to the charge of negligence in selecting a servant. "Character," says the Supreme Court of Pennsylvania, in Frazier *v.* P. R. R., 38 Pa. 104, 80 Am. Dec. 467, "grows out of special acts, but is not proved by them. Indeed special acts do very often indicate frailties or vices that are altogether contrary to the character actually established. . . . Besides this, ordinary care implies occasional acts of carelessness, for all men are fallible in this respect, and the law demands only the ordinary." This is true, and the Courts constantly make the discrimination, where the question is as to the veracity of a party or witness, between character or reputation and specific acts of falsehood. But it would be unphilosophical and do violence to the common sense and experience of mankind, to say that there may not be repeated specific acts showing incompetence or unfitness in a particular employment, or a continued line of conduct amounting to a habit of negligence in the performance of a given duty, as would render one, with knowledge of such specific acts or such a habit on the part of the person he was about to employ, negligent of his duty to those who should thereafter come within the danger of such incompetence or negligence. But we have no hesitation, where the question is as to negligence of the master in retaining a servant in his employ after he knows, or has reason to know, that he is incompetent or unfit for the service for which he is employed, in holding that previous specific acts of the servant, tending to show incompetence or unfitness on his part, which were or should have been known by the master, are admissible in proof of the master's negligence. The practical application of this proposition requires to be guarded by such instructions from the Court as shall make clear the essential difference between mere negligence and incompetency. A man perfectly competent in all respects for the duty he undertakes to perform, may occasionally be negligent, so that one or two specific acts of negligence do not prove incompetence. It must be either shown that the so-called negligent acts were the result of incompetence, or were of such a character and so constantly committed as to constitute a habit of negligence, rendering the servant unfit to be retained in his position, for unfitness, as well as incompetency, is a disqualification for employment.

Keeping in mind these distinctions, we come to consider the specifications of error pertinent thereto. The two specific accidents in which the motorman, Conway, was concerned, and which were adduced to show incompetence on his part, taken by themselves, hardly present sufficient ground for the inference sought to be drawn from them. Their character is principally proved by the motorman himself, and his explanation of the circumstances under which they occurred would seem to exonerate him from responsibility or blame. In one case, he testifies that he ran into the rear of a car which had suddenly stopped by reason of bumping into another car ahead of it. As it was in the early hours of a November morning and very foggy, he testifies that he could only see ahead as far as his headlight shone, about fifteen yards, and that the fog had made the

rails so slippery that, by reason thereof, he was unable to stop his own car in time to avoid the collision. In the other case, which happened in the previous September, he testified as follows:

"The Rebecca Street car was going ahead of me, up Preble avenue, and there is a bridge there for the people going up California avenue, and just as his car was passing, an old man got off the bridge and signaled for the motorman ahead of me to stop the car. It was not a regular stop, and I was coming after him about fifty yards, and before I could stop my car, I slightly touched him."

This is practically the only evidence as to the happening of the two accidents, evidence of which was introduced, not to show negligence, for that would not have been pertinent, but to show incompetence. Standing alone, they do not have probative force in that respect, and should have been withdrawn from the consideration of the jury.

There was, however, other evidence undoubtedly pertinent, as tending to show incompetence. This was the testimony of several of the conductors and motormen who daily congregated, to the number of thirty or forty, in the car barn to the effect that the reputation of Conway, for competence as a motorman, was bad. Undoubtedly, great weight was added to this evidence of reputation by the admission of the testimony in regard to the previous accidents to which reference has been made, and the Court, with entire correctness and fairness, submitted to the jury the general questions as to reputation and as to the facts surrounding the accidents.

But our attention has been called to certain language used by the learned judge of the Court below, as set forth in the last four assignments of error. . . .

The use of this language was evidently the result of inadvertence on the part of the trial judge, but this inadvertence, in the course of the delivery of an oral charge, could hardly fail to confuse in the minds of the jury the distinction that exists between incompetence and the mere negligence of one who is competent.

For reasons stated, the judgment below is reversed, and a venire de novo ordered.

Sub-topic D. Conduct as Evidence of Knowledge, Intent, Plan, Habit, etc., in Civil Cases

59. DELPHI *v.* LOWERY

Supreme Court of Indiana, 1881

74 *Ind.* 520

From the Carroll Circuit Court.

C. R. Pollard, L. E. McReynolds, J. R. Coffroth and *C. B. Stuart,* for appellant. *J. Applegate* and *N. O. Ross,* for appellee.

Elliott, J. — The questions, which the record of this case presents, arise upon the ruling denying appellant's motion for a new trial. William A. Lowery, the appellee's intestate, lost his life by drowning in the Wabash and Erie canal, at a point within, or near, the corporate limits of the city of Delphi. There was evidence tending to prove that the intestate's death was attributable to the negligence of the appellant in failing to place barricades about the dangerous place, or to guard it by signals or warnings of danger. There was also evidence tending to show that it was the duty of the city to properly protect passengers from danger, inasmuch as one of the public streets of the city either ran up to and across the dangerous place or terminated in very close and direct proximity to that point. . . . Evidence was given by the appellee, that other persons had received injuries at the place where the deceased was drowned, at times anterior to his death. This the appellant contends, with vigor and ability, was erroneous.

There is some conflict in the authorities. In Collins *v.* The Inhabitants of Dorchester, 6 Cush. 396 [*post*, No. 65] such evidence was declared incompetent. It was said to be "testimony concerning collateral facts, which furnished no legal presumption as to the principal facts, which furnished no legal presumption as to the principal facts in dispute, and which the defendants were not bound to be prepared to meet." . . . In Darling *v.* Westmoreland, 52 N. H. 401 [*post*, No. 66] the doctrine of Collins *v.* Dorchester is vigorously assailed in an unusually able and elaborate opinion, and the opposite doctrine declared to be correct, both upon reason and authority. In the recent case of Moore *v.* The City of Burlington, 49 Iowa 136, the Court adopted in effect, although not expressly, the rule declared in the New Hampshire case. The Supreme Court of Illinois declared, in the case of the City of Chicago *v.* Powers, 42 Ill. 169, that such evidence was competent. It was said in that case:

"It is insisted that the Court erred in admitting evidence that another person had fallen through the same bridge. If this evidence was admissible for any purpose, then it was not error. The action was based upon the negligence of the city in failing to keep the bridge properly lighted. If another person had met with a similar fate, at the same place, and from a like cause, it would tend to show a knowledge on the part of the city, that there was inattention on the part of their agents having charge of the bridge, and that they had failed to provide further means for the protection of persons crossing on the bridge. As it tended to prove this fact, it was admissible; and, if appellants had desired to guard against its improper application by the jury, they should have asked an instruction limiting it to its legitimate purpose."

In Kent *v.* The Town of Lincoln, 32 Vt. 591, it was held competent to prove that other persons than the complainant had, at previous times, been injured by the same defect in a highway. A similar ruling was made in the case of Quinlan *v.* The City of Utica, 11 Hun 217. This case was affirmed without comment by the Court of Appeals, 74 N. Y. 603. . . . This Court has adopted and enforced this doctrine. In the

case of The Pittsburgh, etc., R. W. Co. *v.* Ruby, 38 Ind. 294, this question was exhaustively discussed, and the point expressly ruled. It was there held that evidence of specific facts was competent for the purpose of charging the corporation with notice.

We are unable to perceive any difference in principle between the case in hand and the class of cases of which those last cited are types. If specific acts are proper for the purpose of showing notice to the owners of machinery or the employers of servants, it must be competent for the purpose of showing notice to a municipal corporation, that there is a dangerous place within or very near the limits of the highway. The cases directly ruling the point here under immediate mention outweigh the cases in Massachusetts, for the latter are all built upon a single and not very carefully considered case. . . . It also seems to us that the doctrine of Collins *v.* Dorchester cannot be harmonized with Crosby *v.* Boston, 118 Mass. 71, but we deem it unnecessary to prolong this opinion by a discussion of the conflict between these two cases. New trial denied.

60. MORROW *v.* ST. PAUL CITY R. CO.

SUPREME COURT OF MINNESOTA. 1898

71 *Minn.* 326; 73 *N. W.* 973

APPEAL by plaintiff as administratrix of the estate of George Morrow, deceased, from an order of the district court for Ramsey County, BUNN, J., denying her motion for a new trial after a verdict for defendant by direction of the Court. Reversed.

C. D. & Thomas D. O'Brien, for appellant. *Munn & Thygeson*, for respondent.

START, C. J. The plaintiff's intestate, George Morrow, was injured by a collision between an electric and cable car of the defendant on March 22, 1895, and died two days thereafter as the result of his injuries. This action was brought to recover the damages which the widow and next of kin sustained by his death. . . . At and prior to the time Morrow was injured the defendant operated an electric railway, on which Morrow was a conductor, from Merriam Park east to Milton street in the city of St. Paul, where it connected with defendant's cable railway, which ran thence east to Broadway street. . . . At the time of the accident the electric car was being switched from the south to the north track, and Morrow was standing on the ground in the act of transferring the trolley from one wire to the other, in the discharge of his duty, when the cable train, upon which Seth Colbeth was the gripman, started forward, and collided with the electric car, and Morrow was caught between the bumpers, and so injured as to cause his death. There seems to be no controversy in this case that Morrow was not, but that Colbeth was, guilty of negligence, in the premises. The complaint charges that the

cable was defective, and that the gripman operating the cable train was, to the knowledge of the defendant, incompetent. If the evidence upon either of these claims was such as to take the case to the jury, the trial Court erred in directing a verdict and in denying the motion for a new trial. . . . The trial Court was of the opinion "that there was not sufficient evidence to go to the jury on the question of the knowledge of defendant of the incompetency of the gripman, Colbeth, at the time of the accident, if he was incompetent, as the nature of the accident would indicate." We are of the opinion that there was. The burden of showing the incompetency of the gripman was clearly upon the plaintiff, and we shall assume, for the purposes of this appeal, that the burden of showing notice to the defendant of such incompetency was also on the plaintiff, although the evidence tends to show that the gripman was incompetent not only at the time of the accident, but also at the time he was employed. . . . The evidence as to his incompetency was clearly such as to require the submission of this issue to the jury. We shall not refer particularly to the evidence on this point, but in a general way only, in connection with the evidence on the question of notice to the defendant. Whether the defendant had notice of the incompetency of the gripman was a matter peculiarly within its knowledge; and, further, if such incompetency existed at the time he was employed by the defendant, such fact would be an important item of evidence on the question of notice. These suggestions must be kept in mind in considering the evidence.

The gripman, Colbeth, was, prior to his employment by the defendant, a farmer, unused to machinery, and was given instructions and examined by the defendant's foreman, George J. Burns, as to the duties of a gripman. It was the duty of Burns so to instruct and examine applicants for employment, and to report as to their qualifications to the superintendent; and if, after their employment, he had reason to change his opinion, so to report to the superintendent. On August 21, 1894, he reported Colbeth competent as a gripman, rating him 85 per cent., and he was employed, and placed on the extra list as an extra man. Four days after this an accident occurred, whereby the cable was cut by Colbeth's forgetting to open his grip when he came to the cut-off at the power house. This accident was reported to the superintendent by Burns, who testified as follows:

"Now, I notice that in this slip or report of yours to Mr. Smith with regard to Colbeth, you turned him in as, 'Gripman, O.K.' *A.* — Yes, sir. *Q.* — '——— the bearer is O.K?' *A.* — Yes, sir. *Q.* — Did you ever change your opinion upon that point? *A.* — Well, I might have changed my opinion after he got to running as a regular man, — while he was running as an extra man, — and still I might change my opinion after he got to be a regular man. *Q.* — Did you change your opinion? *A.* — I did, after the report was made out, so far as his running on the cable was concerned, at the time of that accident; yes, sir. *Q.* — Did you notify Mr. Smith of your change of opinion? *A.* — Well, I made

a written report of that, — that case that occurred at that time. *Q.* — You notified Mr. Smith? *A.* — Yes, sir. *Q.* — Mr. Smith told you that you would give him another chance, anyway, didn't he? *A.* — Well, I think that is customary. *Q.* — Well, didn't Mr. Smith say that 'we'll give him another chance?' *A.* — Well, I wouldn't swear he did. . . .

On his re-cross and re-direct examination he further testified thus:

"*Q.* — You discovered the fact that after he had been running [running after this accident] he got to be a capable and competent man, — after that? *A.* — He was a good man on the extension. No question about that. *Q.* — I mean, was he a good man on the cable also? *A.* — I never had any fault to find with him when he was running any trips afterwards. *Q.* — He never had any other accidents with the cable than this one, did he? *A.* — No, sir; he did not. *Q.* — You say you found him a good man on the extension? *A.* — He was a good man. *Q.* — That is on the electric cars? *A.* — Yes, sir. *Q.* — Within a few days after he started to perform the duties of gripman, he cut the rope? *A.* — Yes, sir. *Q.* — Can that be done except by either negligence or incompetency? *A.* — Oh, yes, we have got good men that do it. Old men do it, too. *Q.* — How did this man do it? *A.* — He forgot to open his grip. *Q.* — Forgot to open his grip when he came to the cut-off? *A.* — Yes, sir; that is the way it happened."

Colbeth was at no time a regular gripman, but was employed most of the time as a motorman on the extension, or electric line, and was ordered to take extra cable trains, as gripman, as occasion might require. The evidence tends to show that he made in all about fifty trips on the cable trains from the commencement of his service to the date of Morrow's injury. It also tends to show that he was nervous, and liable to lose his presence of mind in an emergency; and, further, there was evidence tending to show that his general reputation was that he was incompetent. The evidence discloses other minor facts and circumstances which, standing alone, would be of little probative force on this question of notice, but, in connection with the rest of the testimony, they are entitled to consideration.

We are of the opinion that the evidence fairly shifted the burden as to defendant's notice of the incompetency of the gripman to it. It is true that a single act of negligence on the part of a servant who has previously shown himself competent and careful is not sufficient per se to charge the master with liability for retaining him in his service. But such is not this case, for the evidence tends to show that this gripman never was competent, and that, after the first accident, the defendant's foreman, in the line of his duty, so reported in effect to its superintendent. It was upon the report of this foreman that this gripman was employed, and shortly thereafter he again reported that he had changed his mind as to the gripman's competency. Surely, it was a question for the jury, if they found such to be the facts, to determine whether the defendant acted with reasonable care and caution in retaining Colbeth in its

employment as a gripman, in view of the fact that upon the competency and fidelity of the gripman human lives depend.

Order reversed, and a new trial granted.

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61. SPENCELEY *v.* DE WILLOTT

KING'S BENCH. 1806

7 *East* 108

AT the trial of this action for usury before Lord ELLENBOROUGH C. J., at the sittings after last term at Westminster wherein the usury was alleged to have been committed by the defendant in a contract made by him with the French Marquis de Chambonas, the plaintiff's case was proved by the Marquis, who on his examination in chief swore, in substance, that the defendant had advanced to him the sums of money mentioned in the declaration, at the rate of about 10 per cent. per month, and not by way of partnership; and there was no question of the usury if the Marquis were believed. But the defendant's counsel, intending to discredit the witness, on cross-examination proposed to ask him what contract he had made with a Mr. Schullenburg, and with several other third persons from whom he had also taken up money, on the same and on other days on which the contract in question was made; and this, for the purpose of drawing from the witness the confession that he had taken up sums of money from those third persons on terms of confidence that he was to employ the money so raised according to his own discretion, (which he had suggested to them he was enabled to do to great advantage), and to share with them the profits whatever they might be; the defendant's counsel intending, if the witness answered in the affirmative, to draw from thence a conclusion that he had made the same contract with the defendant (which was suggested to be the fact) with whom as with those third persons he was living at the time in habits of frequent communication and familiarity. . . . Lord ELLENBOROUGH, however, refused to suffer the question to be put to the witness on his cross-examination, conceiving it to be entirely irrelevant to the issue in the cause. . . .

The plaintiff having obtained a verdict for £25,200, *Erskine* now moved for a new trial, first, on the ground of the rejection of the evidence proposed to be obtained upon the cross-examination of the witness. . . .

The COURT were all decidedly of opinion that it was not competent to counsel on cross-examination to question the witness concerning a fact wholly irrelevant to the matter in issue, if answered affirmatively, for the purpose of discrediting him if he answered in the negative by calling other witnesses to disprove what he said. That in this case, whatever contracts the witness might have entered into with other persons for other loans, they could not be evidence of the contract made

with the defendant, unless the witness had first said that he had made the same contract with the defendant as he had made with those persons which he had not said. . . .

And the Court desired to have it understood, that they rejected the motion for a new trial on the first ground, and granted a rule nisi on the second ground alone, *i.e.*, upon the affidavit of the publication and distribution of the plaintiff's statement of his case at the trial.

62. HOWE *v.* THAYER

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1835

17 *Pick.* 91

ASSUMPSIT against Thayer & Fellows to recover the value of a quantity of provisions furnished to the Mount Pleasant Institution in Amherst, between November, 1831, and April 7, 1832. Fellows was defaulted. Thayer pleaded to the action.

At the trial, before PUTNAM, J., the plaintiff proved that there had existed a partnership between the defendants and one Colton, as proprietors and conductors of the institution, commencing in 1827; that his account was kept with them under the name of the Mount Pleasant Institution, to a period after April 7, 1832; that in October, 1829, he made a written contract with them under that name, to supply them with meats; and that this contract, which expired by its terms in October, 1830, was renewed at that time, for another year, by the same agent of the institution and under the same name as before. The defendant, Thayer, contended that the partnership was dissolved on June 23, 1830; that at the time of such alleged dissolution, Fellows and one Newton formed a copartnership; and that after that, they alone were interested in the concern; and that he had given notice to the plaintiff of his withdrawal from the firm, and of the dissolution of the old partnership, on the morning after it took place. The witness who testified as to such notice, stated in chief, but not in answer to any question on the part of the defendants, that he was "confident all in the neighborhood were notified in two days." On the cross-examination of this witness, the plaintiff's counsel inquired whether he gave the same notice to the other creditors of the firm as he had testified that he gave to the plaintiff, and asked their names. To this the witness replied affirmatively, and mentioned the names of some of the persons to whom he had given such notice. The plaintiff thereupon offered several of the creditors named by the witness, to prove that he had not given them any such notice as he had stated. The defendant objected to the admission of this evidence; but the objection was overruled. . . .

The jury found a verdict for the plaintiff. The defendant excepted.

Forbes & Baker, for the defendant. . . . It was not competent for

the plaintiff to introduce other creditors to contradict the defendant's witness as to the notice given by the witness to any other persons than the plaintiff himself. It could make no difference, in the present case, whether other creditors had or had not notice that Thayer had ceased to be a partner. The testimony went merely to prove a fact collateral and irrelevant to the issue. . . .

I. C. Bates, Dewey and *E. Dickinson*, for the plaintiff. . . . To the point, that under the circumstances, it was competent for the plaintiff to introduce witnesses to prove that they had not received from the defendant's witness such a notice as he had stated that he gave to them. Rice *v.* New England Mar. Ins. Co., 4 Pick. 439; Atwood *v.* Welton, 7 Conn. R. 66. . . .

Shaw, C. J., drew up the opinion of the Court. The object of this action is to charge the defendants jointly as partners, for provisions furnished to the Mount Pleasant Institution. The defendant, Fellows, has admitted his liability, by a default; the defendant, Thayer, denies his liability as a partner, and has pleaded to the action. . . . The Court are also of opinion, that the direction in regard to the burden of proof was right, which was, that it was incumbent on the plaintiff in the first instance to prove the defendant, Thayer, a partner, and if this were done, he would be liable, unless he could prove a dissolution, as it regarded himself, and notice of it to the plaintiff, before the supplies. . . .

In respect to the admission of the evidence, that the witness had given a different notice to the other creditors, from that which he stated that he had given to the plaintiff, we are of opinion, that it was rightly admitted. . . . It was material to the issue, not only to show that the witness had given some notice, but the form, substance, and particulars of that notice. It was offered as proof of notice to the plaintiff as a creditor, of the general dissolution of the copartnership carrying on the business of the Mount Pleasant Classical Institution. The plaintiff denied this, and insisted that it was a notice of a different character. The witness stated that he gave notice to all the creditors and customers of the institution at the same time. We think the effect of his testimony was, that he gave to them all, the notice of a general dissolution of the partnership, and that the defendant Thayer had ceased to be concerned. It is then manifest that he intended to give the same notice to all standing in the same relation, and the natural inference would be that he did so. When therefore it was offered to show, that he gave a different notice in form, substance, and effect, to others standing in the same relation, it is not merely to show that the witness is not to be believed, because he has made different statements at different times, indicating a want of recollection or integrity, but it is a fact bearing upon the issue, namely, what was the form and substance of the notice which he in fact gave to the plaintiff. Like all inferences from circumstances, it is founded on experience. A man goes forth to a class of persons, standing in the same relation, to give them a notice affecting their interests

alike. If there are ten, and he gives a particular notice to nine, it leads to a probable inference that he gave a like notice to the tenth, where he states that he intended to make no distinction, and believes that he notified all alike. Its tendency is not, therefore, merely to bear upon the credit of the witness, but upon a material fact involved in the issue, to be proved either by the testimony of that witness, or by any other evidence, positive or circumstantial, which is competent and relevant. . . .

Judgment on the verdict.

63. AIKEN *v.* KENNISON

SUPREME COURT OF VERMONT. 1886

58 *Vt.* 665

TROVER for the conversion of a horse. Trial by jury, ROSS, J., presiding. Verdict for the defendant.

The plaintiff's evidence tended to show that on the defendant's request, he, plaintiff, told him he would purchase a horse for him, and that defendant might have the horse when he paid for it; that defendant consented, and that thereupon he gave him the following writing to take to one Miller: "Plin Miller: if you trade with E. A. Kennison for a horse, I will pay you for him about the middle of this month. (Signed) G. W. Aiken." On the same day, January 9, 1883, the defendant took the writing to said Miller, traded for the horse, and took it into his possession. At the same time the plaintiff made the following entry in his book in his account against defendant: "January 9. Horse of Pliny Miller." The plaintiff's evidence further tended to show, that on February 16, 1883, he gave a written consent to the defendant that he might exchange this horse for another horse, provided he, plaintiff, had the money paid in exchange, and also a lien on the second horse; that the defendant exchanged the horse, and soon after sold the one received. The defendant denied that plaintiff ever had any interest in or lien upon either of said horses; and his evidence tended to show that he made the purchase of the horse from said Miller in his own name and right, and took a bill of sale from said Miller therefor at the date of the purchase; that plaintiff gave him the writing before mentioned merely for the purpose of assuming the payment of said horse, and not for the purpose of purchasing the said horse for himself, or of acquiring any lien on it.

On the trial the plaintiff produced his book showing his account with the defendant, and showing the entry in pencil above named, and the same were put in evidence without objection. The plaintiff's counsel then proposed to ask the plaintiff, upon his examination in chief, whether he had had other transactions of a similar nature with other people dealing with him. The evidence was excluded. . . .

Crane & Alfred, for the plaintiff. There was error in excluding the evidence offered to show that the plaintiff had had other transactions with other people of a similar nature. . . .

L. H. Thompson, for the defendant. The evidence excluded by the Court related to matter wholly inter alios. It had no tendency to prove that plaintiff had a lien on the horse. . . .

The opinion of the Court was delivered by

ROWELL, J.— Phelps, Dodge & Company *v.* Conant & Co., 30 Vt. 277, is sufficient authority against the first exception; but as "frequent recurrence to fundamental principles" is as necessary in law as in liberty, we will advert to the general rule under which such evidence is excluded. The maxim "res inter alios acta," that a transaction between two persons ought not to operate to the disadvantage of a third, though somewhat obscure in its application, because it does not show how unconnected transactions should be supposed to be relevant to each other, and though failing in its literal sense, because it is not true that a man cannot be affected by a transaction to which he is not a party, is nevertheless one of the most important and most practically useful maxims of the law of evidence. It means, as Mr. Justice STEPHEN says, that you are not to draw inferences from one transaction to another, that is not specifically connected with it, merely because the two resemble each other; that they must be linked together by the chain of cause and effect in some assignable way before you can draw your inference. Stephen, Digest of Evidence, 198, note vi. But this rule has its exceptions; and one of them is — which is claimed to be applicable here — that where the question is whether a thing was done or not, the existence of any course of office or business according to which it naturally would or would not have been done, is a relevant fact.

But, as here was no offer to show any such course of office or business, the case is not brought within this exception; and as there is no other exception to the rule within which it is brought, it is left to stand on the rule itself, which, as we have seen, excludes similar but unconnected facts. 1 Wharton, Evidence, § 29. Mr. Phillipps says it is considered in general that no reasonable presumption can be drawn as to the making or the execution of a contract by a party with one person in consequence of the mode in which he has made or executed similar contracts with other persons. 1 Phillipps, Evidence, 748. A reference to a few cases will serve to illustrate the rule. In assumpsit for use and occupation, the question being whether the rent was payable quarterly or half-yearly, Lord KENYON would not allow the plaintiff to show that his other tenants like the defendant paid their rents quarterly, and said that it had been solemnly determined in a trial at the bar that evidence of the custom of one manor was no evidence of the custom of an adjoining manor. Carter *v.* Pryke, Peake 95. So where the question was upon the custom of tithing in the parish of A., evidence that such a custom

existed in adjoining parishes was excluded, the custom not being laid as a general custom of the whole country. Furneaux *v.* Hutchins, Cowp. 807. And see Spenceley *v.* De Willott, 7 East 108 [*ante*, No. 61]. . . .

Judgment affirmed.

64. BOCK *v.* WALL

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1911

207 *Mass.* 506; 93 *N. E.* 821

PETITION, filed on August 2, 1906, under R. L. c. 196, for damages sustained by the petitioners, upper riparian proprietors on the Stop River, by reason of the flooding of their land by water set back by the respondent's dam below them. The respondent in her answer alleged "that she and those under whom she claims have had peaceable possession and occupation of said mill and water works and dam and have maintained said dam at its present height for more than twenty years prior to the first day of August, 1903." The case was tried in the Superior Court before WAIT, J. The jury found for the respondent; and the petitioners alleged exceptions. The facts material to these exceptions are stated in the opinion.

R. Clapp, for the petitioners. *H. E. Ruggles* (*J. B. Crawford* with him), for the respondent.

SHELDON, J. — The question contested was whether the respondent's dam had been maintained at its present height for more than twenty years before the bringing of the petition. The evidence was conflicting. There was evidence that in 1876 one Campbell owned the respondent's premises and an adjacent piece of land upon which a pond had been created by this dam. The respondent was allowed to put in evidence a deed of the adjacent land given in March, 1876, by Campbell to the New York and New England Railroad Company, in which deed Campbell covenanted for himself and his heirs and assigns to maintain this dam "to at least its present height," so that the water in the pond should not be drawn down below its level then existing. The petitioner contends that this was erroneous.

In our opinion the deed was rightly admitted. It created, or could be found to have created, an obligation upon Campbell and his successors in title to keep the dam at the same height that it then was; and there was evidence that this was the same height at which it had been ever since maintained. The deed brought about a permanent condition of affairs affecting the use of Campbell's estate and imposing a duty upon all future owners thereof. The existence of such a duty and obligation furnished a motive, perhaps a strong motive, on the part of Campbell and his successors to comply with its requirements and thus avoid the liability under which they otherwise might be placed. But when it is disputed whether certain persons have done a certain act, the

existence of a motive on their part to do or to refrain from doing that act is relevant. Hanson & Parker *v.* Wittenberg, 205 Mass. 319, 327. This is the underlying element in such cases as Clark *v.* Brown, 120 Mass. 206, and those cited in Conklin *v.* Consolidated Railway, 196 Mass. 302, 306. The rule has been frequently applied in criminal cases, in which it is held that while the prosecution is not obliged to show a motive for the commission of an alleged crime, evidence of the existence of such a motive is competent and material. Commonwealth *v.* Richmond, 207 Mass. 240. Commonwealth *v.* Jeffries, 7 Allen 548, 566. The rule is stated and the authorities are collected in 12 Cyc. 149, 150.

It follows that this deed was rightly admitted, not as a declaration of the grantor, but to show that he and his successors had a motive to do what the respondent contended that they did do, and thus to corroborate the other evidence upon which she relied. . . .

Exceptions overruled.

Topic 3. Specific Events or Acts as Evidence of a Condition or Cause, etc., in External Inanimate Nature.[1]

65. COLLINS *v.* DORCHESTER

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1850

6 *Cush.* 396

THIS action was brought for an injury received by the plaintiff in December, 1847, by reason of a defect in a highway, which the defendants were bound to keep in repair. The trial was in the Court of Common Pleas, before HOAR, J., to whose rulings and instructions the plaintiff excepted.

The highway in question passed through a marsh, and was made smooth and passable for the width of at least thirty-one feet; and, on each side, at the edge of and along the road there was a row of posts about six feet apart, extending on each side for twenty rods or more, which had been standing for many years. The plaintiff drove his chaise against one of the posts, so that one wheel passed outside of and locked upon the post; and this accident was the occasion of the injury complained of. It appeared that two or three of the posts, at about the place where the accident occurred, were broken down or removed. The alleged defect was the want of a railing at the place where the accident occurred. . . .

The plaintiff, having introduced evidence of the injury, and of the circumstances under which it occurred, proposed to prove, by one Sprague, that before the happening of the accident complained of, the

[1] For the principles of Logic here applicable, see the present Compiler's "Principles of Judicial Proof" (1913), Nos. 4–13.

witness was riding over the same road, at or near the same place, and under similar circumstances, and that an accident similar to the one in question then occurred, which was caused by the same alleged defect, and without any neglect or fault on the part of the witness. But the plaintiff stated, at the same time, that he did not expect to prove, that the defendants had any notice of this accident. The proposed evidence being objected to, the presiding judge ruled, that for the purpose of proving notice to the town, the plaintiff might show, that any inhabitant of Dorchester had known or heard of accidents upon the highway in question; but, that for the purpose of proving the way defective, the plaintiff could not be allowed to show the circumstances of another accident alleged to be similar, as that would raise a collateral issue, and result in testing one point in dispute by another. The evidence was accordingly rejected. . . .

F. Hilliard, for the plaintiff. *J. J. Clarke* and *N. F. Safford*, for the defendants.

METCALF, J.: The testimony of Sprague, that he, before the injury complained of by the plaintiff, received a similar injury, at or near the same place, without any negligence on his part, was not competent for the purpose of proving that the road was defective at the time and in the place of the plaintiff's injury. It was testimony concerning collateral facts, which furnished no legal presumption as to the principal facts in dispute, and which the defendants were not bound to be prepared to meet. Standish *v.* Washburn, 21 Pick. 237; 2 Stark. Ev. 381 et seq.; 1 Greenl. on Ev., §§ 52, 448. . . . Exceptions overruled.

66. DARLING *v.* WESTMORELAND

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. 1872

52 *N. H.* 401

CASE by Charles Darling against the town of Westmoreland, for an injury caused by defects in a highway. Verdict for the defendants, and motion of the plaintiff for a new trial. The defects alleged by the plaintiff were, a pile of lumber by the side of the road likely to frighten horses, and an insufficient railing of a bridge. His claim was, that his horse was frightened by the lumber as he crossed the bridge, and ran back, and backed off the bridge. One ground of defense was, that the horse was vicious and unsafe, and much evidence was offered on that point on both sides. The plaintiff introduced the testimony of a Mr. Cressy, who testified that he rode past this pile of lumber with a Mr. Fletcher, and he offered to prove by him that Fletcher's horse was frightened by the lumber; but the Court rejected the evidence, and the plaintiff excepted.

Cushing & Lane & Healy, for the plaintiff. The fact that other horses were frightened by the same pile of lumber, tends to show that it

was dangerous, and so an encumbrance, and also tends to rebut the defendant's claim that the plaintiff's horse was unsafe. But it is said, on the authority of Hubbard *v.* Concord, 35 N. H. 52, that this fact cannot be shown, because the attempt to show it raises a collateral issue which the opposite party cannot be expected to be prepared to try. It seems to us that this objection is entirely unfounded, either in principle or practice. . . .

Wheeler & Faulkner, for the defendants. With such respectable authorities to support the decision in Hubbard *v.* Concord as Greenleaf, Starkie, Phillipps, the Supreme Court of Massachusetts, and the uniform ruling at nisi prius of the Court of this State, for a period of at least twenty years prior to the decision in Hubbard *v.* Concord, any argument in support of the ruling here excepted to would seem superfluous.

Doe, J.: . . . One question of fact was, whether the pile of lumber was likely to frighten horses. . . . Was the fright of Fletcher's horse competent evidence on the question whether the lumber was likely to frighten horses? . . . On the independent and general question of the horse-frightening capacity of a certain pile of lumber, what rule of law considers the fright of [the plaintiff's] horse as important and disregards the fright of Mr. Fletcher's horse as of no consequence at all? . . . If the question were, whether the lumber was capable of floating in water, or making a good fire, or being sawed or cut or planed in a specific manner, or supporting horses and wagons passing over a bridge, there could be no legal objection to the trial of an appropriate experiment upon it in the presence of the jury, or to evidence of experiments that had been tried elsewhere. And there is no reason, outside of the technical rules of law, why its ability to frighten horses should not be tested out of Court, and proved in Court in the same manner. When we want to know whether a certain horse is skittish or is capable of a certain speed, whether a certain substance is poisonous and destructive of animal or vegetable life, whether certain materials are of a certain strength, whether a certain field or a certain kind of soil is likely to produce a certain kind or amount of crop, whether a certain man or brute or machine is likely to perform a certain kind or amount of work, or whether anything can be done or is likely to be done, one way is to speculate about it, and another way is to try it. The law is a practical science, and when it is appealed to to direct what means shall be used to find out whether a certain pile of lumber is likely to frighten horses, if any one asserts that, on this subject, the law prefers speculation to experience, abhors actual experiment and delights in guesswork, the person advancing such a proposition takes upon himself the task of maintaining it upon some legal rule, distinctly stated by him and well established by the authorities. Such a proposition is not sustained by the reason of the law. It is sustained by nothing that can be justly called a principle. By what technical rule, at war with reason and principle, is it supported?

The very few authorities tending to sustain the exclusion of the fright of Fletcher's horse in this case, are based upon the authority or the reason of the decision in Collins *v.* Dorchester, 6 Cush. 396 [*ante*, No. 65] and two other Massachusetts cases which rest upon that case. . . . A consideration, substantially disposing of the very few authorities that have any considerable tendency to sustain the ruling in this case, is, that Collins *v.* Dorchester, on which the others are based, is no authority for the exceptional doctrine it has been supposed to establish. That case being no foundation for the others, and they having no other foundation, they all fall together.

In that case the judge ruled that this evidence was not competent for the purpose of proving the way defective. The whole of the decision of the question raised by that ruling was this: "The testimony of Sprague, that he, before the injury complained of by the plaintiff, received a similar injury at or near the same place, without any negligence on his part, was not competent for the purpose of proving that the road was defective at the time and in the place of the plaintiff's injury. It was testimony concerning collateral facts, which furnished no legal presumption as to the principal facts in dispute, and which the defendants were not bound to be prepared to meet. Standish *v.* Washburn (21 Pick. 237). Even a judgment recovered by Sprague against the defendants for damages sustained by him by reason of a defect in the road, would not be admissible in evidence in favor of the plaintiff."

In that case, a sufficient railing on the posts would have prevented the plaintiff's wheel going outside of the post with which his carriage came in contact. The question was, whether, in the undisputed condition of the road, the absence of such railing, exposing travellers to the danger of their wheels going outside of and locking upon the posts, was a defect. No experiment or experience of the plaintiff, or Sprague, or any one else, was necessary to show that the posts were capable of being run against. It does not appear that any such experiment or experience would assist the judgment of the jury on the question whether, in the undisputed condition of the road, the posts were likely to be run against. Such a case is no authority for holding that the disputed horse-frightening capacity of a certain pile of lumber cannot be shown by experience. . . .

The only rule relied upon to exclude experimental knowledge in such a case as this, is the rule requiring the evidence to be confined to the issue, — that is to the facts put in controversy by the pleadings, prohibiting the trial of collateral issues, — that is, of facts not put in issue by the pleadings, and excluding such evidence as tends solely to prove facts not involved in the issue. This rule merely requires evidence to be relevant. It merely excludes what is irrelevant. It is a rule of reason, and not an arbitrary or technical one, and it does not exclude all experimental knowledge. A fact as relevant and as directly involved in the issue of guilty or not guilty between these parties, as any fact in controversy, was the likelihood or probability of the lumber frightening ordinary

horses. There was nothing collateral — that is, nothing irrelevant — in that. . . .

When a trial is likely to be unreasonably protracted by a great number of witnesses impeaching or sustaining the character of other witnesses, the evil is not remedied by any principle of law prescribing the exact number. Many evils of that kind must necessarily be avoided by the judge determining, as a matter of fact, upon the circumstances of the case, where the line of reasonableness is. As to the number of experiments or experiences on many points, collateral in a certain sense, but relevant in the legal sense, it is impossible in the nature of the case for a limit to be fixed as a matter of law. But it does not follow that the law excludes all evidence of which it cannot measure a reasonable quantity.

Exceptions sustained.

67. MORSE *v.* MINNEAPOLIS & ST. LOUIS R. CO.

SUPREME COURT OF MINNESOTA. 1883

30 *Minn.* 465

APPEAL by defendant from an order of the District Court for Freeborn County, FARMER, J., presiding, refusing a new trial.

This was an action to recover damages for the alleged negligence of defendant, causing the death of plaintiff's intestate while employed as an engineer on its railroad. One of the acts of negligence alleged to have contributed to the injury was defendant's allowing its track to become and remain out of repair; the defects in that respect consisting of a broken rail and defective switch, which caused the engine upon which the deceased was to be thrown from the track and upset. The rail and switch referred to were situated in the yard of defendant at Albert Lea, and near the water-tank, at which point the accident occurred.

The Court, against defendant's objection and exception, allowed plaintiff to show defects generally in all the numerous tracks in defendant's yard, from the round-house, whence the engine started, to the "place where the first work was to be performed," . . . [*i.e.*] the first snow-drift, situated a short distance ahead of the point where the accident occurred. The engine in question did not pass over any of these tracks except one, and there was nothing tending to show that any defects, except those at or near the place of the accident, in any way contributed to the injury complained of.

J. D. Springer, for appellant. *Gordon E. Cole* and *J. H. Parker*, for respondent.

MITCHELL, J. [after stating the facts as above]. 1. We think the admission of this evidence was error. The evidence, under the circumstances, should have been limited to those defects which caused or reasonably might have conduced to produce the injury. The mere

existence of other defects in other parts of the road is not evidence that a similar defect existed at the place of the casualty, and caused it. The only exceptions to this rule which now occur to us are where the other defects were shown to be the result of a cause presumptively operating at the place of the casualty, or where such other defects might have caused the defect which produced the injury. But there are no facts bringing this case within any such exceptions. Defects in other tracks in the yard at Albert Lea had no more to do with producing this accident than defects a hundred miles distant. The fact that they were in the same vicinity does not alter the principle. If evidence of these was admissible, we see no reason why defects in any part of defendant's road might not have been shown. The effect of this evidence was to raise false issues. The defendant was not on trial for general negligence; nor was it liable to plaintiff for any acts of negligence except those which caused the injury complained of. L. & N. R. Co. *v.* Fox, 11 Bush (Ky.) 495; Grand Rapids & Ind. R. Co. *v.* Huntley, 38 Mich. 537; Pierce on Railroads, 293. . . .

2. There remains one other point which should be considered with reference to another trial. For the purpose of showing the defective character of the switch referred to, plaintiff was permitted to show that other engines and cars missed the track at the same point, both before and after the accident complained of. The competency of such evidence under any circumstances is by many Courts denied. This Court has held it to be competent. Phelps *v.* City of Mankato, *supra;* Kelly *v.* South. Minn. Ry. Co., 28 Minn. 98.

It is, of course, not competent for the purpose of showing independent *acts* of negligence. But we think on principle it is clearly admissible when it tends to show that the common cause of these accidents is a *dangerous or unsafe thing.* It would be certainly competent to prove by an expert that, at a time either before or after the accident when the instrument claimed to have caused it was in the same condition as when the accident complained of occurred, he examined and experimented with it, and found it capable of producing like results. Hence there seems no reason for excluding ordinary experience, when confined within the same limits and for the same purpose. These facts are in the nature of experiments to show the actual condition of the instrument. Upon any issue as to the condition or safety of any work of human construction designed for practical use, evidence showing how it has served, when put to the use for which it was designed, would seem to bear directly upon the issue. It is sometimes objected that this presents new and collateral issues of which a defendant has no notice. In a certain sense every item of evidence material to the main issue introduces a new issue; that is, it calls for a reply. In no other sense does it make a new issue; its only importance is that it bears on the main issue, and, if it does, it is competent. Evidence of similar accidents resulting from the same cause has often

been held competent for the purpose referred to. Kent *v.* Lincoln, 32 Vt. 591; Quinlan *v.* Utica, 11 Hun 217; Willey *v.* Portsmouth, 35 N. H. 303; Chicago *v.* Powers, 42 Ill. 169; Piggot *v.* Eastern Cos. Ry. Co., 3 C. B. 229; House *v.* Metcalf, 27 Conn. 631; Hill *v.* Portland & R. R. Co. 55 Me. 438; Darling *v.* Westmoreland, 52 N. H. 401 [*ante*, No. 66].

But, to render such evidence competent, it must appear, or at least the evidence must reasonably tend to show, that the instrument or agency whose condition is in issue was in substantially the same condition at such times as it was at the time when the accident complained of occurred. As the evidence upon another trial may not be the same, we content ourselves with stating a general rule, without considering whether all the evidence of this kind introduced was competent within the rule suggested. . . .

We discover no other error, but for those already referred to a new trial must be granted. Order reversed.

68. MATTER OF THOMPSON

COURT OF APPEALS OF NEW YORK. 1891

127 *N. Y.* 463; 28 *N. E.* 389

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made May 13, 1889, . . . to assess the damages caused by the diversion of the water of the Bronx river from certain lands of Charles Butler. . . .

William Allen Butler, for appellant. . . . The commission erred in excluding the evidence offered by the claimant as to the actual value and rental value and the price paid by the city for the water-power in the Bronx river on premises immediately adjoining the claimant. . . .

Arthur H. Masten, for respondent. . . . It was not error on the part of the commission to reject evidence of what the city had paid for certain water-rights appurtenant to a neighboring parcel. . . .

PARKER, J. — This proceeding was brought pursuant to the powers conferred on the commissioner of public works of the city of New York, by chapter 445 of the Laws of 1877, and the various acts amendatory thereof, to acquire the right to divert, and keep diverted from the Bronx river, all the water of the river north of, and above the dam at Kensico.

The commissioners awarded to the claimant, who was the owner of a large and valuable farm through which the river ran, damages in the sum of $7,270. . . . The only exception to which our attention is called, relates to an effort, on the part of the owner, to prove what had been paid by the petitioner for water-rights appurtenant to a neighborhood parcel, on the same river. At folio 7467 the counsel for the owner offered to prove that the city of New York purchased from Robert White, the right to divert the waters from one-half of the water-shed of the Bronx

river, and paying him the sum of $21,991.66, for such rights, and his privileges in connection with a certain mill, upon what is known as the Powder Mill property at Scarsdale. . . . And the question then is, was the rejection of the evidence as to the amount paid by the city for the White water-power, error for which a reversal should be had.

This question has been presented to the Courts of last resort in several of the States, but not with the same result. In Massachusetts, New Hampshire, Illinois, Iowa, and Wisconsin, it is held that actual sales of other similar land in the vicinity, made near the time at which the value of the land taken is to be determined, are admissible as evidence for the purpose of arriving at the amount of compensation. Gardner *v.* Brookline, 127 Mass. 358; Culbertson *v.* Blair Packing & Prov. Co. *v.* City of Chicago, 3 Ill. 651; Town of Cherokee *v.* S. C. & I. F. Town Lot & Land Co., 52 Iowa 279; Concord R. R. Co. *v.* Greely, 23 N. H. 242; Washburn *v.* Milwaukee & Lake Winnebago R. R. Co., 59 Wis. 364.

While in some of the other jurisdictions, notably Pennsylvania, New Jersey, Georgia, and California, it is held that sales of similar property are not admissible for the purpose of proving the value of property about to be taken. East Pa. R. R. Co. *v.* Hiester, 40 Pa. St. 53; P. & N. W. R. R. Co. *v.* Bunnell, 81 *ibid.* 414; Pa. S. V. R. R. Co. *v.* Ziemer, 124 560; Montclair R. Co. *v.* Benson, 36 N. J. L. 557; C. P. R. R. Co. *v.* Pearson, 35 Cal. 247–262; Selma R. & D. R. R. Co. *v.* Keith, 53 Ga. 178.

The reasons assigned for the conclusions reached in the cases last cited are, in the main, that the test in legal proceedings is, what is the present market value of the property which is the subject of controversy? It may be shown by the testimony of competent witnesses, and on cross-examination, for the purpose of testing their knowledge respecting the market value of land in that vicinity, they may be asked to name such sales of property, and the prices paid therefor, as have come to their attention. But a party may not establish the value of his land by showing what was paid for another parcel similarly situated, because it operates to give to the agreement of the grantor and grantee the effect of evidence by them, that the consideration for the conveyance was the market value, without giving to the opposite party the benefit of cross-examination to show that one or both were mistaken. If some evidence of value, then prima facie a case may be made out so far as the question of damages is concerned by proof of a single sale, and thus the agreement of the parties, which may have been the result of necessity or caprice, would be evidence of the market value of land similarly situated and become a standard by which to measure the value of land in controversy. This would lead to an attempt by the opposing party to show, first, the dissimilarity of the two parcels of land; and, second, the circumstances surrounding the parties which induced the conveyance (such as a sale by one in danger of insolvency, in order to realize money to support his business, or a sale in any other emergency which forbids a grantor to wait a reasonable time for the public to be informed of the fact that his

property is in the market). Or, on the other hand, that the price paid was excessive and occasioned by the fact that the grantee was not a resident of the locality, nor acquainted with real values, and was thus readily induced to pay a sum far exceeding the market value. Thus each transaction in real estate claimed to be similarly situated might present two side issues which could be made the subject of as vigorous contention as the main issue, and if the transactions were numerous it would result in unduly prolonging the trial and unnecessarily confusing the issues, with the added disadvantage of rendering preparation for trial difficult.

Our attention has not been called to a case in this court where the question has been passed upon in the manner here presented; but there are a number of decisions indicating the tendency of the Court to be against proving value by evidence of the selling price of similar property. . . .

Even under the Massachusetts rule, a reversal here would not be justified because of the extent of the discretion vested in the judge or officer presiding at the trial to determine whether such evidence is admissible, depending of course on various elements, such as the nearness or remoteness of the time of sale; whether the premises are far separated; the condition of the property about the parcel sold and the use made of it, which may have operated to enhance or diminish its selling value; the similarity of the property, not only as to description, but as to its availability for use. Chandler *v.* Jamaica Pond Aqueduct Co., 122 Mass. 305; Gardner *v.* Brookline, 127 *ibid.* 358–363, and cases cited. In point of time the White sale was a year and one-half prior to the date when the offer was made to prove it. The White water-power was in actual use in the operation of a mill, while the water-power of Mr. Butler had not been utilized in any degree whatever. True, as much water will be diverted from the Butler property as the White property, but it does not follow that the respective water-powers are of equal value. The value of a water-power depends on its availability for use. And as a matter of common observation, that at certain points along a stream the water-power can be more readily and cheaply made available for industrial purposes than at others. So, if appellant's contention as to the admissibility of evidence of that character could be allowed, we should necessarily reach the conclusion that the nature of the evidence offered as to similarity, was not of such a character as to authorize a Court to hold, as matter of law, that the commission improperly exercised their discretion in refusing to admit proof of the price paid for the White parcel. . . .

The order should be affirmed. All concur. Order affirmed.

69. BEMIS *v.* TEMPLE

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1894

162 *Mass.* 342; 38 *N. E.* 970

TORT, for injuries occasioned to the plaintiff's person and property by reason of his horse becoming frightened at a flag suspended across a street in Spencer.

At the trial in the Superior Court, before ALDRICH, J., the plaintiff introduced evidence tending to show that the defendant, as one of a political committee, caused a campaign flag to be suspended and maintained across Main street, in Spencer; that the flag was raised in July, 1892, and continued to swing until after the presidential election of the same year; that it was suspended by a wire attached to buildings on opposite sides of the street; and it was about thirty-one feet in length and eighteen feet in width, and its lower edge, as suspended and when at rest, was about twelve feet above the central part of the travelled way; that on August 5, 1892, the plaintiff was driving from Maple street in Spencer on to Main street, and his horse, though a large and spirited animal, was safe and gentle in driving; that just as he was turning from Maple street into Main street, and coming in sight of the flag, and about thirty or forty feet distant from it, his horse became frightened at the flag, which was being floated gently by the breeze, and turned suddenly and ran a short distance, wrecking the plaintiff's carriage and harness, and injuring his person. . . . The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

A. P. Rugg, (*J. R. Thayer* with him,) for the plaintiff. *F. B. Smith,* for the defendant.

KNOWLTON, J. To maintain his case the plaintiff was obliged to show that the flag hung across the street was an object which was so likely to frighten horses as to render driving upon the street unsafe, and that in its position there it was a public nuisance. The fundamental question in the case was whether ordinarily safe and gentle horses would be frightened by it. The inquiry was in regard to the effect of an inanimate object upon an animal acting from instinct. The only way in which knowledge on this subject could ever be acquired is by observation of the effect of the object, or of similar objects, upon the animal. Inasmuch as no two flags hung in different places with different surroundings could ever present precisely the same appearance in different aspects to an unreasoning animal, the most satisfactory way of ascertaining the fact would be by observing the effect of this particular flag upon different horses. In all the observations and experiments, one factor in the problem, the swinging flag, would always be the same. The other factor, the horse, would always truly exhibit his real feelings, and the only possible difference in the results of different observations would arise from the

difference in the horses. The question of fact whether a particular horse comes within the class of ordinarily safe and gentle horses is not difficult or complicated, and witnesses could easily give the results of their observations of the conduct of horses which they considered ordinarily safe and gentle. We are of opinion that the best way to decide the main question in dispute is to show whether ordinary horses have manifested fear of the flag as it hung over the street. The question is not whether the results of experiments with other ordinary horses might be introduced upon the question whether the flag frightened the plaintiff's horse, — although there is much authority for holding that, where the elements entering into the experiments are so nearly the same, the results may be shown to establish a fact of this kind. But the question is, how a certain kind of animal is commonly affected by the sight of a particular object.

To ascertain the truth, the jury must either use such knowledge as they happen to have on the subject without the aid of testimony, or experts must be called to give their opinions if the subject is one in regard to which experts can be found, or witnesses must be permitted to state particular facts which they have observed, each one of which is an illustration and example of the general fact in dispute. The only objection to testimony of the last kind in such a case is that in testing it collateral issues may be raised. Such an objection in many cases is a sufficient reason for excluding the testimony. Whenever a line of inquiry will give rise to collateral issues of such number and difficulty that they will be likely to confuse and distract the jury and unreasonably protract the trial, it should not be permitted. But the mere fact that a collateral issue may be raised is not of itself enough to justify the exclusion of evidence which bears upon the issue on trial. Most circumstantial evidence introduces collateral issues, and ordinarily it is a practical question, depending upon its relations to the other facts and circumstances in the case, whether it should be received. It may be remote from the real issue or closely connected with it, and in many cases its competency depends upon the decision of questions of fact, affecting the practical administration of justice in the particular case, such that a Court of law will refuse to revise the ruling of the presiding judge, but will treat his ruling as a matter of discretion.

. . . In the present case the only collateral inquiry which could arise is whether a horse called by a witness an ordinarily safe and gentle horse comes within that class. Such an inquiry is certainly simple. We think there would be no particular difficulty in receiving and weighing testimony in regard to the conduct of horses which seem to be like ordinary horses in common use.

This precise question has been decided in favor of the plaintiff's contention by many courts of the highest respectability, and we have been referred to no decisions to the contrary. . . . In Darling *v.* Westmoreland, 52 N. H. 401 [*ante*, No. 66], a suit for damages caused by the fright of a horse at a pile of lumber, evidence was received that other

horses had been frightened by the same pile. . . . The Court of Appeals of New York takes a similar view of the law. Quinlan *v.* Utica, 11 Hun 217; s. c. 74 N. Y. 603. Wolley *v.* Grand Street & Newton Railroad, 83 N. Y. 121.

The defendant relies upon a line of cases in this Commonwealth, brought against cities or towns to recover for accidents received while travelling on highways, in which it has been held that a plaintiff cannot introduce evidence of other similar accidents occurring at the place where he was hurt for the purpose of proving that the way was defective. Collins *v.* Dorchester, 6 Cush. 396 [*ante*, No. 69]. Hall *v.* Lowell, 10 Cush. 260. Aldrich *v.* Pelham, 1 Gray 510; Kidder *v.* Dunstable, 11 Gray 342. Hinckley *v.* Barnstable, 109 Mass. 126. Schoonmaker *v.* Wilbraham, 110 Mass. 134. Merrill *v.* Bradford, 110 Mass. 505. The ground on which these cases were decided is, that such collateral inquiries would be opened (before the evidence could be properly received) as would multiply issues for the trial of which the parties had had no opportunity to prepare, and would lead away from the main issue and tend to confuse the jury. In most of these cases the facts and circumstances of other accidents were so diverse and complicated that the decisions rest on grounds which are generally deemed satisfactory. In others, if they were to be considered apart from authority, it may be that an effect of an attempt to pass on another occasion was so closely connected with the alleged defects, and so free from other possible contributing causes, that, as a simple experiment, it might well have been proved. Such evidence has sometimes been received in other jurisdictions. District of Columbia *v.* Armes, 107 U. S. 519, 524. Morse *v.* Richmond, 41 Vt. 435. Darling *v.* Westmoreland, 52 N. H. 401 [*ante*, No. 66]. Calkins *v.* Hartford, 33 Conn. 57. Quinlan *v.* Utica, 11 Hun 217; S. C. 74 N. Y. 603. Delphi *v.* Lowery, 74 Ind. 520 [*ante*, No. 59]. Chicago *v.* Powers, 42 Ill. 169. Moore *v.* Burlington, 49 Iowa 136. Augusta *v.* Hafers, 61 Ga. 48. . . . This Court has established precedents in favor of the plaintiff's contention that accord with those which we have already cited from other Courts. In Reeve *v.* Dennett, 145 Mass. 23, upon the question of the effect of the use of a certain medicine in dentistry, evidence was received that dental operations performed by a certain dentist who used the medicine were less painful than those performed by other dentists who did not use it. In Brierly *v.* Davol Mills, 128 Mass. 291, to prove that an attachment would be effective on a certain loom, it was held competent to show that it worked successfully on another loom of similar construction. See also Gahagan *v.* Boston & Lowell Railroad, 1 Allen 187; Hunt *v.* Lowell Gas Light Co., 8 Allen 169. . . .

A majority of the Court are of opinion that the evidence offered should have been admitted. Exceptions sustained.

70. CENTRAL VERMONT R. CO. *v.* SOPER

United States Circuit Court of Appeals. 1894

59 *Fed.* 879; 8 *C. C. A.* 341

In error to the Circuit Court of the United States for the District of Massachusetts. At Law. Action by John E. Soper and others against the Central Vermont Railroad Company for the loss of 3,600 bushels of grain, in the burning of a grain elevator owned by the defendant. Verdict and judgment for plaintiffs. Defendant brings error. Reversed.

The plaintiffs claimed, in the opening of their case, that the fire originated at the foot of what was known as the "lofting leg." This lofting leg was a piece of machinery by which the grain was carried from the bottom to the top of the elevator. The pulley at the bottom of the lofting leg made about ninety-six revolutions per minute; and the claim of the plaintiffs was that the bearings at the sides of this pulley had become heated, and thereby ignited the dust which had accumulated upon them, from which the fire was communicated to the building.— The plaintiffs introduced as a witness one Aaron Linton, who testified that he was for many years foreman in this elevator, and well acquainted with its construction and method of operation. The witness testified among other things, that the bearings of this pulley at the foot of the lofting leg were beneath the elevator floor, and were oiled by pouring oil into two pieces of pipe, about two feet long, which led from above the floor down into the bearings. He was allowed to testify, against the objection and exception of the defendant, that while he was foreman of the elevator these bearings frequently became heated, that there was a tendency for dust to accumulate at that point, and that there was also a tendency for the pipes to become clogged and filled with dust and grease. — Against the objection and exception of the defendant, a witness, O'Connor, was allowed to testify as follows:

"*Q.* — Did you ever know the bearings at the foot of the lofting leg to become heated? *A.* — I do.

"*Q.* — You have known it? *A.* — Yes, sir.

"*Q.* — How long prior to this time had you noticed it? *A.* — I do not remember.

"*Q.* — About how long before? *A.* — I do not remember.

"*Q.* — Was it a month? *A.* — It might have been less.

"*Q.* — You say it might have been a month. Would you say two weeks? *A.* — I do not remember.

"*Q.* — All I want to get at is your best understanding. *A.* — I will say a month.

"*Q.* — These bearings, you say, would become heated at this point? *A.* — Yes, sir.

"*Q.* — Would they ignite any dust or accumulations there? *A.* — Yes, sir.

"*Q.* — Have you ever known the dust to become ignited? *A.* — Yes, sir.

"*Q.* — Many times? *A.* — Once.

"*Q.* — Was this the time you were speaking of? *A.* — No, sir." . . .

There was no direct evidence in the case tending to show that any shaft in the defendant's elevator was out of line, or that the oil tubes to the bearings at the foot of the lofting leg, or to any other bearings in the defendant's elevator, had become clogged. All the foregoing testimony was introduced by the plaintiffs in the opening of their case. . . . The defendant claimed that, from all the circumstances in the case, it was evident that the fire was of incendiary origin. In reference to this aspect of the case, the Court instructed the jury: "Now, gentlemen, if you should find that this fire did not result from the defective appliances, or from the gathering debris, but was the result of incendiarism, the defendant will not be liable, provided the defendant furnished reasonable watchmen, and other reasonable protection against such hazard. . . ."

C. A. Prouty and *Sigourney Butler*, for plaintiff in error. The testimony of Mr. Linton, who was foreman at the elevator previous to 1887, that the bearings at the foot of the lofting leg frequently became heated, was inadmissible. The time referred to was more than three years before the happening of the fire. . . . That the employees, whose business it was to oil these bearings when Mr. Linton was foreman, in 1887, neglected their duty on some occasions, had no possible tendency to show that the employees of the defendant also neglected their duty at the time in question. It is not permissible to show that a person is habitually careless, as bearing upon the question whether he has been careless upon a particular occasion. Gahagan *v.* Railroad Co., 1 Allen 187; Maguire *v.* Railroad Co., 115 Mass. 239; Whitney *v.* Gross, 140 Mass. 232; Propsom *v.* Leathem (Wis.), 50 N. W. 586. . . .

Robert M. Morse (*William M. Richardson* and *Charles E. Hellier*, on the brief), for defendants in error. Linton's testimony was properly admitted. . . . The testimony is admissible as showing, and affecting the defendant with knowledge of, a dangerous condition of things at the particular place and as showing the possibility or probability of fire from the causes described. Railroad Co. *v.* Richardson, 91 U. S. 454; Piggot *v.* Railway Co., 3 Man. G. & S. 229; Sheldon *v.* Railroad Co., 14 N. Y. 218.

. . . Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PUTNAM, Circuit Judge. . . . Those portions of the evidence of Linton and Jenkins which were objected to relate entirely to the tendency of things, — inanimate objects, — being, in this case, the machin-

ery. The plaintiff in error has argued as though they related to the peculiar habits of certain specified human beings. The distinction is a broad one; and, if it is kept in mind, the evidence was clearly admissible, for the purpose, not of showing that the employees of the defendant below were negligent, but of showing facts, some of which the jury might, perhaps, have assumed without evidence; namely, that it is the tendency of certain parts of rapidly running machinery to get heated, and of dust in mills where grain is ground or stored to be of a highly inflammable character. These facts might have been properly brought to the attention of the jury, both for the purpose of showing a point where the fire might have originated, and also of showing the necessity of care to guard that point. Maguire *v.* Railroad Co., 115 Mass. 239, cited by the plaintiff in error, which related to the negligent acts on other occasions of the defendant's driver, for whose unskilfulness he was sued, is not in point. The fact that the tendency to get heated, and the inflammable character of the dust, were explained by witnesses, even if the jury might have assumed a part thereof as true without proof, cannot prejudice either party.

The testimony of O'Connor, objected to, goes a little further. He stated, in substance, that he had known of instances when the bearings at the foot of the lofting leg became heated, and that he had also known the dust to become ignited at this point. This evidence is clearly within the rule established in Railroad Co. *v.* Richardson, 91 U. S. 454, and in the other cases referred to in Railway Co. *v.* Johnson, 10 U. S. App. 629, 4 C. C. A. 447, 54 Fed. 474. . . .

As the case stands, the plaintiff in error must prevail, on its exception to the refusal of the learned judge to direct a verdict for it on the ground that it appeared that the plaintiffs below did not bring their action for the loss within three months after it occurred.

Judgment reversed. New trial ordered.

71. FISHMAN *v.* CONSUMERS' BREWING COMPANY

Supreme Court of New Jersey. 1909

78 *N. J. L.* 300; 73 *Atl.* 231

On appeal from the District Court of the city of Newark. Before Justices Reed, Trenchard, and Minturn.

For the appellant, *Child & Carter* (*Riker & Riker*, of counsel). For the appellee, *Philip J. Schotland.* The opinion of the Court was delivered by

Minturn, J. The plaintiff's horse, top buggy, and other chattels incident thereto were destroyed by a fire, which, as plaintiff alleges, originated in a heap of ashes adjoining the stable of Nicholl & Company, where the property in question was kept. The ash heap was upon

defendant's premises close to the stable, and the fire took place about half-past three o'clock of the morning of February 19, 1908. The plaintiff, over continuous objections, deemed it necessary for the purpose of his case, to ask the witness Martin these questions:

"*Q.* — To your knowledge was there a fire at the same place before this? *A.* — Yes, sir.

"*Q.* — When was that? *A.* — On the 14th of December, 1901.

"*Q.* — And did you make an investigation at that time? *A.* — Yes, sir.

"*Q.* — What did you find at that time might cause the fire? *A.* — Hot ashes against the weather boards.

"*Q.* — What burned at that time? *A.* — Weather boards.

"*Q.* — Did you make an investigation of the cause of those weather boards burning at that time? *A.* — Yes.

"*Q.* — Where were those weather boards you speak of? *A.* — About the same location as the last fire.

It further appeared from the testimony of this witness that after the 1901 fire a sheet-iron plate had been placed between the ash heap and the stable, and that when this witness reached the scene of the fire shortly after it started, that iron plate was not hot, but cool enough, indeed, to enable him to handle it. It will be perceived, therefore, that the conditions preceding the two fires were essentially different.

The only purpose, apparently, which could actuate the plaintiff in introducing this character of testimony as material to his cause, is the specious reasoning included in the proposition, post hoc, the fire of 1901 originated; ergo propter hoc, the fire in question must have so originated, and it requires no elaboration of argument to expose the fallacy of such a syllogism both in logic and in law. Relevancy of testimony, as defined by Stephen, is "that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders possible the past, present, or future existence or non-existence of the other." Steph. Dig. Ev. art. I. The testimony in the case made it quite manifest that, since the fire of 1901, conditions had changed, and precautions against fire had been taken by defendant, so that under no reasonable construction of the physical principle of cause and effect could this testimony be applicable. It is inadmissible because of its remoteness in point of time, during which interim changed conditions resulted; but, primarily, as is said in one case, "upon grounds of public policy to prevent the multiplication of issues in a case" without apparent connection. Costello *v.* Crowell, 129 Mass. 588; State *v.* Raymond, 24 Vroom 260; Collins *v.* New York Central Railroad Company, 109 N. Y. 243.

For this reason the judgment is reversed and a venire de novo is awarded.

72. ALCOTT *v.* PUBLIC SERVICE CORPORATION

COURT OF ERRORS AND APPEALS OF NEW JERSEY. 1909

78 *N. J. L.* 482; 74 *Atl.* 499

ON error to the Supreme Court, whose opinion is reported in 48 Vroom 110.

For the plaintiff in error, *John W. Wescott.* For the defendant in error, *Edward Ambler Armstrong.* The opinion of the Court was delivered by

PARKER, J. Judgment in favor of the plaintiff in error was reversed in the Supreme Court on the ground that the proof showed without contradiction that the switching device in which plaintiff's wagon wheel seems to have caught was of standard pattern, in common use, and had been properly laid and inspected. The propriety of that determination is now before us for review. The circumstances of the accident are set forth in the opinion of the Supreme Court and need not be here repeated in detail. . . .

There was evidence tending to show that the switch was out of order some days prior to the accident in question. This evidence was objected to by defendant, and an exception that was taken to its admission will be dealt with presently. Taken with the other evidence, a jury question was presented whether the switch was out of order and had been allowed to become so by negligence of the defendant, notwithstanding testimony on the part of the defendant that inspections were regularly made and that it was found in good condition.

The judgment of the Supreme Court, reversing the trial Court, should therefore be reversed unless justified by some error at the trial that would vitiate the judgment in the trial Court. Two points are urged by defendant in error: That the trial Court admitted testimony of other accidents at this same switch shortly before and shortly after the accident to plaintiff; and that the Court charged, in effect, that this testimony might be considered as throwing light on the question whether the switch was out of order at the time of the plaintiff's accident. It is claimed, on the authority of Bobbink *v.* Erie R. R., 75 N. J. Law 913, decided by this Court, that the testimony was improper, and that the Court should not have alluded to it in the charge. We think that the weight of later authority and the better reasoning favor the view that the action of the trial Court was proper. One witness testified that his wagon was stopped in a similar manner, by the wheel catching in the switch, some thirteen days before plaintiff had that experience. Another witness testified that three days after the accident, as a result of his own wagon catching in the switch, he examined it, and his description of it at that time corresponded closely with plaintiff's description of it at the time of the accident in question.

Professor Wigmore, in the sixteenth edition of "Greenleaf on Evidence" (volume 1, p. 81), lays down the doctrine that: . . .

"In evidencing a quality, tendency, capacity, etc., by instances of its effects or exhibitions or operations on other occasions, the natural and logical limitation is that the evidential instances should have occurred under substantially the same circumstances or conditions as at the time in question, because otherwise they might well be attributed to the influences of some other element introduced by the differing circumstances."

He concedes that the logical objection to this sort of evidence is the tendency to unfair surprise and confusion of issues; that, in addition, the tendency of the Courts has been to exclude this class of evidence in cases of deliberate experiment to test the particular quality, and in cases where it has been sought to show, in defense, that the place, or appliance, or what not, had long been in use without accident, and ergo must be safe. Experimental evidence was excluded in Libby, McNeill & Libby *v.* Scherman, 146 Ill. 540; and the plan of showing safety by previous absence of accident was condemned by our Supreme Court in Temperance Hall Association *v.* Giles, 33 N. J. Law 260; and outside of this State, in such cases as Baltimore, etc., Turnpike *v.* Leonhardt, 66 Md. 70, Hodges *v.* Bearse, 129 Ill. 87, Lewis *v.* Smith, 107 Mass. 334, and Peverly *v.* Boston, 136 Mass. 366, although countenance is given to it in Dougan *v.* Champlain Transportation Co., 56 N. Y. 1.

The learned author continues (page 87):

"'The use that has come most into controversy is that of other injuries at a highway, track, or machine, as evidence of its dangerous character. . . . The doctrines of unfair surprise and confusion of issues . . . have been thought to have an especial bearing here; and for some time . . . much distrust of this sort of evidence was shown. The almost universal attitude of the Courts at the present time, however, apart from minor peculiarities, is to admit such evidence, subject to the limitations already described. . . . The other instances of injuries thus offered in evidence may concern defects in highways or defects in railroad tracks, machines, premises, and the like."

In Collins *v.* Dorchester [*ante*, No. 65], decided in 1850, it was held that the existence of a defect in a highway claimed to have caused injury to plaintiff could not be shown by evidence of a similar injury to another person at the same place. The doctrine of this case is said by Professor Wigmore to be in effect repudiated in Massachusetts, and the remarks of the Court in Bemis *v.* Temple, [*ante*, No. 69], seem to point that way. At all events, the admission of evidence of this class is supported by such cases as: District of Columbia *v.* Armes, 107 U. S. 519, decided in 1883, a suit for injury resulting from a defective sidewalk, in which evidence of other accidents at the same place was held proper as showing both the danger of the place and notice thereof to the defend-

ant; . . . and City of Bloomington *v.* Legg, 151 Ill. 9, a highway case, in which evidence of similar accidents was permitted both as to notice and to show the dangerous character of the place in question. . . .

The case of Darling *v.* Westmoreland, [*ante*, No. 66], is cited by Professor Wigmore as a leading case. It was a suit against the municipality for defect in the highway. The defect alleged was a pile of lumber that was likely to frighten horses, and plaintiff's claim was that his horse was frightened by the lumber and backed off a bridge in consequence. Evidence that another horse had been similarly frightened by the same lumber was excluded. The Court, in a long opinion by Doe, J., held that the exclusion was erroneous and reversed the judgment, incidentally criticising the rule in Collins *v.* Dorchester as not called for by the facts in that case.

Temperance Hall Association *v.* Giles has been cited in a number of our later decisions, but only twice on the admissibility of evidence as to the occurrence or non-occurrence of other accidents under similar circumstances. . . . The precise point decided in Temperance Hall Association *v.* Giles is not now in question, and we are not required to decide whether it was rightly decided in that aspect. Bobbink *v.* Erie R. R. is also clearly distinguishable, as there was no claim in that case that there was any defect in the crossing frog, but only that it might be improved upon, and the rejection of the evidence offered to show this was based on the ground that the rule of law, under the circumstances, required no more than the adoption of an appliance in general use, which the frog in question was conclusively shown to be.

Reverting to the case at bar, we are of opinion that the evidence of a similar accident at the same place some few days before was proper as supporting the plaintiff's evidence as to the condition of the switch at the time of his accident, and as tending to show that that condition had persisted so long that with proper care and inspection it should have been remedied before the plaintiff sustained his injury, and that, as to the evidence of its similar condition two or three days afterwards, this was justified as corroborative of the plaintiff's testimony relative to that condition. . . . There was no error therefore in the admission of this testimony; and, as it was properly admitted, it follows as of course that comment on it by the Court in the aspects we have noted was also proper. The charge of the Court on this point was as follows:

"It has appeared from the testimony in this case that other accidents have occurred at this place. That testimony was introduced not for the purpose of showing any liability on the part of the company beyond this case, but simply as it might throw light upon the question of whether this track, this mate, was out of order at the time when this accident occurred; because the jury might infer that, if an accident occurred just before or just after this occurred, there must be something wrong with the track."

In view of the propriety of this evidence, this was unexceptionable.

There was therefore no error at the trial in any of the aspects we have discussed, and no other point has been brought before us for review.

It follows therefore that the judgment of the Supreme Court must be reversed, and that of the Circuit Court affirmed.

SUB-TITLE. RULES EXCLUDING TESTIMONIAL EVIDENCE

Topic 1. Rules defining Qualifications of Witnesses[1]

75. Simon Greenleaf. *Evidence.* (1842. § 327). In determining what evidence shall be admitted and weighed by the jury, and what shall not be received at all, or, in other words, in distinguishing between competent and incompetent witnesses, a principle seems to have been applied similar to that which distinguishes between conclusive and disputable presumptions of law, namely, the experienced connection between the situation of the witness and the truth or falsity of his testimony. Thus, the law excludes as incompetent those persons whose evidence, in general, is found more likely than otherwise to mislead juries; receiving and weighing the testimony of others, and giving to it that degree of credit which it is found on examination to deserve. It is obviously impossible that any test of credibility can be infallible. All that can be done is to approximate to such a degree of certainty as will ordinarily meet the justice of the case. The question is not, whether any rule of exclusion may not sometimes shut out credible testimony; but whether it is expedient that there should be any rule of exclusion at all. If the purposes of justice require that the decision of causes should not be embarrassed by statements generally found to be deceptive, or totally false, there must be some rule designating the class of evidence to be excluded; and in this case, as in determining the ages of discretion, and of majority, and in deciding as to the liability of the wife for crimes committed in company with the husband, and in numerous other instances, the common law has merely followed the common experience of mankind. It rejects the testimony of parties; of persons deficient in understanding; of persons insensible to the obligations of an oath; and of persons whose pecuniary interest is directly involved in the matter in issue.

76. Sir Edward Coke. *Commentary upon Littleton* (1627). 6 *a.* [As to witnesses to a deed] sometimes, though rarely [objections were allowed], which being found true, they were not to be sworne at all, neither to be joined to the jury nor as witnesses; as, if the witness were infamous, . . . or if the witnesse be an infidell, or of non-sane memory, or not of discretion, or a partie interested, or the like.

77. Statutes.[2]

United States. *Revised Statutes* (1878), § 858. In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried; provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed

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[1] For the general principles of Logic and Psychology applicable to the classification of witnesses, see the present Compiler's "Principles of Judicial Proof" (1913), Nos. 163–252.

[2] These statutes cover sundry rules scattered through the ensuing topics. Cross-references will be found at various points.

to testify against the other, as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the Court. In all other respects, the laws of the State in which the Court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law and in equity and admiralty.

California.[1] *Code of Civil Procedure* (1872), § 1879. All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case the credibility of the witness may be drawn in question, as provided in section 1847.

Ib., § 1880. The following persons cannot be witnesses: 1. Those who are of unsound mind at the time of their production for examination. 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. 3. Parties or assignors of parties to an action or proceeding, or persons on behalf of whom an action or proceeding is prosecuted, against an executor or administrator upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person.

Ib., § 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: 1. A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.

Ib., § 1102. The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code.

Ib., § 1322. Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties.

Ib., § 1323. [If the accused] offer himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief; . . . his neglect or refusal to be a witness cannot in any manner prejudice him nor be used against him on the trial or proceeding.

Illinois. *Revised Statutes* (1874), c. 38, § 426. No person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his having been convicted of any crime, but such interest or conviction may be shown for the purpose of affecting his credibility; provided, however, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent

[1] The Code Commissioners' amendments of 1901 were held *unconstitutional and void* (on formal grounds affecting the Commissioners' authority), in Lewis *v.* Dunne, 134 Cal. 291, 66 Pac. 478; and have not been inserted here.

witness, and his neglect to testify shall not create any presumption against him, nor shall the Court permit any reference or comment to be made to or upon such neglect.

Ib., c. 38, § 491, *St. 1893, June* 17 and *St. 1901, May* 11, § 3. [The wife or husband is to be competent in any case against the other under the statute punishing abandonment of family] as to any and all matters relevant thereto, including the fact of such marriage and the parentage of such children.

Ib., c. 51, § 1. No person shall be disqualified as a witness in any civil action, suit, or proceeding, except as hereinafter stated, by reason of his or her interest in the event thereof, as a party or otherwise, or by reason of his or her conviction of any crime; but such interest or conviction may be shown for the purpose of affecting the credibility of such witness; and the fact of such conviction may be proven like any fact not of record, either by the witness himself (who shall be compelled to testify thereto) or by any other witness cognizant of such conviction, as impeaching testimony, or by any other competent evidence.

Ib., § 2. No party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any idiot, habitual drunkard, lunatic, or distracted person, or as the executor, administrator, heir, legatee, or devisee of any deceased person, or as guardian or trustee of any such heir, legatee, or devisee, unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely:—First. In any such event, suit, or proceeding, a party or interested person may testify to facts occurring after the death of such deceased person, or after the ward, heir, legatee, or devisee shall have attained his or her majority. Second. When, in such action, suit, or proceeding, any agent of any deceased person shall, in behalf of any person or persons suing or being sued, in either of the capacities above named, testify to any conversation or transaction between such agent and the opposite party or party in interest, such opposite party or party in interest may testify concerning the same conversation or transaction. Third. Where, in any such action, suit, or proceeding, any such party suing or defending, as aforesaid, or any person having a direct interest in the event of such action, suit, or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or party in interest, then such opposite party or party in interest shall also be permitted to testify as to the same conversation or transaction. Fourth. Where, in any such action, suit, or proceeding, any witness, not a party to the record, or not a party in interest, or not an agent of such deceased person, shall, in behalf of any party to such action, suit, or proceeding, testify to any conversation or admission by any adverse party or party in interest, occurring before the death and in the absence of such deceased person, such adverse party or party in interest may also testify as to the same admission or conversation. Fifth. Where, in any such action, suit, or proceeding, the deposition of such deceased person shall be read in evidence at the trial, any adverse party or party in interest may testify as to all matters and things testified to in such deposition by such deceased person, and not excluded for irrelevancy or incompetency.

Ib., § 4. In any action, suit, or proceeding, by or against any surviving partner or partners, joint contractor or contractors, no adverse party, or party adversely interested in the event thereof, shall, by virtue of section 1 of this Act,

be rendered a competent witness, to testify to any admission or conversation, by any deceased partner or joint contractor, unless some one or more of the surviving partners or joint contractors were also present at the time of such admission or conversation; and in every action, suit, or proceeding, a party to the same, who has contracted with an agent of the adverse party, the agent having since died, shall not be a competent witness, as to any conversation or transaction between himself and such agent, except where the conditions are such, that under the provisions of sections 2 and 3 of this Act, he would have been permitted to testify, if the deceased person had been a principal and not an agent; amended by St. 1899, April 24, by inserting after "such agent, the words," "unless such admission or conversation with the said deceased agent was had or made in the presence of a surviving agent or agents of such adverse party, and then only."

Ib., § 5. No husband or wife shall, by virtue of section 1 of this Act, be rendered competent to testify for or against each other as to any transaction or conversation, occurring during the marriage, whether called as a witness during the existence of the marriage, or after its dissolution, except in cases where the wife would, if unmarried, be plaintiff or defendant, or where the cause of action grows out of a personal wrong or injury done by one to the other or grows out of the neglect of the husband to furnish the wife with suitable support; and except in cases where the litigation shall be concerning the separate property of the wife, and suits for divorce; and except also in actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be injured or destroyed, or in actions against carriers, so far as relates to the loss of property and the amount and value thereof, or in all matters of business transactions where the transaction was had and conducted by such married woman as the agent of her husband, in all of which cases the husband and wife may testify for or against each other, in the same manner as other parties may, under the provisions of this act. Provided, that nothing in this section contained shall be construed to authorize or permit any such husband or wife to testify to any admissions or conversations of the other, whether made by him to her or by her to him, or by either to third persons, except in suits or causes between such husband and wife.

Massachusetts. *Revised Laws* (1902), c. 175, § 20. No person of sufficient understanding, whether a party or otherwise, shall be excluded from giving evidence in any proceeding, civil or criminal, in court, or before a person having authority to receive evidence, except in the following cases: First, neither husband nor wife shall be allowed to testify as to private conversations with each other; Second, neither husband nor wife shall be compelled to be a witness on any trial upon an indictment, complaint, or other criminal proceeding, against the other; Third, in the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, a person so charged shall at his own request, but not otherwise, be deemed a competent witness; and his neglect or refusal to testify shall not create any presumption against him.

Ib., § 21. The conviction of a witness of crime may be shown to affect his credibility.

New York. *Code of Civil Procedure* (1877), § 828. Except as otherwise specially prescribed in this title, a person shall not be excluded or excused from being a witness, by reason of his or her interest in the event of an action or special proceeding; or because he or she is a party thereto; or the husband or wife of a

party thereto, or of a person in whose behalf an action or special proceeding is brought, opposed, prosecuted, or defended.

Ib., § 829. Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through, or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator, or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through, or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator, survivor, committee, or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication. A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the proceeding or interested in the result thereof.

Ib., § 831. A husband or wife is not competent to testify against the other, upon the trial of an action, or the hearing upon the merits of a special proceeding, founded upon an allegation of adultery, except to prove the marriage or disprove the allegation of adultery. A husband or wife shall not be compelled, or, without the consent of the other if living, allowed to disclose a confidential communication made by one to the other during marriage. In an action for criminal conversation, the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant, as to any matter in controversy; except that she cannot, without the plaintiff's consent, disclose any confidential communication had or made between herself and the plaintiff.

Ib., § 832. A person, who has been convicted of a crime or misdemeanor, is, notwithstanding, a competent witness in a civil or criminal action or special proceeding; but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or by his cross-examination, upon which he must answer any question relevant to that inquiry; and the party cross-examining him is not included by that inquiry.

Ib., § 850. The Court or officer may examine an infant, or a person apparently of weak intellect, produced before it or him as a witness, to ascertain his capacity and the extent of his knowledge.

Penal Code (1881), § 715. The husband or wife of a person indicted or accused of a crime is in all cases a competent witness, on the examination or trial of such person; but neither husband nor wife can be compelled to disclose a confidential communication, made by one to the other during marriage.

Code of Criminal Procedure (1881), § 393. The defendant in all [criminal] cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him.

Laws (1876), c. 182, § 1. All persons jointly indicted shall, upon the trial of either, be competent witnesses for each other the same as if not included in the indictment.

Sub-topic A. Mental and Moral Incapacity

78.[1] Simon Greenleaf. *Evidence.* (1842, § 365). [*Insanity*]. It makes no difference from which cause this defect of understanding may have arisen; nor whether it be temporary and curable, or permanent; whether the party be hopelessly an idiot or maniac, or only occasionally insane, as a lunatic; or be intoxicated; or whether the defect arises from mere immaturity of intellect, as in the case of children. While the deficiency of understanding exists, be the cause of what nature soever, the person is not admissible to be sworn as a witness.

79. REGINA *v.* HILL

Crown Cases Reserved. 1851

2 *Den. & P.* 256

This prisoner was tried before Coleridge, J., assisted by Cresswell, J., at the February sittings of the Central Criminal Court, 1851, for the manslaughter of Moses James Barnes; he was convicted, but a question was reserved for the opinion of this Court, as to the propriety of having admitted a witness of the name of Richard Donelly, on the part of the prosecution.

The deceased and the witness were both lunatic patients in a Mr. Armstrong's Asylum, at Camberwell, at the time of the supposed injury, and they were, at that time, placed in a ward called the Infirmary. It appeared that a single sane attendant (the prisoner) had the charge of this ward, in which as many as nine patients slept, and that he was assisted by three of the patients, of whom the witness Donelly was one.[2] . . . The question for the opinion of this Court was, Whether Richard Donelly was a competent witness? This case was argued on the 3rd May, 1851. *Collier* appeared for the prisoner; Sir F. *Thesiger*, *Bodkin* and *Clarkson* for the Crown.

Collier. — The witness, Donelly, was non compos mentis in point of fact, according to the medical and legal authorities on that subject. It is a rule, that no person who is non compos mentis is admissible as a witness. There are reasons of public policy, as well as of convenience, against qualifying this rule. Even should the above rule be qualified, this case could not be brought within such qualification. . . . The authorities show that a non compos is inadmissible. (Com. Dig. tit. Testmoigne — Witness, A I). There are two heads of incompetency, to which all others may be referred: First, Want of sufficient under-

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[1] For the principles of Logic and Psychology as applicable to *Insanity* of a witness, see the present Compiler's "Principles of Judicial Proof" (1913), Nos. 191–195.

[2] The delusion of this witness is fully stated in the extract from this case in No. 194 of the present Compiler's "Principles of Judicial Proof" (1913). — ED.

standing to tell the truth; Secondly, Want of trustworthiness in a person of sufficient understanding. A non compos comes under the first head. Infidels, infamous persons, parties to the suit, etc., under the second. . . . Neither Comyn nor Buller [see N. P. 283 (a), 293] mention any qualification of the general proposition than an insane person is inadmissible, except "in lucidis intervallis," *i.e.*, when he is not insane at all; for in the matter of evidence no degrees of lunacy are recognized by the law. [Co. Lit. 6 (a); *Ibid.* 247 (a)]. . . . If it be said that this rule is too general, and that as the law recognizes degrees of lunacy with reference to other subjects, it should also recognize degrees in the matter of testimony; this broad distinction seems to exist in the very nature of things; viz., that it is comparatively easy to test madness with reference to a *past* act, but not so with reference to a *future* act. How can a Judge say whether a witness's whole evidence may not be based on delusion, or that the delusion will not come on while he is giving his evidence? Is every insane witness to be admissible, and his credit left to the jury? That is contrary to all the authorities. If not, what classes of insane persons are to be admitted? Monomaniacs only? What is monomania? Its existence is denied by some medical writers. It seems, therefore, that as soon as the unsoundness of mind is manifested, the inquiry should stop, otherwise the Judge would have to perform the almost impossible task of determining the precise nature and extent of the insanity, and whether it will affect the evidence of the witness at any period of the trial, and under any circumstances that may take place during its progress.

Lord Campbell, C. J. — You admit that it is for the Judge to decide. You must, therefore, go the length of saying, that the Judge is bound to disallow the testimony of any person who is under any insane delusion. In a case tried before Parke, B., it was held that it was for the Judge to decide the question of competency, and for the jury to decide the question of credibility. . . .

Sir F. *Thesiger* was not called upon.

Lord Campbell, C. J. — The question is important, and has not yet been solemnly decided after argument. But I have no doubt that the rule was properly laid down by Parke, B., in the case which was tried before him, and that it is for the Judge to say whether the insane person has the sense of religion in his mind, and whether he understands the nature and sanction of an oath; and then the jury are to decide on the credibility and weight of his evidence. . . . It has been argued that any particular delusion, commonly called monomania, makes a man inadmissible. This would be extremely inconvenient in many cases in the proof either of guilt or innocence: it might also cause serious difficulties in the management of lunatic asylums. I am, therefore, of opinion that the Judge must, in all such cases, determine the competency, and the jury the credibility. Before he is sworn, the insane person may be cross-examined, and witnesses called to prove circum-

stances which might show him inadmissible. But, in the absence of such proof, he is prima facie admissible, and the jury must attach what weight they think fit to his testimony. . . .

COLERIDGE, J. — Mr. *Collier* has referred to several dicta in which the rule is stated without any qualification; but in those cases no qualification was needed. In old times, too, the rules of evidence were much narrower than at present, and more in accordance with those of the Civil and Canon Laws. In this case the evidence showed that the insane person had only a single delusion; as to memory he was like other people; and with regard to the obligation of an oath he was unusually well instructed. Prima facie, therefore, he was quite fit to be sworn. If, however, in the course of the trial, he showed his evidence to be tainted with insanity, then the jury should have attached no weight to it.

PLATT, B., concurred.

TALFOURD, J. — It would be very disastrous if mere delusions were held to exclude a witness. Some of the greatest and wisest of mankind have had particular delusions.

Lord CAMPBELL, C. J. — The rule which has been contended for would have excluded the testimony of Socrates, for he had one spirit always prompting him.

80. WORTHINGTON *v.* MERCER (1892. Alabama. 96 Ala. 310, 11 So. 72). WALKER, J. One's infirmity may be such as to render it expedient to place him under guardianship, and even to subject him to personal restraints, and yet he may be fully competent to understand the nature of an oath, to observe facts correctly, and to relate them intelligently and truly. A sweeping rule of disqualification which excludes such a person as a witness would be arbitrary and unsupported by sound reason. The true reason for not admitting the testimony of a person *non compos mentis* in any case is because his malady involves such a want or impairment of faculty that events are not correctly impressed on his mind, or are not retained in his memory, or that he does not understand his responsibility as a witness. When the reason for the exclusion of the witness does not exist, he should be permitted to testify.

81. STATUTES. [Printed *ante*, as No. 77]

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82. REX *v.* BRASIER

CROWN CASES RESERVED. 1779

1 *Leach Cr. L. 4th ed.*, 199

THIS was a case reserved for the opinion of the twelve Judges by Mr. Justice BULLER, at the Spring Assizes for Reading, in the year 1779, on the trial of an indictment for an assault with intent to commit a rape on the body of Mary Harris, an infant under seven years of age. . . .

The judges assembled at Serjeants'-Inn Hall, 29th April, 1779, were unanimously of opinion, that no testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath, for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take an oath, their testimony cannot be received.[1]

83. HUGHES *v.* R. CO.

SUPREME COURT OF MICHIGAN, 1887

65 *Mich.* 10

[Printed *post*, under *Oath*, No. 482]

84. WHEELER *v.* UNITED STATES. (1895. Federal Supreme Court. 159 U. S. 523, 16 Sup. 93). BREWER, J. The decision of this question [of a child's competency] rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review, unless from that which is preserved it is clear that it was erroneous.

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85. BROWN *v.* CRASHAW

KING'S BENCH, 1614

2 *Bulstr.* 154

IN a prohibition, upon a supposed modus decimandi, *Yelverton*, Solicitor, moved the Court, for a consultation to be granted, for that the plaintiff in the prohibition, had not sufficiently proved his suggestion, the same being only proved by him, by two persons, which were both of them attainted of felony, and so could be no good and sufficient witnesses in law.

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[1] For the principles of Psychology applicable to the testimony of a *Child*, see the present Compiler's "Principles of Judicial Proof" (1913), Nos. 174–181.

COKE, Chief Justice. — It appears by 11 H. IV, fol. 41b, that if one be attainted of felony, and pardoned, he shall not afterwards be sworn of a jury, for that he is not "probus et legalis homo," for "poena mori potest, culpa perennis erit," and therefore such an one shall not be sworn of an inquest; and this is a good challenge to a juror returned to serve, that he hath been before attainted of felony, and though pardoned for the same, yet he is not a fit person to serve of a jury, nor yet to be an indifferent witness. . . . And in this principal case, upon examination, it was found, that the two witnesses, which proved the suggestion for the prohibition, had been attainted of felony, and therefore, by the rule of the Court, the prohibition was disallowed (the suggestion being unduly proved), and a consultation was granted.[1]

86. *Chief Baron* GILBERT. *Evidence.* (*ante* 1727. p. 139). The second sort of persons excluded from testimony for want of integrity are such as are stigmatized. Now there are several crimes that so blemish that the party is ever afterwards unfit to be a witness. . . . And the reason is very plain, because every plain and honest man affirming the truth of any matter under the sanction and solemnity of an oath is entitled to faith and credit, . . . but where a man is convicted of falsehood and other crimes against the common principles of honesty and humanity, his oath is of no weight, because he hath not the credit of a witness, . . . and he is rather to be intended as a man profligate and abandoned than one under the sentiments and convictions of those principles that teach probity and veracity.

87. SIMON GREENLEAF. *Evidence.* (1842. §§ 373–378). It is a point of no small difficulty to determine precisely the crimes which require the perpetrator thus infamous. The rule is justly stated to require, that the "publicum judicium" must be upon an offence, implying such a dereliction of moral principles, as carries with it a conclusion of a total disregard to the obligation of an oath.' But the difficulty lies in the specification of those offences. The usual and more general enumeration is, *treason*, *felony*, and the *crimen falsi*. In regard to the two former, as all treasons, and almost all felonies were punishable with death, it was very natural that crimes, deemed of so grave a character as to render the offender unworthy to live, should be considered as rendering him unworthy of belief in a Court of Justice. But the extent and meaning of the term, "crimen falsi," in our law, is nowhere laid down with precision. In the Roman Law, from which we have borrowed the term, it included not only forgery, but every species of fraud and deceit. If the offence did not fall under any other head it was called "stellionatus," which included "all kinds of cozenage and knavish practice in bargaining." But it is clear, that the Common Law has not employed the term in this extensive sense, when applying it to the disqualification of witnesses; because convictions for many offences, clearly belonging to the *crimen falsi* of the civilians, have not this effect. Of this sort are deceits in the quality of provisions, deceits by false weights and measures, conspiracy to

[1] For the principles of Psychology applicable to the *Infamous Moral Character* of a witness, see the present Compiler's "Principles of Judicial Proof" (1913), Nos. 196–202.

defraud by spreading false news, and several others. On the other hand, it has been adjudged, that persons are rendered infamous, and therefore incompetent to testify, by having been convicted of forgery, perjury, subornation of perjury, suppression of testimony by bribery, or conspiracy to procure the absence of a witness, or other conspiracy, to accuse one of a crime and barratry. And from these decisions it may be deduced, that the "crimen falsi" of the Common Law not only involves the charge of falsehood, but also is one which may injuriously affect the administration of justice, by the introduction of falsehood and fraud. . . .

We have already remarked, that no person is deemed infamous in law, until he has been legally found guilty of an infamous crime. But the mere verdict of a Jury is not sufficient for this purpose; for it may be set aside, or the judgment may be arrested, on motion for that purpose. It is *the judgment*, and that only, which is received as the legal and conclusive evidence of the party's guilt, for the purpose of rendering him incompetent to testify. And it must appear that the judgment was rendered by a Court of competent jurisdiction. Judgment of outlawry for treason or felony will have the same effect; for the party, in submitting to an outlawry, virtually confesses his guilt; and so the record is equivalent to a judgment upon confession. If the guilt of the party should be shown by oral evidence, and even by his own admission (though in neither of these modes can it be proved, if the evidence be objected to), or, by his plea of guilty, which has not been followed by a judgment, the proof does not go to the competency of the witness, however it may affect his credibility.

The disability thus arising from infamy may, in general, be removed in two modes; (1) by reversal of the judgment; (2) by a pardon; [and (3) by serving the sentence].

88. SIMS *v.* SIMS

COURT OF APPEALS OF NEW YORK. 1878

75 *N. Y.* 466

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 12 Hun 231.) This action was brought upon a contract for the sale of a steam tug. The facts material to the point discussed appear sufficiently in the opinion.

A. G. Rice, for appellant. The defendant could not be rendered incompetent to testify by proof of a record of conviction of a felony in another State. .

John C. Strong, for respondent.

RAPALLO, J. The only exception necessary to be considered, is that taken to the exclusion of the question to the defendant while on the stand, whether he was guilty of the offense of which he had been convicted in the State of Ohio thirty-five years previously. . . . The plaintiff, after having given oral evidence, by the cross-examination of the defendant, of his conviction in Ohio in 1839 of the offense of having counterfeit money in his possession, put in evidence the record of conviction.

. . . 1. The first point of inquiry is whether this conviction in Ohio rendered the defendant incompetent to be a witness in the courts of this State. . . . The Revised Statutes provide (2 R. S. 701, § 23) that no person sentenced upon a conviction for felony shall be competent to testify in any cause, etc., unless pardoned by the Governor or Legislature, except in the cases specially provided by law; but that no sentence upon a conviction for any offense other than a felony, shall disqualify or render any person incompetent to be sworn or to testify, etc. The same statute in a subsequent section (p. 702, § 30) defines the term felony, when used in that act or in any other statute, to mean an offense for which the convict is liable, by law to be punished by death or by imprisonment in a State prison. I think it quite clear that the disqualification created by this statute is consequent only upon a conviction in this State. It is found in that part of the Revised Statutes which relates to crimes and their punishment, and is in the nature of an additional penalty consequent upon the sentence. Although the disqualification incidentally affects parties in civil litigations wherein the testimony of the convict may be material, and serves as a protection to those against whom his testimony may be sought to be used, yet the provisions which inflict it must be regarded as a part of the criminal law of this State. Furthermore, the provisions requiring that the offense be a felony, and defining the term felony as used in that act, indicate that the conviction referred to, is a conviction had within this State. Though petty larceny was a felony at common law, it has been held that a conviction of that offense does not constitute a disqualification in this State, but the offense must be a felony as defined in the statute above cited. (Carpenter *v.* Nixon, 5 Hill 260; Shay *v.* The People, 22 N. Y. 317.) Crimes might be felonies in other States, which did not fall within our statutory definition.

It was not shown that according to the laws of the State of Ohio, a person convicted of the offense of which this party was convicted, was incompetent to be a witness. But if this fact had been shown, or could be presumed, it could make no difference. There is some conflict of authority on this point. In Chase *v.* Blodgett, 10 N. H. 24, and State *v.* Chandler, 3 Hawks 393, it was held that one convicted in another State of an offense conviction of which rendered him incompetent in the State where convicted, and would have had the same effect in the State where he was offered as a witness had he been convicted there, was also disqualified in the latter State. But in Commonwealth *v.* Green, 17 Mass. 515, the contrary was held. The case last referred to rests upon the ground that the disqualification is in the nature of an additional penalty, following and resulting from the conviction, and cannot extend beyond the territorial limits of the State where the judgment was pronounced; that the constitutional provision requiring that full faith and credit be given to the records, etc., of other States does not require that the same effect be given to them as in the State where

rendered, as it was left to Congress to prescribe their effect, and also that this constitutional provision does not apply, and is not in its nature applicable, to criminal proceedings.

In the New Hampshire and North Carolina cases referred to (10 N. H. 22, and 3 Hawks 393), this argument is met by the contention that it is the crime and not the judgment which incapacitates the witness, and that the incapacity is not prescribed as a punishment for the crime, but because by the commission of it the criminal has shown himself a person unfit to be trusted to give testimony affecting the rights of others; that the judgment is required only for the purpose of establishing the fact of the crime by conclusive evidence, and that the constitutional provision requires that the same credit be given in every State to the judgment of a sister State to which it is entitled in the State where rendered. Assuming that this constitutional provision applies to convictions for crimes (which is denied in the Massachusetts case) the answer to the position stated is twofold. First, that whatever reason may lie at the foundation of the law, the law is that the sentence, and not merely the commission of the crime, disqualifies the witness. The crime may be admitted or proved ever so conclusively, even by record, without having that effect. A judgment rendered in a civil action to which plaintiff, defendant, and witness were all parties, finding the witness guilty of forgery, grand larceny, or any other felony, would not disqualify. Such a record might exist, as in cases of justification of libel, actions to cancel forged instruments, etc. The disability to testify can only follow conviction and sentence in a prosecution for the crime. Secondly, a record of conviction for a crime, is not conclusive evidence in a civil action, of the facts upon which it was based. . . .

2. This brings us to the second branch of the case. . . . Error has occurred in the present case. The judgment should be reversed and a new trial ordered, costs to abide the event.

All concur except MILLER and EARL, JJ., absent.

Judgment reversed.

89. STATUTES. [Printed *ante*, as No. 77]

90. VANCE *v.* STATE. (1902. Arkansas. 70 Ark. 272, 68 S. W. 37). RIDDICK, J. We take this occasion to call attention to the backward state of the law in this State in reference to the competency of witnesses convicted of felony. The statutes which render such witnesses incompetent belong to a class of antiquated laws which suppress evidence, and which the wisdom of modern ages has discredited and shown to be unreasonable and injurious. They are of the same class as the laws which formerly forbade the parties to the suit from testifying, and closed the mouth of the defendant on trial for his life, and should be repealed, as these laws have been repealed, for such matters should go only to the credit or impeachment of the witness, not to the exclusion of his testimony. There is no valid reason why a person who knows anything material to the decision of a case on trial should not be permitted to tell it, whatever may his character, the jury being allowed to weigh his testimony in connection with his character and

antecedents. These statutes not only suppress evidence, but the application of them often presents difficult and doubtful questions, which, being decided in the hurry of trial, frequently results on appeal in reversals, and in this way justice is often thwarted. There are very few States that now retain such laws and we think our legislators might well consider whether they should not be repealed in this State also.

Sub-topic B. Emotional Incapacity [1]

(1) *Interest in Litigation*

91. *Sir* Edward Coke. *Commentary upon Littleton.* (1629. fol. 6 *b*). It was also agreed, by the whole Court, that in an information upon the statute of usury, the party to the usurious contract shall not be admitted to be a witness against the usurer, for in effect he should be "testis in propria causa," and should avoid his own bonds and assurances, and discharge himself of the money borrowed. . . . And herewith in effect agreeth Britton, that he that challengeth a right in the thing in demand cannot be a witness, for that he is a party in interest.

92. Simon Greenleaf. *Evidence,* §§ 328*b*, 333*b*; Addenda by John H. Wigmore (16th ed., 1899). *Interest,* in general, as a Disqualification. At common law, the most important, because most extensive, ground of incapacity was that supposed inclination to falsify which arose from the prospect of gaining or losing by the issue of the proceedings. The circumstance creating this incapacity was known as Interest; and the theory was that "from the nature of human passions and actions there is more reason to distrust such a biased testimony than to believe it." (Gilbert, Evidence, 119.) This theory and policy was, up to the latter part of the eighteenth century, not at all out of harmony with the moral and emotional notions of the time; and in certain regions of our own country it is perhaps still not thought unnatural. It is consistent with any state of society in which violent partisanship colors the whole mental and moral attitude of the man. But with the social changes of the eighteenth century, this policy gradually became incongruous, and by the beginning of the nineteenth century, the Courts had already shown disfavor to it, and the community was ready to perceive this incongruity. The rigors of its application had already been mitigated by numerous exceptions and evasions; but these only served to illustrate the general unsoundness and impolicy of the principle as a whole. The powerful sarcasm of Jeremy Bentham mercilessly exposed its inconsistencies and its fallacies (Rationale of Judicial Evidence, B. ix, pt. iii, c. iii, Bowring's ed., vol. vii, 393). Bentham's doctrines were given currency in this country by the work on Evidence of Chief Justice Appleton, of Maine (see cc. i and iv therein); and by his works, during the first quarter of the nineteenth century, an opinion was created which before long, under the efforts of Lord Brougham and others, took shape in legislation. In 1843 (St. 6–7 Vict., c. 85.) the general rule of disqualification by reason of interest was abolished in England; and the first statute (Rev. St. 1846, c. 102, Sec. 99.) of the same sort seems to have been enacted in this country in Michigan in 1846; to be followed within two or three decades

[1] For the principles of Psychology here applicable, see the present Compiler's "Principles of Judicial Proof" (1913), Nos. 203–216.

by the remaining jurisdictions. The mass of detailed rules and exceptions depending upon this principle have therefore ceased to be law; and in spite of the continued existence of remnants of the old policy (now to be mentioned), the decisions dealing with interest in general have ceased to be of direct bearing, except in a few respects, and are even for that purpose rarely referred to by the Courts of to-day.

But the abolition of this source of incompetency was not completed at once; nor has complete abolition yet been reached, except in a few jurisdictions. . . . There still remains the disqualification for *survivors of a transaction with a deceased person*. In almost every jurisdiction in this country, by statutes enacted in connection with or shortly after the statute removing the disqualification of parties and of interested persons in general, an exception was carved out of the old disqualification and allowed to perpetuate its principle within a limited scope. The theory of the original disqualification was that persons interested were likely to bear false witness; the reasons for abolition were in brief (1) that this was true to a limited extent only, (2) that, even if true, yet, so far as they did not testify falsely, the hardship of exclusion was intolerable, (3) that, in any case, the test of cross-examination and the other processes of investigation would with fair certainty expose falsehood; (4) that no exclusion could be so defined as to be simple, consistent, and workable. The reformers in this country did not accept these arguments to their fullest extent; and they preferred to maintain the disqualification for the situation in which it seemed to them that the means of refuting a false claim would be wanting, i.e., a claim by one whose adversary was deceased; since, in the vague metaphor often invoked by way of a reason, "if death has closed the lips of the one party, the policy of the law is to close the lips of the other."

This exception is wholly a creation of statute; for as all interested persons were excluded at common law, the whole embraced a part, and there was no occasion to define the terms of any such partial exclusion. . . . It is enough here to note two lines of distinction between the various statutes, viz., (*a*) some exclude only parties to the cause, while the others exclude any person interested in the issue; (*b*) some exclude only testimony to a specific transaction or communication with the deceased person, while the others exclude the disqualified persons from testifying at all in the cause.

As a matter of policy, this survival of the now discarded interest-disqualification is deplorable in every respect; for it is based on a fallacious and exploded principle, it leads to as much or more injustice than it prevents, and it encumbers the profession with a mass of barren quibbles over the interpretation of mere words.

93. Statutes. [Printed *ante*, in No. 77]

94. LOUIS' ADMINISTRATOR *v.* EASTON

Supreme Court of Alabama. 1874

50 *Ala.* 470

Appeal from the Circuit Court of Greene. Tried before the Hon. L. R. Smith. This action was brought by William C. Easton, against

Thomas C. Clark, as the administrator of the estate of John Louis, deceased; and was founded on an account for goods sold and delivered to said John Louis in his lifetime by the firm of Paschal & Foster, who transferred said account to the firm of Easton, Wymans & Co., by whom it was transferred to the plaintiff. The account was contracted between the 30th July, 1866, and the 29th March, 1867; and the action was commenced on the 4th February, 1870. The defendant pleaded, "in short by consent — 1st, that he denies that the money claimed is the property of the plaintiff; 2d, that the said John Louis owed the money at the time of his death; 3d, the statute of limitations of three years, which is a bar to open accounts"; and issue was joined on these pleas.

On the trial, as the bill of exceptions states, the plaintiff offered W. M. Paschal as a witness, "to prove the correctness of the account sued on, and that the same was just and unpaid." Objection being made as to the competency of this witness, he testified, on his voir dire, "as to his interest in said account, that he, for the firm of Paschal & Foster, transferred said account to Messrs. Morgan & Jolly, as attorneys of Easton, Wymans & Co., in the lifetime of said John Louis, in payment of a claim which Paschal & Foster owed to them, and which had been sent to said attorneys for collection; and that he now had no interest in said account." The Court thereupon overruled the objection to the competency of said witness, and allowed him to testify, as proposed, to the sale of the goods, the correctness of the account, its transfer by delivery, during the lifetime of said John Louis, to said Morgan & Jolly as attorneys for Easton, Wymans & Co.; and further, that said Louis acknowledged the correctness of the account to him, and offered to give his note for the amount. The defendant reserved an exception to the overruling of his objection to the competency of said witness, and also to the admission of his testimony; and he now assigns these matters as error.

J. B. & T. C. Clark, for appellant. *Morgan & Jolly*, contra.

Brickell, J. The only objection to the competency of witnesses, in civil proceedings, allowed by the statute, is, "that in suits or proceedings by or against executors or administrators (as to which a different rule is not made by the laws of this State), neither party shall be allowed to testify against the other, as to any transaction with, or statement by the testator or intestate, unless called to testify thereto by the opposite party." R. C. § 2704. At common law, the transferror of a chose in action was not a competent witness for his transferee to support the claim transferred. This rule of exclusion was not founded on the ground that the transferror had an interest in the event of the suit, but on reasons of public policy; and no release could remove the objection. Houston *v.* Prewitt, 8 Ala. 846; Clifton *v.* Sharpe, 15 Ala. 618. This rule of the common law was carried into and formed section 2290 of the Code of 1852. The reason assigned for the rule was, that it would let in the evils of champerty and maintenance, and would operate

as an evasion of the rule excluding as witnesses those having a direct and immediate interest in the suit. A party to a contract, finding he had not legal evidence to sustain an action on it, could render himself competent by a transfer to another, while the lips of his adversary were sealed by an inflexible rule of law. The law can never permit indirection, or evasion, to accomplish that which is not capable of being accomplished directly. It was not material that, in the particular case, the transfer was made in good faith, and for a valuable consideration; the evils to be avoided were in some degree the same, and the rule was applied.

The same reasons induce us to hold, that the transferror of a chose in action, on which, if no transfer had been made, suit must have been brought in his name, cannot render himself a competent witness against an executor or administrator under the statute of this State. He may not be within the letter, but he is within the spirit and policy of the statute. The object of the statute is to extend to each party the right and privilege of testifying. This right and privilege must be mutual. It cannot exist in the one party, and not in the other. If death has closed the lips of the one party, the policy of the law is to close the lips of the other. In all actions on contracts for the payment of money, whether express or implied, which must, under our system, be instituted in the name of the party having the beneficial interest, the policy of the statute would be defeated, if, by the machinery of a transfer, the party with whom the contract was made could render himself a competent witness against his deceased adversary. Nor can we think the fact that the transfer was made before the death of the party supposed to be bound by the contract varies the rule. His death destroys the mutuality the statute intends to preserve, and an advantage would thereby accrue to the party suing on the contract, which the statute guards against. . . . The witness Paschal was one of the transferrors, from whom the appellee derived his right of suit. He was called to testify as to the intestate's admission of the correctness of the account, and as to his purchases of the goods charged in the account. He was not a competent witness for this purpose, and the objection of appellant to his admission as a witness and to his evidence should have been sustained. The judgment is reversed, and the cause remanded.

Peters, C. J. (dissenting). — I am compelled respectfully to dissent from the opinion of a majority of the Court in this case, and its judgment. I think that the construction of the statute brought in question is incorrectly made. The enactment referred to is very clearly intended to remove all objection to a witness on account of interest merely. This overturns the old rule of exclusion on account of interest, in every case, except one only. The language of the Code is this: "In suits and proceedings before any Court or officer, other than criminal cases, *there must be no exclusion of any witness*, because he is *a party or interested* in the issue to be tried." Rev. Code, § 2704. This is the new rule.

To this there is *one* exception, and *only one*. This is expressed in definite and precise words. O'Neal *v.* Reynolds, 42 Ala. 197. It is precisely defined; and expressed with equal clearness, as the general rule. It is thus stated: "Except that, in suits or proceedings *by* or *against* executors or administrators, neither *party* shall be allowed to testify against the other, *as to any transaction with,* or *statement by* the testator or intestate, unless called to testify thereto by the opposite party." Rev. Code, § 2704; Jeffries *v.* Avary, at the January Term, 1873. The witness excluded under the exception is only the "party to the suit." This description does not include a transferror or assignor of a promissory note, or verbal contract, or an account. . . . The Legislature made but one single exception, which could not have been marked out by language of greater clearness. . . . To extend the particular identification of the person named, and thus let in others not named, seems to me against principle, and an unauthorized judicial interference with clear legislative expression. The law, before the statute, allowed a transferror or assignor to be made competent by a release. 1 Greenleaf, Evidence, § 426; but see Houston *v.* Prewitt, 8 Ala. 846; Brown *v.* Brown, 5 Ala. 508. . . . The witness offered in this case, being a mere transferror of the claim in suit, and not a party to the record, is not such a person as is excluded by the exception named in the Code. He was, therefore, properly allowed to testify for the plaintiff. . . . The judgment of the Court below should be affirmed.

95. ST. JOHN *v.* LOFLAND

SUPREME COURT OF NORTH DAKOTA. 1895

5 *N. D.* 140; 64 *N. W.* 730

APPEAL from District Court, Steele County; MCCONNELL, J. Action by Sidney S. St. John, administrator of Albert C. St. John, against John F. Lofland. Judgment for defendant, and plaintiff appeals. Affirmed. The action was to foreclose a mortgage given to secure a promissory note. The note and mortgage were executed by defendant. The consideration for the note was the sale to defendant by Lydia B. St. John, as administratrix of the estate of Albert C. St. John, of certain personal property, constituting a portion of the assets of such estate. The note and mortgage were both executed to such administratrix. Subsequently she died, and the plaintiff was appointed administrator of the estate in her place. The defense to the action is payment. To prove it, the defendant himself testified that he paid the note and mortgage to Lydia B. St. John, as administratrix during her lifetime. This evidence was objected to as incompetent, under the provisions of Comp. Laws, § 5260. The objection was overruled, and the plaintiff excepted. The Court having found on this evidence that the debt had been paid,

judgment was rendered for the defendant. From this judgment the plaintiff appealed.

George Murray, for appellant, contended that § 5260, Comp. Laws, extended its operation to transactions with the deceased as administratrix. . . .

F. W. Ames, for respondent. . . .

CORLISS, J. (after stating the case as above). The decision of this case will turn upon the construction of Comp. Laws, § 5260. We think that the evidence was competent. The section referred to (5260) reads as follows:

"No person offered as a witness in any action or special proceeding, in any court, or before any officer or person having authority to examine witnesses, or hear evidence, shall be excluded or excused, by reason of such person's interest in the event of the action or special proceeding; or because such person is a party thereto; or because such person is a husband or wife of a party thereto, or of any person in whose behalf such action or special proceeding is brought, opposed or defended, except as hereinafter provided: . . . (2) In civil actions or proceedings by or against executors, administrators, heirs at law, or next of kin, in which judgment may be rendered or ordered entered, for or against them, neither party shall be allowed to testify against the other, as to any transactions whatever with, or statement by, the testator or intestate, unless called to testify thereto by the opposite party. But if the testimony of a party to the action or proceeding has been taken, and he shall afterwards die, and after his death the testimony so taken shall be used upon any trial or hearing in behalf of his executors, administrators, heirs at law, or next of kin, then the other party shall be a competent witness, as to any and all matters to which the testimony so taken relates."

The extent to which this statute seals the lips of a party is with regard to "any transaction with or statement by the testator or intestate." The definite article "the" makes it certain that the testator or intestate referred to is the one whose executor or administrator is the party to the suit, and not any testator or intestate with whom the transaction has been had or by whom the statement has been made. But we are urged to broaden this statute by interpretation, on the theory that its true spirit demands an expansion of its literal meaning. If we were to do this, we must, if we would be logical and consistent, continue in the same line; and hence we would be compelled to hold that a transaction with a deceased agent was within the statute, for in that case, as in this, the surviving party would have the advantage of testifying without the possibility of his evidence being contradicted. So, where one of two partners had died, and the survivor, who, so far as the partnership assets are concerned, occupies a position very similar to that occupied by an administrator, should sue on a partnership claim, we would have to hold that a debtor of the firm could not in such action by the surviving partner swear to a payment made by him to the deceased partner in his lifetime. This so-called "spirit" of the statute would embrace such a case also. So far as a transaction with a deceased agent

is concerned, there is express authority for the doctrine that, under such a statute as ours, the transaction may be proved by the testimony of the debtor. Voss *v.* King (W. Va.), 10 S. E. 402.

This whole argument that the letter of this law should be expanded to the dimensions of the spirit of the statute rests on a false assumption as to the spirit of this legislation. The general policy of the section is to make all persons competent witnesses. So far as the question of the extent of the limitations of that policy is concerned, the only way we can ascertain the scope of this limitation is by looking to the language in which that limitation is expressed. We cannot look beyond the language. We cannot say that it was the purpose of the Legislature to exclude *all* evidence merely because the witness from whose lips it might fall would enjoy the advantage of testifying to a transaction with a deceased person, who on that account could not confront and contradict him. Statutes which exclude testimony on this ground are of doubtful expediency. There are more honest claims defeated by them, by destroying the evidence to prove such claim, than there would be fictitious claims established if all such enactments were swept away and all persons rendered competent witnesses. To assume that in that event many false claims would be established by perjury is to place an extremely low estimate on human nature, and a very high estimate on human ingenuity and adroitness. He who possesses no evidence to prove his case save that which such a statute declares incompetent is remediless. But those against whom a dishonest demand is made are not left utterly unprotected because death has sealed the lips of the only person who can contradict the survivor, who supports his claim with his oath. In the legal armory, there is a weapon whose repeated thrusts he will find is difficult, and in many cases impossible, to parry if his testimony is a tissue of falsehoods, — the sword of cross-examination. For these reasons, which lie on the very surface of this question of policy, we regard it as a sound rule to be applied in the construction of statutes of the character of the one whose interpretation is here involved, that they should not be extended beyond their letter when the effect of such extension will be to add to the list of those whom the act renders incompetent as witnesses.

There is ample authority for our ruling in the case. The decision of the Court in Palmateer *v.* Tilton (N. J. Err. & App.), 5 Atl. 105, is directly in point. . . . In fact practically the whole drift of the adjudications is along the line of construction which we follow. . . . The case of Waldman *v.* Crommelin, 46 Ala. 580, is undoubtedly an authority for plaintiff, but we do not regard it as sound, and it stands alone. The Illinois cases cannot be classed with it, as they were decided under a statute radically different from § 5260, — a statute so broad as to render a party incompetent from testifying in his own behalf as to any fact in a suit in which the adverse party is an executor, administrator, etc. Under such a statute, no question relating to a personal transaction could

possibly arise. See Boynton *v.* Phelps, 52 Ill. 210; Whitner *v.* Rucker, 71 Ill. 410; Redden *v.* Inman, 6 Ill. App. 55. Even if these cases supported the plaintiff's contention, we should adhere to the views we have expressed.

The judgment of the District Court is affirmed. All concur.

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96. ROSS *v.* DEMOSS

SUPREME COURT OF ILLINOIS. 1867

45 *Ill.* 447

WRIT of Error to the Circuit Court of Livingston County; the Hon. CHARLES R. STARR, Judge, presiding. This was a suit in equity, brought by Alexander Demoss, in the Livingston Circuit Court, against Riley Ross, Margaret Wood, Daniel J. Wood, and Benjamin W. Gray, to have a mortgage satisfied, and the lands reconveyed to complainant. It appeared that defendant in error, in April, 1858, executed a mortgage with a power of sale, to secure to William Ross $68, on forty acres of land. That subsequently, in September of the same year, to secure the further sum of $300, defendant in error executed a mortgage on another tract of land, containing seventy-five acres, to William Ross, with power of sale. That in the month of October, 1859, Ross advertised and sold the land, and Riley Ross, his son, became the purchaser; that in the following January, Riley Ross reconveyed the lands to his father, for the expressed consideration of $365, and a few cents; that William Ross died in the month of September, 1860, intestate, leaving Riley Ross and Margaret Wood, who was the wife of Daniel J. Wood, his heirs; and that Gray subsequently became the administrator of his estate. It was alleged in the bill, that the sale by Ross was not intended to be a foreclosure of these mortgages, but that it was at the time agreed that defendant in error should have further time to pay and redeem the lands; and that all of the money for which the mortgages were given had been fully paid.

Mr. *Charles J. Beattie*, and Messrs. *Dickey & Rice*, for the plaintiffs in error. Messrs. *Fleming & Pillsbury*, for the defendant in error.

Mr. Justice LAWRENCE (after stating the case as above). On the trial below, the evidence was conflicting, but it seems to preponderate in favor of the decree.

The weight of the evidence of Garner is somewhat impaired from the fact, that he was proved to have been one of the attorneys in the case, and had a conditional fee, dependent on the result of the suit. It is of doubtful professional propriety for an attorney to become a witness for his client, without first entirely withdrawing from any further connection with the case; and an attorney occupying the attitude of both witness and attorney for his client subjects his testimony to criticism

if not suspicion; but where the half of a valuable farm depends upon his evidence, he places himself in an unprofessional position, and must not be surprised if his evidence is impaired. While the profession is an honorable one, its members should not forget that even they may so act as to lose public confidence and general respect.

In so much conflict in testimony, it is hard to determine with absolute certainty as to what is proved. But, upon a careful examination of all that is in the record, we are strongly impressed with the belief that the weight is decidedly in favor of the continuance of the mortgage and its ultimate payment by defendant in error. . . . In such a conflict the only course is to reject such portion as seems to be unworthy of belief. The circuit judge has better means of determining which class of witnesses are the most worthy of credit, than we possess. In this case he has given credit to the testimony of the witnesses of defendant in error, and we are unable to see that he erred in that conclusion. The decree of the court below must be affirmed. Decree affirmed.

97. ANON. (1848. 5 Western Law Journal 457). *The Attorney as a Witness.* The attorney's exclusion should rest on peculiar grounds. He should be rejected, not for the protection of the opposite party, but for his own; not because his integrity may be exposed to temptation, but because it will be exposed to suspicion. Let us consider for a moment the relation which he appears to sustain toward the party he represents. . . . He is paid for the knowledge, industry, talent, and zeal he may exert in the cause. Though his compensation depends on no contingency of success or failure, yet he feels entitled to charge, and his client feels disposed to pay, a higher fee when the cause terminates successfully. His sympathy for a losing client induces him to abate the amount of his charge, and he feels that a fortunate litigant can compensate him more liberally. There are cases, too, in which, from the inability of his client, he must receive nothing, if the case is determined against him. . . . He is perhaps ardent to prevail for the sake of victory. Reputation is greatly enhanced by success. The vulgar generally applaud the winning lawyer, as the winning horse, and have no better criterion of ability than the event of a suit. The successful termination of a case, especially a doubtful one, often attracts other business. In whatever degree some minds may be influenced by such motives, there is no advocate wholly indifferent to the prestige which attends victory. The lawyer who approaches a jury to sustain a case by his testimony, and to advocate it by his eloquence, places himself in an indecent position. Paid for the ability he may exert in obtaining success, deceived by a partial knowledge of the facts, and ardent to win, his testimony must be viewed with distrust. His statement, though perfectly reliable under other circumstances, is received with suspicion by the jury, generally consisting of men whose limited education and position in life give them no enlarged views of things, and no elevated opinion of human nature. The incompetency of the attorney, therefore, need not be placed on the probability of the falsehood of his testimony. He should not be suffered by the Court to place himself in a position that may lessen his character, or diminish the confidence of men in the purity of the administration of justice.

(2) *Marital Relationship*

98. *Sir* Edward Coke. *Commentary upon Littleton.* (1628. fol. 6 *b*). It hath been resolved by the justices that a wife cannot be produced either for or against her husband, "quia sunt duæ animæ in carne una."

99. *Chief Baron* Gilbert. *Evidence.* (ante 1727. p. 133). The second corollary to this general rule [of exclusion from interest] is that husband and wife cannot be admitted to be witnesses for or against each other; for if they swear for the benefit of each other, they are not to be believed, because their interests are absolutely the same, and therefore they can gain no more credit when they attest for each other than when any man attests for himself.

100. CORNELL *v.* VANARTSDALEN

Supreme Court of Pennsylvania. 1846

4 *Pa. St.* 364

In error from the Common Pleas of Bucks County. December 31 Assumpsit against the executor of Adrian Cornell, who was the father-in-law of plaintiff. The plaintiff declared for goods sold, money laid out and expended, for work and labor done, and for goods sold on a quantum meruit. . . . The defendant pleaded non-assumpsit, and the statutes of limitations. . . . The plaintiff, then, under exception (fourth) gave evidence of the . . . will of Adrian Cornell, dated in 1833, and proved in 1841. By this, after making sundry devises to his sons, he gave the farm on which plaintiff resides, to the children of Jane (the wife of plaintiff), subject to a charge of $2000 at 5 per cent. interest from the time of his decease, and subject to the maintenance of their mother during her life. . . . The defendant called Rachel Cornell, the widow of testator, and showed that her legacy was paid, leaving an unpaid annuity under the will of $300. The rejection of the witness constitutes the fifth bill of exceptions. Having shown a release and assignment of all her interest under the will, he again offered her to prove, (1) That every year during A. Cornell's life, when plaintiff was to pay rent, all previous matters were settled. (2) That Cornell told plaintiff not to make these improvements. (3) That in January, before Cornell's death, plaintiff claimed a balance of $72, which it was agreed should be paid out of the rent. The witness was rejected as incompetent (sixth exception). The seventh bill was to the rejection of the same witness as incompetent to prove enmity existing on the part of plaintiff's witness to testator and his family. . . .

Fox, for plaintiff in error. The competency of Rachel Cornell depends on the subject-matter of her proposed testimony, as she had received her legacy and released all claim under her annuity, the estate being otherwise amply sufficient to cover that. There is no case exclud-

ing the widow in a suit between the personal representatives of her husband and a stranger, though I admit she is not competent if confidence is abused. Monroe *v.* Twisselton, 43 Geo. 3, in Norris' Peake, App. 29, is the leading case, and is cited by Phillips and Starkie. In Aveson *v.* Lord Kinnaird, 6 East 192, the ground of her incompetency is stated to be, where there would be a violation of confidence reposed in her by her husband. In Beveridge *v.* Minter, 1 Carr. & Payne 364, the objection, that she is incompetent to do that, after dissolution of the marriage, which she cannot do while it exists, is overruled. So in Coffin *v.* Jones, 13 Pick. 445, she is said to be competent to prove facts coming to her knowledge from other sources. . . .

Chapman, contra. . . . The witness was interested, for her legacy could be levied on, and a creditor could compel her to refund. 1 Vern. 94, 2 Vern. 205, 1 Ch. Ca. 136. . . .

ROGERS, J. (after stating the pleadings and the evidence excepted to) . . . It remains only to consider the rejection of Rachel Cornell, the widow of Adrian Cornell, as a witness. That she cannot be excluded on the ground of interest, is too plain to admit of argument. If she has any interest, it is in the question which never renders a witness incompetent. Under the will she is but a legatee, and can have no interest excepting the estate be insolvent, which is not pretended here. That a legatee may be admitted in a suit for or against the estate will not admit of doubt, for if the estate is solvent, which is always presumed, his interest cannot be affected. It is a contingent interest which has never been held a disqualification. Besides, the witness executed an assignment, and although it may have been colorable, and probably was, yet that is a matter of which the Court, except in the case of a party to the record, do not undertake to judge. The evidence, under proper directions, is always referred to the decision of the jury.

But it is said to be against the policy of the law, to permit a wife to testify for or against the estate of her deceased husband; that parties are excluded from being witnesses for themselves, and that the same rule applies to husband and wife, neither of them being admissible as a witness in a cause, civil or criminal, in which the other is a party. The exclusion is founded partly upon the identity of their legal rights and interests, and partly on the principles of public policy. And, neither is it material, in some cases, that this relation no longer exists. The great object of these rules being to secure domestic happiness by prohibiting *confidential communications* from being divulged, the rule is the same to that extent, even though the other party is no longer in being, or has even been divorced and married to another person. The rule is the same in its spirit and extent, as that which excludes confidential communications made by a client to an attorney. And in analogy to this rule, it is held, that the wife, after the death of the husband, is competent to prove facts, coming to her knowledge from other sources not by means of her situation as wife, notwithstanding they relate to the transactions

of her husband. The prohibition, where she is a competent witness, being divested of all interest, extends to confidential communications alone, or such as come to her knowledge from her domestic relation. Coffin *v.* Jones, 13 Pick. 445; Williams *v.* Baldwin, 7 Vermont, 506, and Wells *v.* Tucker, 3 Binn. 366.

In the case in hand, it is difficult to imagine in what respect any confidential communication is divulged, or any domestic confidence abused. She is brought forward to testify *for* the estate, so that a confidential communication, merely, would not be evidence on other grounds, although it might be evidence if permitted against the estate. In every case where the question has arisen, the wife has been offered to charge her former husband or his estate. Indeed, it is somewhat difficult to understand how the point can arise, when her testimony is offered in favor either of the former husband or of his estate after his death. She may have a strong bias it is true, but that goes to her credit and not to her competency; but in what respect public policy arising from the domestic relation forbids her to testify, is not apparent to my mind. In the evidence offered, there is nothing either confidential or improper to be disclosed. It is testimony to facts which must have necessarily come to her knowledge from other sources than confidential communications from her deceased husband. The defendants offer to prove, that every year during the lifetime of her husband, when plaintiff was to pay rent, all previous matters were settled; that Cornell told him not to make those improvements, and that in January before Cornell's death, plaintiff claimed a balance of $72 which it was agreed should be paid out of the rent; and also to prove as rebutting testimony to the evidence of plaintiff's witness, that he, the witness, had enmity to her husband and all her family. . . .

As then the reception of the evidence would contravene no principle of domestic or public policy, we are of opinion the testimony was improperly rejected.

Judgment reversed, and a venire de novo awarded.

101. WILLIAM AND MARY COLLEGE *v.* POWELL

COURT OF APPEALS OF VIRGINIA. 1855

12 *Gratt.* 372

THOMAS J. POWELL being indebted to William and Mary College, he executed his bond, bearing date the 25th day of April, 1836, with George N. Powell as his surety, to the college, for $1500, payable on demand; and on the same day he executed a deed by which he conveyed to Edmund Christian, who was the bursar of the college, a tract of land in the county of King William, described as containing 390 acres, in trust to secure the payment of said debt. One moiety of this

land in quantity, and that part of it on which was the dwelling-house, was the property of Powell's wife, of which he was tenant by the curtesy; the other moiety Powell had purchased of one of the heirs of Mrs. Powell's father. Her moiety was much the most valuable. By deed bearing date the 1st of April, 1841, Thomas J. Powell and Mary E. his wife, in consideration of the sum of $500 in cash, and for the further consideration that George N. Powell should pay Christian, agent of William and Mary College, the debt aforesaid of $1500, with its accruing interest, conveyed to said George N. Powell the said tract of land, described as containing 303 acres. . . . By deed bearing date the 1st day of January, 1839, Thomas J. Powell conveyed to James Bosher a tract of between eighteen and nineteen acres of land lying in the county of Henrico near the city of Richmond, four slaves and some household furniture, in trust for the separate use of his wife Mary E. Powell during her life, with a general power of appointment; and if she should make no appointment, to her heirs. And Mrs. Powell was authorized to direct a sale and reinvestment of any part of the trust property. . . . The land conveyed in the deed of January, 1839, was sold by the direction of Mrs. Powell and the proceeds were invested in a lot in the city of Richmond. Mrs. Powell died prior to 1850, leaving ten children, and without having exercised her power of appointment; and in November, 1850, Bosher, the trustee, conveyed the trust property to her children. He afterwards purchased three of the interests of the children in the property. In 1851, the parties interested in this property instituted a suit in the County Court of Henrico for the purpose of having it sold and divided; and a decree was made appointing Herbert A. Claiborne a commissioner to sell and distribute the proceeds. In February, 1853, the cause came on to be heard, when the Court directed one of its commissioners to ascertain and report the nature and extent of the consideration paid and surrendered by Mary E. Powell for the settlement made upon her by the deed of the 1st day of January, 1839, from Thomas J. Powell to James Bosher.

The defendants introduced before the commissioner Thomas J. Powell as a witness, and he was objected to as incompetent by the plaintiffs, on the ground that he was the husband of Mary E. Powell as well as grantor in the deed. He stated that previous to the execution of that deed, there was an agreement between himself and his wife. That having purchased the tract of eighteen acres of land conveyed in the deed for $1600, and finding he could not pay for it by $600, and still owing the college a debt, Mrs. Powell told him that she had about $600, which she had made from the sale of turkeys, and work, and other savings, which she had been laying up for several years, and that if he would make her a right to this tract of land, she would pay the $600, and convey her interest in the land she had inherited from her father, and in some other lands he had bought adjoining the same, for the express benefit of the college. And he stated that the deed afterwards

executed by himself and his wife to George N. Powell was intended to carry out this agreement. . . . The cause came on to be finally heard on the 26th of March, 1853, when the Court held, that the deed of January 1, 1839, from Thomas J. Powell to Bosher, having been made when Powell was indebted to the plaintiffs, was, as to them, null and void, except to the extent of the interests surrendered by Mrs. Powell in relinquishing her right of dower in the lands of her husband, and her right to her own land. And the Court further held that the deed of the 1st of April, 1841, from Thomas J. Powell and wife to George N. Powell, was not fraudulent and void. . . . From this decree the college applied to this court for an appeal which was allowed.

Daniel, for the appellants. *Griswold & Claiborne*, for the appellees.

Lee, J. — The settlement of Thomas J. Powell upon his wife of the 1st of January, 1839, having been made when he was heavily indebted to the appellants, and as it would seem, insolvent, being of his whole estate, except perhaps his interest in the King William land, which was already incumbered beyond its value by the deed of trust of 1836, and being upon a consideration not at all adequate in value to the property settled, must be held fraudulent and void as to creditors, except so far as it may be sustained for the purpose of rendering to the estate of Mrs. Powell a just equivalent for any interests which she may have surrendered on faith of it. We are therefore to inquire what were the interests, if any, so surrendered, and whether to the extent of those interests the settlement can be held good. And on making this inquiry we are at once met by the objection to the testimony of Thomas J. Powell.

Now it is a pervading principle of the law of evidence, that a husband or wife cannot be a witness in a cause, civil or criminal, in which the other is a party; not for that other, because the law considers them as one person, and their interests as identical; nor against that other, on grounds of public policy; because of the mutual confidence subsisting between them, and for fear of sowing distrust and dissensions and of giving occasion to perjury. Co. Litt. 6b. . . . And if an estate be settled upon a wife, for her sole and separate use, exempt from the debts or control of the husband, the legal identity of interests is regarded as still subsisting, and the husband will not be admitted to testify touching such separate estate, though there may be other parties in respect of whom he would be a competent witness. Windham *v.* Chetwynd, 1 Burr. R. 424; Davis *v.* Dinwoody, 4 T. R. 678; Langley *v.* Fisher, 5 Beav. R. 443; Snyder *v.* Snyder, 6 Binn. R. 483. So a husband is not a competent witness to prove the execution of a deed conveying property for the benefit of his wife, for the purpose of registration. Johnston *v.* Slater, 11 Gratt. 321. Nor is it material that the relation of husband and wife no longer exists when the party is offered as a witness, for the incompetency still remains though the marriage have been dissolved by death or a divorce a vinculo matrimonii. Aveson *v.* Lord Kinnaird, 6 East's R. 188. . . .

This case falls clearly within the rule ascertained by the cases cited. Thomas J. Powell is offered as a witness in support of the settlement made by him upon his wife. By his testimony it is sought to make out the consideration in favor of those now claiming under the wife. For this purpose he was clearly incompetent, nor was his competency restored (as we have seen) by the death of his wife. That he was not himself personally interested because he was bound for the college debt in any event, or that his interest was the same either way, does not vary the case. The authorities cited show that his incompetency does not rest upon the narrow ground of a personal and direct interest in himself, but upon other and different principles. Indeed the incompetency has been maintained even in cases in which the husband's interest was the other way. Thus in an action by the trustee for a wife against the sheriff for taking goods which were separate property, under an execution against the husband, the husband was held to be an incompetent witness for the plaintiff (the wife being regarded as the real plaintiff), although he had an interest on the other side, in having his debt satisfied by the levy of the execution. Davis *v.* Dinwoody, 4 T. R. 678. . . .

Rejecting then the testimony of Thomas J. Powell, there is no evidence supporting or explaining the item of $600 claimed as part of the consideration of the settlement. . . . But although the claim to this $600 must be abandoned, I am of opinion that the settlement of the 1st of January, 1839, may and should be sustained to the extent of securing to the estate of Mrs. Powell a just and reasonable compensation for the interests in the real property belonging to her, which were surrendered by the deed of the 1st of April, 1841. . . . I am of opinion to affirm so much of the decree as declares the deed of settlement of the 1st of January, 1839, void as to the appellants, except to the extent of the just value of the interests surrendered by Mary E. Powell, in conveying her maiden land and relinquishing her right of dower in the lands of her husband; and also so much of the same as declares the deed from Thomas J. Powell and wife to George N. Powell, of the 1st of April, 1841, to be not fraudulent nor void; but in all other respects to reverse the same, with costs to the appellants. . . .

The other judges concurred in the opinion of LEE, J.

Decree reversed.

102. COMMON LAW PRACTICE COMMISSIONERS. *Second Report.* (England. 1853. p. 11). The highly satisfactory results of these more enlarged views [represented by the abolition of disqualification by interest in general] induces us to consider whether an exception preserved by the late statute, namely, the exclusion of husband and wife as witnesses for or against each other, may not be abolished.

The incompetency of husband and wife to be witnesses *for* one another is said to rest on three grounds: 1st, Identity of interest; 2d, the consequent danger of perjury; 3d, the policy of the law, which, as it is said, "deems it necessary to guard the security and confidence of private life, even at the risk of an

occasional failure of justice," and which rejects such evidence, because its admission would lead to domestic disunion and unhappiness. The first two grounds are manifestly no longer tenable, since the parties to suits have been themselves made competent to give evidence. It remains to be considered how far the third ground should be allowed to exclude testimony which may be essential to justice. In the first place, it seems clear that no disturbance of domestic happiness need be apprehended from permitting husband and wife to call one another as witnesses. The evidence may in many cases be indispensable A wife often keeps her husband's books, conducts his business in his absence, pays or receives money for him. Even in matters in which she may take a less active part, her testimony may be the only one to prove facts essential to the vindication of her husband's rights, or it may be valuable as confirmatory of the evidence of other witnesses; so, the testimony of the husband may be material to the wife in matters relating to her separate estate, to the proof of her coverture, if sued as a feme sole, and the like. It seems difficult to assign any reason why the law should be more tender of the domestic happiness of married persons than they are themselves disposed to be; the only danger that can be suggested is, that evidence might be extracted from the witness, by the adverse party, prejudicial to the interest of the married plaintiff or defendant, and that some bitterness of feeling might arise in consequence; but of the probability of such a result the married couple are themselves the best judges. Should any fact be thus brought to light which would otherwise have remained unproved, the interests of truth will be thereby promoted, and any transient interruption of conjugal harmony from such a circumstance or from disappointment occasioned by the evidence falling short of what was expected, would be a trifling evil compared to the mischief which must result from the exclusion of testimony essential to the ends of justice and truth.

103. Statutes. [Printed *ante*, as No. 77]

Sub-topic C. Experiential Capacity [1]

The rulings of Courts applying the requirements of experiential capacity are broadly of two general sorts, answering the questions:

1. *On what matters* is that *general experience*, common to every member of the community, a sufficient qualification?

2. When something more than this general experience is necessary, what shall the requirements be, as to such *special experience*, for the particular matter to be testified to?

More briefly put: 1. *On a particular topic, is general experience sufficient?* 2. *If not, what sort of special experience is necessary?*

The rules of law under these two topics form the legitimate subject of the present principle.

In the application of the second inquiry, a third question arises: 3. *Has the witness*, now offered, *the special experience required by the rule for that topic?*

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[1] For the principles of Psychology applicable to this topic, see the present Compiler's "Principles of Judicial Proof" (1913), Nos. 220–232.

104. VANDER DONCKT *v.* THELLUSSON

COMMON BENCH. 1849

8 *C. B.* 812

DEBT, on two foreign promissory notes. The first count stated that the defendant, theretofore, to wit, on the 25th of March, 1843, in parts beyond the seas, to wit, at Brussels, in the kingdom of Belgium, according to the law of the said kingdom of Belgium in that behalf, made his promissory note in writing, and delivered the same to the plaintiff, and thereby promised to pay to the plaintiff the sum of 2000 francs at the end of the month of July, 1843, for value received, — which period had elapsed before the commencement of the suit. . . .

The case was tried before PARKE, B., at the spring assizes at Kingston, in 1849. . . . On the part of the defendant, it was objected, that there was a variance between the declaration and the proof, — the declaration describing the notes as payable generally, and the notes themselves, when produced, appearing to be payable at a particular place, viz., the house of M. Legrelle; and that there was no averment or proof of presentment of the notes there. The plaintiff called a witness named De Keyser, who stated that he was a native of Belgium; that he had formerly carried on the business of a merchant and commissioner in stocks and bills of exchange at Brussels, but was now an hotel-keeper in London; and that he was well acquainted with the Belgian law upon the subject of bills and notes. On the part of the defendant, it was objected that M. De Keyser was not an admissible witness to prove the foreign law, he neither being a lawyer, nor a person who was bound, by reason of his holding any office, to have a knowledge of the law of Belgium. The learned judge, however, overruled the objection.

The witness then stated, that, by the law of Belgium, it is not necessary, even though a bill or note is made payable at a particular place, that it should be presented there for payment. Under the direction of the learned judge, — who told them, that, if they believed the law of Belgium to be as stated by De Keyser, they must find for the plaintiff, — the jury returned a verdict for the plaintiff.

Willes, in Easter term last, moved for a new trial, on the ground of improper reception of evidence, and misdirection. In order to qualify a person to give evidence of the law of a foreign country, it is essential either that he be a professional man, or that he hold some office which makes it his duty to have a knowledge of such law. In the case of The Queen *v.* Dent, 1 Carr. & K. 97, it was ruled by WIGHTMAN, J., on an indictment for bigamy, that it is not essential that a witness who is called to prove the law of Scotland as to marriage, should be at all connected with the legal profession. But, in the Sussex Peerage case, 11 Clark & Fin. 85, 134, Lord LYNDHURST, C., in deciding upon the

admissibility of the evidence of Dr. Wiseman, as to the law of Rome regarding marriage, says: "He comes within the description of a person peritus virtute officii. I ought to say at once that it is the universal opinion both of the judges and the lords, that the case (The Queen *v.* Dent), as represented to have been decided by Mr. Justice WIGHTMAN, is not law." . . .

A rule nisi having been granted accordingly, *Lush* now showed cause. . . . *Lush.* The witness De Keyser was clearly competent. It was not necessary that he should be a lawyer. . . . This was simply a question of commercial usage. The witness had been a merchant and stock-broker at Brussels, — a person who must be conversant with money securities: and he proves the custom of merchants as to bills and notes. . . . In no case has it ever been held that a lawyer must necessarily be called to speak to foreign law.

Willes, in support of his rule. The simple question is, whether this hotel-keeper is a competent witness to prove the Belgian law. . . . The line must be drawn somewhere: and it would be safer to draw it so as to exclude all except professional men, and persons who, by virtue of their office, may be said to be peritos. (CRESSWELL, J. Would Baron Rothschild be supposed to know anything about the law of England as to bills of exchange?) As a matter of fact, probably he is peritus. . . .

MAULE, J. We must take it to be the law of England, that, in order to prove the law of a foreign country, there must be some special ground for believing that the person who is offered is more than ordinarily capable of speaking upon the subject. In the case of The Queen *v.* Dent, a witness was called who stated that he was acquainted with the law of Scotland, but it did not appear that he was, or ever had been, connected with the law, or in any situation which made it necessary that he should have made himself acquainted with the Scotch law. The members of the Committee of Privileges in the House of Lords, in the Sussex Peerage case, thought that the ruling of my brother WIGHTMAN in that case was erroneous. We bow to that decision.

The question, then, is, whether the witness who gave evidence of the Belgian law in this case, falls within the principle of exclusion which is implied in the opinion of the lords and the judges in the Sussex Peerage case. Unless he does, he was clearly admissible; for, it is upon that ground only that he is said to be inadmissible. The ground of exclusion relied on, is, as in The Queen *v.* Dent, that there is a total absence of any peculiar means of information in the witness on the subject upon which he is called to speak. It appeared that he is now carrying on the business of an hotel-keeper, but that he had formerly been a merchant and stock-broker at Brussels. Whatever the line of business he now follows, if he was an expert before, he can hardly be said to be less so now. The question is, whether he is a person having special and peculiar means of knowledge of the law of Belgium with regard to bills of exchange and promissory notes, — one whose business it was to attend to, and

make himself acquainted with, the subject. I think, that, inasmuch as he had been carrying on a business which made it his interest to take cognizance of the foreign law, he does fall within the description of an *expert*. Applying one's common sense to the matter, why should not persons who may be reasonably supposed to be acquainted with the subject, — though they have not filled any official appointment, such as judge, or advocate, or solicitor, — be deemed competent to speak upon it? Persons who have *practiced* as physicians are frequently examined, and no inquiry is ever made as to whether or not they have a regular diploma. All persons, I think, who practice a business or profession which requires them to possess a certain knowledge of the matter in hand, are experts, so far as expertness is required.

For these reasons, I am of opinion that this rule must be discharged.

CRESSWELL, J. — I am of the same opinion. . . .

V. WILLIAMS. — I am of the same opinion. It must be taken, upon the evidence of this witness, that it was part of his business as a merchant and broker in Belgium, to acquire a correct notion of the law of that country regarding bills of exchange. He was, therefore, an admissible witness, — though it might turn out that his evidence, like that of many experts and scientific persons, was of very little worth.

105. JONES *v.* TUCKER

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. 1860

41 *N. H.* 54

CASE, for injuring, by immoderately driving, a horse, hired of the plaintiff by the defendant. A witness for the plaintiff, whose competency to testify as an expert in the matter was proved to the satisfaction of the Court, was allowed to testify as to the cause, nature, and remedy of the disease of horses called founder, and that the plaintiff's horse was foundered. To the ruling of the Court, admitting this evidence, the defendant excepted, on the ground that the witness was not an expert. A verdict was returned for the plaintiff, which the defendant moved to set aside.

Towle and *Bell*, for defendant. *Hatch & Webster*, for the plaintiff.

DOE, J. — When a witness is offered as an expert, three questions necessarily arise: (1) Is the subject concerning which he is to testify, one upon which the opinion of an expert can be received? (2) What are the qualifications necessary to entitle a witness to testify as an expert? (3) Has the witness those qualifications?

1. Experts may give their opinions upon questions of science, skill, or trade, or others of the like kind, or when the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, or when it so

far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it; and the opinions of experts are not admissible, when the inquiry is into a subject-matter, the nature of which is not such as to require any peculiar habits or study, in order to qualify a man to understand it. 1 Greenleaf, Evidence, § 440; 1 Smith, L. C. 286; Rochester *v.* Chester, 3. N. H. 349; Petersborough *v.* Jaffrey, 6 N. H. 462; Whipple *v.* Walpole, 10 N. H. 130; Beard *v.* Kirk, 11 N. H. 397; Robertson *v.* Stark, 15 N. H. 109; Marshall *v.* Ins. Co., 27 N. H. 157. Upon subjects of general knowledge, which are understood by men in general, and which a jury are presumed to be familiar with, witnesses must testify as to facts alone, and the testimony of witnesses as experts merely is not admissible. Concord Railroad *v.* Greely, 23 N. H. 237, 243.

2. Experts have been described as "men of science," Folkes *v.* Chadd, 3 Doug. 157; "persons professionally acquainted with the science of practice," Strickland on Ev. 408; "conversant with the subject-matter," Best's Principles of Evidence, § 346; "persons of skill," Rochester *v.* Chester, 3 N. H. 349, 365; "experienced persons," Peterborough *v.* Jaffrey, 6 N. H. 462, 464; "possessed of some particular science or skill respecting the matter in question," Beard *v.* Kirk, 11 N. H. 397. In Barron *v.* Cobleigh, 11 N. H. 557, certain lots of land had been surveyed, about fifty years before the trial, by one Snow, a surveyor. The defendants offered one McDuffie as a witness, who testified that he had for many years been a surveyor, and had often run out the lines of the lots surveyed by Snow; and it was said that if the witness had been called to give his opinion, as an expert, whether the marks upon the corners, about which he testified, were ancient marks, he would have been admissible for that purpose. Greater opportunities for observation, and greater study respecting certain subjects, may give the witness superior skill in relation to those subjects, and entitle his opinions to be received as those of an expert. Thus, witnesses who have made it a subject of study and observation, may be admitted to give their opinion respecting handwriting. Robertson *v.* Stark, 15 N. H. 109, 113. In Marshall *v.* Ins. Co., 27 N. H. 157, 163, a witness testified that he was a house-joiner, and had always been engaged in that as his business; that he had worked at it himself for many years, and had built a great many houses by contract, employing a great many hands in the prosecution of that business; that during the three preceding years he had built not less than twenty-five houses by contract, and that he considered himself to be well acquainted with the business; and it was remarked by the Court that the witness appeared to have had sufficient experience to entitle him to the character of an expert in his business. An expert must have made the subject upon which he gives his opinion a matter of particular study, practice, or observation, and he must have particular and special knowledge on the subject.

3. The rule determining the subjects upon which experts may testify,

and the rule prescribing the qualifications of experts, are matters of law; but whether a witness, offered as an expert, has those qualifications, is a question of fact, to be decided by the Court at the trial. The various disqualifications which render a person incompetent to be sworn and to give any testimony, are fixed by law, but whether the disabilities exist in a particular case is a question of fact. And whether a disability is such that a person cannot testify at all, or only such that he cannot testify as an expert, the existence of the disability is equally a matter of fact, most conveniently and satisfactorily determined at the trial. That an expert must have special and peculiar knowledge or skill, is as definite a rule as that the search for a lost paper, or subscribing witness, must be diligent and thorough; and whether a witness has special and peculiar knowledge, is as much a question of fact as the question whether a search is diligent and thorough. Upon a question of fact, the whole Court will not revise the decision of a presiding justice, unless it is specially reserved by him for revision, and his decision is not subject to exception.

In the present case, it does not appear that the rule of law, prescribing the qualifications of an expert, was disregarded, and the judgment of the presiding justice, as to what the qualifications of the witness were, was conclusive and final. Judgment on the verdict.

106. EVANS *v.* PEOPLE

SUPREME COURT OF MICHIGAN. 1858

12 *Mich.* 27

ERROR to Kent Circuit. The plaintiff in error was informed against for murder. . . . On this information defendant was convicted of manslaughter and sentenced to the State prison for two years and six months. The case was removed to this court for review, on writ of error and bill of exceptions. The question raised by the exceptions sufficiently appear by the opinion.

Ashley & Chipman, *J. T. Holmes* and *G. V. N. Lothrop*, for plaintiff in error. . . . Upon the question as to the prevalence of erysipelas in the neighborhood of the residence of the deceased, physicians alone were competent to testify. . . .

A. Williams, Attorney-General, for the People. . . . The witness residing near the deceased in his lifetime, could testify whether or not there was sickness, but perhaps not, there being sickness, as to the type of it — a point, however, not conceded.

CAMPBELL, J.: Evans, the plaintiff in error, was convicted of manslaughter in killing one Coban Balch. . . . The remaining ground of error alleged is, that one John Hendershot, not being shown to possess any special qualifications, was allowed to answer a question involving

an inquiry of medical science, having an important bearing upon the cause of Balch's death. It had been shown that he died of erysipelas, claimed by the prosecution to have resulted from the injuries inflicted by Evans. The defense had introduced medical witnesses, whose evidence tended to prove the existence of that disease in an epidemic form in Balch's neighborhood, previous to his visit to Grand Rapids, where he died two days after the assault upon him. Hendershot was called as a rebutting witness, and was asked, under objection, whether there was "any case of erysipelas about the neighborhood of the residence of the deceased, before his coming to Grand Rapids, in February last"; the witness answered, "No, sir; neither before nor since; no sickness within five or six miles of Coban Balch's residence during the month of February, nor until after that time." There can be no doubt of the importance of these various inquiries, inasmuch as they were aimed at explaining the causes of the death of Balch, and showing how far Evans was responsible for it. It becomes essential, therefore, to consider whether this question was admissible under the circumstances, and also how far the form of the answer may affect the legality of its reception.

If the question was improper, it is because it is supposed to involve obtaining an opinion which no one has a right to give in evidence without an especial knowledge of diseases in general, or of the particular disease named, not supposed to be possessed except by those whose study or attention has been turned in that direction. It is not always easy to determine the propriety of receiving or rejecting testimony concerning matters involving, apparently, to a greater or less extent, medical or other scientific investigation. There are many cases where it is difficult to determine whether the facts to be examined are to be considered beyond the range of ordinary intelligence. And the decisions are by no means clear or satisfactory upon the distinctions. The principles on which the authorities rest are more consistent than the attempts to apply them.

The primary rule, concerning all evidence, is, that personal knowledge of such facts as a court or jury may be called upon to consider, should be required of all witnesses, where it is attainable. . . . And it also follows, that no witness can be permitted to offer such testimony, unless he appears to be qualified, in some degree, at least, to furnish the means of aiding the jury in arriving at a true result. The greatest difficulty encountered in determining questions of competency of testimony, on subjects connected more or less with medical science, is in ascertaining how far it is safe to suppose unprofessional observers are able to form a reliable judgment. There are some simple disorders, which all persons are familiar with. Others require the very highest degree of medical skill to distinguish them from disorders having some resembling appearances or symptoms. In some cases, too, although inquiries arise concerning the existence of health or disease, it does not become important to have accurate information as to the precise character of such disorders as may exist. . . . Thus, when it was held by

some authorities that, upon questions touching the mental capacity of a particular person, only physicians and subscribing witnesses could give their opinion, the injury was not made one of science merely, and the scientific expert was put on the same footing, on questions not purely medical, with ordinary witnesses having no scientific knowledge, and whose powers of observation were those possessed by any one in like circumstances. . . .

What is thus true of mental capacity may become equally true in regard to other matters involving some questions of skill. Circumstances may make whole communities familiar with diseases not generally known elsewhere, and reasonably competent to manage ordinary cases of such diseases, and to recognize their symptoms. Such is often the case from necessity in new countries; and the same necessity leads to a more general knowledge of the extent to which a neighborhood has suffered from any prevailing sickness than is usual in populous towns. And it often happens that some persons having no general skill become very familiar with particular subjects. It would be very unwise to exclude such evidence, merely because the range of the witness's knowledge is limited. There are as many grades of knowledge and ignorance in the professions as out of them. The only safe rule in any of these cases is, to ascertain the extent of the witness's qualifications, and, within their range, to permit him to speak. Cross-examinations, and the testimony of others, will here, as in all other cases, furnish the best means of testing his value.

The circumstances of the case, therefore, must be looked at to determine the admissibility, not only of the question put to Hendershot, but also of his answer. As he was not examined concerning his knowledge of erysipelas, or of diseases generally, he could not be asked such a question, if the issue materially required from the witness any such knowledge. The inquiry before the jury was whether the erysipelas, of which Balch died, was dependent on a wound, or was wholly or in part derived from other causes. It was attributed by the defense to his previous exposure to an epidemic. The exact nature, as well as the existence of such epidemic was thus directly in controversy. This question, therefore, could not properly be put to any one not having some knowledge of the disease; and, as the record stands, was erroneously allowed. But Hendershot's answer, denying the existence of any disease whatever in that vicinity, stands on a different footing. The difference between health and any sickness whatever can hardly be regarded as open only to medical knowledge; and his contradiction of the medical testimony is a contradiction of common facts, and not of science. The value of such a sweeping assertion is not to be determined in this Court. The testimony was not incompetent. There was no error in the proceedings, and the judgment must be affirmed.

The other justices concurred.

107. SIEBERT *v.* PEOPLE

SUPREME COURT OF ILLINOIS. 1892

143 *Ill.* 571; 32 *N. E.* 431

WRIT of Error to the Circuit Court of Kane County; the Hon. HENRY B. WILLIS, Judge, presiding.

Messrs. *Alschuler & Murphy*, and Mr. *J. A. Russell*, for the plaintiffs in error. . . . The Court erred in admitting improper expert evidence. Boyle *v.* State, 57 Wis. 472. . . .

Mr. *George Hunt*, Attorney General, Mr. *Frank G. Hanchett*, State's Attorney, and Messrs. *Hopkins, Aldrich & Thatcher*, for the People: . . . A practicing physician, being a graduate of a medical college, may give his opinion founded upon his reading alone. . . .

Mr. Justice CRAIG delivered the opinion of the Court: . . . It is next claimed that the Court erred in allowing Dr. S. C. Gillett and Dr. C. L. Smith to testify as experts on the subject of arsenical poisoning. Dr. Gillett, as to his qualifications as an expert, testified that his profession was that of physician and surgeon; that he was a graduate of Rush Medical College of Chicago; that he had been a practicing physician in Aurora for thirty-four years, and that he was a licensed practitioner under the laws of the State of Illinois. An hypothetical question was then put to him by the prosecution, setting forth the symptoms of the deceased, and he was asked from what cause, in his opinion, the deceased came to his death. This was objected to by both of the defendants, on the ground, among others, that the witness did not properly qualify as an expert, which objection was overruled, the defendants excepting. The witness then testified, in substance: "If I found arsenic, then I should expect he died from the effects of arsenic." The testimony of the other witness did not differ materially from the evidence of Gillett, except that he had been in practice but twelve years. It will be observed that the two witnesses were both graduates of medical colleges, and that they were engaged in general practice and had been for a number of years. Whether they had ever had any experience in a case of poisoning in the practice does not appear from their examination.

It is insisted that it devolved on the prosecution to show that the witnesses had, in their practice, had a case of arsenical poisoning before they could testify. This is a question upon which the authorities are not entirely harmonious. In the State *v.* Terrell, 12 Rich. (S. C.) 321, on an indictment for murder produced by poison, the same objection was interposed to certain witnesses called by the prosecution as has been raised in this case, but the Court held that medical witnesses, in giving their opinions as experts, are not confined to opinions derived from their own observation and experience, but may give opinions based upon information derived from the books. In Mitchell *v.* The State,

58 Ala. 417, which was an indictment for murder by poisoning by arsenic, a physician was allowed to give his opinion as to the cause of death, although it did not appear that he had ever attended cases of that character, and in passing on the admissibility of the evidence the Court held that a physician who has had long experience in the practice of his profession, and knowledge of the symptoms of the malady of the deceased, is competent to testify as an expert. . . . The case differs in its facts so widely from the case under consideration that we do not regard it as an authority here. . . . Emerson *v.* Lowell Gas Light Co., 6 Allen 146, has also been cited as an authority. The action was one brought to recover damages for an injury to plaintiff's health, caused by an accidental escape of gas. On the trial a witness was called as an expert, but it appeared that he had no experience as to the effects upon the health of breathing illuminating gas. He was merely a physician who had been in practice several years, and the Court held that he was not qualified to testify as an expert, and this ruling was affirmed in the Supreme Court. In the decision it is said: "The mere fact that he was a physician would not prove that he had any knowledge of gas, without further proof as to his experience, for it is notorious that many persons practice medicine who are without learning, and a physician may have much professional knowledge without being acquainted with the properties of gas or its effect on health." What was said in the case cited cannot apply to a case of this character. An ordinary physician might not be acquainted with the properties of gas or its effect on health, but a physician of but slight experience would have no difficulty in telling the effect likely to result from taking into the stomach a deadly poison.

Without, however, extending the discussion of the question any further, we are inclined to hold that the opinions of the witnesses, founded on their practice, were competent evidence. What weight, however, should be given to the evidence was a question for the jury. . . .

After a careful consideration of the entire record we find no substantial error, and the judgment will have to be affirmed. Judgment affirmed.

BAILEY, C. J., and BAKER, J., dissenting.

SUB-TOPIC D. PERCEPTION (OBSERVATION, KNOWLEDGE) [1]

(1) *In General*

108. JOHN AYLIFFE. *Parergon.* (1726. p. 540). Testimony or evidence ought first of all to be given and founded on some principal corporeal sense of their own, according to the nature and quality of the fact, as on their sight, hearing, touching, tasting, or smelling; and not on the corporeal sense of another person. . . . And thus witnesses ought to depose appositely "de proprio suo sensu," and not "de sensu alieno."

[1] For the principles of Psychology here applicable, see the present Compiler's "Principles of Judicial Proof" (1913), Nos. 234–238.

109. Bushel's Case. (1670. Vaughan, 135). Vaughan, C. J. (noting the difference between a juryman and a witness): A witness swears but to what he hath heard or seen, — generally or more largely, to what hath fallen under his senses.

110. Thomas Starkie. *Evidence.* (1824. p. 79, 127). To render the communication of facts perfect, the witnesses . . . should possess, in the first place, the means and opportunity of acquiring a knowledge of the facts. . . . A witness who states facts ought to state those only of which he has personal knowledge; and such knowledge is supposed, if not expressly stated, upon the examination in chief; and upon cross-examination his means of knowledge may be fully investigated, and if he has not sufficient and adequate means of knowledge, his evidence will be struck out.

111. Evans *v.* People, 12 Mich. 35, and Elliott *v.* Van Buren, 33 id., 52 (1863, 1875). Campbell, J. The primary rule concerning all evidence is that personal knowledge of such facts as a Court or jury may be called upon to consider should be required of all witnesses, where it is attainable. . . . No one can be allowed to prove what he has never learned, whether it be ordinary or scientific facts.

112. Walter Bushnell's Trial. (Wiltshire, 1656. Howell's State Trials, V, 633). [The Wiltshire Commissioners summoned Mr. Walter Bushnell, Vicar of Box, near Malmsbury, before them, to answer to a charge of drunkenness, profanation of the Sabbath, gaming, and disaffection to the government; and after a full hearing, and proof upon oath, they ejected him. The Vicar prepared for the press a narrative of the proceedings of the Commissioners. . . . He is now impeaching the testimony of William Pinchin, one of the chief witnesses against him.] William Pinchin goes on in these words: "That about eight years since, when Mr. Bushnell came first to Box, he feasted his friends on the Lord's day, and having drank liberally that day there, Thrift, one of the guests, was killed in the Tower there, but by what means this deponent knoweth not. And said farther, That he knoweth, that Mr. Bushnell have usually till within this two years frequented ale-houses in parish business, and have there drank hard in Mr. Speke's and Mr. Long's company; and have seen him sit there drinking after they have been gone, but cannot say that ever he saw him drunk." . . .

And first I shall tell thee that whatsoever William Pinchin deposeth touching my feasting on the Lord's day, or drinking liberally on that day, or of the death of John Thrift, he hath only upon conjecture, or else upon hearsay. For he then upon oath acknowledged before the Commissioners, that he was not that day at Box, but at Broughton, which is four or five miles distant from Box, and it is like enough he was there at the Revel, that being their Revel day. . . . William Pinchin acknowledgeth himself to be absent, and yet he swears as if he had been at Box. I am not so much a lawyer as to know how far an oath will extend, or to what it will amount, if a man depose nothing but what he hath received by hearsay. . . . "He is a false witness, not only he who tells a lie, but he also who testifies a truth whereof he hath not a certain and undoubted knowledge," that is, if he testify that which he hath neither seen nor heard, nor hath had any experience of. . . . Proportionably say I, If William Pinchin were then at Broughton, it is impossible that he should see it. And if he saw it not, how could he be a witness?

113. R. *v.* Dewhurst. (1820. 1 State Tr. n. s. 529, 590). Mr. *Raines* (cross-examining). — Upon your oath, did you not see something very like that which I have read to you?

Witness. — I cannot recollect.

Mr. *Raines.* — Will you swear you do not believe what I have read to you?

Bayley, J. — It must be belief from recollection.

Mr. *Raines.* — I should have thought it was a legitimate question capable of being answered.

Bayley, J. — If it admits of a legitimate answer. It may not; because he might say "I believe it, because I have heard people say so."

114. Parnell Commission's Proceedings. (1888. 36th day, Times' Rep. pt. 10, p. 18). [The Irish Land League and its leaders being charged with complicity in certain crimes, particularly in the Phœnix Park assassination of 1882, certain of the known criminals testified that their body, the Invincibles, had received assistance-money from the League. It had turned out, on cross-examining one of them, that his testimony to the receipt of this money from the League officers was not based on his own knowledge at all, but merely on what he had heard from others. Another of these persons was now asked on direct examination as follows:]

Sir *H. James.* — Tell me of your own knowledge whether you know of his receiving any money from the Land League.

Sir *C. Russell.* — My Lords, I would ask my learned friend to be particular as to that question "of his own knowledge," after the experience we had of Delaney's evidence. "Did he see any one pay him?" is the proper form of question.

Sir *H. James.* — I think not.

Sir *C. Russell.* — With great deference, my Lords, it is. We had a deliberate statement the other day in answer to a similar question put to a witness, "Did you know this?" and "Did you know that?" and, afterwards in cross-examination, it turned out that he did not know it of his own knowledge, but it was what had been told him. I want to guard against a repetition of that. The proper form of question as I submit is, "Did he *see* any money paid?"

Sir *H. James* (to the witness). — You understand what I mean — do you know this of your own knowledge?

Sir *C. Russell.* — I am objecting to the form of the question.

President Hannen. — It is a very usual form of question.

Sir *C. Russell.* — I respectfully say, in view of the reasons I have given, that the proper question is, "Did he see any money paid?"

President Hannen. — I shall not interfere with the discretion of counsel in asking a question in a manner which is quite usual.

Sir *C. Russell.* — I have pointed out the danger — the great danger — of putting the question in the form in which my learned friend is putting it.

President Hannen. — Precisely so; and you have also shown where the safeguard lies, namely, in cross-examination.

115. STATE *v.* FLANDERS

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. 1859

38 *N. H.* 324

INDICTMENT, charging the respondent with the crime of forgery, in having altered, at Manchester, in said county, on the fourth day of August, 1857, a bond of that date, in the penal sum of forty thousand dollars, signed by himself as principal, and by Samuel Andrews and Luther Aiken as sureties, given and payable to Thomas P. Webber. The bond was originally written with a condition to indemnify Webber against the attachments made by Asa T. Barron, or by his procurement, on a house at the corner of Union and Concord streets, in Manchester, which the respondent had bargained to sell to Webber for about the sum of $6,000. The alteration, whereby the forgery was charged to have been committed, consisted in adding to the condition of the bond, after the provision to save Webber harmless from the attachments on the house made by Barron, or his procurement, the words, "*or from any and every claim whatsoever.*" . . . It was also admitted that the respondent altered the bond in this material manner, after it was signed by Andrews, without authority first obtained from him.

The principal questions before the jury were, whether the signature of Aiken was upon the bond when the respondent made the alteration; the evidence being clear that Aiken never saw the bond before it was passed to Webber, except when he signed it, and never assented to any alteration afterwards, and whether Andrews assented to the alteration after it was made and before the respondent passed or attempted to pass the bond to Webber as genuine. Upon the first question Webber testified positively that Aiken's signature was upon the bond before the alteration was made. Aiken testified that he read the bond hastily when he signed it, and could not say whether it had then been altered or not, although he had an impression in regard to it. The Court thereupon permitted the counsel for the government to ask him, against the respondent's objection, what his impression was, and he testified that his impression was, that it had not then been altered, but contained an indemnity against the Barron attachment only as originally written. . . .

Joel Parker (of Massachusetts), for the respondent. The evidence of Aiken respecting his impression was inadmissible. . .

A. F. Stevens (Solicitor for Hillsborough County), for the State. The testimony of Aiken, as to his impression, was properly admitted. . . .

SAWYER, J. . . . Another question in the case is, whether the testimony of Aiken, as to his impression, was properly received. He testified that he read the bond hastily when he signed it, and could not say whether it had then been altered or not, but that he had an impres-

sion in regard to it. The government then asked what the impression was, to which the respondent objected.

The objection has several aspects. An impression as to a past fact may mean personal knowledge of the fact as it rests in the memory, though the remembrance is so faint that it cannot be characterized as an undoubting recollection, and is therefore spoken of as an impression. This, perhaps, is the sense in which the word is most commonly used by witnesses, in giving their testimony. In this sense the impression of a witness is evidence, however indistinct and unreliable the recollection may be. No line can be drawn for the exclusion of any record left upon the memory, as the impress of personal knowledge, because of the dimness of the inscription. If, therefore, the objection is to be considered as one taken to the general competency of such testimony, it is clear that it was properly overruled.

An impression, however, may mean an understanding or belief of the fact, derived from some other source than personal observation, as the information of others; or it may mean an inference or conclusion of the mind as to the existence of the fact, drawn from a knowledge of other facts. When used in these senses, it is not evidence; and the objection may be understood to be that enough appears in the other statements of the witness, when considered in connection with the subject of his testimony, to show that he intended to use the word in one of these senses as his understanding and belief, or his inference and conclusion, and not as his recollection.

It has been urged in the argument, that when the witness stated that he read the bond hastily, and could not say whether it had then been altered or not, he was fairly to be understood as meaning that he had no such recollection, founded on his personal observation, as would enable him to testify from memory; and that, consequently, by the word impression, he must have meant an understanding or inference, resulting from the information of others, or the operations of his own mind, instead of his personal knowledge of the fact. If it was apparent to the Court that the word was thus used, the objection is well taken. We think, however, that, taking the whole testimony together, it may be understood to mean that, although, from the slight attention which he gave to the bond in his hasty reading, he cannot say positively whether the alteration had been made or not, he nevertheless had an impression upon his memory, derived from reading it, that it had not. At least, it may be said that the jury might so understand him, without doing violence to any fact or statement contained in his testimony. If it was susceptible of that construction, it could not be excluded by the Court merely because a different interpretation might be put upon it, which would render it incompetent. If the parties choose to leave the testimony of a witness doubtful, by refraining to draw from him an explicit declaration of his meaning, when it is susceptible of two interpretations, one of which renders it competent and the other incompetent, it must

be submitted to the jury, with proper instructions, of course, as to how they are to regard it, when they have ascertained what his meaning really was. . . .

The jury should have been instructed that, . . . if the respondent subsequently procured his assent to the alteration before delivering the bond to Webber, the respondent should be acquitted, unless, upon other evidence in the case, they found the existence of the fraudulent intent prior to the time of procuring the assent. For this cause a new trial must be granted. The other questions presented by the case may not be material on the new trial, and have not, therefore, been considered. Verdict set aside, and new trial granted.

116. PERRY *v.* BURTON

SUPREME COURT OF ILLINOIS. 1884

3 *Ill.* 138

APPEAL from the Superior Court of Cook County; the Hon. JOHN A. JAMESON, Judge, presiding.

Mr. *Edmund S. Holbrook*, for the appellants. Messrs. *Moore & Browning*, for the appellees. Messrs. *G. & W. Garnett*, for the Louisville Banking Company.

Mr. Chief Justice SCHOLFIELD delivered the opinion of the Court: This was a bill for the partition, as first drawn, of a tract of eighty acres of land in Cook County, and to quiet the title thereto. By an amendment to the bill, the north forty acres of the tract were taken out of the controversy, and the allegations and prayer of the bill were limited to the south forty acres. . . . It is contended on behalf of the appellees that the deed of Judd, and the sheriff's tax deed to Cook, constituted color of title in him, obtained in good faith, and that the evidence shows that he paid taxes thereunder for seven successive years. Appellants deny both that those deeds constituted color of title in Cook and that the evidence shows that he paid taxes thereunder for any period of seven years successively. . . . The title to one undivided half was in the heirs at law of John Gibson, deceased, and the title to the other undivided half was in Chambers and Benedict. If it be conceded that a tax title could, under the law then in force, be acquired to an undivided interest in a tract of land, it is obvious there being default in the payment of taxes on either undivided half would have justified the description of the land as it was described in the tax sale and the tax deed. The difficult question is to ascertain whether that undivided half was that held by Chambers and Benedict, or that held by the heirs at law of Gibson. . . .

The evidence of Cook, as we understand it, shows that he paid taxes on the undivided half belonging to Chambers and Benedict, under a

claim and belief of ownership, and consequently that the delinquency must have been that of Gibson's heirs at law. He says: "After I received that deed I paid taxes. I paid on the whole, or both undivided halves. I paid taxes on it before I purchased it for taxes. Yes, sir; on the whole of it, I think." Question 14: "And was you certain you paid on your own individual half?" Answer: "Yes, sir." . . . The evidence of the payment of taxes for seven successive years is confined to Cook's statements. In his direct examination he is quite full and positive as to the payment, but in his cross-examination he shows that in fact he knows nothing about it. All that he proves is that he instructed his agent to pay, not these particular taxes, but all his taxes. Thus, he is asked: "Do you remember it" (*i.e.*, the payment of taxes on this property) "clearly?" And he answers: "Well, I judge so from the fact if it had been sold I would have had to redeem it, as I paid taxes right along." Then he is asked: "So your remembrance is one of inference?" To which he replied: "Well, yes. It is a good many years ago. I can't swear to any particular point. That is my general idea of it, to the best of my recollection." He was then asked: "Can you swear positively that you paid any one certain year — say 1850?" He answered: "Well, my impression is that the taxes were paid every year, except by some mishap my agent did not pay it. He was authorized and directed to pay the taxes on my property." Again he says: "Well, I know they were paid, as I had an agent to pay my taxes. I could not say my agent paid every year. It was his business to do it." And again: "I presume it was paid every year." And still again, in speaking of their payment, he says: "It is the presumption. I would not swear positively to anything."

We said in Hurlbut *v.* Bradford, 109 Ill. 397, where the same kind of question was before us: "Inasmuch as the payment of taxes under color of title operates to defeat the paramount and all other titles, when relied on, the proof must be clear and convincing. Such titles should not be overcome by loose and uncertain testimony, or upon mere conjecture or violent presumptions." This evidence utterly fails to come up to this standard. For the reasons given, the decree below is reversed and the cause remanded. Decree reversed.

Mr. Justice Scott, dissenting.

117. KILLEN *v.* LIDE'S ADM'R

Supreme Court of Alabama. 1880

65 *Ala.* 505

Appeal from the Circuit Court of Montgomery. Tried before the Hon. James Q. Smith.

This action was brought by the administratrix of the estate of Charles

W. A. Lide, deceased, against William J. Killen, to recover damages for the alleged conversion of several bales of cotton; and was commenced on the 26th September, 1876. "On the trial," as the bill of exceptions states, "there was evidence tending to show that plaintiff's intestate and defendant cropped together in 1870 and 1871, under an agreement by which the defendant was to furnish the land and teams, and plaintiff's intestate was to furnish and feed the laborers, and share equally the crops made. . . . There was evidence tending to show, on the part of the defendant, various advances in money and supplies to the plaintiff's intestate, on his individual account, during the years 1870 and 1871. There was evidence tending to show that there had never been a settlement between them; and there was other evidence tending to show a full and complete settlement between them in the spring of 1872." . . . The plaintiff introduced one Lide as a witness, who was a nephew of her intestate, and, with his father, had lived and worked on the same plantation with the intestate during the year 1870, and on an adjoining place during the year 1871. "This witness, while being examined by plaintiff's counsel, and not in response to any question propounded by defendant, stated that, if plaintiff's intestate had any money while he lived with defendant, he (witness) would have been apt to know it, and that he did not think he had any. The defendant moved to exclude this statement from the jury; and the Court said, it would not exclude the evidence, if the witness had an opportunity of knowing. The witness then stated: 'I was about there a good deal, and if he had any money, I would have known it. He had none. I had a good opportunity of knowing.' The defendant moved to exclude this evidence from the jury," and he reserved an exception to the overruling of his objection. . . .

Watts & Sons, for appellant. *Clopton, Herbert & Chambers,* contra.

Stone, J. . . . The testimony of the witness Lide, to the effect that, if intestate had any money, he, witness, would have been apt to know it, and that he did not believe he had any money; and further, that if deceased had money, he, witness, would have known it, and that deceased had no money, was all illegal. Having money or not, is not one of the patent facts, which is open to general observation. Money is not usually carried in sight. That witness was about there (intestate's residence) a great deal, would not tend to show that he would know intestate had, or had not money. Want of knowledge of things open to the senses, in a person who had the opportunity of knowing such fact if it existed, is some evidence, though slight, that the thing did not exist. The present case is not brought within this rule. . . . Reversed and remanded.

118. PITTSBURGH, VIRGINIA & CHARLESTON R. CO. *v.* VANCE

SUPREME COURT OF PENNSYLVANIA. 1886

115 *Pa.* 326; 8 *Atl.* 764

FEBRUARY 1, 1887. Before MERCUR, Ch. J., GORDON, PAXSON, STERRETT, GREEN, and CLARK, JJ. TRUNKEY, J., absent. Error to the Court of Common Pleas of Fayette County: Of January Term, 1887, No. 123.

On May 8, 1882, Thomas Vance presented his petition to the Court of Common Pleas of Fayette County for the appointment of viewers to assess damages sustained by him by reason of the location and construction of the Pittsburgh, Virginia & Charleston Railway Company over his land. The Court thereupon, on the nomination of the parties, appointed viewers under the Act of February 19, 1849. The railway company took a strip of the land of Thomas Vance, sixty feet wide and twenty-three hundred feet long. This was a part of a tract of land of 90 acres, used as a farm, and upon which, in addition to the farm buildings, were a grist mill and a saw mill operated by him. The viewers entered upon the discharge of their duties and, on June 21, 1882, filed their report, awarding Thomas Vance $1,100 damages. From this he appealed; the issue was made up and tried before a Court, INGHRAM, P. J., and a jury. Verdict for the plaintiff, Thomas Vance, for $4,532.50, and judgment thereon. The defendant, the Pittsburgh, Virginia & Charleston Railway Company, thereupon took this writ and filed inter alia the following assignments of error: 1. The Court erred in not sustaining the objection of the defendant to the qualification of witness John Brownfield to give an estimate of plaintiff's damages, the offer and objection and ruling being as follows, viz.: Witness John Brownfield, having testified that he is "not much acquainted" with plaintiff's farm, "only the lower part, I was never over it, only on it about the house and railroad and mill," was asked by plaintiff:

Q. — Well, sir, state what you consider, if any, the difference in the market value of that tract of land of about eighty-eight acres, as affected by the location and construction of the railroad upon it?" The defendant objects that the witness has disclosed facts which show that he is not competent to give an estimate. By the Court: "He has answered that he was acquainted with the land before and since the construction of the railroad, and, if the witness is able to answer the question, it is a proper question." Objection overruled, and exception sealed for the defendant. . . .

Nathaniel Ewing, for plaintiff in error. — A perusal of the testimony of each of the witnesses named in the assignments of error will disclose how completely lacking they are in all essential requirements to give estimates of the damages for the guidance of the jury. Such an estimate

is, as Justice STRONG said, in Watson *v.* P. & C. R. R. Co., 1 Wright 481, "but a mere guess, with no substantial foundation upon which to rest." . . .

R. H. Lindsey (*A. D. Boyd* with him), for defendant in error.

Mr. Justice CLARK delivered the opinion of the Court February 21, 1887. . . . The general selling price of lands in the neighborhood cannot be shown by evidence of particular sales of alleged similar properties; it is a price fixed in the mind of the witness from a knowledge of what lands are generally held at for sale, and at which they are sometimes actually sold, bona fide, in the neighborhood. . . . In order, therefore, that a witness may be competent to testify intelligently as to the market value of land, he should have some special opportunity for observation; he should, in a general way, and to a reasonable extent, have in his mind the data from which a proper estimate of value ought to be made; if interrogated, he should be able to disclose sufficient actual knowledge of the subject to indicate that he is in condition to know what he proposes to state, and to enable the jury to judge of the probable proximate accuracy of his conclusions. . . .

In the case now under consideration, John Brownfield was called as a witness on part of the plaintiff; he stated, in the most unequivocal manner, that he was not much acquainted with the land in question; that he had been on the lower part of it, but that he knew nothing at all about the upper part; that he had seen the lower part a couple of times, seven or eight years ago, but had not seen it for four or five years before the railroad was built; that he knew nothing whatever of the quality of the upper part, which was the greater part of the tract, and that his estimate was made with reference solely to the lower part, which he knew. It certainly does not require much argument to show that Brownfield was an incompetent witness to testify on this question; he had not sufficient knowledge of the requisite facts upon which to base an opinion. In the assessment of damages, regard was to be had to the tract of land, taken as a whole, and yet the greater part of it, he freely confessed, he knew nothing about. He did not pretend to know the general selling price of land in the neighborhood, and admits that he did not know enough about the premises injured to make any estimate whatever.

The first assignment of error is, therefore, sustained. It is unnecessary to refer, in detail, to the testimony of the witnesses mentioned in the second and third assignments; what has been said with reference to the testimony of Brownfield, indicates the course of examination which should be pursued, and, as the cause must go back for a second trial, the same rule of examination will be applicable to all the witnesses named. . . .

The judgment is reversed, and a venire facias de novo awarded.

119. STATE *v.* LYTLE

SUPREME COURT OF NORTH CAROLINA. 1895

117 *N. C.* 799; 23 *S. E.* 476

INDICTMENT for barn burning, tried before EWART, J., at the July, 1895, Term of the Criminal Circuit Court for Buncombe County. The defendant was convicted and appealed. The facts appear in the opinion of Associate Justice FURCHES.

The Attorney-General and *Locke Craig*, for the State. Messrs. *Adams & Parker*, for defendant (appellant).

FURCHES, J.: The exceptions not appearing very plainly from the record, it was agreed by the Attorney-General and Mr. Adams, who represented the defendant, to submit the case on three exceptions. . . .

(3) The Court erroneously allowed the evidence of Doskins as to seeing defendant the night of the fire. . . . The third exception cannot be sustained. John Dawkins, among other things, testified: "I recollect the night when the barn was burnt. I met a man whom I took to be Lytle; I was in seven steps of him, the man whom I took to be Lytle, in the road near my house. He was a low, chunky man. It was too dark to see whether he was white or black. He had his back to me, had on a dark sack coat. I have known Lytle ten years, have seen him often. Had I spoken to him, I would have called him Lytle. This was almost 7:30 on the Howard Gap road. This was the night the barn was burnt." This evidence was objected to, allowed, and defendant excepted, and State *v.* Thorp, 72 N. C. 186, is cited to sustain the exception. But it will be seen that this case is easily distinguished from Thorp's case. That case holds that a witness should not be allowed to give his "impression as to the matters of which he has no personal knowledge," that is, he should not be allowed to give the results of his mind, his reasoning, as evidence, but only the results produced on his senses, as seeing, hearing, etc. In fact, the case of State *v.* Thorp, sustains the ruling of the Court as does also that of State *v.* Rhodes, *supra.*

It is true that it appears from the evidence sent up that upon cross-examination by defendant, the witness Dawkins said, "I only judged it was Lytle from his chunky build and the fact that I had heard he had gone up the road that day." If this had been the evidence called out by the State under the objection of defendant, we would have held that the latter part of the sentence ("and the fact that I had heard he had gone up the road that day") was improper as a means of identifying Lytle. This would have fallen within the criticism of Judge READE in delivering the opinion in State *v.* Thorp, *supra.* But there are two reasons why it cannot avail the defendant here: it was called out by him on cross-examination, and it was not objected nor excepted to. Affirmed.

120. GRAYSON *v.* LYNCH

SUPREME COURT OF THE UNITED STATES. 1895

163 *U. S.* 468; 16 *Sup.* 1064

THIS was an action originally begun in the District Court for the Third Judicial District, for the county of Dona Ana, New Mexico, by the appellees, constituting the firm of Lynch Bros., against the appellants, who are members of the firm of Grayson & Co., for loss and damage to a herd of cattle by a disease known as "Texas cattle fever," claimed to have been communicated to them by certain cattle owned by defendants, which had been shipped from infected districts in Texas, and permitted to roam over plaintiffs' range. . . . The case was tried by the District Court, which, having heard the evidence and arguments of counsel, found the issue in favor of the plaintiffs, and entered a judgment against the defendants for the sum of $5,200 damages, together with their costs. . . . Upon this finding, the Court ordered a judgment to be entered affirming the judgment of the Court below, and allowed an appeal to this Court.

Mr. *T. B. Catron*, for appellants. Mr. *Samuel M. Arnel* and Mr. *S. B. Newcombe*, for appellees.

Mr. Justice BROWN delivered the opinion of the Court.

Fourteen assignments of error are addressed to the admission of the depositions of Salmon and Detmers, who testified as experts to the nature and symptoms of the disease, and to the fact that there were certain districts infected with the fever. Salmon resided in Washington, was a professor of veterinary medicine, chief of the United States Bureau of Animal Industry, and at the time in the service of the United States government. He had held this position for more than ten years; had been chief of the veterinary division of the Department of Agriculture; had been in the employ of the Department of Agriculture, investigating the diseases of animals, for over fifteen years, and was called to Washington about 1883 in the discharge of his duties. He had investigated the disease known as the Texas fever. Detmers resided in Illinois, was a veterinary surgeon, and had been in the employ of the Department of Agriculture for the purpose of investigating contagious, infectious, and epizootic diseases of horses, cattle, and swine, and had investigated the disease known as Texas fever, and was acquainted with its symptoms and diagnosis; had made a good many post mortem examinations of cattle that had died with it, and was familiar with the disease. If these gentlemen, who were connected with the Department of Agriculture and made a specialty of investigating animal diseases, were not competent to speak upon the subject as experts, it would probably be impossible to obtain the testimony of witnesses who were.

The fact that they spoke of certain districts of Texas as being infected

with that disease was perfectly competent, though they may never have visited those districts in person. In the nature of their business, in the correspondence of the department, and in the investigation of such diseases, they would naturally become much better acquainted with the districts where such diseases originated or were prevalent, than if they had been merely local physicians and testified as to what came under their personal observation. The knowledge thus gained cannot properly be spoken of as hearsay, since it was a part of their official duty to obtain such knowledge, and learn where such diseases originated or were prevalent, and how they became disseminated throughout the country. Spring Co. *v.* Edgar, 99 U. S. 645; State *v.* Wood, 53 N. H. 484; Dole *v.* Johnson, 50 N. H. 452; Emerson *v.* Lowell Gas Light Co., 6 Allen 148. . . . As one of these witnesses testified that Oak and Bee Counties in Texas were known to be permanently infected with the fever, and as the Court found that these counties were a part of the infected district; and also found that the cattle in question were shipped from those counties into the Territory of New Mexico, and that the defendants were notified by the plaintiffs of the existence of such disease in these counties at the time they drove their cattle across plaintiffs' range; . . . we see no reason for attacking the findings of the Court in this connection. . . .

There is no error in this case of which the defendants are entitled to complain, and the judgment of the Court below is accordingly affirmed.

Mr. Justice FIELD dissented.

(2) *Handwriting*[1]

121. LORD FERRERS *v.* SHIRLEY

KING'S BENCH. 1731

Fitzgibbon 195

UPON a feigned issue out of Chancery, directed to be tried at Bar, whether a deed pretended to have been executed by Robert Earl Ferrers, in the year 1683, was his deed, or not, several witnesses were called to swear to the handwriting of the subscribing witnesses, now dead; and amongst others one J. J., who would have swore to the handwriting of one J. Cottington, whose name was to the deed as a witness, because he had seen several letters wrote by J. Cottington. Thereupon he was asked, whether he had ever seen the said Cottington write; to which he answered, that he never did, nor never saw the person that wrote the said letters; but that his master, to whom the said letters were wrote for the rent of a part of the estate of the late Earl Robert Ferrers, which

[1] For the *history* of the rules for handwriting-witnesses, see *post*, No. 181.

his said master held, informed him, they were the letters of J. Cottington, the Lord Ferrer's steward, who was the person pretended to have attested the deed in question. Hereupon it was objected to his testimony, because he could not say with any certainty, whether or no the writer of the letters was the same person that attested the deed; for that the J. Cottington that was supposed to write the letters, might get some other person to write those very letters for him; and the counsel insisted, that in all cases, where a witness would swear to the handwriting, he must be able to say, that he saw such person write.

The COURT rejected the said J. J. because he could not ascertain the identity of the person.

But my Lord RAYMOND said, that it is not necessary in all cases that the witness have seen the person write, to whose hand he swears; for where there has been a fixed correspondence by letters, and that it can be made out that the party writing such letters is the same man, that attested a deed, that will entitle a witness to swear to that person's hand, though he never saw him write.

PAGE, Justice, said: If a subscribing witness to a deed lives in the West Indies, whose handwriting is to be proved in England; a witness here may swear to his hand, by having seen the letters of such person wrote by him to his correspondent in England, because under the special circumstances of that case, there is no other way, or at least, the difficulty will be great, to prove the handwriting of such subscribing witness. But my Lord RAYMOND differed, and said, that those special circumstances could not vary the reason of the thing.

It was further objected to the said witness, that he should produce the letters, that the Court and the jury might be able to judge of the resemblance between the hand to the letters, and that to the deed; but this was overruled by the Court, because the witness might well have acquired a knowledge of Cottington's character, by having seen several letters wrote by him.

122. EAGLETON *v.* KINGSTON. (1803. Chancery. 8 Ves. Jr. 473). ELDON, L. C. When I first came into the profession, the rule as to handwriting in Westminster Hall in all the Courts was this: You called a witness, and asked whether he had ever seen the party write. If he said he had, whether more or less frequently, that was enough to introduce the further question, whether he believed the paper to be his handwriting. . . . Or you might ask a witness who had not seen him write for a length of time, if you could not get a witness of a subsequent date. . . . This rule was laid down with so much clearness that till very lately I never heard of evidence in Westminster Hall of comparison of handwriting by those who had never seen the party write. [The same judge, in 1814, in WADE *v.* BROUGHTON, 3 Ves. & B. 172]. . . . Where there has been correspondence by letters, the contents of which are such as to render it probable that they were received [by the genuine person], perhaps impossible to suppose the contrary, that course of correspondence will do; and that has grown up in modern times.

123. ROWT'S ADM'X *v.* KILE'S ADM'R. (1829. Virginia. Leigh 225). COALTER, J. The reason why a witness must see another write in order to form an opinion of the character of his handwriting, is not, I apprehend, because seeing the party write gives you a knowledge of the character of his hand; he must see the handwriting itself, after the act of writing is performed, in order to acquire that knowledge. But when he sees the manual operation himself, he knows that the handwriting, which he at the same time or afterwards inspects, is the handwriting of the party. He thus acquires a knowledge (more or less perfect, according to frequency and opportunity, and his skill in such matters) of a handwriting, which he knows to be that of a certain individual; and having this knowledge within his mind, as he has of the human countenance, he compares with it a writing, alleged to be the act of the same individual but which he has not seen him write, in order to decide, whether it does or does not possess the same characteristic marks. . . .

But the *character of a handwriting*, may be as well or even better known, by one who never saw another write, as by one who has. Cases of this kind occur in a course of a long correspondence, on business, between parties who never saw each other write. The perfect knowledge of handwriting arises from frequently seeing the writing itself, not the manual operation — from which, without looking at the writing itself, you can form no opinion. Being accustomed to see the operation, is only full evidence that the writing which you have thus seen, and the character of which is more or less distinctly impressed on your mind, according to circumstances, is the character of the manual writing *of that individual*. In the course of business and correspondence, you acquire an equally perfect knowledge of the handwriting of the individual; you equally recognize it as an individual hand, which you can distinguish (as you can the human countenance) from any other hand, with as much certainty as you would the handwriting of one you are accustomed to see write; and yet, if you should meet your correspondent in the street, you would not know him. This writing may have been performed by the clerk of the person in whose name it is, and if so, you have no knowledge of the handwriting of *that person*, though you have of that of his clerk; yet all the correspondence being in one hand, and it being usual for the party himself to carry it on, such witness has been admitted to prove the handwriting to be his. This would be entirely defeated by proof that the letters were written by the clerk; and is weakened in proportion to any doubts that may exist, whether the party, whose handwriting is to be proved, wrote the letters or not.

124. STATE *v.* ALLEN. (1820. North Carolina. 1 Hawks 6). TAYLOR, C. J. . . . The only methods of proving the handwriting of a person, sanctioned by law, are,

First, By a witness who saw him sign the very paper in dispute;

Secondly, By one who has seen him write, and has thereby fixed a standard in his own mind, by which he ascertains the genuineness of any other writing imputed to him;

Thirdly, By a witness who has received letters from the supposed writer, of such a nature as renders it probable that they were written by the person from whom they purport to come. Such evidence is only admissible where there is good reason to believe that the letters, from which the witness has derived his knowledge, were really written by the supposed writer of the paper in question.

Fourthly, When a witness has become acquainted with his manner of signing

his name, by inspecting other ancient writings bearing the same signature, and which have been regarded and preserved as authentic documents. This mode of proof is confined to ancient writings, and is admitted as being the best the nature of the case will allow.

Other modes of proving handwriting, not yet sanctioned by adjudged cases, may possibly come within the reason of the cases enumerated; but I think they ought to appear clearly to do so, before they are admitted.

125. STATE *v.* GOLDSTEIN

SUPREME COURT OF NEW JERSEY. 1905

72 *N. J. L.* 336; 62 *Atl.* 1006

ON writ of error to the Morris Quarter Sessions. Before GUMMERE, Chief Justice, and Justices FORT, GARRETSON, and PITNEY.

The defendant was indicted for and convicted of the crime of indecently exposing his person in a public place. The exposure was made in the grocery store of the defendant, in the town of Butler, on the 29th day of August, 1903, in the presence of one E. B., a girl about fifteen years old, who had gone there to purchase goods. . . . The defendant, being called as a witness in his own behalf, denied having committed the offense charged against him, and for the purpose of substantiating that denial testifies that during the latter part of August, 1903, and particularly on the 29th day of that month, he was engaged in removing his business from a store occupied by him in a building in Butler, belonging to the "Noble estate," into the store in which the indecent exposure was said to have taken place, and that during all of that time, whether he was at the one place or the other, he was never alone, some of his employees being always present at each of the two stores. In order to break the force of this testimony the prosecutor of the pleas, on cross-examination of the defendant, exhibited to him a letter addressed to the executor of the "Noble estate," and signed "Max Goldstein" — the body of which contained a statement that his (Goldstein's) tenancy had expired on the 1st of August, and referred to the fact that a check was enclosed in settlement of the rent due to that date — and asked him if the signature to the letter was not in his handwriting. The defendant denied that it was, or that the letter had been written by his authority.

After the close of the defendant's case the State called Mr. Hinchman, the executor of the "Noble estate," as a witness, and he testified that the defendant had been a tenant of the estate for nearly three years, and that during all of that period a business correspondence had been carried on between himself and the defendant, letters passing between at least as frequently as once a month, on the average. The letter which had been exhibited to the defendant, being then shown the witness, he expressed the opinion that it was in the latter's handwriting. Counsel for the defendant interposed an objection to the witness being permitted to

express an opinion as to the authenticity of the letter, on the ground that his testimony failed to show that he had ever seen the defendant write, or that he knew that the letters which he had received during Goldstein's tenancy were written by him, and error is assigned upon the overruling of the objection.

For the plaintiff in error, *Willard W. Cutler.* For the defendant in error, *Charles A. Rathbun*, prosecutor of the pleas. The opinion of the Court was delivered by

GUMMERE, C. J. (after stating the facts as above). Except for the fact that counsel has earnestly contended before us that this testimony was improperly admitted, we should consider the assignment so frivolous as not to be entitled to specific mention. A reference to any text-book in which this subject is discussed will disclose that it is universally admitted that a witness who has a proper knowledge of a party's handwriting may declare his belief in regard to the genuineness of a writing which is in question, and that such knowledge may be acquired, not only by having seen him write, but also by having had correspondence with him concerning business or other matters transacted between them. In West *v.* State, 2 Zab. 212, the rule is thus tersely stated: "To prove handwriting, in general, a witness must know it by having seen the person write or by having corresponded with him." . . .

The conviction under review should be affirmed.

SUB-TOPIC E. MEMORY (RECOLLECTION) [1]

126. SCROOP'S TRIAL. (1660. Howell's State Trials, V, 1034, 1039). [Murder of King Charles I, the defendant being charged as one of the judges sitting to condemn him.]

Carr (testifying for the Crown). — Amongst others that were judges of that Court, as was printed in a paper which I then had in my hand, I found the name of Mr. A. Scroop, who I saw did there sit and appear. (Mr. Carr looked in that paper when he gave his evidence).

Scroop. — I hope you will not take any evidence from a printed list.

Counsel. — The manner of his evidence is, he saith, this: that he had this printed paper in his hand when the names of that Court were called, and marking the persons in that paper who were present, and that you were one of them who did appear.

Scroop. — . . . By your favour, I do suppose there is no witness ought to use any paper or look upon any paper when he gives evidence.

Sol. Gen. — Ask him the question without the paper; yet nothing is more usual than for a witness to make use of a paper to help his memory.

127. KNOX'S AND LANE'S TRIAL. (1679. King's Bench. Howell's State Trials, VII, 763, 779). [Libel. The prosecution is trying to prove Knox confession.] . . .

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[1] For the principles of Psychology here applicable, see the present Compiler's "Principles of Judicial Proof" (1913), Nos. 239–243.

Serjeant *Maynard.* — My lord, now we will call another justice of peace, that took their examinations, and we shall then particularly apply ourselves to Mr. Knox, that seems to make these excuses for himself. Call Mr. Justice Warcup. (Who was sworn.)

Warcup. — I must beg the favor of the Court, because my memory is bad, that I may refer to the informations that were taken before me.

Justice Pemberton. — You may look upon them for the refreshment of your memory.

Warcup. — I answer to every part of this that hath my hand to it, I desire it may be read.

Recorder. — No, that can't be, you must not read them, but only refresh your memory by them.

128. Sir John Friend's Trial. (1696. Howell's State Trials, XIII, 1, 21). *Witness.* — All that I can say to this business is written in my paper, and I refer to my paper.

Att'y-Gen'l. — You must not refer to your paper, Sir, you must tell all what you know.

L. C. J. Holt. — He may look upon any paper to refresh his memory.

129. Duchess of Kingston's Trial. (1776. Howell's State Trials, XX, 355 619). [Bigamy; a witness was offered to testify to the advice given by a lawyer to the accused as to her right to re-marry.]

Mr. *Mansfield.* — The witness now intended to be produced to your lordships is Mr. Laroche. The purpose for which he is to be produced is to tell your lordships, that he saw Dr. Collier frequently with the lady at the bar and the late Duke of Kingston, during the suit in the Ecclesiastical Court; that he has himself heard Dr. Collier assure both the parties, the late Duke of Kingston and the lady at the bar, after that sentence in the Spiritual Court, that they were perfectly free to marry, and might marry any one they pleased.

Mr. Laroche sworn.

Mr. *Laroche.* — My lords, I did not know, until within these few minutes, that it would be necessary to call me. I will endeavor to recollect to the best of my knowledge. I have got some memorandums in my pocket, and I hope I may be at liberty to refer to them.

Lord High Steward. — Are they in your own writing?

Laroche. — A copy of it, and it has been in my possession ever since it was copied.

A Lord. — Copied by his desire?

Laroche. — Yes, from my own notes, and in my presence, and has been in my own custody ever since.

[The witness proceeded to testify.]

130. Anon. (1754. 1 Ambl. 252). L. C. Hardwicke, said: There is no certain rule how far evidence may be admitted from notes; some judges had thought, and he was inclined the same way, that the witness might speak from notes which were taken at the time of the transaction in question, but not if they were wrote afterwards.

131. Davis *v.* Field. (1884. Vermont. 56 Vt. 426). Rowell, J. The old notion that the witness must be able to swear from memory is pretty much

exploded. . . . There seem to be two classes of cases on this subject: 1. Where the witness by referring to the memorandum has his memory quickened and refreshed thereby, so that he is enabled to swear to an actual recollection; 2. Where the witness after referring to the memorandum undertakes to swear to the fact, yet not because he remembers it, but because of his confidence in the correctness of his memorandum. In both cases the oath of the witness is the primary, substantive evidence relied upon; in the former the oath being grounded on actual recollection, and in the latter on the faith reposed in the verity of the memorandum.

(1) *Present Recollection Revived*

132. HENRY *v.* LEE

Nisi Prius. 1810

2 *Chitty* 124

Topping moved, on behalf of the defendant, for a rule to show cause why a new trial should not be had, under the following circumstances. The plaintiff was a jeweler at Liverpool, and the indorsee of a bill of exchange, drawn and indorsed by the defendant, and accepted, payable at a banker's, London. The defendant pleaded the general issue and bankruptcy, and a verdict was found for the plaintiff. At the time of the trial, a material witness said he did not recollect a fact; but having looked at a paper which he himself had not written, he said that he distinctly recollected the circumstances, though he had before said that he did not know whether he should recollect the circumstances after looking at the paper; and *Topping* contended, that this was neither sufficient, nor the best evidence.

Lord Ellenborough, C. J. — It is sufficient if a man can positively swear that he recollects the fact, though he had totally forgotten the circumstance before he came into court; and if upon looking at any document he can so far refresh his memory as to recollect a circumstance, it is sufficient. And it makes no difference, that the memorandum was not written by himself; for it is not the memorandum that is the evidence, but the recollection of the witness. . . . Rule refused.

133. Sir G. A. Lewin. *Note to* Lawes *v.* Reed. (1835. 2 Lew. Cr. C. 152). Where the object is to revive in the mind of the witness the recollection of the facts of which he once had knowledge, it is difficult to understand why any means should be excepted to whereby that object may be attained. Whether in any particular case the witness' memory has been refreshed by the document referred to, or he speaks from what the document tells him, is a question of fact open to observation, more or less according to the circumstances. If in truth the memory has been refreshed, and he is enabled in consequence to speak to facts with which he was once familiar, but which afterwards escaped him, it cannot signify, in effect, in what manner or by what means these facts were recalled to his recollection. Common experience tells every man that a very slight circumstance, and one not in point to the existing inquiry, will sometimes revive the history of

a transaction made up of many circumstances. . . . Why, then, if a man may refresh his memory by such means out of court, should he be precluded from doing so when he is under examination in court?

134. HUFF *v.* BENNETT

COURT OF APPEALS OF NEW YORK. 1852

6 *N. Y.* 336

THIS was an action, by the plaintiff, an attorney of the Superior Court, against Bennett, the publisher and editor of the New York Herald, for certain alleged libels upon the plaintiff's character as an attorney, published in that paper.

The libels consisted of alleged reports of proceedings before the Recorder of New York, who had discharged two persons committed to prison by another magistrate, on the entry of bail for their appearance; with comments thereon, assuming that the Recorder acted by the advice of the plaintiff, who was the prisoner's counsel, with a sketch of the plaintiff's history. Also, a report of the proceedings in a case before the Court of Special Sessions, with allusions to the plaintiff's conduct in connection therewith. The defendant justified the publications, on the ground that they were correct reports of public legal proceedings, with fair comments thereon; and that the facts stated in relation to the plaintiff were true.

On the trial, before OAKLEY, J., after proof of publication, and in reply to testimony on the part of the defendant, as to the correctness of the published reports, the plaintiff called the Recorder as a witness, and having placed in his hands a copy of the alleged libelous report of the proceedings before him, asked the following question: "Wherein, as you now remember, is that report incorrect?" The defendant's counsel objected to the question, as incompetent, but the objection was overruled, and an exception taken. . . . The plaintiff had a verdict for $150 damages; and a motion for a new trial, made on a bill of exceptions, having been denied, and judgment perfected in favor of the plaintiff, the defendant took this appeal.

Sandford, for the appellant. *Huff*, respondent, in propria persona.

JEWETT, J. — On the trial several exceptions were taken by the counsel for the defendant to the decision of the judge in respect to the admission and rejection of evidence; some of which were not attempted to be sustained, on the argument here. I shall, therefore, notice only such as the counsel relied on upon the argument in this Court.

The first was the exception to the decision of the judge, holding that it was admissible for the counsel for the plaintiff, to put into the hands of the witness, Scott, a paper, and to ask him wherein, as he then remembered it, was the report contained therein incorrect. The objection was placed upon the ground that the question was incompetent, but the

case does not show the particular ground of the supposed incompetency. On the argument, the ground assumed was, that it called for the testimony of the witness of facts, after having refreshed his memory, by looking at memoranda not made at the time, either by himself, or in his presence. It was insisted, that the rule was, that a witness could only testify to such facts as were within his knowledge, and that his recollection of the facts could only be refreshed by examining memoranda, either made by himself, or in his presence. Although the rule is, that a witness, in general, can testify only to such facts as are within his own knowledge and recollection, yet it is well settled, that he is permitted to assist his memory by the use of any written instrument, memorandum, or entry in a book, and it is not necessary that such writing should have been made by the witness himself, or that it should be an original writing, provided, after inspecting it, he can speak to the facts from his own recollection. Doe *v.* Perkins, 3 T. R. 749; Henry *v.* Lee, 2 Chit. 124 [*ante*, No. 132]; Lawes *v.* Read, 2 Lew. Crown Cas. 152 [*ante*, No. 133]; 1 Greenleaf, Evidence, § 436; 1 Phillipps, Evidence, 289, Cowen & Hill's Notes, 750; Lawrence *v.* Baker, 5 Wend. 301. . . . The judgment should be affirmed. . . . Judgment affirmed.

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(2) *Past Recollection Recorded*

135. Lord Talbot *v.* Cusack. (1864. Ireland. 17 Ir. C. L. 213). Hayes, J. ['To refresh the memory of the witness'], that is a very inaccurate expression; because in nine cases out of ten the witness' memory is not at all refreshed; he looks at it again and again, and he recollects nothing of the transaction; but, seeing that it is in his own handwriting, he gives credit to the truth and accuracy of his habits, and, though his memory is a perfect blank, he nevertheless undertakes to swear to the accuracy of his notes.

136. DOE dem. CHURCH & PHILLIPS *v.* PERKINS

King's Bench. 1790

3 *T. R.* 749

This was an ejectment to recover some premises at Wendover, Bucks. At the trial before Lord Loughborough at the last Spring Assizes for Bucks, a verdict was given for the plaintiff against twenty-two of the defendants. . . . It appeared from the report that the title of the lessors of the plaintiff to the several premises for which the ejectment was brought was not in dispute; but that the only question was at what time of the year the annual holdings of the several tenants expired. That Aldridge, the witness, whose testimony was objected to, went round with the receiver of the rents to the different tenants, whose declarations respecting the times when they severally became tenants were minuted down in a book at the time; some of the entries therein being made by Aldridge, and some by the receiver. When Aldridge was examined the

original book was not in Court; but he spoke concerning the dates of the several tenancies from extracts made by himself out of that book, confessing upon cross-examinations that he had no memory of his own of those specific facts; but that the evidence he was giving as to those facts was founded altogether upon the extracts which he had made from the above mentioned book. This evidence was objected to at the time on the part of the defendants, upon the ground that, as the witness did not pretend to speak to those facts from his own recollection, he ought not to be permitted to give evidence from any extracts, but that the original book from which they were taken ought to be produced. The learned judge however being of a different opinion, the evidence was admitted, and the plaintiff had a verdict.

Erskine, Partridge, Bower, Adair, and *Wilson* showed cause against the rule. Although neither the original book itself, any more than the extracts, could be produced as evidence in themselves, yet the witness, who heard the declarations of the tenants, and either wrote the entries with his own hand, or saw them written by the receiver, might be permitted to refresh his own memory by referring to either. . . .

Law and *Lowndes,* contra, insisted on the known distinction between cases where the witness swears from his own knowledge of the fact, though his memory may be assisted by memoranda, and where he does not speak from any recollection which he has, but merely from such memoranda; in the latter case it has always been required that the original minutes should be produced, because of the great door which might otherwise be opened to fraud and concealment. For it might happen in a variety of instances that something would appear upon the original paper itself, which would do away the effect of the evidence, but which might be suppressed in a copy, and still more easily in an extract.

The Court did not appear to entertain much doubt as to the inadmissibility of the evidence, but they said that as it was a matter of such general practice, they would consider of it, that the rule might be finally settled for the future. . . .

On the following day Mr. Justice BULLER read another MS. note of Tanner *v.* Taylor, Hereford Spring Assizes, 1756. "In an action for goods sold, the witness who proved the delivery took it from an account book which he had in his hand, being a copy, as he said, of the day book, which he had left at home; and it being objected that the original ought to have been produced, Mr. Baron LEGGE said, that if he would swear positively to the delivery from recollection, and the paper was only to refresh his memory, he might make use of it. But if he could not from recollection swear to the delivery any further than as finding them entered in his book, then the original should have been produced; and the witness saying he could not swear from recollection, the plaintiff was non-suited." And

Lord KENYON, Ch. J., said, that the rule appeared to have been clearly settled, and that every day's practice agreed with it. And comparing

this case with the general rule, the Court were clearly of opinion that Aldridge, the witness, ought not to have been permitted to speak facts from the extracts which he made use of at the trial.

PER CURIAM. Rule absolute for a new trial.

137. BURROUGH *v.* MARTIN

NISI PRIUS. 1809

2 *Camp.* 112

ACTION on a charter-party; a witness was called to give an account of the voyage, and the log-book was laid before him for the purpose of refreshing his memory. Being asked whether he had written it himself, he said, that he had not, but that from time to time he examined the entries in it while the events recorded were fresh in his recollection, and that he always found the entries accurate.

The *Attorney-General* contended, that the witness could make no use of the log-book during his examination, notwithstanding his former inspection of it, and that the only case where a witness could refer to a written paper for the purpose of giving evidence, was where he had actually written it himself, and had thus the surest means of knowing the truth of its contents.

ELLENBOROUGH, L. C. J. If the witness looked at the log-book from time to time, while the occurrences mentioned in it were recent, and fresh in his recollection, it is as good as if he had written the whole with his own hand. This collation gave him an ample opportunity to ascertain the correctness of the entries, and he may therefore refer to these, on the same principle that witnesses are allowed to refresh their memory by reading letters and other documents which they themselves have written.

138. BURTON *v.* PLUMMER

KING'S BENCH. 1834

2 *A. & E.* 341

ASSUMPSIT for goods sold and delivered. Plea, the general issue. On the trial before the secondary of the city of London, on the 31st of October, 1834, a clerk of the plaintiff was called to prove the order and sending out of the goods; and it was proposed, on the part of the plaintiff, that this witness should refresh his memory by the entries in a ledger which he produced. According to the statement of the witness, these entries had been copied by the plaintiff from a waste-book into the ledger: the waste-book was kept by the witness himself, and entries were made in the waste-book by him as the transactions occurred, from his

own knowledge: the entries were regularly copied from thence into the ledger, day by day, by the plaintiff, in the presence of the witness, who checked them at the time of such copying, and ascertained their correctness. The waste-book itself not being produced, nor its absence accounted for, the defendant objected that the ledger was only a copy, and could not be used to refresh the witness's memory. The secondary allowed the objection; and, the witness being unable to recollect the transactions without the assistance of the entries, the plaintiff elected to be non-suited. *Erle*, obtained a rule in this term (Nov. 6th) to show cause why the non-suit should not be set aside, and a new trial had.

W. H. Watson, now showed cause. The witness could not look at this document. The absence of the waste-book was not accounted for: and the ledger was only a copy of the waste-book. . . . In Doe dem. Church *v.* Perkins, 3 T. R. 749 [*ante*, No. 136], a witness was not allowed to use extracts made by himself from a book, the entries in which were all made either by him or in his presence.

Erle, in support of the rule. There can be no doubt that the witness might have referred to this paper, if he had made the entries in it himself, while the facts were fresh in his memory. But a memorandum made by another person, under the witness's eye, while the latter has the facts fresh in his memory, and has an opportunity of correcting the entry if erroneous, must fall under the same rule; for such a paper is not, properly speaking, a copy, but is in the nature of an original memorandum made by the witness himself, though not with his own hand, which last circumstance has never been held to be essential; this was decided in Burrough *v.* Martin, 2 Campb. 112 [*ante*, No. 137]. So in Henry *v.* Lee, 2 Chitt. 124 [*ante*, No. 132], a witness was allowed to look at a paper not written by himself. In Rex *v.* Duchess of Kingston, 20 How. St. Tr. 619 [*ante*, No. 129], a witness was allowed, by the House of Lords, to use a copy of his own memorandum, made by another person in his presence. And in Tanner *v.* Taylor, 3 T. R. 754, given from the notes of Buller, J., in Doe dem. Church *v.* Perkins, a witness, who produced a copy of a day-book, would have been allowed to use such a copy, if it had been required merely for the purpose of refreshing his memory. Doe dem. Church *v.* Perkins, 3 T. R. 749 [*ante*, No. 136], itself is not in point; for there the witness said that, even after looking at the paper, he had no memory of his own as to the specific facts.

Lord Denman, C. J. We are agreed that the secondary was wrong in refusing this evidence. The paper, though called a copy, is not so; for when it was taken from that which is called the original, the witness checked it, and saw that it was correct. And as this was done when the transactions could not but be fresh in his memory, so that he must have been able to verify the correctness of the entry, he might afterwards look at the paper for the purpose of having the facts brought to his mind.

Taunton, J. The witness proved that these entries, like all the

others, were shown to him, and that he checked the entries himself. The entries so made by the master stand upon the same footing as if they had been made by the witness himself. . . . Rule absolute.

139. ACKLEN'S EXECUTOR *v.* HICKMAN

SUPREME COURT OF ALABAMA. 1879

63 *Ala.* 494

ACTION by James Hickman for the amount due on an account for services rendered to Acklen as agent, money paid, etc.

On the trial, as appears from the bill of exceptions, the plaintiff read in evidence an account in his favor against said William Acklen, which contained, under date of March 21, 1864, the following items: "Paid hauling 24 B. C. to Beirne's, $182.70"; "Bailing, rope, and twine, for 24 B. C., $108.39"; together amounting to $291.09, with interest added, "3 years, 4 mos., $83.77"; making a sum total of $374.53. Indorsed on this account were two memoranda, one signed by J. V. A. Hinds, and the other by said James Hickman; the first being in these words: "The above is correct, by the books of James Hickman, as kept by me, October 30, 1867"; and the other: "Huntsville, Alabama, twenty dollars on the within account." . . .

The plaintiff introduced James V. A. Hinds as a witness.

1. He testified that, in the year 1864, he was the plaintiff's bookkeeper and agent; that . . . said account was in the handwriting of witness, and was taken by him from the books of said Hickman; . . . that the first indorsement on said account was in his handwriting; that, having refreshed his memory by reading said memorandum, he could now testify from memory that said statement was true, and that the same was correctly dated October 30, 1867, and that he drew off said account from the books of the day of the date of said memorandum; that on or about the 30th of October, 1867, he presented said account, with said indorsement on it, to said Acklen, at his residence in Huntsville; and that said Acklen admitted that he owed the account, and that said account was correct. Thereupon, plaintiff offered to read in evidence the said memorandum, or indorsement, dated October 30, 1867. To this the defendant objected, because said memorandum was not legal evidence; admitting that the witness could refer to said memorandum to refresh his memory, but insisting that the same could not be properly received as evidence, because it was an ex parte statement of the witness. The Court overruled the objection, and admitted the memorandum; to which the defendant excepted.

2. The witness further testified that several years afterwards, some four or five years, the plaintiff came to Huntsville, from Nashville, and, at his request, witness went with him to the residence of said Acklen in

Huntsville; that the account was the subject of conversation between Hickman and said Acklen; that Hickman told Acklen, he must have some money to go home on, and did not have money to pay his expenses; that Acklen thereupon handed something to Hickman, but he (witness) cannot say whether it was a bank-bill, or the account sued on, or both; that he does not remember what it was; and that Acklen, when he handed this something to plaintiff, said, "I will pay you the balance soon." The witness said, that he could not remember the day, the month, or the year, when he went with Hickman to see Acklen; and that the second indorsement on said account (the credit of $20) was in the handwriting of said Hickman. The Court allowed the witness, against the objection of the defendant, to testify that he saw Hickman make said indorsement on said account, in Huntsville, on the same day, and soon after he and Hickman left Acklen's house, and went up town on the public square; to which ruling the defendant excepted. The Court also allowed the witness, against the objection of the defendant, in the presence of the Court and jury, to look at said indorsement in the handwriting of Hickman, and refresh his memory by the use of said memorandum, and then to testify, against the objection of the defendant, that the said visit of witness and Hickman to said Acklen was made on the 10th November, 1869. The defendant objected to this evidence of the date of said visit, and his reference to said indorsement to refresh his memory; because the effect was, indirectly, to get said indorsement before the jury; and because no memorandum, made by said Hickman, could be properly referred to by said witness; and because it was not shown that the witness knew said indorsement was true. These objections were overruled, and the defendant excepted.

After the argument of counsel was concluded, the Court charged the jury, that said indorsement on the account, dated November 10, 1869, was not evidence. . . .

The rulings of the Court on the evidence, to which exceptions were reserved, as above, and the charge to the jury, are now assigned as error.

Walker & Shelby, for the appellant. . . .

Humes & Gordon, contra.

STONE, J. The law recognizes the right of a witness to consult memoranda in aid of his recollection under two conditions.

First, when after examining a memorandum made by himself, or known and recognized by him as stating the facts truly, his memory is thereby so refreshed that he can testify, as matter of independent recollection, to facts pertinent to the issue. In cases of this class the witness testifies to what he asserts are facts within his own knowledge, and the only distinguishing difference between testimony thus given, and ordinary evidence of facts, is that the witness, by invoking the assistance of the memorandum, admits that without such assistance his recollection of the transaction he testifies to had become more or less obscured. In cases falling within this class, the memorandum is not thereby made evidence

in the cause, and its contents are not made known to the jury, unless opposing counsel call out the same on cross-examination. This he may do, for the purpose of testing its sufficiency to revive a faded or fading recollection, if for no other reason.

In the *second* class are embraced cases in which the witness after examining the memorandum cannot testify to an existing knowledge of the fact, independent of the memorandum, — in other words, cases in which the memorandum fails to refresh and revive the recollection and thus constitute it present knowledge. If the evidence of knowledge proceed no further than this, neither the memorandum, nor the testimony of the witness, can go before the jury. If, however, the witness go further, and testify that, at or about the time the memorandum was made he knew its contents and knew them to be true, this legalizes and lets in both the testimony of the witness and the memorandum. The two are the equivalent of a present, positive statement of the witness, affirming the truth of the contents of the memorandum.

1. Under these rules, the Circuit Court erred in allowing the memorandum to be given in evidence to the jury.

2. The Court erred, also, in allowing the witness to refresh his recollection by the credit indorsed in the handwriting of Hickman. True, he stated he saw the indorsement made; but he did not testify that he knew, or ever had known, it contained a true statement of the facts. If he had testified that he saw the indorsement made, and observed its contents, and knew at the time that they were true, this would have brought the testimony within the second of the rules stated above and would have let in both the testimony and the memorandum, notwithstanding the witness, at the time of the trial, had no independent recollection of the facts shown by the indorsement.

Reversed and remanded.

140. NORWALK *v.* IRELAND

SUPREME COURT OF ERRORS OF CONNECTICUT. 1896

68 *Conn.* 1; 35 *Atl.* 807

ACTION upon the official bond of a constable to recover damages for an alleged trespass, brought to the Court of Common Pleas in Fairfield County and tried to the Court, CURTIS, J., upon the defendants' demurrer to the complaint. The Court overruled the demurrer, and thereafter the case was tried, upon the defendants' denial, to the Court, DOWNS, J., who found the facts and rendered judgment for the plaintiff, and the defendants appealed for alleged errors in the rulings of the Court. No error. . . .

At the time of the attachment Louisa Fawcett, the plaintiff's wife, was engaged in conducting a millinery store with a miscellaneous stock

of millinery goods therein. The defendant officer, with a writ of attachment against said Louisa, entered said store and attached the goods therein, including the goods belonging to the plaintiff, and carried the same away. . . . During the attachment the plaintiff came in and informed the officer that some of the goods in the store belonged to him, and asked that he might be allowed to see what he (the defendant) was taking, and make a list of the same. The request was denied. . . . Said Louisa Fawcett and the plaintiff both testified as to the value of the plaintiff's said goods, and the value of said Louisa Fawcett's goods. Concerning the ruling now in question, the finding in full is as follows:

"Said defendant, while testifying in his own behalf, identified a written memorandum, which he testified was an inventory of all the goods attached, made by him at the time of said attachment, partly from his own inspection of the goods and the tags or tickets thereon, and partly from information given him at the time by John Lockwood and Wilbur F. Young, who had been employed by him to assist in attaching and removing said goods. He testified that he could not specify any particular article in said inventory as one upon which he had seen a price mark, and could not say as to any particular item in said inventory, whether he had written it from his own examination of the article, or from information furnished him by one of his said assistants. He also testified that nearly all of the goods attached were marked, and that he used said inventory in making out his return on the writ. The defendants counsel, for the purpose of further showing the manner in which said inventory was made, then read a portion of the deposition of said Wilbur F. Young, as follows:

"*Q.* — Did you and Mr. Ireland take an inventory of the stock attached? *A.* — We did.

"*Q.* — Did you attach to this inventory any value of the stock? *A.* — Yes.

"*Q.* — Upon what was this value based? *A.* — Upon the amount it would bring at forced sale.

"*Q.* — Were, or were there not, any tags with prices marked upon them affixed to the goods attached? *A.* — There were.

"*Q.* — Were or were not these prices so affixed taken by you and Mr. Ireland in making up the value in the inventory? *A.* — They were. . . . As descriptive of the property attached. As tending to prove the value of the property."

To the admission in evidence of said inventory the plaintiff objected; and the Court excluded the same, but ruled that the witness (said defendant) might use said inventory to refresh his recollection as to the number and description of the articles attached, and the prices marked thereon. The defendants duly excepted to the Court's ruling in refusing to admit said inventory in evidence. The witness did use said inventory to refresh his recollection, and having so refreshed his recollection,

testified as to the prices marked on 17 hats, 7 rolls of ribbon, and 4 pieces of velvet trimmings.

On cross-examination he testified that he had selected and testified concerning said 17 hats because, to the best of his belief, he had personally seen the price marks on one-half of the whole number of hats named in said inventory, and, therefore, had selected from said inventory alternate hats to the number of 17; and again stated that he could not select from said inventory any specific article as one he had personally seen a price mark on at the time of the attachment. Thereupon the defendant again offered said inventory in evidence, but the Court refused to admit the same, to which ruling the defendant duly excepted. . . .

John H. Light, for the appellants (defendants). . . . The inventory or memorandum of goods attached, was admissible in evidence. . . .

John C. Chamberlain and *Joseph A. Gray*, for the appellee (plaintiff). . . . The inventory was properly rejected. Curtis *v.* Bradley, 65 Conn. 114. . . .

FENN, J. . . . It is claimed that the Court erred . . . in refusing to admit in evidence a certain written inventory. . . .

The inventory in question fails in one, and that the most vital particular, to be admissible. The memorandum was not proved to have been made under such circumstances as to make a correct statement of details as they were then known to the witness who made the memorandum. It testifies to matters to which the witness is unable himself to testify, not from lack of recollection, but from want of personal knowledge. . . . It has never, so far as we know, been seriously claimed that such papers could even be used at all, by a witness under examination, except to refresh his memory, or to assist him to testify to something which he once knew to be true. . . . The trouble was, the inventory, before us as an exhibit, does not show which of the goods were marked. The defendant could not specify any article in said inventory as one on which he had seen a price mark, and could not say as to any item whether he had written it from his own examination, or from information furnished him by one of his assistants. One of these assistants only was called. . . . It is true this witness also stated that some of the goods had tags with price marks affixed, and that these were taken in making up the value of the inventory. But this was all. Finally, the inventory was claimed as descriptive of the property attached. But the same want of knowledge on the part of the witness is evident here throughout. The Court in its above ruling committed no error prejudicial to the defendants. . . .

There is no error in the judgment complained of.

In this opinion the other judges concurred.

141. VOLUSIA COUNTY BANK *v.* BIGELOW

SUPERIOR COURT OF FLORIDA. 1903

45 *Fla.* 638; 33 *So.* 704

WRIT of Error to the Circuit Court for Volusia County. . . .

It appears from the abstract in this case that the defendant in error filed a claim affidavit asserting that certain personal property levied upon under execution against her husband, J. E. Bigelow, belonged to her as her separate property, and upon trial the jury found in her favor. . . .

The third assignment of error is that "the Court erred in permitting the claimant's witness, Marion L. Bigelow, to read to the jury memoranda of sums of money claimed by witnesses to have been advanced by her to her husband, J. E. Bigelow." The bill of exceptions recites that claimant claimed to have advanced various sums to her husband during the years from 1891 to 1897, inclusive, and to have made memoranda of those sums; that a memorandum in her hand was made the day before from memoranda she had previously made, none of which were made from memory. When asked to give the amount advanced in each year, witness "commenced to read from memorandum in her hand." Plaintiff in execution thereupon objected to witness's reading said memorandum on the grounds that it was not of itself competent evidence, and that it was made the day preceding her testifying and not at the time of the transaction. The bill of exceptions states that "these objections were overruled and witness permitted to read from said memorandum, to which rule plaintiff in execution excepted."

Isaac A. Stewart (with whom was *Egford Bly* on the brief), for plaintiff in error. *Beggs & Palmer*, for defendant in error.

JAMES F. GLEN, Commissioner (after stating the case as above). We think this record sufficiently shows that the memorandum was not used by the witness for the mere purpose of refreshing her independent recollection, but that she relied on the memorandum as the basis of her testimony. There is a clear and obvious distinction between the use of a memorandum for the purpose of stimulating the memory, and its use as a basis for testimony regarding transactions as to which there is no independent recollection. In the former case it is immaterial what constitutes the spur to memory, as the testimony when given rests solely upon the independent recollection of the witness. In the latter case, the memorandum furnishes no mental stimulus, and the testimony of a witness by reference thereto derives whatever force it possesses from the fact that the memorandum is the record of a past recollection, reduced to writing while there was an existing independent recollection. It is for that reason that a memorandum, to be available in such cases, must have been made at or about the time of the happening of the transaction,

so that it may safely be assumed that the recollection was then sufficiently fresh to correctly express it. The assumed reliability of the memorandum as a contemporaneous record is the sole justification of its use by the witness; and hence it is essential in such cases that the witness should produce and testify by reference to the original memorandum, or satisfactorily account for its absence, before resort can be had to a copy. Doe ex dem. Church *v.* Perkins, 3 Term Rep. 749 [*ante*, No. 136]. . . .

It follows that the Court erred in permitting the claimant to testify from the copy in question as to the sums alleged to have been advanced by her to her husband. . . .

The judgment should be reversed and a new trial had.

142. MURRAY & PEPPERS *v.* DICKENS

SUPREME COURT OF ALABAMA. 1906

149 *Ala.* 240; 42 *So.* 1031

APPEAL from Mobile Circuit Court. Heard before Hon. SAMUEL B. BROWNE. Action by Murray & Peppers against Charles C. Dickens From a judgment for defendant, plaintiff's appeal. Reversed and remanded.

This was an action by the appellants (plaintiffs) against appellee (defendant) on the common counts, to wit: (1) Open account; (2) account stated; (3) work and labor done; (4) merchandise, goods, etc., sold; (5) money paid for defendant; (6) money received by defendant for the use of plaintiffs. And the pleas were the general issue and payment. The matter for which plaintiffs claimed that defendant owed them the amount sued for was for the use of a "steam hoister," which it is claimed did service for defendant under an agreement by which he was to pay $10 per day.

A witness for plaintiffs, Edward Peppers, who was a member of the plaintiff's firm, testified that plaintiffs did in September, 1903, rent the "steam hoister" to defendant; that defendant was to pay $10 per day; that defendant, Dickens, was to give plaintiffs a statement each Saturday night as to how much the "hoister" had worked during the week; that defendant had been asked frequently for the statement, but had never given any, except a little slip, once, with no date on it; that witness did not see the hoister worked, as it was 10 or 12 miles from Mobile; that plaintiff became dissatisfied because of Dickens' failure to furnish the statement, and changed the terms to a regular renting agreement, but this suit is for the amount due before this change was made; that the hoister was a barge, with a steam engine on it, and was used for pulling logs out of the woods; that plaintiff's engineer, Bill Steadham, had charge of the hoister; that he left Mobile with it every Sunday evening or Monday morning and returned Saturday evening, at which time he

would report to witness verbally the number of days that the hoister had been worked during that week, and witness would set the amount down in the book (which is offered in evidence); that plaintiffs were paying said Steadham according to the time he worked, and they paid him according to the amounts so set down in said book, and they allowed a half day each week for going to and returning from defendant's place — thus, if he reported 5 days' work they paid him for 5½ days. He also stated that the boat remained through the week at defendant's place, subject to his orders. Bill Steadham testified to the same arrangement; that he made true reports every Saturday night to Mr. Peppers, who entered it at once in the book; also that he would call on Dickens for statements of the work done, but that he never gave but the one, and would tell him that his (Steadham's) word was as good as his (Dickens); that he knew exactly how many days he worked and how many he lost each week, and so reported it; that when he had steam up, under orders, at Dickens' place, he reported it that way; but witness later stated that sometimes Dickens did not come down to work till late in the day, but, if witness had steam up all day, he reported that as a day's work.

The defendant objected to the introduction of said book in evidence, on the ground that it had not been proved, which objection was sustained, and the book was excluded. And the Court then, on motion of defendant, excluded all of the plaintiff's evidence, because it was irrelevant and immaterial, and gave the general charge in favor of the defendant. The chief point of controversy is the action of the Court in ruling out the book as evidence and then excluding all of plaintiffs' testimony. The appellants insist that there was error in this action of the Court, and the appellee sustains the action, because . . . the person making the entries did not himself have personal knowledge of their truth. . . .

William C. Fitts and *David H. Eddington*, for appellant. — The book was a book of original entry in contemplation of law. . . .

Gregory L. and *H. T. Smith*, for appellee. — The entries in the book are not admissible . . . because the person making the entries had no personal knowledge of their proof. . . .

Simpson, J. (after stating the facts as above).

1. As to the third exception, while it is true that the expression is found in the authorities that the person making the entry must have knowledge of the correctness of the item, yet it will be found that in those cases there was no proof by *any one else* of the correctness of the item. And it would seem, on reason, that if one party testifies that he knew of the correctness of the item and gave it correctly to the other, and the other testifies that he entered it as it was given to him, that that would amount to the same thing as if the party who made the entry should swear that he knew of the correctness of the item. So it is laid down that "entries made by a party from data furnished, or memoranda kept by an employee to assist his memory in making a report or return will be admissible, if supplemented by the oath of the party and the

testimony of the servant making the memoranda or furnishing the information." 17 Cyc. 386; Miller *v.* Shay, 145 Mass. 162. . . . The book in this case was not subject to this objection.

2. It is next insisted that the book was properly excluded, because the entries were not made contemporaneously with the transaction. . . . In the case of Stoudenmire *v.* Harper Brothers, 81 Ala. 242, 245, 1 South. 857, the memorandum sought to be introduced was not an original entry, nor even a copy of the entries on the books, but merely an addition by the witness of certain items which he had taken from the books, and the Court said: "The original must be produced, and must have been made at or near the time of the occurrence." . . . The case of Lane *v.* May & Thomas Hdw. Co., 121 Ala. 296, 298, merely holds that a memorandum book could not be introduced in evidence when there was no proof that the items were entered "at or about the time the payments were made, nor sufficiently that the witness knew the entries to be correct when they were made."

So there is nothing in our decisions contrary to the general principle laid down, to wit, that, while the entries must be made at or near the time of the transactions, yet no precise time is fixed by law when they should be made. The entry need not be made exactly at the time of the occurrence; but it is sufficient if it be made within a reasonable time. In this particular every case must be made to depend upon its own peculiar circumstances, having regard to the situation of the parties, the kind of business, the mode of conducting it, and the time and manner of making the entries. An entry once a week has been held to be sufficient. Yearsley's Appeal, 48 Pa. 531. . . .

It must be admitted that the cases are in some confusion on this subject, but from an examination of them the above seems to be a reasonable deduction. There are a number of cases where loose memoranda were first made, and then afterwards transferred to a permanent book, and the general trend of decisions is that the loose memoranda are not the entry, but mere helps to the party to remember, and the entry in the permanent book is the original entry, so that it seems that the rule would be the same, whether there were any memorandum or not. In those cases it is held that, in order to admit the entries in the book, it is necessary, not only that the party who made the entry shall swear that the entry was made in accordance with the memoranda, but also that the party who made the memoranda should testify to the correctness of the memorandum when he made it. This testimony we have in the case now under consideration. It is also held in a number of them that unless some reason is shown why the entry was not made in a day or two, either from the nature of the business or otherwise, the entry will not be deemed to be contemporaneous within the meaning of the law; but the cases recognize that circumstances may be such as to justify the delay in making the entry for as long a time as a week. Redlich *v.* Bauerlee, 98 Ill. 134; Kent *v.* Garvin, 67 Mass. 148; Vicary *v.* Moore,

2 Watts (Pa.) 451; Forsythe *v.* Norcross, 5 Watts (Pa.) 432. As stated in the Redlich case, *supra:* "It suffices if it be within a reasonable time, so that it may appear to have taken place while the memory of the fact was recent, or the source from which knowledge of it was derived is unimpaired." So, considering the nature of the business in this case, the fact that the boat made weekly trips and there was no opportunity to make the entries until the report came in at the end of the week, that the contract itself provided for weekly reports, and that the service was such as could be easily remembered for that period, we hold that the entries were made within a reasonable time, and admissible. . . .

The Court erred in excluding the book, and in excluding the evidence of the plaintiff, and in giving the general charge in favor of the defendant. The judgment of the Court is reversed, and the cause remanded.

Tyson, C. J., and Haralson and Denson, JJ., concur.

143. CURTIS *v.* BRADLEY

Supreme Court of Errors of Connecticut. 1894

65 *Conn.* 99; 31 *Atl.* 591

Action to recover for work and labor and materials furnished, also upon an account stated; brought to the Superior Court in Fairfield County and tried to the Court, Ralph Wheeler, J.; facts found and judgment rendered for the plaintiff and appeal by the defendant for alleged errors of the Court. New trial denied.

In the summer of 1890, the plaintiff sold the defendant a building lot. In September of that year, the defendant decided to have a house erected on the lot. It was then understood that one Simeon E. Plumb, a builder, should build the house, and that the plaintiff, a merchant, should advance the money for the cost of construction. The decision of this case depended on the actual terms of the agreement then made; the defendant subsequently claiming that his only agreement was with the plaintiff, and that by such agreement the plaintiff undertook to have the house built for the agreed price of $1,700. Plumb built the house under the directions of the defendant. The plaintiff paid to Plumb the amount of all bills for labor and materials as they came due. The house was finished in March, 1891, and the defendant accepted and occupied it. . . . The defendant objected to the total amount of the bill, and refused payment. . . . The plaintiff brought the present action. . . .

The appeal contains two distinct grounds for an appeal from the judgment. . . . Second, because the defendant is entitled to a new trial on account of errors alleged to have been made in the admission of evidence. Under this ground of appeal four errors are assigned.

First. The plaintiff offered in evidence certain slips of paper, testifying that Plumb came to the store each Saturday during the building of

the house, and gave him the names of the men employed by him during the week and their time; that the plaintiff wrote down at the time in the presence of Plumb on these slips these names, the hours of time, the amount due each man, the total amount due, and the date; that he paid Plumb the total amount of money called for by each slip, and filed the slip on a spindle; and that he had no personal knowledge of the facts so stated to him by Plumb and so written by him on the slips, but that he made such memoranda correctly as Plumb then stated the facts to be. Plumb had already testified that he had employed these men on the Bradley house, and that the slips of paper were correct statements of the facts of each case as far as he could recollect; that he knew them to be correct when made, and that he had given the names, hours of time, and the amounts to the plaintiff, in the manner that the plaintiff subsequently testified, and that after deducting his own wages he paid each man the amount due him. This evidence was offered to prove that the plaintiff had incurred liabilities and paid out moneys upon the order of and as required by Plumb as agent for the defendant, in the manner agreed upon by the parties, and to prove the correctness of the items and prices. The defendant objected to the introduction of these slips, and to the testimony of the plaintiff and of Plumb as shown. The Court admitted the slips, not as themselves evidence apart from the oral testimony, but as memoranda made at the time and in the manner shown, and to be used by the witnesses Plumb and Curtis in the manner indicated, the witness reading the contents of the slips; and admitted the testimony of Curtis and Plumb in connection with them as stated. Said slips were marked as exhibits. . . .

J. C. Chamberlain and *Elbert O. Hull*, for the appellant (defendant). The Court erred in allowing the statement of Curtis as to what Plumb said at various times in the absence of the defendant about the correctness of various items in the bills. . . . It would also seem as though the Court had departed very far from the usual rule in admitting in evidence and having them marked as exhibits, slips to be used as memoranda by the witnesses, especially as there never was the slightest pretext that the witnesses had any knowledge or recollection of the subject-matter of such slips, which could be refreshed by their use. . . .

Allan W. Paige and *George P. Carroll*, for the appellee (plaintiff).

HAMERSLEY, J. (after stating the case as above). 1. The use of the slips and bills made at the time of the transaction and known to the witnesses to have been correctly made, as memoranda to be used by them in connection with their oral testimony, comes within the settled rules of evidence. . . .

2. But the defendant claims error in marking the slips as exhibits, on the ground that if they might properly be read by the witness they are not themselves admissible as evidence.

Courts in other jurisdictions have made different rulings as to the admissibility of such a writing. In England it is excluded. In Massa-

chusetts and some other States it is excluded. Costello *v.* Crowell, 133 Mass. 355; Morrison *v.* Chapin, 97 Mass. 72; Dugan *v.* Mahoney, 11 Allen 572. In Vermont it seems to be treated as evidence. Lapham *v.* Kelly, 35 Vt. 195. In New York and some other States the writing is admitted as evidence. Guy *v.* Mead, 22 N. Y. 462, 465; . . . Anchor Milling Co. *v.* Walsh, 18 S. W. Rep. 905. In the Federal jurisdiction the question is still open. In Ins. Cos. *v.* Weides, *supra*, the Court indicates the admissibility of the evidence; but the opinion in Bates *v.* Preble, 151 U. S. 155, shows that the Court is not committed to the general doctrine that such memoranda are admissible for any other purpose than to refresh the memory of the witness. We do not attempt to cite all the cases bearing on the question, or to weigh the conflicting authorities; for we are satisfied on principle that the evidence in question is admissible. The discussion would be endless unless confined to the precise question presented, which may be stated as follows:

The litigated question is, did the plaintiff pay to the agent of the defendant a certain sum on a certain date, as wages due for labor performed by a certain man employed by the agent? The plaintiff and the agent testify that a sum was paid for such purpose; that at the time of payment the agent gave to the plaintiff the exact amount due, and the name of the employee entitled to the same, and the plaintiff then, in the presence of the agent, wrote on a piece of paper the date, the amount, and the name; that these items as then written by the plaintiff were correct; that the paper produced in Court is the identical paper then written upon by the plaintiff and since unchanged; that they have no recollection either before or after examining the paper, of the date, the amount, or the name. Is that paper admissible as evidence?

All Courts concur in holding that the witness may read the statement of such paper to the jury, and that the jury may draw the conclusion that the statement so read to them is a true statement of the facts. But some Courts hold that the paper is not evidence.

It seems to us to be pressing the use of a legal fiction too far, for a Court to permit the statement made by such paper to be *read* as evidence, while holding that the law forbids the *admission as evidence* of the paper which is the original and only proof of the statement admitted. In other words, it would seem as if in admitting the paper to be so read, the Court of necessity admitted the paper as evidence, and therefore, by the concurrent authority of all Courts, the paper is itself admissible. But, waiving the question whether in admitting such paper to be read the Courts have gone so far as to make the denial of its admissibility no longer tenable, we will deal with the matter as if wholly undecided. Is the paper itself admissible as evidence? Its admissibility in the first instance depends on its relevancy. Of this there can be no doubt. Being relevant, it must be admitted, unless excluded under some legal principle, or rule of public policy, which forbids the admission of certain classes of evidence, no matter how relevant and material. It cannot be said

that the paper is not capable in its nature of being treated as competent evidence. Legal evidence is not confined to the human voice or oral testimony; it includes every tangible object capable of making a truthful statement, such evidence being roughly classified as documentary evidence. In oral evidence the witness is the man who speaks; in documentary evidence the witness is the thing that speaks. In either case the witness must be competent, i. e., must be deemed competent to make a truthful statement; and in either case the competency of the witness must be proved before the evidence is admitted; the difference being that in oral evidence the competency is proved by a legal presumption, and in documentary evidence the competency must be proved by actual testimony; and the further difference, that in oral evidence the credit of the witness is tested by his own cross-examination, while in documentary evidence the credit of the witness is tested by the cross-examination of those who must be called to prove its competency. . . .

The doubt has arisen from the complication of the admissibility of such paper with the right of a witness to refresh his memory. In fact, the two questions may be entirely distinct. The right of a witness to refresh his memory is a settled and necessary rule of evidence. The application of that rule is often difficult, involving delicate distinctions. We are not called upon now to draw the line which limits the right of a witness to the use of such aids as, under the subtle laws of association, serve to refresh his memory. All Courts recognize that right, and rightly hold that the thing used to refresh memory is not by reason of such use itself admissible as evidence. When in the application of the rule a document like the one in question was presented to the witness and absolutely failed to refresh his memory, its exclusion as a means of refreshing his memory became imperative; but the evidence of the document was so clearly essential to a fair and just trial, that its use in some form seemed almost imperative. Instead of treating the paper as itself competent documentary evidence, resort was had to a palpable fiction; the paper is read by the witness, and the knowledge the witness once had of the facts stated by the paper is imputed to him as still existing, and the statement of the paper is received as the testimony of the witness, and the paper itself, the only witness capable of making the statement, is excluded. The use of such a fiction in the administration of justice can rarely if ever be justified. It is certainly uncalled for in this instance. The principles of law invoked to justify the fiction are amply sufficient to support, indeed to demand, the admission of the document as evidence. There is no occasion to sacrifice truth in order to secure justice. As regards its admissibility as evidence, there is no substantial difference between this paper and any other tangible object capable of making a truthful and relevant statement. . . . Suppose the litigated question turns on the dimensions of a man's foot. A witness produces a plaster cast of the foot; the testimony conclusively shows that the cast was so taken that it can state accurately the dimensions of the foot. Another

witness produces a paper, on which the exact measurements are written; the testimony conclusively shows that the paper also was so made that it can state accurately the dimensions of the foot. Is it not evident that the paper and the cast is each a witness to the fact that each tends to prove? . . .

The conditions required by law to make such documents legal evidence are: The substance offered as a witness must be proved to have been made or found and preserved in such manner that it states directly, accurately, and truly, a fact relevant and material to the issue. The paper claimed as evidence in this case fulfils these conditions. . . .

3. It does not, however, necessarily follow from the admissibility of such evidence, that the document should be sent to the jury room. Under the general rule of practice the jury must depend on their memory in the case of oral testimony, but may take documentary evidence to their consultation. But there is a difference in documentary evidence. Some is not given to the jury, either because its possession is agreed to be of no consequence or is inconvenient, or the document is of such a nature that it testifies to facts not relevant, in addition to the relevant facts. . . . If the writing admitted in evidence clearly tends to prove nothing but the fact that it was admitted to prove, it should go to the jury. If by reason of peculiar circumstances it clearly may be treated by the jury as evidence of other facts not admissible, it should not go to the jury. Between the two extremes the question is largely one of discretion in the trial judge. . . .

A new trial is denied.

In this opinion the other judges concurred.

Sub-topic F. Narration

(1) *Form of Narration.*[1]

145. James Ram. *On Facts as Subjects of Inquiry by a Jury.* (3d Amer. ed. 1873, p. 134). There are two ways of questioning: one, where the words made use of in the question suggest or prompt a particular answer, and which is called a *leading* question; the other, where the question does not so lead, but is put in general terms, without at all pointing to a particular reply. This may be called an *open* question; it is open to any answer. "Did not you see this?" or "Did not you hear that?" are leading questions. In them the person questioned is in a manner prompted to answer, he did see or hear this or that particular thing. "It is a good point of cunning for a man to shape the answer he would have in his own words and propositions: for it makes the other party stick the less." [2] "Ye will, therefore (addressing Morris), please tell Mr. Justice Inglewood, whether we did not travel several miles together on the road, in consequence of your own

[1] For the principles of Psychology here applicable, see the present Compiler's "Principles of Judicial Proof" (1913), Nos. 253–273.

[2] Bacon's *Essays: Of Cunning.*

anxious request and suggestion, reiterated once and again, baith on the evening that we were at Northallerton, and there declined by me, but afterward accepted, when I overtook ye on the road near Clobery Allers, and was prevailed on by you to resign my ain intentions of proceeding to Rothbury; and, for my misfortune, to accompany you on your proposed route. 'It's a melancholy truth,' answered Morris, holding down his head, as he gave this general assent to the long and leading question which Campbell put to him."[1] Assuming that the person questioned honestly desires to speak the truth, and that his memory is not defective, a strong probability is that, whether the question be open or leading, he will return precisely the same answer to it.

146. NICHOLLS *v.* DOWDING. (Nisi Prius, 1815. 1 Stark. 81). Assumpsit on bills of exchange, and for goods sold and delivered. In order to prove that the defendants were partners, the first witness was asked, whether the defendant Kemp had interfered in the business of Dowding. The question was objected to as a leading one.

LORD ELLENBOROUGH, C. J. — I wish that objections to questions as leading might be a little better considered before they are made. It is necessary, to a certain extent, to lead the mind of the witness to the subject of inquiry. If questions are asked, to which the answer yes or no would be conclusive, they would certainly be objectionable. But in general no objections are more frivolous than those which are made to questions as leading ones.

147. BLEVINS *v.* POPE

SUPREME COURT OF ALABAMA. 1845

7 *Ala.* 371

ERROR to the Circuit Court of Dallas. Trover by the defendant against the plaintiffs in error, to recover damages, for the conversion of a promissory note for $1,503.30, made by Wm. Johnson & Co. to the plaintiffs.

Upon the trial, the plaintiffs introduced Frederick Dorr, of the firm of Wm. Johnson & Co. . . . During his examination, the witness had given a description of the note, and its contents. The defendant's counsel, on the cross-examination, asked him if the note was not in his possession, and if he could not find it upon diligent search; he admitted he could. He admitted, also, that he had been several times requested, by the plaintiffs' counsel, to search for it; that he had done so, partially, and could not find it, and had told them so; and that he had no particular desire to find it. . . . Upon the re-examination, the plaintiffs' counsel asked the witness, "Was not the note for $1,503.30?" which question the defendant objected to, as leading. The Court permitted it to be answered, assigning as a reason, as appears from the bill of exceptions, that the witness had given his recollection fully, upon the examination in chief, as to the description of the note; that the effort, on the

[1] *Rob Roy.*

cross-examination, was to show that the note was different from that described in the declaration; and that the memory of the witness was treacherous. . . .

Hopkins and *Gayle*, for plaintiffs in error, contended, . . . that a leading question could not be put by the plaintiff, to his own witness, unless, by his demeanor, he had evinced a leaning to the defendant, but the record showed that he was impartial. . . .

Edwards, contra, . . . to show the right of a party to ask leading questions of his own witness, and that it was a matter in the discretion of the Court, cited 1 Starkie, Evidence, 123. . . .

ORMOND, J. — . . . The general course of the examination of witnesses, and the difference between an examination in chief and a cross-examination, is perfectly well understood. The whole doctrine rests upon the supposition, that the witness is more favorable to the party who calls him, than to the other side. Though this may be generally true, it frequently happens that parties have to call witnesses who are unfriendly to them, and if confined to the usual course of an examination in chief, would not be able to elicit the truth. When, therefore, the witness, by his demeanor, manifests an unwillingness to tell what he knows, or betrays a leaning in favor of the other side, the Court will permit leading questions to be put, for the purpose of eliciting the truth. It is clear, however, that this must rest in the discretion of the Court, from the impossibility, in most cases, of putting the facts on record, so that they might be reviewed. (1 Starkie, 131; and see the cases collected by the editors, 2 C. & H. 724, note 506.) It results from this, that the presiding Judge need not state his reasons for permitting a leading question to be put, upon the examination in chief, as they would be mere conclusions, and not facts, susceptible of revision. . . .

Let the judgment be affirmed.

148. HEISLER *v.* STATE

SUPREME COURT OF GEORGIA. 1856

20 *Ga.* 153

MISDEMEANOR, in Lee Superior Court. Decided by Judge ALLEN, March Term, 1856. An indictment was found at the June Term, 1855, of Lee Superior Court, charging Elbert Heisler with playing and betting, on the 1st day of April, 1855, "for money and other things of value, at a game of faro, loo, brag, bluff, three-up, poker, vingt-et-un, seven-up, euchre and other games played with cards." At the March Term, 1856, the case came on to be tried. . . .

The State introduced William H. English, who testified, that in the spring of 1855, and before the finding of the indictment, he saw defendant engaged in playing a game of seven-up, being a game played with cards,

in the county of Lee. The Solicitor then asked him "if the defendant played for money." Defendant's counsel objected to this question as leading, and the Court sustained the objection. Defendant's counsel moved the Court to exclude the evidence of this witness, on that point, from the jury, contending that the Solicitor, by his leading question, having put the answer to it in the mouth of the witness, should not so vary the question as to make it legal, and thus elicit from the witness information that would be a reply to the objectionable question overruled by the Court. The Court overruled the motion, and permitted the Solicitor to prove by the witness that defendant played for money, and lost twenty dollars. To this decision, counsel for defendant excepted.

No other testimony was introduced, and the jury found the defendant "guilty"; whereupon, the Court fined the defendant one hundred dollars, and all costs, being the highest fine the Court was allowed, by law, to inflict. To this judgment of the Court, defendant's counsel excepted, and now assigns the same, together with the refusal of the Court to quash said indictment, and the refusal to exclude the testimony of the witness, English, as to defendant's playing for money, as error.

R. F. Lyon, for plaintiff in error. Sol.-General, *John W. Evans*, for defendant in error.

By the Court. — Benning, J., delivering the opinion. . . . Whether a leading question shall be asked on the direct examination, is a matter for the discretion of the Court hearing the examination. The case, therefore, in which this Court would be bound to touch that Court's judgment, allowing or not allowing a leading question to be asked, would be an extreme one.

In this case, the Court would not permit the leading question to be answered; but as the question had been put, and had, therefore, done all the harm it could do, the party hurt by it asked, as the only remedy, that the witness should be prevented from testifying on the point to which the question related. This request the Court refused to grant. This remedy would be worse than the disease. It is one which, so far as we know, has never been applied in practice. If a remedy known to the law, yet, whether it shall be applied in any case, is a matter which, like that as to the asking of leading questions, is for the discretion of the Court presiding.

Upon the whole, this Court cannot say that it sees anything to justify its interfering with the refusal of the Court to prevent the witness from being examined on the point to which the leading question related. That question, it may be remarked, however, was not strongly leading.

A little wholesome punishment inflicted upon the counsel that indulge in such questions, would, no doubt, soon stop the practice. . . . We find no error in this bill of exceptions.

149. TRAVELERS' INSURANCE CO. *v.* SHEPPARD

SUPREME COURT OF GEORGIA. 1890

85 *Ga.* 751

ACTION on a policy of accident insurance on the life of the plaintiff's husband. The main defense was that he was not dead. . . . [The plaintiff's case was that Sheppard, her husband, fell into the river accidentally from his boat; the defense maintained that Sheppard had purposely disappeared, to defraud the defendant. More details are given in No. 459, *post*.]

Henry Jackson, Lanier & *Anderson* and *Hardeman, Davis* & *Nottingham*, for plaintiff in error. *Bacon* & *Rutherford*, contra.

BLECKLEY, Chief Justice. — The verdict against the company was for $5,000. . . . It remains to dispose of objections which were taken to the form of the questions by which some of it was elicited. . . . To thirty of the interrogatories propounded to Turner, an exception on this ground [of leading questions] was duly filed, and was overruled by the Court as to each and all of them.

No doubt most of these interrogatories are leading, but many of them relate only to collateral or introductory matters not in dispute and not bearing directly on the merits of the controversy. As to such matters leading questions are allowable. 2 Taylor's Evidence, § 1404; 1 Greenleaf's Evidence, § 434.

But several of the interrogatories *assume* that Sheppard fell into the river, which was a disputed and most material fact, and one or two of them that he was dead, and that there was news of his death. This sort of assumption is one of the most pernicious forms in which the vice of leading questions can make its appearance, its tendency being to induce the witness to adopt the theory of the facts propounded by the examiner, and shape his testimony in a way to lend support to that theory. Even an honest and well-meaning witness may sometimes be drawn by this device into coloring the letter, if not the spirit, of his evidence more highly than the exact truth, so far as his knowledge of it extends, would warrant. It is not lawful, as a general rule, to propound in chief "questions which involve or assume the answer which the party desires the witness to make, or which suggest disputed facts as to which the witness is to testify." 1 Wharton, Evidence, § 499; Stephen, Digest of Evidence, art. 128. That this rule was flagrantly violated in several instances will be manifest from a mere glance at the following interrogatories. The answers are also set out, — not to elucidate the question whether the interrogatories are leading, for on that question any answers would be irrelevant; but to show that the letter of some of the answers was influenced by the form of the questions, although the witness did not know either that Sheppard was dead or that he fell into the river, and

made it perfectly clear elsewhere in his testimony that he had no such knowledge:

Q. — "State what was the nature of the current at the point where Sheppard fell in, whether it was slow or swift?" *A.* — "Just at the point where the boat lay, there was a little counter-current, but 12 or 15 feet, about, outside there was a very strong current."

Q. — "How far below the mouth of Moccasin Slough was the point where Sheppard fell into the water?" *A.* — "The point where Sheppard fell in the water was about 600 yards below the mouth of Moccasin Slough."

Q. — "State whether or not there were any logs or tree-tops or rafts, either where Sheppard fell in or just below, and if just below, how far below?" *A.* — "There was some tree-tops and logs not over 40 yards where we found the boat."

Q. — "What time in the evening was it that Sheppard fell into the river, etc.?" *A.* — "It was very late in the evening, and very dark and cloudy. It was a dark and gloomy day. It was only a short time before night."

Q. — "Did either you or Boykin or Brown carry the news of Sheppard's death that night to his wife or father and mother? If you say you did not, why did not one of you three go?" *A.* — "We did not carry the news to the Sheppard family that night. I did not feel able to go."

A few others of the leading questions were calculated to do harm, but perhaps did none, construing all the answers of the witness together. His testimony, in its general effect, makes the impression that he was a truthful and unbiased witness. In several instances the attempt to lead him was unsuccessful, and though the letter of his answers was sometimes shaped by the form of the question, there was no perversion of the spirit and meaning of his testimony, considered in its totality. For this reason we hold that the Court did not abuse its discretion in admitting all the answers that were otherwise competent, notwithstanding the vicious character of many of the interrogatories. To admit or reject evidence drawn out by leading questions is generally discretionary with the trial Court. Ewing *v.* Moses, 51 Ga. 410; Farkas *v.* Stewart, 73 Ga. 90; Parker *v.* Railroad Co., 83 Ga. 539.

150. LOTT *v.* KING

SUPREME COURT OF TEXAS. 1891

79 *Tex.* 292; 15 *S. W.* 231

APPEAL from Nueces. Tried below before Hon. J. C. RUSSELL.

This was an action of trespass to try title, brought to recover a league and labor of land patented to John B. Bulrese upon duplicate certificate

No. 35/216, issued by the Commissioner of the General Land Office in lieu of original certificate No. 39, issued by the Board of Land Commissioners of Jefferson County upon Bulrese's headright. Richard King was the original defendant, but he died during the progress of the suit, and appellee became the party defendant in his stead. As we understand from their abstract of title and the evidence offered, the plaintiffs claimed under the heirs of one Nathan Halbert, that Bulrese sold his headright to Halbert before the certificate was issued, and that the original certificate No. 39 was in fact issued to Halbert for one league of land. The defendant claimed under Bulrese through an alleged conveyance of the certificate by Mary C. Halbert as his sole heir.

The plaintiff took the deposition of Mary C. Halbert, and upon a written motion by defendant certain of her answers were suppressed. There were three grounds of the motion, one of which was waived. The grounds insisted upon were as follows: "1. Because the second, third, fourth, sixth, tenth, eleventh, twelfth, thirteenth, and fourteenth direct interrogatories were each of them leading, irrelevant, and incompetent." . . . The direct interrogatories and the answers thereto excepted to by defendant were as follows:

"*Interrogatory 2.* This is a suit in trespass to try title to recover one league and one labor of land situated in Nueces County, Texas, and patented to John B. Bulrese, on the 7th day of August, 1882, by virtue of duplicate headright certificate No. 35/216, issued in lieu of original headright certificate No. 39. The original certificate was issued by the Board of Land Commissioners of Jefferson County, in 1838. Were you ever acquainted with (said) John B. Bulrese? And if yea, when and where did you know him, and for how long did you know him? Is he dead or alive? If you say that he is dead, when and where did he die? Are you related to said John B. Bulrese in any way? If so, how? If you answer that said John B. Bulrese is dead, and that you are a daughter of said John B. Bulrese, now please state whether or not the said Bulrese left any other children surviving him, and if any, how many; and give their names; and if any of them are girls, were they ever married; and if yes, give the names of their husbands. And are any of the said children of Bulrese dead? If yea, how many of them are dead, and what were their names, and when and where did they die? If you say that some of the children of said Bulrese are dead, did they leave any children or other descendants surviving them? And if so, which of them? And give their names. *Answer.* — I was acquainted with the said John B. Bulrese. I knew him in the States of Louisiana and Texas, and knew him as far back as I can recollect. The said John B. Bulrese is dead. He died somewhere on Grand River in the State of Louisiana. I am related to said John B. Bulrese. He was my father. Yes, the said John B. Bulrese left five children surviving him at his death besides myself, as follows." . . .

"*Interrogatory 4.* The original land certificate No. 39, issued by

the Board of Land Commissioners of Jefferson County to John B. Bulrese for one league of land, recites that he had received the certificate for the labor and that he had sold the league to Nathan Halbert. On February 22, 1837, he, said John B. Bulrese, executed to Nathan Halbert a bond for title by which he bound himself to make title to Nathan Halbert to all of his headright, whether it be for a league and labor or for a third of a league, being the land for which he was entitled as a citizen of Texas before the day of the declaration of independence. Now, were you ever acquainted with said Nathan Halbert? If yea, were you related to him in any way, and if yea, how? Is said Nathan Halbert dead or alive? If you say he is dead, when and where did he die? *Answer.* — I was acquainted with the said Nathan Halbert, and I was related to him. I was his wife. The said Nathan Halbert is dead; he died near Eagle Springs, in Coryell County, Texas, about the year 1867." . . .

"*Interrogatory 10.* If you state that you were acquainted with Barnes Parker, now please state whether or not you ever sold and conveyed the headright certificates of John B. Bulrese for one league and one labor of land to said Barnes Parker. *Answer.* — I never did."

"*Interrogatory 11.* If in answer to Interrogatory 10 you say you never sold or conveyed the John B. Bulrese certificate for one league and one labor of land, now state whether or not you ever signed a deed or transfer of said certificate to said Barnes Parker. *Answer.* — I did not."

"*Interrogatory 12.* Please state whether or not you ever authorized any person to sign your name to a deed or transfer of said certificate to said Barnes Parker. *Answer.* — I never did authorize any one to sign my name to a deed or transfer to the said certificate of said John B. Bulrese to Barnes Parker.

"*Interrogatory 13.* Please state whether or not you ever had any business transaction with said Barnes Parker, in which he paid you the sum of $500. *Answer.* — I never did have any business transaction with said Barnes Parker in which he paid me $500 or any other sum of money." . . .

The motion to suppress these answers was sustained and the plaintiffs excepted. The ruling of the Court upon the motion is assigned as error.

E. H. Lott and *D. W. Doom*, for appellants. — 1. The direct interrogatories excepted to by defendant were not leading in form. . . .

Wells, Stayton & Kleberg, and *Hume & Kleberg*, for appellee. — 1. A leading interrogatory is one which may be answered in the affirmative or negative, or one which suggests to the witness the response he is desired to make. . . .

GAINES, Associate Justice (after stating the case as above). . . .

The statement preceding the questions in the second interrogatory is very general, and it is clear that it does not suggest the desired answer to the question, and we think the same may be said of the fourth. The statement of the facts that the certificate recited that Bulrese had sold the league to Halbert and that Bulrese had made a bond for title to

Halbert for his right to land does not suggest any particular answer as to questions concerning the relationship of the witness to Halbert or the fact of his being dead or alive. These statements were unnecessary, but we are of opinion that a statement in an interrogatory which merely calls the attention of the witness to the subject-matter of the inquiry is no ground for suppressing the answer. Long *v.* Steiger, 8 Texas 460.

We are further of the opinion that the tenth interrogatory is not leading. It does not properly admit of an answer "Yes" or "No," and we are not aware of any decision which holds that a question is leading merely because it is put in the form "did or did not." Whether a question in that or a similar form be leading or not depends upon the determination of the inquiry whether it suggests any particular answer; and we think questions in that form which have been held leading are not such as inquire into a single fact, but such as enable the witness to state in two words, such as "he did" or "he did not," a series of group of facts. Such is the case of Tinsley *v.* Carey, 26 Texas 350. The question there evidently suggested to the witness that it was desired to prove that about January, 1857, Tinsley got money from the sheriff of Bastrop County, and that he was first to satisfy a judgment in favor of a certain person and then to apply the balance upon other debts. That these were the facts desired to be proved is indicated by the questions held leading in that case. But as to the question now under consideration, we think it would puzzle the astutest lawyer, who is uninformed as to the issues in the case, to determine from the question alone whether the examiner desired to prove that the witness had or had not transferred the certificate.

In like manner the other interrogatories objected to we think legal; except the thirteenth, which with some hesitation we hold to be leading.[1]

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[1] [*The Docket*, October, 1911.

"Editor of the Docket:

"Enclosed I send you a question which was asked on direct examination in a chancery cause recently in which I was one of the attorneys. . . .

"Yours truly, T.

"'*Q.* — Is it or is is not a fact that said B. told you to let him have the other letters about it, but he thought there would be no difficulty in the matter with Mr. R., and he would write to him that he was of the opinion that Mr. T. was laboring under some misapprehension; that he, the said B., had heard Mr. E. speak of this matter some time in the summer, and he stated to him, the said B., the fact that you had traded for the place, and said that it was so because said R. had told him so; that he carried him from your house to K.; and that you had told him the same thing; and that the said B. said he never knew said R., but had heard of him, and, from what he had heard, he thought he was a pretty straight sort of fellow; and that he would write to said R. about it; Did or did not this occur?'

"'*A.* — I think it did.'"]

151. THOMAS HARDY'S TRIAL. (1794. Howell's State Trials, XXIV, 754). [Treason. The witness had testified to the doings at a meeting of the defendant's society. The witness was a member of the Society at the time, and was not known by his colleagues to be attending the meetings to get evidence for the Crown. He is now on cross-examination.]

What was the first time that you were at any of those meetings? On the 20th of January.

How came you to go then? — I was sent by a gentleman. . . . It was a person high in office under his majesty; but permit me to add, I was not desired by that gentleman to conceal his name. . . .

Mr. *Gibbs.* — Then trusting in you, he sent you to the Globe tavern on the 20th of January, 1794? — Certainly.

Then you never were at any of those meetings in the character of a spy? — As you call it so, I will take it so.

Mr. *Gibbs.* — If you were not there as a spy, take any title you choose for yourself, and I will give you that.

Mr. *Law.* — He did not state any title.

Mr. *Gibbs.* — I did not desire you to take any title in the sense that gentleman is using the term; you object to the term spy, as I called you, and I bid you take any other name.

Lord Chief Justice EYRE. — There should be no name given to a witness on his examination: he states what he went for, and in making observations on the evidence, you may give it any appellation you please. You recollect I made the observation before, when Mr. Erskine did the same thing.

Mr. *Gibbs.* — I really did not feel that I was going at all out of the way in the cross-examination of a witness, in calling him by a name which suits his character, though he does not like it.

Lord Chief Justice EYRE. — Go on.

Mr. *Gibbs.* — You went then (not to call you a spy) to these meetings in the character of a person who had no other reason for going there, than that of picking up what information you could, and carrying it again to those employers, in whose confidence you were? — Certainly. . . .

Mr. *Gibbs.* — You have been giving an account of some conversation that passed there; cannot you recollect who the persons were that had that conversation? — No, I do not know; there was a universal conversation.

Mr. *Gibbs.* — You going there for the purpose of collecting evidence against individuals, and coming now to give evidence against an individual, you thought it not material to observe who the people were who then used this language — you, a gentleman used to practise at the Old Bailey, and meaning to give evidence afterwards against those persons, did not think it material to learn by whom these conversations were held?

Lord Chief Justice EYRE. — Mr. Gibbs, I am sorry to interrupt you, but your questions ought not to be accompanied with those sort of comments; they are the proper subjects of observation when the defence is made. The business of a cross-examination is to ask to all sorts of acts, to probe a witness as closely as you can; but it is not the object of a cross-examination, to introduce that kind of periphrasis as you have just done.

Mr. *Gibbs.* — Send to Mr. Erskine, he is in the parlor.

(Mr. Erskine immediately came into court.)

Mr. *Erskine.* — Will your lordship give me leave to say, it is the universal practice of the Court of King's bench, the first criminal court in this country,

in which I have had the honor to practise for seventeen years — we are certainly permitted to go as far as this. I agree with your lordship in what you just now said (and it will be of no consequence whether I did or no, because your lordship must give the rule). But what I take my learned friend to have said to the witness, is this: "You, sir," not meaning it as an insult to the witness, but "you, sir, as a practiser at the Old Bailey, must know the necessity, if you go to any place to get evidence, of having proper materials for that evidence; how do you account for not having done that?" In a cross-examination, counsel are not called upon to be so exact as in an original examination — you are permitted to lead a witness. . . .

Mr. Justice BULLER. — Undoubtedly the practice has increased much within my memory: what Mr. Erskine alludes to now has been universally the practice; that when you are upon a cross-examination, you are permitted to lead a witness more than you can on an original examination. But be so good as to recollect the mode in which the Lord Chief Justice put it yesterday, and I do not think in Guildhall, or any where else, you ever departed from that. You may lead a witness upon a cross-examination to bring him directly to the point as to the answer; but not to go the length as was attempted yesterday, of putting the very words into a witness's mouth, which he was to echo back again.

Mr. *Erskine.* — Having done that yesterday, I immediately bowed to the admonition I received from my Lord Chief Justice.

Lord Chief Justice EYRE. — . . . With regard to the point, I think it is so clear that the questions that are put are not to be loaded with all the observations that arise upon all the previous parts of the case. They tend so to distract the attention of every body; they load us in point of time so much; and that that is not the time for observation upon the character and situation of a witness is so apparent, that as a rule of evidence it ought never to be departed from. But it is certainly true that it does slide into examinations, and that it is very often not taken notice of, and it saves more time frequently to let it pass than to take notice of it. But there is a rule to which all those sort of things, if once an appeal is made to the Court, ought to be brought, and my judgment is, that after you have got the particular facts upon which that sort of observation is founded, the examination ought to proceed to the other facts upon the case, and the observations upon those former facts ought to make part of the defence. . . .

Mr. *Gibbs.* — I think you told me that you were a gentleman who practised at the Old Bailey; do you now practise here, or have you left off that practice? — I have not left it off.

You now practise at the Old Bailey? — I have not for some time.

How happens that? — Not this six months.

Your reason for not having practised is, that no business has been brought to you, I presume? — Certainly, you are right there.

Did you or not think it necessary, at this meeting, to attend to the particular persons from whom the conversation that you are now stating, proceeded? — At that time I was a total stranger almost to every one in the room.

You did not endeavor to distinguish what was said by one man from what was said by another? — I did not in conversation.

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152. STATUTES. *United States Revised Statutes.* (1878. § 864). Every person deposing, as provided in the preceding section, shall be cautioned and sworn to

testify the whole truth, and carefully examined. His testimony shall be redueed to writing by the magistrate taking the deposition, or by himself in the magistrate's presence, and by no other person, and shall, after it has been reduced to writing, be subscribed by the deponent.

153. ALLEN *v.* RAND

SUPREME COURT OF ERRORS OF CONNECTICUT. 1824.

5 *Conn.* 321

THIS was an action of trespass, tried at Middletown, February Term, 1823, before HOSMER, Ch. J.

To prove a material fact, the defendants offered in evidence the deposition of Mary Trowbridge; to the admission of which the plaintiffs objected, on the ground, that it was written by the agent of the defendants, or of one of them. The circumstances were these. On Monday, previous to the taking of the deposition, the parties met at the house where Mrs. Trowbridge resided, with the magistrate who ultimately took the deposition. He attempted then to take it; but after writing a few lines, Mrs. Trowbridge became faint and exhausted; and the business was adjourned to the next evening. Afterwards, in the absence of the plaintiffs and their counsel, and of the magistrate, Rand, one of the defendants, requested Cornelia Hall, who was living in the house with Mrs. Trowbridge, to write her deposition, from time to time, as she was able to give it. With this request Miss Hall complied; and, at the time adjourned to, the plaintiff not having attended, the paper thus written by her, was presented to the magistrate, and being read to Mrs. Trowbridge, was signed by her, and sworn to. The Chief Justice held, that the deposition was inadmissible; and rejected it. The plaintiffs having obtained a verdict, the defendants moved for a new trial, on the ground of this decision.

Sherman, in support of the motion, contended, that the deposition of Mrs. Trowbridge was legally taken. From her peculiar situation, it was necessary that some person residing in the house with her, who could watch her returns of strength, should write down her testimony for her. An amanuensis was indispensable. Rand requested Miss Hall to act in this capacity. He gave her no instructions. She did not know what use was to be made of the writing. There was not only nothing fraudulent or unfair in the transaction, but there was nothing in the situation of Miss Hall calculated to produce any bias on her mind. Aside from the single circumstance, that the request came from Rand, she acted in as unexceptionable a manner as she could. Then, does this circumstance, of itself, destroy the deposition? It was a lawful act, not prohibited by the statute, and clearly not malum in se. If a request from the party to write a deposition vitiates it; then such a request to the deponent, or to the magistrate, would have that effect. The material

inquiry is, not at whose request the writing was done, but in what capacity the writer acted; whether it was done by an agent of the party, by one presumed to have an interest or bias in his favor. This, evidently, was not Miss Hall's situation. If she was the agent of Rand, her act was his act; but did Rand write this deposition? What she did was in aid of her inmate, the deponent, or of the magistrate engaged to take the deposition. It lightened their labor. She was their substitute; but not Rand's.

Staples and *Hotchkiss*, contra, after remarking upon the salutary nature of the provisions of law intended to guard against fraud in the taking of depositions, and the importance of adhering to the general rule prescribed, without inquiring whether there was any unfairness in the particular case, contended, that Miss Hall was in fact the agent of Rand, and acted as such, in writing the deposition of Mrs. Trowbridge. Whether she lightened Mrs. Trowbridge's labor, or whether she was, in any sense, the amanuensis of Mrs. Trowbridge, is immaterial. Sufficient it is, that Rand employed her to do this service; and in doing it, she acted under his authority. If A. employs B. to do a particular act, and B. does it; is not B., in doing that act, the agent of A.? The writing of depositions by amanuensis employed by the party is a door leading to all the mischiefs the Legislature intended to guard against. That door this Court will not open.

Hosmer, Ch. J. The only question raised in this case, is, whether the deposition of Mrs. Trowbridge was legally rejected. By statute it is enacted, (p. 47) that "the party, his attorney, or any person interested, shall not write, draw up, or dictate any deposition"; and that every such deposition shall be rejected by this Court. Whether the deposition of Mrs. Trowbridge was taken under the above law, or while the preceding statute was in force, does not appear from the motion; but this is perfectly immaterial, as the law now existing is precisely similar to the former, not in words, but in the construction which the Courts had put upon it. The law will not trust an agent to draw up a deposition for his principal; as by the insertion of a word, the meaning of which is not correctly understood, or by the omission of a fact that ought to be inserted, the testimony thus garbled and discolored, will be false and deceptive. Nor is there any possible argument in favor of such a proceeding. The deponent may write the deposition; or procure it to be written, by a disinterested person; or the parties may agree on a fit person for this purpose. The statute, even when strictly construed, is sufficiently lax, when ex parte depositions are taken, at least not unfrequently, to admit of the poisoning of justice in the very fountain; for if the evidence is untrue or partial, the result can never be conformable to right.

The deposition in question was written by Cornelia Hall, in the absence of the plaintiffs, their counsel, and the magistrate, on the procurement of Mr. Rand, one of the defendants. He requested and pro-

cured her to write it, from time to time, as the deponent was able to give her testimony. Miss Hall was an agent and attorney, authorized by her principal to do this specific act; for what is an agent but a substitute or deputy, and an attorney but one who is put in the place, stead, or turn of another? 3 Blackstone's Commentaries, 25. A general agent cannot be permitted to draw up a deposition; a fortiori is a special agent objectionable, who, in the situation of Miss Hall, must be influenced, in some degree, by the wishes, feelings, and interest of her employer. As the witness ought to be disinterested, so must the evidence be impartial, comprising the whole truth, as well as nothing but the truth; and this never can be rationally expected, when a deposition is drawn up by an attorney or agent, or what is little less exceptionable, by the party himself. Sickness constitutes no reason for the relaxation of the law; as it produces no actual necessity; and if it did, it would make no difference, as no such exception to the general rule is admissible. It is much preferable, that in particular instances, the party should even be deprived of testimony, than that a principle leading to wide-spread mischief should be adopted; as private disadvantage is a less evil, than general inconvenience.

It is true, that an agent *may* draw up a deposition impartially; and there is no reason to doubt that the young lady, in the case before us, acted with the most delicate integrity. But the statute was made in prevention of a wrong; and intends not, in any case, to place confidence where it *may* be abused.

Brainard and Bristol, Js. were of the same opinion.

Peters, J., dissented.

New trial not to be granted.

154. PEOPLE *v.* MOORE

Supreme Court of New York. 1836

15 *Wend.* 419

This was the trial of the prisoner on an indictment for murder, at the Onondaga oyer and terminer in September, 1835, before the Hon. Daniel Mosely, one of the circuit judges, presiding. After the public prosecutor had adduced proof in support of the indictment, a witness of the name of Crofoot was sworn on the part of the prisoner, who gave evidence material to the defense of the prisoner; to invalidate which the public prosecutor called the magistrate to whom complaint of the murder was made by Crofoot on the day it happened, who testified to a relation of facts given to him by Crofoot on that day, very different from that given by him in court. The magistrate, on his cross-examination, stated that four days after the complaint made by Crofoot, he took Crofoot's examination as a witness, which was taken pursuant to the

statute, though he stated that he did not recollect that the examination was read to the witness, and on that occasion Crofoot's relation of the facts was substantially the same as when the complaint was made. This evidence was objected to by the public prosecutor, but received by the Court. The counsel for the prisoner then offered to read in evidence the examination of Crofoot, for the purpose of impeaching the testimony of the magistrate given on his cross-examination; to which the public prosecutor objected, and the Court ruled that the examination should not be read in evidence, but that the prisoner's counsel might use it for the further cross-examination of the magistrate. To this decision the prisoner's counsel excepted. . . .

B. Davis Noxon, for the prisoner. *J. J. Briggs*, district attorney of Onondaga, for the People.

By the Court, SAVAGE, Ch. J. — Two questions arise: 1. Should the examination of Crofoot have been received? . . . It has recently been decided by this Court, in conformity, as is supposed, with the weight of authority and correct practice, that when a witness is in any manner impeached, the party calling him may support his testimony by showing, that on other occasions he has given the same relation of facts to which he has sworn on the trial. 12 Wendell 78. In that point of view the defendant was clearly entitled to produce the deposition taken before the magistrate on the examination of the prisoner.

It was also proper for the purpose for which it was offered, to wit, to show that the justice was mistaken in the relation which he had just given of what Crofoot had sworn to. What reasons operated upon the mind of the Court do not appear, as none are stated in the bill of exceptions. The objections now made by the district attorney to the introduction of the deposition taken on the examination, are, 1. That it does not appear to have been correctly taken. On that point, the justice says that the examination was taken in pursuance of the statute, but whether it was read to the witness or not he did not recollect. When the justice swears that the deposition was taken in pursuance of the statute, the presumption is that it was regularly and properly taken; the law presumes every public officer does his duty until the contrary appears. The deposition must therefore be considered properly taken until some irregularity is shown. It is presumed that it was read over to the witness or by him, as it must have been signed by him according to the statute, 2 R. S. 709, § 19. But the statute does not in terms require that the deposition shall be read *to* the *witness*, as it does that the examination of a *prisoner* shall be read to *him*, 2 R. S. 708, § 16. There is a reason for this difference. The deposition of the witness must be upon oath and signed by him; the examination of the prisoner must not be on oath, and need not be signed by him, but by the magistrate. It is not to be presumed that any man will sign and swear to a deposition, without being properly informed of its contents. Such fact, therefore, if it exists, should be shown on the other side to discredit the deposition. . . .

As they erred in rejecting the testimony offered, a new trial should be granted. It may have been very important. On that subject we cannot judge, as the testimony to support the indictment is not set forth, nor was it necessary that it should be. The jury are to judge of the effect of the testimony. It is enough for us to know that competent testimony has been withheld from the jury to authorize us in awarding a new trial. New trial granted.

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155. COWLEY *v.* PEOPLE

COURT OF APPEALS OF NEW YORK. 1881

83 *N. Y.* 464

ERROR to the General Term of the Supreme Court, in the first judicial department, to review judgment entered upon an order made June 11, 1880, affirming a judgment entered upon a verdict convicting the plaintiff error of a misdemeanor. . . . An act of the Legislature was passed in 1876, entitled "An act to prevent and punish wrongs to children." (Laws of 1876, chap. 122, p. 95.) The plaintiff in error was indicted under this statute. The first count charged that he wilfully neglected to provide a child known as Louis Kulkusky, alias Louis Victor, with, and to give him, proper, wholesome, and sufficient food, clothing, and means of cleanliness, and thereby did wilfully cause and permit his health to be injured. . . . There was testimony of what was the food given to this boy from day to day; there was testimony that it was not enough in quantity or variety for the healthy nutrition of a growing child; there was testimony of the state of body and mind in which the lad was found, after months of feeding thus; and that that state was a result of that feeding. . . .

On the trial, the People offered in evidence pictures taken by the photographic process. One picture was claimed to be that of the boy Louis, before he went into the care of the plaintiff in error. Others were of him about two weeks after he had been taken from the custody of the plaintiff in error and to St. Luke's Hospital. They were offered to show the bodily appearance of the child at the several times of taking the pictures. The first one was proven to be a correct likeness of him, a perfect picture of him when he came to this country. The photographic operator who took the others, testified that he was a photographer, doing that business in New York city; that he took them about the 6th of January, which was about two weeks after Louis was taken to the hospital; that they were exactly correct likenesses of Louis, as he appeared at the time of taking them. The house physician at the hospital, testified that the last taken pictures represented the child as he appeared at the hospital, only that from the position in which the pictures were taken, they did not show the emaciation as great as it really existed. Another

medical witness, who saw and examined the child a while after the last pictures were taken, testified that they were about correct. Another such witness testified that they were correct. It was also in evidence that the boy improved in condition after he was taken into the hospital, so that the fair inference is, that if the pictures were a correct likeness of him when taken, they did not show a worse appearance of him than it was when he left the house of the plaintiff in error. The plaintiff in error objected to the reception of these pictures in evidence.

Charles Cowley, for plaintiff in error.

Daniel G. Rollins, for defendant in error. The photographs of the child showing his condition at the time he was taken from the custody of the plaintiff in error were properly received in evidence. . . .

Folger, C. J. (after stating the case as above). So far as the circumstances of the taking of these pictures, and the purpose of them in evidence were concerned, in our judgment they were properly received, if copies of objects taken by that process are ever competent in evidence. And we are now to consider whether they are, under a proper state of facts, and for a proper purpose, competent evidence.

We know not of a rule, applicable to all cases, ever having been declared, that they are not competent. Nor do we see, in the nature of things, a reason for a rule that they are never competent. We do not fail to notice, and we may notice judicially, that all civilized communities rely upon photographic pictures for taking and presenting resemblances of persons and animals, of scenery and all natural objects, of buildings and other artificial objects. . . . Photographic pictures do not differ in kind of proof from the pictures of a painter. They are the product of natural laws and a scientific process. It is true that in the hands of a bungler, who is not apt in the use of the process, the result may not be satisfactory. Somewhat depends for exact likeness upon the nice adjustment of machinery, upon atmospheric conditions, upon the position of the subject, the intensity of the light, the length of the sitting. It is the skill of the operator that takes care of these, as it is the skill of the artist that makes correct drawing of features, and nice mingling of tints, for the portrait. Most of evidence is but the sign of things. Spoken words and written words are symbols. Once, a deaf mute born so was presumed in law an idiot (1 Hale 34), but later days look upon him as not incompetent to be a witness, if he in fact have understanding and knows the nature of an oath. (Ruston's Case, 1 Leach, Cr. Cas. 408). He is now taught to give ideas to his fellow men by signs, and his deprivation of some of the common faculties of humanity does not exclude him from the witness-box. The signs he makes must be translated by an interpreter skilled and sworn. So the signs of the portrait and the photograph, if authenticated by other testimony, may give truthful representations. When shown by such testimony to be correct resemblances of a person, we see not why they may not be shown to the triers of the facts, not as conclusive, but as aids in determining the matter in issue, still being

open, like other proofs of identity or similar matter, to rebuttal or doubt. A witness who speaks to personal appearance or identity tells in more or less detail the minutia thereof as taken in by his eye. What he says is a description thereof, by one mode of signs, by words orally uttered. If his testimony be written instead of spoken, and is offered as a deposition, it is a description in another mode of signs, by words written; and the value of that mode, the deposition, depends upon the accuracy with which his words uttered are put into words written. Now if he has before him a portrait or a photograph of the person, and it shows to him a correct copy of that person, if it produce to his view a correct description, which he testifies is a likeness, why may not that be given to the jury, as a description of the person by the witness in another mode of signs? The portrait and the photograph may err, and so may the witness. That is an infirmity to which all human testimony is lamentably liable. But when care is taken to first verify that the process by which the photograph was taken was conducted with skill and under favorable circumstances, and that the result has been a fair resemblance of the object, the picture produced may, in many of the issues for a jury, be an aid to determination. . . . In our judgment, the learned recorder did not err in taking the photographs into the evidence. . . .

All concur, except MILLER, J., absent at argument. Judgment affirmed.

156. DE FORGE *v.* NEW YORK, NEW HAVEN & HARTFORD R. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1901

178 *Mass.* 59; 59 *N. E.* 669

TORT, under St. 1887, c. 270, for injuries sustained by a freight brakeman while in the employ of the defendant, through the negligence of the engineer of a locomotive engine of the defendant, on which the plaintiff was riding. Writ dated October 13, 1899. At the trial in the Superior Court, before DEWEY, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

As a result of the accident the plaintiff's left foot was injured, and the principal inquiry at the trial was as to the extent of the injury. The plaintiff put in evidence X-ray pictures of the plaintiff's two feet, printed from a glass plate. Each of the pictures was marked under the toes of each foot, "left" and "right" respectively, both words being in lead pencil. One of the plaintiff's witnesses explained that the representation of the foot with the word "left" below it was the left foot and represented the injured foot, and the other, marked "right," was the right foot. He then testified that there had been a dislocation of the bones upward, and that an enlargement of the bone of the foot marked "left" in the picture was, in his opinion, the result of fracture, and that the man

would always have a weak foot, and would not be able to perform the duties of a freight brakeman. On cross-examination he testified that, leaving out the question of fracture, there was no reason why the plaintiff could not have a perfectly useful foot; and that leaving the pictures out, there was nothing to the eye to disclose any fracture; although he had suspicions as to a fracture.

The defendant contended and offered to show that the X-ray placed the right foot upon the right side of the plate, and the left foot upon the left side of the plate, and that in printing sensitized paper the objects would be reversed; and that, as matter of fact, the pictures showing an enlargement were pictures of the right foot instead of the left. This evidence was excluded. Immediately before this the defendant had offered the glass plate from which the plaintiff's pictures were taken, and this was excluded. Subsequently other pictures printed from the same plate were offered in evidence and were excluded.

W. S. Robinson, for the defendant. *J. B. Carroll* & *W. H. McClintock*, for the plaintiff.

Lathrop, J. (after stating the facts as above). No reason appears in the exceptions why the evidence offered by the defendant was excluded; and we can see no reason why the plate from which the pictures put in evidence by the plaintiff were printed should not have been admitted. . . . It is further contended by the plaintiff that there was some doubt as to the manner in which the plate was made, and that the judge might have excluded it for that reason. We see nothing in the exceptions to substantiate this claim. If it were true, then the plaintiff's pictures should not have been admitted.

It is entirely clear from the testimony that the picture on the glass plate was not taken by a lens but by an X-ray machine; and that it was the impression of a shadow, not a reflection of an object, the plate being below the feet, and the light above them. When pictures were printed from the plate, the position of the feet would be reversed; and this would have been demonstrated had the plate and the pictures taken by the defendant been admitted. The plaintiff assumed, from his marking on the pictures admitted, that the feet as represented on the plate were reversed, which is not in accordance with the testimony given by his own witnesses as to the manner in which the impressions on the plate were produced.

Lastly, it is asserted that the judge might have excluded in his discretion the plate and the pictures offered by the defendant. The rule is thus stated by Chief Justice Gray in Blair *v.* Pelham, 118 Mass. 420: "A plan or picture, whether made by the hand of man or by photography, is admissible in evidence, if verified by proof that it is a true representation of the subject, to assist the jury in understanding the case. . . . Whether it is sufficiently verified is a preliminary question of fact, to be decided by the judge presiding at the trial, and not open to exception." It is therefore in the matter of verification or authentication that the

judge has discretion. But here there was no question of this sort. The plaintiff had put in two pictures printed from the glass plate. The defendant then offered the plate together with two other pictures made from the same plate; and the evidence of verification was stronger in the case of the defendant's pictures than in the case of the plaintiff's. The photographer who took the plaintiff's pictures testified that he did not know much about the X-ray; while the person who took the pictures for the defendant was a physician of high standing who had taken, as he testified, in the neighborhood of a hundred X-ray pictures, and had seen the majority of them developed. On this evidence we do not deem it possible that the judge could have excluded the plate or the pictures on the ground that they were not duly verified. While a picture produced by an X-ray cannot be verified as a true representation of the subject in the same way that a picture made by a camera can be, yet it should be admitted if properly taken. Bruce *v.* Beall, 99 Tenn. 303.

The rule laid down by Chief Justice Gray in Blair *v.* Pelham is in accordance with earlier and later cases in our reports. Hollenbeck *v.* Rowley, 8 Allen 473. Marcy *v.* Barnes, 16 Gray 161, 163. Randall *v.* Chase, 133 Mass. 210, 213. Turner *v.* Boston & Maine Railroad, 158 Mass. 261, 265. Commonwealth *v.* Morgan, 159 Mass. 375. Farrell *v.* Weitz, 160 Mass. 288. Van Houten *v.* Morse, 162 Mass. 414, 422.

It is true that the opinion in Gilbert *v.* West End Street Railway, 160 Mass. 403, after stating many reasons why the photograph offered in evidence in that case was properly rejected, concludes in these words: "We think at least it was in the discretion of the Court to reject it," citing Farrell *v.* Weitz, ubi supra. But the case cited was not decided on the ground that the judge had discretion except on the matter of verification; and we do not think that the Court intended to lay down a broader rule than that stated in Blair *v.* Pelham.

It is also true that in some cases a somewhat broader rule is laid down. See Verran *v.* Baird, 150 Mass. 141. Harris *v.* Quincy, 171 Mass. 472. Carey *v.* Hubbardston, 172 Mass. 106. An examination of the papers in these cases leaves no doubt in our minds that the cases were properly decided, whether the reasons given were in accordance with the rule laid down in Blair *v.* Pelham or not.

In Beals *v.* Brookline, 174 Mass. 1, where photographs were admitted, it was said: "In the admission of such evidence much must be left to the discretion of the presiding justice, and we are not prepared to say that there was error in law in permitting them to be shown to the jury." But in this as in other matters, which may be left generally to the discretion of the trial judge, his discretion is not unlimited, and the judge is not at liberty to disregard the rules of law, by which the rights of the parties are governed. See Woodward *v.* Leavitt, 107 Mass. 453, 460. Chandler *v.* Jamaica Pond Aqueduct, 122 Mass. 305.

We are of opinion that the rights of the defendant in this case were violated, and that the glass plate, the pictures taken by the defendant,

and the evidence offered by the defendant and excluded should have been admitted. It was clearly competent for the defendant to introduce evidence to show that the plaintiff's pictures showing an enlargement of one of the feet, and from which a witness for the plaintiff discovered a fracture, did not represent the left foot but the right, and for this purpose to show the difference between an ordinary photograph and one taken by an X-ray.

As the only exception relating to the question of liability has been overruled, the new trial will be on the question of damages only.

So ordered.

(2) *Opinion*

160. History.[1] On the principle of Testimonial Knowledge (*ante*, Nos. 108–125), *i.e.* that the witness must speak as a perceiver, not merely a guesser, a witness, speaking (for example) to a sale of goods who declares that he thinks or believes or is persuaded that the sale was not made, cannot be heard, so far as he means that he did not see the transaction in question but believes so on rumor alone or on supposition. This principle of personal observation came early into play in emphasizing the impropriety of testimony by one who speaks only from hearsay. Thus, in Archbishop Laud's Trial (1644. 4 How. St. Tr. 315, 399), a witness, testifying to rumors of the bishop's tampering with a jury, said "and thereupon, as he conceives, the petty-jury was changed"; and the defendant argues: "[This evidence] is not the knowledge, but the conceit only of the witness; he 'conceives,' which I am confident cannot sway with your lordships for a proof." At this stage, then, and as the distinct first meaning of the disparaging references to "opinion," the profession had in mind a witness who turns out upon examination to have no facts to contribute, no knowledge, no personal acquaintance with the man or the land or the loan or the affray about which he is speaking.

But, at the same time, or shortly after, there occurs a general recognition of what seemed at the time as an exception to it, — the use of skilled witnesses. A witness is called to the stand, but appears to have no personal acquaintance with the circumstances in dispute; then how can we listen to his mere opinion? Because he is a skilled witness on these matters, says the counsel. Lord Mansfield in effect answered the objection that the expert had no personal knowledge, no facts, by pointing out that the subject was in truth one of fact, but of a class of facts about which expert persons alone could have knowledge. In short, it was only "opinion" as a mere guess or a belief without observation which they rejected; but "opinion" as an inference or conclusion from personally-observed data they did not think of disparaging. "*Mere* opinion," said Lord Mansfield, in Carter *v.* Boehm, is not evidence; "mere abstract opinion," says the Pennsylvania Court in 1803, is not evidence; "opinions not coupled with the facts," "opinion without assigning a reason," say other judges, is no evidence; because, of course, it does not appear that the witness has any personal knowledge.

But, in another generation's time, there occurs the modern mutilation of this idea, chiefly seen in the United States. The English writers and judges and the early American judges, when they disparaged "*mere* opinion," never had in mind

[1] Adapted from the present Compiler's "Treatise on Evidence," § 1917.

the case of the lay-witness who, having a "fact"-knowledge, included in his testimony an opinion or inference based on those data, — as in the leading instances (used by those writers and judges) of handwriting, character, and sanity. But when, by careless usage, the phrase came to be passed along that "*opinion* is not evidence," the distinction for skilled witnesses not having a "fact-knowledge was readily enlarged, and was made to apply to the lay witness who *had* a "fact"-knowledge, and to support the new and broad idea that "opinion" in general was not evidence. That distinction or test was, as put by Mr. Garrow, in Beckwith *v.* Sydebotham, excluded opinion which "was an inference which it was for the jury to draw, if the facts would warrant it."

This extension — logical enough, it is true, and correct in theory, but pernicious (as it has proved) in practice — is a peculiarly American doctrine. It has apparently not taken place in England in any important degree.

The sum of the history is, then, that the original and orthodox objection to "mere opinion" was that it was the guess of a person who had no personal knowledge, and the "mere opinion" of an expert was admitted as a necessary exception; the later and changed theory is that wherever inferences and conclusions can be drawn by the jury as well as by the witness, the witness is superfluous, and thus an expert's opinion is received because and wherever his skill is greater than the jury's, while a lay opinion is received because and whenever his facts cannot be so told as to make the jury as able as he to draw the inference. The old objection is a matter of testimonial qualifications, requiring personal observation; the modern one rests on considerations of policy as to the superfluity of the testimony. In the old sense, "opinion" — more correctly, "mere opinion" — is a guess, a belief without good grounds; in the modern sense, "opinion" is an inference from observed and communicable data.

(*a*) *The Opinion Rule, in general*

161. NEW ENGLAND GLASS CO. *v.* LOVELL

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1851

7 *Cush.* 319

THIS was case for negligence against the owners of a vessel, as common carriers, in not stowing properly under deck, conveying safely, packages of glassware, by means of which they were lost. They had been laden on board the defendants' schooner, at Boston, and bills of lading given, promising to carry them safely to New York, "dangers of the seas excepted;" and the question was, whether the loss was within the exception.

It was proved that the schooner, whilst prosecuting this voyage, was driven ashore on Hart Island, at the head of Long Island Sound, and the goods lost. It was alleged by the plaintiffs, but denied by the defendants, that the goods lost were carried on deck, instead of being securely stowed under deck; and that became substantially the fact in issue. It was conceded, that if the packages of glassware were stowed on deck, without the permission of the shippers, it was proof of negligence,

which would render the carriers responsible for the loss. Much evidence was offered on both sides, upon the controverted fact, whether the packages of glassware were stowed under deck, and as incident thereto, the plaintiffs introduced evidence tending to show, that if they had been stowed under deck, they would have been found there, although in a damaged condition, so that they could be identified; because, upon the facts proved, they could not have been washed out or broken to pieces, if they had been there. On the other hand, the defendants attempted to prove that the main hatch was forced off, and holes beaten in the bottom of the vessel, by force of the wind and sea, at the time the schooner stranded, by means of which the packages might have been washed out.

In this state of the evidence, Brown, a witness for the plaintiff, stated that he had been acquainted with the navigation about Hart Island thirty years, and been stranded there, and was employed in saving and getting off wrecked vessels, and was near the place on the night in question. The plaintiffs then proposed to ask him whether, taking into view the condition and situation of the vessel, and all the accompanying circumstances of the case, the goods in question could, in his opinion, have been broken to pieces in the hold, or washed out of the hold, if they had been stowed therein, in the manner testified to by the defendants' witnesses. This was objected to and rejected. The question on this exception is, whether it should have been admitted.

Shaw, C. J. (after stating the case as above). In weighing circumstantial evidence, the opinion of a witness is often useful, and indeed necessary; but as its admissibility is contrary to the general rule, and limited to particular cases. It depends so much upon the other evidence which has been given, the nature of the facts to be proved, and the particular posture of the case, it is often extremely difficult to apply it in practice. The principle, upon which this evidence is admissible, is clear and entirely just. In applying circumstantial evidence, which does not go directly to the fact in issue, but to facts from which the fact in issue is to be inferred, the jury have two duties to perform; first, by a rigid scrutiny of the evidence to ascertain the truth of the fact to which the evidence goes, and thence to infer the truth of the fact in issue. This inference depends upon experience. When we have ascertained by experience that one act is uniformly or generally the cause of another, from proof of the cause we infer the effect, or from proof of the effect we infer the cause. For instance; it being ascertained by long experience that arsenic is a deadly poison, if it were proved that one took arsenic and was found dead, the inference would be, that his death was caused by that poison; or, if, upon a post mortem examination, arsenic were found in the stomach, it would be inferred that the death was caused by it.

Now when this experience is of such a nature that it may be presumed to be within the common experience of all men of common education, moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference. It is not because a

man has a reputation for superior sagacity, and judgment, and power of reasoning, that his opinion is admissible; if so, such men might be called in all cases to advise the jury, and it would change the mode of trial. But it is because a man's professional pursuits, his peculiar skill and knowledge in some department of science, not common to men in general, enable him to draw an inference, where men of common experience, after all the facts proved, would be left in doubt. Suppose a vessel has been stranded, and the charge is, that it resulted from unskilful and careless navigation. After all the evidence given of the state of the wind and weather, the position and distance of the land, the sail carried, the course steered, and the nautical manoeuvres adopted, landsmen, men of common experience would be unable to infer that the disaster was caused by bad seamanship, rather than inevitable accident; whereas, a man of nautical expérience might draw a certain inference, and pronounce it attributable to the one or the other cause. Folkes *v.* Chadd, 3 Doug. 157; 1 Greenleaf, Evidence, § 440; 6 N. H. 463.

In the present case, this Court are of opinion, with the judge who tried the cause, that these questions were not proper for the opinions of the witness; they were inferences to be drawn from facts within common experience, not depending on peculiar experience, especially such as the witness said he possessed. We think the same rule applies to the rejection of the opinions of the other witnesses, as stated in the answers given in their depositions, which were objected to, and rejected by the Court.

In view of the difficulty of laying down any rule on this subject, precise enough for practical application, the only proper course seems to be, to keep the principle steadily in view, and apply it according to all the existing circumstances affecting the particular case. Exceptions overruled.

W. Sohier, for the plaintiffs. *B. F. Hallett*, for the defendants.

162. COMMONWEALTH *v.* STURTIVANT

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1875

117 *Mass.* 122

INDICTMENT for the murder of Simeon Sturtivant, at Halifax, in the county of Plymouth, on February 15, 1874. Trial before WELLS and AMES, JJ., who allowed a bill of exceptions in substance as follows:

1. There was evidence tending to show that Simeon Sturtivant and Mary Buckley, his housekeeper, were last seen alive about half past six o'clock on Sunday evening, February 15, 1874, and that Thomas Sturtivant was last seen alive about half past four o'clock on the afternoon of the same day; that about half past seven o'clock on the morning of the sixteenth, Mary Buckley was found lying dead in a field about thirty-

five rods from the dwelling-house of the Sturtivants, and soon afterwards the dead body of Thomas was found lying in one room of the house, and that of Simeon in another room; that between these rooms was another large room, all the doors of which were closed. The only evidence tending to show who was the murderer of either of these persons was circumstantial. The government contended that the evidence tended to show that the three persons were killed by the same person, with the same weapon, at the same time. Two other indictments against the defendant had been found, and were pending in this Court, for the murder of Thomas Sturtivant and Mary Buckley. . . .

2. A chemist having stated that he was accustomed to make chemical and microscopic examination of blood and blood-stains, for the purpose of determining whether they were human blood or the blood of other animals, was admitted as a witness for the government, and testified in regard to the tests which he had applied to certain stains upon articles of clothing belonging to the defendant. He was then asked to give an opinion as to the direction from which a certain stain upon the defendant's overcoat had come. The defendant's counsel objected, contending that the limit to which the witness could go was a full description of the stain as it appeared under the microscope or otherwise and illustrations before the jury (which the witness made). The objection was overruled, and the witness stated that the blood came from below upward. It was not shown that he had made or witnessed any experiments with blood or other fluids in regard to this matter. The examination of the witness and the rulings of the Court upon this point were as follows:

Q. — "I wish to inquire what the stains upon the coat would indicate as to the direction from which the blood came?" The defendant's counsel objected that this was not chemistry or any other branch of science. . . .

Wells, J. — "I think your first inquiry would be, whether there was anything discovered that indicated anything of that sort."

Q. — "At the time you made your first examination, was there anything discoverable that indicated the direction from which the stains had come that you found upon the coat?"

A. — "Yes, sir."

Q. — "What?"

A. — "The appearance of the stains."

Q. — "Will you tell us what direction they had come from?"

Defendant's counsel. — "So far as the stains are concerned that are upon the coat, the jury can judge as well as he can."

Wells, J. — "I think the witness can describe what it was that he saw that indicated the direction, and show what it was, rather than to give a general opinion as to what the direction was."

Defendant's counsel. — "I wish to reserve an exception, so far as the stains that are now upon the coat are concerned, and which the witness says are the same now that they were then, excepting the change resulting from the natural handling of the coat."

Wells, J. — "I understand, also, that he says that there were indications then that are not apparent now; that he examined it with a lens, and that that

aided his examination. It is in that view that he is allowed to describe what the indications were which indicated the direction."

Defendant's counsel. — "What is not there now, we do not object to the witness describing; but so far as anything now visible, indicating in which direction the blood came, is concerned, we object to that. We think the distinction should be observed by the witness; and unless your Honors are of a different opinion, we ask that he may be confined to that."

WELLS, J. — "We think he may give the whole description, as it was found."

A. — "It is an oval stain between one-eighth and one-fourth of an inch long, and one inch from the edge of the coat, on the right-hand side, front, and three and three-fourths inches below the last button-hole, the bottom button-hole. The direction of the stain is diagonal. Using my own coat as an illustration, the stain lay in this direction (illustrating). The upper portion of the stain contained more blood than the lower, which it does not contain now, on account of its having been rubbed off."

Q. — "What does that indicate as to the direction?"

Defendant's counsel. — "One moment. If it is chemistry, we do not object; if it is anything else, we do."

WELLS, J. — "I think if the witness explains the reasons at the same time that he gives the result, he may do so."

A. — "If the force of a stream of fluid, whatever it may be, and especially blood, be from below upward, the heaviest portion of the drop will stop at the further end of the stain; if from above downward, it will stop below."

Defendant's counsel. — "That is pure opinion as to a matter of mechanics, not chemistry. Any butcher is just as good an expert on that as this witness."

WELLS, J. — "The evidence is admitted subject to exception."

A. — "It can only be seen with a lens in a small stain."

Q. — "Now, you have described one, the direction of which was upward and diagonal. Is there any other?"

A. — "Not upon the coat."

The jury returned a verdict of guilty of murder in the first degree; and the defendant alleged exceptions.

B. W. Harris. . . . The opinion of the chemist who testified from the appearance of the drop of blood, that it came from below upward, was incompetent evidence. The expert should have been limited to a statement of what he was, by his superior knowledge, better qualified to testify about than another, and concerning which the jury, from that knowledge common to mankind which they were supposed to possess, would be unable to determine for themselves and without his aid. The case finds "that it was not shown that he had made or witnessed any experiments with blood or other fluids, in regard to this matter." He was, nevertheless, permitted to give his opinion that the drop of blood came from below upward. . . . The witness had minutely described the shape of the stain, its position on the coat, that its direction was diagonal, and that the upper portion of it contained more blood than the lower. The jury, therefore, had all the facts, and it was for them to draw the inference from whence the blood came, for the witness had no more knowledge derived from experiment than they. . . .

C. R. Train, Attorney-General, (*W. G. Colburn*, Assistant Attorney-General, with him), for the Commonwealth.

Endicott, J. . . . The principal exception is to the competency of the evidence in regard to the blood-stain. The question here is whether a witness, who is familiar with blood and has examined, with a lens, a blood-stain upon a coat, when it was fresh, can also testify that the appearance then indicated the direction from which it came, and that it came from below upward, although he has never experimented with blood or other fluid in this respect. The witness had previously testified to its appearance at the time he examined it, and to the fact that at the trial it was not in the same condition, some of the blood having been rubbed off.

The exception to the general rule that witnesses cannot give opinions is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill, or learning; but includes the evidence of common observers, testifying to the results of their observation made at the time in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to a jury. Such evidence has been said to be competent from necessity, on the same ground as the testimony of experts, as the only method of proving certain facts essential to the proper administration of justice. Nor is it a mere opinion which is thus given by a witness, but a conclusion of fact to which his judgment, observation, and common knowledge has led him in regard to a subject-matter which requires no special learning or experiment, but which is within the knowledge of men in general.

Every person is competent to express an opinion on a question of identity as applied to persons, things, animals, or handwriting, and may give his judgment in regard to the size, color, weight of objects, and may estimate time and distances. He may state his opinion in regard to sounds, their character, from what they proceed, and the direction from which they seem to come. State *v.* Shinborn, 46 N. H. 497. The correspondence between boots and footprints is a matter requiring no peculiar knowledge, and to which any person can testify. Commonwealth *v.* Pope, 103 Mass. 440. So a person not an expert may give his opinion whether certain hairs are human hairs. Commonwealth *v.* Dorsey, 103 Mass. 412. And a witness may state what he understood by certain "expressions, gestures, and intonations," and to whom they were applied; otherwise the jury could not fully understand their meaning. Leonard *v.* Allen, 11 Cush. 241.

In this connection may be noticed a large class of cases, where, from certain appearances more or less difficult to describe in words, witnesses have been permitted to state their conclusions in relation to indications of disease or health, and the condition or qualities of animals or persons. As, when a witness testifies that a horse's foot appeared to be diseased, he states a matter of fact, open to the observation of common men. Willis *v.* Quimby, 31 N. H. 485. And it is proper for a witness to give his opinion that a horse appeared to be sulky and not frightened at the

time of an accident; Whittier *v.* Franklin, 46 N. H. 23; or he may testify as to the qualities and appearance of a horse. State *v.* Avery, 44 N. H. 392. . . . It is competent for a witness to testify to the condition of health of a person, and that he is ill or disabled, or has a fever, or is destitute and in need of relief; Parker *v.* Boston & Hingham Steamboat Co., 109 Mass. 449; Wilkinson *v.* Moseley, 30 Ala. 562; Barker *v.* Coleman, 35 Ala. 221; Autauga County *v.* Davis, 32 Ala. 703; and one may testify that another acted as if she felt very sad; Culver *v.* Dwight, 6 Gray 444. So those who have observed the relations and conduct of two persons to each other may testify whether, in their opinion, one was attached to the other. And in M'Kee *v.* Nelson, 4 Cowen 355, the Court say: "The opinion of witnesses on this subject must be derived from a series of instances passing under their observation, which yet they never could detail to a jury." See Trelawney *v.* Colman, 2 Stark. 191. A witness may also give his judgment whether a person was intoxicated at a given time; People *v.* Eastwood, 4 Kernan 562; or whether he noticed any change in the intelligence or understanding, or any want of coherence in the remarks of another. Barker *v.* Comins, 110 Mass. 477. Nash *v.* Hunt, 116 Mass. 237. . . .

It would seem to be within the knowledge of men in general, when looking at the effects of a blow upon a solid body, to determine from the external marks and indications, if any exist, the direction from which it came. . . . Suppose the panel of a carriage door is broken in by a collision; different appearances would follow from a horizontal blow delivered at right angles, than from a blow from the front or rear, from above or below. Such appearances the common observer can detect, some more accurately and clearly than others, but it is presumed to be within the power of all; and the opinion of an expert, who has experimented by blows on similar surfaces, and is learned in the law of forces, is not necessary or required. If the panel itself is introduced to the jury, they are competent and able to decide the question. If it cannot be, the witness who saw it may describe, as well as he can, what he saw, and state the conclusion he formed at the time. It would also seem to be within the range of common knowledge to observe and understand those appearances, in marks or stains caused by blood or other fluids, which indicate the direction from which they came, if impelled by force. . . .

The competency of this evidence rests upon two necessary conditions: first, that the subject-matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time; and second, that the facts upon which the witness is called to express his opinion are such as men in general are capable of comprehending and understanding. When these conditions have been complied with or fulfilled in a given case, the Court must then pass upon the question, whether the witness had the opportunity and means of inquiry and was careful and intelligent in his observation and examination. . . .

In the case at bar the admission of the evidence by the Court involved

the decision: (1) that the stain was not in the same condition, and did not exhibit the same appearance at the trial as it did when examined by the witness, and cannot be reproduced to the jury: upon this as a matter of fact there is no question; (2) that the stain might in itself furnish indications from what direction it came, capable of being observed by a witness, who though familiar with blood and its qualities, had not made or seen experiments made with it or other fluids in this respect; and (3) that the witness had made that thorough, careful, and intelligent observation of the appearances, which would entitle him to testify. We must take the decision of the Court on this last point to be conclusive.

Whether the reasons the witness gave for his opinion of the direction of the stain were sound or unsound, does not affect the question of competency, and of course the defendant had full opportunity to test him by cross-examination, or to show by evidence or argument that his reasons were unsound. . . . Exceptions overruled.

163. HARDY *v.* MERRILL

SUPERIOR COURT OF JUDICATURE. 1875

56 *N. H.* 227

APPEAL, by William H. Hardy against Isaac D. Merrill, from the decree of the judge of probate approving and allowing, in solemn form, the will of Joseph Hardy, deceased. Said will was dated July 26, 1870. . . . The issues were in common form. In the first, the executed alleged that the said Joseph Hardy was of sound mind; and in the second, he alleged that said will was not obtained by undue influence: upon both of which allegations issue was taken by the appellant. . . . Solomon Hardy, a brother of the testator, was called as a witness by the appellant, and the following questions, among others, were put to him:

1. "Being a brother of Joseph Hardy, from your observation of his appearance and conduct at the time you saw him at your house in June, 1869, state whether or not, in your opinion, he was, at the time, of sound and disposing mind and memory." 2. "Being a brother of the testator, from what you had observed as to his conversation, conduct, and general deportment as to all subjects, up to July 26, 1870, have you any opinion as to his sanity at that date, and, if so, what is it?"

The referees excluded these questions, and the appellant excepted. . . .

. . . Josiah C. Hardy, a witness for the appellant, testified, among other things, that the "testator appeared like a failing man in every respect," which was excluded, and the appellant excepted. Madison M. Howe, a witness for the appellant, testified that the testator "appeared like a man who did not seem to know what he was talking about half the time," which was excluded, and the appellant excepted; but he was

allowed to state, subject to the exceptions of the appellee, that "he (the testator) appeared very weak in his mind." George B. Hardy, a witness for the appellant, stated, subject to exception of the appellee, that "he (the testator) appeared childlike — appeared feeble in body and mind — more like a child than a rational man." Samuel C. Hardy, a witness for the appellant, testified that "it looked to me as though he was failing in his business capacity, or in his mind," which was excluded, and appellant excepted. . . .

In the Circuit Court, at the April Term, 1875, it was ordered that the questions of law raised by the report of the referees be reserved and transferred to this Court for determination.

Mugridge, for the appellant. We submit that the questions put to Solomon Hardy, the brother of the testator, whether he had any opinion as to the sanity of the testator when the will was made, and if so, what it was, was improperly excluded by the Court. We know that this suggestion is in conflict with certain decisions, referred to by the other side, in which this kind of testimony has been rejected; but feeling, as we do, that the existing rule on this subject is clearly wrong, we most respectfully ask the Court to reconsider it, in the hope that, its fallacies appearing, it may be condemned as tending to subvert rather than promote the ends of justice, and as being no longer worthy of toleration.

The first time that the precise question now under consideration was before the Court in this State was in Boardman *v.* Woodman, 47 N. H. 120, and the decision was then made by a divided Court. The opinion of a majority of the judges in that case seems to be based on the general doctrine, recognized in some of the prior cases referred to by counsel on the other side, that ordinarily the opinions of witnesses other than experts are not admissible. . . . We wish to refer the Court, also, to the learned and exhaustive dissenting opinions of Judge Doe, in State *v.* Pike, and Boardman *v.* Woodman, as indicating what we claim to be the true rule of evidence, and the one abundantly supported by the weight of judicial authority. We would suggest, that no more odious law of practice exists than the one under consideration, and that its rigid enforcement is one of the greatest embarrassments and hindrances in the administration of justice that can be found in the practice of this State.

To render evidence as to mental condition competent, it must be purely and essentially descriptive in its character; and any statement partaking at all of the nature of an opinion is at once rejected. By witnesses who are not capable readily of making that accurate discrimination required to keep opinion and fact, oftentimes so intimately blended, separate in testifying, the rule is most difficult of comprehension, and much testimony is many times excluded on account of the inability of the witness to make the true distinction demanded. . . .

Again: we suggest that a class of evidence, which would with every intelligent jury be the most satisfactory, is now peremptorily excluded. A parent, brother, or friend, who may have associated with the testator

on terms of the closest intimacy every day of his life, and become, by the closest observation and study, perfectly familiar with every phase of his character, no matter how great his learning and intelligence on other subjects, unless he has made mental diseases a study, so that he can be recognized as an expert in such matters, is debarred from expressing his opinion, while that of the expert, who never saw the party, and had no actual knowledge of him, upon a hypothetical case is admitted. . . .

Sargent & Chase, for the executor. . . . The questions to Solomon Hardy were not competent, he not being a subscribing witness to the will, nor an expert. The general rule, that the opinions of witnesses not experts are not competent evidence, is well established and everywhere admitted. The subscribing witnesses to a will are an exception to this rule, well marked and defined. The statute has made another exception as to the value of property — Gen. Stats. ch. 209, § 24. There is no good reason why insanity should be treated as an exception to this general rule. . . .

FOSTER, C. J. . . . . The case before us involves an inquiry into the nature and extent of the exceptions to the general rule, that testimony of facts alone is admissible in courts of justice, and that the opinions of witnesses are to be excluded. The same questions are presented which were considered by the late Supreme Court in Boardman *v.* Woodman, 47 N. H. 120, and State *v.* Pike, 49 N. H. 399. In both these cases a majority of the Court sustained the doctrine of the exclusion of the opinions of non-professional witnesses upon questions of mental condition. . . . But the subject is so rapidly increasing in importance, that its thorough re-examination ought to be no longer postponed. . . .

It would be merely a repetition of the historical part of Judge DOE's opinion, in State *v.* Pike, 49 N. H. 421, 423, if I were to relate how, after the eminent jurists, who presided in our courts between the years 1811 and 1833, had all passed off the stage, the "Massachusetts exception" gradually worked into favor in New Hampshire, it having been erroneously declared by the Massachusetts Courts to be an expression of the English common law. . . . A tolerably careful investigation authorizes me to repeat the language of Judge DOE, that "in England no express decision of the point can be found, for the reason that such evidence has always been admitted without objection. It has been universally regarded as so clearly competent, that it seems no English lawyer has ever presented to any Court any objection, question, or doubt in regard to it." State *v.* Pike, 49 N. H. 408, 409. I presume, however, it will not be denied that in the ecclesiastical Courts, where questions of testamentary capacity are generally tried, such opinions have always been received. . . . The practice in the Courts of the common law has been universal and unwavering in the same direction; and "the number of English authorities is limited only by the number of fully reported cases in which the question of sanity has been raised." State *v.* Pike, 49 N. H. 409. . . .

It is proper for me to invite attention to the history of what I have called the Massachusetts exception. . . . The exception grew and dilated, finding larger and stronger expression along through the years and the course of the cases of Hathorn *v.* King, 8 Mass. 371, Dickinson *v.* Barber, 9 Mass. 225, Needham *v.* Ide, 5 Pick. 510, Com. *v.* Wilson, 1 Gray 337, down to Com. *v.* Fairbanks, 2 Allen 511 (1861), when it was held per curiam, "that the incompetency of the opinions of non-experts was not an open question in Massachusetts;" though Judge THOMAS had recently said, in Baxter *v.* Abbott, 7 Gray 79, that

"If it were a new question (he) should be disposed to allow every witness to give his opinion, subject to cross-examination upon the reasons upon which it is based, his degree of intelligence, and his means of observation."

In very recent times, however, we observe a more liberal disposition on the part of the Massachusetts Courts — see Barker *v.* Comins, 110 Mass. 477 (1872), and Nash *v.* Hunt, 116 Mass. 237 (1874). In the former of these cases, it was held that persons acquainted with the testator, although neither witnesses to the will nor medical experts, may testify whether they noticed any change in his intelligence, and any want of coherence in his remarks. GRAY, J., said,

"The question did not call for the expression of an opinion upon the question whether the testator was of sound or unsound mind, which the witnesses, not being either physicians or attesting witnesses, would not be competent to give. The question whether there was an apparent change in a man's intelligence or understanding, or a want of coherence in his remarks, is a matter not of opinion but of fact, as to which any witness may testify, in order to put before the court or jury the acts and conduct from which the degree of his mental capacity may be inferred." . . .

With deference and great respect I may be allowed to say, that I rejoice much more in the results attained in these later cases, than in the modus operandi of judicial reasoning by which the conclusions were reached. They indicate decided and accelerating progress of the Massachusetts Courts in the right direction. The full establishment of the true doctrine there, is a question of time only.

Courts and text-writers all agree that, upon questions of science and skill, opinions may be received from persons specially instructed by study and experience in the particular art or mystery to which the investigation relates. But without reference to any recognized rule or principle, all concede the admissibility of the opinions of non-professional men upon a great variety of unscientific questions arising every day, and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness, and health; questions, also, concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character, and particular phases of character, and other conditions and things, both

moral and physical, too numerous to mention. . . . Opinions concerning matters of daily occurrence, and open to common observation, are received from necessity; and any rule which excludes testimony of such a character, and fails to recognize and submit to that necessity, tends to the suppression of truth and the denial of justice. The ground upon which opinions are admitted in such cases is, that, from the very nature of the subject in issue, it cannot be stated or described in such language as will enable persons, not eye-witnesses, to form an accurate judgment in regard to it. How can a witness describe the weight of a horse? or his strength? or his value? Will any description of the wrinkles of the face, the color of the hair, the tones of the voice, or the elasticity of step, convey to a jury any very accurate impression as to the age of the person described? And so, also, in the investigation of mental and psychological conditions, — because it is impossible to convey to the mind of another any adequate conception of the truth by a recital of visible and tangible appearances, — because you cannot, from the nature of the case, describe emotions, sentiments, and affections, which are really too plain to admit of concealment, but, at the same time, incapable of description, — the opinion of the observer is admissible from the necessity of the case; and witnesses are permitted to say of a person, "He seemed to be frightened;" "he was greatly excited;" "he was much confused;" "he was agitated;" "he was pleased;" "he was angry." . . . All evidence is opinion merely, unless you choose to call it fact and knowledge as discovered by and manifested to the observation of the witness. . . . And it seems to me quite unnecessary and irrelevant to crave an apology or excuse for the admission of such evidence, by referring it to any exceptions (whether classified, or isolated and arbitrary) to any supposed general rule, according to the language of some books and the custom of some judges.

There is, in truth, *no general rule requiring the rejection of opinions as evidence*. A general rule can hardly be said to exist, which is lost to sight in an enveloping mass of arbitrary exceptions. . . . Suppose, the day before or a week before the death, a lawyer, farmer, and blacksmith saw the deceased, and had an opportunity to see whether he appeared to be well or sick: suppose the lawyer is asked, "Did you observe any indications of his being well or sick?" and the answer to be, "I observed no indication of his being sick; he appeared as well as usual, as well as I ever saw him;" suppose the farmer is asked, "Did you notice anything unusual in his appearance or conduct?" and the answer is, "No, I did not;" suppose the blacksmith is asked, "In your opinion was he well or sick?" and the answer is, "In my opinion he was perfectly well; his spirits, looks, and behavior, all showed, in my opinion, freedom from weakness and pain;" what legal distinction can be drawn between these questions and answers, to make one competent, and either of the others incompetent? It is all opinion, and nothing but opinion, of the man's physical condition in relation to health or disease. The use or the omission of the word "opinion," in either of those questions or answers, does

not affect the character of the testimony in the slightest degree. Calling such testimony "opinion" does not make it "opinion;" and calling it something else does not make it something else. . . .

Now let us imagine a scene that might very probably be exhibited in any Court where the Massachusetts rule prevails. One witness says: "He did not appear as usual; he did not appear natural." "Very well," says a learned barrister, "very well, Mr. Witness. You may say that, — that is quite regular, — that is your opinion. Now tell us in what respect he did not appear 'as usual' or 'natural.'" "Well, I can't describe it, but I should call it wandering, delirious; he was incoherent in his talk." "Very well, Mr. Witness, you acquit yourself like a sensible man. Now tell the jury whether in your opinion he was then of sound mind." "I object," thunders the learned barrister on the other side. "I object," thunders the opposing junior. "Counsel knows better; it is an insult and an outrage to put such a question." . . . The witness is confounded. The jury are confounded. Everybody is confounded, — except those who understand that "incoherence of thought" and "delirium," vulgarly called "wandering," is not a state of mental unsoundness, is not mental disease; and that "as usual" or "natural" is not a condition of mental health. Whether it is such condition or not is a question then solemnly debated. . . . At the close of the scene which I have described, not a man of the laity goes out of the room without being disgusted with this exhibition of the law as a system of arbitrary rules, that ignoring all legal ideas decides upon a distinction purely verbal. And why should not the laymen be disgusted with the senseless subtlety which permits one party to show by his witness that a testator "appeared perfectly natural," and forbids the adverse party to offer the testimony of another witness that "he didn't appear to be in his right mind"? . . .

In the case now before us, the learned judge and his associates, to whom the trial was referred, evidently and inevitably experienced great embarrassment and confusion of mind in their effort to conform to the supposed rule. The futility of their endeavors is notably apparent. Mr. McAlpine was permitted to say of the testator, "He seemed to be all broken down in body," but was forbidden to say, "He seemed to be all broken down in mind;" and yet, the same witness (without specification of mental or bodily infirmity) was permitted to say that, between certain dates, "he had changed very much;" "his mind was such that he could not give any intelligent answer;" "he didn't seem to have any memory;" "I discovered that he had failed;" "his conversation was childish." The following questions were ruled out: First. "Being a brother of Joseph Hardy, from your observation of his appearance and conduct at the time you saw him at your house, in June, 1869, state whether or not, in your opinion, he was at the time of sound and disposing mind and memory." Second. "Being a brother of the testator, from what you had observed as to his conversation, conduct and general deportment as to all subjects, up to the 26th day of July, 1870, have you any

opinion as to his sanity at that date, and if so, what is it?" Mr. Hardy was not allowed to say that the testator "appeared like a failing man in every respect." . . .

The Massachusetts rule is, that non-experts' opinions shall be excluded. But the rule itself does not exclude *them*; it only excludes the use of certain *words*. It admits the opinions, and merely embarrasses the witness and confounds the jury by requiring the witness to express his opinion without using certain forbidden terms, and by using others that are understood by the jury and everybody else to be precisely synonymous. A non-expert, who has been watching by the bedside of a sick man, may say, "He was delirious all night;" a farmer may say that his neighbor's boy is so lacking in intelligence as to be "below par;" anybody may say that a man was "crazy drunk;" that a testator didn't seem to understand anything that was said to him — seemed senseless, unnatural, not as usual; or, that "no change was perceptible in his intelligence," "no incoherence of thought," nor anything unusual or singular in respect to "his mental condition;" was healthy or sickly in body; — but in giving his opinions of mental health or disease, the non-expert must not use the words "sane," "insane," "mentally disordered," or "deranged." . . . The selection of the phraseology in which such an opinion may be expressed, and that in which it cannot be uttered, depends on no legal principle, but on the mere whim of the Court. Such an arbitrary and senseless choice or rejection of terms in which to express an admissible opinion is mere, sheer logomachy, a waste of precious time given us for better purposes, a verbal quibble unworthy of the law, and calculated to bring it into contempt. . . .

Thus supported upon principle and authority, I am satisfied that the time has arrived when this Court is called upon to declare the law to be in conformity with the views I have expressed.

Ladd, J. I think it is shown by proofs which fall little, if at all, short of demonstration, that the doctrine excluding the opinions of non-experts on the question of insanity has grown up in this State within the memory of men now living in the profession; that it had no place in the common law brought here from England, nor in the jurisprudence or practice in this State, from the constitution down to a comparatively recent date; that it is contrary to reason, extremely difficult of application, and inconvenient in practice; that the great weight of judicial opinion and authority outside this State is against it; and that, even if we look at the condition of authority as shown by the expression of judicial opinion and practice in this State, the balance cannot fairly be said to be in favor of the rule. No titles are to be disturbed by adopting a rule more consonant with reason, and which accords with the almost universal practice in jurisdictions where the common law is used the world over. I therefore concur fully with my brother Foster in the conclusions at which he has arrived.

Cushing, C. J., concurred. Case discharged.

164. FISKE *v.* GOWING

SUPREME COURT OF NEW HAMPSHIRE. 1881

61 *N. H.* 431

DEBT, on the statute (G. L., c. 236, s. 19). Plea, the general issue. Verdict for the defendant.

The plaintiff recovered judgment against Milan Harris, A. R. Harris, and S. G. Griffin, who were stockholders in the M. Harris Woollen Co., a corporation of which the defendant was treasurer; the execution issued thereon was placed in the hands of the sheriff for collection, who exhibited it to the defendant at his office in Boston, and at the time gave to him a proper and sufficient written request for a certificate of the number of shares, etc., of the judgment debtors in the corporation; and the defendant did not then, or ever, furnish such certificate. The defense was, that after giving the written request the sheriff waived or withdrew it. Both the sheriff (produced as a witness by the plaintiff) and the defendant testified fully in respect to all the conversation, facts, and circumstances which took place during their interview. Subject to the plaintiff's exception, the Court allowed the following question to be put to the defendant, and his answer to be taken: "Did you, or not, understand from what Mr. Holt [the sheriff] said, and from his conduct, that he waived or withdrew his request for a certificate?" Ans. — "I fully so understood it; that was the reason I took no steps towards giving a certificate." . . .

Lane & Dole, for the plaintiff. *B. Wadleigh* and *S. Hardy*, for the defendant.

SMITH, J. The precise question raised in this case was decided in Eaton *v.* Rice, 8 N. H. 378, where it was held that a witness may state generally what he understood a contract between two persons to have been from their conversation, although he may not be able to state the language used in making the agreement. It rarely happens that two persons are able to give precisely the same account of a conversation. Their narration will differ more or less according to their intelligence, their interest in the subject-matter, their opportunities for hearing, their prejudices for or against the parties, the lapse of time since the conversation occurred, and a variety of other circumstances. Emphasis thrown upon the wrong word might convey a meaning different from that originally intended. Often the manner in which a remark is made, and the conduct and appearance of the party, may have much to do in producing the understanding that was received, much of which it is difficult and sometimes impossible for a witness to describe. It was a vital question whether the defendant understood or had a right to understand, from what was said and done, that the request for a certificate was waived or withdrawn. He might have received his understanding

in part from the conduct of the officer, and in part from what was said between them and from the way it was said. To confine the witness to a mere narration of the language used, if he were able to recall it, might give the jury an imperfect and erroneous idea of the actual understanding of the parties.

The request for a certificate might be waived expressly, or by a mutual understanding that it was waived. . . . It was a question of mutual understanding. Such evidence has been so commonly received that the question of its admissibility can hardly be said to be an open one.

Case discharged.

165. MARCOTT *v.* MARQUETTE, HOUGHTON & ONTARIO R. CO.

SUPREME COURT OF MICHIGAN. 1882

49 *Mich.* 101; 13 *N. W.* 374

ERROR to Marquette. Submitted June 22. Decided October 4. Case. Plaintiff brings error. Affirmed.

. . . The case was submitted to the jury upon the facts, and they returned a verdict for the defendant. The action was for causing the death of plaintiff's intestate, a child two or three years old, who got upon the track of the railroad, and was struck by a passing train. The train was an irregular train, consisting of a locomotive and a single passenger car, and was moving, as the jury found, at the rate of twenty-four miles an hour. Plaintiff lived very near the track, and there was no fence between the track and his house. Plaintiff was a laborer in defendant's employ. He had two small children, and when he went to his labor in the morning, left them with their mother, who at this time was unwell. The children went out of the house by themselves, and were observed by a neighbor upon the track when the train was approaching. One of them got off in time, and the other was killed. No one appears to have seen them when they went upon the track and the testimony of the engineer tended to show that they had probably been in a ditch by the side of an embankment on which the track was laid, and that they had come upon the track in haste when they were first observed. The jury negatived any carelessness in the parents in suffering them to go out unattended. . . . When the engineer was on the stand as a witness for the defense, he was asked why he did not see the children upon the track. He answered, "The children could not possibly be on the track and I not see them, unless they got on from the ditch on the left-hand side of the engine." This was objected to as a mere opinion, but the Court held it to be competent.

F. O. Clark, for appellant. A witness cannot swear to mere deductions. . . . *W. P. Healy*, for appellee.

COOLEY, J. (after stating the case as above). — The Court was right in this ruling. The engineer was watching the track for obstacles and discovered none. The sweep of vision he could testify to, and if the fact was that the children could not come upon the track without coming within the range of his vision, except by coming from the left-hand ditch, it was entirely proper that he should testify to that fact. It was not matter of opinion, but of knowledge.

But the Court is said to have ruled differently on evidence offered for the plaintiff. Mrs. LaCoss, a neighbor of the plaintiff, had testified that she was in the garden by her house for ten or fifteen minutes before the train passed, and that she did not hear any whistle blown. She was then asked: "Could the whistle have blown anywhere near Champion station and you not have heard it?" This was objected to and ruled out. It is contended that a fact was called for in this case just as much as in the other. We do not think so. It might be a fact that Mrs. LaCoss heard or noticed no ringing of a bell, but whether a bell could have rung without her hearing it is another matter altogether. It is probably within the knowledge of every reflecting person that familiar sounds within his hearing often fail to be noticed by him at all, where the circumstances are such that he has no occasion to notice them. The striking of a clock, and the customary railroad signals, are familiar illustrations: the sound strikes the ear without securing mental attention, and immediately afterwards the person cannot say he heard it at all. If one under such circumstances swears that there was no sound, because if there had been he would have heard it, he testifies very carelessly, unless indeed he had his mind on the signal at the time, and was awaiting it. . . . But the case was one in which the jury could judge as well as the witness herself. When she had given the facts of distance, and whether there was any interfering obstacle, there was no good reason why her judgment of the probability of hearing a whistle should be taken, rather than that of the jury, or why her judgment should direct theirs in a matter which related to a fact of common observation and common experience. They could apply and should apply their own good sense to the case; and if she had sworn positively there was no bell, merely because she did not notice it, the jury might disregard the statement, if other evidence satisfied them that it was erroneous, without any imputation upon her veracity. Mistakes are too easy and too common in such matters to afford much ground for serious accusation. . . .

We find no error of substance in the record, and the judgment must stand affirmed.

The other justices concurred.

166. GRAHAM *v.* PENNSYLVANIA CO.

SUPREME COURT OF PENNSYLVANIA. 1890

139 *Pa.* 149; 21 *Atl.* 131

ON October 23, 1888, William S. Graham and Maria E. Graham, his wife, in right of said wife, brought trespass against the Pennsylvania Company, operating the Pittsburgh, Fort Wayne & Chicago railway, to recover damages for personal injuries received by Mrs. Graham and alleged to have been caused by the negligence of the defendant company. Issue.

At the trial on April 1, 1890, it was shown that the arrangement of the Federal street station, Allegheny City, where Mrs. Graham received her injuries, was as follows: Along the track upon which Mrs. Graham arrived, were two platforms, together about 23 feet wide, the two covered with a shed. Next the track was a platform 3 feet 10 inches wide (as given in the appellant's paper-book, 4 feet 9 inches, as given in that of the appellees), extending the length of the train eastwards towards the exit gate. This platform was 9 inches below the lowest car step. On the other edge of it from the train, was a descent of 9 inches to the main platform, which was about 19 feet wide, extending across to the north main track. The posts of the shed, on one side, were at the inner edge of the narrow platform; on the other, about 12 feet, perhaps, to the south. The shed was lighted by electric lights of 50-candle power, suspended under the comb of the roof.

Mrs. Graham testified that on the evening of February 6, 1888, about 8 o'clock, her train reached the station, when she alighted and with a basket on her arm started east towards the exit; that, after walking about 12 feet, "edging" to the right to get within the line of the posts, she fell and sustained severe injuries; that she had frequently stopped at Federal street station from defendant's trains, but never before had she alighted upon this raised platform; and she could not imagine at first what caused her to fall, as she supposed she had alighted upon the main platform, until she looked about her and observed the descent from the narrow platform to the other, and that was the first she knew of the offset there.

William Graham, a son of the plaintiffs, called on their behalf:

Q. — "State whether, in your judgment, from your observation there, your knowledge of the platform, that is a safe platform upon which to alight from trains?" Objected to, as incompetent and irrelevant. By the Court: "Objection overruled." Exception. *A.* — "I think it is an unsafe platform to arrive on, for the light shines towards you, and the elevation is in front of you, and the light shining against this elevation would make the platform appear one, unless you were looking for it; unless you were warned against it. . . ."

Other witnesses for the plaintiffs were permitted to testify under objection and exception, to the same effect. . . . The jury returned a verdict for the plaintiff for $3000. A rule for a new trial having been discharged, judgment was entered, when the defendant took this appeal, assigning for error: 1, 2. The admission of plaintiffs' offers.

Mr. *George B. Gordon* (with him Mr. *John H. Hampton* and Mr. *William Scott*), for the appellant: (1) The question at issue was whether the platform provided by the defendant was so constructed that it could be used by passengers, by the exercise of ordinary care on their part, without injury. There was involved in the case no question of any particular technical knowledge, with reference to the platform. It was a plain, ordinary contrivance, of which any juror of ordinary knowledge was competent to judge, when put in possession of the facts. Having the location, the distance of this offset from the train, the height of the offset, and the width of the platform below, the jury were as competent to pass upon the fact whether it was dangerous or not, as upon a like question connected with a step in a sidewalk or pair of stairs. The offers objected to were, therefore, inadmissible. . . .

Mr. *R. B. Petty* (with him Mr. *J. O. Petty* and Mr. *K. T. Friend*), for the appellees: (1) The witnesses whose testimony was admitted, under objection, were not called and permitted to testify as experts. They did not testify as experts at all. Before they were permitted to give their judgments, they testified that they were familiar with the platform from daily use . . . and, upon showing their knowledge of all the facts, they were permitted to give their judgments. The question is settled by the rulings in Bearry *v.* Gilmore, 16 Pa. 463. . . .

Opinion, Mr. Justice MITCHELL. That the opinions of witnesses are in some cases admissible as evidence, even when not coming properly under the head of expert testimony, has long been established in practice. In several classes of questions, the line between the witness's judgment or opinion and his affirmation of a fact is so indistinct that it cannot be marked out in practice. Such are questions of identity of persons or things, of the lapse of time, of comparative shape or color or sound, of expression and through it of meaning, etc. In all of these, however positively the witness may affirm facts, what he says is after all largely his opinion, but so blended with knowledge and recollection that the line where opinion ends and fact begins cannot be distinguished. Hence, both must be admitted or both excluded, and to do the latter is often to shut out the only light the case admits of. In questions, therefore, of identity, of sanity, of handwriting, and some others of like nature, opinions of witnesses, having sufficient knowledge of the particular circumstances to form the basis of a responsible judgment, have been admitted without hesitation. Such is the elementary doctrine laid down in Greenleaf and other authoritative works, but the theory on which such evidence is admitted is very slightly developed. The cases, however, have extended far beyond the classes mentioned in the text

books, and may be said not only to have become legion, but legion against legion. An examination of a large number of them, while not enabling us to reconcile all the practical applications, does, we think, show that the ground on which such evidence must always rest, as expert testimony strictly so called does, is a clear necessity. . . .

In those matters where mere descriptive language is inadequate to convey to the jury the precise facts or their bearing on the issue, the description by the witness must of necessity be allowed to be supplemented by his opinion, in order to put the jury in position to make the final decision of the fact. It is thus expressed in Commonwealth *v.* Sturtivant, 117 Mass. 122 [*ante*, No. 162], where a large number of illustrations are given (some of which, I may say, in passing, seem to us extremely questionable):

"The exception . . . includes the evidence of common observers testifying to the results of their observation, made at the time, in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to a jury."

But, as necessity is the ground of admissibility, the moment the necessity ceases, the exception to the general rule that requires of a witness facts and not opinions ceases also. Hence, whenever the circumstances can be fully and adequately described to the jury, and are such that their bearing on the issue can be estimated by all men, without special knowledge or training, opinions of witnesses, expert or other, are not admissible. This is well stated by Chief Justice SHAW, in New England Glass Co. *v.* Lovell, 7 Cush. 321 [*ante*, No. 161]:

"The principle upon which this evidence is admissible is clear and entirely just. In applying evidence which does not go directly to the fact in issue, but to facts from which the fact in issue is to be inferred, the jury have two duties to perform: first, . . . to ascertain the truth of the fact to which the evidence goes, and thence to infer the truth of the fact in issue. This inference depends on experience. . . . Now, when this experience is of such a nature that it may be presumed to be within the common experience of all men of common education, moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference." . . .

This examination of elementary principles and general authorities has seemed necessary, because our own cases on the exact point are few, and supposed not to be in entire harmony. . . .

Some occasional difference in application may be unavoidable, because, as said by Chief Justice SHAW in New England Glass Co. *v.* Lovell, *supra*, there is extreme difficulty in laying down any rule precise enough for practical application, and the only proper course is to keep the principle steadily in view, and apply it according to the circumstances of each case. . . .

In the present case, the alleged dangerous place was a raised part of the platform, or broad step, 4 feet wide and 9 inches high. It came clearly within the range of ordinary experience. The briefest

statement would convey a perfect comprehension of the place, and every juryman who ever got in or out of a car, or went up or down a flight of steps, was as capable of judging of the alleged danger as the witnesses who gave their opinions. The first and second assignments of error must be sustained. . . .

However, it is clear that the admitted facts fail to establish any negligence of defendant, and that the plaintiff must, as a matter of law, always fail to recover. It would, therefore, be useless to send the case back for another trial. Judgment reversed.

167. SCHAEFER & CO. *v.* ELY

SUPREME COURT OF ERRORS OF CONNECTICUT. 1911

84 *Conn.* 501; 80 *Atl.* 775

APPEAL from Superior Court, Fairfield County; HOWARD J. CURTIS, Judge.

Action by John V. Schaefer, Jr., & Co. against Elizabeth L. Ely and others on a building contract, to recover the balance due thereunder, and for the value of extra work done in connection therewith. There was a judgment for plaintiff, and defendants appeal. Affirmed.

John C. Chamberlain and *George G. McNall* (*Ivins, Mason, Wolf & Hoguet*, on the brief), for appellants. *Edwin L. Scofield* and *Wilbur S. Wright*, for appellee.

WHEELER, J. In the second count of the complaint, the plaintiff alleges that, on October 2, 1905, the plaintiff and defendants entered into an agreement, whereby the plaintiff was to furnish all material and labor for the erection of the buildings known as the Misses Ely School Building, at Greenwich, Conn., in accordance with the plans and specifications of Carrere & Hastings, architects, with such modifications as might be desired by the defendants, in consideration of the payment to it by the defendants of a sum equal to the cost of the work and $7,500 commission and 5 per cent. upon the cost of the added or modified work. The plaintiff alleges that there is still due and unpaid, according to the architects' certificate, $38,665.89.

One ruling only is made a ground of appeal. Mr. Brainerd, a construction engineer, and of the firm of architects intrusted with the building of the Ely School, qualified as an expert upon the character and manner of the construction of the Ely School Building and the west wing. He testified that he drew the plans, specifications, and contract, and was familiar with and knew of all subsequent changes and additional work, and that as the work progressed it was constantly within his knowledge, through the books, reports, and records in his office, and that he made an examination of the work in April, 1907, for the purpose of enabling him to determine as to the acceptance of the work and the issuance of the final

certificate. He was inquired of as to whether he was satisfied from that examination that the work called for by the contract, and as in fact done, had been done in a workmanlike manner. The defendants objected to the question, because not a subject for an opinion.

The main objection to this evidence was that the opinion of the witness could not be given; that he must state in detail what he saw, and the various defects, and leave the conclusion of compliance with the contract to be drawn between the contract and the work done by the Court. This is an erroneous view. The witness who qualifies as an expert and testifies to his familiarity with contract, plans, specifications, and changes therein, and with the work done, may give his conclusions as to the comparison between these, without detailing at length the manner in which each item of the work done had been performed. When the opinion of the witness in a case is evidence otherwise competent, and that the subject of the investigation will be made clearer by its introduction, the opinion should be received.

When facts sought to be proved are of so voluminous or complicated a character that their introduction would occupy much time, and might be difficult of understanding by themselves, and these many facts are to be proved for the purpose of drawing a conclusion from them, the Court may permit a witness who is qualified upon the subject of investigation, and has made the investigation, to express an opinion, without giving the details on which the opinion rests.

The opinion of the expert as to whether a building is furnished in a workmanlike manner, or according to certain plans and specifications, is admissible for the same reason as is the opinion of the accountant as to the result of his examination of the books of account, or as to schedules taken from the books, verified by him (Elmira Roofing Co. *v.* Gould, 71 Conn. 629, 631, 42 Atl. 1002), or as summaries or averages from voluminous or complicated records are admitted. Wigmore on Evidence, (1904 Ed.) § 1231.

The necessities of the situation, taken in connection with the improbability of liability to misrepresentation, led to the rule admitting the opinion of the accountant and the record searcher, and the situation is as urgent permitting the qualified architect or mechanic to testify as to whether work is done in a workmanlike manner, or according to a contract. The opportunity of cross-examination, and the presence in court of contract, plan, and specifications, and the ability of the opposing party to examine the work done and test the sufficiency of the opinion, render such a source of evidence practically safe against misrepresentation.

The authorities upon this, as upon many subjects of opinion evidence, are variant, with a strong tendency to widen the scope of opinion evidence. Atwood *v.* Atwood, 79 Atl. 59. The following are instances of correct applications of the general rule:

The qualified witness may state that the work is well done. Wood *v*

Brewer & Brewer, 57 Ala. 515, 517; Ward *v.* Kilpatrick, 85 N. Y. 413. He may state that the machine was built in a good and workmanlike manner. Curtis *v.* Gano, 26 N. Y. 427. He may state whether a railroad was properly constructed at a certain point. St. Louis, A. & T. R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104; Kreuzberger *v.* Wingfield, 96 Cal. 251, 31 Pac. 109. He may state the cost of erecting a building from plans, or similar to one destroyed. Joske Bros. *v.* Pleasants, 15 Tex. Civ. App. 433, 440, 39 S. W. 586; Woodruff *v.* Imperial Fire Ins. Co., 83 N. Y. 133, 138. He may state that the building was constructed in accordance with the contracts. J. T. Stark Grain Co. *v.* Harry Bros. Co. (Tex. Civ. App.) 122 S. W. 947. He may give his opinion as to the difference in value of a vessel as repaired, and what her value would have been if repaired according to the contract. Sikes *v.* Paine et al., 32 N. C. 280, 51 Am. Dec. 389. . . .

There is no error. The other Judges concurred.

168. JOHN H. WIGMORE. *A Treatise on the System of Evidence at Common Law.* (1905. Vol. III, § 1929.)

Future of the Opinion Rule. If one were asked to name the rules most peculiar to the Anglo-American evidence-law, he ought perhaps to name the Character rule, the Hearsay rule, and the Opinion rule. Neither is found on the Continent. All three are indigenous judicial developments. All are the product of the jury-system. All are founded on a peculiar cautiousness in our law, and all have been developed with an equally peculiar rigidity and stolid disregard of practical consequences. All three are complex and far-reaching in application, as well as voluminous in detailed development. But a radically different future may be predicted for them. The Hearsay rule and the Character rule will always remain in our law, in a more or less relaxed form; while the Opinion rule will in substance disappear. An important difference between them is that the first two are the solid growth of experience; while the last rule, in its American development, is merely the logically technical development of a misunderstood term. The Opinion rule day by day exhibits its unpractical subtlety and its useless refinement of logic. Under this rule we accomplish little by enforcing it and we should do no harm if we dispensed with it. We accomplish little, because, from the side on which the witness appears and from the form of the question, his answer, *i.e.*, his opinion, may often be inferred. We should do no harm, because, even when the final opinion or inference is admitted, the inference amounts in force usually to nothing unless it appears to be solidly based on satisfactory data, the existence and quality of which we can always bring out, if desirable, on cross-examination. Add to this that, under the present illiberal application of the rule, and the practice as to new trials, a single erroneous ruling upon the single trifling answer of one witness out of a dozen or more in a trial occupying a day may overturn the whole result and cause a double expense of time, money, and effort; and we perceive the absurdly unjust effects of the rule. Add, finally, the utter impossibility of a consistent application of the rule, and the consequent uncertainty of the law, and we understand how much more it makes for injustice rather than justice. It has done more than any one rule of procedure to reduce our litigation towards a state of legalized gambling. It must go. Better to cut it out, root and branch.

(*b*) *Opinion to Character*

170. Layer's Trial. (1722. Howell's State Trials, XVI, 253). *Counsel* [asking as to the credit of witness]. Is he a man as may be believed, even upon his oath, or not?

Witness. — I must tell you that I found him in so many mistakes about his own wife that, by God, I would not take his word for a halfpenny.

Counsel. — Go on, but don't swear "by God" any more.

171. Lord Chancellor Macclesfield's Trial. (1725. 16 How. St. Tr. 1239). *Common Serjeant* [asking as to the credit of a principal witness for the prosecution.] We desire that Mr. Price may give your Lordships an account of what he knows of the character of Mr. Cothingham and how long he hath known him.

Mr. *Price.* — My lords, I have known him upwards of twenty years; I never knew anybody say anything amiss of him. . . . I know no man in his place behaved himself better than he hath done.

Common Serjeant. — We desire to ask not only to what Mr. Price's opinion is, but to what is the opinion of others, as to his general character.

Mr. *Price.* — I believe, if you ask his character of an hundred people, ninety of them will give him rather a greater character.

172. Alexander Davison's Trial. (1808. 31 How. St. Tr. 186). [The accused, a commissary-general in the army, was charged with fraud in the public accounts]. Lord *Moira* sworn.

Q. — Had your lordship (as general-in-command) an opportunity of observing his [the accused's] public conduct? *Q.* — His conduct was clear and punctual, answering every expectation I had formed, strictly delicate in refusing emoluments which he might well have claimed.

Q. — From your lordship's general knowledge of his conduct, is he a person whom your lordship would think capable of committing a fraud? *A.* — Certainly not.

[After an interruption on another point.] L. C. J. Ellenborough. — The correct inquiry is as to the general character of the accused, and whether the witness thinks him likely to be guilty of the offense charged in the indictment.

Sir *Andrew Hammond* sworn.

L. C. J. Ellenborough. — From your knowledge of Mr. Davison's character and conduct, do you think him capable of committing a fraud? *A.* — I should have thought him the last man in the world that would have attempted anything of the kind, or even to have been a cause of it.

Mr. *James Davidson* sworn.

Q. — From all that you have observed of him [Mr. D.] and all that you have known and heard of him, what is your opinion of his general character? *A.* — You say "known and heard"; all that I have *known* of him is that he has been an honest man, an honest dealer with me as a merchant.

Q. — From what you have *heard* in the world at large, what is your opinion of him? *A.* — There are a variety of reports concerning Mr. Davison; those I know only as the world knows; but as to his dealings with me, I always found him an honorable and honest man.

173. REGINA *v.* ROWTON

CROWN CASES RESERVED. 1865

Leigh & Cave 520; 10 *Cox Cr. C.* 25

[THE facts and evidence in this case, with the ruling on the first question, are printed *ante*, No. 13. On the second question reserved by the trial judge, viz., whether the personal opinion of the Crown's witness to the bad moral character of the accused was admissible, the arguments and the opinions were as follows:]

Sleigh, for the prisoner. . . . Secondly, this evidence was wrongly admitted, on the ground that evidence of general reputation only can be given, and that nothing which amounts to an individual opinion can be received. Character and reputation both mean credit derived from public opinion or esteem. When the witness in this case said that he knew nothing of the opinion of the neighborhood, he should have been stopped. The best definition of character is to be found in a speech of Erskine's, when he was counsel for Hardy (24 St. Tr. 1079):

"You cannot," he says, "when asking to character, ask what has A. B. C. told you about this man's character. No; but what is the general opinion concerning him. Character is the slow-spreading influence of opinion, arising from the deportment of a man in society. As a man's deportment, good or bad, necessarily produces one circle without another, and so extends itself till it unites in one general opinion; that general opinion is allowed to be given in evidence."

Tayler. — As to the second point, there is no rule of law excluding the answer here given. It was scrupulous and conscientious evidence of character. The witness says, in effect, "In my opinion as a pupil the defendant's character was very bad." (COCKBURN, C. J. — Is general evidence of good character to be met by the particular opinion of an individual?)

Tayler. — All evidence is admissible, unless it be excluded by some rule. What was given in evidence here was evidence of the prisoner's disposition; for that, and not reputation, is the sense in which the word "character" is used in these cases. (COCKBURN, C. J. — I do not understand that to be the meaning of the word "character." ERLE, C. J. — I agree with Mr. *Tayler* that the question of character is a question of disposition, and that reputation is admissible only because it is some evidence of disposition.)

Tayler. — The prisoner, by giving evidence of character, raises the issue that he is of such a disposition as to make it more than ordinarily improbable that he should have committed the offense charged against him. Character, in that sense, and reputation do not stand on the same basis. The latter should rather be defined as estimated character. . . .

COCKBURN, C. J. — This case turns upon the admissibility of an answer given by a witness who was called to rebut evidence of good

character which had been given in favor of the prisoner, and who was asked what was the prisoner's general character for decency and morality. The answer was in these terms:

"I know nothing of the neighborhood's opinion, because I was only a boy at school when I knew him; but my own opinion, and the opinion of my brothers who were also pupils of his, is that his character is that of a man capable of the grossest indecency and the most flagrant immorality."

The chief question for us is whether that answer was proper to be left to the consideration of the jury. I am of opinion that it was not, and that the conviction cannot stand.

Cockburn, C. J. (for the majority). The second question is, Was the answer which was given in this case, in reply to a perfectly legitimate question, such an answer as could be properly left to the jury? Now, in determining this point, it is necessary to consider what is the meaning of evidence of "character." Does it mean evidence of general reputation, or evidence of disposition? I am of opinion that it means evidence of general reputation. What you want to get at is the tendency and disposition of the man's mind towards committing or abstaining from committing the class of crime with which he stands charged; but no one has ever heard the question, What is the tendency and disposition of the prisoner's mind? put directly. The only way of getting at it is by giving evidence of his general character founded on his general reputation in the neighborhood in which he lives. . . . In my judgment it must be restricted to the man's general reputation, and must not extend to the individual opinion of the witness. . . . If that be the true doctrine as to the admissibility of evidence to character in favor of the prisoner, the next question is, Within what limits must the rebutting evidence be confined? I think that that evidence must be of the same character and confined within the same limits — that, as the prisoner can only give evidence of general good character, so the evidence called to rebut it must be evidence of the same general description, showing that the evidence which has been given in favor of the prisoner is not true, but that the man's general reputation is bad. In this case the witness disclaims all knowledge of the general reputation of the accused. . . .

I find it uniformly laid down in the text books that the evidence to character must be general evidence of reputation; and, dealing with the law as I find it, my opinion is that the answer given in this case was inadmissible, and that the conviction ought not to stand.

Erle, C. J. . . . With respect to the second question, . . . What is the principle on which evidence of character is admitted? It seems to me that such evidence is admissible for the purpose of showing the disposition of the party accused, and basing thereon a presumption that he did not commit the crime imputed to him. Disposition cannot be ascertained directly; it is only to be ascertained by the opinion formed concerning the man, which must be founded either on personal experi-

ence, or on the expression of opinion by others, whose opinion again ought to be founded on their personal experience. The question between us is, whether the Court is at liberty to receive a statement of the disposition of a prisoner, founded on the personal experience of the witness, who attends to give evidence and state that estimate which long personal knowledge of and acquaintance with the prisoner has enabled him to form.

I think that each source of evidence is admissible. You may give in evidence the general rumor prevalent in the prisoner's neighborhood, and, according to my experience, you may have also the personal judgment of those who are capable of forming a more real, substantial, guiding opinion than that which is to be gathered from general rumor. I never saw a witness examined to character without an inquiry being made into his personal means of knowledge of that character. The evidence goes to the jury depending entirely upon the personal experience of the witness who has offered his testimony. Suppose a witness to character were to say, "This man has been in my employ for twenty years. I have had experience of his conduct; but I have never heard a human being express an opinion of him in my life. For my own part, I have always regarded him with the highest esteem and respect, and have had abundant experience that he is one of the worthiest men in the world." The principle the Lord Chief Justice has laid down would exclude this evidence; and that is the point where I differ from him. To my mind personal experience gives cogency to the evidence; whereas such a statement as, "I have heard some persons speak well of him," or, "I have heard general report in favor of the prisoner," has a very slight effect in comparison. Again, to the proposition that general character is alone admissible, the answer is that it is impossible to get at it. There is no such thing as general character; it is the general inference supposed to arise from hearing a number of separate and disinterested statements in favor of the prisoner. But I think that the notion that general character is alone admissible is not accurate. . . .

The arguments of Mr. *Tayler* upon this branch of the case have commanded my assent. They are strongly confirmed by the case of *Rex* v. *Davison* (31 St. Tr. 99 [*ante*, No. 172]). In that case Lord Ellenborough held — and all the counsel engaged in it were of the same opinion — that the personal experience of a witness, or his opinion founded upon his personal experience, was admissible. . . . On the general principle which I have stated, I think that both questions ought to be answered in the affirmative, and that the conviction should stand. . . .

Willes, J. . . . With respect to the second question, I agree in opinion with the Lord Chief Justice Erle. . . . The ultimate fact to be arrived at by such evidence is that the prisoner's character, in the sense of the particular disposition which nature or education may have given him, is good and not evil. You can, no doubt, go into the question

of reputation, and inquire as to the opinion of others concerning the man. But I apprehend that the man's disposition is the principal matter to be inquired into, and that his reputation is merely accessory, and admissible only as evidence of disposition. . . . The judgment of the particular witness is superior in quality and value to mere rumor. Numerous cases may be put in which a man may have no general character — in the sense of any reputation or rumor about him — at all, and yet may have a good disposition. For instance, he may be of a shy, retiring disposition, and known only to a few; or again, he may be a person of the vilest character and disposition, and yet only his intimates may be able to testify that this is the case. One man may deserve that character [reputation] without having acquired it, which another man may have acquired without deserving it. In such cases the value of the judgment of a man's intimates upon his character becomes manifest. In ordinary life, when we want to know the character of a servant, we apply to his master. A servant may be known to none but members of his master's family; so the character of a child is known only to its parents and teachers, and the character of a man of business to those with whom he deals. . . . According to the experience of mankind, one would ordinarily rely rather on the information and judgment of a man's intimates than on general report; and why not in a court of law? . . . The evidence in this particular case was of a very peculiar character, because the prisoner was charged with an offense which would not only be committed in secret if it were committed at all, but would be likely to be kept secret by the persons who were subjected to it. Such being the case, in order to ascertain the prisoner's character for morality and decency, the persons of whom you would inquire would be those who had been within reach of his influence — persons who would not be likely to communicate his conduct to the neighborhood or to one another. . . . It appears to me that that evidence of the man's character comes within the scope of the principle I have been referring to, and ought to have been admitted, if any evidence of the prisoner's bad character is to be admitted at all. . . .

The other learned Judges concurred in the judgment delivered by the Lord Chief Justice of England. Conviction quashed.

174. John H. Wigmore. *Note on R.* v. *Rowton.* (*Treatise on Evidence*, 1905, vol. III, 1981, n. 21). In R. *v.* Rowton the opinion of Cockburn, C. J., for the majority, does not cite a single precedent in its favor. The completeness of the historical misunderstanding in the mind of the learned but dogmatic Chief Justice may be judged from his following statement, which should be compared with the preceding list of citations: "No one has ever heard the question, 'What is the tendency and disposition of the prisoner's mind?' put directly." The Chief Justice's citation of Phillipps on Evidence seems to show that he reached his conclusion solely on that authority, the frailty of which may be seen in a few words. In the first edition, of 1814, at p. 72, was the following passage, quite consistent with the law as explained

above: "In trials for felony the prisoner is always permitted to call witnesses to his general character"; repeated in substance up to the 3d edition; then, in the 4th, in 1820, comes the following insertion: "What, then, is evidence of general character? One medium of proof is by showing how the person stands in general estimation; proof that he is reputed to be honest is evidence of his character for honesty, and the species of evidence most commonly resorted to in such inquiries. It frequently occurs that witnesses, after speaking to the general opinion of the prisoner's character, state their personal experience of his honesty; and this statement is admitted, rather from favor to the prisoner, than strictly as evidence of general character." This passage is made more emphatic in later editions, ending with the 10th (I, 507) in 1852. But not a single authority was vouchsafed for the above passage until in 1824, in the 6th edition, R. *v.* Jones, the single misleading utterance, above explained, was referred to; and, in spite of the score of instances in the 1800s alone, no other citation was made, nor could be, indeed, to justify that passage. Thus, curiously and unfortunately enough, the law of England as repeatedly declared for two centuries was overturned by a passage invented and inserted by a text-writer without the citation of a single precedent.

175. Sir James Fitzjames Stephen. *Note on R.* v. *Rowton.* (*Digest of the Law of Evidence*, 3rd ed., Note XXV, to Chapter VI.), *Character, when Relevant.* The subject is considered at length in R. *v.* Rowton, 1865, 1 L. & C. 520. One consequence of the view of the subject taken in that case is that a witness may with perfect truth swear that a man, who to his knowledge has been a receiver of stolen goods for years, has an excellent character for honesty, if he has had the good luck to conceal his crimes from his neighbors. It is the essence of successful hypocrisy to combine a good reputation with a bad disposition, and according to R. *v.* Rowton, the reputation is the important matter. The case is seldom if ever acted on in practice. The question always put to a witness to character is, What is the prisoner's character for honesty, morality, or humanity? as the case may be; nor is the witness ever warned that he is to confine his evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction.

176. HAMILTON *v.* PEOPLE

Supreme Court of Michigan. 1874

29 *Mich.* 172

Error to Calhoun Circuit. Information for burning a barn with intent to defraud insurers. Defendant Thomas W. Hamilton brings error. Reversed and new trial ordered.

The defendants were indicted for burning a barn, with intent to defraud an insurance company. The conviction was had of this plaintiff in error (defendants below being tried separately) upon the testimony of William Fuller, who was sworn as State's evidence. . . . The theory of the prosecution depended entirely on the evidence of the respondent Fuller, who swore to a plan, made in advance, to burn the barn in question, by putting a lighted candle in a place where, as it

burned low, it would reach litter and other combustible material, and set it on fire. . . . A witness, William Gayton, having been sworn to sustain Fuller's reputation for truth and veracity, was asked whether he had not said at a certain time and place that he would not believe Fuller under oath, and answered that he did not think he had done so at that time, but that it was likely he might have said so at the time of Fuller's arrest for this crime. This answer was stricken out as not responsive. He was then asked whether the arrest affected his opinion of Fuller, one way or the other. This was ruled out, as well as a proposition to show his statements to different persons to the same effect, that he would not believe Fuller under oath. . . .

Brown & Patterson and *M. S. Brackett*, for plaintiff in error. *Byron D. Ball*, Attorney-General, for the People.

CAMPBELL, J. . . . Was it proper, then, to ask a sustaining witness on cross-examination, whether he had said he would not believe the impeached witness under oath?

The purpose of any inquiry into the character of a witness is to enable the jury to determine whether he is to be believed on oath. Evidence of his reputation would be irrelevant for any other purpose. And a reputation which would not affect a witness so far as to touch his credibility under oath could have no proper influence. The English text books and authorities have always, and without exception, required the testimony to be given directly on this issue. The questions put to the impeaching and supporting witnesses relate, first, to their knowledge of the reputation for truth and veracity of the assailed witness; and, second, whether from that reputation they would believe him under oath. The only controversy has been whether or no the grounds of belief must rest upon and be confined to a knowledge of reputation for *veracity* only. But confined to that, the authorities are harmonious. — 1 Stark. Ev., 237 and seq.; 2 Phil. Ev. (Edwards' Ed.), 955, 958. A very recent decision is found in Queen *v.* Brown & Hedley, L. R. 1 C. C. R. 70.

The reason given is that, unless the impeaching witness is held to showing the extent to which an evil reputation has affected a person's credit, the jury cannot accurately tell what the witness means to express by stating that such reputation is good or bad, and can have no guide in weighing his testimony. . . . It has also been commonly observed that impeaching questions as to character are often misunderstood, and witnesses, in spite of caution, base their answer on bad character generally, which may or may not be of such a nature as to impair confidence in testimony. When the question of credit under oath is distinctly presented, the answers will be more cautious.

Until Mr. Greenleaf allowed a statement to creep into his work on evidence to the effect that the American authorities disfavored the English rule, it was never very seriously questioned. — See Greenl. Ev., § 461. It is a little remarkable that of the cases referred to to

sustain this idea, not one contained a decision upon the question, and only one contained more than a passing dictum not in any way called for. — Phillips *v.* Kingfield, 1 Appleton's (Me.) R. 375. The authorities referred to in that case contained no such decision, and the Court, after reasoning out the matter somewhat carefully, declared the question was not presented by the record for decision. . . .

The objection alleged to such an answer by a witness is, that it enables the witness to substitute his opinion for that of the jury. But this is a fallacious objection. The jury, if they do not act from personal knowledge, cannot understand the matter at all without knowing the witness' opinion, and the ground on which it is based. It is the same sort of difficulty which arises in regard to insanity, to disposition or temper, to distances and velocities, and many other subjects, where a witness is only required to show his means of information, and then state his conclusions or belief based on those means. If six witnesses are merely allowed to state that a man's reputation is bad, and as many say it is good, without being questioned further, the jury cannot be said to know much about it. Nor would any cross-examination be worth much unless it aided them in finding out just how far each witness regarded it as tainted.

So far as the reports show, the American decisions, instead of shaking the English doctrine, are very decidedly in favor of it, and have so held upon repeated and careful consideration, and we have not been referred to, nor have we found any considerable conflict. — See in New York, People *v.* Mather, 4 Wend. R. 229. . . . In New Hampshire, Titus *v.* Ash, 4 Foster 319; in Pennsylvania, Bogle's Exrs. *v.* Kreitzer, 46 Pa. St. 465; Lyman *v.* Philadelphia, 56 Pa. St. 488; in Maryland, Knight *v.* House, 29 Md. 194; in California, Stevens *v.* Irwin, 12 Cal. 306; People *v.* Tyler, 35 Cal. 553; in Illinois, Eason *v.* Chapman, 21 Ill. 33; in Wisconsin, Wilson *v.* State, 3 Wis. 798; in Georgia, Stokes *v.* State, 18 Ga. 17; Taylor *v.* Smith, 16 Ga. 7; in Tennessee, Ford *v.* Ford, 7 Humph. 92; in Alabama, McCutchen *v.* McCutchen, 9 Port. 650; in Kentucky, Mobley *v.* Hamit, 1 A. K. Marsh. 590; also in Judge McLean's Circuit, in U. S. *v.* Van Sickle, 2 McLean 219.

Mr. Greenleaf himself intimates that it might be a proper inquiry on *cross-examination*. We think the inquiry proper, when properly confined and guarded, and not left to depend on any basis but the reputation for truth and veracity. And we also think that the cross-examination on impeaching or sustaining testimony should be allowed to be full and searching. . . .

For the reasons we have given the judgment must be reversed and a new trial granted, and the respondent must be remanded into the custody of the proper sheriff, to be held in custody until bailed or otherwise dealt with according to law.

Cooley, J., and Graves, Ch. J., concurred.

Christiancy, J., did not sit in this case.

177. William Trickett. *Character-Evidence in Criminal Cases.* (1904. The Forum, Dickinson College of Law, Vol. VIII, p. 128.) But little trace, if any, of an attempt to prove a defendant's character by the summarized impressions of those who have known him, is to be found in the Pennsylvania reports. (Men who knew the defendant well seem to have testified from that knowledge to his chastity in Commonwealth *v.* Brubaker, 13 Super. 14.) It is not clear that this would not be a feasible method, nor that it would not be more reliable and satisfactory than the method actually in vogue. "The most natural way to learn what disposition to truth-telling is possessed by a witness, would be," says Prof. Wigmore (Greenleaf's Evidence, p. 582, 16th ed.), "to receive the estimates of those who are personally and intimately acquainted with him, and have had ample opportunity to learn his character; and such was the original and orthodox practice, both in England and in this country. Such continues to be the rule in England." As the veraciousness of a man can be discovered best by those who are acquainted with him, so can any other personal quality. For some reason, not at all satisfactory, this testimony of those who know the man, is not receivable as to his traits.

The specific acts of a man cannot be proved in order that the jury may induct from them his character. The inductions of witnesses, who have observed his acts and are competent to make and report inductions from them, cannot be heard from the witnesses themselves. How, then, can the character of a defendant be shown? Only in one way, viz., by his reputation. The objections to this vehicle of proof are striking. The reputation, if well grounded, emanates from those who have seen the specific acts, and have reported them, or from those who have seen these acts, have generalized and inducted character from them, and have stated their generalizations and inductions. The witness who testifies to reputation testifies, in substance, that he has heard A, and B, and C, and D, and twenty or forty others, say that the accused was this or that sort of a man. The witness may or may not correctly represent what he has heard from others. These others may have repeated only what still others had told them, and these may not have correctly reported what they heard. But, the value of the original reporter would depend on his being an observer of an adequate number of the acts of the defendant, and on his properly inducting character from them. If these observers were before the court, the content and the value of their opinions could be more surely learned, than when, invisible themselves, their identities even being unascertained, reports at first, second, tenth, nay, so far as can be known, at thousandth hand, of what they have said, are the only evidence of their opinions.

The propriety of receiving reputation, so far as it is composed of the opinions of non-observers, rests on the unverified assumption that this reputation will faithfully represent the opinions of the observers. This assumption is not only unprovable, but improbable. It is true that, Lowrie, C. J. (Hoffman *v.* Kemerer, 44 Pa. 452) remarks, "there is no danger of any person having a better reputation in ordinary conduct than he deserves," a dictum which could be justified only by an investigation of a very large number of reputations, and of the conduct of the persons affected by them; for such things are not self-evident. We are not aware that any sociological students have conducted such investigations. Socrates was believed at Athens to be a much worse man than he was, and prophets are without honor where they ought to be best known. It is quite as easy to think that a reputation may be better than is deserved as that it may be worse. It would be a miracle if, in a large percentage of cases, the reputation

exactly corresponded with the facts of conduct and character. The annals of crime not infrequently exhibit shocking and startling discrepancies between the good repute of men and what the evidence shows to have been their actual character. . . . But, whatever may be the justification of assuming that, in the long run, reputation will correspond with the conduct of the subject, so far as it is visible to observers, there is scarcely a word to be said in favor of employing the reputation as the evidence of the tenor of conduct, to the exclusion of the judgments of those who know the party whose conduct or character is in question.

(c) *Opinion to Handwriting*

179. Algernon Sidney's Trial. (1683. Howell's State Trials, IX, 851, 864.) [Seditious libel.] Mr. *Sheppard* sworn.

Att'y-Gen. — Pray, will you look upon these writings [shewing the libel]. Are you acquainted with Colonel Sidney's hand?

Sheppard. — Yes, my lord.

Att'y-Gen. — Is that his handwriting?

Sheppard. — Yes, sir; I believe so. I believe all these sheets to be his hand.

Att'y-Gen. — How come you to be acquainted with his hand?

Sheppard. — I have seen him write the indorsement upon several bills of exchange.

Col. *Sidney.* — My lord, I desire you would please to consider this, that similitude of hands can be no evidence.

L. C. J. Jeffries. — Reserve yourself until anon, and make all the advantageous remarks you can. . . .

Sidney. — Now, my lord, I am not to give an account of these papers; I do not think they are before you, for there is nothing but the similitude of hands offered for proof. The similitude of hands is nothing; we know that bonds will be counterfeited, so that no man shall know his own hand.

180. Hales' & Kinnersley's Trial. (1729. Howell's State Trials, XVII, 267.) . . . Mr. *Strange.* — May it please your lordship, and you gentlemen of the jury, this is an indictment against the two prisoners William Hales and Thomas Kinnersley. This indictment sets forth, that they being persons of ill fame, and intending to deceive Mr. Edwards, etc., on the 2d of March, in the first year of his majesty's reign, did forge a writing purporting to be a promissory note, etc. . . .

(Note read:) — "I promise to pay to Mr. Thomas Kinnersley, or his order, within six months after date, the sum of sixteen hundred and fifty pounds, for ye value received,

"March 30, 1728. Samuel Edwards."

Indorsement. "Thomas Kinnersley."

Serjt. *Whitaker.* — The gentlemen of the jury should see it now. . . .

Mr. *Thomas Bird* sworn.

Att'y-Gen. — Sir, whose hand is that? [showing him a different note, of earlier date.]

Bird. — Mr. Kinnersley, Sir, owned that to be his handwriting.

Att'y-Gen. — Was it showed by you to Mr. Kinnersley at that time when he owned it?

Bird. — Yes, Sir.

Kinnersley. — And did I own it, Sir?

Att'y-Gen. — Why, you owned it in court. This is the old note.

Kinnersley. — I beg your pardon, Sir; I did not understand that.

Att'y-Gen. — Give that note to the jury to compare it with the other note that is now before them. . . .

Mr. *Lincoln* sworn. . . .

Serjt. *Whitaker.* — Mr. Lincoln, those receipts which you produced, did Mr. Kinnersley actually write them?

Lincoln. — I saw him write them all.

Serjt. *Whitaker.* — Show them to the jury.

Judge *Reynolds.* — Gentlemen of the jury, in that book you will find some receipts wrote by Mr. Kinnersley, which Mr. Lincoln swears are his hand; that he saw him write them all.

181. History of the Rule.[1] The trials of the 1500s and 1600s illustrate (1) that the term "similitude" or "comparison of hands" covered *all modes of proving handwriting* (in the strict sense, *i.e.*, every way in which the type of writing was the source of belief, and that this kind of evidence was much distrusted; (2) that the orthodox use of such proof was confined at least to *civil causes;* (3) that the only accepted mode of such proof was by those who had *seen the person write.* But a gradual expansion took place of the limits of the doctrines under (2) and (3). (2) We first find the doctrine that in *criminal cases* proof by "similitude of hands" is admissible if the disputed paper was found in the accused's possession. (3) The Crown lawyers had already begun and incessantly kept up the practice of offering witnesses who had an inferior knowledge, based on specimens seen by them and somehow *known to them as genuine otherwise than by seeing them written.* The great case of Lord Ferrers *v.* Shirley, in 1731 (*ante*, No. 121) stamped this new doctrine as orthodox. By the beginning of the 1800s this class of testimony takes its place on an equal footing with the older kind, but as distinctly modern and parvenu.

Thus the opposition to proof by "comparison of hands" had been forced to give way, and the use of such proof had been enlarged. But the old stigma remained, and the old literature discountenancing it was still perused. Thus, when now still other varieties of it were attempted to be availed of, it came about that the argument against them was that they involved "comparison of hands" and were thus unlawful.

What we have as the 1800s came in (the time when reasons and principles for the rules of evidence began much to be thought about) is (1) the acceptance of witnesses who had seen the person write; (2) the acceptance of witnesses who had received writings subsequently treated by him as genuine or who had had the custody of ancient documents of the same person's; (3) the permission, for such persons, of bringing into court the specimens they knew and juxtaposing them; (4) the exclusion of any other mode of testimony under the condemnatory phrase "comparison of hands."

(*A*) *Kinds of Witnesses.* The other kinds of witnesses that were thus excluded would be (*a*) an *ordinary witness who knew nothing about the handwriting* but merely juxtaposed specimens and compared; (*b*) the same testimony by one *skilled in handwriting* generally.

[1] Adapted from the present Compiler's "Treatise on Evidence" (1905, Vol. III, §§ 1991–1993).

(*a*) Now the former was of course barred absolutely by the Opinion rule, well expounded in this connection in the following passage:

1770, YATES, J., in Brookbard *v.* Woodley, Peake N. P. 21, note: "Where it is merely opinion on similitude of the writing collected from barely comparing them, the jury may compare them as well as anybody else, and any two people may think differently."

(*b*) The other kind of testimony thus excluded was that of *experts speaking from juxtaposition*. This it was now strenuously sought to introduce. It is no matter of surprise that the judges instinctively hesitated; for the idea of expertism in handwriting was then a novel one. But the significant circumstance is that those who tried to use this kind of testimony were obliged to strive to remove from it the stigma of being "comparison of hands." They failed for a long time to introduce the new kind of testimony; and the Legislature had finally to step in with its aid. But the result of the discussion was that the stigmatized "comparison of hands" now obtained definitely a narrow meaning; it covered the testimony of all witnesses whose knowledge was acquired solely *by examination of specimens for the purpose of the trial;* it no longer applied to witnesses who had gained a knowledge by seeing the person write or by receiving correspondence or the like. . . .

(*B*) *Submission of Specimens to the Jury.* There is, of course, a sole remaining way of attempting to prove the genuineness of handwriting, *viz.*, without asking the opinion of any witness, to *lay before the jury some specimens* of the writing of the person in question. In the early practice before 1800 there was no objection to the jury's examination purely as such. The witness who had seen the person write (or later, had received papers, or possessed old documents learned to be genuine) might bring the writing in, if he had it, and the jury would incidentally look at it. Thus the stigma of "comparison of hands" was not applicable to the fact of the jury's examination as such; the struggle was against the use of a certain kind of witness, not against what he did if admitted. But now the controversy (above mentioned) over expert testimony by juxtaposition was in full array; the new and narrow sense of the stigmatized "comparison of hands" naturally associated itself with any and every process of "comparison" or manual juxtaposition; and doubts about the propriety of the time-honored inspection by the jury thus arose. The Court of Exchequer, in 1830, and the King's Bench, in 1836, after canvassing the whole subject from the point of view of policy, put a limitation upon the practice — confining it to documents already in the case — which remained the law, until the Common Law Procedure Act of 1854 speedily reverted to the early tradition, and substituted its more satisfactory rule.

If the foregoing exposition has been clear, we may understand that the classes of witnesses who may testify to handwriting have increased in number by successive enlargements; that the whole meaning of "comparison of hands" has changed; that the mere process of juxtaposition *coram judicio*, whether for witness or for jury, was historically orthodox and unquestionable; and that the opposite fates at common law of juxtaposition by experts and juxtaposition by jury — exclusion for the former, but limited sanction for the latter — were due simply to the fact that the former had never been attempted till the 1800s and was merely prevented from coming into existence, while the latter had always existed and was thus able to survive the attempts on its life.

182. DOE DEM. PERRY *v.* NEWTON

QUEEN'S BENCH. 1836

5 A. & E. 514; 1 *Nev. & P. 1*

EJECTMENT for land in Cumberland. At the trial before COLERIDGE, J., at the last assizes at Carlisle, it appeared that this action was brought by the heir at law of one Brockbank against the defendants, who claimed as devisees under the will of the same individual. In February last the testator died, as was supposed intestate. Some weeks afterwards, in removing the bed in which he had died, a document was found, which the defendants alleged to be his will. The question at the trial was, as to the genuineness of this document. It was dated in 1833, and was witnessed by three persons, all of whom were dead at the time of the discovery of the will; and it was not known by whom it had been written. Evidence was given, on the part of the defendants, of belief in the handwriting of the testator and attesting witnesses. On cross-examination the same persons proved that various letters produced to them by the plaintiff's counsel, and purporting to be letters written and signed by the testator and two of the persons attesting the will, were respectively in their handwriting. On the part of the plaintiff witnesses were afterwards called, who negatived, according to their belief, the alleged handwriting of the testator and attesting witnesses; and it was then proposed to give in evidence the before-mentioned letters, proved to have been undoubtedly written by the testator and witnesses respectively, in order that the jury might compare the handwriting contained in those letters with the signatures to the will, and thus detect an alleged dissimilarity between such letters and signatures. This evidence was rejected by the learned judge. A verdict was found for the defendants.

Alexander now moved for a rule *nisi* for a new trial, on the ground that this proof had been improperly rejected. "The general rule of evidence on this subject is stated to be, that handwriting cannot be proved by a comparison of the paper in dispute with any other papers, although acknowledged to be genuine. The generality of the proposition was, however, limited by Griffith *v.* Williams, 1 Cro. & J. 47. In that case the Court of Exchequer held, that the rule does not apply where the writing acknowledged to be genuine is already in evidence in the cause, and that in such case the jury may compare the two documents. Nor was this the earliest decision upon the point; for in Allesbrook *v.* Roach, 1 Esp. 351, not noticed in the last-cited case, Lord KENYON allowed the signature of the defendant to several bills of exchange to be compared by the jury with his alleged signature to the bill on which that action was brought. The bills there allowed to be made the subject of comparison were no more connected with the matter in dispute than the letters proposed to be given in evidence in the present

action. . . . The question, therefore, will be, the propriety of such a limitation. Two reasons have been assigned in its support: first, that the jury may be wholly illiterate, and unable, therefore, to institute the comparison; the second, that the party interested has it in his power to select, and probably will select, out of a number of documents, such only as suit his purpose, and will keep back the rest. The first reason, however applicable at former times, will scarcely have any weight at the present day. The second would apply with equal stringency to cases of ancient documents, which are undoubtedly provable by a comparison of handwriting, and yet in such cases the interested party possesses the same power of producing or keeping back any specimens he may deem favorable or otherwise to his view of the case. Such a course of proceeding is open to inquiry and observation, and affords a test, rather for the value, than for the admissibility, of this description of evidence. It is difficult to see on what solid grounds the distinction can rest between the admissibility of documents already in evidence in the cause, and those offered for the purpose of comparison. Both are avowedly in the handwriting of the party; and the question being the genuineness of the alleged writing, they afford an equal criterion.

Lord DENMAN, C. J. — This is a point on which we ought not to raise any doubt. I rather think the decision in Griffith *v.* Williams, 1 Cro. & J. 47, has been considered to go a long way; but the real ground upon which that rests appears to me to be that the comparison is unavoidable. There being two documents in question in the cause, one of which is known to be in the handwriting of a party, the other alleged, but denied to be so, no human power can prevent the jury from comparing them with a view to the question of genuineness; and, therefore, it is best for the Court to enter with the jury into that inquiry, and to do the best it can, under circumstances which cannot be helped. . . .

PATTERSON, J. — I always thought that the rule laid down in Griffith *v.* Williams, 1 Cro. & J. 47, was limited to documents which were already before the jury. It is not said in the report of that case that necessity was the ground upon which the comparison was allowed; but I think that must have been so. It was impossible, in such a case, to prevent the jury from making a comparison. I have rejected evidence, upon the ground of distinction now taken, in a case which came before me at Gloucester, I think on the Crown side. . . .

WILLIAMS, J. — I doubt if the facts of Allesbrook *v.* Roach, 1 Esp. 351, are correctly given; for the rule, if laid down there as it is stated, does not appear to have been acted upon since, although it might be supposed that such a decision by Lord KENYON, whose judgment on points of evidence is so much respected, would have been followed up in other cases. I question the authority of the case, as there has been no corresponding practice. If the comparison here contended for were admitted, the party disputing a document ascribed to him might produce to the jury for that purpose a selection from any number of papers

written by himself, which would be very dangerous. The decision in Griffith *v.* Williams, 1 Cro. & J. 47, no doubt proceeded upon the ground that comparison of the documents, when they are in evidence for other purposes, cannot be avoided, and, therefore, it is better that the comparison should be made under the direction of the Court than in a corner. . . .

Coleridge, J. — I am of the same opinion. I only wish to say a word in respect to that instance on which Mr. *Alexander* relied with respect to ancient handwriting. . . . I have always understood that to be an excepted case; but that exception has been founded on the same principle which justifies it in others. The exception is of *necessity;* the handwriting cannot be proved in any other way. Doubtless it is less open than modern writing would be to the objection that the selection may be an unfair one.

I will add another reason why I think the evidence was properly rejected, — that many irrelevant issues would be thereby raised. It is all very well if the jury are to look only at the documents that are otherwise in evidence in the cause. Whether those documents are or are not in the handwriting of the party must be proved in the course of the case. If the rule is extended to documents that have nothing to do with the matter in dispute, on every one of those an issue is raised quite irrelevant to the main point; with this additional objection to be made to it, that the other party cannot know what documents are going to be produced, and does not come prepared to answer inferences arising from their production. This seems an additional reason why the rule should be narrowed. Rule refused.

183. DOE dem. MUDD *v.* SUCKERMORE

Queen's Bench. 1836

5 *A. & E.* 703

Ejectment for messuages, etc., in Suffolk. On the trial before Vaughan, J., at the Suffolk Spring assizes, 1835, a verdict was found for the defendant. In Easter term, 1835, *Storks*, Serjt., obtained a rule for a new trial on the ground of an improper rejection of evidence. The question in the cause was the due execution of a will; and the three attesting witnesses were called. It was supposed that one of them, Stribling, was deceived in swearing to his own attestation, and that, although he had attested a will for the testator, the document produced was not that will, but a forgery, and that the attestation was in truth a counterfeit. Upon cross-examination, two signatures, purporting to be his, and to have been subscribed to depositions, made by him in proceedings relating to the same will in another court, and also sixteen or eighteen signatures, apparently his, pasted on a sheet of pasteboard,

were shown to him; and he said he believed they were all of his handwriting. At the time he gave his evidence, another witness was in court, and, the cause lasting to the second day, was called. He had never seen Stribling write, nor had any other means of acquiring a knowledge of the character of his handwriting, but from an examination of the signatures so produced: this he had made on the first day, and, from this, he stated that he thought he had acquired a knowledge of the character of his handwriting; and he was asked whether he believed the attestation to the will to be the handwriting of Stribling. This was objected to, and, on argument, determined to be inadmissible.

. . . Cause was shown by *Kelly* and *Gunning;* and *Storks,* Serjt., and *Byles,* were heard in support of the rule. The Court took time to consider; and in Trinity term, 1837 (June 8th), their Lordships, differing in opinion, delivered judgment seriatim. . . .

Coleridge, J. . . . In my opinion, after much consideration, the evidence was properly rejected.

The rule as to proof of handwriting, where the witness has not seen the party write the document in question, may be stated generally thus. Either the witness has seen the party write on some former occasions, or he has corresponded with him, and transactions have taken place between them upon the faith that letters purporting to have been written or signed by him have been so written or signed. On either supposition, the witness is supposed to have received into his mind an impression, not so much of the manner in which the writer has formed the letters in the particular instances, as of the general character of his handwriting; and he is called on to speak as to the writing in question by a reference to the standard so formed in his mind. It is obvious that the weight of this evidence may vary in every conceivable degree; but the principle appears to be sound, both in regard to the test of genuineness, and the acquisition of the means of applying it. The test of genuineness ought to be the resemblance, not to the formation of the letters in some other specimen or specimens, but to the general character of the writing, which is impressed on it as the involuntary and unconscious result of constitution, habit, or other permanent cause, and is, therefore, itself permanent. And we best acquire a knowledge of this character by seeing the individual write at times when his manner of writing is not in question, or by engaging with him in correspondence; either supposition giving reason to believe that he writes at the time not constrainedly, but in his natural manner. . . .

Upon these grounds directly, I conceive, although not on these alone, our law has not, during a long course of years, permitted handwriting to be proved by the immediate comparison, by a witness, of the paper in dispute with some other specimen proved to have been written by the supposed writer of the first. . . . It is familiar to lawyers that many attempts have been made to introduce this mode of proof, according to the practice of the civil and ecclesiastical laws; and a text writer,

to whose opinions I shall always pay the greatest respect, Mr. Starkie I mean, has given this mode of proof the sanction of his authority, as preferable on principle to our own; 2 Starkie on Evidence, 375, Ed. 2. But, after some uncertainty of decision, the attempts have finally failed. Rex *v.* Cator, 4 Esp. 117, though a Nisi Prius decision, brings this matter very fully under review; and, to the extent at least of what is rejected, has always since been considered as laying down the rule correctly. In my humble judgment, that ought not to be departed from. Assuming that no dispute exists as to the genuineness of the standard, or the fairness with which it has been selected, such a comparison leads to no inference as to the general character of the handwriting. The two specimens may be much alike, or very different; yet, in the former case, they may proceed from different hands, in the latter case from the same. If the points, which I have just supposed to be conceded, be brought into question, other and more serious objections arise to this mode of proof. If the genuineness be disputed, a collateral issue is raised, and that upon every paper used as a standard; an issue, too, in which the proof may be exactly of the same nature as that used in the principal cause, namely, mere comparison; with the additional disadvantages, that the former standard is not produced, and that the opposing party can avail himself of no counterproof. It is easy to see too, as has been well observed by Mr. Starkie, that this inquiry might lead to an endless series of issues each more unsatisfactory than the preceding.

Upon the grounds, therefore, that our rule is a sound one, and well established, both in what it admits and what it rejects, sound in principle, and convenient with reference to the mode of trial to which it is to be applied, and that the present facts are substantially within the latter branch of it, I am of the opinion that the learned Judge rightly rejected the evidence tendered. . . .

Williams, J. — This was an action of ejectment, to try the validity of a will. . . . The question seems mainly to be reduced to this point, whether the knowledge, which the witness professed to have, was acquired by means prohibited by any known and established rule of law. . . . And the objection is twofold; first, that it was acquired merely by the comparison of writing; and next, that, at all events, it was not acquired by either of the legitimate and recognized modes, already referred to, having seen the party write, or corresponded with him.

As to the first, . . . it seems to me that the evidence, so far as this objection is concerned, was admissible, because it was not the comparison of handwriting, in the proper and ordinary sense of the term. To reject it, because what was equivalent to a comparison of handwriting took place, would go far, so far as the reason of the thing is concerned, towards disturbing the rule altogether, and letting in a comparison of handwriting as a medium of proof in all cases whatsoever, or excluding, in a great degree, all possibility of proof. What is to be

said, where the means of knowledge are derived from a bygone correspondence of considerable standing? What is it but comparing a distant, and (in proportion to the length of time) faint image in the mind with the writing in question? . . .

I come now to consider, whether the witness in this case had any legitimate means of knowledge to authorize the question, the answer to which was rejected. It has been said that the specimens selected may have been garbled and fallacious, "calculated to serve the purpose of the party producing them, and, therefore, not exhibiting a fair specimen of the general character of the handwriting." . . . I cannot perceive how it can be affirmed that this was a partial selection by those who wished to use the papers. The selection was not depending upon their power merely. The whole was subject to the answer of the witness. The papers produced might all have been admitted to be of his handwriting, or one-half, or any other portion of them, or all might have been denied. When the papers were so admitted, was there not then some proof that they were of the witness's handwriting? And if so, how can the case differ in kind, though it may in amount or degree of proof, from the perusal or reperusal of a couple of letters, written, the one ten, the other five, years before? Why may the witness give an opinion of any person's handwriting from a study of such letters? Because the writer has, in some manner, authenticated them to be his. Why might the witness have been asked the proposed questions in this instance? Because the witness had sworn that the papers were of his handwriting. In each case, it is from the perusal of papers (and papers only) that the knowledge is acquired. In each case there is some proof that the papers to be perused, in order to form a judgment, are those of the parties respectively, respecting whose handwriting in the particular case the question and inquiry arise. . . . Anything, I presume, from which the identity of the writer is established, may suffice. If then, from such proof, whence a reasonable inference may arise that the letter or signature is by such or such person, an opinion of his handwriting may be given, the question recurs, whether there be not *some* foundation for opinion, where the party has upon his oath declared that the papers perused by the witness were written by himself. That no person has, hitherto, been allowed to speak of his belief of handwriting, except he has acquired his knowledge by one or other of the prevalent methods (having seen the party write, or receive writing from him), may doubtless be true; but it is, I fear, but an imperfect solution of the present difficulty. May not the answer be, that the case is new? In truth, has it ever arisen before? If not, we are called upon, as in the various and ever varying combinations of human affairs continually does and must occur, to apply, as well as we can, the principles and analogies having the nearest and most direct affinity to the subject, to this fresh question. . . .

Upon the whole, with sincere respect for the contrary opinions, I

think the evidence was improperly rejected, and that there ought to be a new trial.

PATTESON, J. — In this case, . . . the learned Judge rejected his testimony; and the question is whether he was right in so doing. . . .

All evidence of handwriting, except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge. That knowledge may have been acquired, either by seeing the party write, in which case it will be stronger or weaker according to the number of times and periods, and other circumstances under which the witness has seen the party write, but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then merely signing his surname. . . . Or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers, producing further correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party. . . . A third mode is now sought to be introduced, namely, by satisfying the witness by some information or evidence that a number of papers are in the handwriting of the party, and then desiring him to study those papers, so as to acquire a knowledge of the handwriting, and fix an exemplar in his mind, and afterwards putting into his hand the writing in question, and asking his belief respecting it, or by merely putting certain papers into the witness's hands, without telling him who wrote them, and desiring him to study them, and acquire a knowledge of the handwriting, and afterwards showing him the writing in question, and asking his belief whether they are written by the same person, and calling evidence to prove to the jury that the former are the handwriting of the party, which perhaps may be considered as the same process in effect, expressed in other words. The very foundation of this mode is the establishment of the fact that the papers, from studying which the witness is to acquire his knowledge, are the handwriting of the party. Now that fact must be established, either by the acknowledgment of the party, or by the information of third persons.

Assuming the witness to be the only person to be satisfied of the fact, it is obvious that the acknowledgment of the party, if the witness be called to affirm the handwriting, would be a most unsafe ground on which to act, and was so considered by Lord KENYON in Stranger *v.* Searle,

1 Esp. 14; and, if the witness be called to disaffirm the handwriting, the acknowledgment of the party, unless he be a party to the suit, ought not to bind the litigants; and, if he be a party to the suit, it may fairly be urged that the case would come within the second mode of acquiring knowledge above suggested, namely, by a direct communication with the party. The other mode of satisfying the witness, viz., by the information of third persons, is equally open to objection, as it must be given behind the back of one or both of the litigant parties, and would obviously be most unsafe and unfair.

The jury, therefore, must be satisfied of the fact. Now that must be by evidence, and will raise a number of collateral issues, foreign to those on the record, and for which one of the litigants must of necessity be wholly unprepared, in addition to the danger of unfair selection by the other litigant who produces the papers. I need hardly advert to the great inconvenience and waste of time which will be incurred by such a wide range of collateral matter, nor to the observation that the proof of the papers in those collateral issues might be by calling a witness who had acquired his knowledge of the handwriting in the very same way from other papers, which would equally require to be proved; and so it is obvious that the same process, as is now attempted, might be repeated ad infinitum, and lead to no conclusion. This Court recently, in the case of Doe dem. Perry *v.* Newton [*ante*, No. 182], 1 Nev. & P. 1., has expressly determined that documents irrelevant to the issues on the record shall not be received in evidence at the trial, in order to enable a jury to institute such a comparison. Much less can it be permitted to introduce them in order to enable a witness to do so. . . .

I do not, under these circumstances, feel that I am obliged by authorities to admit of any mode of acquiring a knowledge of handwriting, except the two above suggested, and, for the reasons already stated, I am of opinion that no other mode ought to be introduced, and that the learned Judge was right in rejecting the evidence.

Lord DENMAN, C. J. . . . We are bound to consider whether, as a matter of strict law, the plaintiff had a right to lay before the jury the evidence that was withholden from them. . . .

Taking it, then, as clear that the undeniable peculiarities of this case do not preclude evidence of opinion as to the handwriting, the only question is, whether the witness called to pronounce one had a sufficient material for forming one, to be admissible for that purpose. And he appears to stand in exactly the same situation as he would have done, if called to speak of the handwriting of a party to the suit, whether for or against the genuineness of the document. He may have been called for the plaintiff to prove the defendant's signature to a bill or bond. He did not see him sign it; nor has he ever seen him write: but this is confessedly immaterial, if he has had other adequate means of obtaining a knowledge of his hand, 2 Starkie on Ev. 372, Ed. 2. . . . The clerk who constantly read the letters, the broker who was ever

consulted upon them, is as competent to judge whether another signature is that of the writer of the letters, as the merchant to whom they were addressed. The servant who has habitually carried letters addressed by me to others has an opportunity of obtaining a knowledge of my writing, though he never saw me write, or received a letter from me. . . . In ancient documents, knowledge of an officer's handwriting is frequently obtained by an observation of his signature to papers which he would be called upon officially to sign; and a witness speaking from that knowledge may give an opinion whether any particular writing was made by the same person. The process is, therefore, recognized as one which may enable one man to form a competent opinion as to the writing of another.

Pausing here for a moment, I must fairly say that I think the syllogism complete. Opinion is evidence of handwriting, where it is founded on knowledge obtained from inspection of documents proved to be written by the same party. The opinion tendered here was founded on such knowledge. If, however, any rule excluding such evidence had been promulged by competent authority, I should at once have yielded my own views. I find no such rule laid down. . . .

From the substitution of a witness for the jury, in forming an opinion on the genuineness of handwriting, an advantage follows so great and obvious, that it would form a strong motive for so framing the rule of evidence; I mean the prevention of that distracting multiplicity of issues which a jury might be called upon to try, arising out of every one of the whole number of documents placed before them. . . . On these points the party could not be expected to come prepared; and infinite injustice might ensue from prejudices of every kind. I therefore entirely adhere to Doe dem. Perry *v.* Newton [*ante*, No. 182], 1 Nev. & P. 1, in which we refused a rule nisi for a new trial, moved for on the ground that my brother COLERIDGE had excluded papers tendered evidence for the mere purpose of being compared with some which were proved. . . .

On the whole, I think the question regular, and the exclusion of the evidence improper; but, the Court being equally divided, the rule for a new trial must be discharged.

Rule discharged.

184. MORRISON *v.* PORTER

SUPREME COURT OF MINNESOTA. 1886

35 *Minn.* 425; 29 *N. W.* 54

THE plaintiff brought this action in the District Court for Hennepin county to determine the defendant's adverse claims to certain land, and appeals from an order by LOCHREN, J., refusing a new trial.

P. M. Babcock, for appellant. . . . *John D. Howe* and *S. L. Perrin*, for respondents.

Dickinson, J. — The defendant railroad corporation has title to the land in controversy through a chain of conveyances running back to the plaintiff, if in fact the plaintiff executed a certain deed of conveyance in the year 1860, the execution of which the plaintiff disputes. The Court found that it had been executed by her.

The first point to be considered arises upon the admission in evidence of an instrument (Exhibit Y) containing a signature of the plaintiff admitted to be genuine, to enable a comparison to be made between that signature and the disputed signature in issue, Exhibit Y being not otherwise relevant to the issue. Expert witnesses were allowed to give their opinions, based upon such comparison. Upon the question thus presented, as to whether a writing, admitted to be in the hand of the person whose signature is in issue, may be received in evidence for the purpose of comparison, the authorities are so at variance that we are at liberty to adopt the rule of evidence which seems to be most consistent with reason, and conducive to the best results. At common law, and generally in the United States, it has been the rule that where other writings, admitted to be genuine, are already in evidence for other purposes in the case, comparison may be made between such writings and the instrument in question. If such a comparison is conducive to the ends of truth, and is allowable, there would seem to be but little reason for refusing to allow a comparison with other writings admitted to be genuine, although not in evidence for other purposes.

The objections which have been urged to receiving other instruments, for the purpose of comparison, have been the multiplying of collateral issues; the danger of fraud or unfairness in selecting instruments for that purpose, from the fact that handwriting is not always the same, and is affected by age, and by the various circumstances which may attend the writing; and the surprise to which a party against whom such evidence is produced may be subjected. When the writings presented are admitted to be genuine, so that collateral issues are not likely to arise, nor the adverse party to be surprised by evidence which he is unable to meet, these objections seem to us to be insufficient as reasons for excluding the evidence. If such evidence has apparent and direct probative force, it should not be excluded unless for substantial reasons. In general, and from necessity, the authenticity of handwriting must be subject to proof by comparison of some sort, or by testimony which is based upon comparison, between the writing in question and that which is in some manner recognized or shown to be genuine. This is everywhere allowed, through the opinions of witnesses who have acquired a knowledge, more or less complete, of the handwriting of a person, as by having seen him write, or from acquaintance with papers authenticated as genuine. In such cases the conception of the handwriting retained in the mind of the witness becomes a standard for comparison, by reference to which his opinion is formed, and given in evidence. It would seem that a standard generally not less satisfactory,

and very often much more satisfactory, is afforded by the opportunity for examining, side by side, the writing in dispute and other writings of unquestioned authenticity; and this, we think, is in accordance with the common judgment and experience of men.

The evils that may be suggested as likely to arise from the selection of particular writings for the purposes of comparison may be left, as all unfair or misleading evidence must be, to be corrected by other evidence, and by the intelligent judgment of the Court or jury. In our opinion, such evidence is conducive to the intelligent ascertaining of the truth, and the receiving of it in this case was not error. We cite authorities sustaining this view, some of which go further in this direction than does our present decision. Tyler *v.* Todd, 36 Conn. 218; Moody *v.* Rowell, 17 Pick. 490; State *v.* Hastings, 53 N. H. 452; Adams *v.* Field, 21 Vt. 256; State *v.* Ward, 39 Vt. 225; Farmers' Bank *v.* Whitehill, 10 Serg. & R. 110; Travis *v.* Brown, 43 Pa. St. 9; Chance *v.* Indianapolis & W. G. R. Co., 32 Ind. 472; Macomber *v.* Scott, 10 Kan. 335; Wilson *v.* Beauchamp, 50 Miss. 24.

The conclusion of the Court that the plaintiff executed the deed in question is very satisfactorily sustained by the evidence. It is opposed by the bare denial of the plaintiff. The deed purported to have been executed by herself and by her husband, and to have been acknowledged in the manner prescribed by law, and has been on record more than twenty years. The fact of its execution is sustained, not merely by the statutory authentication, but by the evidence of the subscribing witnesses, although they do not now recollect the fact itself. Evidence of a circumstantial nature, relating to the signature itself, went also to show that the plaintiff's name was not a forged writing. Clear and convincing proof is required to oppose the statutory authentication by which the proof of deeds is established. . . .

The deed of the plaintiff, being sustained, determines the case, and it is unnecessary to consider the respondents' further claim of title by prescription. Order affirmed.

185. UNIVERSITY OF ILLINOIS *v.* SPALDING

SUPREME COURT OF NEW HAMPSHIRE. 1900

71 *N. H.* 163; 51 *Atl.* 731

DEBT, on a bond. Solomon Spalding was the only defendant named in the writ who was resident in this State, and the only one upon whom service was made or who appeared. Trial at the January Term, 1901, of the Supreme Court, before PARSONS, J., and a jury, and verdict for the defendant. . . .

The defendant's signature as surety and the breach of the bond were admitted. The defense was that after the bond was signed, and before

it was delivered to the plaintiffs, the name of one surety was erased and another written over it, and that the appearance of the signatures was such that ordinary care would have disclosed the erasure and substitution to the plaintiffs before acceptance of the bond. An enlarged photographic copy presented faint lines of the writing alleged to have been erased. The plaintiffs claimed that the erasure was of a part of the defendant's name accidentally written by him upon the line below his full signature, while the defendant denied that the words erased were in his handwriting. For the purpose of comparison the defendant introduced in evidence his signatures written upon stock certificates, and sworn to be genuine by him and by the treasurer of the corporation. The plaintiffs excepted to this evidence on the ground that the signatures were neither admitted to be genuine, nor found in papers otherwise in the case, and, further, that they appeared to have been written at a date subsequent to the execution of the bond. . . .

Charles J. Hamblett, Charles H. Burns, and *John S. H. Frink,* for the plaintiffs. *George B. French* and *Oliver E. Branch,* for the defendant.

REMICK, J. . . . The exception next considered presents the question whether signatures of the defendant on papers otherwise irrelevant, and not admitted to be genuine, were admissible for the mere purpose of comparison with the signature in dispute.

By the general rule of the common law, comparison by juxtaposition was limited to the writing in issue and writings in the case for other purposes. The introduction of writings otherwise irrelevant for the mere purpose of comparison was permitted only when the writing in issue was so ancient as not to admit of proof based on knowledge derived from seeing the party write or its equivalent. 1 Greenleaf, Evidence, § 580; . . . Doe *v.* Newton, 5 A. & E. 514 [*ante,* No. 182]; Doe *v.* Suckermore, 5 A. & E. 703 [*ante,* No. 183]; Griffits *v.* Ivery, 11 A. & E. 322; Hickory *v.* United States, 151 U. S. 303. This general rule of the common law has been adopted and is enforced in its integrity in the United States courts. Strother *v.* Lucas, 6 Pet. 763; Rogers *v.* Ritter, 12 Wall. 317; Moore *v.* United States, 91 U. S. 270; Williams *v.* Conger, 125 U. S. 397, 414; Hickory *v.* United States, 151 U. S. 303; Stokes *v.* United States, 157 U. S. 187. . . . The tendency, however, of legislation and judicial decisions is away from this strict and narrow rule toward the more liberal one permitting comparison with any writing established to be the writing of the party whose hand is in issue, whether otherwise relevant or not, and without reference to the age of the particular writing in controversy. 15 Am. & Eng. Enc. Law (2d ed.), 265, 269. The rule has been so enlarged in England by the statute of 17 & 18 Vict., ch. 125, sec. 27. Also by statute in many of the States of this country. 15 Am. & Eng. Enc. Law (2d ed.), 270. In other States the same result has been reached by judicial decisions. . . . While more or less has been said to the same effect by the Courts in this jurisdiction, much, not in

terms overruled, has also been said to the contrary. . . . While the law remains in the conflicting and inconclusive shape disclosed by the foregoing review of the authorities, confusion and controversy are inevitable. Consistency and efficiency alike require a definite rule, authoritatively declared. In this view, we have re-examined the question, both from the point of reason and authority.

It may be safely stated as a fundamental proposition that, on the question whether a given signature is in the handwriting of a particular person, comparison of the disputed signature with other writings of that person known to be genuine is a rational method of investigation, and that similarities and dissimilarities disclosed are probative, and as satisfactory in the instinctive search for truth as opinion formed by the unquestioned method of comparing the signature with an exemplar of the person's handwriting, existing in the mind, and derived from direct acquaintance, however little, with the party's handwriting. The objections upon which the common-law rule of exclusion is founded are threefold: (1) Ignorance of jurors, and their inability to make intelligent comparison; (2) danger of unfairness and fraud in the selection of specimens, with no sufficient opportunity for the opposing party to investigate and expose; (3) collateral issues to the genuineness of specimens presented.

(1) The first objection, however justified by the state of English society when it was originally announced, has no weight at the present time in a jurisdiction where intelligence and education are general, and needs no further comment. (2) Since the right to produce specimens under a rule allowing a comparison is equally open to both parties, and the specimens are all subject to examination and cross-examination, the opportunity for advantage from unfair selections is too slight to furnish reason for closing the door against this important avenue of investigation. (3) The third objection — that to permit comparison with specimens not otherwise in evidence, and admitted for the mere purpose of comparison, would introduce collateral issues, and confuse and distract the jury — is, when applied to specimens neither admitted by the parties nor found by the Court to be genuine, firmly grounded in reason and authority. The whole doctrine of comparison presupposes the existence of genuine standards. Comparison of a disputed signature in issue with disputed specimens would not be comparison, in any proper sense. When the identity of anything is fully and certainly established, you may compare other things with it which are doubtful, to assert in whether they belong to the same class or not; but, when both are doubtful and uncertain, comparison is not only useless as to any certain result, but clearly dangerous, and more likely to bewilder than to instruct a jury. If disputed signatures were admissible for the purpose of comparison, a collateral inquiry would be raised as to each standard; and the proof upon this inquiry would be comparison against, which would only lead to an endless series

of issues, each more unsatisfactory than the first, and the case would thus be filled with issues aside from the real question before the jury. Juries are indeed more intelligent than when the common law denied them even the right to make comparison with admitted signatures not otherwise in the case; but the time has not yet come when they should be left without chart or compass. It is due to them and to the administration of justice that when called upon to pass upon the identity of a signature the standards furnished for this purpose should be genuine standards. The jury should not be required, nor should they be permitted, to make comparison with disputed standards, and to settle for themselves the collateral question of the genuineness of the standards, which might often be more difficult than the main question of the genuineness of the writing in issue. Such a practice is not only indefensible in reason, but it is against the judicial and legislative opinion of the world, almost without exception. . . . The controversy in the great case of Doe *v.* Suckermore was not to secure the admission of disputed signatures to be passed upon by the jury, but to the end that specimens *already established* to be genuine might be used as a basis of comparison; WILLIAMS, J., and DENMAN, C. J., while contending in that case for the right to compare specimens admitted to be genuine, expressly conceded that disputed specimens should not be permitted to go to the jury. . . . In St. 17 & 18 Vict., ch. 125, sec. 27, . . . while the refinements, distinctions, and exceptions which had confused the subject and embarrassed the administration of justice were thus wiped away, and the door opened wide for comparison with genuine specimens, it is to be noted that the essential principle of the common law forbidding disputed signatures and collateral issues was distinctly preserved, by the provision limiting comparison to writings "proved to the satisfaction of the judge to be genuine." So, wherever the door has been opened to this class of proof, whether by legislation or by judicial expansion and adaptation of the common law, the same safeguard has been preserved. . . .

The true rule is that, when a writing in issue is claimed on the one hand and denied on the other to be the writing of a particular person, any other writing may be admitted in evidence for the mere purpose of comparison with the writing in dispute, whether the latter is susceptible of or supported by direct proof or not; but, before any such writing shall be admissible for such purpose, its genuineness must be found as a preliminary fact by the presiding judge, upon clear and undoubted evidence. This involves, indeed, a marked departure from the common law. It does away with the common-law limitation of comparison to standards otherwise in the case, and hence with its exceptions, and the controversy and confusion which have grown out of them. . . . In some States, as already shown, legislation has been deemed essential to bring about such changes; but in others, as we have also shown, the same result has been accomplished by judicial action. As the common-law rule was based primarily upon the assumed incapacity of jurors to make intelligent

comparison, such judicial action would seem warranted under the power to adapt the common law to new conditions. The value of comparison as a method of proof being now generally conceded, juries being no longer too ignorant to derive benefit from that source, and the danger of spurious specimens and the objections to collateral issues being fully met by requiring the genuineness of the standard to be determined as a preliminary fact by the trial judge, there remains, it would seem, no satisfactory reason for the old limitations and exceptions. And it is fair to assume that, had no statute been enacted, the common law of England, adjusting itself to changed conditions, would now accord with the rule we have announced. Such a tendency was indicated by the discussion and decision in [Doe d.] Mudd *v.* Suckermore, which was so soon followed by the act of Parliament referred to. In any event, the essential principle of the common law is preserved, and the dangers and objections against which it was aimed met, by requiring the genuineness of the standard to be found by the Court as a preliminary fact, upon clear and positive testimony.

In the present case, no objection appears to have been made to the introduction of the specimen signatures upon the ground that their genuineness had not been predetermined by the Court. . . .

The exception to the admission of the signatures because they were made subsequent to the time the bond purported to have been made cannot be sustained. True, "the claimed author of disputed writings cannot make testimony in his favor by bringing in for comparison a writing manufactured by him for that very purpose after the controversy has arisen. . . ." Sanderson *v.* Osgood, 52 Vt. 309; King *v.* Donahue, 110 Mass. 155; Hickory *v.* United States, 151 U. S. 303. There is no pretense in the present case that the signatures introduced for the purpose of comparison were made after controversy arose, or that they were manufactured for the purpose of comparison. The mere fact that they were made subsequent to the execution of the bond is not sufficient to render them inadmissible.

Exceptions overruled.

PARSONS, J., did not sit; the others concurred.

186. STATUTES. *England* (1854, Common Law Procedure Act, 17 & 18 Vict. c. 125, § 27). Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness, or otherwise, of the writing in dispute.

California. (C. C. P. 1872, § 1944). Evidence respecting the handwriting may also be given by a comparison made by the witness or by the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge.

New York. (Laws 1880, c. 36, § 1; Laws 1888, c. 555). Comparison of a disputed writing, with any writing proved to the satisfaction of the Court to be

genuine, shall be permitted to be made by witnesses in all trials and proceedings, and such writings and the evidence of witnesses respecting the same may be submitted to the Court and jury as evidence of the genuineness, or otherwise, of the writing in dispute. § 2 (amendment of 1888) [same for the first eighteen words; then] handwriting of any person claimed on the trial to have made or executed the disputed instrument or writing, shall be permitted and submitted to the Court and jury in like manner.

187. HOAG *v.* WRIGHT

COURT OF APPEALS OF NEW YORK. 1903

174 *N. Y.* 36; 66 *N. E.* 579

[Printed *post*, as No. 220]

(*d*) *Hypothetical Questions*

189. LORD MELVILLE'S TRIAL. (1806. House of Lords, Howell's State Trials, XXIX, 1065). [Henry Dundas, Lord Melville, was impeached for embezzlement of the public funds while treasurer of the navy. The prosecution is seeking to prove the profit made on the misuse of a certain portion of the funds.]

Mr. Serjeant *Best*. . . . The Commons now propose to prove, by a calculation, the amount of the interest which Lord Melville has saved, applying particularly to those sums which are paid into the Bank of Scotland, upon which your lordships have it in evidence, he, Lord Melville, would have been charged with interest; and also the dividends he has received; they amount to 21,571£. 5*s*. 9*d*., which Lord Melville has derived from the use of the public money, which the managers have traced into his hand, upon these stocks.

Then *Joseph Kaye*, Esq., was called in, and being sworn, was examined as follows:

Mr. Serjeant *Best*. — Have you made any calculation, as to the profit made upon the different sums which have just been mentioned?

Mr. *Kaye*. — I have.

Mr. Serjeant *Best*. — Does the paper that you hold in your hand contain those calculations? — Mr. *Kaye*. — It does.

Mr. *Plumer*. — Do your lordships think that this is a proper subject of evidence? . . .

Mr. *Adam*. — I conceive this to be by no means admissible evidence. In the first place, the learned manager states, as an assumption of his, that here are certain matters proved; my lords, I say, therefore, that the data are assumed in the first instance. In the data be assumed, it is impossible for your lordships to receive any calculation upon those assumed data as evidence. . . .

A Lord. — I submit to your lordships, that the data stand where they did; they must stand or fall by the proof. There is nothing more common than to put to a witness: "Provided such and such a sum has been received, what is the amount of interest?" and it is merely casting upon the witness the labor of doing that which all the lords might do with a pen themselves; but which is

done through the medium of the witness in a more compendious manner; the data and facts stand as they did; it is a mere hypothetical question to the witness, "If the fact stands so and so, what is the arithmetical result?"

Lord Chancellor. — I take it to assume no facts whatever; it proceeds on certain data. If you take away the foundation upon which it is made, which is matter for the Court afterwards, there is an end of the superstructure.

Mr. Serjeant *Best*. — Is that calculation, which you hold in your hand, a correct calculation upon these sums?

Mr. *Kaye*. — It is as correct as I can make it. I believe every figure will be found right. . . .

(Then *Joseph Kaye*, Esq., was cross-examined as follows): . . .

Mr. *Plumer*. — From what did you take the data?

Mr. *Kaye*. — I must state the items, in order to answer that question. The first item is 13,500 £ India stock; I took that from the data of the credit in the signed accounts in these books of Messieurs Coutts and Company, to the day that was carried to the credit of Mr. Trotter, as has appeared in evidence.

Lord Chancellor. — All the witness has done, is to establish, by calculation, that such a stock, from such a time, will produce so much. He does not himself prove any fact, and the calculations he has made must therefore depend upon the facts which are proved by others.

Mr. *Plumer*. — Does that document contain all the data upon which the calculation is made?

Mr. *Kaye*. — Yes, the learned counsel may refer to every document that has been given in evidence. The entries of the books have been given in evidence, from which I have taken this account. . . .

Mr. *Plumer*. — Then upon the India stock alone, there arises a profit according to your calculation of about 10,000 £.

Mr. *Kaye*. — Yes, the profit and excess of dividends above the interest.

Mr. Serjeant *Best*. — Does this account include the 10,600 £ on the Chest account?

Mr. *Kaye*. — No, here is nothing here upon the Chest account. . . .

A Lord. — Before Mr. Trotter is called, I wish to suggest whether this paper should be entered on your lordship's minutes; if it should turn out that there is no foundation for these facts, it will have an improper effect, by having been entered.

Another Lord. — All the inconvenience that might result from this entry, would be obviated by stating that *if* it is proved, or shall be proved, that such and such facts exist, that is the calculation of the profits; but that will not be an admission of the facts.

A Lord. — I submit, whether it is not proper to ask the witness on what suppositions he makes these calculations.

On what suppositions, or admissions, do you make these calculations which you have given to the Court?

Mr. *Kaye*. — The first item of 13,500 £ India stock I have taken at the value which was paid into Mr. Trotter's account.

A Lord. — Is not the foundation of your making these calculations, a *supposition* that these are the facts?

Mr. *Kaye*. — Yes.

A Lord. — Read the title.

Mr. *Kaye*. — "A statement of the profits made by investments in the funds, on account of Lord Melville, and by advances made for interest of money." . . .

A Lord. — I submit that this might be all set right, if the honorable manager would put one question to the witness: "Supposing such and such facts to have been proved, is that the calculation?"

Another Lord. — Is that calculation formed on the assumption by you, that all the facts stated in that paper are proved?

Mr. *Kaye.* — Most certainly. . . .

The paper was delivered in.

190. M'Naghten's Case. (1843. House of Lords. 10 Cl. & F. 207). Question for the Judges: "Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, etc.?" Maule, J. In principle, it is open to this objection, that as the opinion of the witness is founded on those conclusions of fact which he forms from the evidence, and as it does not appear what these conclusions are, it may be that the evidence he gives is on such an assumption of facts as makes it irrelevant to the inquiry.

191. Dickenson *v.* Fitchburg. (1859. Massachusetts. 13 Gray 546, 555). Shaw, C. J. The respondents have offered the testimony of a witness, that in his opinion the market value of the estate was enhanced by the widening of the street, the witness was asked by the respondents to state the grounds and reasons upon which his opinions were founded; this was objected to by the petitioners, and rejected by the sheriff. . . . It is objected that the admission of this evidence would open the door to evidence entirely incompetent, by allowing the witness to state the facts on which the opinion is founded, facts not proved by competent evidence. This objection seems to us to be founded on a misconception of the manner in which the investigation is to be conducted, and the testimony of experts received and applied. It assumes that the facts will be *taken to be true* because the witness has stated that he found his opinion upon them. But this is quite a mistake. In order to obtain the opinion of a witness on matters not depending upon general knowledge, but on facts not testified of by himself, one of two modes is pursued: either the witness is present and hears all the testimony, or the testimony is summed up in the question put to him; and in either case the question is put to him hypothetically, whether, *if* certain facts testified of are true, he can form an opinion, and what that opinion is? The jury will then be instructed, if the truth of any such fact is contested, first to consider whether the fact on which such opinion rests is proved to their satisfaction; if it is, then to give such weight to the opinion resting on it as it deserves; but if the fact is not proved by the evidence, then to give the opinion no weight. This is necessary to enable the jury, upon the true theory of jury trial, to decide all questions of fact, upon competent evidence laid before them. M'Naghten's Case, 10 Cl. & Fin. 200 [*ante*, No. 190].

192. BELLEFONTAINE & INDIANA RAILROAD CO. *v.* BAILEY

SUPREME COURT OF OHIO. 1860

11 *Oh. St.* 333

ERROR to the District Court of Darke county.

Peter Bailey brought this action against the Bellefontaine and Indiana Railroad Company, before a justice of the peace of Darke county, to recover damages for the killing of his two horses, through the carelessness and negligence of the cars. . . . The company answered simply denying the negligence charged. . . .

On the trial of the case in the Common Pleas, it appeared from a bill of exceptions embodied in the record, that the defendant, to maintain the issue joined on its part, called to the stand, as a witness, Aloah Skilton, who testified that he was acting as locomotive engineer on the train which killed the horses for which the action was brought, at the time of said killing, and saw said horses in the act of coming upon the railroad track; that he was acquainted with the business of running railroad engines and trains, and had been engaged in the business for the last five years. The defendants' counsel then asked said witness his opinion as to the possibility of avoiding the injury to the said horses, in view of the distance between the train and the plaintiff's horses when the latter came upon the railroad track? To which question the plaintiff objected; which objection the Court sustained, and refused to allow the question to be answered; to which decision of the Court the defendant excepted. . . .

Conklin & Thompson and *Murray*, for plaintiff in error. *Wilson* and *Allen & Meeker*, for defendant in error.

BRINKERHOFF, J. (after stating the case as above). — That the running and management of railroad locomotives and trains is so far an art, outside of the experience and knowledge of ordinary jurors, as to render the opinions of persons acquainted with the running and management of such locomotives and trains, as experts, admissible and proper testimony, in proper cases, is very clear on principle, and is so recognized in Quimby *v.* Vermont Central Railway, 23 Vt. R. 394, and Illinois Central Railway *v.* Ready, 17 Ill. R. 580. . . .

1. The objection that the witness is put in the place of the jury, and is made to perform their proper function, applies, so far as it has any foundation at all, to all testimony of this kind. The truth is, as is well remarked by Mr. Redfield in the note above referred to, the testimony of scientific witnesses and experts is a sort of education of the jury, upon subjects in regard to which they are not presumed to be properly instructed; and they at last are entitled and required to pass upon the weight and credit to be attached to the opinions given them, weakened

or strengthened, as they may be, by the sifting process of cross-examination, and by counter or corroborating testimony.

2. It is objected, in the second place, that the question put to the witness does not suppose or assume a state of facts on which his opinion was to be based. Undoubtedly, if the witness had been a stranger to the actual facts, it would then have been necessary to assume a state of facts as the foundation of any opinion he might give; but no such assumption, it seems to us, is necessary when the witness is, or is properly presumed to be, himself *personally acquainted* with the material facts of the case. The witness here was himself the engineer of the locomotive, by which the injury was done; he saw the horses when they came upon the track; we think it is fairly presumable that he knew something of the distance between the engine and the horses when they came upon the track; the velocity and weight of the train; the character of the grade; the means of checking the velocity of the train; and the time and distance which would be required to check the progress of, or stop the train. If an expert may give his opinion on facts testified to by others, we see no reason why he may not do so on facts presumably within his own personal knowledge; and if his knowledge of any material fact be wanting or defective, the parties have ample opportunity to show it by cross examination, and by testimony aliunde. A physician or surgeon called on to give an opinion as to the state of health, or the cause of the death of any person, and having no personal knowledge of the person's symptoms, must of necessity testify hypothetically from assumed or supposed symptoms; but surely the attending physician or surgeon of the patient, having himself the best opportunity of personally knowing his symptoms and condition, is not, in the first instance presumed to be under any such necessity. The question before us is, in principle, it seems to us, the same; and we think the Common Pleas erred in refusing to allow the question to be answered.

The judgment of the District Court and of the Common Pleas will be reversed, and the cause will be remanded to the Common Pleas for further proceedings.

SCOTT, C. J., and SUTLIFF, PECK and GHOLSON, JJ., concurred.

193. PEOPLE *v.* McELVAINE

COURT OF APPEALS OF NEW YORK. 1890

121 *N. Y.* 250; 24 *N. E.* 465

APPEAL from judgment of the Court of Sessions of Kings County, rendered October 23, 1889, entered upon a verdict convicting defendant of the crime of murder in the first degree.

George M. Curtis, for appellant. . . . The evidence of Dr. Lanton C. Gray was improperly admitted. . . .

James W. Ridgway, for respondent. . . . It is no objection to a hypothetical question that the state of facts which it assumes is erroneous, if within the possible or probable range of the evidence, since the judge cannot decide as a preliminary question on objection to the evidence, whether it is erroneous or not, the question being for the jury. . . .

Ruger, Ch. J. — The defendant, upon trial, was convicted of the crime of murder in the first degree, for having killed one Luca in his own house in Brooklyn, about three o'clock in the morning of the 23rd day of August, 1889. . . .

The sole defense attempted was the alleged insanity of the accused. Considerable evidence was given on the trial in his behalf tending to show that he possessed a defective mental organization and was subject to delusions and hallucinations, which were claimed to be evidence of his insanity. Two witnesses were called on his behalf, as experts, who respectively gave evidence tending to show a belief that he was, to a certain degree, insane. Two expert witnesses were also called on behalf of the prosecution, to give opinions upon the question of the defendant's sanity, and each testified that he was, in their opinion, sane. It cannot be questioned but that the evidence of these witnesses was material and had weight with the jury upon the question of the defendant's mental condition. If these opinions were based upon an erroneous hypothesis and were founded in any material respect upon indefinite or unascertainable conditions, or upon considerations which were not the proper subject of expert evidence, they must be regarded as having been erroneously admitted.

The only serious objection to the convictions arises upon an exception to the ruling of the Court, permitting Dr. Gray, a witness for the prosecution and an expert of high reputation and character, to answer, against objection, a hypothetical question as to the defendant's sanity. The question put by the district attorney, and the proceedings accompanying the question were as follows:

"Q. Now, are you able to say whether in your judgment, based upon all the testimony, the acts of the defendant on the night of the homicide, the testimony as to his past life given by the witnesses in his defense, and based upon the whole case, whether this young man is sane or insane?

"Mr. *Curtis.* — I object, as it is not a question properly put.

"The *Court.* — Why not?

"Mr. *Curtis.* — It is too vague and indefinite. In order to put a hypothetical question properly, so say the Court of Appeals, it must consist of specifically proven facts, which come within the pale of the proof; not where a person for instance, is permitted to give an anomalous opinion. . . .

"The *Court.* — Where a medical witness, who is called as an expert, has been in court during the whole trial and heard all the testimony in the case, everything that has been done and said by everybody, I don't see why it is not competent to ask him whether upon these facts, all he heard testified to, he thinks the defendant is sane or insane. This witness has heard all that has been sworn to by everybody.

"To the Witness:

"You have heard all the testimony in the case?

"The *District Attorney*. — Based upon the whole testimony of the prosecution and the defense, including the hypothetical question put by Judge CURTIS, and everything that you have heard sworn to here; now will you answer the question?

"The defense excepts.

"A. — I have formed an opinion.

"Q. — State it?

"The defense excepts.

"A. — I believe the defendant is sane.

"Q. — What do you believe he was at the time of the commission of the offense?

"A. — I believe he was sane at the time of the commission of the offense."

We cannot doubt but that this question was improper. The witness was thus permitted to take into consideration all the evidence in the case given upon a long trial extending over nine days, and, upon so much of it as he could recollect, determine for himself the credibility of the witnesses, the probability or improbability of their statements, and, drawing therefrom such inferences as, in his judgment, were warranted by it, pronounce upon the sanity or insanity of the defendant. It cannot be questioned but that the witness was by the question put in the place of the jury and was allowed to determine upon his own judgment what their verdict ought to be in the case. . . .

The rule as to the conditions governing the formation of hypothetical questions to experts, has frequently been discussed and illustrated in the reported cases in this Court. . . . In Reynolds *v.* Robinson, 64 N. Y. 589, 595, Judge EARL, in speaking of evidence attempted to be given under a hypothetical question, says:

"In such a case it is not the provision of the witness to reconcile and draw inferences from the evidence of other witnesses and to take in such facts as he thinks their evidence has established, or as he can recollect and carry in his mind, and thus form and express an opinion. His opinion may be obtained by stating to him a hypothetical case, taking in some or all of the facts stated by witnesses, and claimed by counsel putting the question to be established by their evidence, and when the question is thus stated the witness has in his mind a definite state of facts, and the province of the triers, whether referees or jurors, is not interfered with." . . .

No other decisions from this State are cited, and we deem it unnecessary to discuss or consider the rules prevailing in other countries in view of the reported decisions made in our own Courts.

An attempt was subsequently made to, in some degree, cure the error committed, by proving by the witness that in answering the question he assumed the truth of the evidence given by the defendant's witnesses; but we think this did not remove the vice inhering in the question. Even as thus affected, it left the uncertainty of his memory as to all of the evidence in the case, and the freedom of his judgment as to all other

evidence to give such weight as he should in his own mind determine it was entitled to, and substantially allowed him to usurp the functions of the jury in deciding the questions of fact.

We think it is not competent in any case to predicate a hypothetical question to an expert upon all of the evidence in the case, whether he has heard it all or not, upon the assumption that he then recollects it, for it would then be impossible for the jury to determine the facts upon which the witness bases his opinion, and whether such facts were proved or not. Suppose the jury concluded that certain facts are not proved, how are they, in such an event, to determine whether the opinion is not, to a great degree, based upon such facts? When specific facts, either proved or assumed to have been proved, are embraced in the question the jury are enabled to determine whether the answer to such question is based upon facts which have been proved in the case or not, and whether other facts bearing upon the correctness and force of the answer are contained therein, or have been omitted from it; but in the absence of such a question the evidence must always be, to a certain extent, uncertain, unintelligible, and, perhaps, misleading.

We regret that an error of this character is found in a case which was otherwise tried by the learned Court with an intelligent understanding of and adherence to the rules of law applicable to the case, and a strict regard to the rights of the accused; but, in compliance with the uniform practice of Courts in capital cases to avoid even the possibility of injustice to the accused, we think the error referred to requires a new trial.

All concur. Judgment reversed.

194. PEOPLE *v.* FABER

COURT OF APPEALS OF NEW YORK. 1910

199 *N. Y.* 256; 92 *N. E.* 675

APPEAL from a judgment of the Supreme Court, rendered July 10, 1909, at a Trial Term for the county of Warren, upon a verdict convicting the defendant of the crime of murder in the first degree.

J. Edward Singleton, for appellant. The expert witnesses sworn on behalf of the People were erroneously allowed to express their opinions as to the sanity of defendant without first giving the facts on which the opinion was based. . . .

John H. Cunningham, for respondent. . . . It is not legal error to permit a medical expert, who has made a personal examination of a person for the purpose of determining his mental condition, to give an opinion as to that condition at the time of the examination without, in the first instance, disclosing the particular facts upon which the opinion is based. . . .

CHASE, J. — The defendant has been convicted of the crime of murder in the first degree. It is not denied that he shot and killed Maude

Bumps, otherwise known as Maude Ryan. It is contended on behalf of the defendant that the evidence of premeditation and deliberation is not sufficient to sustain the judgment rendered, and it is also contended in his behalf that the defendant at the time of the commission of the act was laboring under such a defect of reason as not to know the nature and quality of the act he was doing, or that the act was wrong.

We have fully examined the record and are of the opinion that the judgment should not be reversed as a matter of fact, but that the trial judge erred in his charge in relation to the duties of jurors. . . .

It is unnecessary to consider the other alleged errors claimed in behalf of the defendant, as the questions so presented may not arise upon a new trial, except as to the contention of the defendant that the Court erred in allowing the admission of certain opinions as to the defendant's sanity which were given by physicians who are skilled and experienced alienists, without requiring the prosecution to first disclose the personal conversations, observations and examinations upon which such experts severally based their opinions. . . . We will consider such rulings now, that the trial Court may have the opinion of this Court in regard thereto upon the new trial.

In the early history of the Courts of England mere opinion evidence was wholly rejected. The admission of opinions as evidence by persons specially qualified by skill and experience to speak as experts has been a matter of development both in England and in this country. The history of the admission of such evidence with illustrations from decisions of the Courts is given by Wigmore in his exhaustive work on Evidence, and in connection therewith he refers to the practice of admitting opinion evidence by experts based upon observation, and concludes that evidence by experts of conceded skill and experience may be received when based upon the observation of the witness without in the first instance necessarily requiring that the facts observed be stated to the Court and jury. In connection with his discussion of the question as to the admissibility of opinion evidence and of the early opposition to the admission of such evidence in any case, he says:

"It has already been seen in reviewing the history of the doctrine, that in the beginning the disparagement of opinion rested on grounds totally different from those now received. It was objected to because as a mere guess, the belief of one having no good grounds, it lacked the testimonial qualification of observation; hence, a *mere* opinion, as soon as it appeared to be such, must be rejected. In a few jurisdictions the modern doctrine has been confused with the earlier one, and it is laid down as a general rule that opinions *must be accompanied with the facts* on which they are based — usually with the exception that expert witnesses are exempted from this rule.

Now, in no respect is this rule sound. In the first place, then, there is no principle and no orthodox practice which requires a witness having personal observation to state in advance his observed data before he states his inferences from them; all that needs to appear in advance is that he had an opportunity to observe and did observe, whereupon it is proper for him to state his conclusions,

leaving the detailed grounds to be drawn out on cross-examination. Any other rule cumbers seriously the examination, and amounts in effect to changing substantially the whole examination into a voir dire — an innovation on established methods which is unwarranted by policy." (§ 1922.)

He further says:

"All opinions or conclusions are in a sense hypothetical. But does it follow that, when the opinion comes from *the same witness* who has learned the premises by actual observation those premises must be stated beforehand, hypothetically or otherwise, by him or to him? For example, the physician is asked, 'Did you examine the body?' 'Yes.' 'State your opinion of the cause of death.' Is it here necessary that he should first state in detail the facts of his personal observation, as premises, before he can give his opinion? In academic nicety, yes; practically, no; and for the simple reason that on cross-examination each and every detail of the appearances he observed will be brought out and thus associated with his general conclusion as the grounds for it, and the tribunal will understand that the rejection of these data will destroy the validity of his opinion. In the opposite case, where the witness has not had personal observation of the premises, they are not to be got from him on cross-examination, because he had no data of personal observation; and that is precisely the reason why they must be indicated and set out in the question to him, for thus only can the premises be clearly associated with the conclusion based upon them. Through failure to perceive this limitation, courts have sometimes sanctioned the requirement of an advance hypothetical statement even where the expert witness speaks from personal observation." (§ 675.)

There is a great difference in the decisions of the Courts of the States upon this subject, but it seems unnecessary to consider such authorities other than those of this State. We are in accord with the conclusions reached by Mr. Wigmore in his work on Evidence; and such conclusion is in accord with the weight of authority in this State. In People *v.* Youngs, 151 N. Y. 210, the question was directly before this Court, and its determination was essential to the disposition of the appeal. Evidence of the opinions of experts was received in that case without first requiring that the observations upon which such opinions were based be given in evidence. The judgment appealed from, by which the defendant had been sentenced to death, was affirmed, and this Court said: . . .

"It may be true that the Court in the exercise of a sound discretion *may* require the witness to state the facts before expressing the opinion; and in all cases the opposite party has the right to elicit the facts *upon cross-examination.* But the precise question here is whether the Court committed an error in permitting the witness to give the opinion *before* the facts upon which it was founded were all disclosed. And we think that when it is shown that a medical expert has made the proper professional examination of the patient in order to ascertain the existence of some physical or mental disease he is then qualified to express an opinion on the subject, though he may not yet have stated the scientific facts or external symptoms upon which it is based. People *v.* Kemmler, 119 N. Y. 580; People *v.* Taylor, 138 N. Y. 398; People *v.* Hoch, 150 N. Y. 291.)" (p. 218.) . . .

A witness to a will, although a non-expert, may testify to the competency of the testator to make a will. In common practice in the Courts a physician who has examined a patient is allowed to testify directly as to the disease from which the patient is suffering. There seems to be no good reason for requiring a physician to specify in detail his observations before expressing an opinion as to the sanity or insanity of a person examined by him any more than he should be required to recount such observations in advance of expressing an opinion as to whether a person had typhoid fever or was suffering from an epileptic fit. . . .

The trial Court did not err in allowing the physicians to express their opinions in regard to the sanity of the defendant without previously stating in detail the observations upon which the opinions were based. For the reasons stated the judgment of conviction should be reversed and a new trial granted.

CULLEN, Ch. J., HAIGHT, WILLARD BARTLETT and HISCOCK, JJ., concur; GRAY, J., absent.

Judgment of conviction reversed, etc.

Topic 2. Rules Limiting Impeachment of Witnesses

SUB-TOPIC A. GENERAL CHARACTER TRAITS[1]

196. LORD CHANCELLOR MACCLESFIELD'S TRIAL. (1725. Howell's State Trials, XVI, 1239). *Common Serjeant:* We desire that Mr. Price may give your Lordships an account of what he knows of the character of [the witness] Mr. Cothingham and how long he hath known him.

Mr. *Price.* — My lords, I have known him upwards of twenty years; I never knew anybody say anything amiss of him. . . . I know no man in his place behaved himself better than he hath done.

Common Serjeant. — We desire to ask not only to what Mr. Price's opinion is, but to what is the opinion of others, as to his *general* character.

Mr. *Price.* — I believe, if you ask his character of an hundred people, ninety of them will give him rather a greater character.

197. REX *v.* WATSON. (1817. 32 How. St. Tr. 1, 495, 2 Stark. 154). ABBOTT, J. The usual question put for the purpose of discrediting the testimony of a witness is, Would you believe that witness upon his oath?

BAYLEY, J. — The witnesses may state that he is not a man to be believed upon his oath.

James Lawson sworn. — Examined by Mr. *Wetherell.* *Q.* — Do you know a person of the name of John Heyward, alleged to abide at No. 6, Stangate-wall, Lambeth, in the county of Surrey, stock-broker? *A.* — I know the person you allude to. *Q.* — How many years have you known him? *A.* — Upwards of ten years; in fact, I have known him from a boy. *Q.* — Would you believe him

[1] For the principles of Logic and Psychology applicable to this topic, see the present Compiler's "Principles of Proof" (1913. Nos. 196–202.)

upon his oath; or in your judgment, is he a person to be believed upon his oath? *A.* — I believe not; I would not believe him upon his oath. *Q.* — You would not; and you believe he is not a person to be believed upon his oath? *A.* — I do.

198. STATE *v.* RANDOLPH

SUPREME COURT OF ERRORS OF CONNECTICUT. 1856

24 *Conn.* 363

ELLSWORTH, J. . . . Another subject has been discussed, respecting which there is a diversity in the practice of the Courts of justice. We mean, the proper question to be put to a witness who is called to impeach the character of another witness.

One thing, however, is obvious, that in all Courts, whatever be the form or extent of the inquiry, the thing aimed at is one and the same, the character of the witness for *truth;* and where the question assumes a more general form, it is allowed only for its supposed bearing on the truthfulness, or the reverse, of the witness. His character for truth is all that is pertinent and material to the point, and all that the jury should inquire after; other facts, other offences, tried or untried, not being crimen falsi, have no bearing upon the inquiry whatever, and should not be brought into the case.

In the English Courts, the inquiry is in this form: "Are you acquainted with the character of the witness? — What is his *general* character? — Would you believe him under oath?" As a general rule of practice this has been found satisfactory in that country and elsewhere; and doubtless would be so here, if our Courts had not, at an early period, adopted a different rule, which has proved to be satisfactory and sufficient, and which we are not willing, at this late day, to abandon for another, certainly not better, if as good. The more general inquiry in England is adopted, as we have said, to learn the witness' character for truth; ours is adopted for the same purpose, but is more single and direct. In our Courts, the inquiry put is: "Is the character of the witness for *truth* on a par with that of mankind in general?"

The English rule has this advantage, that it brings the general character of the witness before the triers, which is important, where the witness has not acquired a specific character on the subject of truth, and hence it is urged, with some force, that in such a case, the general inquiry is essential, for no other will reach the case; and further, that the testimony of the impeaching witness that, from his acquaintance with the witness' character, he would, or would not, believe the witness under oath, will throw light on the credit and standing of the witness. We do not deny that there is much good sense in this course of reasoning. But on the other hand, our rule, proceeding upon the same idea, goes to the question of truth at once, nor does it leave anything to the mere inference

of the impeaching witness, whether he would, or not, believe the witness under oath. By our rule, he states the premises, or character for truth, from which he draws the conclusion, and as, in other cases, leaves the triers to draw their own inferences. . . .

The English rule, as laid down by Greenleaf, has been practiced upon in several of the States of the union, while in others a more restricted and specific one has been preferred. . . . Whether we ought to go further, and allow the English questions to be put to the witness, has not been decided, certainly not in this Court, although we believe it has often been done on the circuit. General bad character is undoubtedly a serious blemish in a witness, and might justly detract from the weight of his testimony, and so might the character of a witness for the specific blemish of licentiousness, especially in the female sex. But where shall we stop the inquiries? Witnesses, who can have no opportunity to exculpate themselves, or give explanations of their acts, ought not to be exposed to unjust obloquy, nor should the trial be complicated and prolonged by trying collateral issues. If it were wise and just to inquire for one's reputation for virtue, why not for gambling, horse-racing, drunkenness, sabbath-breaking, etc.? These are serious blemishes on character. Now the general inquiry in the English Courts, and the more limited one in ours, is free from the objections to specific acts, or the character of specific habits; which, if allowed to be proved, would be very uncertain in effect, for they would be differently estimated and viewed by the triers, and hence, general character, which every witness is supposed to be able to establish, whenever attacked, is held to be all that is necessary or proper. For a more full and satisfactory discussion of these questions, we refer to an elaborate opinion of McLean, J. in United States *v.* Van Sickle, 2 McLean R. 223.

199. CALHOON *v.* COMMONWEALTH

COURT OF APPEALS OF KENTUCKY. 1901

64 *S. W. Rep.* 965

APPEAL from Circuit Court, Green County. Thomas Calhoon was convicted of the offense of manslaughter, and he appeals. Reversed.

Henry & Woodward, for appellant. *Clem J. Whittemore*, for the Commonwealth.

WHITE, J. — The appellant was indicted in the Circuit Court of Green County, charged with the crime of murder. On trial he was convicted of manslaughter, and his punishment fixed by the jury at twenty years in the penitentiary, and he appeals.

The errors assigned and complained of by appellant are the admission of testimony and as to instructions. The testimony objected to was that of several witnesses called for defense to prove the general character of

deceased, Tilden Morr, as to peace and quietude. After these witnesses had testified as to the general character of Morr as to peace and quietude, and that it was bad, the prosecution was allowed, over objection, to prove by a witness that the general character of accused as to peace and quietude was bad. As an indication of the questions asked, we quote from the bill of exceptions: "witness was asked if he was acquainted with the general character of the defendant for peace and quiet in the neighborhood where he resided, from having heard his neighbors speak of it, and the witness answered, 'I have heard that the defendant's character was bad.'" . . . At the time of the admission of this testimony accused had testified in his own behalf, but had offered no testimony as to his own character, — neither as to peace and quiet, nor any other way. This action of the Court is complained of as error.

The object of this testimony, evidently, was to show that accused was given to quarreling and raising disturbances generally. It could not have been to impeach him as a witness. We are of opinion that the testimony was incompetent for any purpose. Appellant had not presented an issue as to his general character as a peaceable, law-abiding citizen, and until he had done so the prosecution had no right to show that his character and reputation in that particular were bad. When appellant testified for himself, he invited an investigation of his character for truth, the same as any other witness; but, as to any other traits of character, they were not put in issue. It is clearly incompetent to attempt to impeach a witness by showing that he has a bad character for peace and quietude. The testimony, being incompetent, was prejudicial to appellant. . . .

The judgment of conviction is reversed, and cause remanded for new trial, and for proceedings consistent herewith.

200. STATE *v.* BECKNER

SUPREME COURT OF MISSOURI. 1905

194 *Mo.* 281; 91 *S. W.* 893

APPEAL from Jackson Criminal Court. — Hon. JOHN W. WOFFORD, Judge. Reversed and remanded.

This was a prosecution for murder. . . . The defendant was duly arraigned and entered his plea of not guilty. On the 8th day of May, 1905, defendant was put upon his trial, and on May 12, 1905, the jury returned a verdict finding him guilty of murder in the second degree. . . . At the close of the defendant's evidence in chief, the State offered various witnesses for the purpose of impeaching the general reputation of the defendant, for peace and good order, and to show that his general reputation was that of a violent, turbulent and dangerous man, over the objections and exceptions of the defendant. Thereupon the defendant offered

evidence on his part tending to prove that his general reputation was that of a quiet, peaceable, law-abiding citizen. . . . The defendant was sentenced in accordance with the verdict of the jury, and now prosecutes his appeal from the said judgment and sentence. . . .

Boyle, Guthrie & Smith for appellant; *J. S. Brooks* of counsel. The trend of authority is to the effect that a witness may be impeached by showing his general reputation for truth and veracity and his general moral character for the purpose of affecting his credibility as a witness; but it has always been held in all the Courts that a man's bad character for turbulence and violence could not be put in issue by the State unless the defendant had first introduced witnesses to show his character was good. . . .

Herbert S. Hadley, Attorney-General, *Frank Blake,* Assistant Attorney-General, and *I. B. Kimbrell,* for the State. The testimony respecting the general reputation of defendant for being a violent, turbulent and dangerous person was admissible to impeach him as a witness. That any witness in a case may be impeached not only by showing that his general reputation for truth and veracity is bad, but also by showing that his general reputation for morality and for possessing the various attributes of an immoral character is bad, has been the settled law of this State since the case of State *v.* Shields, 13 Mo. 236, decided in 1850. . . .

GANTT, J. (after stating the case).

Various errors are assigned for the reversal of the judgment herein, but the most important and serious question raised by the defendant is as to the action of the Court in permitting the prosecuting attorney, over the objection of the defendant, to call various witnesses and to propound to them this question: "Do you know the general reputation of the defendant for peace and quietness or turbulence and violence in the neighborhood where he lives?"

1. In this State, from a very early period, it has been the uniform rule of decisions that the character of a defendant, charged with a criminal offense, cannot be assailed by the State until the accused has offered proof as to his character, or, in other words, put his character in issue. (State *v.* Creson, 38 Mo. 372; State *v.* Martin, 74 Mo. 547; State *v.* Palmer, 88 Mo. 568; State *v.* Hart, 66 Mo. 208; State *v.* Hudspeth, 159 Mo. 178.) And this is the general doctrine announced by trustworthy commentators on Criminal Law. (Wharton's Criminal Evidence, 9th Ed., § 64, and cases cited; 3 Greenleaf's Evidence, § 25; State *v.* Hull, 20 L. R. A. 609, and cases collated in the note.) The Criminal Court, however, admitted this evidence on the ground that the defendant had offered himself as a witness and, having done so, he occupied the position of any other witness, and was liable to be cross-examined as to any matter pertinent to the issue and might be contradicted and impeached *as any other witness,* and subjected to the same tests.

At a very early day in the judicial history of this State and before

the defendant was permitted to testify in his own behalf, it was held, in State *v.* Shields, 13 Mo. 236, that for the purpose of discrediting a witness, the opposite party is not restricted to inquiring into the general reputation of such witness for truth and veracity, but may inquire as to the witness's moral character generally. NAPTON, J., speaking for the Court, said:

"It seems to be a better and more settled opinion, in discrediting a witness, a party is not restricted to inquiries into the character of the witness for veracity. A bad moral character generally, or a depravity not necessarily allied to a want of truth, may yet to some extent shake the credibility of the witness, and, therefore, is a fair subject of investigation. The questions propounded in this case were proper, although they must necessarily, to have had any sensible impression upon the case, been followed by others eliciting the opinion of the witness upon the effect which the general or specific moral depravity spoken of, had upon the credibility of the witness attacked. The entire exclusion of the question seems to have proceeded upon the ground that general bad character was inadmissible, unless it was general bad character for truth and veracity." (Day *v.* State, 13 Mo. 422.)

The doctrine thus announced has been followed in this State from that day until the present. . . . The last announcement on this subject is in State *v.* Pollard, 174 Mo. 607, in which Judge FOX said:

"We will say in respect to this complaint, that the learned trial judge accepted and followed the rule adopted by a long line of decisions in this State, commencing with the case of State *v.* Shields, and followed in the cases (citing all the cases hereinbefore referred to). These cases announce the rule as to the impeachment of witnesses, that the inquiry need not be confined to the trait of character in issue, but may be extended to general moral character. In view of the long and uniform adherence as announced in the cases quoted, and as this only constitutes one division of this Court, I will not undertake to overrule the doctrine thus announced, but will say for myself, that the rule upon the impeachment of witnesses should be restricted to the trait of character directly involved, that of truth and veracity."

Thus we have two well-defined rules of law which apparently conflict. When a defendant, under statutes like ours, is permitted to testify, and he avails himself of his privilege, it is at once obvious that he occupies a dual position, that of witness and accused. . . . The proof of character offered as a defense to a charge of crime and evidence rebutting such character must be such as bears analogy and reference to the nature of the charge on which the defendant is being tried. (1 Wigmore on Evidence, § 59, and cases cited in note.) The ground upon which such testimony is admissible is that good character tends to lessen the probability of guilt. . . . On the other hand, the defendant in his character as a witness is not entitled to offer his good character in evidence to corroborate his testimony until it has been attacked by the State. (2 Wigmore on Evidence, §§ 891, 1104.)

The difficulty arising out of the foregoing rules, when a statute like ours permits a defendant in a criminal prosecution to testify in his own behalf, has been encountered by the Courts of last resort in many of the

States, as it was by this Court in State *v.* Clinton, 67 Mo. 380. In Lockard *v.* Commonwealth, 87 Ky. 201, under a statute very similar to ours on this subject, the defendant testified in his own behalf, but offered no evidence as to his character. The Commonwealth then introduced several witnesses, who were, over the appellant's objection, permitted to testify that while they knew nothing of defendant's character for truthfulness, yet his general moral character was bad. In Kentucky, as in this State, it had been decided at an early day that evidence of the general moral character of a witness was admissible upon the ground, as was said in the case of Tacket *v.* May, 3 Dana 80, that "a witness whose moral character is bad, is not as credible as one whose moral character is good." HOLT, J., speaking for the whole Court, discussed the effect of the statute in view of the settled rule of decision in that State that the general bad character of any witness might be shown to impeach him. He met the objection urged by many law-writers and many able judges, that the impeachment of the general moral character of a defendant as a witness would affect him as a defendant, and would violate the rule that until he put his character in issue, the State could not assail it, and said, "When, however, the defendant becomes a witness, he voluntarily assumes another character," and . . . held that these considerations must prevail over the suggestion that if the general moral character of the accused, when he becomes a witness, can be assailed, it is in effect a violation of the rule that in a criminal case the defendant alone can put it in issue. . . .

2. Whatever may have been the differences in this Court as to whether certain specific traits of immorality affected the credibility of a witness, it is clear that the case of State *v.* Shields, 13 Mo. 236, which is the foundation for the rule that in impeaching a witness the inquiry may extend to his moral character generally, is predicted upon the ground that the loss of moral principle evidenced by the practice of a particular vice affects his credibility. But accepting this as the established rule, was it competent for the State to assail the defendant's character, before he placed his character in issue, by proving that he was a violent and turbulent man? As we have already seen, the Alabama Court, while adopting the rule that when a defendant offered himself as a witness he could be impeached by proving his general bad character for morality, yet rejected evidence in a homicide case of the character for violence or turbulence as casting no light on his credibility. It will be observed that the question propounded to the impeaching witnesses in this case did not involve his general reputation for truth and veracity, nor his general reputation for immorality, but was confined to the specific charge as to his reputation of being a violent and turbulent man. This evidence, we think, was not directed to the impeachment of the defendant in his character as a *witness*, but was direct evidence tending to impeach his character *as a defendant* only for turbulence and violence, when he had not put his character in issue. . . .

In our opinion, our esteemed brother of the Criminal Court erred in holding that a reputation for being violent and turbulent was tantamount to evidence of a reputation of general bad character and admissible to impeach the credibility of the defendant as a witness. . . . It seems clear to us that this evidence went directly to the character of the defendant as a defendant in the case and not to his credibility as a witness, and this being so, we must hold it was reversible error.

201. ALLEMAN *v.* STEPP

SUPREME COURT OF IOWA. 1879

52 *Ia.* 626; 3 *N. W.* 636

ACTION at law to recover for services rendered to defendant by plaintiff, who is a surgeon. There was a judgment for plaintiff, from which he appeals. The facts of the case appear in the opinion.

Holmes & Reynolds, for appellant. *Kidder & Crooks,* for appellee.

BECK, Ch. J. — 1. The petition declares upon an account for services rendered by plaintiff, as a surgeon, in reducing fractures of the bones of defendant's leg, the amputation of the thigh, and attendance until the defendant's recovery. The answer admits the services, but as a defense pleads that there was a difference between the parties as to the true and just amount of plaintiff's bill, and thereupon they had a settlement and plaintiff agreed to charge $250 for his services, which defendant then undertook to pay. . . . The defendant testified to the settlement as alleged in his answer; it was denied by plaintiff. It can hardly be said that defendant's testimony is corroborated, but the abstract does not purport to give all the evidence.

The plaintiff introduced a physician who testified that he had known the defendant from a time prior to the amputation of his limb. He was then asked to state the condition of defendant's mind as to memory before and after the injury; to state the effect of the injury upon the defendant's memory as to money and finances in particular, and to state whether, in the opinion of the witness, the mind of defendant was greatly impaired. The evidence, upon defendant's objection, was rejected. We think the ruling erroneous. Surely, if defendant was suffering from an impaired mind, which affected his memory, the fact would tend to lessen the credit to be given to his testimony. Can it be doubted that the credibility of a witness may be assailed by showing his want of mental capacity? It is said that the infirmity of memory should be shown by cross-examination. But it might not be made to appear in that way, though it really existed. The witness was a physician and knew the defendant before and after the injury and the condition of his mind as to memory. He was surely competent to state the fact of defendant's loss of memory, and in our judgment he was competent to state his

opinion of the defendant's mental condition, based upon his knowledge and observation of the defendant before and after the injury. If in this way it should be made to appear that defendant's memory was impaired by disease, his credibility would be impeached.

Under familiar rules of the law the credibility of a witness may be impeached by showing moral defects. Mental defects in the witness, or loss or impairment of memory, will, according to the observation of all men, detract from the credibility otherwise due a witness, just as surely as do moral defects. It is not reasonable to hold that the law will permit impeachment of a witness by showing the moral defects of his character, and will not permit impeachment by proof of defects of memory caused by diseases of the body or mind. Under the rules of evidence, and statutes of this State, a witness may be impeached by proof of his bad moral character, and that his reputation for veracity is so low that he cannot be believed under oath. The impeaching witness states his conclusions, belief or opinions, based upon knowledge of the character and reputation of the witness whose credibility is brought in question. The like course was proposed in this case, to impeach the defendant by showing his mental defects. The testimony excluded was of the conclusion, belief and opinion of the witness, based upon knowledge that defendant's memory was impaired by disease affecting the mind.

It is proper to say that the rule we recognize extends no farther than to permit the impeachment of a witness by showing an abnormal condition of the mind caused by disease, or habits which impair the memory. It will not permit evidence of the want of strength or accuracy of memory of a witness whose mind is not shown to be in an abnormal condition. While it is true that the memories of men of sound physical and mental health are not equally strong and accurate, or they are unequal in other faculties of the mind and in physical development, the law can devise no standard of measurement or test of the mind in its normal condition. It cannot be compared with the mind of others in order to impeach or support the memory. . . .

For the error in excluding the evidence offered by plaintiff, the judgment of the District Court is reversed.

Seevers, J. — I concur in the result reached in the foregoing opinion, but as I understand it goes further than I am willing to go. That evidence is admissible to show that the mind or memory of a witness has become impaired or abnormal by reason of disease I think is true, and this in substance the plaintiff offered to show; but he went farther and by another question offered to show the "effect of the injury upon defendant's memory, as to money and finances in particular." This was not in my judgment admissible. The impaired or abnormal condition of the mind being shown, the effect was for the jury to determine.

Sub-topic B. Specific Conduct [1]

202. Rookwood's Trial. (1696. Howell's State Trials, XIII, 209). Sir *B. Shower* (for the defendant): We will call some other witnesses to Mr. Porter's [the chief witness for the Crown] reputation and behavior; we think they will prove things as bad as an attainder. . . .

L. C. J. Holt. — You must tell us what you call them to.

Sir *B. Shower.* — Why, then, my lord, if robbing upon the highway, if clipping, if conversing with clippers, if fornication, if buggery, if any of these irregularities will take off the credit of a man, I have instructions in my brief of evidence of crimes of this nature and to this purpose against Mr. Porter; and we hope that by law a prisoner standing for his life is at liberty to give an account of the actions and behavior of the witnesses against him. I know the objection that Mr. Attorney [-General] makes, — that a witness does not come prepared to vindicate and give an account of every action of his life, and it is not commonly allowed to give evidence of particular actions. But if those actions be repeated, and a man lives in the practice of them, and this practice is continued for several years, and this be made out by evidence, we hope that no jury that have any conscience will upon their oaths give any credit to the evidence of a person against whom such a testimony is given. . . .

Mr. Attorney-General *Trevor.* — My lord, they themselves know that this sort of evidence never was admitted in any case, nor can be, for it must tend to the overthrow of all justice and legal proceedings; for, instead of trying the prisoner at the bar, they would try Mr. Porter. It has been always denied, where it comes to a particular crime that a man may be prosecuted for; and this, it seems, is not one crime or two, but so many and so long continued, as they say, and so often practised, that here are the whole actions of a man's life to be ripped up; which they can never show any precedent when it was permitted, because a man has no opportunity to defend himself. Any man in the world may by this means be wounded in his reputation, and crimes laid to his charge that he never thought of, and he can have no opportunity of giving an answer to it, because he never imagined there would be any such objection. It is killing a man in his good name by a side-wound, against which he has no protection or defence.

Sir *B. Shower.* — My lord, . . . we conceive, with submission, we may be admitted in this case to offer what we have offered. Suppose a man be a common, lewd, disorderly fellow, one that frequently swears to falsehood for his life. We know it is a common rule in point of evidence that against a witness you shall only give an account of his character at large, of his general conversation. But that general conversation arises from particular actions; and if the witnesses give you an account of such disorderly actions repeated, we hope that will go to his discredit; which is that we are now laboring for.

L. C. J. Holt. — Look ye, you may bring witnesses to give an account of the general tenor of his conversation; but you do not think sure that we will try now at this time whether he be guilty of robbery or buggery.

203. Layer's Trial. (1722. Howell's State Trials, XVI, 246, 256). Mr. *Hungerford* [on being stopped by the Court, when offering testimony to various

[1] For the principles of Logic and Psychology applicable to this topic, see the present Compiler's "Principles of Proof" (1913), Nos. 196–202.

misdeeds of another witness]. If my brief be true, the whole Ten Commandments have been broken by him.

L. C. J. Pratt. — Very well, and so you *charge* him with the breach of the Ten Commandments, and he must let it go for fact, because he cannot have an opportunity of defending himself! . . . [Later, forbidding a similar offer] you have been so often admonished by the Court, but it signifies nothing. You are charging Mrs. Mason with being a bawd, when you ought only to inquire as to her general character. . . . At this rate the most innocent persons may be branded as the most infamous villains, and it is impossible for them to defend themselves.

204. Watson's Trial. (1817. Howell's State Trials, XXXII, 1, 486). [One Castle had been a principal witness for the Crown. The defence now proposed to call a witness to show Castle to have lived in bigamy. This was objected to.]

Wetherell and *Copley*, for defendant, argued "that a man might be able to prove that a witness was not to be believed upon oath, by showing that he had been guilty of a number of criminal acts, although he could not produce a single record of conviction; that since it might be proved indirectly that the witness is not credible upon oath, it was too strong a proposition to say that the same conclusion might not be proved directly by actual proof of accumulated crimes which demonstrated the infamy of the witness; . . . that the consequences would be enormous and alarming to the administration of justice, if such evidence were to be shut out; a witness who had committed a multitude of crimes, but who had not been convicted of one, would stand as a fair and credible witness in a court of justice.

Ellenborough, L. C. J. — This is so clear a point and so entirely without a precedent that it would be a waste of time to call for a reply. . . . The Court does not sit for the purpose of examining into collateral crimes. It would be unjust to permit it, for it would be impossible that the party should be ready to exculpate himself by bringing forward evidence in answer to the charge; there would be no possibility of a fair and competent trial upon the subject, and therefore it is never done.

Bayley, J. — If this evidence were admissible, it would be impossible to proceed in the administration of justice, because on every trial the Court would have to try one hundred different issues, and juries, instead of having one issue to try, would have their attention withdrawn from one single point to look into an indefinite number of crimes. The rule is that a party against whom a witness is called may examine witnesses as to his general character, but he is not allowed to prove particular facts in order to discredit him, . . . for although every man be supposed to be capable of defending his general character, he cannot come prepared to defend himself against particular charges without notice. . . . If the witness were apprised of the charges, he might come prepared with evidence to show that, although there was prima facie evidence against him, they were in reality unfounded.

205. PEOPLE *v.* JACKSON

SUPREME COURT OF NEW YORK. 1857

3 *Parker Cr. C.* 391

INDICTMENT for rape. This was a *certiorari* to the Kings Oyer and Terminer, in which court the prisoner had been convicted, before S. B. STRONG, one of the justices of this Court, and Samuel D. MORRIS, county judge, and the justices of the Sessions. . . . The jury found the prisoner guilty.

John G. Schumaker (District Attorney), for the People. . . . *Alexander Hadden*, for the prisoner. . . .

By the Court, S. B. STRONG, J. — The defendant was tried at the Court of Oyer and Terminer held in the county of Kings on an indictment against him and another for a rape upon Catharine Sullivan. The trial occupied eight days, and resulted in his conviction. The complainant was asked, on her cross-examination by the counsel for the accused, whether upon her passage from Liverpool to New York, previous to the alleged outrage, she had illicit intercourse with a fellow passenger; to which she answered unhesitatingly that she had not. Subsequently the counsel for the accused offered to prove by another witness particular acts of such illicit sexual intercourse between the complainant and the same passenger during such voyage. The district attorney objected to the admission of the proposed evidence; and the Court decided that the defendant might prove the general bad character of the prosecutrix for chastity, but that evidence of particular acts of unchaste conduct by her, with any person other than the accused, at any period previous to their intercourse, was inadmissible, and rejected the evidence as to such alleged acts offered in behalf of the accused, to which his counsel excepted. The only question raised by the bill of exceptions is whether this rejection of the proposed evidence was proper. . . .

Generally the conduct of a witness in matters disconnected from the subject of the trial, being irrelevant, cannot be given in evidence. The objections to admitting such evidence are, that it raises collateral issues, and that the party against whom it may be offered would generally be taken by surprise, and not be prepared to meet it. It is very desirable that the inquiries upon a trial should be confined to the issues actually joined between the parties. They attend to try those only; the attention of the jury is or should be exclusively directed to them, and not adverted to other and irrelevant matters which have a tendency to confuse their minds, and an investigation into collateral matters would protract issues into inconvenient and intolerable length. . . .

If there should be anything to require the rejection of the proposed evidence, or to diminish the force of what is actually adduced, it may be proved, provided it does not raise or tender a collateral issue. Thus it

may be proved that a proposed witness has been convicted of an infamous offence by producing the record. That raises no collateral issue of fact, as the record is conclusive, and there can be no further inquiry. But it is not competent to prove that the witness has in fact committed a crime, if he has not been convicted, — although the actual perpetration of the crime is what renders him unworthy of belief. That, if permitted, might raise a collateral issue for trial. So, too, a witness may be asked if he has not perpetrated some offence, or been guilty of some moral obliquity, which would if true impair the weight of his evidence. He may indeed refuse to answer whether he has been guilty of an act which would render him liable to an indictment or a prosecution for a penalty, or of any act disconnected with the main transaction which would have a tendency to degrade him. But he may confess either, at his option, and the evidence would be admissible. That would not, however, raise any issue for trial, as whatsoever his answer might be the party asking the question could not controvert it. . . .

There can be no doubt but that, in ordinary cases, an inquiry, addressed to any other than the assailed witness, as to any particular act derogatory to his character, or as to any specific blemish in his reputation, should be excluded.

It was contended on the argument, however, that the rule had been relaxed in reference to the testimony of the prosecution in trials for rape, and in such cases the door had been opened sufficiently wide to admit the evidence offered and rejected in the Court below. It is certainly right that the testimony of the female preferring the complaint should be subjected to the strictest scrutiny compatible with the due administration of justice; she is a necessary and generally the sole witness of the transaction. Experience has shown that the charge is frequently unfounded and instituted from impure motives. . . . They are permitted to prove that the general character of the prosecutrix for chastity is bad, or that she had previously had sexual intercourse with the accused. In either case, the probability of any considerable resistance would be very slight. . . . But the reasons for the admission and against the rejection of evidence as to the general character of the prosecutrix for chastity, and her illicit previous intercourse with the accused, are inapplicable to the proof of sexual intercourse between her and another, which was offered and rejected in this case. . . . If proof of particular instances should be admissible, rebutting evidence would be allowable, and thus there might be one or more collateral issues to occupy the time and divert the attention of the jury. Such would be the evils if the prosecution could require previous and timely notice of the particulars of the intended attack upon the conduct of the complainant; but as no such notice can be exacted, there would be no means of meeting the evidence, often of the dissolute companions of the accused, however mistaken or corrupt it might be, and thus the character of an innocent and greatly abused female might be sacrificed, and the ends of public justice be defeated. The

weight of authority is decidedly against the admissibility of such evidence. . . .

As the proffered evidence in this case was properly rejected, the motion for a new trial must be denied, and the record must be remitted to the Court of Oyer and Terminer, with instructions to sentence the defendant conformably to his conviction. Proceedings affirmed.

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206. Lord Castlemaine's Trial. (1680. Howell's State Trials, VII, 1082). [Treason.]

Att. Gen. — Swear Mr. Dangerfield.

Pris. — Pray stay.

L. C. J. Scroggs. — Why so?

Pris. — Here I am a prisoner, my lords, and submit it to your lordships, whether or no Mr. Dangerfield, who hath had the censure of this Court, may be a witness? Whether or no counsel shall show reasons to your lordships, whether he may speak or no?

Justice *Jones.* — You must show your exceptions that you have against him.

Pris. — My exception is this: that he was convicted of felony, that he broke prison, and was outlawed upon it. Besides this, my lord, he is a stigmatick, hath stood in the pillory, and was burnt in the hand. . . .

Just. *Jones.* — When was he outlawed?

Att. Gen. — In the 27th year of the King, and we say he hath a pardon in the 30th year of the King. . . . (A record produced.)

Att. Gen. — That record we confess; show the pardon, show the pardon. . . . (The pardon read: "Decimo tertio die Januarii, Anno Regni, &c.") . . .

L. C. J. — Now you see, my lord, you think Dangerfield ought not to be a witness, who hath gone through so many punishments, outlawed for felony, and burnt in the hand for felony: Mr. Attorney makes answer, We have a pardon, and by that he is restored, as he says, to be a witness again. . . . If so be that you should insist upon it, and he be capable of being a witness, supposing it so, yet I must say you may give in the evidence of every record of the conviction of any sort of crimes he hath been guilty of, and they shall be read. They say last day there were sixteen; if there were an hundred they should be read against him, and they shall all go to invalidate any credit that is to be given to anything he shall swear.

Pris. — My lord, I humbly submit myself to your lordship, sixteen we have, I bring but six, you shall have them, Mr. Attorney, when you please. . . .

L. C. J. — What think you, Mr. Attorney, if a man be convicted of felony, and afterwards hath a general pardon, is he a witness?

Att. Gen. — Yes truly, my lord, it signifies the same thing, my lord, as to be a free man again. . . .

Recorder. — My lord Hobart says, A pardon takes away the guilt.

L. C. J. — It takes away guilt so far as he shall never be questioned; but it does not set a man as if he had never offended. It cannot in reason be said, a man guilty of perjury is as innocent as if he had never been perjured. . . .

Att. Gen. — My lord, if you please, Mr. Dangerfield may be sworn, if your lordship pleases.

L. C. J. — My lord shall have the benefit of excepting against his credibility. . . .

Att. Gen. — If it restore him to his credit, I hope it shall not blemish him so much when he is sworn, that he shall not be believed.

L. C. J. — We will not have any prepossession in that case, his crimes shall be all taken notice of; is it fit to have men guilty of all sorts of villanies, and not to observe it?

207. STATUTES. *England* (1844. St. 6 & 7 Vict. c. 85; 1854, St. 17 & 18 Vict. c. 125, § 103). A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor; and, upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction.

California. (1872. Code Civ. Pr. § 2051). [A witness is not impeachable] by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony.

Illinois. (1874. Rev. St. c. 51, § 1, c. 38, § 426). [Printed *ante*, in No. 77].

208. KOCH *v.* STATE

SUPREME COURT OF WISCONSIN. 1906

126 *Wis.* 470; 106 *N. W.* 531

ERROR to review a judgment of the Municipal Court of Milwaukee County; A. C. BRAZEE, Judge. Reversed. Plaintiff in error was tried jointly with one Meyers upon an information for robbery and larceny from the person under § 4378, Stats. 1898. From which judgment and conviction plaintiff in error sued out his writ of error.

W. B. Rubin, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney-General* and *A. C. Titus*, assistant attorney-general, and oral argument by Mr. *Titus*.

KERWIN, J. — The errors assigned raise the following questions for review: First, the exclusion of testimony. . . .

The State produced as a witness one Kanter, who testified to facts tending to connect plaintiff in error with the crime charged. On cross-examination he was asked the following question: "Have you ever been arrested and convicted of being drunk and disorderly?" The question was objected to as incompetent, irrelevant, and immaterial, and the objection sustained, and this ruling is assigned as error. It is contended that the evidence sought to be adduced was proper under § 4073, Stats. 1898. . . . § 4073 provides that a person who has been convicted of a criminal offense is, notwithstanding, a competent witness, but the conviction may be proved to affect his credibility, either by the record or his own cross-examination. . . . § 1561 makes it a criminal offense, punishable by fine and imprisonment, for any person to be found in any public

place in such state of intoxication as to disturb others, or unable, by reason of his condition, to care for his own safety or the safety of others. . . .

1. At common law it was only convictions of crimes which rendered the person infamous that excluded him from being a witness, and it was regarded a point of no small difficulty to determine precisely the crime which rendered the perpetrator thus infamous. It was the infamy of the crime, not the nature or mode of punishment, that rendered the witness incompetent. 1 Greenleaf Evidence (16th ed.) §§ 372, 373; Bartholomew *v.* People, 104 Ill. 601; State *v.* Taylor, 98 Mo. 240. The rule of the common law, however, has been regulated by legislative enactment. In England, by statute, "a witness may be questioned as to whether he has been convicted of any felony or misdemeanor." 3 Taylor, Evidence, § 1437. Statutes exist in many of the States regulating the subject. In some States such statutes have been held to remove the common-law disability and permit proof of former conviction of *infamous crimes only* to affect credibility (Card *v.* Foot, 57 Conn. 427; Bartholomew *v.* People, supra; Coble *v.* State, 31 Ohio St. 100); while in other States statutes providing that a party who has been convicted of a criminal offense may testify, but that the conviction may be proved to affect his credibility, apply to *misdemeanors* as well as felonies. In New York, under a statute quite similar to ours, it is held that the statute was intended to establish a uniform rule and permit the conviction of a witness of any crime to be proved, and allow the effect of such conviction upon his credibility to be passed upon by the jury. People *v.* Burns, 33 Hun 296. The same rule has been held in other States. In State *v.* Sauer, 42 Minn. 258, it is said: "From the earliest legislation in this State, all felonies and all misdemeanors have been denominated as 'crimes,'" and it is held that the conviction of any crime may be received to affect the weight of the witness's testimony. In Massachusetts, under a statute providing that "conviction of any crime may be shown to affect the credibility of any person testifying," it was held that the statute applied to any crime, and it is said: "It is obvious that some offenses that are not felonies may affect one's credibility much more than some felonies." See Comm. *v.* Hall, 4 Allen 305; Comm. *v.* Ford, 146 Mass. 131; Arhart *v.* Stark, 27 N. Y. Supp. 301.

Our statute on this subject (§ 4073) provides:

"A person who has been convicted of a criminal offense is, notwithstanding, a competent witness, but the conviction may be proved to affect his credibility, either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining him is not concluded by his answer." Under a similar statute in Missouri, the Court holds that the term "criminal offense," as used in the statute, includes both felonies and misdemeanors, and that evidence tending to show that witnesses had been convicted of misdemeanors was competent as affecting their credibility. State *v.* Blitz, 171 Mo. 530. We think it clear, therefore, that "criminal offenses,"

within the meaning of § 4073, Stats. 1898, includes a misdemeanor. Stoltman *v.* Lake, 124 Wis. 462; In re Bergin, 31 Wis. 383; State *v.* Blitz, supra; Comm. *v.* Ford, supra; State *v.* Sauer, supra; People *v.* Burns, supra.

2. But the question arises here whether a conviction under a city ordinance is a criminal offense within the meaning of § 4073. § 2598 defines a criminal action as one prosecuted by the State as a party against a person charged with a public offense. A crime or misdemeanor is defined to be "an act committed or omitted in violation of a public law either prohibiting or commanding it." 4 Bl. Com. 5; In re Bergin, 31 Wis. 383. . . . It has been held in New York, under a statute providing that a person who has been convicted of a crime or misdemeanor is, notwithstanding, a competent witness, but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or upon cross-examination, that a conviction under a city ordinance was not a conviction of a misdemeanor within the meaning of the statute. Arhart *v.* Stark, supra. See, also, on this proposition, Stoltman *v.* Lake, supra; Coble *v.* State, 31 Ohio St. 100; Williams *v.* Augusta, 4 Ga. 509; Madison *v.* Horner, 15 S. D. 359; Davenport *v.* Bird, 34 Iowa 524; Brookville *v.* Gagle, 73 Ind. 117; Kansas *v.* Clark, 68 Mo. 588; Byers *v.* Comm. 42 Pa. St. 89; Wiggins *v.* Chicago, 68 Ill. 372. . . . We are therefore forced to the conclusion, upon principle and authority, that the term "criminal offense," within the meaning of § 4073, Stats. 1898, includes misdemeanors as well as felonies, but that conviction under a municipal ordinance is not a conviction of a criminal offense within the meaning of such statute. . . .

It is contended by counsel for the State that the offense sought to be proved by the question to this witness is not a criminal offense under § 4073, Rev. St. 1898, because not made such in localities where there is a municipal ordinance or regulation for the punishment of drunkenness, and that in the city of Milwaukee such offense is so punishable. We have discovered no evidence in the record to the effect that there is any ordinance or regulation upon the subject in the city of Milwaukee, nor is the question confined to the commission of a criminal offense in the city of Milwaukee. So far as appears from the record and the form of the question asked, the criminal offense sought to be proved may as well have been committed in any other locality as in the city of Milwaukee, and obviously may have reference to the commission of an offense some place within the State of Wisconsin where there was no municipal ordinance or regulation respecting the matter. § 1561 being in force in all parts of the State, and the question not being confined to any locality, it must be deemed to have reference to a locality where no municipal ordinance or regulation had been passed. . . .

It follows, therefore, that the Court erred in excluding evidence on cross-examination, in permitting the verdict to be amended, and in denying the motion for new trial.

By the Court. — Judgment of the Court below is reversed, and the cause remanded for a new trial.

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209. Oxier *v.* United States. (1896. Indian Territory. 1 Ind. T. 85, 38 S. W. 331). Lewis, J. There is a clear distinction recognized by the authorities cited above, between impeaching a witness by proof of facts which discredit him, made independently of his examination, and by proof of the same facts elicited in his cross-examination. Proof of particular facts tending to impair his credibility, made independently of his own examination, is excluded for the reason that its admission would engender a multiplicity of collateral issues, and would frequently surprise a witness with matter which he could not be prepared to disprove. But these reasons do not apply to his cross-examination as to the same facts, because the witness, better than any one else, can explain the impeaching matter, and protect himself to the extent that explanation will protect him; the cross-examining party being bound by his replies. . . .

210. R. *v.* Castro, *alias* Tichborne. (1873. 32d day, Kenealy's ed., I, 396, Report of the Charge, II, 720, 722). [Lord B., who had testified to the tattoo-marks on Roger Tichborne, was cross-examined.] Dr. *Kenealy*, counsel for defendant: Did you play a practical joke [on Captain H.]? . . .

L. C. J. Cockburn. — It *may* be a practical joke of such a nature that the jury would disbelieve the evidence on his oath, on its being made known to them. We must leave that to the discretion of Dr. Kenealy. . . .

Dr. *Kenealy*. — It was not a practical joke. Did you take away his wife?

Lord *B.* — I cannot answer that question. . . .

Dr. *Kenealy*. — Did you seduce his wife and make her elope from her husband? . . . I am sorry to have to ask my lord to tell you you must answer it.

L. C. J. Cockburn. — I certainly shall not.

Dr. *Kenealy*. — Indeed you must, my lord! It goes to the witness' credit. I must have it answered, my lord. . . .

L. C. J. Cockburn. — I am afraid, if the question is pressed, you [the witness] must answer it. It is one of the consequences of being brought into a court of justice as a witness that whatever he has done may be brought up against him.

[Upon charging the jury, L. C. J. Cockburn adverted to this examination as follows]: Lord B. has committed a wofully sad sin; . . . another man's wife left her husband and joined him, and they have lived together. . . . [Counsel] asks you deliberately to come to the conclusion that because of this offense Lord B. is not to be believed upon his oath, — nay, more, that you must assume him to be perjured. Is that, do you think, a view that you can properly adopt? Is it because a man has committed a breach of morality, however flagrant, that those to whom his testimony may be important in a court of justice are to be deprived of it? . . . There are crimes and offenses which savor so much of falsehood and fraud that they do go legitimately to the credit of witnesses. There are offenses of a different character, and grievous offenses if you will, but which do not touch that particular part of a man's moral organization — if I may use the phrase — which involves truth; and there is an essential distinction between this species of fault and those things which go to the very roof of honesty, integrity, and truth, and so do unfortunately disentitle witnesses to belief.

211. BUEL *v.* STATE

SUPREME COURT OF WISCONSIN. 1899

104 *Wis.* 132; 80 *N. W.* 78

THE accused was charged with the murder of one Nelson, a companion who had in his possession at the time a sum of money. The further facts of the supposed homicide are stated more fully in No. 518, *post.*

Error to review a judgment of the Circuit Court for Sawyer County; JOHN K. PARISH, Circuit Judge. Reversed.

The Court against objection permitted the prosecuting attorney on cross-examination to ask the accused these questions: "Did you have any trouble with any man there in that house while you were there?" "Do you remember of making an assault upon a man there and breaking his arm?" "Did you kill a man at Ord, Nebraska?" "Did you kill two men at Ord, Nebraska?" "State the trouble you had at Ord that caused you to leave there?" "Did the insurance company give you any reason for not giving you the insurance money?" referring to the insurance on a house belonging to the accused which was burned. "Did you ever have any talk with any of them that the reason they would not pay it was that you burned the house yourself?" "What was the insurance on the house?" To the last question the accused answered $200, and to each of the others he gave a negative answer. The Court frequently cautioned him that he need not make answers to any question that would tend to incriminate him.

For the plaintiff in error there was a brief by *J. B. Alexander,* attorney, and *V. W. James,* of counsel, and oral argument by Mr. *Alexander.*

For the defendant in error there was a brief by the Attorney-General, and oral argument by *C. E. Buell,* first assistant attorney-general.

MARSHALL, J. (after stating the case as above). . . . It is argued in support of the conduct of the trial at this point, that on cross-examination the previous life and character of the witness, especially when he is a party, may be inquired into to such an extent as in the sound judgment of the trial Court may seem proper. Such is undoubtedly the settled rule, and it is resorted to generally where the person accused of crime offers himself as a witness in his own behalf. There is no rule by which the exercise of that discretionary power of the Court can be guarded with exactness. The range is necessarily broad in order to fit the facts of particular cases, but there is a limit beyond which it cannot go. That limit is clearly reached and passed when questions are asked, manifestly, for the mere purpose of creating prejudice in the minds of the jurors, or the examination is carried on to such an extent and in such a manner as to become oppressive, and is not warranted by anything in the case. Questions as to previous convictions of criminal offenses, or serving

terms in prison or in jail from which convictions will be presumed, are uniformly permitted when the instances are not too remote, upon the theory that a person of that character will not be as likely to testify truthfully as a man whose life has not been thus blackened. Our statute (§ 4073, Stats. 1898) expressly allows that kind of cross-examination. Questions relating to mere criminal charges, or acts which might be the foundation for criminal prosecutions, are usually rejected. They should not be permitted unless there are circumstances in the case suggesting that justice will or may be promoted thereby.

It would be a clear abuse of judicial discretion to permit such questions where the indications are plain that the purpose is not to bring out the truth in regard to the witness's life and character, and to thereby discredit his testimony, but for the purpose of discrediting the witness regardless of whether there is any warrant for the questions or not, and if he be a party, in that way to influence the minds of the jurors into a verdict against him. The administration of justice requires that trial Courts shall not have their discretionary powers circumscribed by any very narrow boundaries, but does require that such limit shall be placed upon them as will prevent any mere prejudice to be built up in the course of a trial, especially in an important case like this, which will tend to influence a jury to determine the facts otherwise than from the legitimate evidence produced in Court. It seems clear that such limit was passed in allowing the cross-examination in question, to the extent to which it was carried. It is one thing to honestly ask questions on cross-examination for the purpose of discrediting a witness, and quite another to ask questions of a witness who is a party, especially in a serious criminal case, for the purpose of injuring his cause in the eyes of the jury, and leading them to believe he was likely, because of his bad character, to have committed the offense charged.

A reading of the questions under consideration leads to the irresistible conclusion that no idea was entertained by the cross-examiner that proof would be elicited of the matters implied by them. We say "implied"; because the asking of the direct questions in the manner in which they were asked implied to some degree that the examiner was possessed of information upon which the questions were based; and although the answers were in the negative, the bad effect of the insinuations thrown out by the questions was not and could not have been removed entirely from the minds of the jurors. . . . The general rule, that the previous life and character of a witness can be inquired into, must be preserved, and the broad discretionary power of trial Courts in administering such rule fully recognized. The trouble here is that the cross-examination was allowed to be carried on manifestly without any reason except to create prejudice against the accused in the minds of the jurors. It was well calculated to have that effect and to bear materially on the ultimate result, especially since the whole case rested on circumstantial evidence.

It is clearly reversible error, that cannot be overlooked without lowering the standard of justice which it is the duty of the Court to rigorously maintain.

212. PEOPLE *v.* CRANDALL

SUPREME COURT OF CALIFORNIA. 1899

125 *Cal.* 129; 57 *Pac.* 785

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. B. N. SMITH, Judge. The facts are stated in the opinion of the Court.

W. H. Shinn, and *Earl Rogers*, for appellant. *W. F. Fitzgerald*, Attorney-General, for respondent.

VAN DYKE, J. — The defendant was tried upon a charge of murder and convicted of manslaughter. He appeals from the judgment and from an order refusing a new trial. . . .

The defendant's wife was called as a witness and gave important evidence in his behalf. On cross-examination, for the avowed purpose of impeaching her, the district attorney, against continuous objection and protest on the part of the defendant, was allowed to ask a series of questions which, if answered affirmatively, would disgrace and degrade the witness. They were all wholly collateral and outside the issues in the case, and did not refer to the relation of the witness to the parties, to the subject of the action, or to the previous testimony of the witness. The asking of the questions implied, at least, an assertion of a belief on the part of the attorney that the witness had been guilty of gross immorality. It is charged by the defense that the questions were not asked for the purpose of getting before the jury the testimony of the witness upon the subject of investigation, but to insinuate damaging charges against the witness, which, by the rules of evidence, neither the witness nor the party could rebut, save by the denials of the witness, whose credibility was affected by the insinuations. That this charge was well founded is proven beyond cavil by the record. She was asked by a great variety of questions if she did not live by prostitution. She was questioned in reference to particular times and places, and to particular men, and as to whether she did not practice special modes of solicitation for immoral purposes. To all these questions the witness answered in the negative.

The defendant's contention, that by the decisions in this State this line of cross-examination is not allowable, is correct. Sec. 2051 of the Code of Civil Procedure says:

"A witness may be impeached, by the party against whom he was called, by contradictory evidence, or by evidence that his general reputation for truth, honesty or integrity is bad, but not by evidence of particular wrongful acts,

except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony."

In other States there is apparently a conflict of decisions upon the subject. (See Carroll *v.* State, 32 Tex. Crim. App. 431, 40 Am. St. Rep. 786, where the matter is discussed, and the cases cited.) But while there is a controversy as to whether such questions can be permitted, there is no difference in holding that when allowed the answer of the witness must be accepted as conclusive. In asking such questions the questioner takes that risk, and justly so, because under the rules of evidence no other witness can be allowed to testify upon the subject. . . . It has further been repeatedly held [in this State] that such collateral matters cannot be gone into, even upon cross-examination. Sec. 2051 of the Code of Civil Procedure expressly forbids the impeachment of a witness "by evidence of particular wrongful acts." . . .

In the case under consideration, after the prosecuting officers had gone out of their way in putting such questions, which were negatively answered, and which answers under all rules are made conclusive of the facts, they proceeded in their argument to insinuate to the jury that the answers were not true. This demonstrated conclusively that the purpose of asking the improper questions was to make insinuations against the character of the witness, and not to impeach her testimony, and by this improper mode of procedure to prejudice the defendant. . . .

Judgment and order reversed and cause remanded for a new trial.

Garoutte, J., McFarland, J., and Harrison, J., concurred.

Temple, J., concurring. — I concur in the judgment and in the opinion of Mr. Justice Van Dyke, except that I do not agree that questions irrelevant to the issues in a case, asked for the purpose of discrediting a witness, can never, in the discretion of the trial judge, be asked of a witness.

It is said that §§ 2051 and 2052 of the Code of Civil Procedure prohibit such evidence. In express terms these sections certainly do not. It is stated that a witness may be impeached: 1. By contradictory evidence; 2. By evidence that his general reputation for honesty and integrity is bad; and 3. By proving inconsistent statements. Other modes of impeachment are not expressly prohibited, and ever since the existence of the statute other modes have been freely resorted to. . . . The statute has, in fact, never been treated as prohibiting other usual modes of impeachment. . . .

We all agree that a witness cannot be asked questions merely for the purpose of degrading him; and while there has been much controversy as to admissibility of such evidence, no one contends that a party has an absolute right to indulge in such examination. It is not permissible to go into the former life of a witness and unnecessarily drag to light ancient scandals. The matter is almost entirely within the discretion of the trial Court, and such examination should be permitted only when and so far as it seems to be required for the ends of justice. . . . Rice in

his work on Evidence considers the question quite elaborately. He states the rule to be that: "Such questions should be allowed when there is reason to believe it may tend to promote the ends of justice; but they may be properly excluded when a disparaging course of examination seems unjust to the witness or uncalled for by the circumstances of the particular case." He cites the case of Great Western etc. Co. *v.* Loomis, 32 N. Y. 127, where the discretion of the trial Court is asserted [in the following language, by PORTER, J.:

"It has been understood, that the range of irrelevant inquiry, for the purpose of degrading a witness, was subject to the control of the presiding judge; who was bound to permit such inquiry, when it seemed to him, in the exercise of a sound discretion, that it would promote the ends of justice, and to exclude it, when it seemed unjust to the witness, and uncalled for by the circumstances of the case. The judgment now under review was rendered, on the assumption, that it is the absolute legal right of a litigant to assail the character of every adverse witness, to subject him to degrading inquiries, to make inquisition into his life, and drive him to take shelter under his privilege, or to self-vindication from unworthy imputations, wholly foreign to the issue on which he is called to testify. See Elliott *v.* Boyles, 31 Penn. St. 66–7.

"The practical effect of such a rule would be, to make every witness dependent on the forbearance of adverse counsel, for that protection from personal indignity which has been hitherto secured from the Courts, unless the circumstances of the particular case made collateral inquiries appropriate. This rule, if established, will be applicable to every tribunal having original jurisdiction. It will, perhaps, operate most oppressively in trials before inferior magistrates, where the parties appear in person, or are represented by those who are free from a sense of professional responsibility. But it may well be questioned, whether, even in our courts of record, it would be safe or wise, to withdraw the control of irrelevant inquiry from the judge, and commit it to the discretion of adverse counsel. The interposition of the Court has often been necessary to protect witnesses from the rigor of examinations, conducted on the supposition that they were entitled to such protection. When this power of protection is withdrawn, is it to be expected, that counsel, deeply enlisted for their clients, and zealous to maintain their rights, would feel bound to exercise toward witnesses a forbearance which the courts themselves refuse? . . . Few men of character, or women of honor, could suppress, even on the witness-stand, the spirit of just resentment, which such an examination, on points alien to the case, would naturally tend to arouse. The indignation with which sudden and unworthy imputations are repelled, often leads to injurious misconstruction. A question, which it is alike degrading to answer or decline to answer, should never be put, unless, in the judgment of the Court, it is likely to promote the end of justice. . . .

"Much confusion and conflict in the treatment of this subject is apparent in the English text-books, as well as our own. This is mainly due to the fact, that the question usually arises only at nisi prius. . . . The decisions in these, as in all other cases, resting in mere discretion, have been, of course, inharmonious, according to the views of different judges, and the varying circumstances of the cases in which the question was presented. The text-writers, as well as the judges, differ in their views as to the rules which should control the exercise of this discretion; some being predisposed in favor of the liberal allowance of

irrelevant crimination, and others preferring the practice of rigid exclusion. . . . But when we reflect, that both authors, in what they wrote, had in view the existing practice of England, by which the limits of collateral examination were under the control of the presiding judge, the seeming conflict disappears, and their respective conclusions harmonize with each other, and with the cases on which they rest. It is entirely true, as affirmed by Roscoe, that inquiries on irrelevant topics, to discredit the witness, may be permitted on the trial, in the discretion of the judge; and equally true, as affirmed by Peake, that such inquiries may be excluded, without infringing any legal right of the parties."]

Nor do I admit that a different rule has been established here. Most of the cases cited have no bearing upon the general proposition. Of course, such examination is not allowable in every case. Where it is manifest, as in People *v.* Wells, 100 Cal. 462, and in People *v.* Un Dong, 106 Cal. 88, that the examination was not for the purpose of proving the immorality, but to prejudice by insulting questions, it should not be tolerated, and it would be error to permit it. . . .

Henshaw, J., and Beatty, C. J., concurred.

213. STATE *v.* GREENBURG

Supreme Court of Kansas. 1898

59 *Kan.* 404; 53 *Pac.* 61

Appeal from Bourbon District Court. Walter L. Simons, Judge. Opinion filed May 7, 1898. Affirmed.

J. I. Sheppard, County Attorney, for the State. *W. R. Biddle* and *Perry & Crain*, for appellant.

Johnston, J. — Jacob Greenburg was convicted in the District Court of Bourbon County of feloniously receiving stolen goods, knowing them to have been stolen. The punishment imposed was imprisonment in the State Penitentiary for a period of two and one-half years. Upon this appeal he complains:

1. Of rulings made in the admission of testimony. The county attorney was a witness for the State and gave considerable testimony in narrative form, some of which may have been open to objection, but no objection thereto was made nor was any exception saved. Meyer Berkson, who testified in behalf of the defendant, was cross-examined as to his past life and conduct, with a view of impairing his credit, and, after he had stated that he had been under arrest, he was asked what he had been arrested for, when an objection was made that the record was the best evidence, and further that it was only a civil arrest. No other or more specific objection was made. The defendant went upon the witness-stand and testified in his own behalf. He stated in answer to an inquiry, without objection, that he had previously been under arrest in Fort Scott. When asked the cause for his arrest, an objection was made

that it was a civil arrest and that his testimony was not the best evidence of it. These were the only objections made, and in both instances they were overruled. Each of the witnesses testified that he had been arrested several times upon charges of fraud.

Granting that the objections were sufficient to raise the question, the testimony was permissible under the rule which has long been recognized in this State. For the purpose of judging the character and credit of a witness, he may be cross-examined as to specific facts tending to disgrace or degrade him, although collateral to the main issue and touching on matters of record. Such questions are allowed when there is reason to believe that allowing them will tend to the ends of justice and they are asked for the purpose of honestly discrediting the witness. It is the duty of the Court to see that the rule is not abused or the cross-examination unreasonably extended. When the defendant became a witness in his own behalf he took the hazard of such questions, and could be subjected to the same tests and be discredited in the same way as any other witness. The State *v.* Pfefferle, 36 Kan. 90; The State *v.* Probasco, 46 id. 310; The State *v.* Wells, 54 id. 161; The State *v.* Park, 57 id. 431; Hanoff *v.* The State, 37 Ohio St. 178; Brandon *v.* The People, 42 N. Y. 265. . . .

The judgment of the District Court will be affirmed.

Doster, C. J. (dissenting). — I dissent from the application of the first syllabus to the facts of this case. . . . As raising the question whether, for the purpose of judging of the character and credit of a witness, he may be asked if he had been formerly arrested. I have positive convictions that he cannot be so asked.

An arrest is nothing more than an accusation of crime or other act of turpitude. That it is made in the form of a forcible restraint of the person, based upon a sworn complaint, makes it, for purposes of disgrace or discredit, no stronger evidence of the truth of the accusation than an oral statement by the accuser would be. No one would contend that a witness could be asked whether another person had not orally accused him of crime. Why should the rule be different when the accusation has been written out and sworn to? It is but an accusation in each case. Why should it be different when the sworn accusation is followed by an arrest? The arrest is but a reassertion of the accusation in another form. It is quite different, however, when the accusation has been proved. When the proceeding has passed from accusation to conviction, evidence of the turpitude of the witness exists; — not what somebody said of him, but what the judicial tribunals sitting in judgment upon the accusation have found against him. He may be asked whether he has been convicted of crime; but he ought not to be asked whether he has been accused of crime. Conviction is evidence of his baseness. Accusation is only an insinuation against his character. Three of the four former decisions of this Court cited in the foregoing opinion of the majority were cases in

which the admissibility of convictions, not accusations, was upheld. In the other one the witness was asked as to the *fact* of his commission of an offense. That, of course, was equally permissible as a question relating to conviction would be. There has been, therefore, up to this time, no rule upon the subject in this State; and in my judgment there are no well considered decisions in other States sustaining the majority opinion in this case.

214. Sir James Stephen. *History of the Criminal Law.* (1883. Vol. I, p. 433). The most difficult point as to cross-examination is the question how far a witness may be cross-examined to his credit by being asked about transactions irrelevant to the matter at issue, except so far as they tend to show that the witness is not to be believed upon his oath. No doubt such questions may be oppressive and odious. They may constitute a means of gratifying personal malice of the basest kind, and of deterring witnesess from coming forward to discharge a duty to the public. At the same time it is impossible to devise any rule for restricting the latitude which at present exists upon the subject, without doing cruel injustice. I have frequently known cases in which evidence of decisive importance was procured by asking people of apparent respectability questions which, when first put, appeared to be offensive and insulting in the highest degree. I remember a case in which a solicitor's clerk was indicted for embezzlement. His defence was that his employer had brought a false charge against him to conceal (I think) forgery committed by himself. The employer seemed so respectable and the prisoner so discreditable that the prisoner's counsel returned his brief rather than ask the questions suggested by his client. The prisoner thereupon asked the questions himself, and in a very few minutes satisfied every person in court that what he had suggested was true. . . . It is also to be remembered that cross-examination to credit may be conducted in very different ways. It is one thing to throw an insulting question coarsely and roughly in the face of a witness. It is quite another thing to follow up a point by questions justified by the circumstances. . . .

The most difficult cases of all are those in which the imputation is wek founded, but is so slightly connected with the matter in issue that its truth ought not to affect the credibility of the witness in reference to the matter on which he testifies. The fact that a woman had an illegitimate child at eighteen is hardly a reason for not believing her at forty, when she swears that she locked up her house safely when she went to bed at night, and found the kitchen window broken open and her husband's boots gone when she got up in the morning. Cases, however, may be imagined in which a real connection may be traced between acts of profligacy and a man's credibility on matters in no apparent way connected with them. Seduction and adultery usually involve as gross a breach of faith as perjury, and if a man claimed credit on any subject of importance, the fact that he had been convicted of perjury would tend to discredit him.

No general rule can be laid down in matters of this sort. All that can be said is that whilst the power of cross-examining to a witness's credit is essential to the administration of justice, it is of the highest importance that both judges and counsel should bear in mind the abuse to which it is liable, and should do their best not to ask, or permit to be asked, questions conveying reproaches upon character, except in cases in which there is a reasonable ground to believe that they are necessary.

The Same Author. *Digest of the Law of Evidence*, 3rd ed. Note XLVI to Article 129, *Limits of Cross-examination*. This article states a practice which is now common, and which never was more strikingly illustrated than in the case referred to in the illustration [R. *v.* Castro, *ante*, No. 210]. But the practice which it represents is modern; and I submit that it requires the qualification suggested in the text [*i.e.*, that the Court has discretion to set limits]. I shall not believe, unless and until it is so decided upon solemn argument, that by the law of England a person who is called to prove a minor fact, not really disputed, in a case of little importance, thereby exposes himself to having every transaction of his past life, however private, inquired into by persons who may wish to serve the basest purposes of fraud or revenge by doing so. . . . If this is the law, it should be altered. The following section of the Indian Evidence Act (I of 1872) may perhaps be deserving of consideration. After authorising in § 147, questions as to the credit of the witness, the Act proceeds as follows, in § 148: —

"If any such question relates to a matter not relevant to the suit or proceeding, except so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising this discretion, the Court shall have regard to the following considerations:

"(1) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

"(2) Such questions are improper if the imputation which they convey relates to matters so remote in time or of such a character that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

"(3) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence."

Order XXXVI., rule 38 [Rules of Court, 1883], expressly gives the judge a discretion which was much wanted, and which I believe he always possessed.

Sub-topic C. Contradiction and Self-Contradiction [1]

216. Whitebread's Trial. (1679. Howell's State Trials, VII, 311, 374). [The Popish Plot. The defendant offered to prove that the principal crown witness, Oates, had made a false statement as to his companions, in his testimony at a prior trial of one Ireland for the same Popish Plot.]

L. C. J. North. — That is nothing to the purpose. If you can contradict him in anything that hath been sworn here, do.

Defendant. — If we can prove him a perjured man at any time, we do our business.

L. C. J. North. — How can we prove one cause in another? . . . Can he come prepared to make good everything that he hath said in his life?

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[1] For the principles of Logic and Psychology applicable to this topic, with copious further illustrations, see the present Compiler's "Principles of Proof" (1913), Nos. 314–355.

Another defendant. — All that I say is this, If he be not honest, he can be witness in no case.

L. C. J. North. — But how will you prove that? Come on, I will teach you a little logic. If you will come to contradict a witness, you ought to do it in a matter which is the present debate here; for if you would convict him of anything that he said in Ireland's trial, we must try Ireland's cause over again.

217. Earl of Castlemaine's Trial. (1680. Howell's State Trials, VII, 1067, 1101.) [Treason. The chief witness for the prosecution, Titus Oates, was cross-examined as to having said things about the accused's divorce, and witnesses were then called by the defendant to contradict his answers.] *Attorney-General* (objecting). If he may ask questions about such foreign matters as this, no man can justify himself; . . . any man may be catched thus. *Defendant.* How can a man be catched in the truth?

L. C. J. Scroggs. — We are not to hearken to it. The reason is this, first: You must have him perjured, and we are not now to try whether that thing sworn in another place be true or false; because that is the way to accuse whom you please, and that may make a man a liar that cannot imagine this will be put to him; and so no man's testimony that comes to be a witness shall leave himself safe.

218. ATTORNEY-GENERAL *v.* HITCHCOCK

Exchequer. 1847

1 *Exch.* 91

Information at the suit of the Attorney-General, which charged the defendant, a maltster, with having used a certain cistern for making malt without having previously entered it, as required by statute.

At the trial, before Pollock, C. B., a witness of the name of Spooner, who deposed to the fact of the cistern having been used by the defendant, was asked, on cross-examination by the defendant's counsel, whether he had not said that the officers of the Crown had offered him £20 to say that the cistern had been used. Spooner denied having said so, and thereupon the defendant's counsel proposed to ask another witness of the name of Cook, whether Spooner had not said so. The Attorney-General objected to this question, and the Lord Chief Baron, being of opinion that the question was irrelevant to the issue, and that it also tended to raise a collateral issue, held the objection good, and ruled that it could not be put.

Bovill obtained a rule for a new trial, on the ground that this evidence was improperly rejected, and cited Meagoe *v.* Simmons, 3 C. & P. 75, and Yewin's Case, 2 Campb. 638, note.

The Attorney-General (*J. Wilde* with him) showed cause. — This is a very important question, and one which is not directly affected by any decided cases; for such as are applicable to it, which are mere Nisi Prius decisions, cannot be said to lay down any definite principle or fixed rule by which this case can be governed. The principle upon which it must

depend is correctly laid down in Phillipps on Evidence, where it is stated that "it is a general rule that a witness cannot be cross-examined as to any fact, which, if admitted, would be wholly collateral, and wholly irrelevant to the matters in issue, for the purpose of contradicting him by other evidence, and in this manner to discredit his testimony. And if the witness answer such an irrelevant question before it is disallowed or withdrawn, evidence cannot afterwards be admitted to contradict his testimony on the collateral matter. The point for consideration, therefore, is, what question, or what matter is wholly irrelevant?" 2 Phillipps on Evidence, 9th ed. p. 398. This is the correct rule, and the criterion of relevancy depends, as it is submitted, upon this, — Could the defendant substantially have proved, as a part of his own case, that the witness had said what was imputed to him by the question? . . .

Bovill, in support of the rule. — The evidence was improperly rejected. It was admissible to show the motives of the witness, and also to contradict his statements made upon oath, and thereby to show that he was guilty of perjury. A witness may be contradicted on any matter, provided it be not collateral to the subject of inquiry, and this is the only limitation. . . . The case of Spencely *v.* De Willot, 7 East 108, was a penal action for usury, where the defendant's counsel were not permitted to cross-examine as to other contracts made on the same day with other persons, in order to show that the contracts in question were of the same nature, and not usurious, if the witness answered one way, or to contradict him if he answered the other, — proceeds thus: — "And should such questions be answered, evidence cannot afterwards be adduced for the purpose of contradiction. The same rule obtains, if a question as to a collateral fact be put to a witness for the purpose of discrediting his testimony; his answer must be taken as conclusive, and no evidence can afterwards be admitted. This rule does not exclude the contradiction of the witness as to any facts immediately connected with the subject of the inquiry." . . . There must, no doubt, be some connection with the particular matter of inquiry, in order to give the power of contradicting the witness. Here the question is sufficiently connected, both with reference to the motives which influence and act upon the mind of the witness, and as impeaching his testimony on a point which is materially connected with the inquiry. The question in dispute is the use of the cistern, and this person being a witness to prove the use of it, and being on his trial as to his veracity on that subject, every expression uttered by him, as to its use, is not collateral, but is most materially connected with the matter in dispute. It is submitted, therefore, that for these reasons the evidence should have been received. . . . Yewin's Case is an authority to show that the witness is interested by some motive which may influence his testimony. In Lord Stafford's Case, 7 How. St. Tr. 1400, proof was admitted, on the part of the prisoner, that Dugdale, one of the witnesses for the prosecution, had endeavored to suborn witnesses to give false evidence. (POLLOCK, C. B. — If it had been

sought to inquire from the witness Spooner whether he had offered a bribe to another witness, the cases would have been parallel. ALDERSON, B. — You endeavor to fix the corrupt state of mind upon the person to whom the offer is made, and not upon him who makes the offer. The offer, without the acceptance, is nothing, as regards the person to whom the offer is made.) It is not contended that the acceptance has any bearing on the present issue.

POLLOCK, C. B. — I am of opinion that this rule should be discharged; and I may also add, that my brother PARKE, expressed himself to be of that opinion before he left the Court. The question is, whether the witness Spooner, who had been asked if he had not said that the officer had offered him a bribe for the purpose of saying that the cistern had been used, and who stated that he had not said so, could be contradicted by asking the other witness, Cook, if Spooner had not made that statement to him? . . .

In this case it is admitted, that, with reference to the offering of a bribe, it could not originally have been proved that the offer of the bribe had been made to the witness to make a particular statement, the bribe not having been accepted by him. And the reason is, that it is totally irrelevant to the matter in issue, that some person should have thought fit to offer a bribe to the witness to give an untrue account of a transaction, and it is of no importance whatever, if that bribe was not accepted. It is no disparagement to a man that a bribe is offered to him: it may be a disparagement to the person who makes the offer. If, therefore, the witness is asked the fact, and denies it, or if he is asked whether he said so and so, and denies it, he cannot be contradicted as to what he has said. Lord Stafford's Case was totally different. There the witness himself had been implicated in offering a bribe to some other person. That immediately affected him, as proving that he had acted the part of a suborner for the purpose of perverting the truth.

My view has always been that the test whether the matter is collateral or not is this: If the answer of a witness is a matter which you would be allowed on your part to prove in evidence, if it have such a connection with the issue that you would be allowed to give it in evidence, then it is a matter on which you may contradict him. . . . I think the expression "as to any matters connected with the subject of inquiry" is far too vague and loose to be the foundation of any judicial decision. And I may say I am not at all prepared to adopt the proposition in those general terms, that a witness may be contradicted as to anything he denies having said, provided it be in any way connected with the subject before the jury. It must be connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which, if answered in a particular way, would contradict a part of the witness' testimony; and if it is neither the one nor the other of these, it is collateral to, though in some sense

it may be considered as connected with, the subject of the inquiry. A distinction should be observed between those matters which may be given in evidence by way of contradiction as directly affecting the story of the witness touching the issue before the jury, and those matters which affect the motives, temper, and character of the witness, not with respect to his credit, but with reference to his feelings towards one party or the other. It is certainly allowable to ask a witness in what manner he stands affected toward the opposite party in the cause, and whether he does not stand in such a relation to that person as is likely to affect him and prevent him from having an unprejudiced state of mind, and whether he has not used expressions importing that he would be revenged on some one or that he would give such evidence as might dispose of the cause in one way or the other. If he denies that, you may give evidence as to what he said, — not with the view of having a direct effect on the issue, but to show what is the state of mind of that witness in order that the jury may exercise their opinion as to how far he is to be believed. But those cases, where you may show the condition of a witness or his connection with either of the parties, are not to be confounded with other cases where it is proposed to contradict a witness on some matter unconnected with the question at issue. . . .

Alderson, B. — The question is this, Can you ask a witness as to what he is supposed to have said on a previous occasion? You may ask him as to any fact material to the issue, and if he denies it you may prove that fact, as you are at liberty to prove any fact material to the issue. . . . The witness may also be asked as to his state of equal mind or impartiality between the two contending parties, — questions which would have a tendency to show that the whole of his statement is to be taken with a qualification, and that such a statement ought really to be laid out of the case for want of impartiality; [and these answers may be contradicted]. . . . Such, again, is the case of an offer of a bribe by a witness to another person, or the offer of a bribe accepted by a witness from another person; the circumstance of a witness having offered or accepted a bribe shows that he is not equal and impartial. . . . But with these exceptions I am not aware that you can with propriety permit a witness to be examined first and contradicted afterwards on a point which is merely and purely collateral. . . . Perhaps it ought to be received, but for the inconvenience that would arise from the witness being called upon to answer to particular acts of his life, which he might have been able to explain if he had had reasonable notice to do so, and to have shown that all the acts of his life had been perfectly correct and pure, although other witnesses were called to prove the contrary. The reason why a party is obliged to take the answer of a witness is, that if he were permitted to go into it, it is only justice to allow the witness to call other evidence in support of the testimony he has given, and as those witnesses might be cross-examined as to their conduct, such a course would be productive of endless collateral issues.

ROLFE, B. — I am of the same opinion. The laws of evidence on this subject as to what ought and what ought not to be received, must be considered as founded on a sort of comparative consideration of the time to be occupied in examinations of this nature, and the time which it is practicable to bestow upon them. If we lived for a thousand years instead of about sixty or seventy, and every case were of sufficient importance, it might be possible, and perhaps proper, to throw a light on matters in which every possible question might be suggested, for the purpose of seeing by such means whether the whole was unfounded, or what portion of it was not, and to raise every possible inquiry as to the truth of the statements made. But I do not see how that could be; in fact, mankind find it to be impossible. Therefore some line must be drawn. . . .

It is proposed to contradict the witness by showing, not that he had received a bribe, — not that he had said that he had received a bribe (which might have had a bearing on the bias of his mind,) — but by showing that, on some occasion, he had said he had been offered a bribe. If that were to be allowed, as my brother ALDERSON has pointed out, endless inquiries might be entered into. It has not the smallest bearing on earth on the question as to the credibility of his testimony, as even the offer would be nothing if rejected; therefore I think it had no bearing on the subject of inquiry, and was very properly rejected. . . . I am, therefore, of the same opinion with the rest of the Court, that this rule ought to be discharged. Rule discharged.

219. CHICAGO CITY R. CO. *v.* ALLEN

SUPREME COURT OF ILLINOIS. 1897

169 *Ill.* 287; 48 *N. E.* 414

APPEAL from the Appellate Court for the First District; — heard in that Court on appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. This was an action on the case, instituted in the Superior Court of Cook County by appellee, against the appellant company, to recover damages for personal injuries alleged to have been sustained by him by reason of the negligence of the servants of the appellant company. The declaration alleged that while the appellee, with all due care, was endeavoring to enter one of appellant's cars, which had stopped at the crossing of Thirty-second street and Cottage Grove avenue for the purpose of receiving passengers, the servants of the company in charge of the car negligently and recklessly caused the car to be suddenly and violently started and put into rapid motion, whereby the appellee was jerked and thrown from the car to and upon the ground with great force and violence, his collar-bone broken and other injuries to his person inflicted.

The trial Court refused to allow a witness produced on behalf of the appellee to answer the following question propounded by the appellant: "In what polling precinct was the corner of South Park avenue and Thirty-second street on September 6, 1892?" And also refused to allow the same witness to answer another question, viz.: "Can you tell me now which of those precincts the corner of South Park avenue and Thirty-second street, — any corner, — is?" The exclusion of the evidence sought to be elicited by these questions is urged as ground for the reversal of the judgment.

Whether the car in question came to a stop at the intersection of Thirty-second street and Cottage Grove avenue for the purpose of permitting passengers to enter it, or whether appellee endeavored to get aboard the car while it was in motion, was a material fact to be determined by the jury. Louis Hutt, a witness introduced on behalf of the appellee, testified he was at the place in question and saw the car stop and soon after start again, and immediately thereafter saw the appellee lying on the ground, apparently injured. The witness accounted for his presence at the crossing by stating he had gone there and voted at a primary for the election of delegates to a convention. He also stated he lived at the south-west corner of South Park avenue and Thirty-second street, and had lived there for more than forty years. Appellant contends, if answers had been permitted to have been made to the questions hereinbefore set out, it would have been disclosed the residence of the witness Hutt was not in the voting precinct within which the primary election was being held, on Cottage Grove avenue near Thirty-second street, and hence it would have appeared he was not entitled to vote at the primary at which he testified he cast his ballot. The argument of appellant is, such testimony would have tended to contradict the statement of the witness Hutt that he was present at the time when and place where appellee received the injury.

The trial before the Court and jury resulted in a judgment in favor of the appellee in the sum of $2000. That judgment was affirmed by the Appellate Court for the First District, and the appellant company perfected this appeal to this Court.

William J. Hynes, for appellant. *Case & Hogan*, for appellee.

Mr. Justice Boggs (after stating the case as above), delivered the opinion of the Court:

It is competent for a party to produce testimony to contradict material statements of an adverse witness, though such statements do not relate directly to the matter in issue between the litigants. The purpose of such testimony is to discredit the witness, and therefore direct contradiction of the statement of the witness as to any fact or circumstance which tended to corroborate or strengthen his testimony is admissible. (Butler *v.* Cornell, 148 Ill. 276; 29 Am. and Eng. Ency. of Law, 783.) In the case at bar it was competent for the appellant company to contradict the statement of the witness Hutt that he was at the

crossing where the injury is alleged to have occurred at the time in question, and also that he voted at the primary. The latter statement offered a reason for his presence there, and tended to strengthen his assertion that he was there at the time and place of appellee's injury. He did not state he lived in the precinct for which the primary election was being held, and therefore the excluded testimony would not have directly contradicted any statement made by him.

It was not, of course, proper to receive it for the purpose of showing the witness had illegally voted at the primary, for that in nowise concerned the issue to be determined by the jury. The questions, answers to which were excluded, called upon this witness to state in what precinct any corner of the intersection of Thirty-second street and South Park avenue was in, and an answer thereto, if permitted, might have had no relation whatever to the question whether the witness lived in the precinct wherein the primary in question was being held.

Altogether, we think no sufficient reason appears for reversing the judgment because of the rulings under consideration. . . .

Judgment affirmed.

220. HOAG *v.* WRIGHT

COURT OF APPEALS OF NEW YORK. 1903

174 *N. Y.* 36; 66 *N. E.* 579

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 17, 1902, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The plaintiff was the son and sole surviving descendant of the defendants' testatrix, Hester Hoag, who died on the 15th of February, 1895, in the eighty-first year of her age. The action was upon two promissory notes — one for $2,000, dated October 16, 1890, payable to the order of the plaintiff; and the other for $4,000, dated November 13, 1894, payable to the plaintiff — without words of negotiability. The complaint was in the usual form, and by their answer the defendants denied the making and delivery of both notes, and alleged that, if made or delivered, they were without consideration. . . .

Experts were called by both parties to give their opinions as to the genuineness of the signatures to the notes after comparing them with the indorsement of the decedent upon certain checks read in evidence as standards of comparison. Upon the cross-examination of an expert named Reed, called by the plaintiff, it appeared that during his testimony upon a previous trial of this action he had been shown two papers so folded as to disclose only what purported to be the signature of the decedent upon each. He testified, in substance, that upon the other trial, after comparing these signatures with the standards in evidence, he had

pronounced them genuine, and had sworn that all were written by the same hand. Each of the papers, when unfolded, was a total blank, and the signatures were obviously spurious. The witness was thus compelled to admit that he had been mistaken in his opinion as an expert, upon the previous trial, in relation to the signature of the decedent, and had testified that the spurious signatures were genuine.

After this witness had left the stand, another expert was called by the plaintiff, who, also testifying by comparison, stated that the signatures to the notes were genuine. Upon cross-examination an effort was made by the defendants' counsel to show that he had made the same mistake upon the previous trial as Mr. Reed. For this purpose he was shown the two papers, folded so as to expose only the spurious signatures, and was asked if he remembered that these signatures had been shown him on the former trial. The counsel for the plaintiff objected to "showing the witness any papers which are not in evidence." The Court thereupon said: "The objection is sustained. I think it is incompetent. On reflection, I will strike out the testimony in regard to these two papers which has been given by Mr. Reed. (To the jury) I will strike it out and you will pay no attention to it." The defendants' counsel duly excepted and thereupon asked: "Do you not remember that you testified before Judge JENKS, when the papers that I now show you were presented, that in your opinion the same hand wrote the words 'Hester Hoag' before the seals on those papers that wrote the words 'Hester Hoag' upon the indorsement upon the checks." This was objected to as incompetent and immaterial, "and especially that these papers are not in evidence." The objection was sustained, and the defendants, after duly excepting, offered the papers in evidence "to obviate that objection." This was objected to "on the grounds that they have not been proven so as to be admitted as standards of comparison, and the papers themselves are wholly immaterial." The objection was sustained and the defendants excepted. Afterward the same rulings in substance were made when the third expert of the plaintiff was upon the stand, and similar exceptions were taken.

James M. Hunt, for appellants. . . . Error was committed upon the trial in refusing to permit a full cross-examination of plaintiff's handwriting experts. . . .

Isaac N. Mills and *Joseph Hover*, for respondent. . . . The plaintiff was properly permitted to testify that the signatures attached to the notes were in the genuine handwriting of the testatrix. . . . The testimony, upon cross-examination of several expert witnesses for the plaintiff, as to two spurious signatures of decedent, was properly excluded.

PER CURIAM (after stating the case as above). The opinions of experts upon handwriting, who testify from comparison only, are regarded by the Courts as of uncertain value, because in so many cases where such evidence is received, witnesses of equal honesty, intelligence and experience reach conclusions not only diametrically opposite, but always in

favor of the party who called them. The right to cross-examine such witnesses is of great importance, and, while it should be confined within reasonable limits, it should not be so restricted as to deprive it of all value.

The evidence stricken out in this case was not only competent and material, but was of decided value, and might have turned the scale toward the defendants upon an issue so closely contested. It tended to cast doubt upon the credibility of the witness and his skill as an expert. It suggested the question whether, if the witness was at fault as to the spurious signatures, he was not at fault as to the signatures in question. It made a direct attack upon the value of his opinion. The maxim, "falsus in uno falsus in omnibus" applies, but with less force, to the statements of a witness which, although not intentionally false, are in fact untrue, especially when they involve matters of judgment and skill. Each witness was asked in substance, "Did you not on another trial swear that these bogus signatures were genuine?" What better test could be applied? The effort was to show, not that the witness had been mistaken as to the signature of some third person, or even as to some signature of the decedent not in evidence, but with reference to the very signatures which were then the subject of investigation, for by confounding the spurious with the genuine he demonstrated that he could not tell one from the other. One witness virtually confessed his error, so that there was no necessity for contradiction as to him, and the other two might have been forced into the same situation if the trial judge had not intervened.

. . . Owing to the dangerous nature of expert evidence, and the necessity of testing it in the most thorough manner in order to prevent injustice, we are disposed to go farther, and to hold that, where a witness makes a mistake in his effort to distinguish spurious from genuine signatures, and he does not acknowledge his error, it may be shown by other testimony. The test sought to be applied in this case was one of the most practical and conclusive that can be employed to determine whether the witness is really an expert or not. It bears not only upon his competency to express an opinion, but upon the value of his opinion when expressed. . . . The good sense of the trial judge will confine it within proper bounds, and prevent an unnecessary consumption of time. It is better to take a little time to see whether the opinion of the witness is worth anything, rather than to hazard life, liberty, or property upon an opinion that is worth nothing. The evils and injustice arising from the use and abuse of opinion evidence in relation to handwriting are so grave that we feel compelled to depart from our own precedents to some extent, and to establish further safeguards for the protection of the public. As the hostility of witnesses to a party may be shown as an independent fact, although it protracts the trial by introducing a new issue, so, as we think, the incompetency of a professed expert may be shown in the same way and for the same reason; that is, because it demonstrates that testimony, otherwise persuasive, cannot be relied upon. We think that any testimony of an alleged expert upon handwriting which bears on his

competency to express an opinion, may, within reasonable limits, be contradicted by the testimony of other witnesses. We deem it our duty to limit such cases as People *v.* Murphy (135 N. Y. 450) and Van Wyck *v.* McIntosh (14 N. Y. 439) in so far as the conclusion thus announced is inconsistent with the views therein expressed.

The judgment should be reversed and a new trial granted, with costs to abide event.

PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN, VANN, CULLEN and WERNER, JJ., concur.

221. LAMBERT *v.* HAMLIN

SUPREME COURT OF NEW HAMPSHIRE. 1905

73 *N. H.* 138; 59 *Atl.* 941

CASE for personal injuries. Trial by jury, and verdict for the plaintiff. Transferred from the May Term, 1904, of the Superior Court by SPIKE, J. The defendant's exceptions to the exclusion of evidence, and the argument of the plaintiff's counsel, are sufficiently stated in the opinion.

The plaintiff is seventy-one years old. When injured, on the evening of August 21, 1903, she was keeping a small store, which she rented of the defendant, and in which she sold bread, milk, etc. The negligence complained of is the defendant's failure to use ordinary care in the removal of the doorsteps while repairing the underpinning of the store, in that he did not notify the plaintiff that they had been removed. She alleges that, in ignorance of their removal, and while in the exercise of due care, she attempted to step out of doors to get a bill changed, and fell and sustained her injuries. The defendant admits removing the steps while repairing the underpinning, but claims that they were replaced before the accident occurred. He also claims that the plaintiff sustained her injuries by walking off the side of the steps while descending, and that she was intoxicated at the time.

Doyle & Lucier and *Ivory C. Eaton*, for plaintiff. *George W. Clyde*, *Henry B. Atherton*, and *Wason & Moran*, for defendant.

BINGHAM, J. — One of the issues in the case bearing upon the plaintiff's exercise of care was whether she was intoxicated when she went out of her store on the evening of August 21, 1903. The plaintiff claimed that the defendant had removed the steps over which she was to pass in going from the store, and that he was negligent in failing to inform her that he had removed them. The defendant claimed that the steps were in position, and that the plaintiff was intoxicated, and sustained her injuries by stepping off the side of the steps. The plaintiff called the defendant as a witness. He testified that the plaintiff sold beer in the store at or about the time of the accident. The plaintiff, being subse-

quently called in her own behalf, testified in her examination in chief, and without objection, that she never sold beer in the store. In reply to this the defendant offered to show that she had been convicted four times for selling beer, the last conviction being in 1898; that she pleaded guilty to the charges; and that during the time covered by the sales she was occupying the store. This evidence the Superior Court excluded, both as a matter of law and in the exercise of its discretion, and the defendant excepted. The defendant now urges (1) that the evidence offered by him was relevant and material to the issue, and (2) that, if that portion of the plaintiff's evidence which he offered to contradict was collateral and irrelevant, she ought not for that reason to be heard to object, as it was testified to in her direct examination; that the rule preventing the contradiction of immaterial evidence, brought out on cross-examination for the purpose of impeaching a witness, does not apply in such a case.

1. If the evidence offered by the defendant was relevant to the issue, still it was of so remote a character as to be properly excluded by the Court in the exercise of its discretion. Kendall *v.* Flanders, 72 N. H. 11; Pattee *v.* Whitcomb, 72 N. H. 249.

2. In the cases adopting the view contended for by the defendant in his second proposition, it seems to have been considered that the main reason for the rule which prevents a cross-examination upon immaterial matters, for the mere purpose of contradicting a witness, is that he cannot be presumed to come prepared to defend himself on such collateral questions, and, as this reason fails when the testimony is voluntarily given, the rule itself does not in that case apply. But, as said in Blakey's Heirs *v.* Blakey's Ex'x, 33 Ala. 611, 620:

"The reason referred to is doubtless one of those on which the rule is founded, but it is not the only, or even the chief, one. The principal reasons of the rule are, undoubtedly, that but for its enforcement the issues in a cause would be multiplied indefinitely, the real merits of the controversy would be lost sight of in the mass of testimony to immaterial points, the minds of jurors would thus be perplexed and confused and their attention wearied and distracted, the costs of litigation would be enormously increased, and judicial investigations would become almost interminable."

Similar reasons are assigned for the rule in Seavy *v.* Dearborn, 19 N. H. 351, 356. See, also, Attorney-General *v.* Hitchcock, 1 Exch. 91, 104; Powers *v.* Leach, 26 Vt. 270, 277. According to the weight of authority, the reasons above assigned apply equally whether the evidence on such collateral matters is brought out on the examination in chief or upon cross-examination, and whether the witness gives it voluntarily or in response to questions calling for it. Blakey's Heirs *v.* Blakey's Ex'x, *supra*; Commonwealth *v.* Buzzell, 16 Pick. 163, 168; 1 Greenleaf, Evidence, § 461e; 2 Wigmore, Evidence, § 1007. The portion of the plaintiff's testimony which related to sales prior to and including 1898 was collateral and immaterial to the issue, and applying the above principle, the defendant was not entitled to contradict it for the purpose

of impeaching the credibility of the plaintiff, though it was introduced by her on direct examination. . . .

Exceptions overruled. All concurred.

222. SIMMS *v.* FORBES

SUPREME COURT OF MISSISSIPPI. 1905

86 *Miss.* 412; 38 *So.* 546

APPEAL from Circuit Court, Adams County; M. H. WILKINSON, Judge. Action by Miss Oelean E. Forbes against A. P. Simms to recover the sum of $10,000 damages for injuries sustained by her in falling into an open elevator shaft in defendant's store. Defendant pleaded the general issue, and gave notice that evidence would be introduced to show that plaintiff's damage was caused by her contributory negligence. . . .

From a verdict and judgment for plaintiff for $1,741, defendant appeals. Reversed.

Brown & Martin, for appellant. *Dabney & McCabe*, for appellee.

COX, Special Judge. . . . The plaintiff, after having testified in her own behalf, was recalled and questioned touching a conversation with W. J. Foster, a witness for defendant, some days before trial, at plaintiff's home. Foster was the clerk in defendant's store who was showing plaintiff the bookcases at the time she fell in the elevator opening, and had testified that he called plaintiff's attention to the opening a few moments before she fell. Plaintiff was asked by her counsel: "When Mr. Foster came down to see you, as a part of the conversation he had with you, did you say to him that you heard that they intended to say that you were warned about that place?" This was objected to, and objection sustained. She was then asked: "As a part of that conversation, did you say to him that you had not been warned?" This question was objected to, objection overruled, and defendant excepted. Plaintiff replied: "I looked him right in the face most impressively, and said it very slowly: 'I hear your people say that I was warned. I wasn't warned.' And he said nothing."

There is no ground upon which this testimony was admissible. It is clearly nothing but hearsay, and not within any of the exceptions to the rule which excludes hearsay evidence. It is true that when Foster was on the stand a predicate was laid for contradicting him upon this point. But the rule is well established that a witness may not on cross-examination be questioned as to collateral and irrelevant matters with a view to self-contradiction of his answer. In such cases the cross-examiner is bound by his answer. The rule against hearsay would be of but little value if it could be evaded by the transparent device of introducing it in contradiction of the adversary's witness upon collateral matters. Unless a party has the right to offer a conversation or statement directly, he

cannot get it before the jury merely by way of contradicting a witness on matters brought out on cross-examination.

Again, plaintiff was asked: "When Mr. Foster came down to see you, did he make a statement to you in which he said, 'I take great blame for that accident myself?'" To this she replied: "I cannot say whether he did say that, exactly, but he said, 'I take great blame,' or he said, 'I blame myself for the accident,' and my reply was, 'Somebody was to be blamed, certainly.'" Defendant moved to strike out the last question and answer. Motion was overruled, and exception taken. The last answer was obnoxious to the same objection as the former. It was mere hearsay. Plaintiff could not have availed of it as a part of her case, nor could she have shown it in evidence for any purpose, independently of the self-contradiction of Foster. Such being the case, it was not available in any form or for any purpose. Wigmore on Evidence, § 1020; V. & M. R. Co. *v.* McGowan, 62 Miss. 698, 52 Am. Rep. 205; Williams *v.* State, 73 Miss. 821, 19 South. 826.

This evidence must have been highly prejudicial to defendant. For the error of the Court in admitting it, the judgment must be reversed.

Reversed and remanded.

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223. THE QUEEN'S CASE

House of Lords. 1820

2 *B. & B.* 313

Abbott, C. J. [answering a question put to the Judges by the Lords.] . . . If it be intended to bring the credit of a witness into question by proof of anything he may have said or declared touching the cause, the witness is first *asked, upon cross-examination, whether or no he has said* or declared that which is intended to be proved. If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary, and the witness has an opportunity of giving such reason, explanation, or exculpation of his conduct, if any there may be, as the particular circumstances of the transaction may happen to furnish; and thus the whole matter is brought before the Court at once, which in our opinion is the most convenient course. . . .

[If the witness denies the utterance or claims the privilege of silence], the proof in contradiction will be received at the proper season. But the possibility that the witness may decline to answer the question affords no sufficient reason for not giving him the opportunity of answering and of offering such explanatory or exculpatory matter as I have before alluded to; . . . not only for the purpose already mentioned, but because, if not given in the first instance, it may be wholly lost, for a witness who has been examined and has no reason to suppose that his further attendance is requisite often departs the Court, and may not be found or brought

back until the trial be at an end. So that, if evidence of this sort could be adduced on the sudden and by surprise, without any previous intimation to the witness or to the party producing him, great injustice might be done, . . . and one of the great objects of the course of proceeding established in our Courts is the prevention of surprise, as far as practicable, upon any person who may appear therein.

224. DOWNER *v.* DANA

SUPREME COURT OF VERMONT. 1847

19 *Vt.* 346

DEBT upon a jail bond. Plea, non est factum, with notice of special matter of defense, and trial by jury, March Term, 1845, HEBARD, J., presiding. On trial it appeared that the defendant Dana had heretofore been committed to the common jail in Orange county, upon execution in favor of the plaintiffs, and that the bond in suit was executed, in common form, upon his being admitted to the liberties of the prison. . . . The plaintiffs also gave in evidence the deposition of one Smith, taken *ex parte*, and the deposition of one Rutter, taken with notice to the defendants, but at the taking of which the defendants did not attend, — which depositions tended to prove a breach of the condition of the bond declared upon. . . .

The defendants also, for the purpose of impeaching the witness Rutter, offered to prove declarations made by him previous to the giving of the deposition used in the case by the plaintiffs, but in reference to which no preliminary inquiry had been made of him. To this the plaintiffs objected; but the evidence was admitted by the Court. . . . Verdict for defendants. Exceptions by plaintiffs.

Hunton and *Tracy & Converse*, for plaintiffs. . . . The Court erred in admitting the evidence as to the witness Rutter. The deposition was taken with notice, and the defendants had an opportunity to inquire of the witness as to the conversation concerning which the evidence was given, but did not do so. Queen's Case [*ante*, No. 223], Angus *v.* Smith, 1 M. & M. 473; 1 Stark. Ev. 145, 146.

O. P. Chandler and *L. B. Vilas*, for defendants. . . . The testimony admitted to impeach the deposition of Rutter was properly received. We recognize the rule contended for by the plaintiffs, when applied to witnesses in Court; but in reference to depositions it is inapplicable. There can be no distinction between ex parte depositions and those taken with notice.

The opinion of the Court was delivered by DAVIS, J.:

The first question which arises is, whether the decision of the County Court was right in admitting the defendant to show the previous declarations of Rutter, with a view to impeach his deposition introduced by

the plaintiff, — it appearing, that, at the time of taking the same, no person appeared on behalf of the defendants, although they had due notice, and that consequently the deponent was not interrogated in respect to such declarations.

It is indeed an established rule of practice in this State, that testimony of this kind cannot be received to impeach a witness produced upon the stand, unless an opportunity be first afforded to the witness, whose testimony it is proposed to impeach, to explain or qualify the imputed declarations. This rule is carried so far in England, as to admit of no exception, in cases where, when the cross-examination was closed, the party wishing to impeach had no knowledge of the variant declarations, or inconsistent conduct, and the witness has departed from Court and cannot be recalled. Queen's Case, in House of Lords, 2 Brod. & Bing. 284 [*ante*, No. 223]. This Court have fully sanctioned the rule as existing in England. In Massachusetts it has never been adopted. Tucker *v.* Welsh, 17 Mass. 160. I infer, also, that it has never been adopted in New Hampshire; French *v.* Merrill, 6 N. H. 465; nor in Connecticut; Judson *v.* Blanchard, 3 Conn. 557.

As observed by Ch. J. PARKER, in Tucker *v.* Welsh, the rule seems to be of recent origin in England, as no mention is made of it by either Peake, or Phillips, in their treatises upon the law of evidence. Starkie recognizes it in his text as settled law. He is, I think, the first English writer that does so. 3 Starkie, Evidence, 1753–4. Ch. J. PARKER says, it has never been adopted in this country. This remark was made as long ago as 1821. At that time I think no lawyer in Vermont had heard of such a rule here; and even now I do not find it naturalized anywhere, except here. It is not adopted in Maine. Ware *v.* Ware, 8 Greenl. 42. Prof. Greenleaf, in his valuable treatise on evidence, (1 Greenleaf Evidence, 514), adopts the English law in his text, without scruple, and in a note adds, that in this country the same course is understood generally to have been adopted, except in Maine, and perhaps Massachusetts.

Were the question "res integra," I confess I could see no advantages to the cause of truth and justice, from the adoption of this rule of evidence, which are not equally well secured by the old practice of allowing the party whose witness has in that way been attacked to recall him, if he choose, for the purpose of contradicting or explaining the conduct or declarations imputed to him. Indeed, I have seen no objections of consequence to that course, except that it may sometimes happen that the witness may have departed from Court supposing his attendance no longer necessary. Such an objection practically is entitled to very little weight, as it would be provided against by requiring, as is in fact generally done for other reasons, witnesses to remain in court until the testimony is finished. On the other hand, this rule would be productive of intolerable mischiefs, were it not mitigated by the somewhat awkward and inconvenient expedient of suspending the regular course of testimony for the purpose of recalling the witness proposed to be impeached and

laying a foundation for the impeaching testimony by interrogating him whether he did or said the things proposed to be proved. Besides, the privilege of doing this will be lost in all those cases where the witness has left Court and cannot be found; the opposite party has every inducement to cut off this opportunity by immediately discharging all such as he may have reason to suspect are liable to be impugned. In addition to this, the avowed attempt to produce self-impeachment, made of course in a tone and manner evincing distrust of the general narrative, too often both surprises and disconcerts a modest witness. He answers hastily and confusedly, as is natural from having such a collateral matter hastily sprung upon him. Every one conversant with judicial proceedings must have often observed with pain an apparent contradiction produced in this way, when he is satisfied none would have existed under a different mode of proceeding.

Although to my mind these considerations present very formidable objections to the practice first authoritatively developed on the trial of the Queen in the House of Lords, yet I acquiesce in it as the settled practice in this State.

It remains to be considered, whether it can be properly applied in the case of depositions.

In the case of Tucker *v.* Welsh, already cited from Massachusetts, the Court were urged to adopt the practice in respect to testimony taken in that form, though they should not be disposed to do so in other cases. The Court, however, could perceive no special reasons in favor of such a discrimination. We think there are substantial reasons why a discrimination should be made the other way. The rule thus applied would impose on a party, wishing the privilege of impeachment, the necessity of attending in person, or by counsel, at the taking of every deposition to be used against him, within or without the State, which, on any other account, he might not be disposed to do. Besides, in many cases the deponent may be wholly unknown to him; he may have no knowledge of the matter to be testified to, until actually given; the notice of the taking may be barely sufficient to enable him to reach the place, perhaps hundreds of miles distant, in season to be present. It would be idle, under such circumstances, to expect a party to be prepared to go through with this preliminary ceremony. The result would be, he would be least able to shield himself against partial or false testimony, precisely when such protection is most needed. It is true, the deponent, being absent from the trial, hears not the impeaching testimony, and cannot be called upon to contradict or explain it. This may be an evil, but is unavoidable from the nature of the case. It would be a worse evil to deny the right of impeaching depositions, unless under regulations, which would reduce the right to a nullity.

We attach no importance to the circumstance, that the defendants, though notified, were not present at the taking of Rutter's depositions. Had they been present, the result would have been the same. In our

opinion the rule adverted to has no proper application to testimony taken in the form of depositions. The impeaching testimony was therefore properly admitted. . . .

On the whole the judgment of the County Court is affirmed.

225. Unis *v.* Charlton's Administrator. (1855. Virginia. 12 Gratt. 495). Daniel, J. In the case of Downer *v.* Dana, 19 Verm. R. 338 [*ante*, No. 224] a distinction is taken between the case of a witness examined in court and one who has given his testimony in the form of a deposition. In that case the Court sanctions, and expresses a determination to adhere to, the rule, that testimony, as to the previous declarations of a witness produced upon the stand, offered for the purpose of impeaching him, is not to be received, unless an opportunity be first offered him to explain or qualify the imputed declaration. But it still decides that the rule has no application to testimony in the shape of depositions, whether taken with or without notice, and whether the adverse party attended at the taking or not, and that the adverse party may in such case, without previous inquiry, prove any inconsistent declarations or conduct of the witness.

After a careful examination of the opinion in which this distinction is taken, I have been unable to perceive the force of the reasoning on which it is made to rest. The principal reason assigned by the learned judge who delivered the opinion of the Court for refusing to apply the rule to depositions is that such a practice would impose on a party wishing the privilege of impeachment the necessity of attending in person or by attorney at the taking of every deposition to be used against him, within or without the State, which on any other account he might be disposed to do. This argument *ab inconvenienti* is not wholly without show of reason when urged in behalf of the exercise of the privilege of impeachment by a party who had had no notice of the taking, or who, though notified, did not attend at the taking of a deposition which he seeks to discredit, but seems to me devoid of weight when extended to the case of a party who was present at the taking of the deposition, and had thus the same opportunity of cross-examining the witness and calling his attention to the imputed inconsistent statements that he would or might have had in case the witness had been examined in court. . . . The rule proceeds from a sense of justice to the witness; . . . these reasons, it is obvious, apply just as forcibly to depositions as to oral examinations in court. And indeed there are considerations which urge the application of the rule to the case of an impeachment of a witness who has given his testimony in the form of a deposition, which may not arise in an effort to discredit a witness who has been examined in court. In the latter case the witness usually remains in or about the court till the trial is concluded; and if an assault is made upon him by proof of inconsistent statements, he might, even before the adoption of the rule requiring him to be first examined as to such statements, be recalled and re-examined by the party in whose favor he had testified; and he may thus have an opportunity of repelling or explaining away the force of the assault; whereas the witness whose deposition has been taken is usually absent from the scene of the trial, and has no shield against attacks on his veracity other than that provided by the rule. . . . There are no peculiar considerations calling upon us to exempt this case from the operation of the rule; for it appears from the deposition that the plaintiff's counsel was not only present at the taking, but exercised on the occasion his privilege of cross-examining the witness.

226. ADAMS *v.* HERALD PUBLISHING CO.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1909

82 *Conn.* 448; 74 *Atl.* 755

APPEAL from Court of Common Pleas, Hartford County; JOHN COATS, Judge. Action for breach of contract by Eugene Adams against the Herald Publishing Company. From a judgment for defendant, plaintiff appeals. Affirmed.

The defendant is a corporation engaged in the publication of a newspaper and doing printing. . . . A business office was maintained in the building where the paper was printed and issued. . . . One Schmidt was employed as the head of this office. His duties consisted in ascertaining and carrying out the directions of the directors, except in routine matters concerning which there could be no reasonable doubt. On the morning upon which Schmidt first went to work, the plaintiff visited the office, inquired for the business manager, and by some one was referred to Schmidt. . . . He proposed to Schmidt to enter into a contract with the defendant for the canvass of New Britain for four-line advertisements, . . . his proposal to be signed by the defendant. Schmidt expressed a desire to think over the matter and to consult others, and the plaintiff left, leaving the forms of contract with him. Schmidt later accepted the proposition and signed the contract in the name of the defendant by himself as business manager. . . . Schmidt in fact, did not consult with either of the directors or officers in relation thereto, and had no authority to enter into such a contract on behalf of the defendant, and it was not within the apparent scope of his authority to do so. . . . None of the proposed advertisements were ever published, and no benefit therefrom ever accrued to the defendant, who repudiated the contract entered into by Schmidt when its existence became known to it, and refused to pay the plaintiff thereunder. The other pertinent facts are stated in the opinion.

Charles S. Hamilton and *James Roche,* for appellant. *Bernard F. Gaffney,* for appellee.

PRENTICE, J. (after stating the facts as above). The plaintiff seeks to enforce against the defendant the terms of a written contract which was not otherwise executed on the latter's behalf than by one who at the time of its execution was known to the plaintiff to be an agent. . . .

The plaintiff offered evidence in chief tending to show that Schmidt submitted the contract to the two officers of the corporation, who were also its only directors, before it was executed, and that it was approved by them. This the two persons concerned denied. Upon rebuttal a witness was called for the purpose of contradicting one of these directors — the president, one Cochran. This witness was asked concerning a conversation which he testified he had with Cochran within a few days

after the contract was entered into, for the purpose of showing, as claimed, that Cochran then informed the witness about it. Counsel for the defendant objected to the inquiry, upon the ground that Cochran's attention had not been called to the claimed conversation, and the proper course, as outlined in 22 Conn., 58 Am. Dec., pursued, and the inquiry was not permitted. The case to which counsel thus appealed for the exclusion of the proffered testimony was that of Hedge *v.* Clapp, 22 Conn. 262, 58 Am. Dec. 424, wherein the question of the power and duty of a Court in dealing with a situation like that before the Court in the present case was fully discussed and clearly defined. In that case it was contended that it was reversible error to receive evidence of the declarations of a witness, made out of Court, contradictory of his statements sworn to on the trial, without requiring that the attention of the witness should have been first called upon cross-examination to the claimed contradictory declarations. Such is the unbending rule of law in many, if not most, jurisdictions to-day. Wigmore on Evidence, § 1028.

This Court, however, refused to join in the procession of those who have created, out of the decision of the judges in The Queen's Case, 2 B. & B. 313 [*ante*, No. 223], any such inflexible principle. But, while this is true, it gave no encouragement to a general practice on the part of the Courts of admitting such contradictory declarations quite regardless of whether or not the attention of the witness sought to be contradicted had been first directed to them. Much less did that authority hold or suggest that the refusal to hear such contradictory testimony under any and all circumstances would be reversible error. The conclusion of the Court was that there was no inflexible rule to govern the conduct of a trial Court under the conditions suggested, that the practice sought to be established as an unyielding rule by the plaintiff in error was a safe and conservative one to pursue in many, if not most, cases, and one very proper to be adhered to in such cases, but that it was one from which a Court in the exercise of that discretion, with which it is liberally endowed, might well and properly depart, if, with the circumstances before it, it was of the opinion that the ends of fairness and justice would thereby be best subserved. The principles of this leading case have been strictly adhered to in this jurisdiction, and they embody familiar law. State ex rel. Woodford *v.* North, 42 Conn. 79; Tomlinson *v.* Derby, 43 Conn. 562, 565; Bradley *v.* Gorham, 77 Conn. 211, 213. It is clear therefore that the ruling of the Court was not one which deprived the plaintiff of any right, and that it was one which lay within the domain of the judicial discretion. . . .

We have said that error cannot be predicated upon a ruling made in the exercise of this discretion. State ex rel. Woodford *v.* North, 42 Conn. 79; Tomlinson *v.* Derby, 43 Conn. 562, 565. If, however, it be assumed that a case might arise which disclosed such a clear abuse of discretion as to warrant a review this clearly is not such a case. . . . There is no error. The other Judges concur.

Sub-topic D. Who may be Impeached

228. *History.*[1] — The history of the rule is singularly obscure, considering its practical frequency and importance. But the following stage of its development are fairly clear:

In the primitive modes of trial, persons who attended on behalf of the parties were not witnesses, in the modern sense of the word. They were "oath-helpers," by whose mere oath, taken by the prescribed number of persons and in the proper form, the issue of the cause was determined. They were chosen, naturally and usually, from among the relatives and adherents of either party. They went up to the court literally to "swear him off," and the two sets of oath-takers were marshalled in opposing bands. This traditional notion of a witness, that of a person *ex officio* a partisan pure and simple, persisted as a tradition long past the time when their function had ceased to be that of a mere oath-taker and had become that of a testifier to facts. So long as such a notion persisted, it was inconceivable that a party should gainsay his own witness; he had been told to bring a certain number of persons to swear for him; if one or more did not do so, that was merely his loss; he should have chosen better ones for his purpose. This notion that a party must stand or fall by what his partisan affirms was long in disappearing.

It was a natural consequence of this notion that the party should not be allowed to dispute what his own chosen witness says. Such (presumably) was the instinctive thought all through the earlier periods of our recorded trials, and long after the time when witnesses in the modern sense had taken the place of compurgators. Its beginnings are seen at the end of the 1600s, in criminal trials. Until that time, the accused had no legal right to summon witnesses (*ante*, § 575), and apparently the prosecution was not before then hampered by any rule against impeachment. In that period a rule begins to be hinted at, as against the accused's witnesses, though the prosecution is still exempt.

By the beginning of the 1700s a general rule makes a casual appearance, and is applied in civil cases equally. But it had not yet received common acceptance; for it is not mentioned in any of the early editions of the treatises on trial practice. By the end of the 1700s, however, it is notorious and unquestioned. Its enforcement in the trial of Warren Hastings, in 1788, seems to have been the immediate cause of its general currency; for thereafter it receives mention in the treatises.

229. Stephen Colledge's Trial. (1681. Howell's State Trials, VIII, 637.) [Treason. The accused was a Protestant joiner, said to have shared in a Presbyterian Plot against the King. A principal witness against him was one Turbervile. Colledge now calls witnesses to discredit Turbervile.]

Colledge. — Pray, my lord, give me leave to call Mr. Ivy.

Serj. *Jeff.* — Do, if you will. (He stood up.)

Colledge. — What was that you heard Turbervile say of me, or of any presbyterian Plot?

Ivy. — I never heard him say any thing of a Presbyterian Plot in my life.

Colleged. — Did you not tell Zeal of such a thing?

Ivy. — No, I never did. . . .

Colledge. — Did not you call me out with Macnamarra and Haynes, to the Hercules Pillars?

[1] Adapted from the present Compiler's "Treatise on Evidence" (§ 896).

L. C. J. Scroggs. — Look you, Mr. Colledge, I will tell you something for law, and to set you right; whatsoever witnesses you call, you call them as witnesses to testify the truth for you; and if you ask them any questions, you must take what they have said as truth. Therefore, you must not think to ask him any questions, and afterward call another witness to disprove your own witness.

Colledge. — I ask him, was he the first time with us, when I was called out of the coffee-house to hear Haynes's discovery?

L. C. J. — Let him answer you if he will; but you must not afterwards go to disprove him. . . .

Colledge. — I ask whether he hath given any evidence against me any where?

Ivy. — I am not bound to answer you.

L. C. J. — Tell him, if you have.

Ivy. — Yes, my lord, I have.

Colledge. — Then I think he is no good witness for me, when he hath sworn against me. . . . Call Mr. Lewes. (Who appeared.)

L. C. J. — What is your Christian name?

Lewes. — William.

Colledge. — Pray, Mr. Lewes, what do you know about Turbervile?

Lewes. — I know nothing at all, I assure you, of him that is ill.

Colledge. — Do you know anything concerning any of the evidence that hath been given here?

Lewes. — If I knew any thing relating to you, I would declare it; but I know something of Mr. Ivy; it has no relation to you, as I conceive, but against my lord of Shaftesbury.

L. C. J. — You would call Ivy for a witness, and now you call one against him; and that I told you, you must not do.

230. Buller, J. *Trials at Nisi Prius.* (*Ante* 1767. p. 297). A party shall never be permitted to produce general evidence to discredit his own witness, for that would be to enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him.

231. EWER *v.* AMBROSE

King's Bench. 1825

3 *B. & C.* 746

Assumpsit for money had and received, and on an account stated. John Baker suffered judgment by default, and afterwards died, and his death was suggested on the roll. Plea, in abatement by Ambrose, that the promises were made by him jointly with John and Samuel Baker. Replication that they were made jointly by defendant and J. Baker, and not by the three, and issue thereon. At the trial before Gaselee, J., at the Summer assizes, for the county of Suffolk, 1824, the defendant called Samuel Baker, the alleged joint contractor, to prove the plea in abatement. He denied that he ever was a partner, but he admitted that articles of partnership were prepared, but not executed, by which he was to have been a partner. . . . The defendant's counsel, in order to prove

that S. Baker was a partner, proposed to read in evidence, an answer in Chancery of John and S. Baker, to a bill filed against them by Ambrose, in 1821, for a dissolution of the partnership and an account. The learned judge inclined to think that the evidence was not admissible, on the ground that it was produced in order to contradict the defendant's own witness; but, in order to prevent the cause coming down again, he received it, reserving liberty to the plaintiffs, in case the verdict should be against them, to move the Court to enter the verdict for them. By the answer it appeared that in 1816, Samuel Baker had become a partner with his father, John Baker, and Ambrose, and that that partnership continued down to the time when the answer was filed in April, 1821. The defendant then called two other witnesses to prove that Samuel Baker was a partner. This evidence was objected to on the ground the that defendant could not contradict his own witness. . . . The learned judge left it to the jury to find for the plaintiff or defendant according as they gave credit to Samuel Baker's answer in Chancery, or to his testimony given in Court. They found a verdict for the defendant. A rule *nisi* having been obtained in Michaelmas term, to enter a verdict for the plaintiff, on the objections taken at the trial.

Storks, and *Dover*, now showed cause. Alexander *v.* Gibson, 2 Camp. 555, is an authority to show that if a witness proves facts in a cause which make against the party who calls him, the party may call other witnesses to contradict him as to those facts. In such case the facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, the impeachment of his credit is incidental and consequential only.

Rolfe, contra. The effect of the answer was to impeach the credit of the witness called by the defendant, and upon whose credit he rested his case. Now that was clearly inadmissible. The same observation applies to the other witnesses. They were called to prove the fact of Samuel Baker, being a partner, he himself having disproved it. . . .

Bayley, J. — There have been cases in which, when a witness called to make out a substantive case disproved that case, the party calling him has been allowed to prove it by other witnesses. But those were cases where a witness was forced upon the party by law; as, for instance, a subscribing witness to a deed or will. Thus in Lowe *v.* Joliffe, 1 Black. 365, the subscribing witness to a will swore to the testator's insanity, yet the plaintiff was allowed to examine other witnesses in support of his case, to prove that the testator was sane. So in Pike *v.* Badmering, cited in 2 Strange 1096, where the three subscribing witnesses to a will denied their hands, the plaintiff was permitted to contradict that evidence. This case differs from those, inasmuch as the witness was not forced on the party. But I have no doubt that if a witness gives evidence contrary to that which the party calling him expects, the party is at liberty afterwards to make out his own case by other witnesses, Richardson *v.* Allan, 2 Stark. 334.

I doubt, however, whether the defendant was at liberty to put in the answer in Chancery of the witness in order to discredit him. . . .

I think, however, that the evidence of Wing and Spark, was admissible to prove the fact of the partnership, and that it ought to have been left to the jury to consider whether they were not satisfied from their evidence, coupled with the other facts of this case, that there was an ostensible partnership between the two Bakers, and Ambrose.

Holroyd, J. — I also think there ought to be a new trial. I take the rule of law to be, that if a witness proves a case against the party calling him, the latter may show the truth by other witnesses. But it is undoubtedly true, that if a party calls a witness to prove a fact, he cannot, when he finds the witness proves the contrary, give general evidence to show that that witness is not to be believed on his oath. . . .

It may admit of doubt whether the answer were admissible at all. It certainly was not admissible to prove generally that the witness was not worthy of any credit. It might, perhaps, be admissible if the effect of it were only to show that, as to the particular fact sworn to at the trial, the witness was mistaken. But if its effect were only to show that the witness was not worthy of credit, then it was not admissible. . . .

Littledale, J. — Where a witness is called by a party to prove his case, and he disproves that case, I think the party is still at liberty to prove his case by other witnesses. It would be a great hardship if the rule were otherwise, for if a party had four witnesses upon whom he relied to prove his case, it would be very hard, that by calling first the one who happened to disprove it, he should be deprived of the testimony of the other three. If he had called the three before the other who had disproved the case, it would have been a question for the jury upon the evidence whether they would give credit to the three or to the one. The order in which the witnesses happen to be called ought not therefore to make any difference.

It may be a doubtful question, whether the answer in Chancery was properly received to prove a different state of facts from that which the witness had sworn to at the trial. At all events it could only be admissible to contradict the particular fact to which the witness had then sworn; and whether it was admissible in the latter point of view, it is not necessary to decide. Rule absolute for a new trial.

232. SELOVER *v.* BRYANT

Supreme Court of Minnesota. 1893

54 *Minn.* 434; 56 *N. W.* 58

Appeal by defendant, John W. Bryant, from an order of the District Court of Hennepin County, C. B. Elliott, J., made March 1, 1893, denying his motion for a new trial.

The plaintiffs, George H. Selover and Charles D. Gould, were attorneys at law, practicing at Minneapolis. Between July 15, and September 23, 1892, they rendered professional services for Lucia A. Bryant. She employed them to bring suit against her husband, George M. Bryant, for divorce, and for a share of his property. They did so, and conducted the case to an amicable settlement on the latter date. They brought this action on October 25, 1892, to recover for their services. They alleged that on the settlement the husband agreed with his wife to pay them their reasonable fees and charges in the divorce suit. That the value of their services was $500, of which $90 only had been paid. They asked judgment for the residue. Defendant denied the agreement to pay his wife's attorneys, and denied that their services were worth more than the $90 she had paid.

On the trial November 17, 1892, plaintiffs called Lucia A. Bryant as a witness and asked her as to the agreement of her husband to pay her attorneys. She testified that she did not hear anything said on the settlement about the fees of her attorneys; that her husband did not agree with her to pay them. She further testified that she did not state to Mr. Gould, the day before, that her husband had so agreed. Plaintiffs then called Mr. Gould and offered to prove by him that she did so state to him on the previous day Defendant objected, but the objection was overruled. Defendants excepted, and the witness so testified. . . .

The jury found a verdict for plaintiffs and assessed their damages at $345. Defendant died January 23, 1893, and John W. Bryant, the administrator of his estate, was substituted as defendant in his stead. He moved for a new trial, and, being denied, appeals.

George R. Robinson, for appellant. The plaintiffs, knowing that the wife could not testify against her husband without his consent (1878, G. S. ch. 73, § 10), placed her upon the stand, and, after having her testimony, they were allowed, not only to contradict and discredit their witness, but to show, by the testimony of other witnesses, her alleged statements against her husband made when not under oath. . . .

Boardman & Boutelle, for respondents. Plaintiffs had the right to show contradictory statements of their own witness. This is sustained by the great weight of authority in cases where the witness has been called, upon the strength of his prior statements, and upon the supposition that he will testify in accordance therewith, and when upon the stand he surprises the party calling him, by testifying directly to the contrary, and in the interest of the adverse party. . . .

Dickinson, J. . . . The case justified the conclusion of the Court that the plaintiffs were surprised by the adverse testimony. It is one of the controverted questions in the law of evidence whether a party calling a witness, and who is surprised by his adverse testimony, may be permitted to show that he had made previous statements contrary to his testimony. A learned writer has said that the weight of authority seems to be in favor of admitting such proof. 1 Greenleaf, Evidence, § 444.

We are in doubt whether the weight of authority is not the other way; but we feel confident that the well-recognized reasons and principles of the law of evidence support the proposition that, at least in the discretion of the trial Court, such evidence is admissible. It is perfectly well settled, and upon satisfactory reasons, that if the defendant had called the witness to the stand, and she had testified as she did as to the fact in issue, the plaintiffs, after proper preliminary proof, would have been allowed to show by other witnesses that she had made statements contrary to her testimony. This rule, now everywhere recognized, rests upon the obvious propriety and necessity of informing the jury of circumstances so directly bearing upon the credibility of the witness and the value of his testimony as do contradictory statements by him of the controverted facts concerning which he testifies, and which the jury must determine. But this controlling reason for allowing such discrediting evidence exists, and with precisely the same force, whether the witness has been called to stand by the opposite party or by the party who offers the impeaching proof; and if the witness may be thus discredited by the party who did not call him, but may not be discredited by the party who called him, the reason must be that by calling the witness to the stand the party holds him forth as being worthy of credit, and hence he should not be allowed afterwards to impeach his credibility. And this is the proposition which, in one form or another, is generally assigned as the reason of the rule disallowing such impeachment wherever that rule has prevailed. This rule and the reason for it has been so generally accepted and applied with reference to an impeachment by a party of the general reputation of a witness whom he has called that it is perhaps not now to be questioned; but as respects the particular discrediting proof which we are considering, the practice has been less uniform, and the excluding of the discrediting proof has been more strenuously opposed by the best authorities.

The reason upon which it rests is, we think, plainly fallacious. The fault in the reason lies in the premise that, by calling the witness, the party presents him as being worthy of credit, or, in any sense, vouches for his truthfulness. In some sense and measure this may be true. But laying aside the subject of general impeachment, and directing our attention only to the question of allowing proof of statements contrary to the testimony by which a party is surprised at the trial, the above-stated reason is of no controlling force, except as it includes and implies such a degree of responsibility for the credit of the witness — such a personal voucher of his truthfulness — that it would be bad faith, double dealing, trifling with the Court, or something akin thereto, for the party to afterwards throw discredit upon his testimony. The premise is not tenable. A party is not to be held to have assumed any such responsibility as to the truthfulness of a witness, and ordinarily, at least, there can be no imputation of bad faith, or anything like it, when, the party being surprised by his own witness testifying directly in favor of the adverse party,

he offers to show his preliminary statements to the contrary, as impeaching his credibility. One has not all the world from which to choose the witnesses by whose testimony he must prove his case. He has not the freedom of choice that one has in the selection of an agent. He can only call those who are supposed to know the facts in issue. He is entitled to have their testimony placed before the jury, not as the statements of his agents or representatives by which he is to be concluded, but as the testimony of witnesses whose credibility he cannot be expected to vouch for, but which the jury are to determine.

It is everywhere admitted that a party whose witness testifies against him is not concluded thereby. He may prove the fact to be contrary to such testimony, although that does discredit a witness whom he has called. We deny that, by calling a witness to the stand, a party becomes responsible for his credibility in any such sense that he is absolutely precluded, when surprised by adverse testimony, from showing that the witness had made statements of the facts contrary to his testimony. It is at least within the discretion of the Court to allow this. It has been suggested that this affords an opportunity to fraudulently get before the jury the unsworn statement of a witness which the jury may accept as evidence of the fact. But the same objection may be urged in opposition to allowing a party to discredit in this way a witness called by the adverse party; yet this is always allowed. The direct, certain, and obvious effect of such evidence, in enabling the jury to rightly weigh the testimony, should prevail over the far more remote, improbable, and collateral considerations that opportunity may be thus afforded to a dishonest party to collude with a dishonest witness to make a false statement of facts, which the witness would not swear to, in order that, after the witness shall have testified the truth, the false unsworn statement to the contrary may be shown. There are so many contingencies in the way of such barely possible results that the remote possibility is not of much weight, as against the plain practical considerations opposed to it.

While, perhaps, the weight of authority is in favor of excluding such evidence, we feel that, in holding it to be within the discretion of the Court to receive it, we are justified, not only by reason, but by a sufficient array of authority. In the English Courts both views have been sanctioned. A strong presentation of the rule allowing such proof was made by Lord Chief Justice DENMAN in Wright *v.* Beckett, 1 Moody & R. 414. This view is preferred in Starkie, Evidence (Sharswood's Ed.) 245; 2 Phillips Evidence, pp. 985–995; 1 Greenleaf, Evidence, 444; Cowden *v.* Reynolds, 12 Serg. & R. 281, 283; Bank of the Northern Liberties *v.* Davis, 6 Watts & S. 285; Smith *v.* Briscoe, 65 Md. 561, (5 Atl. Rep. 334); Campbell *v.* State, 23 Ala. 44, 76; Hemingway *v.* Garth, 51 Ala. 530; Moore *v.* Chicago, St. L. & N. O. Railroad Co., 59 Miss. 243; and see Johnson *v.* Leggett, 28 Kan. 590, 606. See, also, a discussion of this subject in 11 Am. Law Rev. 261. It may be added, as indicating what

it has been considered the rule ought to be, that in England and in several of our States statutes have been enacted allowing such proof to be made. Our conclusion on this point is that the Court did not err in receiving the evidence. . . . Order affirmed.

Gilfillan, C. J. — On the point of the admissibility of the evidence of contradictory statements made by the witness Bryant, I dissent.

233. Statutes. *England.* (1854, St. 17 & 18 Vict. c. 125 § 22). [1] A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; [2] but he may, in case the witness shall in the opinion of the judge prove adverse, [3] contradict him by other evidence, [4] or by leave of the judge prove that he has made at other times a statement inconsistent with his present testimony.

California (C. C. P. 1872, § 2049). The party producing a witness . . . may also show that he has made at other times statements inconsistent with his present testimony.

234. STATE *v.* SLACK

Supreme Court of Vermont. 1897

69 *Vt.* 486; 38 *Atl.* 311

Indictment for assault with intent to rob. Plea, not guilty. Trial by jury at the December Term, 1896, Windsor County. Munson, J., presiding. Verdict, guilty. The respondents excepted.

In the cross-examination of Orson Sargent, he was asked in behalf of the State whether he had not been convicted in the United States Circuit Court for selling liquor without a government license, and replied that he had not, that the matter had been settled up in some other way, but exactly how he did not remember.

G. A. Davis and *D. A. Pingree,* for the respondent Slack; *W. E. Johnson* and *Wm. Batchelder,* for the respondent Clough. . . . The general rule precluding parties from impeaching their own witnesses applies to this State. . . .

J. G. Harvey, State's Attorney, and *W. W. Stickney,* for the State.

Rowell, J. — The State, in its opening, called Orson Sargent as a witness, to prove flight. The prisoners called him in defense, to prove innocence. On cross-examination, to impeach him, the State was allowed to ask him if he was not convicted in the United States Circuit Court for selling liquor without a license, and he said he was not, that he settled it, but could not tell just how it was done. The State was also allowed, for the same purpose, to introduce a copy of the record of his conviction in 1883 for selling liquor contrary to law, and to prove by him that he was the person convicted. Before said copy of record was offered and Sargent inquired of concerning it, the prisoners, on cross-examination of the State's witness Armstrong, had shown by him without objection

that he had been convicted at that term of selling liquor contrary to law. . . .

1. The principal question is, whether the prisoners can object to the State's impeaching Sargent in the same way, provided it could impeach him at all. They say that the State could not impeach him at all, save as allowed by statute, because it first called him, wherefore he was its witness throughout. This is the general rule; but the question is, whether it is applicable to the State in a criminal case.

As reason is the soul of the law, the maxim is that when the reason of a law ceases the law itself ceases. Or, as WILLES, C. J., puts it in Davies *v.* Powell, referred to in argument in Morgan *v.* The Earl of Abergaveny, 8 C. B. 786, "when the nature of things changes, the rules of law must change too." Now the reason of the rule that a party cannot impeach his own witness is, that by calling him in proof of his case, he represents him to be worthy of belief, and that to attack his general character for truth after that, would be not only bad faith to the Court, but, in the language of BULLER, J., [*ante*, No. 230] would enable the party to destroy him if he spoke against him, and to make him a good witness if he spoke for him. But cases of what are called instrumental witnesses do not come within that rule, certainly not fully if at all; for there the reason of the law fails, as the law compels the party to call such witness, and therefore they are the witnesses of the law rather than of the party, and it would be absurd to say that the party accredits a witness whom the law compels him to call. . . .

In Thornton's Executors *v.* Thornton's Heirs, 39 Vt. 122, where it was held that a party calling a subscribing witness to prove a will could impeach him by showing prior contradictory statements, as the law compelled the party to call him, the Court said that many, but not all, of the reasons for permitting that kind of impeachment applied to an impeachment of a general nature. . . . We think no such distinction can logically be made, for the same reason that makes the rule inapplicable to one mode of impeachment makes it equally inapplicable to all modes, as the different modes are but different ways of doing the same thing, namely, discrediting the witness, and they are equal in degree and alike in essence. The reason of the rule does not fail in part and stand in part — fail as to one mode of impeachment and stand as to another mode — it is indivisible, and stands or falls as a whole. . . .

As the public, in whose interest crimes are prosecuted, has as much interest that the innocent should be acquitted as that the guilty should be convicted, we hold it to be the duty of the State to produce and use all witnesses within reach of process, of whatever character, whose testimony will shed light upon the transaction under investigation and aid the jury in arriving at the truth, whether it makes for or against the accused, and that therefore the State is not to be prejudiced by the character of the witnesses it calls. State *v.* Magoon, 50 Vt. 333; State *v.* Harrison, 66 Vt. 523. This doctrine, carried to its logical result,

exempts the State in criminal cases from the operation of the rule in question, and places it in the position of a party calling an instrumental witness, and for the same reason.

We are aware that in many, if not most, jurisdictions the rule is applied to the State in criminal cases; but it is upon the ground that the State stands like any other party, and accredits a witness by calling him; from which we infer that they do not hold, as we do, that the State is bound to call all witnesses, but is at liberty to choose and to call whomsoever it will.

We are the more satisfied with the conclusion here reached, because we think the State ought not to be hampered by such a rule. Prosecutions are carried on by the government, through the agency of sworn officers elected for that purpose, who have no private interests to serve nor petty spites to gratify, but whose sole and only duty is, to faithfully execute their trust, and do equal right and justice to the State and to the accused. The course of public justice, thus directed, ought not to be obstructed by a rule without a reason. The ascertainment of the truth, which is the object of the prosecution, is of more consequence than the instrumentalities by which it is sought to be ascertained; and when an instrumentality becomes an obstruction to the course of justice, the State should be at liberty to remove it, and by trampling upon it if necessary.

2. But the prisoners further say that if the State was at liberty to impeach the witness, it could not do it by showing that he had been convicted of selling liquor, for that is not an infamous crime. But whether an infamous crime or not, the prisoners, against objection, were allowed to impeach the State's witness Armstrong in the same way, and therefore they cannot be heard to say that the State could not afterwards impeach in that way. This is a just application of the maxim that he is not to be heard who alleges things contradictory to each other; or, as Lord KENYON once said, a man cannot be permitted to "blow hot and cold" concerning the same transaction. . . .

Judgment that there is no error in the proceedings of the County Court.

235. STURGIS *v.* STATE

COURT OF CRIMINAL APPEALS OF OKLAHOMA. 1909

2 *Okl. Cr.* 362; 102 *Pac.* 57

APPEAL from Tulsa County Court; N. J. GUBSER, Judge.

Norman Sturgis was convicted under an information charging the selling of intoxicating liquor and the conveying of intoxicating liquor from one place to another in the state, and appeals. Reversed and remanded.

On the 31st of December, 1907, a prosecution was instituted against

Norman Sturgis, Arthur Sturgis, and Walter Sturgis, by information, charging them with the commission of two separate and distinct offenses, viz.: First. Selling intoxicating liquors to certain parties whose names were unknown. Second. With transporting and conveying intoxicating liquors from one place in the state to another place in the state, but not designating such places. The case being called for trial, the defendants assailed the information upon the ground of duplicity, in that it attempted to charge two offenses based upon separate and distinct acts of the defendants. This motion was, by the Court, overruled, and the defendants then obtained a severance. Walter Steen was placed upon trial first. Norman Sturgis, who will hereinafter be called the defendant, was placed upon trial and found guilty by the jury. A motion for a new trial was filed and overruled, and the case is regularly before us on appeal.

Sleeper & Davidson, for appellant.

Fred S. Caldwell, for appellee.

FURMAN, P. J. (after stating the facts as above). . . .

Fourth. The twelfth assignment of error presents two questions as to the admissibility of evidence: . . . Second. As to the circumstances and conditions under which a party can contradict or impeach his own witness. The proper presentation of these questions requires a statement of the evidence admitted upon the trial.

John McKinley, on behalf of the state, testified that on the 31st day of December, 1907, he went to the iron-roofed building mentioned, for the purpose of securing work there; that Joe Holmes had told him that if he would come around there on that day he thought he could get a job; that he didn't find Joe Holmes there at that time, but some one in the building, whom he did not know, handed him a sack and asked him to go across the wagon yard to the "old stone jail" and to go into that building, and out of an empty barrel which he would find there get six bottles of beer, put them in the sack, and bring them back to him; that he took the sack and went across to the "old stone jail," and, by means of a key which had been given him by the man who sent him, entered it; that he found the barrel referred to, and took one bottle of beer out of it and put it in the sack, and was in the act of passing a second bottle from the barrel into the sack when he was arrested by Deputy Gilchrist; that it was his intention, if he had not been disturbed by the officer, to get the six bottles of beer, and take them back to the man who had sent him. Defendant objected to this testimony because incompetent, irrelevant, and immaterial, but the Court overruled his objection, to which he excepted. The witness also testified on direct examination that he did not tell Deputy Gilchrist when he was arrested, or at any other time, that he was working for Sturgis and Steen, or that he was getting one dollar per day from them for washing and repacking beer bottles, or that in substance; that he did not tell him that he had been sent for the beer by defendant, or either of the other defendants, or any one else whom he knew. He also testified that on the 31st day of December, 1907, he was

not in the employment of defendant or either of the other defendants, and did not even know the defendant or Arthur Sturgis. . . .

The county attorney, M. A. Breckinridge, then introduced himself as a witness on behalf of the state to contradict and impeach the witness McKinley, alleging that McKinley had taken him by surprise in testifying that he was not in the employment of defendant and Arthur Sturgis and Walt Steen on December 31, 1907, and did not wash empty beer bottles or repack them in barrels for them, and did not get a dollar a day for his services, and testified that on December 31, 1907, in his office, the witness McKinley stated to him, in the presence of Lon Lewis and A. C. Gilchrist and others, that on December 31, 1907, he was working for Sturgis and Steen and got a dollar a day from them for his services, which were to wash empty beer bottles and repack them in barrels. Defendant objected to this testimony, because incompetent, irrelevant, and immaterial, and tending to impeach McKinley, but the Court overruled his objection, to which he excepted.

By leave of Court, counsel for defendant then examined the witness touching his being taken by surprise, and he stated under this examination that a few days before, on the trial of Walt Steen on this same information, McKinley had testified and had stated on that trial that he was not in the employment of defendant or Arthur Sturgis or Walt Steen on December 31, 1907, and did not wash empty beer bottles or repack them in barrels for them or either of them, and did not get a dollar a day for his services; and that he had denied on that trial that he made such statements to the county attorney in his office on December 31, 1907, in the presence of Lon Lewis or A. C. Gilchrist, or any one else.

The defendant then moved the Court to exclude the testimony of this witness from the jury, and instruct them not to consider it for any purpose; but the Court overruled this motion, and refused to so exclude said testimony to so instruct the jury, to which ruling defendant excepted.

The county attorney then introduced Lon Lewis and A. C. Gilchrist to contradict and impeach McKinley by testifying that McKinley had said in their presence in the county attorney's office on December 31, 1907, that on that day he was in the employment of Sturgis and Steen, and got a dollar a day for his services washing empty beer bottles and repacking them in barrels. They each so testified over the objection of defendant, because incompetent, irrelevant, and immaterial, who saved his exceptions to the Court's ruling thereon.

Was the introduction of this impeaching testimony proper? Originally the law was that, when a party voluntarily introduced a witness in proof of his case, he thereby represented him as worthy of belief. The parties were presumed to know the character of the witnesses they produced and the facts to which they would testify, and, having thus presented them, the law would not permit the party afterwards to impeach them. All of the earlier decisions are to this effect, and some later

authorities still adhere to this rule. But law, while conservative, is a progressive science, and keeps even step with the progress of mental development, and adapts itself to the changing conditions among men in their relations to each other, and the requirements of justice owing to these changes. If it were not for this, the world would be ruled by the dead and not by the living. The former rule is that of China; the latter rule is that of America.

So the ancient rule prohibiting a party from impeaching his own witness has been modified in those particulars wherein experience and reason have shown it to be unjust. A party cannot now impeach his own witness by proving the bad character of such witness for truth, because this is something of which the party can and should inform himself before placing a witness upon the stand. But suppose a witness makes a statement to a party which would be highly beneficial to such party, and the party, thus having reasonable ground to believe that the testimony of the witness would be in substance the same as the statement made, in good faith places the witness upon the stand, and the witness, instead of swearing to the statement previously made, testifies to matters which are injurious to the party calling him, it would be a manifest perversion of justice to say that the party so surprised, deceived, and imposed upon is bound by such testimony. Under these conditions the great weight of modern authority is that a party, upon grounds of surprise at and injury from the testimony so given may, in the discretion of the trial Court, offer in evidence previous statements of such witness which contradict the injurious portion of his testimony. This rule is necessary for the protection of litigants against the contrivance of artful and designing witnesses. If a witness had deceived the party calling him (to the injury of such party), it would be manifestly unjust to hold the party to be bound by such deception and to prevent him from relieving himself of such injury. This is the philosophy of the law, upon which parties are permitted to offer contradictory statements made by their witnesses, for the purpose of impeaching them.

But this rule is subject to certain conditions: First. The party must be surprised at the testimony of the witness sought to be so impeached, and this surprise must exist as a matter of fact; that is, it must be based upon such facts as would give the party reasonable ground to believe that the witness would testify favorably to such party. If the facts were such that the party had no reasonable ground to believe, when he placed such witness on the stand, that the witness would so testify, then no surprise could exist at the failure of the witness to give such testimony, and statements previously made by the witness, contradicting the testimony given, would not be admissible. Second. It is not enough that the witness failed to testify favorably to the party calling him, in order that previous contradictory statements made by such witness may be introduced in evidence, but the witness must have testified to facts injurious to the party calling him before he can be so impeached. In other words,

such contradictory statements are permissible alone for the purpose of impeaching the witness, and are not original substantive evidence against the adverse party. Third. When such contradictory statements are admitted in evidence, under proper conditions, the Court should clearly inform the jury that such contradictory statements can only be considered by them for the purpose of affecting the credibility of the witness, and that it is for the jury alone to determine whether they do have this effect or not, and that such contradictory statements are in no case to be considered as original evidence against the adverse party.

In the case at bar there is no testimony in the record that the county attorney had reasonable ground for surprise at the testimony of the witness McKinley. This witness had testified on the trial of Steen, only a few days prior to this trial, substantially as he testified in this case. This put the county attorney upon notice of what he would swear. With a full knowledge of this fact, the county attorney placed McKinley on the stand as a witness for the State. He is therefore not in a position to claim surprise. He made no showing that anything had occurred since the Steen trial which gave him the least right to expect that the testimony of McKinley would in this case be different from the testimony which he gave in the Steen trial. The testimony of the county attorney entirely shuts out the idea of surprise. Again, when McKinley was examined in chief by the county attorney, and before the effort to impeach him had been made, the witness had not stated a single fact favorable to the defendant or anything inconsistent with the testimony of the other witnesses for the State. His evidence was negative, and he only failed to swear what the county attorney desired him to testify to. Under these conditions, the statements made by the witness out of court, injurious to defendant, were not admissible in evidence, because he had not testified to a single fact which injured the State's case.

The defendant requested the Court to instruct the jury that they would consider said testimony for no other purpose than that of impeaching or contradicting, if it in any wise did impeach or contradict, the witness John McKinley. The Court overruled this motion and refused to instruct the jury. This was error. If this testimony was competent at all, it was competent for no other purpose than that of impeaching and contradicting McKinley, and the Court should have so instructed the jury. Who can say but that the jury did not consider this testimony as original substantive evidence, showing that McKinley and the defendant were connected or acting together in committing the acts charged in the information? They would be warranted in so considering it after the Court had refused in their presence to limit the scope to that of impeaching and contradicting McKinley.

The restrictions, above stated, upon the right of a party to impeach his own witness by showing contradictory statements made by such witness, are supported by the soundest reasons, and are based upon the highest considerations of public policy. If the State has the right, upon

the plea of impeaching its own witness, to introduce statements made by such witness contradictory of his testimony given in Court, and thus get hearsay before the jury, as original substantive evidence against a defendant, then in all fairness and justice we would be compelled to hold that the defendant had the same right. The far-reaching and ruinous consequences of such a rule are manifest. A defendant could place a witness upon the stand and, after asking him a few general questions, could then ask the witness if he had not made a statement (giving the statement in full) to the defendant, and other persons, which would constitute a complete defense. Upon the denial of the witness that he had made such a statement, the defendant could then place the parties named upon the witness stand and prove that the first witness had made such statements. If a defendant could do as was permitted to be done by the State in this case, it would be impossible to secure a single conviction, and no one would be subject to the pains and penalties of perjury. There are already too many loopholes for the escape of the guilty. This court will not add to or enlarge these avenues of escape; on the contrary, it is our purpose to close them up as far as possible.

For the reasons hereinbefore given, the Court erred in permitting the State to introduce evidence to impeach its own witness McKinley, and erred again in refusing to give the instruction requested by the defendant with reference to such evidence. We are supported in this view by many eminent authorities and well-reasoned cases. . . .

Reversed and remanded.

236. JOHNSTON *v.* MARRIAGE

SUPREME COURT OF KANSAS. 1906

74 *Kan.* 208; 86 *Pac.* 461

ERROR from District Court, Kiowa County; E. H. MADISON, Judge. Action by P. A. Johnston against John Marriage, Jr. Judgment for defendant, and plaintiff brings error. Affirmed.

P. A. Johnston suffered severe loss from a fire which apparently originated upon or near the premises of John Marriage and spread over a large tract of country. He sued Marriage to recover compensation, alleging that his injury was occasioned by Marriage's having "negligently and carelessly set fire to the dry grass of the prairie" while engaged in charring posts. A jury trial was had, which resulted in a verdict and judgment for the defendant. The plaintiff prosecutes error. . . .

J. W. Davis, for plaintiff in error. *L. M. Day*, for defendant in error.

MASON, J. (after stating the case as above). The only remaining specification of error requiring discussion relates to an attempt made by the plaintiff to impeach one T. M. Ellsworth, a witness called by the defendant, by showing that he had made a statement out of Court

inconsistent with his testimony. This witness was originally called by the plaintiff. He was an employee of the defendant, both when the fire occurred, and at the time of the trial. There is nothing in the record, however, to indicate that this circumstance affected either his manner upon the stand or what he there said, or that the plaintiff was misled by him. He told at the instance of the plaintiff what he knew of the occurrences on the day of the fire, but showed no personal knowledge as to how it originated. Later he was called by the defendant, and went over much the same ground, giving additional particulars as to physical conditions observed by him before, during, and after the fire. On cross-examination he was asked if he had not, at a time and place specified, told two persons that Marriage had been charring posts, and had let the fire get out. He answered that he had not. Upon the rebuttal the plaintiff produced these two persons, and offered to show by them that Ellsworth had made such a statement to them. An objection to the offer was made by the defendant, and the Court sustained the objection. This ruling is the one involved in the specification of error now under consideration. Manifestly the evidence offered was incompetent, except as it might be deemed admissible for the purpose of impairing the credibility of Ellsworth; that is, of impeaching him. The question is therefore presented whether a litigant who first uses a witness may afterwards attempt to impeach him if in the meantime he has been called upon to testify in behalf of the adverse party.

This question is considered in Wigmore on Evidence, where the whole subject of the impeachment of witnesses is discussed historically, with the painstaking thoroughness, and in the light of reason, with the discriminating insight characteristic with that work. The conclusion is there reached (volume 2, § 913) that the usual rule which forbids a party to impeach his own witness operates to prevent an attempted impeachment by one who has first used a witness, notwithstanding that the opposite party afterwards calls him. The rule referred to is enforced in this State, where there are no special circumstances which would make its application work an injustice. State *v.* Keefe, 54 Kan. 197; 38 Pac. 302. No such circumstances are here shown. We think that for the purpose of this rule Ellsworth was to be deemed the plaintiff's witness, and that it was not error for the Court to refuse to admit the impeaching evidence. The judgment is affirmed. All the Justices concurring.

237. KOESTER *v.* ROCHESTER CANDY WORKS

COURT OF APPEALS OF NEW YORK. 1909

194 *N. Y.* 92; 87 *N. E.* 77

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 16, 1907,

affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. . . . The action is brought, servant against master, to recover damages for personal injuries caused by the defendant's negligence. The complaint charged the defendant, which conducted a candy factory, with employing the plaintiff, who at the time was an infant under the age of fourteen years, in the operation of dangerous machinery in violation of § 70 of the Labor Law (L. 1897, ch. 415), and that the machinery was not protected by proper safeguards as required by § 81 of that law. The answer put in issue the extent of the plaintiff's injuries and the other allegations of the complaint, except plaintiff's employment and the character of the business carried on by the defendant. The plaintiff recovered a verdict at the Trial Term, which has been affirmed by the Appellate Division by a divided Court.

On the trial, evidence was given by the plaintiff's parents as to the date of his birth, which established that at the time of the accident he was a few months less than fourteen years of age. The defendant gave evidence to the effect that when the plaintiff sought employment he represented that he was more than sixteen years old. . . .

On the trial the plaintiff did not testify in his own behalf as to his age. The question, however, was asked him by the defendant on cross-examination. His testimony was in accord with that given by his parents. For the defense it was sought to prove various declarations made by the plaintiff as to his age. That made to the defendant at the time of his employment was admitted, but those made to third parties at other times were excluded. The ruling is sought to be justified . . . on the further ground that the defendant by examining the plaintiff as to his age made him its own witness and could not impeach him.

P. M. French, for appellant. . . . The trial court erred in rejecting evidence of admissions and other representations of plaintiff as to his age. . . .

George H. Harris, for respondent. . . . The trial Court committed no error in rejecting evidence of other alleged representations of plaintiff as to his age. . . .

CULLEN, Ch. J. (after stating the facts above). The limitations of the rule which forbids a party to impeach his own witness (assuming the plaintiff to have been such, which we do not decide) are well settled. He may not thereafter introduce witnesses to prove that his general reputation is bad and that he is unworthy of credit; nor can he prove statements made out of Court in contradiction of his testimony on the stand, and he cannot contradict him as to collateral facts. But he may prove by competent testimony that the facts material to the issue are the exact reverse of those testified to by his witness, and may ask the jury to disbelieve his statement, and credit that of the later witnesses.

When, however, it is said that one cannot impeach his own witness by contradictory statements made out of Court, this statement must be limited to the case of a witness who is not the adverse party. The

effect of such contradictory statements in the case of other witnesses is merely to impeach the witness, because they are mere hearsay and are not proof of the fact stated. The case of an adverse party is the exact reverse. In a civil action the admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever or to whomsoever made, excepting, of course, confidential communications the disclosure of which is prohibited by statute, such as from client to counsel, from patient to physician, from penitent to clergyman or priest, and the like.

The cases relied upon by the learned counsel for the plaintiff as asserting a contrary doctrine are not in point. . . . In Coulter *v.* American M. U. Ex. Co. (56 N. Y. 585) the witness whom it was sought to contradict was not the adverse party. The situation was the same in Fall Brook Coal Co. *v.* Hewson (158 N. Y. 150). The misconception as to the rule arises from the failure to distinguish between declarations and the admissions of a party, which latter, though undoubtedly declarations, are also very much more. Declarations, as a general rule, are mere hearsay, and, therefore, incompetent, while admissions of a party are original evidence against the party making them, and are as a rule sufficient to establish a cause of action or defense without further evidence of the fact.

The judgment should be reversed and a new trial granted, with costs to abide the event.

Edward T. Bartlett, Haight, Vann, Hiscock and Chase, JJ., concur; Werner, J., not sitting. Judgment reversed, etc.

238. John H. Wigmore. *A Treatise on the System of Evidence, etc.* (1905. Vol. II, § 899). The truth is that many Courts affecting to find reasons for this rule against impeaching one's own witness have sought too much in the realm of objective arguments. They have thought of visiting punishment on the head of offending parties, or of leaving them to suffer the consequences of their mistakes. This is not a high-minded nor a practical attitude for a tribunal seeking truth, nor is it in harmony with the policy of other rules of Evidence. This whole attitude must be abandoned. What we are to ask is, Is there anything in the process of impeaching one's own witness which tends to restrict or impair the sources of evidence, to make competent evidence less plentiful or less trustworthy? We should ask, not what the conduct of the party is, but what the effect is upon the witness. Taking this subjective point of view, we find that there is something of a reason — a reason easy to grasp, founded on reality, not on cant, legitimate in its policy, orthodox in its history, though narrow in its scope, — the reason that *the party ought not to have the means to coerce his witnesses.* It was laid down by Mr. Justice Buller, a century and a half ago, in terms which have been frequently quoted, — more often quoted than acknowledged (as Serjeant Evans once said of his own writings).

The true foundation of policy (so far as there is any) is thus manifest. If it were permissible, and therefore common, to impeach the character of one's witness whose testimony had been disappointing, no witness would care to risk the abuse of his character which might then be launched at him by the disappointed

party. This fear of the possible consequences would operate subjectively to prevent a repentant witness from recanting a previously falsified story, and would more or less affect every witness who knew that the party calling him expected him to tell a particular story. Of this sort of abuse from the opposite side the witness is even now sufficiently afraid; were he liable to it from either side indiscriminately, the terrors of the witness-box would be doubled. Speculative as this danger may be, it furnishes the only shred of reason on which the rule may be supported. Moreover, it is the only reason which allows the details of the rule to be worked out consistently. What is this fear which we desire to save the witness? It must be a fear that would operate upon the ordinary witness honestly inclined. The fear that his character will be abused, — this is certainly a tangible and sufficient consideration. On the other hand, the fear that he will be shown to be affected by bias or interest, — this involves nothing disgraceful or derogatory to character, and is hardly worth considering. Thus this reason tests efficiently the various details of the rule.

But, after all, it is a reason of trifling practical weight. It cannot appreciably affect an honest and reputable witness. The only person whom it could really concern is the disreputable and shifty witness; and what good reason is there why he should not be exposed? That he would adhere to false testimony solely for fear of exposure by the party calling him is unlikely; because his reputation would in that case equally be used against him by the opponent. It therefore becomes merely a question which of the two parties may properly expose him. Is there any reason of moral fairness which forbids this to the party calling him? The rational answer must be in the negative.

There is no substantial reason for preserving this rule — the remnant of a primitive notion. Except the Opinion rule, no other rule of evidence does so much harm and so little good. It ought to be completely discarded.

Topic 3. Rules Limiting Corroboration of Witnesses

240. BATE *v.* HILL

Nisi Prius. 1823

1 *C. & P.* 100

This was an action for seducing the plaintiff's daughter. . . .

The whole of the cross-examination went to show, that the plaintiff's daughter had conducted herself immodestly towards the defendant before the seduction, and that she kept improper company. Several witnesses were then called, on the part of the plaintiff, to prove the general good character, and modest deportment of the plaintiff's daughter, and the general respectability of the family. The defendant called no witnesses.

Verdict for the plaintiff, damages, 50£.

Reporter's Note. This controverts the case of Dodd *v.* Norris, 3 Camp. N. P. C. 519, where Lord Ellenborough ruled, that witnesses to show the general good character of the daughter, could only be called, if her character had been attacked by witnesses called for the defendant,

to prove her general bad character; but if her character was only attacked in her cross-examination, the plaintiff's counsel were only entitled to set it right by her re-examination, and not to call witnesses to give her a good character; and in that case, her character having been attacked only in her cross-examination, Lord ELLENBOROUGH refused to allow witnesses to be called by the plaintiff's counsel in favor of her general character. The course allowed by Mr. Justice PARK, in the present case, is much more conducive to the attainment of justice; for it can signify very little, whether the daughter's character is attacked by witnesses, or by cross-examination; and if it is right in one case, where it is attacked, to give further evidence, so it must be in the other. Lord ELLENBOROUGH says, that it is to be set right in re-examination. This looks very well in theory. Those used to Courts of Justice well know, that if the character of a party seduced is attacked in her cross-examination, though the witness may deny the things insinuated, a jury very often believe, that, though denied, there is some foundation for the insinuation, if witnesses are not called to convince them of the contrary. It is a little too much, to allow a defendant to blast the character of a person he has seduced by insinuations, and then not to allow her to clear her character by the best means in her power.

241. TEDENS *v.* SCHUMERS

SUPREME COURT OF ILLINOIS. 1884

112 *Ill.* 263

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Circuit Court of Cook County; the Hon. JOHN G. ROGERS, Judge, presiding.

Mr. *Edward F. Comstock*, and Mr. *J. Edwards Fay*, for the appellants. As a general rule it is not competent to give evidence of the general character of a witness for truth and veracity, unless an attempt has been made to impeach him. A mere contradiction in the testimony of witnesses does not necessarily involve their moral character, and does not, alone, authorize the admission of evidence in support of their general reputation for truth. . . .

Mr. *W. C. Minard*, and Mr. *W. H. Skelly*, for the appellee. After the defendants had assailed the character of the plaintiff by an effort to prove that he was a thief, and attempted to impeach him by proof that he had made contradictory statements out of Court to his testimony, the admission of evidence of his good character was proper. Craig *v.* Rohrer, 63 Ill. 335. . . .

Mr. Justice WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by Schumers, in the Circuit Court of Cook County, against J. H. Tedens and J. Thormahlm. There

was filed the general issue, under which a trial was had, resulting in a verdict and judgment against defendants for $1379. . . .

It appears from the evidence that appellants owned a general store, which was kept by them in Lemont, in Cook County. Appellee, after being in their employment for thirteen or fourteen years, commenced business on his own account; but, it proving unsuccessful, he soon abandoned it, and returned to the employment of appellants, and he so remained until on the 1st of June, 1879, when, on a settlement, they were found to be indebted to him in the sum of $2100, to evidence which they drew and gave to him a due bill, drawing eight per cent. interest. Appellee continued in their employment until in March, 1880, when defendants claimed to have discovered that appellee was secretly removing goods from the store without either paying for or charging them to himself. They also claimed that he confessed that he had so acted for near four years past. They claimed the amount so taken aggregated $4000, and, after several interviews, they claim that it was arranged that to satisfy their demand he surrendered the due bill, and they cancelled it, and have since held it. Appellee insists that he did not surrender the due bill as a satisfaction of such claim on the part of appellants, but that it was agreed that they should hold it until they could examine and ascertain the amount he owed them for goods thus taken, credit the amount on the due bill, and pay him the balance, if any, which they have never done.

On the trial, appellee testified to his theory of the case. Appellants, on the stand, contradicted him, and testified to their version of the matter. In some portions of their evidence they are corroborated by other witnesses. Appellee, to support his testimony, called a number of witnesses to prove his general character for truth and veracity, to which appellants objected, but the Court admitted the evidence, and they excepted, and urge its admission as error.

Appellee claims this evidence was admissible, on the ground that his character for truth and veracity was attacked by being contradicted by other witnesses. This is, we think, a misconception of the rule. As we understand the rules of evidence, a witness cannot call witnesses to support his general character for truth and veracity until it is assailed. Mere contradictions, or different versions by witnesses, do not justify the application of the rule that he may call witnesses to support his character for truth. When witnesses are called who say his general character is bad, then he may call witnesses in support of his general character. Before he can do so his general character must be attacked. If the practice sanctioned the calling of witnesses to prove general character whenever a witness is contradicted, it would render trials interminable. The greater portion of the time of Courts would be liable to be engaged in the attack and support of the characters of witnesses. If permitted, each of the contradicting witnesses would have the same right, and not only so, but all of the supporting witnesses on each side contradicting each other would be entitled to the same

privilege. It is thus seen that the rule must be limited to cases where witnesses are called to impeach the general character of a witness; otherwise, instead of reaching truth by the verdict, it would tend to stifle it under a large number of side issues, calculated to obscure and not to elucidate them. It may be that some Courts have made exceptions to the rule, but we are not inclined to adopt them as the rule. Many cases referred to were where the witness was charged with crime by other witnesses, when it was held he might call witnesses to support his character for honesty. . . .

For the errors indicated, the judgment of the Appellate Court is reversed, and the cause remanded. Judgment reversed.

Scohlfield, Ch. J., and Dickey and Mulkey, JJ., dissenting.

242. GERTZ *v.* FITCHBURG R. CO.

Supreme Judicial Court of Massachusetts. 1884

137 *Mass.* 77

Tort, for personal injuries received by the plaintiff while in the defendant's employ. At the trial in the Superior Court, before Aldrich, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions to the exclusion of certain evidence, which appears in the opinion.

J. J. Myers, for the plaintiff. *C. A. Welch*, for the defendant.

Holmes, J. — In this case, the plaintiff having testified as a witness, the defendant put in evidence the record of his conviction in 1876, in the United States District Court, of the crime of falsely personating a United States revenue officer. The plaintiff then offered evidence of his character and present reputation for veracity, which was excluded, subject to his exception.

We think that the evidence of his reputation for truth should have been admitted, and that the exception must be sustained. There is a clear distinction between this case and those in which such evidence has been held inadmissible, for instance, to rebut evidence of contradictory statements; Russell *v.* Coffin, 8 Pick. 143; Brown *v.* Mooers, 6 Gray 451; or where the witness is directly contradicted as to the principal fact by other witnesses. Atwood *v.* Dearborn, 1 Allen 483.

In such cases, it is true that the result sought to be reached is the same as in the present, — to induce the jury to disbelieve the witness. But the mode of reaching the result is different. For, while contradiction or proof of contradictory statements may very well have the incidental effect of impeaching the character for truth of the contradicted witness in the minds of the jury, the proof is not directed to that point. The purpose and only direct effect of the evidence are to show that the witness is not be to believed in this instance. But the reason why he is

not to be believed is left untouched. That may be found in forgetfulness on the part of the witness, or in his having been deceived, or in any other possible cause. The disbelief sought to be produced is perfectly consistent with an admission of his general good character for truth, as well as for the other virtues; and until the character of a witness is assailed, it cannot be fortified by evidence.

On the other hand, when it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit. 1 Gilbert, Evidence (6th ed.) 126. The conviction in the United States District Court was for a felony punishable with imprisonment. . . . And when a conviction is admitted for that purpose, it always may be rebutted by evidence of good character for truth. Commonwealth *v.* Green, ubi supra. Russell *v.* Coffin, 8 Pick. 143, 154. Rex *v.* Clarke, 2 Stark. 241. Webb *v.* State, 29 Ohio St. 351.

It is true that a doubt is thrown upon this doctrine in Harrington *v.* Lincoln, 4 Gray 563, 568; but that case was decided on the ground that the cross-examination which showed that the witness had been charged with a crime also showed that he had been acquitted, and cannot be regarded as an authority against our decision, whether the "ratio decidendi" adopted be reconcilable with later cases or not. Commonwealth *v.* Ingraham, 7 Gray 46. . . . Whether any different rule would apply when the fact is only brought out on cross-examination we need not consider.

The exception to the exclusion of evidence that the witness was innocent of the offence of which he was convicted, and explaining why he was convicted, is not much pressed, and is overruled. Commonwealth *v.* Gallagher, 126 Mass. 54. Exceptions sustained.

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243. Knox's and Lane's Trial. (1679. Howell's State Trials, VII, 763, 787). [The defendants were charged with libelling Messrs. Oates and Bedlow, who had been witnesses for the Crown in the Popish Plot trial.]

Recorder. — Call Henry Wiggins and his mother. (Who were both sworn.)

Att. Gen. — Come on, Mr. Wiggins, what do you know of any endeavors of Knox or Lane, or any of these persons, to take off or scandalize Mr. Oates's or Mr. Bedlow's testimony?

L. C. J. — What is this man's name?

Att. Gen. — Henry Wiggins.

Wiggins. — About the latter end of February last, Mr. Knox and I met at Charing Cross, and we went in and drank together; and he proposed several things to me; first he desired that I would get for him a copy of the papers my master had.

L. C. J. — Who is your master?

Wiggins. — Mr. Bedlow. And especially what concerned my Lord Treasurer; as also to take a journal of all my master's actions; and the names of the persons that came to him. . . . And he said, moreover, my lord, Mr. Oates and Mr. Bedlow were two great rogues; that the king believed not a word they said; and as soon as he had heard all they could say, they should be hanged. . . .

Mr. *Williams.* — Call Mr. Palmer. (Who was sworn.) We call him to corroborate what that young man Wiggins hath said.

Palmer. — What he hath told here, he discovered first to me, and I discovered to his master, that Mr. Knox would have had him to take a journal of his master's actions, and to give it him every day. My lord, I am one of the yeomen of the guard, and I waited upon Mr. Bedlow, and he desired me to help him to a clerk; and I helped him to Wiggins, this young man. He had not been there three weeks, or a very little time, when Knox came to him to tempt him; and being a stranger to his master he knew not how to discover it to him, and told me, "such a thing is offered to me, but I am a stranger to my master, and I know not how to break it to him."

L. C. J. — The use you make of this, is no more, but only to corroborate what he hath said, that he told it him while it was fresh, and that it is no new matter of his invention now.

Mr. *Recorder.* — It is very right, my lord, that is the use we make of it.

244. Chief Baron Gilbert. *Evidence.* (*Ante* 1726. fol. 68, 150). Though hearsay may not be allowed as direct evidence, yet it may be in corroboration of a witness' testimony, to show that he affirmed the same thing before on other occasions and that the witness is still consistent with himself; . . . [he then makes an exception for former sworn testimony,] for if a man be of that ill mind to swear falsely at one trial, he may well do the same on the other on the same inducements; but what a man says in discourse without premeditation or expectation of the cause in question is good evidence to support him.

245. STOLP *v.* BLAIR

Supreme Court of Illinois. 1873

68 *Ill.* 541

Appeal from the Court of Common Pleas of the city of Aurora; the Hon. Richard G. Montony, Judge presiding.

Mr. *B. F. Parks,* for the appellant. Messrs. *Wheaton, Smith & McDole,* for the appellee.

Mr. Justice Sheldon delivered the opinion of the Court:

This was an action of assumpsit, brought by Blair against Stolp, to recover $500, money alleged to have been loaned by the former to the latter. The plaintiff below recovered, and the defendant appealed. Three certain rulings of the Court below in the admission of evidence are assigned for error, as also that the verdict was contrary to the evidence.

The first ruling excepted to was, in allowing Blair to testify as to his

manner of doing business with other persons in the respect of making loans of money without taking notes. He had testified that, on the 18th of September, 1871, he lent Stolp $500 for six months, and that he took no note. The uncommonness of making a loan of money, of such an amount, for so long a time, might have afforded ground for an unfavorable inference against the truth of the statement of the witness. . . .

The other ruling excepted to was, in the admission of the following testimony of the witness Bailes: "I borrowed $10 of Blair; am not positive about date, but I think it was on Friday of that week (of Sept. 18, 1871). I spoke of giving a note for the money I borrowed, and Blair said: 'I loaned $500 to Mr. Stolp, and did not take a note; I would not think of taking a note of you for $10.'" The witness further stated, Blair said he let Henry Stolp have $500. The 18th day of September, the day of the alleged loan, was Monday. It is contended by appellee's counsel that this statement of Blair, of his loan of $500 to Stolp, was properly admitted as rebutting testimony to sustain Blair, after the defendant below had attempted to impair the credibility of Blair on cross-examination, and by testimony contradicting him.

This Court, in Gates *v.* The People, 14 Ill. 434, recognized the existence of a conflict of authority upon the question whether the former declarations of a witness, whose credibility is attacked, may be given in evidence to corroborate his testimony, but did not find it necessary in that case to determine in regard to the general rule, as that case came within one of the admitted exceptions to the rule of exclusion. We find the decided weight of authority to be, that proof of declarations made by a witness out of court, in corroboration of testimony given by him on the trial of a cause, is, as a general rule, inadmissible, even after the witness has been impeached or discredited; and we are satisfied with the correctness of the rule. The following may be referred to among the authorities sustaining such rule: 2 Phillipps, Evidence, 5th Ed. 973, marginal; 1 Starkie, Evidence, 147; 1 Greenleaf, Evidence, § 469; Robb et al. *v.* Hackley et al., 23 Wend. 50; Gibbs *v.* Tinsley, 13 Verm. 208; Ellicott *v.* Pearl, 10 Pet. 412; Conrad *v.* Griffey, 11 How. 480. . . .

In some places, as in England and New York, the rule has been adopted in the place of a prior contrary one. As recognized in Gates *v.* The People, supra, the authorities agree that the former statements of the witness may, in some instances, be introduced for the purpose of sustaining his testimony; as, where he is charged with testifying under the influence of some motive prompting him to make a false statement, it may be shown that he made similar statements at a time when the imputed motive did not exist, or when motives of interest would have induced him to make a different statement of facts. So, in contradiction of evidence tending to show that the witness' account of the transaction was a fabrication of a recent date, it may be shown that he gave a similar account before its effect and operation could be foreseen. In some cases the admission of the confirmatory statement has been confined to the sole

case of an impeachment by a contradictory statement of the witness; and again, such confirmatory statements have been held to be especially not admissible, if they were made subsequent to the contradictions proved on the other side, as in Ellicott *v.* Pearl, supra, and Conrad *v.* Griffey, supra.

In the case under consideration, there were no contradictory statements of Blair introduced in evidence. There was nothing further in the way of impeachment than that it was sought to impeach him on cross-examination, and that there was contradictory testimony to his in the case. The statement of Blair, which was admitted, does not come within any of the admitted exceptions to the general rule of inadmissibility. It was his mere declaration of the fact made not under oath, which was not evidence. We are of opinion that, on principle and authority, it was not competent, and was wrongly received. As we find this a sufficient ground for reversal, we will express no opinion upon the weight of the evidence.

The judgment is reversed and the cause remanded. Judgment reversed.

246. STATE *v.* PARISH

SUPREME COURT OF NORTH CAROLINA. 1878

79 *N. C.* 610

INDICTMENT for larceny, tried at May Term, 1878, of Wake Criminal Court, before STRONG, J.

It was in evidence that John Jones had lost two sheep between the 20th and 28th of August, 1876, and that the defendant at that time owned no sheep. One Dick Young, a witness for the State, testified that soon after Jones lost them he saw the sheep shut up in an old out-house in possession of defendant, and a short distance from his residence; that when he saw them he was in company with his son, Thomas Young, the witness next introduced, whose testimony corroborated the above, and during whose examination he was ordered by the Court to stop, but failing to do so, was ordered several times by the defendant's counsel in a loud and disrespectful manner, to stop. The State next proposed to prove by one Lewis Jones, in order to confirm the evidence of the two first witnesses, that Thomas Young, shortly after the loss of the sheep and before the defendant had been accused of the larceny or receiving, etc., had made the same statement to the witness that he had given to the jury. The defendant objected to the evidence, the Court overruled the objection, and the witness said that Young had made the same statement to him. . . .

There was a verdict of not guilty of larceny, but guilty of receiving, etc. Judgment. Appeal by the defendant.

Attorney-General, D. G. Fowle and *W. H. Pace*, for the State. Mr. *T. M. Argo*, for the defendant.

READE, J.: It can scarcely be satisfactory to any mind to say that if a witness testifies to a statement to-day under oath, it strengthens the statement to prove that he said the same thing yesterday when not under oath. If the proposition were reversed, as if one make a statement to-day not under oath, it strengthens the statement to show that he said the same yesterday under oath, it would be conceded because of the sanction of the oath. And yet it must be conceded that it is settled by the weight of authority both of text writers and decided cases, that when a witness testifies to a statement under oath, and the witness is impeached, he may be supported by proving that on a former occasion he had made the same statement, although not under oath. As first administered, the rule was sensible and useful. A witness was called and testified and impeached upon the ground of some new relation to the cause or to the parties, and then other witnesses were called to prove that he had made the same statement prior to such new relation or supposed influence, or where from lapse of time his memory was impeached it was proved that he made the same statement when the memory was fresh. All that was sensible and useful. But the idea that the mere repetition of a story gives it any force or proves its truth, is contrary to common observation and experience that a *falsehood* may be repeated as often as the *truth.* Indeed it has never been supposed by any writer or judge that the repetition had any force as substantive evidence to prove the *facts,* but only to remove an imputation upon the witness. It is like to evidence of character which only affects the *witness.*

For illustration: Thomas Young, one of the witnesses for the State, swore that he saw the stolen property in the possession of the defendant. He was not cross-examined, not contradicted, his character was not assailed, nor was he in any way impeached, but stood before the Court as any other witness upon his merits. And the State, lest his story might not be believed, proved by another witness that he had heard him tell the same story before. Now suppose Thomas Young had not been a witness at all, would it have been competent for the State to prove that he had said upon some occasion that he had seen the stolen property in the defendant's possession? Of course not. It would have been nothing but hearsay. If then it would not have been evidence to prove the fact, if Thomas Young had not been a witness, how was it evidence to prove the fact, he being a witness? It was not evidence to prove the *fact* in the one case more than in the other. He being a witness, such testimony would have been competent to remove some imputation upon him if any had been cast, and for that purpose only; and as no imputation had been cast upon him, there was no purpose for which it was competent. If he stood before the Court unimpeached, it was unnecessary and mischievous to encumber the Court and oppress the defendant with his garrulousness out of Court and when not on oath. . . .

But a more palpable error than this was committed. The former declarations of Thomas Young were admitted not only to "confirm his

own evidence" but to "confirm the evidence" of another witness, Dick Young. This is without precedent. As well might it be said that to prove one of a dozen witnesses to be of good character is to prove all to be so, or to sustain one is to sustain all. This is put upon the ground that both witnesses testified as to the same facts, and therefore, if one was to be believed, so was the other. Let us see if that is so: — A and B both swore that they were in the city of New York on the 4th of July last and witnessed the celebrations of the day which they describe. A was in fact there, but it is proved by a dozen witnesses that B was not there but was in Raleigh; would it "confirm the evidence" of B to prove that A had given the same account of the celebration before the trial as upon the trial? Clearly not. No more does the former consistent account of Thomas Young "confirm the evidence" of Dick Young. . . . Error.

Venire de novo.

247. HEWITT *v.* COREY

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1890

150 *Mass.* 445; 23 *N. E.* 223

TORT by a married woman against a deputy sheriff for the conversion of a horse. Trial in the Superior Court, before DUNBAR, J., who allowed a bill of exceptions, which appear in the opinion.

Mrs. Hewitt sued for the conversion of a horse, which the defendant had attached as property of her husband. The question was, whether the horse belonged to her or to her husband. He testified in her behalf that he was not the owner. In order to discredit his testimony, it was shown on his cross-examination that he had formerly included it in a mortgage of personal property given by him; but he added, that he did not know that the horse was included when he signed the mortgage, and that as soon as he found that it was, he went to the mortgagee and told him that the horse did not belong to him, and ought not to be embraced in the mortgage. This testimony came in without objection, and the defendant made no motion to strike it out as irresponsive or incompetent. The plaintiff, afterwards, called one of the mortgagees, by way of confirmation of her husband's explanation, who testified, that a day or two, perhaps longer, after the mortgage was signed, the husband came to him and told him the horse did not belong to him and ought not to be in the mortgage. This, according to the testimony, was before the attachment by the defendant. The defendant's exception is to this testimony by the mortgagee.

The case was argued at the bar in October, 1889, and afterwards was submitted on the briefs to all the judges except MORTON, C. J.

W. H. Fox, for the defendant. *S. M. Thomas*, for the plaintiff.

C. ALLEN, J. (after stating the case as above). It was held in

Commonwealth *v.* Wilson, 1 Gray 337, 340, that the rule excluding such testimony does not apply to a case where the other party has sought to impeach the witness on cross-examination. This decision was affirmed in Commonwealth *v.* Jenkins, 10 Gray 485, 489, 490, where it is said that such confirmatory evidence is competent where a witness is sought to be impeached by evidence tending to show that, at the time of giving his evidence, he is under a strong bias, or in such a situation as to put him under a sort of moral duress to testify in a particular way; or where an attempt is made to impeach the credit of a witness by showing that he formerly withheld or concealed the facts to which he has now testified. In the present case, the witness had done an act which, unexplained, appeared to be inconsistent with his testimony, and to show that at the time of giving the mortgage he claimed to own the horse. His explanation, if believed, went to show that he did not consciously do anything which amounted to an assertion of title in himself. His statement to the mortgagee, made before the present controversy arose, would have a legitimate tendency to confirm his explanation, and if he might himself testify to this statement, there can be no good reason why the mortgagee might not also testify to the same thing.

Clearly distinguishable from this is a case where it appears that the witness has at other times made statements inconsistent with his testimony, and where it is plain that he must have been false at one time or the other. In such case he is discredited by reason of his contradictory statements at different times, and it is no restoration of his credit to show that at still other times he has made statements in accordance with his testimony. This distinction is clearly pointed out and dwelt upon in Commonwealth *v.* Jenkins, ubi supra. In the present case, let it be assumed, by way of making a strong illustration, that the witness when signing the mortgage was the victim of imposition or fraud, whereby the horse was inserted therein without his knowledge, he being blind, or illiterate, and that he made a great outcry as soon as he discovered the fact, and took steps to correct the mistake and to punish the perpetrators; certainly this would be fair testimony for the consideration of any tribunal which might have to pass upon the facts. The testimony of the mortgagee in the present case does not differ in principle, and its competency is supported, not only by the authorities cited, but by the decisions of other courts, and by various text-books. Robb *v.* Hackley, 23 Wend. 50. Hester *v.* Commonwealth, 85 Penn. St. 139, 158. . . .

For these reasons, in the opinion of a majority of the Court, the entry must be Exceptions overruled.

Topic 4. Rules Excluding Party's Admissions and Confessions

Sub-topic A. In General

250. *Theory.*[1] (1) Just as a witness' testimony is discredited when it appears that on another occasion he has made a statement inconsistent with that testimony, so also the party is discredited when it appears that on some other occasion he has made a statement inconsistent with his present claim. This is the simple theory upon which a party's admissions— of the informal sort, which might better be termed "quasi-admissions" — are every day received in evidence on behalf of his opponent. A witness speaks in court through his testimony only, and hence his testimony forms the sole basis upon which the inconsistency of his other statement is predicated. But the party, whether he himself takes the stand or not, speaks always through his pleadings and through the testimony of his witnesses put forward to support his pleadings; hence the basis upon which may be predicated a discrediting inconsistency on his part includes the whole range of facts asserted in his pleadings and in the testimony relied on by him. Thus, in effect, and broadly, *anything said by the party may be used against him as an admission*, provided it exhibits the quality of inconsistency with the facts now asserted by him in pleading or in testimony.

(2) It follows that the subject of an admission is *not limited to facts against the party's interest at the time.* No doubt the weight of credit to be given to such statements is increased when the fact stated is against the person's interest at the time; but that circumstance has no bearing upon their admissibility. On principle, it is plain that every prior statement of the party, exhibiting an inconsistency with his present claim, tends to throw doubt upon it, whether he was at the time speaking apparently in his own favor or against his own interest. For example, a plaintiff who now claims a debt of $100 is clearly discredited by having made a demand a month ago for only $50, even if at the time the debtor conceded only $25 and thus put the demandant in the position of making an assertion purely in his own favor and for the aggrandizement of his claim. If the principle upon which admissions were received rested at all upon the disserving quality of the fact asserted at the time of assertion, all such statements would be as certainly rejected when offered by the opponent as they would be when offered by the party himself in his own favor.

251. State *v.* Willis. (1898. Connecticut. 71 Conn. 293, 41 Atl. 820). Hamersley, J. Admissions are not admitted as testimony of the declarant in respect to any facts in issue. . . . They are admitted because conduct of a party to the proceeding, in respect to the matter in dispute, whether by acts, speech, or writing, which is clearly inconsistent with the truth of his contention, is a fact relevant to the issue.

252. HEANE *v.* ROGERS

King's Bench. 1829

9 *B. & C.* 577

Trover for goods and chattels. Plea, not guilty. At the trial before Gaselee, J., at the Summer assizes for the county of Gloucester, 1828,

[1] Adapted from the present Compiler's "Treatise on Evidence" (§ 1048).

it appeared that in August, 1826, a commission of bankrupt had issued against the plaintiff, under which he was declared a bankrupt. The defendants were his assignees, and in that character had possessed themselves of and sold the goods mentioned in the declaration. The action was brought to try the validity of the commission, the plaintiff contending that he was not a trader within the meaning of the bankrupt laws. . . .

The defendants contended that even if the plaintiff was not a trader within the meaning of the bankrupt law, he was estopped by his conduct from disputing the validity of the commission. The evidence to that point was as follows: About a week before the sale of the goods, the plaintiff, the auctioneer, and the assignees, met and consulted together as to the best means of disposing of the property. The plaintiff, at the time when the commission issued, was in possession of a farm, which he held under a lease from Messrs. Wilkins, at an annual rent of 350£, for a term of which more than a year and a half was unexpired. The farm had not yielded him any profit for the two preceding years. On the 12th of September, 1826, the plaintiff, pursuant to the statute 6 G. 4, c. 16, s. 75, gave the following notice to W. Wilkins, Esq., and W. Wilkins, Esq., the younger: — "I, the undersigned, James Heane, of the city of Gloucester, brickmaker, dealer, and chapman, *a bankrupt*, do hereby give you notice that I am ready and willing, and hereby offer to give up and deliver unto you a certain indenture purporting to be a lease of Walsworth Hall estate, dated the 17th of September, 1817, made between you the said W. Wilkins and W. Wilkins the younger, of the one part, and myself of the other part, and also the possession of the messuages, lands, hereditaments, and premises therein comprised." In consequence of this notice the lessors accepted the lease, and received possession of the premises. Upon this evidence it was contended . . . by the defendant's counsel, that assuming the commission to be invalid, the plaintiff, who had availed himself of it to get rid of his lease, and his liability thereon, was estopped from disputing the validity of the commission under which the defendants acted; and Watson *v.* Wace, 5 B. & C. 155, was cited. . . . The learned judge told the jury that, in his opinion, the defendants were entitled to a verdict; but he desired them to find specially whether the land had or had not been taken for the express purpose of making bricks, and they found that it had. He then directed the verdict to be entered for the defendants, but reserved liberty to the plaintiff to move to enter a verdict for 440£., the value of the goods, if the Court should be of opinion that he was not estopped, and also that he was not a person liable to become bankrupt within the meaning of the 6 G. 4, c. 16, s. 2. A rule nisi having been obtained for that purpose,

Taunton, *Campbell*, and *Phillpotts*, showed cause. The plaintiff was a trader within the meaning of the 6 G. 4, c. 16, s. 2. . . . But assuming that the commission cannot be supported in that respect, the bankrupt is estopped by his own acts from disputing its validity, for he interfered in the sale of the goods. . . .

Ludlow and *Russell*, Serjts., contra. The plaintiff's interference in the sale was such as to show, not that he assented to the commission, but that he intended to take care of the property, so that the most should be made of it. . . .

Bayley, J., now delivered the judgment of the Court:

Upon the report in this case, two questions arise for our consideration first, Whether the plaintiff was estopped from disputing the validity of the commission under which the defendant acted; and, secondly, if he was not, whether the commission was valid.

1. The circumstances relied upon at the trial, and by the defendant's counsel in argument, as precluding the plaintiff from contesting his bankruptcy, were, first, his interference relative to the sale of his effects, for the conversion of which by such sale, this action was brought; and, secondly, his having given notice to the landlords of a farm which he held (Messrs. Wilkins), describing himself as a brickmaker, dealer and chapman, and a bankrupt, and offering to give up his lease, which appears to have been afterwards accepted. The learned Judge thought on the trial, that the interference of the plaintiff in the sale was referable to an intention on his part, to take care of the property, and see that the most was made of it; and that it did not amount to a consent to the sale, and that he was not estopped on that ground; but he thought that as he had availed himself of the commission to derive a benefit from it, by the surrender of his lease, he was estopped by that act from saying that he was not a bankrupt; though he reserved the point for the consideration of the Court. In the former opinion we entirely concur, in the latter we are not able to acquiesce. There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him. But we think that he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him), and that transaction; but as to third persons he is not bound. It is a well established rule of law, that estoppels bind parties and privies, not strangers. (Coke on Littleton, 352 a. Comyn's Digest, Estoppel (C.).) The offer of surrender made in this case, was to *a stranger to this suit*. . . .

2. The second question is, Whether the commission was invalid. The objection is, that the bankrupt was not a trader, and we are of opinion that he was not. . . .

Therefore, we are of opinion that the plaintiff was not a trader; and as he was not estopped from resisting this commission against him, the rule to enter a verdict for the plaintiff for 440£. must be made absolute.

Rule absolute.

253. Corser *v.* Paul. (1860. New Hampshire. 31 N. H. 24, 31). Bell. J, C. There is a class of admissions which may be either express or implied from silence, or acquiescence, which are conclusive. Such are admissions which have been acted upon, or those which have been made to influence the conduct of others, or to derive some advantage to the party, and which, therefore, cannot be denied without a breach of good faith. As if, for example, in the present case, the defendant had stood by and seen this note offered to the bank for discount; and, being aware of what was doing, had been silent; or if, before the discount he had been spoken to by any of the officers of the bank in relation to the note, and, being aware of the facts, had forborne to deny the signature — by these tacit admissions he would be forever concluded to deny the note to be his, in case the bank discounted it. This is but an application of the same principle that is applied in the case of deeds of real estate, that he who stands by, at the sale of his property by another person, without objecting, will be precluded from contesting the purchaser's title.

254. KITCHEN *v.* ROBBINS

Supreme Court of Georgia. 1860

29 *Ga.* 713

Certiorari, in Richmond Superior Court. Decision by Judge Holt, at October Term, 1859.

This cause arose in the City Court of Augusta, being an action on the case brought by William K. Kitchen, against Stephen B. Robbins, to recover the value of a gold watch and eighty-five dollars in money, alleged to have been stolen from plaintiff, on the night of the 27th day of December, 1858, from the room occupied by him in the inn or hotel, kept by defendant in the city of Augusta, and while plaintiff was asleep in the room. After proving that the defendant kept a common inn in the city of Augusta, on or about the 27th day of December, 1858, and that on or about that day, plaintiff and his family were guests at said inn, plaintiff proved by Curtis H. Shockley, who was examined by commission, that during the month of December, 1858, the defendant, Stephen B. Robbins, informed him, that the plaintiff had lost some money and (as witness thought) a gold watch also.

Plaintiff, by his attorneys, then offered as evidence, his own testimony, taken by commission, for the purpose of proving his actual loss. . . . The Court ruled out the testimony of the plaintiff, who excepted at the time to the decision. The plaintiff then placed the defendant, Stephen B. Robbins, on the stand; by whom he proved that on the night of the 27th day of December, 1858, the plaintiff, his wife and daughter were guests at his inn, and that he had been paid in full for their board. Plaintiff's counsel then asked of the defendant, whether or not he believed that the plaintiff was robbed of said watch and money on said night, and requested him to give the reasons of his belief. The defendant replied that he had no belief except what was founded upon the statements of the plaintiff

to him. The Court refused to allow the defendant to give his belief, though insisted upon by plaintiff's counsel; to which refusal the plaintiff excepted. Plaintiff again offered in evidence his own testimony, upon the grounds aforesaid, which the Court refused to allow as evidence, and plaintiff again excepted. The case was then submitted to the jury, who found for the defendant.

Upon this statement of facts, a writ of certiorari was granted; and after argument on both sides in the Superior Court for said county, the Judge of that Court ordered a new trial, upon the grounds that "the loss having been proven by the admissions of the defendant," the "testimony of the plaintiff was admissible to prove the amount and value of the property lost." And, secondly, that the plaintiff, when the defendant was put upon the stand, "was entitled, on the direct examination, to have his belief, and the reasons of his belief."

To which decision defendant, by his counsel excepted, and tenders this bill of exceptions, and says that Court erred: 1st. In holding that the admission of the defendant, founded upon the statements of the plaintiff, was sufficient evidence of the fact of loss, to admit any evidence of the value of the loss. . . . 3rd. In deciding that the defendant when placed upon the stand by the plaintiff as his witness, might be compelled, on the direct examination, to give his belief, and the reasons of his belief, as to any fact not within his own knowledge.

John H. Hull, and *Edward J. Walker*, for plaintiff in error. *Millers & Jackson*, contra.

By the Court, — STEPHENS, J., delivering the opinion:

(1) The first error assigned is on the ruling that the admissions of the defendant founded on statements to him by the plaintiff, were sufficient proof of the fact of loss, to authorize the introduction of evidence concerning the amount of the loss. I remark in the first place, the admission did not appear to have been founded on statements of the plaintiff, so far as was disclosed by Mr. Shockley, who was the witness that testified to the admissions. He stated the admissions to have been made without any qualification or suspicion expressed as to their truth, and without any mention of the source from which the defendant's knowledge of the facts had been derived. We think the testimony of this witness was sufficient proof of the fact of loss, to authorize the introduction of evidence to show its amount, and it was not for the Judge to pronounce that the testimony of this witness was to be weakened or destroyed by the subsequent statement of the defendant, that all his knowledge had been derived from the plaintiff. The jury was the tribunal to compare the witnesses, and weigh the evidence. But why should not the admissions be good evidence even if founded on the statements of the other party? Are no admissions good against a party, unless founded on his personal knowledge? The admissions would not be made except on evidence which satisfies the party who is making them against his own interest, that they are *true*, and that is evidence to the jury that they are true.

Admissions do not come in on the ground that the party making them is speaking from his personal knowledge, but upon the ground that a party will not make admissions against himself unless they are *true*. The fact that he makes them against his interest can be reasonably explained only on the supposition that he is constrained to do so by the force of the evidence. The source from which a knowledge of the facts is derived, is a circumstance for the party to consider, in estimating the value of the evidence, but that is all.

(2) And on the same principle as well as on another, we think the plaintiff had a right to the *belief* of the defendant when the latter was on the stand as a witness, under our statute. He was a party as well as a witness, and on the principle just stated, the plaintiff would have been permitted to prove, that the defendant had said, he *believed* the plaintiff had lost the watch and money. He would have been permitted to prove that the plaintiff had said so, in the presence of the defendant, and that the latter did not deny it. This evidence would show no personal knowledge of the fact stated, on the part of the silent party, but it raises a presumption that he *believed* it. The belief of a man against his own interest is a fact for the jury to consider as evidence, and if this belief may be proven by admissions before witnesses or inferred from silence, surely it may be proven by the oath of a witness who knows, as the party does know, what his belief is. Courts of equity will require parties to answer not only according to their knowledge, but also according to their belief; and our Act, which permits one party to put the other on the stand as a witness, is stated in its very caption to be a mode of obtaining a discovery at common law, in *lieu* of going into equity. And this is the additional principle on which the belief of the defendant was admissible evidence. . . . Judgment affirmed.

Sub-topic B. Third Person's Admissions

255. THE KING *v.* THE INHABITANTS OF HARDWICK

King's Bench. 1809

11 *East* 578

An appeal against an order for the removal of Joseph Vipond, Mary his wife, and their children, by name, was entered at the sessions in the name of "The Churchwardens and Overseers of the Poor of the Parish of Hardwick in the County of Norfolk, Appellants, and the Churchwardens and Overseers of the Poor of the Parish of Fulham Saint Mary the Virgin, in the same County, Respondents." And upon the hearing of the appeal, the Sessions confirmed the order, subject to the opinion of this Court upon a case which stated,

That John Vipond, the father of the pauper Joseph, was a settled

inhabitant of the parish of Forncett St. Mary, in Norfolk, and about forty years ago came to reside in the parish of Hardwick, in the same county, on a tenement at the rent of 5 £. 10 s. per annum. The pauper, Joseph Vipond, who is now thirty-seven years of age, was born in that parish. . . . The respondents, in order to prove the pauper's settlement in Hardwick, called the father, who, being a settled inhabitant of that parish, refused to be examined. They then called the pauper himself, who proved from his knowledge, that his father had resided on the tenement at Hardwick for twenty-five years, and that it was now worth more than 10 £. per annum. And the Court admitted the pauper to give evidence of his father's declarations to him, that he (the father) had purchased the house when the pauper was sixteen years of age for 87 £. and that he had about ten years ago laid out above 100 £. on the premises. The Court were of opinion, that the pauper was not emancipated by his residing in Besthorpe under the indenture of apprenticeship, nor by any other act subsequent to it; and therefore confirmed the order.

Alderson, in support of the orders, said, . . . The declarations of the father, that this estate was his own by purchase for 87 £., would be let in, upon the authority of The King *v.* Woburn, 10 East 395, 402, as the declaration of one of the parties to the cause, objection having been made on that ground to his examination by the adverse party. . . .

Garrow and *Frere*, Serjt., contra, contended . . . that it did not necessarily follow from the determination in The King *v.* Woburn, 10 East 395, that because a payer of the parish might refuse to answer as a witness when called by the adverse party, therefore his declarations upon the subject might be given in evidence. . . . The common case, where declarations of parties have been given in evidence, is where they are parties on the record; whereas the nominal parties to an appeal of this sort are the parish officers. The rule was considered to be so technical in Bauerman *v.* Radenius, 7 Term Rep. 663, that the declaration of a trustee, who was the nominal plaintiff on the record, was admitted to defeat the action of his cestui que trust, the real party. (BAYLEY, J. That case only decided that the declarations of the nominal party on the record were evidence against him; but not that the declarations of the real party would not also have been evidence. Then, taking the inhabitants of the parish to be the real parties to the appeal, still they are not such parties whose declarations are admissible within the true meaning and sense of the rule; which is founded upon a reasonable presumption that no person will make any declaration against his interest, unless it be founded in truth; but the interest of all aggregate bodies, such as corporators, hundreds, parishioners, and the like, upon a matter affecting the whole community alike, is too minute to insure an accurate attention to declare nothing but the truth. Upon this ground of the minuteness of their interest, they have in some cases been held to be witnesses. LE BLANC, J. In The King *v.* Woburn, the parishioner was not rejected as a witness on the ground of interest; for his interest was

opposed to that of the party who wished to call him; but he was held to be privileged from answering, on the ground of his being one of the real parties to the suit.) . . . Considering him as a party, yet as the interest of each inhabitant is several, his declarations would not be evidence to charge the others; as an admission made by one of the defendants in trespass is no evidence against the others. The inconvenience of letting in this evidence will be very great in practice.

Lord ELLENBOROUGH, C. J. Evidence of an admission made by one of several defendants in trespass will not, it is true, establish the others to be co-trespassers; but if they be established to be co-trespassers by other competent evidence, the declaration of the one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object.

With respect to the case at the bar, two questions have been made; but that which has been argued most at length, and is considered to be of most importance, is, Whether the declarations of the father, as proved by the son, were admissible evidence? . . . The question then is, Whether the declaration of a parishioner respecting the circumstances of a settlement, of which he could not be compelled to give evidence as a party to the appeal depending, be admissible in evidence? I consider all appeals against orders of removal, though technically carried on in the names of the churchwardens and overseers of the respective parishes, yet in substance and effect to be the suits of the parishioners themselves, who are to contribute to the expense of maintaining the paupers. The parishioner, therefore, being a party, could not be called upon as a witness.

Then what is there to differ this from other cases of aggregate bodies, who are parties to a suit? In general cases it cannot be questioned that the declarations of the parties to a suit are evidence against them; and how is this case distinguishable from those upon principle? What credit is due to such evidence is another consideration. His declaration does not conclude the parish; but will be more or less weighty according to his means of knowledge, the genuineness of the declaration, and other circumstances of which the Court would judge. A declaration made by such a party loosely, and without competent grounds of knowledge of the fact, would not be entitled to weight; but the credibility of such evidence is quite a different question from its competency; and it is always open to contradiction like other evidence. Here, however, the father had very competent means of knowledge as to the fact declared by him; but it is sufficient for us to say, that the evidence was competent to be received. . . .

LE BLANC, J. . . . The point comes now to be judicially considered, for the first time, whether such a declaration be receivable in evidence: whether when a suit be pending against a great number of persons who have a common interest in the decision, a declaration made by one of those persons concerning a material fact within his knowledge be evidence against him and all the other parties with him to the suit? And it still

seems to me to follow as a corollary from the decision of the Court in the former case, that such a person, not being liable to be called upon to give evidence upon oath of the fact, as being a party to the suit, his declaration of it must be evidence for the opposite party. . . .

Bayley, J. . . . The declaration of every such rated inhabitant, as to the matters in question, made at the time he was a rated inhabitant, is evidence. . . . Orders confirmed.

256. GIBBLEHOUSE *v.* STONG

Supreme Court of Pennsylvania. 1832

3 *Rawle* 437

Frederick Stong, the defendant in error, brought an ejectment against the plaintiffs in error, John Gibblehouse and John Brandt, to recover two lots of ground in Whitpain township, one of them containing three-quarters of an acre, with a dwelling-house, and other buildings erected on it, and the other containing five acres. The plaintiff below claimed under a deed dated 1st of April, 1813, from David Johnson, in whom it was admitted the legal title to both the lots was vested, one of them by deed dated the 1st of April, 1811, from S. Slingluff, and wife, the other by deed dated the 13th of May, 1811, from Samuel Ashmead to him. Gibblehouse was the tenant of Brandt, who alleged that David Johnson was the mere trustee of his brother Edward Johnson, for whose use he held the legal title to the lots in dispute, and that he, Brandt, had purchased them as the property of Edward Johnson at a sheriff's sale under an execution upon a judgment obtained by Brandt against Edward Johnson.

George Gregor was produced and affirmed as a witness, for the plaintiffs in error. He testified as follows: "Edward Johnson bought the three-quarter acre lot from Slingluff. David Johnson and Edward Johnson told me so." The counsel for the plaintiff below, then objected to this evidence, when the defendant's counsel offered to give in evidence, "declarations made by David Johnson, after the purchase of the property in dispute from Slingluff and Ashmead, and while he held the legal title to it, and before it was afterwards sold to any one, that he had never paid any part of the purchase-money, but that he held the title for the property as the trustee of Edward Johnson, and that Edward Johnson had paid the purchase-money for it." To this evidence the counsel of the plaintiff below objected; upon which the Court decided "that the witness could not give any evidence of any declarations made by David Johnson, unless such declarations were made at the time or immediately before, or immediately after, the execution of the deeds to him, or by him to the plaintiff, Frederick Stong, or in the presence of the opposite party; the said David Johnson being a competent witness, and from any-

thing which appears to the contrary, in full life, and within reach of the process of the court." To this opinion the counsel of the defendant below excepted, and assigned it for error in this Court.

The cause was argued by *T. Sergeant*, for the plaintiff in error, and by *Kittera*, for the defendant in error; after which

The opinion of the Court was delivered by

ROGERS, J. 1. The declarations of a person, while in the possession of the premises, against his title, are always admissible, not only against him, but against those who claim under him. The general principle is conceded; but with this qualification, that when the person whose acknowledgment is relied on is alive and a competent witness, that then he must be examined: that his declarations cannot be received. I have examined all the cases, and I cannot perceive a trace of any such exception. In most cases it is true the party was dead, and this is usually the case in fact, for it is the declarations of an ancestor that are most commonly offered in evidence. It has in no case however been made a subject of inquiry whether the person was dead or alive, a competent witness or otherwise, and this surely would have been the case had any such qualification of the general rule existed. The reason of the rule is at war with the exception. The point falls within the well-established principle that although a man's declarations are not evidence for him, they are strong evidence against him. The principle is founded on a knowledge of human nature. Self-interest induces men to be cautious in saying anything against themselves, but free to speak in their own favor. We can safely trust a man when he speaks against his own interest. It is not conclusive, but is unquestionable evidence, entitled to some weight against himself, and those who claim under him. Bassler *v.* Neisly et al., 2 Serg. & Rawle 353.

2. The defendant's counsel offered to prove declarations made by David Johnson, after the purchase from Slingluff and Ashmead, and before the sale of the property to any person, that he, David Johnson, never paid any part of the purchase-money, but that he held the title as trustee for Edward Johnson, and that Edward Johnson had paid the purchase-money for it. The Court decided that the witness could not give any evidence of any declarations made by David Johnson, unless such declarations were made at the time, or immediately before, or immediately after the execution of the deeds to him, or by him to the plaintiff, or in the presence of the opposite party; David Johnson being a competent witness, and from anything which appears to the contrary, in full life, and within reach of the process of the Court. Suppose this declaration had been in writing, can David Johnson by a subsequent conveyance, prevent the party in whose favor the declaration was made, from giving it in evidence against the party who claims under him? And where is the difference between written and parol testimony, except in the certainty; and particularly in cases of personal property, which may pass by parol, and to which the principle also applies? . .

We think there was error in rejecting the testimony, and that the judgment should be reversed.

HUSTON, J.: The only error assigned in this record is contained in a bill of exceptions to the opinion of the Court in rejecting certain testimony. . . . The Court decided that the witness could not give any evidence of any declaration made by David Johnson, unless it were made at the time, or immediately before or after the execution of the deed to him, or by him to the plaintiff, Frederick Stong, or in the presence of the opposite party, he, David Johnson, being a competent witness, in full life, and within reach of the process of the Court. To this exception was taken; and I see no error, at least against the defendants.

It has been contended that by a series of decisions in this State it is settled, that the declarations of a former owner of property, made while he was owner, are evidence against the party claiming under him; and that this rule is universal, and applies to cases where such former owner is alive, is entirely disinterested in the matter trying, and is standing in Court and there is no objection to examining him as a witness. On the other hand, it is contended that the rule is not universal: That declarations of a former owner are only evidence to establish boundary, pedigree, and custom: That it does not extend to permit parol evidence to contradict written and recorded deeds, and destroy titles good by such deeds, and proved by those who never heard of such parol declarations: and at all events it is limited to cases in which the person whose declarations are proved is interested, and cannot be examined, or is dead, or out of the reach of the process of the Court; but that if he is alive, in Court, or can be brought there, and is totally disinterested, he must be examined on oath, an opportunity given to cross-examine, and his declarations not on oath, are not in such case to be proved; and that the statute of frauds forbids that a title depending by law on written and recorded deeds, should be destroyed by parol evidence of parol declarations, which may have been made, or may not, and which if made, did not at all affect the rights of him who uttered them, except as to those who may have purchased on the faith of such declarations. . . .

The opinion of the Court in all the cases cited, and most if not all those in our reports, which I have found, were delivered by the late Chief Justice. And in Buchannan *v.* Moore, 10 Serg. & Rawle 275, the same judge in delivering the opinion of the Court, quoting Phillipps' Evidence,

"In all cases which have been mentioned on this subject (parol evidence of declarations) the person who made the declaration was deceased at the time of trial;" and he adds, "there is great reason for the law being so held. Why should the declarations without oath of a person who may be produced and examined on oath, be evidence? Why should the party against whom the evidence is offered be deprived of the opportunity of cross-examining? In the case of death there is a necessity. But while the witness is living there is no pretence for

dispensing with the general rule which rejects all testimony except on oath, and in the presence of the parties to the suit." . . .

Believing, then, the law to have been settled in this state by Buchannan *v.* Moore, 10 Serg. & Rawle 275, and so considered by the profession, and by the several Courts of Common Pleas, as well as the one which tried this cause, I would not lightly change, but, on full reflection, I believe, it was then settled on principle, and ought not to be changed. . . . The Court admitted declarations to the plaintiff, rejected parol declarations to others, and, I think, rightly, whether the former owner was dead or alive, unless they went to prove boundary in the sense I have stated, or pedigree or custom; and further, that where such declarations can be proved, it is only when the person who used them was owner when he used them, and is dead, or out of the reach of the process of the Court, or interested.

KENNEDY, J. . . . It is argued that the declarations of David Johnson were rightly rejected, upon the principle that they were not made upon oath or affirmation, nor yet in the presence and hearing of the adverse party, but made in his absence when no opportunity was afforded of a reply, much less of a cross-examination, and as David Johnson was within the jurisdiction of the Court, and was a competent witness, he might have been produced to testify to the facts, which would have been better evidence than his declarations or admissions. And in support of this, Buchannan and others *v.* Moore, 10 Serg. & Rawle 281, is cited. . . . The decision of the Court here was not only correct, but I am willing to admit that everything said by the Chief Justice is likewise so. But it will be seen in the sequel, I think, that it is not applicable to the case before us.

The testimony in Buchannan *v.* Moore was purely of hearsay character, with regard to which the general rule is well settled, as there stated, that it cannot be received except in certain cases from necessity, when the facts offered to be proved from their very nature are incapable of the ordinary means of proof; such as questions of pedigree, character, prescription, custom, boundary, and the like. It is manifest that some of these matters from their very nature, and others from their antiquity, do not admit of the ordinary and direct means of proof by living witnesses; and hearsay would seem to be the next best evidence to which recourse must therefore be had. 1 Stark. Evi. 54, part I.; Bull. N. P. by Bridg. 294, b, n. (d).

But in the case before us the testimony offered and rejected, was not of that character, which in a technical and legal sense, comes under the denomination of hearsay. It comes under what is considered the declarations or admissions of the party to the suit or his privies, that is, those under whom he claims; in respect to which the general rule of law is just as well settled that they shall be received in evidence as that hearsay shall not. All a man's own declarations and acts, and also the declarations and acts of others to which he is privy, are evidence, so far

as they afford any presumption against him, whether such declarations amount to an admission of any fact, or such acts and declarations of others to which he is privy afford any presumption or inference against him. . . . The confessions of the party himself (which I do not understand to be denied) have always been considered good and admissible evidence of any fact admitted by them to be true, and may be given in evidence to prove it, notwithstanding the confessions might be such as to show that twenty witnesses were present who could all testify to its existence or non-existence, and who might all appear to be in the Court-house at the time when such confessions should happen to be offered in evidence against the party making them. And this rule of admitting the confessions or declarations of the party extends not only to the admission of them against himself, but against all who claim or derive their title from him; in other words, between whom and himself there is a privity. There are four species of privity: privity in blood, as between heir and ancestor; privity in representation, as between testator and executor, or the intestate and his administrators; privity in law, as between the commonwealth by escheat and the person dying last seised without blood or privity of estate; and privity in estate as between the donor and the donee, lessor and the lessee, vendor and the vendee, assignor and the assignee, etc. . . . Upon this same principle it is, that executors and administrators, as also devisees, legatees, heirs and the next of kin, are all bound by the promises, whether written or verbal, of their respective testators or intestates, so far as they may have received estates from them that are liable, and the declarations and admissions of such testators and intestates are uniformly received in evidence against their devisees, legatees, heirs, and next of kin, so as to affect the estates which have passed to them. Privies in estates, such as vendee and vendor, assignee and assignor, stand upon the same footing in this respect to each other that privies in blood do. I know of no distinction. That which is binding upon the vendor will generally be equally so upon his vendee; and whatever would have been admissible as evidence against the former, ought not only to be so against the latter, but ought to have the same effect too.

Lord ELLENBOROUGH has given the true reason of the rule for admitting the declarations of a party in evidence, 11 East 584, where he says, it "is founded upon a reasonable presumption that no person will make any declaration against his interest, unless it be founded in truth." If true when made, and therefore receivable in evidence, his selling or disposing of the property afterwards cannot make his former declaration in respect to it untrue, nor furnish any reason, that I can perceive, which ought to derogate from its character as evidence. But I cannot avoid believing that as long as the great object of receiving testimony is to aid in and to promote the investigation of truth, the declarations or admissions of a vendor or assignor against his interest, made before the sale or assignment, may be more safely relied on and received in

evidence against his vendee or assignee, than the testimony that would be given by such vendor or assignor himself, if the party claiming in opposition to his vendee or assignee, must be compelled to resort to him. . . . Is it not most apparent from what we know by experience of human nature, that a vendor who had placed himself in such a situation would in many, if not most instances, swerve from the truth, in order to rescue himself from the imputation that was about to be made against his integrity? His temptation, to say the least of it, would frequently be very strong to give such a coloring to the whole transaction as he might think would present his own conduct in the most favorable point of view, without much regard to the truth of the case. . . .

The judgment of the Court below ought to be reversed and a venire de novo awarded.

Judgment reversed, and a venire facias de novo awarded.

257. FRANKLIN BANK *v.* PENNSYLVANIA, DELAWARE & MARYLAND STEAM NAVIGATION CO.

COURT OF APPEALS OF MARYLAND. 1839

11 *G. & J.* 28

IN an action for the loss of a package sent by the plaintiffs through the defendant, the cashier, Mitchell, of the bank to which the package was consigned testified: that he was absent from Philadelphia from about the 10th until the 27th of November, 1834; that on his return he found two letters at the Mechanics' Bank, addressed to him from the cashier of the plaintiffs; the first of the 17th of November, 1834, advising him of the forwarding of the package by the steam boat line of the defendant, which had been received at the bank, and opened in his absence, which it was the duty of the president to do; and the second of the 21st of the same month, requesting him to make inquiry at the office of the steam boat line, by which the package had been forwarded; that within a day or two after his return, he applied at the office, to Davidson the agent of the defendants, for the package, and thinks he showed him the letter from the cashier of the plaintiffs of the 21st of November, 1834, who told him, that on the evening of the 18th of November, 1834, there were a number of persons in the office, when the trunk was opened by the clerk, and the packages handed out by the porter to the clerk; that there was a package addressed to Mr. Mitchell; but whether to Mr. Mitchell the witness, or to a dry goods merchant of that name, he did not know, nor did he know that it contained bank notes; and that the package was thrown upon the desk, and which was the last that he, Davidson, knew of it.

In the progress of the trial, the defendant's counsel objected to the admissibility of a part of the plaintiff's proof, and the Court below

(ARCHER, C. J., PURVIANCE, A. J.) sustained the objection and excluded it. The plaintiffs excepted, and the verdict and judgment being against them, they prosecuted the present appeal.

The cause was argued before BUCHANAN, C. J., STEPHEN, and CHAMBERS, JJ.

By *Meredith*, for the appellants, and by *McMahon*, for the appellees.

BUCHANAN, C. J., delivered the opinion of the Court:

The suit is to recover the value of a package of bank notes, which it is alleged, the defendants undertook to carry safely from Baltimore, and deliver at Philadelphia, and which is charged to have been lost by reason of gross negligence.

The evidence offered in this case and rejected by the Court below, is of a conversation alleged to have taken place between Davidson, the agent of the defendants, and the witness, some eight or ten days after the transaction to which it relates, and after the loss of the package in question, when the agency for the delivery of it to the person to whom it was addressed had ceased, not constituting a part of the transaction, but a subsequent account only of what had before occurred respecting it. It cannot therefore be treated as a statement or admission by the defendants, and as such binding upon them, and admissible in evidence; but must be considered as a mere narrative of facts by Davidson, of his own authority, to be proved by him on oath, if within his own knowledge, or by some other witness, and not by evidence of his statement of them, which is forbidden by the general rule of law in relation to hearsay evidence. The principle upon which the declarations or representations of an agent, within the scope of his authority, are permitted to be proved, is, that such declarations, as well as his acts, are considered and treated as the declarations of his principal. What is so done by an agent, is done by the principal through him, as his mere instrument. So whatever is said by an agent, either in the making a contract for his principal, or at the time, and accompanying the performance of any act, within the scope of his authority, having relation to, and connected with, and in the course of the particular contract or transaction in which he is then engaged, is, in legal effect, said by his principal, and admissible in evidence; not merely because it is the declaration or admission of an agent; but on the ground, that being made at the time of and accompanying the contract or transaction, it is treated as the declaration or admission of the principal, constituting a part of the "res gestæ," a part of the contract or transaction, and as binding upon him as if in fact made by himself. But declarations or admissions by an agent, of his own authority, and not accompanying the making of a contract, or the doing of an act, in behalf of his principal, nor made at the time he is engaged in the transaction to which they refer, are not binding upon his principal, not being part of the "res gestæ," and not admissible in evidence, but come within the general rule of law, excluding hearsay evidence; being but an account or statement by an agent of what has passed or been done

or omitted to be done, — not a part of the transaction, but only statements or admissions respecting it.

This distinction between the declarations or admissions of an agent, accompanying the making of, and constituting therefore a part of the contract or transaction, and such as are made at another time, runs through the books, and is clearly settled. . . . In Biggs and others *v.* Lawrence, 3 Term. Rep. 454, Justice BULLER permitted a receipt given by an agent for goods directed to be given to him, to be read in evidence against the principal. But that decision is condemned by DALLAS, Ch. J., in Betham *v.* Benson, 5 Eng. Com. Law Rep. and disapproved of in Fairlie *v.* Hastings, 10 Vesey Jr.; and in Bauerman *v.* Radenius, 7 Term. Rep. 665, it is said to have passed without much observation, and that Lord KENYON, who was on the bench at the time, had since frequently ruled the contrary, without its having ever been questioned. Biggs et al. *v.* Lawrence, may therefore be considered as overruled. . . .

That portion therefore of Mitchell's evidence, which was objected to at the trial, was properly rejected, as inadmissible to bind or affect the defendants. . . . The judgment must therefore be affirmed.

Judgment affirmed.

258. ASHMORE *v.* PENNSYLVANIA STEAM TOWING & TRANSPORTATION CO.

SUPREME COURT OF NEW JERSEY. 1875

38 *N. J. L.* 13

ARGUED at February Term, 1875, before BEASLEY, Chief Justice, and Justices DALRIMPLE, DEPUE and KNAPP.

For the motion, *E. T. Green.* Contra, *Alfred Reed.*

The opinion of the Court was delivered by

BEASLEY, Ch. J.:

This suit was for damage caused by the carelessness of the defendant in towing a boat of the plaintiff's. The alleged want of care consisted in running upon a snag, whereby the plaintiff's boat was injured and sunk; and, at the trial, the central fact in dispute was, whether the existence of the snag in question was known to the agent of the defendant. To prove this fact of knowledge, several witnesses testified that the agent in charge of the boats of the defendant, and who is here to be regarded as the general agent in charge of this business of towing, admitted to them that he knew of this snag before the happening of the accident. These conversations, embracing these admissions, were entirely casual, and were not connected with the doing of any act within the scope of the agent's authority. It is now insisted that these conversations were not admissible in evidence.

At the trial, the alternative was between letting in this evidence,

or non-suiting the plaintiff; and as some of the books intimate that a distinction exists with respect to the rules of evidence between the statements made by a general agent and those made by a special agent, whereby the former are placed on a broader principle than the latter, it was thought best, though with much misgiving, not to rule out the offered testimony. Favorable to the view thus taken at Nisi Prius, is the statement in note 239, appended to Phillipps' Evidence, to the effect that some of the cases put the power of the general agent to make admissions on the same footing as the power of the principal himself. But upon carefully examining the authorities referred to, they do not support this doctrine, except in a very loose sense. I do not find any of them rule the point. And even if any of them maintained such a rule, they ought not to be followed, for such a rule would, as it seems to me, be inconsistent with true policy and correct principle. With regard to the law of evidence, I think there should be no difference, whatever, between the binding effect of the admissions of a general and a special agent. In both cases alike, the rule should be that the admission, to be evidence, was made in pursuance of the power conferred. In this particular there is no difference between the acts and the words of the agent; with respect to the first, he must be authorized to do them; with respect to the latter, he must be authorized to speak them. In each set of instances it is a question of authority. Upon the basis of this rule, then, the authority of the general agent to bind his principal by his statements, would be broader than that of the special agent, in the ratio of the transcendence of the power of the former over that of the latter, but the right of each to speak for his principal would rest on the same ground, that is, his authority to conduct the business confided to him. All statements made in the conduct of such business, are evidence against the principal; all others are inadmissible, because they are unauthorized. By considering the words of the agent in the light of acts — verbal acts — the subject will be cleared of all obscurity, and there will be no more difficulty in deciding when such words are admissible, than there is in concluding what acts of the agent can be proved. When the word or the act is done in pursuance of the agent's duty, it can be proved against the principal, otherwise, not. Upon this ground, I think all the cases can be made to stand. I shall not mention particularly these decisions; many of them will be found upon turning to the note in Phillipps on Evidence, already referred to, and to Story on Agency, sec. 134, et seq. The doctrine is also very clearly stated, and its limits defined, in the latest English case upon the subject, being that of The Kirkstall Brewery Co. *v.* The Furness Railway Co., L. R., 9 Q. B. 468.

Manifestly, then, the rule thus defined does not embrace statements, declarations, or admissions of the agent, which are not made in the execution of the agency. That they relate to the business of the agency, is not sufficient; but they must be in performance of it. This test excludes mere narrations and casual conversations, having a reference to,

but no effect in the discharge of the delegated duty. For the purpose of illustration: In the case of Morse *v.* Connecticut River Railroad Co., 6 Gray 450, it was correctly held that, in an action against the corporation for the loss of a trunk, the admissions of the conductor, baggage master, or station master, as to the manner of the loss, made in answer to inquiries of the passenger, the next morning after the loss, are admissible in evidence against the corporation, for the reason, in the words of the Court that, "it was part of the duty of those agents to deliver the baggage of passengers, and to account for the same, if missing, provided inquiries for it were made within a reasonable time." While, in the case of The Michigan Central Railroad Company *v.* Gougar, 55 Ill. 503, it was decided that the declarations of an engineer in charge of an engine, made subsequently to the happening of the accident, at a time when he was not doing any business of the company in relation thereto, could not be received as evidence against the corporation. These two examples place in a clear light the line of demarcation between, in cases of this class, such admissions of the agent as will bind, and such as will not bind the principal, showing, that to make them receivable, they must not only refer to the business of the principal, but must be made in pursuance, and as a part of such business.

Applying this test, the evidence in question in the present instance should have been overruled. It was a statement made by a general agent with respect to the business of his principal; but it was a mere voluntary statement, made to a person having no interest in the subject to which it referred, and was not in the performance of any part of the duty.

A new trial should be granted.

259. RUDD *v.* ROBINSON

COURT OF APPEALS OF NEW YORK. 1891

126 *N. Y.* 113

[Printed *post*, as No. 280]

260. STARR BURYING GROUND *v.* NORTH LANE CEMETERY ASSOCIATION

SUPREME COURT OF ERRORS OF CONNECTICUT. 1904

77 *Conn.* 83; 58 *Atl.* 467

ACTION to condemn certain land for the enlargement of a cemetery, and for an adjudication that the defendant was not organized in good

faith but to prevent the plaintiff from acquiring said land, brought to the Superior Court in New London County, where a demurrer to the complaint was overruled (THAYER, J.) and the cause was afterwards tried to the Court, RALPH WHEELER, J.; facts found and judgment rendered for the plaintiff, and appeal by the defendant. No error.

Abel P. Tanner and *Christopher L. Avery*, for the appellant (defendant). *Hadlai A. Hull*, for the appellee (plaintiff).

HAMERSLEY, J. . . . The plaintiff is an association formed and incorporated in 1857, in pursuance of the statute of 1841, and has since maintained an ancient burying-ground, enlarged at different times through the purchase of adjoining land. In 1897 the plaintiff association found it necessary and desired to enlarge its burying-ground by adding thereto the adjoining land of John J. Copp. It passed the necessary vote for obtaining this enlargement through purchase or condemnation. In 1898 the plaintiff attempted to agree with said Copp for the purchase of said land. The negotiation was postponed, to be renewed at a meeting of the parties at a time agreed upon. Before this time arrived said Copp, on May 25, 1898, with his two brothers, formed an association called the North Lane Cemetery Association for the declared purpose of establishing and permanently maintaining a cemetery for the burial of the dead and of procuring land for that purpose, and on the same day John J. Copp conveyed to the association the land required for the enlargement of the plaintiff's burying-ground, for the purchase of which negotiations between him and the plaintiff were then pending. . . .

The plaintiff being unable to agree with the defendant as to the purchase of the land required, brought this application to the Superior Court alleging, among other things, that the plaintiff's burying-ground is maintained as a public burial ground, and asking the condemnation of the land described. . . . The defendant then answered, admitting the ownership of the land described, and denying the other material allegations of the application, and also alleging . . . that the land mentioned is now held and appropriated by the defendant to the uses of a public cemetery. . . . The defendant claims that the Court erred in overruling the demurrer, as well as in overruling various claims of law made upon the trial, and in the admission of certain testimony. . . .

There remain for consideration the questions of evidence. Upon the trial the witness Hull was permitted, against the objections of the defendant, to testify to certain declarations made by J. J. Copp — who conveyed the land in question to the defendant association and who was its secretary and treasurer — and by his brother, Belton A. Copp, president of the defendant association, as to their purpose in organizing the association; J. J. and B. A. Copp, with their brother William Copp, being the only persons who organized the association and its only members. It is now urged that the purpose or intention of a corporation is properly shown by its charter and corporate votes, and that an admission made by the members of a corporation in respect to its purpose or inten-

tion cannot be shown in a suit against a corporation, because it is the admission of natural persons not parties to the suit and not of the entity consisting of those natural persons which is the party.

This distinction between a corporation as being an impalpable entity, and a corporation as being the living persons of whom it consists, is, for many purposes, a substantial distinction necessarily involved in the creation and use of corporations; but for some purposes it is not only a fiction but a useless and unreasonable fiction; and it is a settled principle that in certain cases where the fiction can serve no purpose but to accomplish injustice and to screen the corporation from the just consequences of its wrongs, the Court will not permit this legal fiction to prevail against real substance. It is certainly true, as a general proposition, that the admissions of individuals affecting the interests of a corporation of which they are members cannot have the effect of an admission by the corporation. But the distinction between the interest of the corporate entity and that of the corporate members may become a difficult one to draw in certain kinds of corporations, and this is especially true of one like the defendant. In speaking of a similar corporation, we have said: "It is impossible to separate the interest of the individual members, in such a corporation as this, from the interest of the corporation itself." Edwards *v.* Stonington Cemetery Asso., 20 Conn. 466, 478. If this evidence were material only as tending to show a corporate purpose, we are not prepared to say that the admission of the organizers and members of the corporation, as to their purpose in organizing it, must be excluded because the corporate entity is the party to the suit.

It is not, however, necessary to determine this question. The testimony was material and admissible for other purposes than to prove a technical corporate intention. This proceeding is one to condemn a particular piece of land owned by the defendant association. It is immaterial whether the defendant is a voluntary association or a corporation. . . . The defendant association was organized as a cemetery association when its articles were signed by the three Copp brothers. The intention and purpose the Court has to find is that involved in this act of the Copp brothers. . . . As tending to prove that the North Lane Cemetery Association, whether or not it remained a voluntary association or subsequently became a corporation, was organized by the three Copp brothers with the intent and purpose designated, the declarations of each against his interest would be admissible, against *him*, to show his purpose in joining in the formation of the association. The objection taken to the reception of these declarations was, in each instance, a general one. It was that they were not admissible at all; not that they were not admissible as against any of the parties in interest other than the person who made them. This general objection was properly overruled.

The testimony of the witness Hull as to his negotiations on behalf of the plaintiff with the president, secretary and treasurer of the defendant

association for the purpose of reaching an agreement as to the acquirement of the land in question by purchase, was properly admitted.

There is no error in the judgment of the Superior Court.

In this opinion the other judges concurred.

261. STATE *v.* WALKER

SUPREME COURT OF IOWA. 1904

124 *Ia.* 414; 100 *N. W.* 354

APPEAL from District Court, Polk County; JOSIAH GIVEN, Judge.

Defendant was indicted for the crime of murder in the first degree, and on trial by a jury he was convicted of manslaughter, and sentenced to imprisonment in the penitentiary for the term of eight years. From this sentence he appeals. Reversed.

About 10 o'clock in the evening of August 5, 1902, one Isaac Finkelstein was found lying on the north side of East Walnut street, in the mouth of the alley between East Sixth and Seventh streets, in Des Moines, with one side of his head mashed, apparently by a club of some kind, and he died within a few minutes after he was found. One Harris Levich, and the defendant, John Walker, the latter being a colored man, were indicted for the crime of murder in causing the death of Finkelstein. Levich was tried first and acquitted. Subsequently, when this defendant was tried, the prosecution, after proving the corpus delicti, and introducing evidence tending to show that the mortal wound on the head of the deceased had probably been inflicted with a singletree (found lying in the alley near the body of Finkelstein) that had apparently been taken from a wagon belonging to Harris Levich, which was discovered in an alley about a block away, and showing the facts as to the arrest of the defendant Walker, the next morning in West Des Moines, and before any evidence whatever had been introduced tending directly to connect defendant with the commission of the crime, sought to show by witnesses, prior to the time of the commission of the crime, that Levich had made declarations, not in the presence of Walker, indicating the employment by him of Walker to do "up" Finkelstein. This testimony was objected to, on the ground that, in the absence of evidence tending to show conspiracy between Levich and the defendant, the declarations of Levich were not admissible as against the defendant. The following colloquy was then had, as appears from the record, between the trial judge and the attorney for the prosecution: State: "We claim two grounds upon which we have a right to declarations of Levich in the absence of Walker: First, that this was just a short time preceding the murder; second, they having been much together, and having been seen together at so short a time before the fatal blow was struck. Court: Will the evidence sought to be elicited here have any tendency to prove conspiracy itself? State: We think it would, and that is the object and purpose of this

evidence. Court: Then we need not trouble much about other rules. I think the rule is this: that where the prosecution relies, in part at least, upon conspiracy, before we can charge either party with the declarations of the other, the State may be required to first give in evidence some testimony of the conspiracy, or it may be permitted to introduce the evidence, and it will be left or taken from the jury according as they follow it with evidence of some conspiracy. Whether there be evidence to go to the jury may be a question. But if the declaration itself preceded the act, and tends to establish conspiracy, then it is admissible, regardless of either of the rules. Therefore the objection will be overruled." The prosecution was then allowed, over the defendant's objections, to show declarations of Levich tending to establish the fact that Levich had arranged with the defendant to inflict death or severe bodily injury upon Finkelstein, and that Levich made this arrangement in a spirit of revenge, by reason of real or fancied injuries done to him and his business by Finkelstein.

Charles Mackenzie, J. B. Rush, and *John T. Mulvancy,* for appellant. *Charles Mullan,* Atty. Gen., *Jesse A. Miller* and *Robert O. Brennan,* for the State.

McClain, J. (after stating the case as above). It seems from the colloquy above set out that the prosecution was contending that the fact that such a declaration was made by Levich just a short time preceding the commission of the crime would render the declaration admissible, and that the trial judge seemed to entertain the view that the fact of conspiracy, which must be established to make the declarations of Levich admissible, might be taken as established by such declaration alone, although no other evidence of conspiracy should be introduced. Perhaps the position taken by the prosecution and the trial judge are not accurately represented in the colloquy. However this may be, it is plain that unless the declarations were part of the res gestæ they were not admissible as independent evidence, and could not be considered at all without there was some evidence, apart from the declarations themselves, tending to show a conspiracy previously entered into between Levich and defendant with reference to the commission of the crime.

The first contention on behalf of defendant is that the Court should have required the conspiracy to be proven by independent evidence before receiving the declarations. With reference to this question, the contention for the State is that it is within the discretion of the trial Court to admit proof of acts and declarations of joint conspirators even before a prima facie case of conspiracy has been made, provided the State promises in the further progress of the trial to introduce such prima facie evidence; and such a rule seems to have been announced in broad terms in State *v.* Grant, 86 Iowa, 216, 53 N. W. 120, and State *v.* Mushrush, 97 Iowa, 44, 66 N. W. 746. We have no occasion to question the correctness of this general proposition, but in the first place it does not appear from the record that in this case the State made any such promise. So far as we

can gather, the assertion on the part of the prosecution was that the declarations of Levich which were to be proven would tend to show a conspiracy. This clearly would not be enough, for, as already stated, and as the rule unquestionably is, the evidence tending to show a conspiracy must be outside of and in addition to the declarations of the co-conspirators whose declarations are sought to be introduced. The safer rule, undoubtedly, is to require the proof of conspiracy to be made before the declarations are allowed to be shown. . . . Those declarations were so likely to prejudicially affect the minds of the jury with reference to the defendant that no subsequent acts of the court in striking them out and directing the jury not to consider them could free the jurors' minds of the prejudicial result, should it subsequently appear that there was no evidence whatever, aside from the declaration of Levich himself, that defendant had entered into an arrangement with Levich to do violence to Finkelstein. We would not reverse the case on this ground alone, had there been independent evidence of a conspiracy such as to make out a prima facie case, but in view of a new trial we feel justified in suggesting that it will be difficult to adequately protect the right of defendant to be tried only on competent evidence without requiring a prima facie case of conspiracy to be made out before the declarations of Levich are received.

It is further contended for the defendant that, without regard to the order of procedure, there is no competent evidence in the record to show a conspiracy between Levich and Walker, aside from the declarations of Levich himself. . . . We concede that it is not necessary on the one hand that such a conspiracy be shown by direct evidence, and that circumstantial evidence may be sufficient for the purpose. Gardner *v.* Preston, 2 Day 205, 2 Am. Dec. 91; State *v.* Thompson, 69 Conn. 720, 38 Atl. 868; Roscoe, Criminal Ev. 430. But, on the other hand, it is well said that it is not enough that the evidence introduced tends to raise a suspicion. "The humane presumption of the law is against guilt, and though a conspiracy must ordinarily be proved by circumstantial evidence, yet it is not to be forgotten that the charge of conspiracy is easily made. . . . Mere suspicion, possibility of guilty connection, is not to be received as proof in such a case, and especially in such a case, because, when the connection is proved, the acts and declarations of others become evidence against the party accused." Benford *v.* Sanner, 40 Pa. 9, 80 Am. Dec. 545, 549. And see People *v.* Stevens, 68 Cal. 113, 8 Pac. 712. We reach the conclusion that, had the trial Court required that the evidence tending to show the conspiracy between Levich and defendant been introduced before allowing the declarations of Levich to be proven, and no further evidence of the fact had been introduced than appears in this record, it would have been error to overrule defendant's objection to the introduction of such declarations, for whatever may be the rule in some States, we have recognized the rule here to be that the sufficiency of the proof of conspiracy, to justify introduction of the declarations of one

conspirator against another, in the first instance, is to be determined by the trial judge ruling on the admissibility of such declarations. State *v.* Nash, 7 Iowa, 347, 384; State *v.* Crofford (Iowa) 96 N. W. 889. And this is the general rule. . . . Therefore the Court should not have left it to the jury to say in the first instance whether or not there was sufficient evidence of conspiracy, aside from the declarations of Levich, to justify them in considering such declarations in determining whether defendant was guilty of the crime. . . .

We think there is another good reason why the declarations of Levich should have been excluded from the consideration of the jury. What Levich said, as testified to by the witnesses, was, in substance, that he had a grudge or grievance against Finkelstein, and that he had hired defendant to do him an injury. This declaration was not made in furtherance of the unlawful plan; it had no relevancy to the carrying out of that plan; but it was a mere narrative of a fact, made by Levich upon his own responsibility, and not purporting in any way to represent the defendant. The rule, as usually stated, with reference to the admissibility of the declarations of one conspirator as against another, is that such declarations are admissible only where they are made pending the conspiracy, and in furtherance of its unlawful purpose. State *v.* Crofford (Iowa) 96 N. W. 889. . . . It is true that in many, if not all the cases cited, the rule as thus stated is invoked to exclude declarations made after the conspiracy had been completed, or abandoned with reference to what took place while the conspiracy was in existence, but in principle the same reasons are applicable to declarations made while the conspiracy is pending, but not in furtherance of the unlawful purpose. The declarations of one conspirator are admissible against another on the theory that each is acting for all — that is, on the principle of agency — and certainly an alleged conspirator is not to be charged with statements made by another which have no relation to the carrying out of the common design. The fact appears to be that Levich made the declarations, to which the witnesses testified, in a spirit either of bravado, or, as one of the witnesses says, in a joking way, and his declarations were not taken seriously, nor did they apparently receive any attention until after the death of Finkelstein, when it was sought through them to connect defendant with the crime. If these declarations were of any significance, they were much more incriminating as against Levich himself than as against defendant. It is also to be noticed that some of the declarations to which the witnesses testified were made at a time prior to any connection or relation between Levich and defendant, so far as the other evidence in the case tends to establish it. Of course, declarations of Levich made prior to the formation of the conspiracy, and not in furtherance of any plan with which defendant was shown to have been connected, were not admissible. . . .

For the errors pointed out, the case is remanded for a new trial. Reversed.

262. PIEDMONT SAVINGS BANK *v.* LEVY

SUPREME COURT OF NORTH CAROLINA. 1905

138 *N. C.* 274; 50 *S. E.* 657

[Printed *post,* as No. 471]

SUB-TOPIC C. IMPLIED ADMISSIONS

(*a*) *Sundry Conduct*

265. FOXLEY'S CASE (1607? 5 Coke's Rep. 109b). For although he be found Not Guilty, yet he shall forfeit his goods by the flying, "quia fatetur facinus qui judicium fugit," and the law will not admit any proof against this presumption.

266. ARMORY *v.* DELAMIRIE (1722. King's Bench, 1 Str. 505). In Middlesex, coram PRATT, C. J. The plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who, under pretence of weighing it, took out the stones; and calling to the master to let him know, it came to three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled: . . .

As to the value of the jewel, several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and show it *not* to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages; which they accordingly did.

267. CRAIG DEM. ANNESLEY *v.* ANGLESEA

KING'S BENCH, IRELAND. 1743

17 *Howell's State Trials,* 1217

[IN this celebrated case the plaintiff claimed to be the legitimate son of the defendant's brother, and the true heir to the estates and peerage. He showed that at the age of fourteen he had been kidnapped by the defendant's procurement and transported to Pennsylvania, and after fifteen years' slavery had escaped back to England and instituted a suit to obtain his rights; while on the way to begin proceedings, he joined the gamekeeper of a friend in catching some poachers, and one of them was killed by a shot from his gun, which he claimed went off accidentally; he had been prosecuted and tried for murder and acquitted. He now

proposed to show the defendant's conduct towards him in those proceedings.]

Mr. *John Giffard* sworn, for the plaintiff.

Q. — Do you know the plaintiff, Mr. James Annesley? *Giffard.* — Yes, Sir.

Q. — Did you know when it was that he arrived in England from the West Indies? *Giffard.* — No, Sir.

Q. — Do you know of any prosecution carried on against the plaintiff by the defendant for murder?

(The question is objected to by the counsel for the defendant.)

Mr. *Fitz-Gibbon*, of counsel for the plaintiff. — My lord, this witness is brought to show that the lord Anglesea, knowing that the plaintiff claimed the estate of the family, as son and heir to the late lord Altham, expended vast sums of money on a prosecution, which he set on foot against him for the murder of an unfortunate man at Staines, in Middlesex, though the person killed stood in no degree of relation to my lord Anglesea that could have engaged him to have taken up this matter; and that the relations of the deceased being convinced that the killing was only accidental, had intended a very slight prosecution; but that the defendant, who was no way related to, or acquainted with the person killed, employed a solicitor, and carried on a severe prosecution against Mr. Annesley at a very great expense, and declared "he would spend £10,000 to get him hanged."

It will also appear, that while he labored to convict the plaintiff for murder, he knew the person, whose death gave occasion for the prosecution, was killed by accident. And this we apprehend to be a circumstance proper to be laid before the jury, to show that my lord Anglesea, conscious of the plaintiff's title, took these methods to cut him off.

Mr. *Recorder* (*Eaton Stannard*, Esq.), of counsel for the defendant. . . . This evidence is offered, as I apprehend, to raise a presumption that the plaintiff is the legitimate son of the lord Altham, because the defendant endeavored to destroy him; and then the question will be, Whether such evidence is proper to be admitted? It would be a question whether any improper measure taken to affect the life of the plaintiff would be evidence; but where, from their own opening the case, it does appear to your lordship nothing more than a proceeding according to the regular and open course of the law, with humble submission, that in this case or any case whatsoever, is not to be imputed to a man as a crime. . . .

Mr. *Harward*, for the plaintiff. — My lord, I apprehend, that every matter which in any degree tends to show whether the plaintiff was the lawful son of the late lord Altham, or no, is proper evidence to be laid before the jury. This evidence now offered, is to show that the present lord Anglesea, conscious of the plaintiff's legitimacy, undertook the prosecution to take away his life, and spent great sums of money in it. If it is an act of the defendant's, it is proper for the jury to consider, quo animo he undertook it, whether from a public spirit of justice, or a

private view to take away the life of this rival to his estate; for every act of the defendant that can give light to the jury of the opinion that my lord himself had of the plaintiff's right, is proper evidence to be offered to them. We have already laid evidence before the jury that we apprehend clearly shows that the lord Anglesea had, several years ago, spirited away this plaintiff, to prevent his asserting his right to the estate. This now offered is a further proof of my lord Anglesea's opinion concerning his right; and to corroborate that evidence that has already been laid before the Court, we have a right to produce it, as a further instance of this lord's own opinion, that it was necessary for him to come at his life at any rate. The question is not now, whether the prosecution was just or not? Whether Mr. Annesley was guilty or not of the murder charged on him? He has been acquitted. I must beg leave to say, if he had been found guilty, and got a pardon, and came to seek his right in this Court, my lord's carrying on the prosecution might have been imputed to a zeal for justice; but being acquitted, there is room for the jury to consider, whether his interfering was not owing to some other motive, and some other end than that of public justice. . . .

L. C. Baron Bowes. — This witness was produced to show that the prosecution against the plaintiff, for killing a man at Staines, was promoted and carried on by the defendant, and at his expense; which, as it was an attempt to take away the plaintiff's life, his counsel have insisted is proper to be laid before the jury, as further proof of the present defendant's distrust of his own title, and his opinion of the now plaintiff's right. . . .

This is a new attempt, and were it necessary for me now to give my opinion, I should think it ought not to be admitted.

The prosecution in itself was not unlawful; on the contrary, it is the duty of every man, especially in the case of blood, to take care that the offender be put upon his trial. And therefore, without entering into the merits of that case, the motives of the prosecution cannot appear; and those alone can, in my apprehension, introduce this evidence as pertinent to the matter in issue in this cause: who, without going farther, can say, this prosecution, though lawful, was carried on with an unlawful intention? I apprehend the Court cannot judge whether the prosecution was frivolous or malicious, unless the indictment was tried over again here. But as it is a matter worthy of deliberate consideration, and this trial will last another day, the counsel for the plaintiff may proceed to some other evidence, and we, if it be insisted on, will give you our opinions in the morning.

Mr. Baron Mounteney. . . . My present opinion is, that the evidence now offered ought to be admitted. . . . The foundation of my opinion is this: Every act done by the defendant, which hath a tendency to show a consciousness in him of title in the lessor of the plaintiff, must I think be admitted, beyond all controversy, to be pertinent and legal evidence in the present cause. I think that the evidence now offered hath

that tendency, and consequently is proper to be admitted. This evidence of the prosecution, in my apprehension, stands exactly on the same footing with the evidence of the kidnapping, . . . for I can by no means enter into the distinction of lawful and unlawful acts, which seems to have so much weight with my lord chief baron. That unlawful act was not therefore, in my apprehension, to be admitted in evidence because unlawful, but because it had a tendency to show such a consciousness as I have mentioned in the defendant; and if the carrying on the prosecution (which must be admitted to be a very extraordinary, though lawful, act of the defendant) hath the same tendency, it ought upon the same principle to be admitted.

[The evidence was admitted.] . . .

Bowes, C. B. [charging the jury]: . . . You will also consider whether these acts [above testified to] are not evidence to satisfy you that the defendant, in his own thoughts and way of reasoning, considered the staying of the boy here as what might some way prejudice his title. But whether, as insisted upon by the plaintiff's counsel, you ought to take this as an admission on the part of the defendant that the plaintiff was the lawful son of Lord Altham [earl of Anglesea], will deserve further consideration. Undoubtedly, there is a violent presumption, because no man is supposed to be wicked without design, and the design in this act must be some way or other relative to the title; but whether or no it was the opinion of the trouble he might have from this lad that induced him to do the act, or a consciousness that the lad was the son of Lord Altham, must be left to your determination.

268. ROE DEM. HALDANE & URRY *v.* HARVEY

King's Bench. 1769

4 *Burr.* 2484

In ejectment for certain premises in Newton, alias Frankville, in the Isle of Wight. The demises were laid on the 6th of October, 1768. The cause was tried before Mr. Justice Aston at Winchester.

He reported, that the title opened for the plaintiff was under Mrs. Haldane, as devisee of Robert Holmes. . . . Then the will of Robert Holmes was produced and proved, dated 24th of January, 1738. It appeared that he died the 9th of April, 1751, and by his will devised all the rest and residue of his estate whatsoever and wheresoever to his wife Elizabeth, her heirs, executors, and administrators. It was proved that Mrs. Elizabeth Holmes married Captain Haldane, and that he was dead. There was no proof of any receipt of rents since the Blachfords: and William Clark, a witness produced for the plaintiff, upon his cross-examination, said, "that Mrs. Haldane had, before the 6th of October, 1768, conveyed away her interest in the premises to Mr. Thomas Urry, and that the deed was in Court."

Upon this it was insisted by Mr. Serjeant *Burland,* for the defendant, "That the plaintiff's own witness proving the title out of Mrs. Haldane, and that the deed of conveyance to Urry was in Court, it ought to be produced in evidence, to show a title in Thomas Urry, the other lessor of the plaintiff." The deeds being in Court, or at least in the plaintiff's power, was not controverted. But, for the plaintiff, it was insisted "that no notice having been given by the defendant, for the plaintiff to produce this deed, they were not obliged to do it. . . . It was answered, "That this was not a case which required notice, that the defendant did not claim under this deed; it was only then disclosed by the plaintiff's own evidence; and to be produced, to complete his title derived from Urry."

Under the above circumstances, Mr. Justice ASTON thought "the plaintiff ought to give further evidence, to ascertain the title, under which he was to recover the term." But the plaintiff rested his case, and was nonsuited; the defendant agreeing "that the plaintiff should be at liberty to move for a new trial, without payment of costs."

A motion was accordingly made; a rule to show cause, and cause now shown. This case was strenuously argued at the bar, by several eminent counsel on both sides.

It was urged, on behalf of the defendant, that the deed being confessedly in Court, and in the power of the plaintiff, ought to have been produced by him, in order to show that Urry had a title. For, his own witness (William Clark) had proved that no title remained in Mrs. Haldane; she having conveyed it away: and none appeared in Urry; as they refused to produce the deed, though actually in Court, upon which they pretended that his title was founded. So that instead of showing that Urry had a title, this refusal to produce the deed was a good ground of presumption "that in fact he had none;" and that there was "some defect in this deed, or something or other contained in it, which, if it had been produced, would have shown that he had none; and that they did not dare to produce it, because it would destroy their title instead of proving it." . . .

On the other hand, it was argued by the plaintiff's counsel — That even admitting "that there was no need of their having had notice to produce it," or taking it upon the same footing as if such notice had been actually given to them; yet they were not under any obligation to produce it. They laid it down as a known and established rule of evidence, "That though a party had regular and full notice to produce a deed, the only consequence of his not producing it, was, that the adverse party should be let in to prove the contents of it by an inferior species of proof, as, for instance, by reading a copy of it, or by parol evidence;" which the defendants had not, in the present case, either done or attempted to do. And as to the pretended presumption "that there might be some defect in it, or something contained in it which destroyed the validity or effect of it," it was grounded upon mere imagination. . . . They insisted, with great vehemence, that instead of being nonsuited, the plaintiff ought

to have had a verdict; for, that his title appeared to be a good one, without the assistance of this deed. He had laid a double demise; one from Mrs. Haldane, the other from Urry. The evidence given by William Clark was, "that Mrs. Haldane had had an interest, but had conveyed it to Mr. Urry." Therefore, most manifestly, there was an interest remaining in one of the two lessors of the plaintiff; and it was indifferent to the plaintiff, in which of the two it subsisted. . . .

Lord MANSFIELD, C. J., reasoned from the nature of an ejectment, and the course of proceeding upon it. He laid it down as a position, "that in this action, the plaintiff cannot recover, but *upon the strength of his own title.*" He cannot found his claim upon *the weakness of the defendant's title.* . . .

He principally laid stress upon the plaintiff's refusing to produce the conveyance from Mrs. Haldane, which was in Court. The want of notice was no objection in *this* case; because they had the deed in Court. The refusal to produce it was an unfair attempt to recover, contrary to the real merits; and being a deliberate refusal, by the advice of counsel, contrary to the recommendation of the judge, warranted the strongest presumption "that the deed would show that neither of the lessors of the plaintiff had any title."

Mr. Justice YATES thought the plaintiff sought to have had a verdict. . . .

Mr. Justice ASTON. . . . I was not called upon to leave it to the jury. I thought the refusing to produce the deed was a want of fairness; and that the plaintiff had not made a complete title, without it. But if there is any doubt in the Court, I have no objection to a new trial.

Mr. Justice WILLES thought the direction was right. In ejectment the plaintiff must recover upon the strength of his *own* title. The only proof here is, "that the witness *said* that Mrs. Haldane had conveyed to Urry;" but he would not produce the deed of conveyance to Urry, though actually in Court. I do not say that the Court could *oblige* them to produce this deed. But I think the title of the plaintiff was *not complete;* the deed *not* being produced. . . .

Lord MANSFIELD observed, that in *civil* causes, the Court will force parties to produce evidence which may prove against themselves, or leave the refusal to do it (after proper notice) as a strong presumption to the jury. The Court will do it in many cases, under particular circumstances, by rule before the trial; especially, if the party from whom the production is wanted applies for a favor. But in a criminal or penal cause, the defendant is never forced to produce any evidence, though he should hold it in his hands in Court. (1 Tidd, 515. 1 T. R. 689.)

Per Cur. Rule discharged.

269. MORSE *v.* MINNEAPOLIS & ST. LOUIS R. CO.

SUPREME COURT OF MINNESOTA. 1883

30 *Minn.* 465; 16 *N. W.* 358

APPEAL by defendant from an order of the District Court for Freeborn County, FARMER, J., presiding, refusing a new trial.

J. D. Springer, for appellant. *Gordon E. Cole* and *J. H. Parker*, for respondent.

MITCHELL, J. — This was an action to recover damages for the alleged negligence of defendant, causing the death of plaintiff's intestate while employed as an engineer on its railroad. One of the acts of negligence alleged to have contributed to the injury was defendant's allowing its track to become and remain out of repair; the defects in that respect consisting of a broken rail and defective switch, which caused the engine upon which deceased was to be thrown from the track and upset. The rail and switch referred to were situated in the yard of defendant at Albert Lea, and near the water-tank, at which point the accident occurred. . . .

Plaintiff was also permitted to show that, after the accident, defendant repaired the switch alleged to have been defective. The Court held in O'Leary *v.* City of Mankato, 21 Minn. 65, that such evidence was, under certain circumstances, competent. This case was followed in Phelps *v.* City of Mankato, 23 Minn. 276, and Kelly *v.* South. Minn. Ry. Co., 28 Minn. 98, and this position is not without support in the decisions of other Courts. But, if competent, such evidence is only so as an admission of the previous unsafe condition of the thing repaired or removed; and, to render it admissible as such, the act must have been done so soon after the accident and under such circumstances as to indicate that it was suggested by the accident, and was done to remedy the defect which caused it. All Courts who admit the evidence at all so hold. In the present case the change in this switch was made over a year after the accident, and after it had been removed to another place. Under such circumstances the repairs were, presumably, merely an ordinary betterment. Under such a state of facts such evidence would not be admissible under any rule, and its admission was, therefore, error.

But, on mature reflection, we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this Court is on principle wrong; not for the reason given by some Courts, that the acts of the employees in making such repairs are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of his new experience after an unexpected accident has occurred, and as a

measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence. Dougan *v.* Champlain Transp. Co., 56 N. Y. 1; Sewell *v.* City of Cohoes, 11 Hun 626; Baird *v.* Daly, 68 N. Y. 547; Payne *v.* Troy & B. R. Co., 9 Hun 526; Salters *v.* Delaware & H. Canal Co., 3 Hun 338; Dale *v.* Delaware, L. & W. R. Co., 73 N. Y. 468. . . .

We discover no other error, but for those already referred to a new trial must be granted. Order reversed.

270. BROCK *v.* STATE

SUPREME COURT OF ALABAMA. 1898

123 *Ala.* 24; 26 *So.* 329

APPEAL from Circuit Court, Lauderdale county; JAMES J. BANKS, Judge.

Polly Brock was convicted of living in adultery with Bill Coppin, and appealed. Reversed.

Under the opinion on this appeal, it is unnecessary to set out in detail any of the facts relating to the rulings of the trial Court to which exceptions were reserved, except that in reference to the argument of the solicitor. In reference to this ruling the bill of exceptions contains the following recital:

In the course of his argument the solicitor stated to the jury that Bill Coppin had failed to take the stand and deny his illicit intercourse with the defendant, or explain what he was doing out in the woods. Defendant objected, and excepted to this statement of the solicitor, because Bill Coppin was one of the defendants, and his failure to testify could not be made the subject of comment. The Court refused to sustain this exception, but stated that the argument was legitimate, and to this action of the Court the defendant then and there duly excepted.

Emmett O'Neal, for appellant. *Chas. G. Brown, Atty. Gen.,* for the State.

SHARPE, J. . . . The defendant and one Bill Coppin being indicted jointly, a severance of the trial was obtained. The solicitor, in his argument to the jury, commented upon the fact that Coppin "had failed to take the stand and deny his illicit intercourse with the defendant, or explain what he was doing out in the woods." Upon objection by defendant's counsel to this comment, the Court stated that the argument was legitimate. There is a recognized rule of evidence which authorizes a presumption unfavorable to a party failing to produce a witness having

peculiar knowledge of facts from which the party claims a benefit, and where the witness is accessible to such party and not to his adversary. In Bates *v.* Morris, 101 Ala. 282, 13 South. 138, this rule was referred to, and it was added that "such presumption is, however, indulged with great caution, and only when it is manifest the evidence is within the power of one party, and is not accessible to his adversary." In that case the question involved the bona fides, as to creditors of Bates, of a transfer of property by him to his wife, and it was held that the last rule stated was applicable, and that no unfavorable inference could be raised against the wife from her failure to introduce her husband as a witness, though he was present at the trial. While there has been diversity of opinion in courts of other States as to the right of the jury to consider the nonproduction of witnesses as a circumstance against the party to whom they are available, the decisions of this State appear without conflict to sustain the rule as stated in Bates *v.* Morris, *supra;* Patton *v.* Rambo, 20 Ala. 485; Jackson *v.* State, 77 Ala. 18; Carter *v.* Chambers, 79 Ala. 223; Pollak *v.* Harmon, 94 Ala. 420, 10 South. 156; Crawford *v.* State, 112 Ala. 1, 21 South. 214. The last-quoted case denied the right of counsel to comment in argument upon the failure of the opposite party to examine a witness who was accessible to both parties. The authorities rest upon the consideration that there is, in such cases, no presumption that the testimony, if taken, would be more favorable to one party than to the other, and no room for conjecture as to what might have been shown by an examination.

In the present case, Coppin could not have been compelled to testify to any fact tending to criminate himself. The offense being one of which he and the defendant must both have been either guilty or innocent, his mere refusal upon the ground of self-incrimination might have been construed by the jury to the defendant's disadvantage. On the contrary, if he had not declined, the credibility of his testimony would have been open to assault upon the ground of interest. If, in view of the fact that the scope allowed to his examination would have depended largely upon Coppin's own volition, the testimony could be deemed accessible to the defendant, yet it does not appear to have been less accessible to the State. Under the circumstances, no presumption could arise that the testimony was witheld from sinister motives, and the jury should have been left to try the issue upon the evidence introduced.

The proneness of the jury to consider a defendant's failure to testify in his own behalf, and the prejudice to the defendant which would naturally result therefrom, induced the legislative prohibition against any adverse comment in argument upon such failure. The statute does not cover this precise case, but the argument was improper under the general rule before stated; and, in determining its effect, we are impressed with the consideration that the same results which the statute intended to forestall when the defendant is not examined may follow, as well, when the person not produced is one jointly implicated with the defend-

ant. The argument objected to was, therefore, forcibly calculated to injure the defendant's case, and the error committed in its indulgence must work a reversal of the judgment. . . .

Tyson, J. (dissenting). The opinion in this case practically destroys all room for the application of the universal rule or doctrine recognized by this Court and all courts of last resort, as will be shown by a careful examination of the facts as presented by the record and a proper analysis of the cases of this court cited in the opinion, and of the opinions of other Courts, upon the point here involved.

One of the theories for a refusal to apply the rule, recognized by the writer of the opinion in this case, is based upon the idea that Coppin was "accessible" as a witness for the State. To my mind the writer has misconceived the meaning of the word "accessible," and the rule or doctrine involved in this case. He limits the meaning of the word "accessible" to the presence in person of the witness, or the power of the State to procure his personal presence. Such an interpretation, I repeat, not only practically abolishes the application of the rule, but practically destroys it, by limiting it in its application to only those cases where the whereabouts of the witness is known to, and he is accessible to, the defendant, and unknown to the prosecuting officers of the State. . . . It is inconceivable how a witness can be "accessible," in the sense in which Justice Sharpe limits the meaning of the phrase quoted by him, to one party litigant, and inaccessible to his adversary, if the witness' whereabouts is known to both. Each of the parties litigant are equally entitled to all the processes of the Court to compel his attendance, and therefore can compel him to attend. This right to process to compel the attendance of the witness, doubtless, existed at the time the rule under consideration originated. This being true, just how the rule — admitting, for the sake of this discussion, that it was correctly stated in Bates *v.* Morris, which, however, we will show, later on, is not the true one — was called into being and became almost universally recognized and adopted by the courts, is beyond comprehension.

Bearing in mind that it is not so much the presence of the witness that a party litigant stands so much in need of, as it is the testimony to which the witness will depose with fairness, impartiality, and truthfulness, it is the latter that makes the witness accessible or available to both parties litigant. It is within the experience of all connected with the administration of justice and the trial of causes that witnesses are more or less influenced by the circumstances surrounding them at the time of the trial, their relation to the parties litigant, etc. . . . So partisan do they become at times that, however honest they may be, they are not available, to the party to the suit to whom they are hostile, to elicit the truth in full of the transaction of which they possess a full knowledge.

The foregoing considerations are conclusive to my mind of the mistaken meaning of the word "accessibility," and conclusive that a witness to the transaction may be present in the court during the trial, and ye[t]

not be accessible to the State, in the sense that he may be so hostile to the prosecution, or so connected with the defendant, as that his testimony would be unavailable to the State.

But the extract from the case of Bates *v.* Morris, made use of by Justice SHARPE, is a much stronger statement of the rule than can be found in any cases where the question has arisen, and is not in harmony with any statement of the rule that I have been able to find, and it would seem, upon principle, that it is too strongly stated. The rule, in my judgment, was correctly stated . . . by Justice CLOPTON in Pollak *v.* Harmon, where he said: "There is also another rule, that when a party has the means of producing a witness who possesses peculiar or higher knowledge of the transaction, and fails to produce him, this affords ground for suspicion that the testimony of such better-informed witness would be unfavorable to his claim." . . . The presumption, or, more properly speaking, the unfavorable inference, under the rule as laid down in the cases of Carter *v.* Chambers and Pollak *v.* Harmon, the jury may be authorized to indulge, arises, not out of the accessibility or inaccessibility of the witness to either of the parties litigant, but out of the failure of a party to explain or otherwise rebut damaging facts introduced in evidence against him by a witness, accessible to him, possessing a knowledge of the transaction supposed to be favorable to him, if such favorable fact exists. In no case in this court have the facts of the case warranted the application of the rule. . . .

We not are, however, without cases in which the rule has been applied in other jurisdictions. These cases are numerous, and the rule, as stated in them, comports with the one laid down in Carter *v.* Chambers and Pollak *v.* Harmon. Many of them are criminal cases, and involve the correctness of the prosecuting attorney's comment, as here, upon the defendant's failure to explain, by a witness, accessible to him, possessing a knowledge of the incriminating facts introduced by the State against him. Notably among these is the case of Graves *v.* U. S., 150 U. S. 118, where the rule is clearly stated to be as follows: "It was said by Chief Justice SHAW in the case of Com. *v.* Webster, 5 Cush. 295, 316: 'But when pretty stringent proof of circumstances is produced tending to support the charge, and it is apparent that the accused is so situated that he can offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to support, the charge.' The rule, even in criminal cases, is that, if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." . . .

The other theory upon which Justice SHARPE declines to apply the rule in this case is that Coppin's testimony was not accessible *to the*

defendant, for the reason that he could not have been compelled to testify to any fact tending to criminate himself. . . .

There was no allusion in the remarks of the solicitor to her failure to testify, but simply her failure to introduce Coppin, who could have contradicted the evidence introduced by the State tending to establish his illicit intercourse with her, or who could have explained what he was doing out in the woods with her. Besides, the objection to these remarks was not made on this ground, but exclusively upon the idea that Coppin's failure to testify could not be made the subject of comment. This precise question was passed upon in the following cases, cited *supra:* Jackson *v.* State, 31 Tex. Cr. 342; State *v.* Weddington, 103 N. C. 364; People *v.* McGrath, 5 Utah 525; Sutton *v.* Com. 85 Va. 128; and State *v.* Mathews, 98 Mo. 128, — in which it was held that similar comments, as here, did not offend statutes containing substantially the same provisions as ours. The defendent failing to introduce any testimony whatever, clearly her conduct in this respect was the subject of comment, and this record discloses a case where the rule ought to be applied and enforced, as it is applied and enforced by the Courts of other States. . . . In my opinion, the judgment of conviction ought to be affirmed.

271. STEVENS *v.* BOSTON ELEVATED RAILWAY CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1904

184 *Mass.* 476; 69 *N. E.* 338

Two actions of Tort by the administratrix of the estate of Charles N. Stevens, the first for the suffering of the intestate and the second for his death, both alleged to have been caused by the negligence of the defendant's servants in operating a car of the defendant. Writs dated respectively November 19, 1900, and September 20, 1901. In the Superior Court the cases were tried together before FESSENDEN, J., without a jury.

The plaintiff's intestate was a hackman driving a carriage in a funeral. According to the plaintiff's evidence the car came up from behind, and struck one of the forward wheels of the carriage and one of the horses. It was admitted that neither before nor at the time of the accident did the motorman sound the gong. The judge found for the plaintiff in both cases, assessing damages in the first case at $2,500, and in the second case at $4,000. The defendant alleged exceptions. The exception relied upon was as follows:

The plaintiff offered in evidence one of the rules in a certain book admitted by the defendant to be a book of rules issued by the defendant company to its motormen and conductors, and admitted to have been the

book of rules that was in force on the day of the accident. The rule which the plaintiff offered was Rule 83, and was as follows:

"Gong Ringing. The gong must always be sounded before starting, when starting, and before reaching, and at all street crossings, when passing other cars or vehicles, and at all points where vehicles or foot passengers are crossing or are liable to cross the tracks. The gong must not be sounded wantonly or unnecessarily, and when passing places of worship during service hours, making as little noise as possible. Upon approaching streets or crossings the power must be shut off and the car kept under perfect control. This rule must be strictly observed during all hours of the day and night."

To the admission of this rule the defendant objected. The counsel for the plaintiff said: "I put it in as a rule of conduct for your motorman by which he is to be judged to some degree." The judge then said: "I suppose it is put upon the same ground that an ordinance is put upon as bearing upon the carelessness or negligence of the person by whom the rules are to be followed. I will admit the evidence and save Mr. Thompson his exception." The rule was then admitted in evidence.

W. G. Thompson, for the defendant. *S. L. Whipple and W. R. Sears*, for the plaintiff.

KNOWLTON, C. J. — The only exception now relied on by the defendant is to the admission in evidence of the defendant's rule in regard to sounding the gong, in connection with testimony that the defendant's motorman disobeyed the rule and that this disobedience was one of the causes of the accident. The decisions in different jurisdictions are not entirely harmonious upon the question now raised. But we are of opinion that the weight of authority and of reason tends to support the ruling of the judge in the present case.

It has been settled by various adjudications in this Commonwealth that the adoption of additional precautions for safety by a defendant, after an accident, cannot be proved, as tending to show liability for the method used at the time of the accident. . . . This is the general rule in other jurisdictions. Morse *v.* Minneapolis & St. Louis Railway, 30 Minn. 465 [*ante*, No. 269]; Columbia & Puget Sound Railroad *v.* Hawthorne, 144 U. S. 202, 207, 208, and cases there cited. On the other hand, a violation of rules previously adopted by a defendant in reference to the safety of third persons has generally been admitted in evidence as tending to show negligence of the defendant's disobedient servant for which the defendant is liable. The admissibility of such evidence has often been assumed by this Court without discussion. Mayo *v.* Boston & Maine Railroad, 104 Mass. 137, 140. . . . Similar statements of the law may be found in numerous cases. Dublin, Wickford & Wexford Railway *v.* Slattery, 3 App. Cas. 1155, 1163. . . . The only decision to the contrary of which we are aware is in the case of Fonda *v.* St. Paul City Railway, 71 Minn. 438, 449.

It is contended by the defendant that there is no sound principle

under which such evidence can be admitted. The evidence is somewhat analogous to proof of the violation of an ordinance or statute by the defendant or his servant, which is always received as evidence, although not conclusive, of the defendant's negligence. Wright *v.* Malden & Melrose Railroad, 4 Allen 283; Lane *v.* Atlantic Works, 111 Mass. 136; Hall *v.* Ripley, 119 Mass. 135; Hanlon *v.* South Boston Horse Railroad, 129 Mass. 310. Such an ordinance or statute, enacted by a body representing the interests of the public, imposes "prima facie" upon everybody a duty of obedience. Disobedience is, therefore, a breach of duty, unless some excuse for it can be shown which creates a different duty, that, as between man and man, overrides the duty imposed by the statute or ordinance. Such disobedience in a matter affecting the plaintiff is always competent upon the question whether the defendant was negligent. So a rule made by a corporation for the guidance of its servants in matters affecting the safety of others is made in the performance of a duty, by a party that is called upon to consider methods, and determine how its business shall be conducted. Such a rule, made known to its servants, creates a duty of obedience as between the master and the servant, and disobedience of it by the servant is negligence as between the two. If such disobedience injuriously affects a third person, it is not to be assumed in favor of the master that the negligence was immaterial to the injured person, and that his rights were not affected by it. Rather ought it to be held an implication that there *was* a breach of duty towards *him*, as well as towards the master who prescribed the conduct that he thought necessary or desirable for protection in such cases. Against the proprietor of a business, the methods which he adopts for the protection of others are some evidence of what he thinks necessary or proper to insure their safety.

A distinction may well be made between precautions taken voluntarily before an accident, and precautions which are suggested and adopted after an accident. This distinction is pointed out in Columbia & Puget Sound Railroad *v.* Hawthorne, 144 U. S. 202, 207. . . . In Morse *v.* Minneapolis & St. Louis Railway, 30 Minn. 465 [*ante*, No. 269], it is said, referring to the same subject, that "A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards." See also Illinois Central Railroad *v.* Swisher, 61 Ill. App. 611. In Menard *v.* Boston & Maine Railroad, 150 Mass. 386, and in some of the earlier cases there is language which goes further than the decision, and which might imply that such evidence as was received in this case is incompetent, but the case is authority only for that which was decided.

Exceptions overruled.

272. RHEA *v.* TERRITORY

COURT OF CRIMINAL APPEALS OF OKLAHOMA. 1909

3 *Okla. Cr.* 230; 105 *Pac.* 314

[Printed *post*, as No. 590]

(*b*) *Assent by Silence*

274. HORNE TOOKE'S TRIAL. (1794. Howell's State Trials, XXV, 1, 120). [Treason. A certain paper, addressed to Mr. Tooke and found at his house, was offered against him].

Mr. *Tooke*. — I do not know what papers may have been taken from my house; but are letters written to me to be produced as evidence against me?

L. C. J. EYRE. — Being found in your possession, they undoubtedly are producible as evidence; but, as to the effect of them, very much will depend upon the circumstances of the contents of those letters, and whether answers to them can be traced, or whether anything has been done upon them. A great number of papers may be found in a man's possession which will be, prima facie, evidence against him, but will be open to a variety of explanations; and it is always a very considerable explanation that nothing appears to have been done in consequence of the paper being sent to him. But all papers found in the possession of a man are prima facie evidence against him, if the contents of them have application to the subject under consideration.

Mr. *Tooke*. — The reason of my asking it is, I am very much afraid that, besides treason, I may be charged with blasphemy.

Lord Chief Justice EYRE. — You are not tried for that.

Mr. *Tooke*. — It is notorious I do not answer common letters of civility, but I have received and kept many curious letters. I received some letters from a man whose name is *Oliver Verall*, and he endeavoured to prove to me that he was God the Father, Son, and Holy Ghost. He proved it from the Old Testament; in the first place that he was God the Father, because God is *O Veral:* that is, God over all. He proved he was God the Son, from the New Testament — verily, verily I am he; that is, *Veral I*, *Veral I*, I am he. Now, if these letters, written to me, which I, from curiosity, have preserved, but upon which I have taken no step, and to which I have given no answer, are produced against me, I do not know what may become of me.

L. C. J. EYRE. — If you can treat all the letters that have been found upon you with as much success as you have these letters of your correspondent, you will have no great reason for apprehension, even if that letter should be brought against you.

275. FAIRLIE *v.* DENTON

NISI PRIUS. 1828

3 *C. & P.* 103

MONEY had and received. Plea — General issue. The plaintiff had sent a letter to the defendants, demanding a sum of money as due to

him. But no answer had been returned by the defendants. The plaintiff's counsel called for the letter under a notice to produce, with a view to reading it in evidence, as a part of their case.

Scarlett, A. G., for the defendants, objected . . . an answered letter, written by the plaintiff, was not evidence in his own favour; for otherwise a party would only have to write a letter to make evidence for himself.

F. Pollock, contra. Certain things are stated in this letter, which the defendants might deny by answering it; and I submit that it is evidence, exactly the same as what is said verbally in the presence of a defendant is evidence against him, though he may make no answer.

L. C. J. TENTERDEN. — I am slow to admit that. What is said to a man before his face, he is in some degree called on to contradict, if he does not acquiesce in it. But the not answering a letter is quite different; and it is too much to say that a man, by omitting to answer a letter, at all events admits the truth of the statements that letter contains. . . . You may have that single line read, in which the plaintiff makes a demand of a certain amount, but not any other part which states any supposed fact or facts.

276. MATTOCKS *v.* LYMAN

SUPREME COURT OF VERMONT. 1844

16 *Vt.* 113

ASSUMPSIT. The declaration set forth in substance, in several counts, that the plaintiff and defendants entered into an agreement, by which the defendants were to furnish money, and the plaintiff was to purchase wool for them, which the defendants were to sell, and, if the profits exceeded $200, to pay to the plaintiff for his services one half of the amount of profits, — but if they were less than that sum, then to pay the plaintiff one third; and the plaintiff averred that the money had been furnished and the wool purchased, as agreed, and that the defendants had sold the same at a profit, but had refused to pay to the plaintiff his share. The declaration also contained counts in indeb. assumpsit for work and labor, goods sold and delivered, and the money counts. The defendants pleaded the general issue, and also a plea in set-off. Trial by jury.

The plaintiff, to prove the allegations in his declaration, introduced one Bradley as a witness, who testified that, at the request of the plaintiff, he called with him at the defendants' store, and that the plaintiff stated to the defendant Lyman the terms of the contract, as set forth in the declaration, and said he was informed that the wool had been sold for a price which would entitle him to one-half of the profits, and demanded said proportion, — and that Lyman's only reply was, that he was ready to settle with him, plaintiff; but that they did not owe him anything,

but that he, plaintiff, owed them. . . . The defendants, under their plea in offset, gave in evidence a note for $25, which they held against the plaintiff. The defendants requested the Court to charge the jury, — 1. That the evidence was insufficient to entitle the plaintiff to recover. . . .

The jury were also told that the testimony of Bradley was competent evidence, as tending to prove, by an implied admission on the part of the defendant Lyman, that the contract was as claimed by the plaintiff; — but that its weight must depend upon the circumstances attending it, of which they were judges. . . . The jury returned a verdict for the plaintiff. Exceptions by defendants.

C. D. Kasson, for defendants. . . . The testimony of the witness Bradley was not evidence even tending to prove a special contract. No inference of any admission of the correctness of the plaintiff's claim can legally be drawn from it. . . .

Maeck and *Smalley*, for plaintiff.

The opinion of the Court was delivered by

Redfield, J. . . . The most important practical question, by far, discussed in the case, remains to be determined. It seems to have been generally considered that all conversation had in the presence of a party, in regard to the subject of litigation, might properly be given in evidence to the jury. But in Vail *v.* Strong, 10 Vt. 457, and in Gle *v.* Lincoln, 11 Vt. 152, some qualification of this rule is established. It is there held, that unless a claim is asserted by the claimant or his agent, and distinctly made to the party, and calling naturally for a reply, mere silence is no ground of inference against one. And we think even in such a case that mere silence ought not to conclude a party, unless he thereby induces a party to act upon his silence in a manner different from what he otherwise would have acted.

There are many cases of this character when one's silence ought to conclude him. But when the claim is made for the mere purpose of drawing out evidence, as, in the present case, it is obvious must have been the fact, or when it is in the way of altercation, or, in short, unless the party asserting the claim does it with a view to ascertain the claim of the person upon whom he makes the demand, and in order to know how to regulate his own conduct in the matter, and this is known to the opposite party, and he remains silent, and thereby leads the adversary astray, mere silence is, and ought to be, no ground of inference against any one. The liabilities to misapprehension, or misrecollection, or misrepresentation are such, that this silence might be the only security. To say, under such a dilemma, that silence shall apply assent to all which an antagonist may see fit to assert, would involve an absurdity little less gross than some of the most extravagant caricatures of this caricature loving age. With some men, perhaps, silence would be some ground of inferring assent, and with others none at all. The testimony then would depend upon the character and habits of the party, — which would lead to the direct trial of the parties instead of the case.

It is true, when a claim is the subject of conversation in the hearing of a party against whom the claim is made, and he takes any part in such conversation, the whole evidence must go to the jury; for, by consenting to enter into the conversation, he thereby makes his declarations upon the subject evidence, if his adversary sees fit to avail himself of them, — and by consenting to make any declaration in regard to the matter, he thereby puts the matter upon a much stronger ground against him than would mere silence. But even in such a case the jury should be told, in the charge of the Court, that neither his declarations, nor his silence, are to be construed into an implied admission of facts beyond the scope of the declarations themselves.

In the present case the declarations of the defendant, Cole, were a virtual denial of the claim made upon them by the plaintiff. . . . The declaration or the silence of Cole had no tendency to prove an admission of the plaintiff's claim.

We understand the English cases, in regard to admissions implied from silence, to go no farther than we now decide, although it is true the dicta of many of the elementary writers go farther. The cases cited in Starkie's Evidence, 2d vol., p. 26, to support the general proposition that a presumption may be made of an admission of a party from acquiescence, or silence, are all where the party lies by, during the exercise of a right interfering with his claim, or where the party, by his silence, has led another into a mistake, which amounts to a virtual fraud, unless he were to abide by his silence. Steele *v.* Prickett, 2 Stark. R. 463 (3 E. C. L. 490); Doe *v.* Allen, 3 Taunt. 78; Duncan *v.* Scott, 1 Camp. 100. They are cases of acquiescence in the conduct of a party based upon that acquiescence, rather than of silence under the mere assertion of a claim, and when denial could be of no avail, but to lead to altercation. In this latter class of cases, I have not been able to find any decision justifying the presumption of admission from silence merely.

Judgment reversed and cause remanded for a new trial.

277. COMMONWEALTH *v.* KENNEY

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1847

12 *Metc.* 235

LARCENY of a bag of money. . . . John S. Brewer was called by the attorney for the Commonwealth, and testified that he was in one of the watch houses, in Boston, between eleven and twelve o'clock in the evening of September 5, 1846, and that while he was there two of the watchmen of the city, having the defendant in custody, came in; that one of the watchmen said, "here is a man that has been robbing a man;" that presently Russell, the person named in the indictment as having been robbed, came in crying, and said, "that man," pointing to the defendant,

"has stolen my money;" . . . that the witness . . . saw a bag, which he took up, and thereupon said, "here is the bag;" the defendant then being on the stairs, going down cellar, and within hearing; that Russell immediately said, "that is my bag;" that Baxter then took the bag, and counted the money in it; and that while Baxter was counting the money — the defendant then standing in the watch house — Russell said, "that was all the money I had in the world;" and that the defendant made no reply to any of the aforesaid declarations. . . .

The defendant's counsel objected to the admission of the declarations of Russell, on the ground that the testimony of Russell himself was the best evidence, and that the defendant was entitled to it, and to the right of cross-examining him. The judge admitted the declarations of Russell, as above reported. The defendant was found guilty by the jury, and alleged exceptions.

W. H. Whitman, for the defendant. *S. D. Parker*, for the commonwealth.

SHAW, C. J. — The defendant was indicted for stealing money and a bag, the property of Barzillai Russell, from the person of said Russell. The averment of the fact of stealing, and that the money was the property of Russell, were material averments. Russell was not called as a witness, doubtless because he could not be found. But evidence was offered to show that declarations were made at the watch house, by Russell, in the presence and hearing of the defendant, in regard to the theft, to which the defendant made no reply. This evidence was objected to by the defendant, but was admitted by the Court; and this is the ground of exception. . . .

The evidence, if competent at all, was competent on the ground of *admission* by the defendant, which, though often slight as to weight, is not secondary.

But on another ground, we take a different view of the admissibility of the evidence, depending on the question whether the statements of Russell in the hearing of the defendant, and the silence of the latter, do amount to a tacit admission of the facts stated. It depends on this: If a statement is made in the hearing of another, in regard to facts affecting his rights, and he makes a reply, wholly or partially admitting their truth, then the declaration and the reply are both admissible; the *reply*, because it is the act of the party, who will not be presumed to admit anything affecting his own interest, or his own rights, unless compelled to it by the force of truth; and the *declaration*, because it may give meaning and effect to the reply. . . . In some cases, where a similar declaration is made in one's hearing, and he makes no reply, it may be a tacit admission of the facts. But this depends on two facts: first, whether he hears and understands the statement, and comprehends its bearing; and secondly, whether the truth of the facts embraced in the statement is within his own knowledge, or not; whether he is in such a situation that he is at liberty to make any reply; and whether the statement is made

under such circumstances, and by such persons, as naturally to call for a reply, if he did not intend to admit it. If made in the course of any judicial hearing, he could not interfere and deny the statement; it would be to charge the witness with perjury, and alike inconsistent with decorum and the rules of law. So, if the matter is of something not within his knowledge; if the statement is made by a stranger, whom he is not called on to notice; or if he is restrained by fear, by doubts of his rights, by a belief that his security will be best promoted by his silence; then no inference of assent can be drawn from that silence. Perhaps it is within the province of the judge, who must consider these preliminary questions in the first instance to decide ultimately upon them. . . .

The circumstances were such, that the Court are of opinion that the declaration of the party robbed, to which the defendant made no reply, ought not to have been received as competent evidence of his admission, either of the fact of stealing, or that the bag and money were the property of the party alleged to be robbed. The declaration made by the officer, who first brought the defendant to the watch house, he had certainly no occasion to reply to. The subsequent statement, if made in the hearing of the defendant (of which we think there was evidence), was made whilst he was under arrest, and in the custody of persons having official authority. They were made, by an excited, complaining party, to such officers, who were just putting him into confinement. If not strictly an official complaint to officers of the law, it was a proceeding very similar to it, and he might well suppose that he had no right to say anything until regularly called upon to answer.

We are therefore of opinion that the verdict must be set aside and a New trial granted.

278. PARULO *v.* PHILADELPHIA & READING R. CO.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK. 1906

145 *Fed.* 664

MOTION by defendant to set aside the verdict of the jury in favor of the plaintiff and for a new trial, on the grounds that the verdict is contrary to the evidence and law and upon the exceptions taken upon the trial.

Thomas J. O'Neill, for plaintiff. *Pierre M. Brown*, for defendant.

RAY, District Judge. — This action has been twice tried. On the first trial the jury disagreed. On the second trial the jury found a verdict for the plaintiff in the sum of $2,000. On the evening of November 7, 1902, the plaintiff, who was working as a stone mason at a place called "Rock Hill," a few miles north of Perkasie, a station on defendant's railroad, being at Perkasie and desiring to go to his home, and having

five pounds of meat in a package, went down to the station. He claims that as he arrived close to the station he found a freight train at a standstill, with the engine near the water tank a short distance above and north of the station, the cars extending for some distance to the south of it; that he clambered up the side and to the top of the car some three or four cars back and to the south of the engine, and seated himself on the front end of the car, with his feet hanging down between it and the one next in front. He claims that a few seconds after he had so seated himself the train started on north, and that it had proceeded but a few hundred feet when a man with a lantern, whom he does not claim to recognize, came up behind him, and told him, "Get off the train. I told him a couple of times 'Wait until the train stops.' He said, 'You won't get off, you son of a bitch.' I said, 'wait until the train stops,' and he kicked me right off between the two cars." . . . One foot was crushed partially off, and the other wholly severed. . . . The engineer, fireman, and conductor say they were on the engine or tender, and that the brakeman was there also, as they passed Perkasie, and that the flagman was in the top of the caboose at the rear end of the train. They all say they did not see any one on the train except this crew, and did not push or kick any one off.

The contention was and is that the plaintiff did not furnish any evidence that any employé of defendant on that train either pushed or kicked him off; that there is no evidence to sustain such a finding, or to justify the Court in submitting the question to the jury. . . . It was a fair question of fact for the jury whether or not this brakeman kicked the plaintiff off the train when it was in motion at the place in question.

The defendant excepted to the ruling of the Court sustaining objections to certain questions put to Dr. Williams and to the witness Levi Texter. After the accident and the finding of the plaintiff he was taken into a freight car — one on a siding. Dr. Williams, the local physician of the defendant, was sent for, and he saw the plaintiff. He says:

"Part of one foot was cut off, and the other was cut off near the heel. It was smashed. . . . He was not unconscious at any time when I saw him. At no time. . . . It was a dangerous wound; if not attended to properly it would be fatal. He seemed to be suffering great pain. *Q.* — Did you have any conversation direct with him yourself while he was there in the railroad station? *A.* — I made an effort to, but I could not get anything out of him one way or the other for a long time, and the section hands, I asked them to ask him, and he said something to them and they told me. *Q.* — You did not talk directly to him yourself, did you? *A.* — No, sir. *Q.* — You cannot speak Italian? *A.* — No, sir; the section hands were Italians. . . . *Q.* — Then after you had asked the sectionman to ask the plaintiff how the accident occurred, did the sectionman talk to the plaintiff in Italian? *A.* — I do not know what he talked. He talked something. I cannot tell you what it was. He did not talk English, I know that. *Q.* — He said something to him? *A.* — Yes, sir. *Q.* — Did the plaintiff say something to the sectionman after that? *A.* — The sectionman;

yes, sir. *Q.* — Did the sectionman then say something to you? *A.* — Yes. *Q.* — What did the sectionman say to you? Was this in the presence of the plaintiff? *A.* — Yes. *Q.* — What did the sectionman say to you?"

This was objected to as incompetent, irrelevant, and immaterial, and plaintiff's counsel said: "I suppose the theory upon which it is offered is that this sectionman is supposed to have correctly interpreted what he told him." To this defendant's counsel by silence assented. The Court: "You mean there is no proof that the sectionman understood what was said to him?" Plaintiff's Counsel: "Yes." The Court: "Or that this man stated correctly what he said?" Plaintiff's Counsel: "Absolutely." The Court then sustained the objection. Defendant's Counsel: "Do you admit that the plaintiff understood English to any extent?" Plaintiff's Counsel: "No, I do not know how much English he spoke." Defendant's counsel then excepted. At this time there was no evidence before the Court that the plaintiff could speak or understand a word of English. . . .

A. M. Sperry was then called by the defendant, and he said that on the Monday following the accident he went to the hospital, and talked with the plaintiff in English, and he understood plaintiff and plaintiff seemed to understand him. "I asked him first where he lived, and all about him, and he told me he worked in a stone crusher at Rock Hill, and he had been down to Perkasie, and was getting back, and walking up along the railroad, and he stopped to light his pipe, and the wind blew him under the train." Says his talk with the plaintiff was just long enough for him to tell him (witness) that. . . . These Italian sectionmen were not produced. Their absence was attempted to be accounted for by the statement of a witness that they left the employment of defendant in July after the accident, stating they were going to Italy. It is now claimed that it was error to reject the statement of the sectionman made to Dr. Williams in the presence of the plaintiff when he lay in the condition described, and under the circumstances described, as his silence might be considered as an acquiescence in that statement.

It is not everything that is said in the presence of a party to a litigation in reference to the subject-matter thereof that may be given in evidence against him when he remains silent, and his silence is relied upon as an implied admission of the truth or correctness of the statement. If the party in whose presence the statement was made was physically and mentally able to hear and understand, and sufficiently near to hear, and the statement was of a character that would under the circumstances naturally call upon him for a denial or qualification if untrue, and he was at liberty to deny or qualify, then it may be given in evidence against him; otherwise, not. Schilling *v.* Union R. Co. of N. Y. C., 77 App. Div. 74, 78 N. Y. Supp. 1015; Commonwealth *v.* Kenney, 12 Metc. 235 [*ante*, No. 277]; People *v.* Koerner, 154 N. Y. 357, 374, 375; Lanergan *v.* People, 39 N. Y. 41; 1 Greenleaf on Evidence (15th Ed.), § 197; 2

Wigmore on Evidence, § 1071. . . . Whether the circumstances are such as to call for a reply is a preliminary question for the Court. . . .

Applying these rules to the case now before the Court, it is evident that the statement made by the sectionman, whose ability to understand English and whose plainness of speech in English were not disclosed, under the circumstances of this case was not proper to go to the jury, and was properly excluded. Within a very short time before the statement was made in his presence both feet had been crushed off. The shock was great, and he was exhausted from great pain and loss of blood. The doctor was unable to get anything from him. It was with great difficulty and only after repeated efforts that they ascertained his name. There was no shadow of evidence that he heard or paid any attention to what this sectionman said to the doctor. Clearly, "no reasonable inference of acquiescence could be drawn from the silence" of the plaintiff under the circumstances proved by the witnesses and not disputed. Under such circumstances, it cannot be properly presumed or inferred, or even reasonably supposed, that he listened or paid attention to, much less understood or comprehended, what was said to the doctor by this Italian laborer, who soon thereafter left for Italy, assuming he did, and whose knowledge of and ability to speak English must have been imperfect. If the plaintiff could not understand the English of the doctor, is it reasonable to suppose he understood that of this Italian sectionman who was speaking to the doctor and not to him? The case is within and governed by the Schilling Case and the Koerner Case cited, as well as by the general rule laid down by Greenleaf and Elliott, supra. . . .

As there was no prejudicial error, the motion for a new trial is denied.

279. WIEDEMANN *v.* WALPOLE

QUEEN'S BENCH. 1891

L. R. 1891, 2 *Q. B.* 534

MOTION to enter judgment for the defendant on one of the issues in an action tried before POLLOCK, B., and a jury. The action was brought to recover damages for the breach of the defendant's promise to marry the plaintiff; to recover damages for libel, and to recover the amount of expenses incurred by the plaintiff in making certain journeys at the defendant's request. The defendant pleaded a denial of the promise to marry, and of the libel, and further, that the occasion of publishing the alleged libel was privileged. . . .

The plaintiff produced at the trial copies of letters written by her to the defendant subsequently to her meeting with his mother, the first being a letter of November 27, 1882, written from the hotel at Cannes, in which letters she stated that he had promised to marry her. The plaintiff also produced a copy of a letter, dated January 3, 1883, and written to the

defendant by her brother-in-law, a burgomaster of Nordhausen. This letter contained no reference to the alleged promise of marriage, but asked the defendant to communicate his intentions and resolutions for the future of the plaintiff as soon as possible, and said that the defendant must have considered that the compromised honor of the family could not be received without further explanation. The plaintiff further produced a copy of a letter written to the defendant about February 3, 1884, by the pastor of the German Church at Sydenham, asking the defendant whether he intended to fulfil his promise to marry the plaintiff, and threatening that the writer would see by means of the law and the press that justice was done to his countrywoman.

The defendant did not answer any of these letters. . . . At the close of the plaintiff's case, POLLOCK, B., ruled that the fact of the defendant not having answered the letters was such material evidence in corroboration of the promise as was required by 32 & 33 Vict. c. 68, s. 2, and declined to enter judgment for the defendant on the issue of breach of promise of marriage. The defendant was called, and admitted having received the letters, and that the copies produced were substantially correct. The jury found a general verdict for the plaintiff for 300 £. on all the issues. The defendant now moved to have judgment entered for himself on the issue of breach of promise of marriage.

Lockwood, Q. C., and *W. Graham*, for the defendant. The letters in question were not evidence in corroboration of the plaintiff's testimony within 32 & 33 Vict. c. 68, s. 2, which provides "that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise." The fact that a man does not answer a letter from a woman alleging that he has promised to marry her is no evidence that he admits the allegation. . . .

Thomas Terrell (*E. F. C. Philips*, and *Warraker*, with him), for the plaintiff. The defendant's omission to answer the letters was some evidence for the jury of corroboration. It is for the jury to say whether the evidence is material. . . .

Lord ESHER, M. R. — The first and main question to be decided in this case is a question of law, and I shall give no opinion upon any other questions in dispute between the parties. The point of law is whether in such a case as this — where nothing has happened beyond what has happened here — the mere fact of the defendant not answering any of the letters which have been brought before us is any such evidence in corroboration of the promise to marry as is required by the statute. We have not to determine whether or not a promise to marry was given. That was a question for the jury. The question for us is whether, according to law, the fact of the defendant not answering the letters could be taken as any evidence of the corroboration required by the statute. . . .

The first letter put forward by the plaintiff's counsel is one written by the plaintiff to the defendant, in which she states in effect to the

defendant that he had promised to marry her. He did not answer it. When one comes to think what is meant by "not answering it," it is impossible to see how that could be any evidence in corroboration of the promise to marry. The argument that it was such evidence must be that not answering was an admission by the defendant of the truth of what was alleged against him in the letter. Now the allegation in the present case was that he had promised to marry the plaintiff. Suppose, however, the letter had charged against him some grievous offence or misconduct, and the writer had stated that unless the defendant paid something he would be exposed. The argument, if true at all, must be that by not answering such a letter the man who receives it must be taken to *admit* that he is guilty of the charges contained in it. Now there are cases — business and mercantile cases — in which the Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree. So, where merchants are in dispute one with the other in the course of carrying on some business negotiations, and one writes to the other, "but you promised me that you would do this or that," if the other does not answer the letter, but proceeds with the negotiations, he must be taken to admit the truth of the statement. But such cases as those are wholly unlike the case of a letter charging a man with some offence or meanness. Is it the ordinary habit of mankind, of which the Courts will take notice, to answer such letters; and must it be taken, according to the ordinary practice of mankind, that if a man does not answer he admits the truth of the charge made against him? If it were so, life would be unbearable. A man might day by day write letters, which, if they were not answered, would be brought forward as evidence of the truth of the charges made in them. The ordinary and wise practice is not to answer them — to take no notice of them. Unless it is made out to be the ordinary practice of mankind to answer, I cannot see that not answering is any evidence that the person who receives such letters admits the truth of the statements contained in them. I have, therefore, no doubt that the mere fact of not answering a letter stating that the person to whom it is written has made a promise of marriage, is no evidence whatever of an admission that he did make the promise, and therefore no evidence in corroboration of the promise.

I do not say there may not be circumstances, occurring in a correspondence between a man and woman, which would or might make the omission to answer one letter in the correspondence some evidence of an admission of the truth of the statements contained in the letter. There might be cases in which the Court thought that, having regard to the nature of the correspondence and the circumstances of it, the not answering one letter in that correspondence did amount to evidence of an admission; but this is not one of those cases. Here we have only to say whether the mere fact of not answering the letters, with nothing else

for us to consider, is any evidence in corroboration of the promise. . . . I am of opinion that there was no evidence of the corroboration of the promise to marry required by the statute. The judge, therefore, ought to have non-suited the plaintiff with respect to her claim for damages for breach of promise of marriage, and upon that issue there should be judgment for the defendant.

BOWEN, L. J. — It seems to me that, with respect to the question of law for our decision in this case, the matter admits of no doubt. It would be a monstrous thing if the mere fact of not answering a letter which charges a man with some misconduct was held to be evidence of an admission by him that he had been guilty of it. There must be some limitation placed upon the doctrine that silence when a charge is made amounts to evidence of an admission of the truth of the charge. The limitation is, I think, this: Silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not. That appears to me good sense, and it is in substance the principle laid down by WILLES, J., in Richards *v.* Gellatly, Law Rep. 7 C. P. 127, p. 131. He says:

"It seems to have been at one time thought that a duty was cast upon the recipient of a letter to answer it, and that his omission to do so amounted to evidence of an admission of the truth of the statements contained in it. But that notion has been long since exploded, and the absurdity of acting upon it demonstrated. It may be otherwise where the relation between the parties is such that a reply might be properly expected." . . .

KAY, L. J.: The plaintiff's counsel relies upon various matters as evidence which corroborated the plaintiff's testimony that the defendant promised to marry her. . . . I agree with what has been said by the rest of the Court in this respect, and I think that the proper course which the learned judge at the trial ought to have taken was to say that the plaintiff's evidence with respect to the promise had not been materially corroborated in such a way that there was anything left to go to the jury on the issue of breach of promise of marriage.

Motion granted accordingly.

280. RUDD *v.* ROBINSON

COURT OF APPEALS OF NEW YORK. 1891

126 *N. Y.* 113

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 7, 1889, which denied a motion for a new trial made upon a case and exceptions under § 1001 of the Code of Civil Procedure, and which modified and

affirmed as modified a judgment in favor of plaintiff entered upon a decision of the Court on trial at Special Term.

Thomas Darlington, for appellant. The exception to the admission as evidence of the books of account of the Goodwillie-Wyman Company was well taken. . . .

Benjamin F. Blair, for respondent. The account-books of the Goodwillie-Wyman Company were properly received in evidence. . . .

EARL, J. — The plaintiff is receiver of the Goodwillie-Wyman Company, an insolvent manufacturing corporation organized under the laws of this State. The action was brought in equity to charge the defendant as a trustee of the corporation for the unlawful receipt and appropriation of its money and property. An interlocutory judgment was rendered against him charging him with a large amount of money thus improperly received, and appropriated. The liability of the defendant for this money was, in the main, established by the account-books of the corporation, and the principal contention on his behalf upon this appeal is that those books were improperly received as evidence against him.

The capital of the corporation was $50,000, of which Robinson, Briggs and Innet, three of the directors, owned $1,000 each; and the balance of the stock was owned by Fisk and Goodwillie, the two other directors. Goodwillie was president, Fisk treasurer, and Briggs vice-president and secretary of the corporation. There was no proof that the defendant had actual knowledge of the entries contained in the books which were used as evidence against him, or that he authorized such entries or caused them to be made. There was no proof from which the law would raise a legal presumption that he had knowledge of the entries, *unless* he is chargeable with such knowledge from the mere fact that he was a stockholder and trustee of the corporation.

There is no rule of law which charges a director or stockholder or corporation with actual knowledge of its business transactions merely because he is such director or stockholder. In this case the broad claim is made that in an action by a corporation against one of its members to enforce a personal liability to the corporation, its books are competent evidence against him, to show the condition of the accounts between him and it and to establish the extent of his liability to it, upon their simple production and proof that they are the books of the corporation kept as such by its officers and agents. The proposition is thus announced in the points of the learned counsel for the plaintiff: "Between a corporation and its members all its books regularly kept by its officers and agents for the purpose of recording its transactions and properly conducting its business are per se evidence."

The cases reported in this country and England bearing upon this question are very numerous, and the general expressions of judges contained in their opinions are not entirely harmonious. The conflict, however, is mainly in the dicta of judges, and not in decisions actually made. The books of corporations for many purposes are evidence,

not only as between the corporation and its members, and between members, but also as between the corporation or its members and strangers. They are received in evidence generally to prove corporate acts of a corporation such as its incorporation, its list of stockholders, its by-laws, the formal proceedings of its board of directors and its financial condition when its solvency comes in question. But we have not been able, after a careful examination of the authorities cited by the counsel for the plaintiff, and many others, to find any case in which it has been decided that the books of account of a corporation are competent evidence, of themselves, to establish an account or claim against a trustee or stockholder in an action brought in behalf of the corporation: and it has been repeatedly said by judges and text writers that they are not competent for that purpose. . . . In Hill *v.* Manchester, etc., Water Works Co. (5 B. & Adol. 866), by a clause in the charter of the defendant, it was enacted that its clerks should, in a book provided by the company, keep an account of all acts, proceedings and transactions of the company, and that every proprietor should have liberty to inspect the same and take copies of the entries; and it was held that entries of the proceedings in the books thus kept by the clerk were not admissible in evidence on behalf of the company against one of their own members suing them. DENMAN, Ch. J., writing the opinion and speaking of certain facts to be proved, said:

"These points of fact, however, could only be established by the books kept by the clerk of the company; and the question now to be decided is whether they are evidence against the plaintiff. It is argued that they were because he was a proprietor, and the books of a partnership are evidence against any one of the partners, and more particularly as the act requires such books of the proceedings to be kept, and that all the proprietors shall have free access to them at all reasonable times. We are, however, of opinion that the principle on which partnership books are evidence against the partners, is that they are the acts and declarations of such partners, being kept by themselves or by their authority, by their servants and under their direction and superintendence. But the clerk of the company, once appointed, is subject to the control of no individual member, and the free access provided for is only for the purpose of inspection. A proprietor entering into a contract with the company must be deemed a stranger, and can be affected by no entry made under orders from the entire body."

. . . We can perceive no principle upon which the account-books of a corporation can be evidence, against a member of the corporation, of the accounts and entries therein made in a suit brought by the corporation or its representatives against him to enforce his liability upon such account. The officers and book-keepers of a corporation are in no sense his agents. Individually he has no control over their acts, and has no responsibility therefor; and in making the entries they do not, in any legal sense, represent or bind him. As to the competency of such books, directors and stockholders of a corporation stand upon the same footing. It is quite true that a director stands in a more favorable position to

know what is going on within the corporation and to be more familiar with its books in some cases than a stockholder. He has the right to inspect the books of the corporation, and so has a stockholder. A stockholder having the ability is just as able to become familiar with the contents of the books of a corporation to which he belongs as a director; and there is no principle of law by which a director can be charged with knowledge of the entries in the books of a corporation which is not equally applicable to its stockholders. . . . It would be quite a dangerous and we, think, startling proposition to hold that a clerk or other officer in a business corporation could enter charges in its books of account against a director or stockholder which could be proved in favor of the corporation by the mere production of the books, thus throwing upon him, or his personal representatives after his death, the burden of explaining the entries or showing them to be untrue, and we believe the doctrine has no support in principle or authority.

It was admitted on the argument of this case that the evidence furnished by the account-books was vital to the plaintiff's case, and we, therefore, do not deem it important to examine the other points zealously and ably argued before us.

For the error pointed out the judgment should be reversed and a new trial granted, costs to abide event.

All concur. Judgment reversed.

281. CHESAPEAKE & OHIO R. CO. *v.* DEEPWATER R. CO.

Supreme Court of Appeals of West Virginia. 1905

57 *W. Va.* 643; 50 *S. E.* 890

[Printed *post*, as No. 846]

Sub-topic D. Admissions in Litigation

282. HARTFORD BRIDGE CO. *v.* GRANGER

Supreme Court of Errors of Connecticut. 1822

4 *Conn.* 142

[Action on a covenant to build a drawbridge according to plans.] . . . The plaintiffs offered to prove by James R. Woodbridge, that long after the first of March, 1819, the defendant Granger came to his, Woodbridge's store, where he met with Ward Woodbridge, one of the directors of the company, who complained to Granger, that the draw was not such as it ought to be; to which Granger replied, that he knew it was not such an one as they wanted, and that if the directors would furnish him with a plan, he would conform the draw to such plan, but

that he could not make it conformable to the plan of Eli Whitney, because it would cost too much. The defendant's counsel, for the purpose of raising an objection to this evidence, asked James R. Woodbridge, if such conversation was not had with a view to a compromise; to which the witness answered, that in the conversation, Granger asked Ward Woodbridge how much money he would accept, and discharge him from doing anything more to the draw. The defendants then urged their objections to the evidence offered by the plaintiffs; and the judge rejected it.

The jury returned a verdict for the defendants; and the plaintiffs moved for a new trial, on the ground, that the several decisions of the judge, admitting the evidence of the defendants, and rejecting that offered by the plaintiffs, were erroneous. . . .

N. Smith and *A. Smith*, in support of the motion, contended . . . that the testimony of James R. Woodbridge as to the admissions of Granger, ought to have been received. *Facts*, admitted by a party, may always be proved: but concessions or offers, made with a view to a compromise, cannot be. Gregory *v.* Howard, 3 Esp. Rep. 113. Buller, Nisi Prius, 236. The admission, which the plaintiffs proposed to prove, was simply of the fact, that the draw was not such as it ought to be. No rule of law requires the rejection of this evidence, because the party, in the course of the conversation, inquired for what sum of money he could be discharged. . . .

N. Terry and *T. S. Williams*, contra, contended . . . that a new trial ought not to be granted, for the rejection of James R. Woodbridge's testimony. First, it related to an offer made with a view to compromise. The sole business of the meeting was to settle a controversy: and when this is the object, the party is to be protected throughout the conversation. Secondly, the testimony was of no importance. It did not show, that the draw was not made according to the agreement; but merely, that it was not such as Ward Woodbridge wanted. . . . The proposed evidence was material to the issue; and when the admission was made, there had been no conversation with the view above-mentioned. But if the contrary were true, it would not authorize the rejection of the offered testimony.

Hosmer, Ch. J. — This case presents four questions for determination. . . . The plaintiffs offered to show, by James R. Woodbridge, the admission of Granger, one of the defendants, that the draw was not complete; and the Court overruled the testimony as being conversation with a view to a compromise.

The law on this subject has often been misconceived; and it is time that it should be firmly established. It is never the intendment of the law to shut out the truth; but to repel any inference which may arise from a proposition made, not with design to admit the existence of a fact, but merely to buy one's peace. If an admission, however, is made, *because it is a fact*, the evidence to prove it is competent, whatever motive

may have prompted to the declaration. In illustration of this remark, it may be observed, that if A. offer to B. ten pounds, in satisfaction of his claim of an hundred pounds, merely to prevent a suit, or purchase tranquillity; this implies no admission that any sum is due; and therefore, testimony to prove the fact must be rejected, because it evinces nothing concerning the merits of the controversy. But if A. admit a particular item in an account, or any other fact, meaning to make the admission as being true, this is good evidence, although the object of the conversation was to compromise an existing controversy. The question to be considered is, what was the view and intention of the party, in making the admission; whether it was to concede a fact hypothetically, in order to effect a settlement, or to declare a fact really to exist. There is no point of honour guarded by the Court, nor exclusion of evidence, lest it should deter from a free conversation. But testimony of admissions or declarations taking facts for granted, not because they are true, but because good policy constrains the temporary yielding of them to effectuate a greater good, is not admissible; truth being the object of evidence.

CHAPMAN, BRAINARD, and BRISTOL, JJ., were of the same opinion.

PETERS, J., dissented. New trial not to be granted.

283. TRUBY *v.* SEYBERT

SUPREME COURT OF PENNSYLVANIA. 1849

12 *Pa. St.* 101

ERROR to the Common Pleas of Armstrong.

This was an action of ejectment, brought by Sebastian Seybert against Jacob Truby, to recover 100 acres of land, being the settler's part of the Samuel Campbell warrant, which Truby had entered into articles with Seybert to sell to him. Truby derived his title to the land in dispute from a sheriff's sale of three hundred acres, in a certain case of Truby *v.* McIntyre and others.

The defence set up by Truby to this action was, that the survey upon the ground, under the Samuel Campbell warrant, excluded the forty acres, the land really in dispute, embraced in a survey of the settler's part, made long after the original survey of the whole tract warranted. To meet this, the plaintiff offered evidence to show that the Samuel Campbell survey, as made upon the ground, included the land in dispute; and for that purpose further offered the record of a suit, Charles Campbell *v.* Jacob Truby (the defendant here), which was an action of debt on a bond, to which was pleaded payment, &c., and in which the verdict was for the plaintiff; to be followed by proof that the defence in said action was, "that the bond was given in part payment for the purchase by Truby of certain land, and that part of said land, as appeared by the return of

survey on the Samuel Campbell warrant, to the extent of 41 acres (being the land here in dispute), was embraced in that survey." This offer was made for the purpose of showing that, on that occasion, which was seven years after the sale to Seybert, Truby contended that the Samuel Campbell warrant embraced the now disputed portion of the settler's part of that warrant. To the record and offer Truby objected, and the objection being overruled, the evidence was received under exception.

The verdict was for the plaintiff. The error assigned here was to the admission of the evidence excepted to.

Purviance and *Lee*, for the plaintiff in error. Seybert was neither party nor privy to that record; it was as to him "res inter alios acta." . . . Truby's defence in that action was no admission; it was manifestly not made independently, because true, but only as a convenient assumption for the purpose in hand: 1 Greenleaf, Evidence, § 204. It is to be treated as the mere suggestion and allegation of counsel. . . .

Phelps, for the defendant in error. — It is to be presumed that Truby would not have made any admission against his interest, unless it was true. The record was admissible without Seybert being a party to it. A record admission or judicial declaration is admissible against the party making it in favor of a stranger to the record. . . .

The opinion of this Court was delivered by

Bell, J. — The proceeding had in Campbell *v.* Truby being "inter alios acta," the record of the trial, verdict and judgment was not, of course, admissible in this action to prove any fact upon which that judgment professes to be founded. . . . But though the parties be different, a record is admissible to prove the existence of a former action with its legal consequences, as an independent fact; for the mere fact that such a suit was brought and a verdict and judgment rendered, it is said, cannot be considered as "res inter alios acta." Where, therefore, the introduction of a former judgment is necessary by way of inducement to the full understanding of a collateral fact, or the admissions and allegations of a party to it, the record is always received, not only as legal evidence of the rendition of such a judgment, but as conclusive for that purpose. . . .

So, also, it is admissible against one of the parties in favor of a stranger, as containing a solemn admission or judicial declaration by such parties, in regard to any particular fact. But in these instances, it is received, not as an adjudication conclusively establishing the fact, but as the declaration or *admission of the party himself* that the fact is so . . . . . As an illustration of this rule, the case of Tyley *v.* Cowling, 1 Ld. Ray. 744, S. C. Bull. N. P. 243, may be cited. It was trover by a common carrier against a person to whom he alleged he had delivered the goods intrusted to him to be carried, and Lord Holt laid it down that the record of the action would be admissible in a subsequent suit to be brought by the owner against the carrier, as showing the confession of the latter in a Court of record that he had been put in possession of the

plaintiff's goods. . . . "The allegations in the declaration and pleadings, in a suit at law, are receivable in evidence against the party in a subsequent suit between him and a stranger, as his solemn admission of the truth of the facts recited, or of his understanding of the meaning of an instrument, though the judgment could not be made available as an estoppel, unless between the same parties or others in privity with them." (1 Greenleaf, § 195.) The same effect is accorded to an answer in chancery, as an instrument of evidence deriving its value solely from its character of a confession or admission (Ewer *v.* Ambrose, 6 D. & R. 127; 10 Eng. C. L. R. 220; Grant *v.* Jackson, Peake's C. 203; Digby *v.* Steele, 3 Camp. 115); though a bill in chancery is not admissible, because, as it is said, many of the facts are the mere suggestions of counsel, made for the purpose of extorting an answer from the defendant: Owens *v.* Dawson, 1 W. 149; and for a similar reason cases stated for the opinion of the Court are also excluded — McLugan *v.* Bovard, 4 W. 313; Darlington *v.* Gray, 5 Wh. 502; Hart's Appeal, 8 Barr, 37.

In the case at bar, the record in question was offered, not as an estoppel, but to show the fact of its existence, and as introductory to the oral evidence. We have seen it was competent for this purpose, and had the defense made in that action been put upon the record by a special plea, as it might have been, no doubt could be entertained of its availability to show the allegation as a truth averred by the defendant in relation to the point now in controversy. But what possible difference can it make in the determination of the question of evidence, that the party chose rather to introduce his defense under the general issue, with notice, as is permitted by the liberality of our practice? I can perceive none. A declaration or confession, made in or out of a cause, may be proved "per testes," as well as by record, the only difference being in the degree of credit which the mode of proof may command. . . .

The principle of "res inter alios acta," is never permitted to exclude such proof, proceeding either immediately from the party himself or authorized or assented to by him: 1 Starkie's Evidence, 60. These depend for their value, not upon the contest in which they occurred, but upon the fact that they proceeded from the party to be affected by them; and he is equally bound by the concessions of those authorized to represent him. Thus, the concessions of attorneys of record bind their clients in all matters relating to the trial and progress of the cause: 1 Greenleaf, § 186; and this is also true of an admission before suit brought, provided the attorney was then retained in the cause; Marshall *v.* Cliff, 4 Camp. 133. In Young *v.* Wright, 1 Camp., an admission by a deceased attorney of record, that a bill of exchange sued was an accommodation bill, in order to excuse the want of notice of dishonor, was admitted by Lord ELLENBOROUGH, on a new trial, as evidence of the fact, with the observation that it must be supposed the attorney had authority to make the concession, and it therefore bound the client. So in Wetherill *v.* Bird, 7 C. & P. 6, 32 E. C. L. R. 415, the admission of former attorneys, who had

since withdrawn from the case, in contemplation of a trial, was received on the second trial of the cause, though notice had been given that the agreement for that purpose was withdrawn.

It is true, it has been ruled that what an attorney says in the course of casual conversation, relating to the controversy, is not evidence. The reason of the distinction is founded in the nature and extent of the authority given: the attorney being constituted for the management of the cause in Court, and, in England, for nothing more.

It is not necessary further to elaborate this train of reasoning. Enough has been said to show that the line of defense assumed by the defendant, through his counsel, on the trial of the action brought against him by Campbell, consisting of an assertion directly pertinent in the present inquiry, was good evidence for the now plaintiff, as the concession of a truth within the knowledge of the party. Judgment affirmed.

284. DENNIE *v.* WILLIAMS

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1883

135 *Mass.* 28

CONTRACT, in the name of the Treasurer of the city of Boston, for the benefit of R. C. Simpson, upon whom a constable's bond given by the defendant Williams as principal, and the other defendants as sureties, to enforce payment of a judgment recovered by Simpson against Williams for the conversion of certain goods. Trial in the Superior Court, without a jury, before BLODGETT, J., who found for the defendants; and the plaintiff alleged exceptions, which appear in the opinion.

J. L. Newton and *T. S. Dame*, for the plaintiff. *R. Lund*, for the defendants.

COLBURN, J. . . . The remaining exception is to the refusal of the Court to rule that the answer of the defendant Williams, in the suit of Simpson against him, was evidence against all the defendants in this suit that the taking of the property by Williams, for which that suit was brought, was under color of his office as constable.

1. It appears that the admission of one of several *joint obligors*, or joint contractors, made without collusion, is evidence against the others. Martin *v.* Root, 17 Mass. 222; Hunt *v.* Bridgham, 2 Pick. 581; Bridge *v.* Gray, 14 Pick. 55; Amherst Bank *v.* Root, 2 Met. 522, 541. So a clear and unqualified admission by Williams that the property, for the taking of which judgment in the suit of Simpson was recovered against him, was taken under color of his office, would be evidence against all the defendants in this suit. It is not very apparent how the answer in question, which denies any conversion, with an averment that, if the defendant took any of the goods, he did so as a constable, by virtue of a writ of replevin, can be considered as an admission that he took the goods described in the declaration under color of his office.

2. But, passing this by, we cannot consider the *answer* filed by Williams in the suit of Simpson admissible as evidence against the defendants in the present suit. It would not have been admissible as evidence in the former suit; Pub. Sts. c. 167, §§ 76, 78; and the reason for § 78, which was first introduced into the Rev. Sts. as § 18 of c. 100, with a note by the commissioners, would seem to apply with nearly as much force to another suit, as to the one in which the answer is filed.

Without deciding how far, under any circumstances, an answer filed in one suit may be evidence in another suit, against the party filing the answer, it is sufficient in this case to decide that the answer in question, which was signed by attorney, with nothing to indicate how far the attorney was particularly instructed by the defendant, was not competent evidence against Williams in this suit, — especially as, if evidence against him, it would be evidence against the other defendants. Baldwin *v.* Gregg, 13 Met. 253; Walcott *v.* Kimball, 13 Allen, 460; Boileau *v.* Rutlin, 2 Exch. 665; Combs *v.* Hodge, 21 How. 397; Church *v.* Shelton, 2 Curt. C. C. 271.

In Baldwin *v.* Gregg, *ubi supra*, Chief Justice SHAW says:

"The pleadings are usually filed by the attorneys; and they are filed with a view of laying the merits of the respective parties before the court, in a technical form, and can hardly be considered as the act of the parties. It is not competent for the jury to hear evidence, and inquire and decide whether a specification of defence was filed *bona fide* or *mala fide*. A bill of particulars filed by a plaintiff, or a specification of defence filed by a defendant, is usually a formal document, drawn up by counsel, after some examination of his client's case, and is made broad enough to cover all which the party can expect, in any event, to prove; and in most instances, probably, is not seen by the party in whose behalf it is filed."

In Boileau *v.* Rutlin, *ubi supra*, Baron PARKE says:

"But the statements of a party in a declaration or plea, though, for the purposes of the cause, he is bound by those that are material, and the evidence must be confined to them upon an issue, ought not, it should seem, to be treated as confessions of the truth of the facts stated."

3. In some cases the *declaration* in one suit has been admitted in evidence in another suit. But this is upon the ground that the particular allegations in the declarations were obviously made by direction of the plaintiff, and were not merely the suggestions of his attorney; or upon the ground that, after the plaintiff knew what the allegations were, he adopted them, by prosecuting the action upon them, as the foundation of his claim. Gordon *v.* Parmelee, 2 Allen 212; Bliss *v.* Nichols, 12 Allen 443; Boston *v.* Richardson, 13 Allen 146, 162; Elliott *v.* Hayden, 104 Mass. 180; Bogle *v.* Chase, 117 Mass. 273. In Elliott *v.* Hayden, which was an action of tort, in which the plaintiffs offered in evidence a bill in equity, brought by the defendants against them, Mr. Justice GRAY says:

"As no action of the Court was obtained upon the bill in equity, the statements therein, if they had not been made upon the oath of the plaintiffs, might have been considered as mere suggestions of the counsel and not competent evidence of admissions by the parties. . . . But, being upon the oath of the parties in whose behalf the bill was filed, they are competent evidence as solemn admissions by them in person of the truth of the facts stated — upon the same ground upon which sworn answers and pleas in chancery, or allegations concerning the substance of the action in a declaration at common law, have been held admissible in evidence in another suit." 104 Mass. 183.

These cases relating to declarations and sworn pleadings in chancery are exceptions to the general rule, and do not affect the question in the case. Exceptions overruled.

285. BOOTS *v.* CANINE

SUPREME COURT OF INDIANA. 1883

94 *Ind.* 408

FROM the Montgomery Circuit Court.

E. C. Snyder, P. S. Kennedy and *W. T. Brush,* for appellants. *J. M. Thompson, W. H. Thompson, J. E. McDonald, J. M. Butler* and *A. L. Mason,* for appellee.

ELLIOTT, J. — This case is here for the second time. When it was in this Court the first time, it was decided that the award sued on was a common law and not a statutory award, and that the complaint as it then stood was good. Boots *v.* Canine, 58 Ind. 450. These questions are conclusively settled. . . . The award states that the agreement to submit was in writing, and the appellants argue that parol evidence was not competent to show that it was an oral one. We do not regard the recital in the award as being either within the spirit or the letter of the rule prohibiting the introduction of parol evidence to vary or alter a written instrument. . . .

The trial Court did not err in permitting appellee to read in evidence answers filed by the appellants, although they were subsequently superseded by amendment or withdrawn. The question is presented in a peculiar form, and, as presented, we are clear that this ruling should not be allowed to reverse the judgment. The record shows that there had been issues formed and a trial had; that the appellants successfully relied upon their answers, and the case came to this Court, and the judgment was reversed, but not upon the answers; and that after this reversal the original answers were superseded by amendment. The record thus recites the proceeding on the trial: "The plaintiff then offered in evidence the original complaint and answers for the purpose of proving by one of the paragraphs of the answer that the defendant had admitted that the agreement to submit to arbitration was verbal,

and not in writing, to the introduction of which evidence the defendants objected, on the grounds that the statements of a party made in his pleadings, where they are not sworn to, are not admissible against him." It will be observed that the answers had stood through one trial and through an appeal as statements of the appellants' defense, and that they had placed these pleadings before the trial and appellate Courts as true statements of the facts of their case. We can perceive no reason why the answers did not, under these circumstances, constitute some evidence of the facts stated in them. . . .

1. It is not doubted that admissions in pleadings are not conclusive, when used merely as evidence and not as part of the proceedings in the cause. On the contrary, they are, when so used, fully open to contradiction or explanation. We shall presently speak of cases where these admissions assume a conclusive character. Just now we are speaking of their admissibility as evidence. We think the rule is correctly stated by Mr. Wharton, who says: "It is proper to add at this place that the pleadings of a party in one suit may be used as evidence against him in another, not as estoppel, but as proof, open to rebuttal and explanation, that he admitted certain facts." 1 Wharton, Evidence, § 838. This is what we rule here. The answer, having been affirmed to be true for several years, and acted upon through one trial and one appeal, should be deemed evidence of admissions, but evidence open to explanation.

It is well known that the common law recognized fictions in pleading, and did not, in any way, require pleadings to state the truth, but even under that system the decided weight of authority was that the pleadings of a party were admissible against him. Bliss *v.* Nichols, 12 Allen 443; Currier *v.* Silloway, 1 Allen 19; Gordon *v.* Parmelee, 2 Allen 212; Hammatt *v.* Russ, 16 Maine 171; Tabb *v.* Cabell, 17 Grat. 160.

But it is not necessary to refer to common law authorities, for our statute has adopted the equity practice. We treat pleadings as statutory fact not fictions. All the cases upon this subject agree upon this point. We are therefore to look to chancery rather than common law rules. Scott *v.* Crawford, 12 Ind. 410; Pomeroy, Remedies, §§ 507, 508, 517. Commencing with the early authorities, we shall find an unbroken line arrayed in favor of the doctrine that pleadings in chancery are always admissible in evidence. It is said by an author whose book has long occupied a high place, that "The bill in chancery is evidence against the complainant, for the allegations of every man's bill shall be supposed true; nor shall it be supposed to be preferred by a counsel, or solicitor without the party's privity, and therefore it amounts to the confession and admission of the truth of any fact." Buller, Nisi Prius, 235. The ground given by this author for his conclusion applies to all pleadings, and more strongly to code pleadings than others, for, under the code, pleadings are required to state facts. It surely would be a violation of all rules to treat a pleading as a mere meaningless collection of words, or else as a mere collection of fictions. It is to be observed that the reason

why bills in chancery are evidence is, not because they are sworn to, but because they are presumed to state facts. This is clear from what appears in our quotation as well as from the known rule that bills were not always required to be verified. . . . If it can be said that Courts can presume that an answer under our code does not state facts, then it may be logically said that it is not evidence; but if the presumption is, that it does state facts, then it is logically inconceivable that it should not be evidence against the party.

But we need not go outside of our own State for authorities. In McNutt *v.* Dare, 8 Blackf. 35, it was said: "There is another reason why the plaintiffs could not object to the evidence. It was a part of their own answer to the bill of discovery; and the answer of a party is legal evidence against him." . . . It seems clear that as we have substantially adopted the chancery practice, pleadings must be presumed to be true, and, therefore, to constitute evidence, and this, without further discussion, should settle the case.

When we turn to the provisions of the code, and to the decisions of the Courts where the code practice prevails, we shall find that there are still stronger reasons for holding that pleadings are admissible in evidence. Our code imperatively requires that pleadings shall state facts, but it does not stop with this command. It provides that "All fictions in pleadings are abolished." R. S. 1881, § 378. It is several times declared that pleadings not sworn to shall have the same effect as pleadings sworn to. It is simply absurd to say that under our code the statements in the pleadings are mere fictions, and if they are not fictions then they are facts, and if facts in some cases, and in others conclusive admissions of record, then they are evidence. An admission in a pleading is the admission of matters of fact; this seems so plain that it is difficult to understand how the contrary doctrine can be seriously asserted. . . .

The Courts of the States where the code practice prevails are unanimous on the right to introduce admissions contained in pleadings in evidence, with the possible exception of California, where there seems to be a direct conflict. . . . These authorities are conclusively in favor of the ruling of the Court below, and in opposition to them are cited the cases from California and one from New Hampshire. The former cases, as we have said, are directly in conflict with another decision of the same Court, and no authority is cited in their support, and the reasoning is far from satisfactory. The New Hampshire case of Kimball *v.* Bellows, 13 N. H. 58, is not applicable to pleadings under the code system; but if it were, it could not be followed, because it is in conflict with the great weight of authority as to the admissibility of common law pleadings; it is, indeed, in direct conflict with a decision of the same Court, that of Cilley *v.* Jenness, 2 N. H. 87.

Admissions in pleadings are sometimes conclusive, but they are not so in a case like the present. One class of cases where the admissions are conclusive is that in which judgment has been pronounced upon the

issues joined. Another class is that in which the pleadings, without diversity of statement, make distinct admissions and are left standing. As an example of the latter class may be given that of a defendant pleading payment only to a complaint on a promissory note. In such a case he cannot dispute the execution of the note. In the present case the admissions, like ordinary verbal or written admissions, are fully open to explanation, but they are nevertheless admissions, and as such are competent evidence. Like other admissions, all the statements of the whole pleading are to be taken together, what makes for the pleader as well as what makes against him. . . .

2. We should feel that we were doing an idle thing if we should undertake to cite authority upon the proposition that a party can not be deprived of his rights to give in evidence an admission because the latter had withdrawn it. Even in criminal cases, an admission made by the accused before the examining magistrate is not rendered incompetent by a subsequent withdrawal. The withdrawal of an admission may, in proper cases, go in explanation, but it can not change the rule as to its competency. We have never, until the argument in this case, known it to be asserted that the withdrawal of a confession or an admission destroyed its competency as evidence against the person making it. If it did, then criminals might destroy evidence by retraction, and parties escape admissions by a like course. The law tolerates no such illogical procedure. It is proper to show the withdrawal and all attendant circumstances, for the purpose of determining the weight to be attached to the admission, but not for the purpose of destroying its competency. The cases of Colter *v.* Galloway, 68 Ind. 219, and New Albany, etc., P. R. Co. *v.* Stallcup, 62 Ind. 345, are in line with what we here decide, and are well sustained. . . .

3. In the last brief of appellants' counsel it is virtually conceded that the superseded answers would be admissible in a different case, but not in the same case in which they were originally filed. Many of the cases we have cited expose the fallacy of this argument, but it is so apparent that it does not require authority to overthrow it. An admission is an admission, however made, and is just as competent in one case as in another. The competency of an admission does not depend upon the case in which it is offered. If it was voluntarily made and is relevant to the issue, it is admissible against the party making it, although made in the progress of the same cause. If the position of counsel were correct, then the plaintiff, to get the benefit of the admission in the pleading, must dismiss the pending case and commence another, and surely there is neither reason nor law for such a course.

We rule that under the circumstances of this case these was no available error in admitting the answers in evidence, and this is all the record requires us to decide, and it is all we do decide upon this point.

Judgment affirmed.

286. PERSON *v.* BOWE

SUPREME COURT OF MINNESOTA. 1900

79 *Minn.* 238; 82 *N. W.* 480

ACTION in the Municipal Court of Mankato to recover $119 and interest for wages. The case was tried before SHISSLER, J., who found in favor of plaintiff for $109 and interest. From an order denying motion for a new trial, defendant appealed. Affirmed.

Action for wages as a farm laborer. The complaint alleged that the plaintiff worked for the defendant seven months for the agreed price of $17 per month, and that no part of his wages had been paid, except $10. The answer alleged that the plaintiff agreed to work for the full term of eight months, for $16 per month for the first four months of the term, and at $18 per month for the last four months thereof; that the services mentioned in the complaint were performed pursuant to such special contract, and that after working seven months the plaintiff abandoned the contract without the consent of the defendant; and, further, that the plaintiff had been paid on such contract $15. The trial Court found, in effect, that the allegations of the complaint were true, and ordered judgment for the plaintiff for $109. The defendant appealed from an order denying his motion for a new trial. . . .

W. R. Geddes, for appellant. *W. E. Young*, for respondent.

START, C. J. (after stating the case as above). Evidence on behalf of the plaintiff was received by the Court, over the defendant's objections, to the effect that when the plaintiff demanded his pay for his services the defendant said that he could not then pay, but would let the plaintiff have $20, and would pay the rest about the middle of November: that, if the plaintiff "would throw off five dollars," he would at once pay the claim. It is here urged that this was reversible error, for the reason that it violated the rule that an offer to compromise a disputed matter is not admissible in evidence against the party making the offer. The evidence objected to was not within this rule: for it did not relate to any matter then in dispute between the parties, or to any attempt to compromise a disputed claim. On the contrary, it was an offer of present payment of a then undisputed claim, if the proposed discount was allowed. The evidence was competent and relevant upon the issue whether the contract was for seven months' service, as claimed by the plaintiff. It tended to show an indirect admission on the part of the defendant that the plaintiff had performed his contract: for, if true, no claim was made to the contrary by the defendant when the demand for payment was made. Order affirmed.

Sub-topic E. Confessions

288. *History.*[1] There may be noted four distinct stages in the history of the law's use of confessions. In the earliest stage (going for present purposes no further back than the times of the Tudors and the Stuarts) there is no restriction at all upon their reception. In the next stage, comprising the second half of the 1700s, the matter begins to be considered, and it is recognized that some confessions should be rejected as untrustworthy. In the third stage, comprising the 1800s, the principle of exclusion is developed, under certain influences, to an abnormal extent; and exclusion becomes the rule, admission the exception. In the last phase a reaction sets in here and there, but it represents a future rather than a present movement, and little is accomplished in the way of changing the law or the practice.

(1) In the first period is that there is no doctrine about excluding "confessions" in the modern sense; that is, all narratives avowing guilt are accepted in evidence without discrimination, and particularly without question as to their proceeding from hope of promises or from fear of threats, even of torture. There is a doctrine that a plea of guilty in court should not ordinarily be received; and there is a rule that a confession may dispense with the two overt-act witnesses in treason. But these were the only doctrines about "confessions" up to the middle of the 1700s. That, apart from these doctrines, there were no others as to confessions, appears not merely from the general lack of record of such doctrines, but from several other circumstances. In the first place, the reports of trials, down to the middle of the 1600s at least, show the tribunal proceeding, without let or hindrance, upon whatever they could get from him by way of confession. In the next place, we find that, up to the middle of the 1600s at least, the use of torture to extract confessions was common, and that confessions so obtained were employed evidentially without scruple;[2] and it is clear that

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[1] Adapted from the present Compiler's "Treatise on Evidence" (§§ 817, 818, 865).

[2] 1836, Jardine, "Use of Torture in the Criminal Law of England," 58 ff. Mr. Jardine says, further: "The last instance of torture in England, of which I can find any trace, occurred in the year 1640"; and this result seems to be adopted in the acute and interesting articles on the subject by Mr. A. Lawrence Lowell, "Judicial Use of Torture," 11 Harv. L. Rev. 293. Yet in 1664, in Tong's Trial, 6 How. St. Tr. 259, the defendant is found saying, "I confess I did confess it in the Tower, being threatened with the rack." In Scotland, it was applied even much later; 1676, Mitchel's Trial, 6 How. St. Tr. 1207, 1232; 1680, Gordon's Trial 11 id. 51; 1684, Semple's Trial, ib. 985; 1684, Carstair's Trial, 10 id. 687; 1688, Standfield's Trial, 11 id. 1371, 1387; 1689, Renwick's Trial, 12 id. 569, 576; 1690, Pain's Trial, 10 id. 754. Sir Walter Scott, in "Old Mortality," describing, as of 1679, the examination and torture of the Cameronian preacher Macbriar (ch. 36), confessedly relies in part for his authority on this very trial of Mitchel, *supra*. In the Colonies, it was known at as late a time as Mr. Jardine mentions: 1642, Bradford's History of Plymouth Plantation, 473; 1641 and 1660, Mass. Body of Liberties, c. 45. For the history of the abolition of torture in modern times on the Continent, see "Pertile Storia del diritto italiano," 2d ed., 1900, vol. VI, pt. 1, p. 449.

such a practice is inconsistent with the slightest recognition of the modern doctrine about the admissibility of confessions.

(2) In 1775, in Rudd's Case (1 Leach Cr. L. 135) where the accused had applied for release in consequence of having confessed under an assurance of pardon to be received as an accomplice testifying for the Crown, Lord Mansfield, in discussing the practice of using approvers' confessions, seemed to see nothing unlawful in it; but at the same time he made the first judicial utterance limiting the admissibility of ordinary confessions: "The instance has frequently happened of persons having made confessions under threats or promises; the consequence as frequently has been that such examinations and confessions *have not been made use of* against them on their trial." He was here, clearly, thinking only of persons "being drawn by promises and assurances to answer to an examination and to swear to it on oath," and not of confessions in general; moreover he does not intimate that anything more than a common practice (not a rule) existed. But in 1783, in Warickshall's Case, before Nares, J., and Eyre, B., the modern rule received a full and clear expression, and confessions not entitled to credit because of the promises or the threats by which they had been obtained were declared inadmissible in evidence.

(3) At this stage, then, the doctrine was a perfectly rational one. Confessions apparently untrustworthy as affirmations of guilt are excluded. Under this principle very few were in fact excluded. Doubts about situations which subsequently became questionable were never heard of. Confessions were thought of in general as "the highest evidence of guilt"; and there was no general sentiment against them, — no prima facie doubt of their propriety. But by the beginning of the 1800s, the attitude of the judges had changed, through influences which we may attempt later to estimate. There was a general suspicion of all confessions, and an inclination to repudiate them upon the slightest pretext. This attitude continued for half a century, becoming more and more irrational by contrast with newer conditions. That a confession should be excluded because it was made upon a promise to give a glass of gin; because the prosecutor said, "If the prisoner would only give him his money, he might go to the devil if he pleased"; because a handbill, offering a few pounds reward for evidence, was posted in the magistrate's office; because the prisoner was told that "what he said would be used *against* him"; — that such results, chronicled in the reports of the first half of the 1800s, could be reached in the name of the investigation of truth seems almost incredible. In the middle of the 1800s the perversion of normal reasoning had gone so far that counsel were able to advance seriously the argument that "the law assumes that a man may falsely accuse himself upon the slightest inducement." It even came to be urged that an accused person should be dissuaded from confessing; so that this notion had to be rebuked from the bench. This sentimental irrationality of the law, and its obstruction to the administration of justice, has often been conceded by judges. "I confess," said Baron Parke, "that I cannot look at the decisions without some shame when I consider what objections have prevailed to prevent the reception of confessions in evidence; and I agree with the observation of Mr. Pitt Taylor, that the rule has been extended quite too far, and that justice and common sense have been too frequently sacrificed at the shrine of mercy"; and Mr. J. Erle added: "I am much inclined to agree with Mr. Pitt Taylor; and, according to my judgment, in many cases where confessions have been excluded, justice and common sense have been sacrificed, not at the shrine of mercy, but at the shrine of guilt." The spirit that thus tended to prevail in the law has been properly

described "as a weak sentimentalism towards criminals," and it assuredly had unfortunate results. But every fact of life has its explanation; what was the explanation of this one?

(*a*) A first reason certainly was the sort of person usually brought before the English judges on charges of crime. In all countries having the social cleavages and the feudal survivals of England in the 1700s and early 1800s, the offenders against the criminal law come in the far greater proportion from what are known as the "lower classes." This was especially the case (down to the era of the Reform Bill, when nearly two hundred capital crimes were swept from the statute-book) at the time when the great multitude of grave offenses involved merely those petty forms of property-crime which may be the natural result of only hopeless poverty and not necessarily of an abandoned life or a professional profligacy. Furthermore, the same social cleavage is also accompanied, in all countries, with a subordination, a submission, half-respectful and half-stupid, on the part of the "lower classes" towards those in authority, — an attitude especially marked, though not solely found, among the peasantry and towards the squires and other landed superiors on whose will hangs the tenant's fortune. The situation of such a peasant charged by his landlord with poaching and urged to confess, the situation of the maid urged and threatened by her mistress to confess a petty theft, involves a mental condition to which we may well hesitate to apply the test of a rational principle. We may believe that rationally a false confession is not to be apprehended from the normal person under certain paltry inducements or meaningless threats; but we have here perhaps a person not to be tested by a normal or rational standard.[1] This, then, was certainly one of the reasons why, in one way or another, on principle or without principle, many judges came to set themselves against the use of confessions, and to exclude them on pretexts which were in themselves trifling and irrational but in fact represented a fixed judicial sentiment.

(*b*) Another reason is found in the absence at that time of the right of appeal in criminal cases, and the practical creation of the law of confessions by isolated judges at Nisi Prius without consultation and on independent responsibility. In order to solve any doubts which might arise in his mind, the Nisi Prius judge was obliged to consult casually-accessible colleagues or to reserve the question for a meeting of all the judges; and the natural disinclination to such a delay, to becoming the source of trouble to his professional associates, and to bringing perhaps upon himself the reflection of having had unnecessary doubts, made this course always a disagreeable one and a last resort. The result was that the judges commonly preferred to eliminate the questionable evidence altogether, to try the case on whatever other evidence could be mustered, and to solve all questions that were even arguable (whether the judge himself had doubts or not) in favor of the accused. Thus many confessions were excluded.

(3) A third reason, and one amply sufficient in itself to account for the narrowness of confession rulings, and for much besides, was the extraordinary handicap placed upon the accused at common law in the shape of his inability either to testify for himself or to have counsel to defend him. The right to have the aid of counsel was not granted as a general one until 1836; and although as early as 1750 it had become customary to allow counsel to cross-examine for the accused and to do everything but address the jury, this custom was by no means un-

[1] "Most persons accused of crime are poor, stupid, and helpless" (*Stephen*, "History of the Criminal Law," I, 442).

broken and fell far short in efficacy of being equivalent to a right. The competency to testify on his own behalf was for long withheld (until 1898) from the accused person; and the unsworn address to the jury, which he was allowed to make, was very different from the right to testify in his own behalf, and was probably not of great consequence as furnishing testimonial material. In view of the apparent unfairness of a system which practically told the accused person, "You cannot be trusted to speak here or elsewhere in your own behalf, but we shall use against you whatever you may have said," it was entirely natural that the judges should employ the only makeweight which existed for mitigating this unfairness and restoring the balance, namely, the doctrine of confessions. They tried to restore the balance by excluding confessions upon every available pretext.

In view of these considerations, it is easy to see why the law of confessions in England came to develop what seem to us, in another country and in other times, absurd and dangerous sentimentalities, and why there is no necessity for our retention of the distortions and irrational excrescences which, as handed down to us in the English rulings of the early 1800s, have served to obscure the correct and entirely rational principle of exclusion applicable to confessions. No one of these three considerations above pointed out applies to our conditions. The spirit of our community, whether we choose to call it by the name of liberty or by the name of anarchy (and it has certainly the evil as well as the good savor), is a spirit of fearlessness of superior social and political power; of restiveness and struggling against bonds, not of orderly submission; of bold (if superficial) readiness to claim "rights," not of ignorant surrender to demands; and, in general, of keen appreciation of the possibilities of evading justice, rather than of cowed obedience to any authority however oppressive. Furthermore, the power of revision of confession-law on appeal to the higher tribunal is universal. Finally, the accused person may everywhere testify for himself, and has the fullest assistance of a bar not remarkable for its scrupulousness in criminal cases. All those circumstances are thus wanting which explain and excuse the unnatural development of the law of confessions in the hands of the English judges of a past generation. There is for us no such explanation and no such excuse. The perpetuation here of the Nisi Prius doctrines of the first part of the 1800s is now nothing but sentimentalism, a false tenderness to criminals, and an unnecessary deviation from principle.

289. WARICKSHALL'S CASE

Old Bailey Sessions. 1783

1 *Leach Cr. L.* 248, 3*d ed.* 298

At the Old Bailey, in April Session, 1783, Thomas Littlepage was indicted before Mr. Justice Nares, present Mr. Baron Eyre, for grand larceny; and the same indictment charged Jane Warickshall, as an accessary after the fact, with receiving the property knowing it to have been stolen.

The accessary had made a full confession of her guilt; and in consequence of it the property had been found in her lodgings, concealed between the sackings of her bed. The confession, however, having been

obtained by promises of favor, the Court refused to admit it in evidence against her; and it was contended by her counsel, that as the fact of finding the stolen property in her custody had been obtained through the means of an inadmissible confession, the proof of that fact ought also to be rejected; for otherwise the faith which the prosecutor had pledged would be violated, and the prisoner made the deluded instrument of her own conviction.

The Court. — It is a mistaken notion, that the evidence of confessions and facts which have been obtained from prisoners by promises or threats, is to be rejected from a regard to public faith: no such rule ever prevailed. The idea is novel in theory, and would be as dangerous in practice as it is repugnant to the general principles of criminal law. Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are, or are not entitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers. But a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.

This principle respecting confessions has no application whatever as to the admission or rejection of *facts*, whether the knowledge of them is obtained in consequence of an extracted confession, or whether it arises from any other source; for a fact, if it exists at all, must exist invariably in the same manner, whether the confession from which it is derived be in other respects true or false. Facts thus obtained, however, must be fully and satisfactorily proved, without calling in the aid of any part of the confession from which they may have been derived; and the impossibility of admitting any part of the confession as a proof of the fact, clearly shows that the fact may be admitted on other evidence; for as no part of an improper confession can be heard, it can never be legally known whether the fact was derived through the means of such confession or not; and the consequences to public justice would be dangerous indeed; for if men were enabled to regain stolen property, and the evidence of attendant facts were to be suppressed, because they had regained it by means of an improper confession, it would be holding out an opportunity to compound felonies. The rules of evidence which respect the admission of facts, and those which prevail with respect to the rejection of parole declarations or confessions, are distinct and independent of each other.

It is true, that many able judges have conceived that it would be an exceeding hard case, that a man whose life is at stake, having been lulled into a notion of security by promises of favor, and in consequence of those promises has been induced to make a confession by the means of which the property is found, should afterwards find that the confession with regard to the property found is to operate against him. But this

subject has more than once undergone the solemn consideration of the twelve judges; and a majority of them were clearly of opinion, That although confessions improperly obtained cannot be received in evidence, yet that any *acts* done afterwards might be given in evidence, notwithstanding they were done in consequence of such confession.

290. BRAM *v.* UNITED STATES

SUPREME COURT OF THE UNITED STATES. 1897

168 *U. S.* 532; 18 *Sup.* 112

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

Asa P. French and *James E. Cotter*, for plaintiff in error. Assistant Attorney-General *Boyd*, for the United States.

Mr. Justice WHITE delivered the opinion of the court.

This writ of error is prosecuted to a verdict and sentence thereon, by which the plaintiff was found guilty of murder, and condemned to suffer death. The homicide was committed on board the American ship Herbert Fuller, while on the high seas, bound from Boston to a port in South America. The accused was the first officer of the ship, and the deceased, of whose murder he was convicted, was the master of the vessel. The bill of exceptions, after stating the sailing of the vessel from Boston on the 2d of July, 1896, with a cargo of lumber, gives a general summary of the facts leading up to and surrounding the homicide, as follows:

She had on board a captain, Charles I. Nash; Bram, the defendant; a second mate, August W. Blomberg; a steward; and six seamen; also the captain's wife, Laura A. Nash, and one passenger, Lester H. Monks.

The vessel proceeded on her course towards her port of destination until the night between July 13th and July 14th. On that night, at 12 o'clock, the second mate's watch was relieved by the mate's watch, of which Bram, the defendant, was the officer in charge. The captain, his wife, the passenger, Monks, and the first mate and the second mate, all lived in the after-cabin, occupying separate rooms. . . . The crew and the steward slept forward in the forward house.

When the watch was changed at midnight, Bram, the defendant, took the deck, the seamen Loheac and Perdok went forward on the lookout, and Charles Brown (otherwise called Justus Leopold Westerberg, his true name) took the wheel, where it was his duty to remain till two o'clock, at about which time he was relieved by Loheac. The second mate went to his room and the seamen of his watch to their quarters at twelve midnight, and there was no evidence that any of them or the steward appeared again till daylight.

The passenger, Monks, who occupied a room on the starboard side

of the cabin, between the chart room where the captain slept and the room on the forward starboard side where Mrs. Nash slept, with doors opening from the passenger's room into both the chart room used by the captain as his room and that of Mrs. Nash, was aroused not far from two o'clock (the exact time is not known, as he says) by a scream, and by another sound, characterized by him as a gurgling sound. He arose, went to the captain's room, and found the captain's cot overturned, and the captain lying on the floor by it. He spoke, but got no answer; put his hand on the captain's body, and found it damp or wet. He then went to Mrs. Nash's rooms; did not see her, but saw dark spots on her bedding, and suspected something wrong. He went on deck, and called the mate, the defendant, telling him the captain was killed. Both went below, took down the lantern hanging in the main cabin, burning dimly, turned it up, and went through the captain's room to the passenger's room, and the passenger there put on a shirt and pantaloons. They then both returned to the deck, the mate on the way stopping a brief time in his own room. Bram and Monks remained talking on deck till about daybreak, when the steward was called, and told what had happened. Up to this time no call had been made for the second mate, nor had any one visited his room. Later it was found that Captain Nash, his wife, and Blomberg, the second mate, were all dead, each with several wounds upon the head, apparently given with a sharp instrument, like an ax, penetrating the skull, and into the substance of the brain; and the second mate lying on his back, with his feet crossed, in his berth; Mrs. Nash in her bed, in her room, and at the back side of the bed; and Captain Nash in his room, as already stated. . . .

In a day or two, suspicion having been excited in respect to the seaman Brown, the crew, under the supervision of Bram, seized him, he not resisting, and put him in irons. All the while the officers and seamen remained on deck. Bram navigated the ship until Sunday before they reached Halifax, on Tuesday, and after the land of Nova Scotia was in sight, when, Brown having stated to his shipmates, or some of them, that he saw into the cabin through a window in the after-part and on the starboard side of the house, and saw Bram, the mate, kill the captain, in consequence of this statement of Brown, the crew, led by the steward, suddenly overpowered the mate, and put him in irons, he making no resistance, but declaring his innocence. Bram and Brown were both carried into Halifax in irons.

The bill of exceptions further states that, when the ship arrived at Halifax, the accused and Brown were held in custody by the chief of police at that place, and that, while in such custody, the accused was taken from prison to the office of a detective, and there questioned, under circumstances to be hereafter stated. . . .

Nicholas Power, of Halifax, called by the government, testified that he was connected with the police department of Halifax, and had been

for thirty-two years, and for the last fifteen years of that time as a detective officer; that after the arrival of the Herbert Fuller at Halifax, in consequence of a conversation with Charles Brown, he made an examination of Bram, the defendant, in the witness' office, in the city hall at Halifax, when no one was present besides Bram and the witness. The witness testified that no threats were made in any way to Bram, nor any inducements held out to him.

The witness was then asked: "What did you say to him and he to you?"

To this the defendant's counsel objected. . . . The witness stated that the conversation took place in his office, where he had caused the defendant, Bram, to be brought by a police officer; that up to that time the defendant had been in the custody of the police authorities of Halifax, in the custody of the superintendent of police, John O'Sullivan; that the witness asked that the defendant should be brought to his office for the purpose of interviewing him; that at his office he stripped the defendant, and examined his clothing, but not his pockets; that he told the defendant to submit to an examination, and that he searched him. . . .

The witness answered questions by the Court as follows:

"You say there was no inducement to him in the way of promise or expectation of advantage?

"*A.* — Not any, your honor.

"*Q.* — Held out?

"*A.* — Not any, your honor.

"*Q.* — Nor anything said in the way of suggestion to him that he might suffer if he did not, — that it might be worse for him?

"*A.* — No, sir; not any.

"*Q.* — So far as you were concerned, it was entirely voluntary?

"*A.* — Voluntary, indeed.

"*Q.* — No influence on your part exerted to persuade him one way or the other?

"*A.* — None whatever, sir; none whatever." . . .

The objection was overruled, and the defendant excepted on all the grounds above stated, and the exceptions were allowed.

The witness answered as follows:

"When Mr. Bram came into my office, I said to him: 'Mr. Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.' He said: 'He could not have seen me. Where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said: 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said: 'Well, I think, and many others on board the

ship think, that Brown is the murderer; but I don't know anything about it.' He was rather short in his replies.

"*Q.* — Anything further said by either of you?

"*A.* — No; there was nothing further said on that occasion." . . .

The contention is that the foregoing conversation, between the detective and the accused, was competent only as a confession by him made; that it was offered as such; and that it was erroneously admitted, as it was not shown to have been voluntary. . . . It is manifest that the sole ground upon which the proof of the conversation was tendered was that it was a confession, as this was the only conceivable hypothesis upon which it could have been legally admitted to the jury. It is also clear that, in determining whether the proper foundation was laid for its admission, we are not concerned with how far the confession tended to prove guilt. Having been offered as a confession, and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in determining its admissibility. If found to have been illegally admitted, reversible error will result. . . .

The principle on the subject is thus stated in a note to § 219 of Greenleaf on Evidence: "The rule excludes not only direct confessions, but any other declaration tending to implicate the prisoner in the crime charged, even though, in terms, it is an accusation of another or a refusal to confess." . . .

In cases where statements of one accused had been made to others than the magistrate upon an examination, differences of opinion arose among the English judges as to whether a confession made to a person not in a position of authority over the accused was admissible in evidence after an inducement had been held out to the prisoner by such persons. Rex *v.* Spencer (1837), 7 Car. & P. 776. It was finally settled, however, that the effect of inducements must be confined to those made by persons in authority (Reg. *v.* Taylor (1839), 8 Car. & P. 734; Reg. *v.* Moore (1852), 2 Denison, Cr. Cas. 522), although, in the last cited case, while former precedents were followed, the Court expressed strong doubts as to the wisdom of the restriction (2 Denison, Cr. Cas. 527). There can be no question, however, that a police officer, actually or constructively in charge of one in custody on a suspicion of having committed crime, is a person in authority within the rule. . . .

Many other cases in the English reports illustrate the application of the rule excluding statements made under inducement improperly operating to influence the mind of an accused person. . . . In the cases following, statements made by a prisoner were held inadmissible, because induced by the language set out in each case: In Rex *v.* Griffin (1809), Russ. & R. 151, telling the prisoner that it would be better for him to confess. In Rex *v.* Jones, Id. 152, the prosecutor saying to the accused that he only wanted his money, and, if the prisoner gave him that, he might go to the devil, if he pleased. In Rex *v.* Kingston (1830), 4 Car. & P. 387, saying to the accused: "You are under suspicion of this, and

you had better tell all you know." In Rex *v.* Enoch (1833), 5 Car. & P. 539, saying: "You had better tell the truth, or it will lie upon you, and the man go free." In Rex *v.* Mills (1833), 6 Car. & P. 146, saying: "It is no use for you to deny it, for there is the man and boy who will swear they saw you do it." In Sherrington's Case (1838), 2 Lewin, Cr. Cas. 123, saying: "There is no doubt, thou wilt be found guilty: it will be better for you if you will confess." In Rex *v.* Thomas (1833), 6 Car. & P. 353, saying: "You had better split, and not suffer for all of them." In Rex *v.* Simpson (1834), 1 Moody, 410, and Ryan & M. 410, repeated importunities by neighbors and relatives of the prosecutor, coupled with assurances to the suspected person that it would be a good deal worse for her if she did not, and that it would be better for her if she did confess. In Rex *v.* Upchurch (1836), 1 Moody, 465, saying: "If you are guilty, do confess. It will perhaps save your neck. You will have to go to prison. If William H. [another person suspected, and whom the prisoner had charged] is found clear, the guilt will fall on you. Pray tell me if you did it." In Reg. *v.* Croydon (1846), 2 Cox, Cr. Cas. 67, saying: "I dare say you had a hand in it. You may as well tell me all about it." In Reg. *v.* Garner (1848), 1 Denison, Cr. Cas. 329, saying: "It will be better for you to speak out." . . . In the leading case of Reg. *v.* Baldry (1852), 2 Denison, Cr. Cas. 430, after full consideration, it was held that the declaration made to a prisoner, who had first been cautioned that what he said "would" be used as evidence, merely imported that such statement "might" be used, and could not have induced in the mind of the prisoner a hope of benefit sufficient to lead him to make a statement. . . .

The latest decision in England on the subject of inducement, made by the Court for Crown Cases Reserved, is Reg. *v.* Thompson (1893), 2 Q. B. 12. . . .

While, as we have said, there is no question that a police officer having a prisoner in custody is a person in authority, within the rule in England, and, therefore, that any inducement by him offered, calculated to operate upon the mind of the prisoner, would render a confession as a consequence thereof inadmissible, there seems to be doubt in England whether the doctrine does not extend further, and hold that the mere fact of the interrogation of a prisoner by a police officer would "per se" render the confession inadmissible, because of the inducement resulting from the very nature of the authority exercised by the police officer, assimilating him in this regard to a committing or examining magistrate. . . . Whatever be the rule in this regard in England, however, it is certain that, where a confession is elicited by the questions of a policeman, the fact of its having been so obtained, it is conceded, may be an important element in determining whether the answers of the prisoner were voluntary. The attempt on the part of police officer to obtain a confession by interrogating has been often reproved by the English Courts as unfair to the prisoner, and as approaching dangerously near

to a violation of the rule protecting an accused from being compelled to testify against himself. Berriman's Case (1854), 6 Cox, Cr. Cas. 388; Cheverton's Case (1862), 2 Falc. & F. 833; Mick's Case (1863), 3 Falc. & F. 822; Reagan's Case (1867), 17 Law T. (N.S.) 325; and Reason's Case, (1872), 12 Cox, Cr. Cas. 228.

We come, then, to the American authorities. In this Court the general rule that the confession must be free and voluntary — that is, not produced by inducements engendering either hope or fear — is settled by the authorities referred to at the outset. The facts in the particular cases decided in this Court, and which have been referred to, manifested so clearly that the confessions were voluntary that no useful purpose can be subserved by analyzing them. In this Court also it has been settled that the mere fact that the confession is made to a police officer, while the accused was under arrest in or out of prison, or was drawn out by his questions, does not necessarily render the confession involuntary; but, as one of the circumstances, such imprisonment or interrogation may be taken into account in determining whether or not the statements of the prisoner were voluntary. Hopt *v.* Utah, 110 U. S. 574, 4 Sup. Ct. 202; Sparf *v.* U. S., 156 U. S. 51, 55, 15 Sup. Ct. 273. And this last rule thus by this court established is also the doctrine upheld by the state decisions.

In the various State Courts of last resort the general rule we have just referred to, that a confession must be voluntary, is generally recognized. . . . In the following cases the language in each mentioned was held to be an inducement sufficient to exclude a confession or statement made in consequence thereof: In Kelly *v.* State (1882), 72 Ala. 244, saying to the prisoner: "You have got your foot in it, and somebody else was with you. Now, if you did break open the door, the best thing you can do is to tell all about it, and to tell who was with you, and to tell the truth, the whole truth, and nothing but the truth.". . . In Com. *v.* Myers (1894), 160 Mass. 530, 36 N. E. 481, saying to the accused: "You had better tell the truth." In People *v.* Wolcott (1883), 51 Mich. 612, 17 N. W. 78, saying to the accused: "It will be better for you to confess." . . . In State *v.* Drake (1893), 113 N. C. 624, 18 S. E. 166, saying to the prisoner: "If you are guilty, I would advise you to make an honest confession. It might be easier for you. It is plain against you." . . .

We come, then, to a consideration of the circumstances surrounding, and the facts established to exist, in reference to the confession, in order to determine whether it was shown to have been voluntarily made. . . . The situation of the accused, and the nature of the communication made to him by the detective, necessarily overthrow any possible implication that his reply to the detective could have been the result of a purely voluntary mental action; that is to say, when all the surrounding circumstances are considered in their true relations, not only is the claim that the statement was voluntary overthrown, but the impression is irresistibly produced that it must necessarily have been the result of either hope or fear, or both, operating on the mind.

It cannot be doubted that, placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with crime, the result was to produce upon his mind the fear that, if he remained silent, it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person; and it cannot be conceived that the converse impression would not also have naturally arisen that, by denying, there was hope of removing the suspicion from himself. If this must have been the state of mind of one situated as was the prisoner when the confession was made, how, in reason, can it be said that the answer which he gave, and which was required by the situation, was wholly voluntary, and in no manner influenced by the force of hope or fear? To so conclude would be to deny the necessary relation of cause and effect. . . . As said in the passage from Russell on Crimes already quoted: "The law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted." In the case before us, we find that an influence was exerted, and, as any doubt as to whether the confession was voluntary must be determined in favor of the accused, we cannot escape the conclusion that error was committed by the trial Court in admitting the confession under the circumstances disclosed by the record.

The judgment is reversed, and the cause remanded, with directions to set aside the verdict and to order a new trial.

Mr. Justice BREWER, dissenting.

I dissent from the opinion and judgment in this case —

First, because I think the testimony was not open to objection. "A confession, if freely and voluntarily made, is evidence of the most satisfactory character." Hopt *v.* People, 110 U. S. 574, 584, 4 Sup. Ct. 202, reaffirmed in Sparf *v.* U. S., 156 U. S. 51, 55, 15 Sup. Ct. 273. The fact that the defendant was in custody and in irons does not destroy the competency of a confession. "Confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises." Sparf *v.* U. S. *supra.* See, also, Wilson *v.* U. S., 162 U. S. 613–623, 16 Sup. Ct. 895.

The witness Power, when called, testified positively that no threats were made nor any inducements held out to Bram; and this general declaration he affirmed and reaffirmed in response to inquiries made by the Court and the defendant's counsel. The Court, therefore, properly overruled the objection at that time made to his testifying to the statements of defendant. . . . The first part of that conversation is as follows: "When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office, and he made

a statement that he saw you do the murder.' He said: 'He could not have seen me. Where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.'" In this there is nothing which by any possibility can be tortured into a suggestion of threat or a temptation of hope. Power simply stated the obvious fact that they were trying to unravel a horrible mystery, and the further fact that Brown had charged the defendant with the crime, and the replies of Bram were given as freely and voluntarily as it is possible to conceive. It is strange to hear it even intimated that Bram up to this time was impelled by fear or allured by hope caused in the slightest degree by these statements of Power.

The balance of the conversation is as follows: "I said: 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said: 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.' He was rather short in his replies." And here, it is argued, was a suggestion of a benefit, — the holding out of a hope that a full disclosure might somehow inure to his advantage. To support this contention involves a refinement of analysis which, while it may show marvelous metaphysical ability, is of little weight in practical affairs. But, even if did carry any such improper suggestion, it was made at nearly the close of the conversation; and that this suggestion then made had a retroactive effect, and transformed the previous voluntary statements of Bram into statements made under the influence of fear or hope, is a psychological process which I am unable to comprehend. . . . With all respect to my brethren who are of a different opinion, I can but think that such a contention is wholly unsound, and that in all this conversation with Bram there was nothing of sufficient importance to justify the reversal of the judgment.

The Chief Justice and Mr. Justice Brown concur in this dissent.

291. COMMONWEALTH *v.* CRESSINGER

Supreme Court of Pennsylvania. 1899

193 *Pa.* 326; 44 *Atl.* 433

Argued October 16, 1899. Appeal, No. 231, Jan. T., 1899, by plaintiff, from judgment of O. & T. Northumberland Co., Dec. T., 1898, No. 3, on a verdict of guilty of murder. Before Sterrett, C. J., Green, McCollum, Mitchell, Dean and Fell, JJ. Affirmed.

Indictment for murder. Before Savidge, P. J. At the trial it appeared that on October 10, 1898, Daisy Smith, a girl about sixteen

years of age, residing in Lower Augusta township, was shot and killed on her father's farm. Suspicion was directed toward the prisoner, the son of a neighboring farmer. Two of the neighbors went to defendant's home where they found him washing a shirt bespattered with blood.

Counsel for the Commonwealth offered to prove by L. L. Grimm that he, in company with Miles Dougherty, called at the county jail; that the prisoner was brought into the jail office and that they there had a conversation with him and that he confessed to the commission of the crime. Counsel for the prisoner objected, because when the prisoner was interrogated he had been but recently placed under duress without process of law. . . . That while he was yet subjected to the fear and terror incident upon his arrest and incarceration in the middle of the night, and before he had time to acquire even proper composure, in ignorance of his rights, he was, with undue haste, visited by the officers of the law, who immediately informed him who they were, thus being placed in a situation which must necessarily have terrorized him, which circumstances were followed by an artifice and trick by which he was induced to make a statement which they allege to be a confession, and by reason of the artifice and trick might have been induced with the hope of some benefit, or at least while he was under the influence of fear, to make statements which it is proposed to use to his injury: and because the evidence offered is incompetent and illegal.

The COURT. — "Whether the trick in this case was such as to excite hope or fear cannot be known until we hear what it was. . . . I suppose it is of very little consequence which side finds out what the trick was."

Mr. *Mahon*, of counsel for Commonwealth. — "Go on and state what you said to the prisoner on the evening of October 11, without giving what he said to you. What did you first say to him when he was brought into the office?"

The COURT. — "That he has explained to us already, and after he had explained what he had said, leading up to the confession, Mr. *Oram* asked whether he had resorted to any trick, and he said he had."

Q. — "Go on and state what you characterized as a trick on your part on that occasion." *A.* — "Why, we discovered that the knife was bought down at Mrs. Bohner's, but we could not get any trace of who bought on the Monday previous, being the last knife of the kind that she had, but we also found that she got her knives from Mr. Hackett in town. . . . I went into Hackett's store and asked him for a pocket knife of the kind that Mrs. Bohner got; and he said she bought three or four different kinds, and he asked what kind I had reference to and I said I would like to get a two-bladed barlow, both at one end, and he said, 'I have some of that kind,' and he got one; and I says, 'I would like to borrow this for a few days and if I don't bring it back I will pay for it,' and I put it in my pocket and went to the jail; and after talking a while I reached down in my pocket and pulled this out and I said, 'Ed, I found your knife.'"

Mr. *Oram:* *Q.* — "Then the statement he made was induced by that?" *A.* — "Yes, sir: in that way."

The COURT. — "Is that all, by way of trick?" *A.* — "I gave it to the prisoner and he examined it. He asked, 'Where did you get it?' I said, 'Just where you put it,' and he asked me the second time and I gave him the same answer, and he asked the third time, 'I would like to know where you got it;' and I says, 'Nobody knows better than you; I got it just where you put it,' and then he began and told me where I got it."

Counsel for the prisoner renews objections previously made.

The COURT. — "We are of the opinion that we cannot say, as a matter of law, that the trick spoken of by the witness was calculated to produce such a state of hope or fear on the mind of the prisoner as would lead to an untrue confession. We therefore overrule the objection and admit the testimony."

Exception for the prisoner and bill sealed. . . .

Mr. *Oram:* *Q.* — "Go on and state all that occurred, which led up to this confession that you have in this writing." *A.* — "When I told him, 'Nobody knows better than you,' he says, 'You must have found it at the apple tree where the wash bench stands;' I said, 'Certainly, you knew where you put it.' I looked at him straight and says, 'Ed, why did you do it?' And just at that time Dougherty says, 'Did you have a quarrel?' And Ed says, 'Yes, she slapped me,' and Dougherty kind of raised himself up, and said, 'I don't want you to say another word, unless it is voluntarily, because anything you say we will use against you.'" *Q.* — "Is this confession in your handwriting?" *A.* — "Yes, sir, it don't show it very plainly because I was kind of nervous when I wrote it."

Counsel for the Commonwealth renewed offer to read the confession.

Counsel for the prisoner objected. . . .

The COURT: Objection overruled and bill sealed for the prisoner. . . .

Verdict of guilty of murder in the first degree, and sentence passed upon the verdict. . . .

Charles M. Clement and *William H. M. Oram,* for appellant. . . . The confession was inadmissible. . . .

P. A. Mahon, with *D. W. Shipman,* district attorney, for appellee. . . .

Opinion by Mr. Justice MITCHELL, October 30, 1899. . . . The evidence of the confession made to Grimm was properly admitted. The fact that it was obtained by a trick is no objection to its competency, unless the circumstances are such as to suggest an inference that through fear or hope a false confession may be made. There were no such circumstances in the present case, nor anything which required the judge to dwell particularly upon them in his charge. A knife was produced and the prisoner led to believe that it was his. Under this supposition he told where he had hidden his and then told the story of the murder. The object of evidence is to get at the truth, and a trick which has no

tendency to produce a confession except one in accordance with the truth is always admissible. Society and the criminal are at war, and capture by surprise, or ambush, or masked battery is as permissible in one case as in the other. Com. *v.* Goodwin, 186 Pa. 218; McClain *v.* Com., 110 Pa. 263, 269. . . .

Judgment affirmed and record remitted for purpose of execution according to law.

292. COMMONWEALTH *v.* STORTI

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1901

177 *Mass.* 339; 58 *N. E.* 102

INDICTMENT for murder, returned against Luigi Storti and Vincenzo Bocielli by the grand jury, December 9, 1899. The defendant Bocielli was not apprehended. The defendant Storti was tried in the Superior Court, before BOND and LAWTON, JJ. The case came up on appeal and bill of exceptions. . . .

By the bill of exceptions it appeared that on the night of November 6, 1899, the two defendants, Luigi Storti and Vincenzo Bocielli, of whom Storti alone was on trial, occupied a room in a house on Charter street in Boston with five others, one of whom was Michele Calucci, the deceased. At an early hour of the morning of November 7th it was discovered by some of the occupants of the room that Calucci had been murdered in his bed with an axe, and that Storti and Bocielli had fled. Storti was arrested on the following day at Hudson, Massachusetts. He, there and on the way to Boston, made incriminating statements to the officers, and later, at police headquarters in Boston, made a confession through an interpreter. . . .

P. S. Maher and *C. W. Rowley*, for the defendant.

M. J. Sughrue, First Assistant District Attorney, and *J. D. McLaughlin*, Second Assistant District Attorney, for the Commonwealth. . . .

HOLMES, C. J. . . . The admission of statements made by the defendant to the officers who arrested him was excepted to, mainly on the ground that the statements were not voluntary. The judges who tried the case were warranted in finding that the statements were freely made, and whatever latitude we may use in reviewing these findings of fact, we cannot say that they were wrong. Commonwealth *v.* Bond, 170 Mass. 41.

The first conversation was in the station-house, just after the arrest on the day following the murder. In this nothing of great importance was said. But the defendant in denying his guilt said that he never was in Boston, which of course was evidence against him. In the next, on the following day at the same place, the defendant admitted striking the deceased with an axe. So far no inducements had been held out to

him, and the facts that the prisoner was in custody and was questioned by an officer are not conclusive against this evidence. . . .

The first full and extended examination was in the Boston station-house, in the presence of three officers, one of whom put questions through an interpreter, and the questions and answers were taken down by a stenographer. The interpreter was a witness at the trial, and swore that he accurately translated all that was said by the officer to the prisoner and all the answers which the prisoner made. The stenographer testified that he accurately took it all down. What seems to be the chief ground of objection to this examination is that according to his own testimony the interpreter said to the prisoner that "what would be against him, that will be brought in court against him, or in favor, as it was." We understand this to mean in imperfect English that whatever was said would be used in court, against the defendant if unfavorable, or for him if favorable. It is hard to find an inducement to make a confession or to say things unfavorable to himself in these words. But, if it be thought that there was an inducement to speak when otherwise he might have remained silent, Bram *v.* United States, 168 U. S. 532, 549, 550 [*ante*, No. 290], it is enough to say that, according to the testimony of the stenographer from his notes, the prisoner was asked if he wished to make any statement of his own free will, answered yes, and then was cautioned simply that everything he said might be used against him in court. This is confirmed by other evidence, and, to say the least, the presiding judges were warranted in taking it as the true account. . . .

The only exception which causes hesitation on our part is to the exclusion of evidence that, at the talk in the Hudson station-house, Rooney, one of the officers, said in English to Rosatto, another, who was speaking with the prisoner in Italian, "Tell him it will be better for him if he tells." But it appears that the defendant did not speak or understand English, and not only was there no evidence that such a suggestion was communicated to the prisoner, but all the testimony was that it was not communicated, if such a statement was made. It did not even appear that Rooney spoke in the prisoner's hearing. . . .

Decree overruling motion to quash affirmed; exceptions overruled.

293. AMMONS *v.* STATE

SUPREME COURT OF MISSISSIPPI. 1902

80 *Miss.* 592; 32 *So.* 9

FROM the Circuit Court of Warren County. Hon. GEORGE ANDERSON, Judge.

Ammons, appellant, was indicted, tried, and convicted of burglary. On the trial certain confessions of the defendant, obtained by the aid of a sweat-box in the manner mentioned in the opinion of the Court, were

offered in evidence against defendant over his objection. Without the confession there was not sufficient evidence to support the verdict. From the conviction the defendant appealed to the Supreme Court, assigning as error the admission of the confessions.

D. Marshall and *Theodore G. Burchett, Jr.*, for appellant. Before a confession can be introduced it must be shown to be voluntary. . . . By the direction of the chief of police the defendant was thrown into the "sweat-box." . . . If the confession has been extorted by duress or fear, as by threat of violence, or any increased rigor of confinement, or by any other menace which can inspire dread or alarm, it will be excluded. . . . Of course, a mere exhortation to tell the truth does not render the confession inadmissible, but when an officer, without advising a prisoner of his privilege of not answering the questions, tells him he had better tell what is right, and it would be better to tell the truth, the Courts have uniformly excluded such a confession. Regina *v.* Romp, 17 Ont. Rep. 567; Regina *v.* Diherty, 13 Cox C. C. 23; Commonwealth *v.* Meyers, 160 Mass. 530. . . .

Monroe McClurg, Attorney-General, for appellee. The brief of counsel for appellant pictures the "sweat-box" in the city jail as a most horrible place. Much of the picture is drawn from imagination. The record shows that the apartment called the "sweat-box" was simply a small room in one corner of a large room. . . .

Calhoon, J. — The chief of police testified that the accused made to him a "free and voluntary" statement. The circumstances under which he made it were these: There was what was known as a "sweat-box" in the place of confinement. This was an apartment about five or six feet one way and about eight feet another. It was kept entirely dark. For fear that some stray ray of light or breath of air might enter without special invitation, the small cracks were carefully blanketed. The prisoner was allowed no communication whatever with human beings. Occasionally the officer, who had put him there, would appear, and interrogate him about the crime charged against him. To the credit of our advanced civilization and humanity it must be said that neither the thumbscrew nor the wooden boot was used to extort a confession. The efficacy of the sweat-box was the sole reliance. This, with the hot weather of summer, and the fact that the prisoner was not provided with sole leather lungs, finally, after "several days" of obstinate denial, accomplished the purpose of eliciting a "free and voluntary" confession. The officer, to his credit, says he did not threaten his prisoner, that he held out no reward to him, and did not coerce him. Everything was "free and voluntary." He was perfectly honest and frank in his testimony, this officer was. He was intelligent, and well up in the law as applied to such cases, and nothing would have tempted him, we assume, to violate any technical requirement of a valid confession — no threats, no hope of reward, no assurance that it would be better for the prisoner to confess. He did tell him, however, "that it would be best for him to

do what was right," and that it "would be better for him to tell the truth." In fact, this was the general custom in the moral treatment of these sweat-box patients, since this officer says, "I always tell them it would be better for them to tell the truth, but never hold out any inducement to them." He says, in regard to the patient, Ammons, "I went to see this boy every day, and talked to him about the case, and told him it would be better for him to tell the truth; tell everything he knew about the case." This sweat-box seems to be a permanent institution, invented and used to gently persuade all accused persons to voluntarily tell the truth. Whenever they do tell the truth — that is, confess guilt of the crime — they are let out of the sweat-box. Speaking of this apartment, and the habit as to prisoners generally, this officer says, "We put them in there (the sweat-box) when they don't tell me what I think they ought to." This is refreshing.

The confession was not competent to be received as evidence. 6 Am. & Eng. Enc. Law, p. 531, note 3; Id., p. 550, note 7; Hamilton *v.* State, 77 Miss. 675 (27 So. 606); Simon *v.* State, 37 Miss. 288. Defendant, unless demented, understood that the statement wanted was confession, and that this only meant release from this "black hole of Calcutta." Such proceedings as this record discloses cannot be too strongly denounced. They violate every principle of law, reason, humanity, and personal right. They restore the barbarity of ancient and medieval methods. They obstruct, instead of advance, the proper ascertainment of truth. It is far from the duty of an officer to extort confession by punishment. On the contrary, he should warn his prisoner that every statement he may choose to make may be used against him on his trial.

Reversed and remanded.

294. STATE *v.* FINCH

SUPREME COURT OF KANSAS. 1905

71 *Kan.* 793; 81 *Pac.* 494

APPEAL from District Court, Finney County; WM. EASTON HUTCHISON, Judge. O. W. Finch was convicted of manslaughter in the fourth degree, and appeals. Affirmed.

G. L. Miller, for appellant. *C. C. Coleman*, Attorney-General, and *Albert Hoskinson*, for the State.

JOHNSTON, C. J. — In an information, containing two counts, O. W. Finch was charged with manslaughter in the third and fourth degrees for the killing of M. Brooks. He was found guilty of manslaughter in the fourth degree, as charged in the second count. In his appeal numerous errors are assigned. . . .

The principal complaint of the defendant is the admission of testimony given by himself at the coroner's inquest. . . . We find nothing in the record showing that it was not admissible. Like others, the defendant

was subpoenaed as a witness to testify at the inquest as to the cause of Brooks' death. For aught that appears, he may have been anxious and swift to testify. There is not a hint in the record that he was led to testify through any inducement of promised favor or by reason of any fear, menace or duress. Ordinarily, all that a defendant has said pertinent to the subject of inquiry may be received in evidence against him. The exceptions to this rule are when admissions have been extracted from him by means of promises or threats, or where statements made or testimony given have been compulsory or involuntary. The test of admissibility in this and like cases is, Were the statements made voluntarily and without compulsion?

In this instance they were made in an inquiry where the defendant was a witness, and not a party, and where he might have claimed the privileges of a witness. He was not in custody, nor had any accusation been made against him. Indeed, it does not appear that Brooks' death was then thought to have been caused by any criminal act. . . . If the testimony which defendant gave was incriminating, was it inadmissible merely because he was subpoenaed as a witness and gave his testimony at a formal inquest before the coroner? There was no compulsion to testify, unless the mere fact that he was subpoenaed to give his testimony can be so regarded. There is considerable diversity of opinion in the cases as to the admission of such testimony, and these may be found compiled and classified in 1 Wigmore on Evidence, § 851, and the appended note. In an early New York case the subject was examined and the cases reviewed, and it was held that upon a trial for murder statements made by the prisoner at a coroner's inquest upon the body of the deceased, when the witness was not under arrest or accused of the crime, were admissible against him. Hendrickson *v.* The People, 10 N. Y. 13, 61 Am. Dec. 721. In a later case a witness at a coroner's inquest, who appeared in response to a subpoena, testified, and on his subsequent trial the testimony was admitted against him, although he knew at the time he testified that he was under suspicion of having committed the crime under investigation, and would probably be arrested. Teachout *v.* The People, 41 N. Y. 7. In People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, the defendant was charged with murder at an inquest over the body of the deceased; the defendant testified in pursuance to a subpoena issued by the coroner, and he was threatened with punishment if he refused to testify; at the close of the inquest he was arrested, charged with the crime. The Court said, on page 331 of 168 N. Y:

"When a person is called upon to testify at a coroner's inquest, convened to inquire into a crime, for the commission of which such person is then under arrest, or upon which he has been formally accused, he occupies the same position and he has the same rights, as though he were before an examining magistrate. People *v.* Mondon, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709. So, on the other hand, if the person who testifies at the inquest does so simply as a witness, he has none

of the rights or immunities of a party. This is the foundation of the rule which is now firmly established in this State — that when a person testifies at an inquest as an accused or arrested party his testimony cannot be used against him upon a subsequent trial of an indictment growing out of the inquest, unless his testimony has been voluntarily given after he has been fully advised of all his rights and has been given an opportunity to avail himself of them. People *v.* Chapleau, 121 N. Y. 267. The logical and necessary corollary of that part of the rule stated is that when a person testifies simply as a witness, and not as a party, his testimony can be used against him even though he is afterwards indicted and tried for the commission of the crime disclosed by the inquest."

Other authorities supporting this rule are Wilson *v.* The State, 110 Ala. 1; Jones *v.* The State, 120 Ala. 303; State *v.* Coffee, 56 Conn. 399, 16 Atl. 151; State *v.* Gilman, 51 Me. 206; Shoeffler *v.* The State, 3 Wis. 823; Williams *v.* The Commonwealth, 29 Pa. 102; Newton *v.* The State, 21 Fla. 53; Kirby *v.* The State, 23 Tex. App. 13; The People *v.* Taylor, 59 Cal. 640; 1 Greenleaf on Evidence (15th Ed.) § 225; 1 Roscoe's Criminal Evidence (8th Ed.) 95. Some of the Courts have taken a different view. State *v.* Young, 119 Mo. 495; State *v.* Young, 60 N. C. 126; State *v.* Senn, 32 S. C. 392; State *v.* O'Brien, 18 Mont. 1. . . .

Attention is called to the case of State *v.* Taylor, 36 Kan. 329; but there the testimony at the coroner's inquest was admitted because it did not appear to be voluntary. In the course of the opinion it is said that, if the defendant was compelled, by subpoena or otherwise, to give his testimony before the coroner's inquest, and there was duress, it should be excluded. But that case is not an authority that testimony given under a subpoena and without compulsion and duress is inadmissible. Testimony as to the cause of a death at a coroner's inquest, given by a witness who is not accused nor under arrest, is not deemed to be involuntary merely because he testified in response to a subpoena. Of course, if it appeared that he testified as a party, rather than as a witness, or if he had been induced to testify by promises or threats or other improper influences, his testimony might not subsequently be used against him. In this case there are no circumstances indicating coercion, nor anything inconsistent with the view that the defendant desired or sought the opportunity to testify. . . . Finding no prejudicial error, the judgment will be affirmed. All the justices concurring.

295. STATE *v.* CAMPBELL

SUPREME COURT OF KANSAS. 1906

73 *Kan.* 688; 85 *Pac.* 784

APPEAL from District Court, Wyandotte County; *J. McCabe Moore,* Judge.

Frank M. Campbell was convicted of bribery, and appeals. Affirmed.

[The facts and the evidence objected to are printed *post,* in No. 654.]

PORTER, J. (after stating the facts). The appellant contends . . .

that the Court erred in allowing members of the grand jury which indicted appellant to testify to statements made by him while a witness before the grand jury. It is contended: (1) That, before such testimony was competent, the State should have shown that the statements of appellant were voluntary. . . . It is insisted that the same rule applies to the admissibility of statements and declarations of a defendant in a criminal action as obtains in reference to a confession.

The distinction between a confession and a statement or declaration is one recognized by Courts and text-writers because it is a patent distinction in the very nature of things. The only reason why confessions are sometimes not admitted in evidence is because experience has shown that, when made under certain circumstances, they cannot be relied upon as true. It is not out of any consideration for the rights of the party alleged to have made the confession that it is excluded, but simply because of the inherent probability of its untruthfulness, unless it first appears to have been made voluntarily and not under the influence of fear or duress, occasioned by threats or hope of immunity by reason of promises.

"A 'confession,' in a legal sense, is restricted to an acknowledgment of guilt made by a person after an offense has been committed, and does not apply to a mere statement or declaration of an independent fact from which such guilt can be inferred. State *v.* Reinhart, 26 Or. 466, 38 Pac. 822. . . .

In 1 Wigmore on Evidence, § 821, p. 930, the author says:

" (3) An acknowledgment of a subordinate fact, not directly involving guilt, or, in other words, not essential to the crime charged, is not a confession, because the supposed ground of untrustworthiness of confessions is that strong motive impels the accused to expose and declare his guilt as the price of purchasing immunity from present pain or subsequent punishment, and thus, by hypothesis, there must be some quality of guilt in the fact acknowledged. Confessions are thus only one species of admissions, and all other admissions than those which directly touch the fact of guilt are without the scope of the peculiar rules affecting the use of confessions." . . .

Tested by these well established rules, how can it be said that the statements of appellant before the grand jury amounted to a confession? They were made in positive denial of guilt and for the purpose of exculpating himself. He admitted the making of the contract with Gilhaus; there was no guilt, no crime, no offense in that. He admitted the receipt of $412 from Gilhaus; but, if the story he told was true, and this money was in payment of the purchase price of the steam valve which he had sold to Gilhaus, there was no offense in that. No statement by itself amounted to an acknowledgment of guilt; nor could his guilt be necessarily inferred by the jury from all his statements taken together. The constitutional right which every man has to refuse to answer any questions which may incriminate him seems, in these days of "immunity pleas," to be fully recognized and appreciated. It furnishes ample protection and does not, in our opinion, require reinforcement by the adoption of the rule contended for by the appellant. . . .

The judgment will be affirmed. All the justices concurring.

TITLE II. PREFERENTIAL RULES

296. INTRODUCTORY.[1] The nature of the *Preferential* rules is that they prefer one kind of evidence to another. This may be done in one of two ways: (*a*) they may require one kind of evidence to be brought in before any other can be resorted to, and may refuse provisionally to listen to the latter until the former is procured or is shown to be inaccessible; or (*b*) they may prefer one kind of evidence absolutely, *i.e.* they may require its production, and, so long as it is available, consider no other kind of evidence, after the preferred kind has been supplied.

With reference to the *kinds* of evidence thus preferred, these rules are of the following scope:

(1) There is a rule of preference for the inspection of the thing itself, in place of any evidence, either circumstantial or testimonial, about the thing; this is the rule of Primariness, as sometimes termed, and concerns itself solely with *documents*.

(2) There is, next, a preference as between various kinds of *testimonial evidence*. One kind of witness may, for various reasons, be required to be called in preference to another. Here the two kinds of preference, conditional and absolute, are both found. (*a*) The chief example of the former sort is the rule requiring an *attesting witness* to be called. Other examples of this kind of rule are sometimes found in requirements that the eye-witnesses to a crime must all be called, or that the owner of stolen goods must be called to prove their loss, or that the alleged writer of a document must be called to identify it. (*b*) Of the absolute preference of one witness above another, the chief example is the rule preferring a magistrate's *official report* of testimony delivered before him. Another example of such a rule is the preference given to the *enrolment of a statute* as certified to by the presiding officers of the Legislature, the Governor, and the Secretary of State.

297. *Professor* JAMES BRADLEY THAYER. *Preliminary Treatise on Evidence.* (1898, pp. 489 ff.). *The "Best Evidence" rule.* The phrase ["best evidence"] first appears in Chief Justice Holt's time, . . . and continued to hold a great place throughout the eighteenth century. Chief Baron Gilbert introduced the expression into his book on Evidence, and recognized the rule which requires of a party the best evidence that he can produce, as the chief rule of the whole subject. . . . It is said in Gilbert's book that "the first, therefore, and most signal rule in relation to evidence is this, that a man must have the utmost evidence the nature of the fact is capable of." . . . The true meaning of the rule of law that requires the greatest evidence that the nature of the thing is capable of is this, that no such evidence shall be brought which "ex natura rei" supposes still a greater evidence behind, in the parties' own possession and power. Why did he not produce the better evidence? he asks; and he illustrates by what was always the stock example, the case of offering "a copy of a deed or will where he ought to produce the original." . . . The Court also were using the same and even more emphatic language. In 1740, Lord HARDWICKE declared that "the rule of evidence is that the best evidence that the circumstances of the case will

[1] Adapted from the present Compiler's "Treatise on Evidence" (§ 1672).

allow must be given. There is no rule of evidence to be laid down in this court but a reasonable one, such as the nature of the thing to be proved will admit of." And in 1792 Lord LOUGHBOROUGH said "that all common-law courts ought to proceed upon the general rule, namely, the best evidence that the nature of the case will admit, I perfectly agree." But the great, conspicuous instance in which this doctrine was asserted and applied was in the famous and historical case of Omychund *v.* Barker, in 1744, growing out of the extension of British commerce in India, where the question was on receiving in an English court the testimony of a native heathen Hindoo, taken in India, on an oath conformed to the usage of his religion. In this case, WILLES, J., resorted to this rule, and Lord HARDWICKE, sitting as Chancellor, with great emphasis said: "The judge and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will allow." . . .

[By the 1800s,] an old principle which has served a useful purpose for the century while rules of evidence had been forming and were being applied, to an extent never before known, while the practice of granting new trials for the jury's disregard of evidence had been developing, and judicial control over evidence had been greatly extended, — this old principle, this convenient, rough test, had survived its usefulness. A crop of specific rules and exceptions to rules had been sprouting, and hardening into an independent growth. It had become perfectly true that in many cases it made no difference whatever whether a man offered the best evidence that he could or not, — the best evidence that the nature of the case admitted, the best "ex natura rei," as some judges said, or the best "rebus sic stantibus," as others said; none the less it was, in many cases, rejected. . . . As regards the main rule of the Best Evidence, in its general application the text-books which followed Gilbert, beginning with Peake in 1801, and continuing with the leading treatises of Phillips in 1814, Starkie in 1824, Greenleaf in 1842, Taylor in 1848, and Best in 1849, all repeat it. But it is accompanied now with so many explanations and qualifications as to indicate the need of some simpler and truer statement, which should exclude any mention of this as a working rule of our system. Indeed it would probably have dropped naturally out of use long ago, if it had not come to be a convenient, short description of the rule as to proving the contents of a writing. Regarded as a general rule, the trouble with it is that it is not true to the facts and does not hold out in its application; and in so far as it does apply, it is unnecessary and uninstructive. It is roughly descriptive of two or three rules which have their own reasons and their own name and place, and are well enough known without it.

SUB-TITLE I. RULE OF PREFERENCE FOR DOCUMENTARY ORIGINALS

298. History.[1] The rule requiring the production of writings before the tribunal is one of the few rules in our system of evidence that run back earlier than the 1700s. In this rule we find a continuous existence, under one form or another, as far back as the history of our legal system takes us. But this history finds the rule in three stages: first, the stage of a form of trial, — trial by *carta* or document; next, the stage of a rule of pleading in jury trial, — the rule of profert; and finally the modern rule of production in evidence.

(1) *Trial by documents.* This is the primitive aspect of the rule. Here the contrast and competition is between trial before the judges with deed-witnesses and trial by the jury; but this contrast tends to disappear, and the witnesses go out with the jury and investigate the deed.

(2) *Profert in pleading.* In the second stage, the contrast is between documents which are brought into court and formally presented in pleading to the consideration of the jury, and documents which are taken into consideration by the jury without this formal presentation. The jury at this time might freely go upon their own knowledge in reaching a verdict. This had changed by the 1700s; but in the meantime the tendency in that direction is here seen in the rule requiring important documents to be presented ("profert and oyer") before the jury in Court, and forbidding them to be dealt with by the jury unless so presented.

(3) *The rule of production in evidence.* The contrast that remains to investigate is that between a rule requiring the production in evidence of writings and the absence of such a rule. It is apparent that, so far as the rule of profert in pleading obtained, and from the earliest time of its obtaining, there was in effect a rule of evidence on the subject. But the rule of profert applied (1) in the first place only to documents under seal and to judicial records. (2) Furthermore, it applied in civil cases only; there thus remained practically the entire scope of criminal trials to be covered by the rule of evidence. (3) Finally, the rule was dispensed with — at least by gradual steps, stretching over two centuries — where the document was lost, or in the hands of the opponent, or, in certain cases, in the hands of a stranger, or was only collateral to the main issue; but these limitations (except the last) were also perpetuated in the rule of evidence, so that there are under this head no radical steps of expansion to be noted.

At what time, then, did the rule of evidence come to include in its scope the documents exempted by the first two above limitations of the rule of profert?

(*a*) In *civil cases*, it is plain that during the 1500s no independent rule of evidence yet required the production of writings in general. At this period, whatever document was not brought in by virtue of the profert rule in pleading might be testified to without any production. By the beginning of the 1700s and onwards the rule is found applied to miscellaneous writings; although when a formal statement of it is made, the scope is still sometimes not so broad; and only by the beginning of the 1800s do the practitioners and writers of treatises explicitly state it to cover all kinds of writings. Moreover, all through the 1700s the rule

[1] Adapted from the present Compiler's "Treatise on Evidence" (§ 1177).

was understood not to apply to writings which were only "collateral" to the issue, — a limitation borrowed from the profert tradition.

(*b*) In *criminal cases*, the rule appears, as late as the 1600s, not to have been settled as broadly applicable, even to records. No fixed rule of production existed for miscellaneous writings. They were often produced, and often not produced nor accounted for; and when they were accounted for, the explanation was made, as likely as not, only on cross-examination, or to forestall the jury's suspicion or the judge's criticism, and not as a preliminary required by firm and accepted rule. Under Lord Holt, however, the first quarter of the 1700s finds the rule (coincidently with its progress in civil cases) regularly acknowleged in practice, and applied to all kinds of writings. And yet fifty years later it was possible to dispute and necessary to decide plainly that there was no difference in the doctrine for criminal cases: BULLER, J., in Att'y-Gen'l *v.* Le Merchant, 2 T. R. 201 (1772): "The rule of evidence in both cases [criminal and civil] is the same, that is, to have the best evidence that is in the power of the party to produce, which means that, if the original can possibly be had, it shall be required."

299. FRANCIS FRANCIA'S TRIAL. (1717. Howell's State Trials, XV, 897, 919). [Treason. The witness is telling of some letters found on the accused].

Lord *Townsend.* — Upon the issuing out the warrant, the prisoner was seized, and his letters were brought to Mr. Walpole. The next day I sent for the prisoner to be examined. . . . I asked him whether he knew the hand, and whether those letters were not for him? He owned the letters, but said he could not help what was in those letters, and that what others wrote to him could not make him guilty. . . . . On the perusal of the letters, I found he was not a bare conveyor of them, or came by chance to the knowledge of what he explained in them, but that he was wrote to, as one of the managers. . . . About a morning or two after, one Curtis, who was in the same messenger's house, brought a letter to the office, which he had found dropped by this man's bed-side. It was directed to his wife, and the subject was to bid her not afflict herself; . . . that the government had nothing against Mr. Harvey, but a general suspicion that he was against the government, which three parts in four of the nation were; and that he himself laughed at any thing the government could do against him the prisoner. . . .

Mr. *Hungerford.* — I would propose to the judgment of the Court, whether is it proper to give evidence of the substance of a letter without offering the letter itself.

Just. PRATT. — This comes in answer to Mr. Ward's question. . . .

Mr. *Hungerford.* — But to give an account of the substance of a letter without producing it, I apprehend, is not according to the rules of evidence.

Sir *J. Jekyll.* — If the counsel for the prisoner desires the letter to be read, it shall be read. . . .

Mr. *Hungerford.*— If in the course of the evidence the letter is read, I do not press it.

Then Mr. *Horatio Walpole* was called again, and the letter was showed to him.

Att. Gen. — Pray, Sir, will you give an account of what you know of this letter, and how it came into your hands?

300. JOHN TUTCHIN'S TRIAL. (1704. Howell's State Trials, XIV, 1114). [Seditious libel. The accused was charged as the author of certain printed papers, serial numbers of the "Observator." The printer is called.]

Att. Gen. — Now we will show these papers to Mr. How, for these are all that are in the book. (They were shown him.) Mr. How, pray tell us who was the author of these papers? *How.* — Mr. Tutchin.

L. C. J. — How do you know that? *How.* — I had them of him.

Att. Gen. — Did you pay him for them? *How.* — I paid him for these very papers.

Mr. *Mountague.* — What, these papers that are now produced? You never showed them to him, did you? *How.* — No; but I showed him the same number.

Mr. *Mountague.* — Have you read them to him? *How.*— He has owned them all; he has owned them an hundred and an hundred times, all of them.

Mr. *Mountague.* — Have you the copy of these papers by you? *How.* — No.

Mr. *Mountague.* — Did you search for them? *How.* — No, I have not.

Mr. *Harris.* — My lord, if we had seen these papers, then we might have seen what alterations were made in them. . . .

Att. Gen. — Did not Mr. Borret send to you about the original papers? *How.* — Yes.

Att. Gen. — Did you look out what you had? *How.* — Those that I had were looked out.

Att. Gen. — What became of them? . . .

How. — Those that I have now are but two or three.

Att. Gen. — Did you carry all the original papers you had to Mr. Borret? *How.* — Yes, all that I know of. . . .

L. C. J. — Then Mr. Borret must be sworn. (And he was sworn accordingly.) . . .

Mr. *Mountague.* — Did you send to Mr. How, to ask for the original of these papers here named? *Borret.* — I did.

Mr. *Mountague.* — Will you produce the papers you have? *B.* — My lord, they have taken those original papers; and if they were produced, you would see how they are mangled.

Topic 1. The Rule Itself

302. Dr. Leyfield's Case. (1611. Kings Bench, 10 Co. Rep. 92a). Per Curiam. It was resolved that the lessee for years in the case at bar ought to shew the letters patent made to the lessee for life. For it is a maxim in the law that . . . although he who is privy claims but parcel of the original estate, yet he ought to shew the original deed to the Court. And the reason that deeds being so pleaded shall be shewed to the Court is that to every deed two things are requisite and necessary; the one, that it be sufficient in law, and that is called the legal part, because the judgment of that belongs to the judges of the law; the other concerns matter of fact, *sc.* if it be sealed and delivered as a deed, and the trial thereof belongs to the country. And therefore every deed ought to approve itself, and to be proved by others, — approve itself upon its shewing forth to the Court in two manners: 1. As to the composition of the words to be sufficient in law, and the Court shall judge that; 2. That it be not razed or interlined in material points or places; . . . 3. That it may appear to the Court and to the party if it was upon conditional limitation or power of a revocation in the deed. . . . And these are the reasons of the law that deeds pleaded in court shall be shewed forth to the Court. And therefore it appears that it is dangerous to suffer any who by the law in pleading ought to shew the deed itself to the Court, upon the general issue to prove in evidence to a jury by witnesses that there was

such a deed, which they have heard and read; or to prove it by a copy; for the viciousness, rasures, or interlineations, or other imperfections in these cases will not appear to the Court, or peradventure the deed may be upon conditional limitation or with power of revocation, and by this way truth and justice and the true reason of the common law would be subverted. . . . Yet in great and notorious extremities, as by casualty of fire, that all his evidences were burnt in his house, there, if that should appear to the Judges, they may, in favor of him who has so great a loss by fire, suffer him upon the general issue to prove the deed in evidence to the jury by witnesses, that affliction be not added to affliction.

303. READ *v.* BROOKMAN. (1789. 3 T. R. 151). [A demurrer, to a plea excusing profert on the ground that it was "lost and destroyed by time and accident," was overruled]. BULLER, J. The rule laid down by Lord Coke [in Leyfield's Case] extends to all cases of extreme necessity; those which he mentions are only put as instances; and wherever a similar necessity exists, the same rule holds.

304. THE QUEEN *v.* KENILWORTH

QUEEN'S BENCH. 1845

7 *Q. B.* 632

ON appeal against an order of justices, whereby Charles Dencer, his wife and three children, were removed from Bermondsey in Surrey to the parish of Kenilworth in Warwickshire, the Sessions confirmed the order, subject to a case which was substantially as follows.

The ground of removal was an alleged settlement of the pauper in Kenilworth, by the apprenticeship of Joseph Dencer, the deceased father of the male pauper. The indenture of apprenticeship was not produced, either before the removing magistrates or at the Sessions. The appellants objected, under their grounds of appeal, that there was not sufficient proof to let in secondary evidence of the contents of the indenture; and they urged, principally, that a proper and sufficient search was not proved, and that the evidence consisted of the mere proof of parol declarations of third parties not upon oath. . . . The objection was overruled in each instance; but the Sessions reserved the points for the opinion of this Court. . . .

The evidence given at the Sessions with respect to the indenture was as follows:

William Cornwell. — "I am in the vestry clerk's office at Bermondsey. In July, 1840, I searched for the indenture of apprenticeship of Joseph Dencer. I went to Kenilworth, and inquired for Susannah Dencer, the mother of the pauper. I found her in Warwick Union house. She was in bed; her husband was dead. I asked her if she had the indenture; she said she gave it to the master of the workhouse, Mr. Squires. I then went from Warwick to Kenilworth, and saw Mrs. Squires, who said she was a widow, and that she had all her husband's papers up stairs. She brought them down; and I looked over them, but could not find any indenture. She said she had never seen any indenture of Dencer's. The

pauper then ceased to be chargeable. I went again in July, 1843, to Mrs. Squires. She said she had given all her papers to Mr. Sutton, the assistant overseer. I saw Sutton; and he said he had received them, but that he had seen no indenture of Dencer's. He said he had given them to Mr. Hopkins, the then assistant overseer. Hopkins said that he had received all the papers from the late assistant overseer, but that he had seen no indenture of Dencer's. I waited while he searched again; but I did not go up stairs with him. When he came down, he said he could not find such an indenture. I then went to Mr. Watts, at Kenilworth, who prepared the indenture. He was dead; and I saw his widow, who said that all her husband's papers were delivered to Messrs. Poole and Haynes, solicitors, of Leamington. I went there, and saw Mr. Haynes's clerk. We both searched, he up stairs, and I down stairs; but we could not find it. We found no bill, nor draft, nor any memorandum about it. Mrs. Dencer died in the Warwick Union house; and the master and matron said she had left no papers. I have used all due diligence to find the indenture.

"I have not searched the parish chest, nor the offices of the parish officers, it not being a parish indenture."

Charles Dencer, the pauper.

"Joseph Dencer was my father; he died in 1835. My mother is also dead. I have seen my father's indenture in my mother's possession; that was in 1835, after my father's death. . . ."

The appellants, at each stage of the evidence, objected to the admissibility of the parol statements of the different parties, namely Susannah Dencer, Mrs. Squires, William Sutton, William Hopkins, Mrs. Coates, and the master and matron of the Warwick Union workhouse, respectively; and they also objected to the admissibility and sufficiency of the parol evidence of the contents of the indenture; but the objection was, in each instance, overruled, and the order was confirmed, subject to the opinion of this Court. . . .

Wallinger, in support of the order of Sessions. Perhaps no very distinct rule can be laid down as to the search sufficient to let in secondary evidence; no two cases are precisely alike; but Freeman *v.* Arkell, 2 B. & C. 494, resembles the present in many respects. There Bayley, J., citing Brewster *v.* Sewell, 3 B. & Ald. 296, said that, "Where a paper is useless, so that its loss or destruction may reasonably be presumed, very slight evidence of its loss and destruction is sufficient to let in secondary evidence." Here the paper had become useless to the father, and the inquiry was pursued as far as was reasonably practicable. Cornwell was indeed guided, in some steps of his search, by what is objected to as hearsay evidence; but that part of the evidence may be rejected as superfluous. . . .

Watson and *Bovill*, contra. The party seeking to introduce secondary evidence was bound to show that he has searched in the proper place; here the propriety of the place in which the search has been made is shown by hearsay evidence. . . .

Lord Denman, C. J. — I should be very unwilling to come to a decision which might have the effect of making parties lax in the custody of

documents, or careless in the search for them. I think, however, that we may collect from Rex *v.* Morton, 4 M. & S. 48, the only rule, namely, that no general rule exists. The question in every case is, whether there has been evidence enough to satisfy the Court before which the trial is had that, to use the words of BAYLEY, J., in Rex *v.* Denio, 7 B. & C. 620, "a bona fide and diligent search was made for the instrument where it was likely to be found."

But this is a question much fitter for the Court which tries than for us. They have to determine, whether the evidence is satisfactory, whether the search has been made bona fide, whether there has been due diligence, and so on. It is mere waste of time on our part to listen to special pleading on the subject. To what employment shall we be devoted, if such questions are to be brought before us as matters of law! The Court below must exercise their own judgment as to the reasonableness of the search, taking into consideration the nature of the instrument, the time elapsed, and numerous other circumstances which must vary with every case. . . . In the present case I should have come to the same conclusion with the Sessions. And I think we must adhere to their decision, unless we pretend to act on a rule which the nature of the case makes impossible.

As to what is called the hearsay evidence, I am distinctly of opinion that it was receivable: it would have been absurd not to act upon it. When the party got a reasonable account which showed that the documents could not be found, why was he to go farther?

I am, on the whole, satisfied, first, that it was not necessary for the search to go farther, and, secondly, that the evidence given was quite enough to satisfy the Sessions. I only regret that they thought it a question for us at all. They were in the position of a jury; unless we feel certain that they have come to a wrong conclusion we ought not to interfere. . . .

WILLIAMS, J. — You cannot have an absolute certainty of the loss of a document, unless where you can call a party who witnessed its destruction. The question always is, whether due diligence is shown. . . .

COLERIDGE, J. — I am of the same opinion. . . . In the case of inquiry by a Court, if there has been any evidence sufficient for the Court to act upon, we do not set aside their decision, because the same difficulty can not be supposed to exist as in the case of a jury.

Order of Sessions affirmed.

305. BAGLEY *v.* McMICKLE

SUPREME COURT OF CALIFORNIA, 1858

9 *Cal.* 430

APPEAL from the District Court of the Fourth Judicial District, County of San Francisco. This action was commenced on the 4th of

April, 1855, by the appellant, against the respondents, on three promissory notes made and delivered by G. C. McMickle, deceased, to Bagley and Sinton, and by them assigned to Bagley. On the death of McMickle, the claim, duly verified, was presented to the administrators of his estate, and rejected, and suit brought within three months thereafter. . . .

On the trial, the plaintiff's counsel read to the Court, for the purpose of laying the foundation for the introduction of secondary evidence of the notes sued on to the jury, the following affidavits, viz.: . . .

"Grove C. McMickle made and delivered to the firm of Bagley & Sinton three promissory notes of that date, described and referred to in a certain instrument in writing of that date, signed by this plaintiff, and R. H. Sinton and Grove C. McMickle, and acknowledged before J. P. Haven, notary public; that said notes remained in the possession of said Bagley & Sinton for some time after their maturity; and that, in the demand for the same, said Bagley & Sinton had been very lenient and indulgent to said McMickle, and had resorted to no legal proceedings to collect the same; and that said McMickle, having repeatedly requested said firm not to sell or negotiate said notes, and fearing a negotiation to some person who might be more rigorous in the collection of the same, the parties altogether, viz., said Bagley, Sinton and McMickle, consented and agreed that said notes, for the sole purpose of preventing their negotiation into the hands of some other party, or of their getting into the market, might be destroyed, and believing, also, that the rights of the parties would remain the same as before the destruction; and the said notes were then and there, to wit, about the 15th day of August, A.D. 1852, torn up into small pieces and thrown away, in the presence of all the parties. That said destruction was done for the purpose aforesaid, and by the agreement of the parties was not to affect the right of the said Bagley & Sinton to recover on said notes, and with full intention the part of all the parties, that the rights of the parties should be as if the notes continued to exist." . . .

The plaintiff's counsel then offered in evidence to the jury, the following instrument in writing. . . . It was then and there admitted, by the defendant's counsel in open Court, in the presence of the Court and jury, that the signatures to the foregoing instrument were genuine, and that the same was executed in duplicate, one part of which was then in the possession of the plaintiff, and one of the defendants, as the representatives of the intestate.

To the admission of this instrument in evidence to the jury the defendants' counsel objected, but the Court overruled the objection, and permitted it to be read in evidence to the jury, which was done. . . . The defendants offered no evidence.

The Court instructed the jury, without being requested by either party, as follows: "The bond is sufficient evidence of the making of the notes therein described. The affidavits of plaintiff and Sinton are addressed to the Court for the purpose of accounting for the non-production

of the notes sued upon, and laying the foundation for secondary evidence, and are not evidence for the jury. These affidavits show that the maker of the notes peaceably acquired their possession, and destroyed them with plaintiff's consent. Under these circumstances, I feel it my duty to instruct you that there is no testimony to show there is any amount due upon the notes sued upon. . . ." The jury found in favor of defendants, under these instructions.

Plaintiff moved the Court for a new trial, which motion was denied. Plaintiff appealed to this Court, and assigned as error the instructions of the Court.

Hoge & Wilson, for appellant. The foundation for the introduction of secondary evidence may be made either by the party's own affidavit or that of another person. . . . The District Court, after receiving the preliminary proofs, to lay the foundation for the introduction of secondary evidence, admitted the secondary evidence to go to the jury, though objected to by defendants' counsel. . . . After the secondary evidence went to the jury, it was solely for the jury to determine the issues of fact on the evidence introduced before them. . . .

Glassel & Leigh, for respondents. . . .

FIELD, J. — delivered the opinion of the Court — TERRY, C. J., concurring.

This is an action upon three promissory notes executed by McMickle, deceased, to Bagley & Sinton, and by them transferred to the plaintiff. At the solicitation of the maker, the notes were delivered to him in August, 1852, by the holders, and in their presence and with their consent were then destroyed. On the trial, the plaintiff, in order to account for the non-production of the notes, and to lay the foundation for the introduction of secondary evidence of their contents, read to the Court his own and his co-payee's affidavits, detailing the circumstances and motives which occasioned the destruction of the notes. These affidavits were held by the Court sufficient to authorize the admission of the secondary evidence. . . . The verdict and judgment were for the defendants, and a motion for a new trial having been denied, the plaintiff appealed, and assigns these instructions as error.

It is not a matter of course to allow secondary evidence of the contents of an instrument in suit upon proof of its destruction. If the destruction was the result of accident, or was without the agency or consent of the owner, such evidence is generally admissible. But, if the destruction was voluntarily and deliberately made, by the owner, or with his assent, as in the present case, the admissibility of the evidence will depend upon the cause or motive of the party in effecting or assenting to the destruction. The object of the rule of law which requires the production of the best evidence of which the facts sought to be established are susceptible, is the prevention of fraud; for, if a party is in possession of this evidence, and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises, that the better evidence is withheld

for fraudulent purposes which its production would expose and defeat. When it appears that this better evidence has been voluntarily and deliberately destroyed, the same presumption arises, and unless met and overcome by a full explanation of the circumstances, it becomes conclusive of a fraudulent design, and all secondary or inferior evidence is rejected. If, however, the destruction was made upon an erroneous impression of its effect, under circumstances free from suspicion of intended fraud, the secondary evidence is admissible. The cause or motive of the destruction is then the controlling fact which must determine the admissibility of this evidence in such cases. . . .

Authorities to the same effect might be cited almost ad infinitum. From them it is clear that the cause or motive of the destruction of the instrument in suit, when voluntarily made, must determine the question of the admissibility of secondary evidence of its contents. From them it is also clear that the facts and circumstances of the destruction must be shown in the first instance to the Court, to enable it to judge of the propriety of admitting or refusing the secondary evidence. . . . The naked fact of voluntary destruction, *without explanation*, is held such presumptive evidence of fraudulent design as to preclude all secondary evidence (Blade *v.* Noland, 12 Wend. 173); and the restriction placed upon the rule by the Court below in this case would deprive it of all practical benefit in the numerous and by far the largest class of cases, where the destruction has taken place when no third party was present. We do not think, therefore, that the affidavits read to the Court below, in explaining the possession and destruction of the notes in suit by the maker, went "beyond their true purpose." . . .

The preliminary proof is addressed to the Court, and of its sufficiency the Court is the sole judge. We do not find in the cases cited, nor have we been able to find any authority for the ruling that a presumption against the plaintiff, arising upon facts detailed in the preliminary affidavits, is to be explained by evidence to the jury; or for the observation of the Court below, in its opinion on the motion for a new trial, that "sometimes the facts and circumstances connected with the destruction have been submitted to the jury to be passed upon by them in considering their verdict," unless such facts and circumstances were disclosed in the evidence offered to the jury after the question of the admissibility of secondary evidence had been disposed of by the Court. . . . The secondary evidence being admitted, it became the province of the jury to judge of its credit and weight. It took the place of the primary evidence, and was entitled to the same consideration. It was a substitute for the original notes, and if sufficiently full as to their contents, it placed the plaintiff in the same position in Court as though the secondary evidence had never been required. (Jackson *v.* Betts, 9 Cow. 208.) The distinction between primary and secondary evidence has reference to its quality, and not to its strength. Secondary evidence may be equally conclusive as primary. In the present case, the former existence of the

notes, their contents, their execution by the intestate to Bagley & Sinton, and their assignment to the plaintiff, were fully established by the secondary evidence; yet the consideration of this evidence was taken from the jury by the instructions. . . .

The judgment of the Court below is reversed, and the cause remanded for a new trial.

306. PRUSSING *v.* JACKSON

SUPREME COURT OF ILLINOIS. 1904

208 *Ill.* 85; 69 *N. E.* 771

WRIT of Error to the Appellate Court for the First District; — heard in that Court on writ of error to the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge, presiding.

Ernest Saunders, for plaintiff in error. It is not matter of course to allow secondary evidence of the contents of an instrument in suit on proof of its destruction. The motive and intent of the destruction are necessary to be shown before secondary proof will be admitted. Bagley *v.* McMickle, 9 Cal. 430. Secondary evidence of contents of a document cannot be given if the original is in possession of a stranger unless a subpoena duces tecum be served, or if the original is in the possession of an adverse party, unless notice to produce be served. . . .

Collins & Fletcher, for defendant in error. . . .

Mr. Justice BOGGS delivered the opinion of the Court.

This was an action for libel, against the plaintiff in error by the defendant in error. The declaration charged that the plaintiff in error composed and caused to be published in the Chicago "Times-Herald," a daily newspaper published in the city of Chicago, a certain false, scandalous, defamatory and libelous article, set forth in haec verba, with appropriate innuendoes, in the declaration. . . . The plaintiff in error filed the plea of not guilty, and the cause was submitted for trial before the Court and a jury. The jury returned a general verdict finding the plaintiff in error to be guilty and assessing the damages of defendant in error at the sum of $20,000. . . .

We think, however, the plaintiff in error has lawful right to complain of an erroneous ruling of the Court as to the admissibility of evidence. It was sought to maintain the action against the plaintiff in error as the author of the alleged libelous publication which appeared in the Chicago "Times-Herald." He was in nowise connected with the management, control or publication of the newspaper and had no interest therein. The action was against him on the alleged ground that he was the author of a statement, in the form of a letter, which appeared as a part of the publication, and that he had given, or permitted one Varian, a reporter for the newspaper, to take, the letter under such circumstances as that he

should be held to have procured it to be published. The cause was tried before the Court and a jury.

The defendant in error, plaintiff below, was produced as a witness in his own behalf, and, among other things, testified that he, together with one William B. Kent, had an interview with the plaintiff in error. . . . Counsel for the defendant in error then produced a copy of the newspaper which contained the alleged libelous publication and asked the witness if that was the statement about which they were talking. The plaintiff in error then objected. . . .

We think the objections preferred by counsel for the plaintiff in error called upon the Court to rule whether the printed publication was admissible in evidence without the production of the writing of which the plaintiff in error was the author and which it was asserted had been reproduced in the printed article, and which, so reproduced, constituted the alleged libel. Counsel for the defendant in error insist that no definite and specific objection of that nature was made. . . . Counsel for the defendant in error read to the Court the notice which had been served calling for the production of the original writing in Court. In response to this, counsel for the plaintiff in error stated in open Court that the document was not in their possession or in the possession of their client and had never been in their possession, and had not been in the possession of their client since it was taken from his office by a Mr. Varian, a reporter for the "Times-Herald." . . . The printed article was then received in evidence and read to the jury. . . .

We find that the defendant in error produced as a witness one Herman L. Reiwitch, city editor of the Chicago "Times-Herald," for the purpose of laying the foundation for the introduction of secondary evidence of the contents of the manuscript, which was in the handwriting of the plaintiff in error, by showing that the original had been lost or that it was not in the power of the defendant in error to produce the same. The testimony of this witness was received by the Court as sufficient to justify the admission of such secondary proof.

In this the Court was in error. This witness, after stating that he had charge of the department of the "Times-Herald," office in which the printed article in question was prepared, testified further, to quote from the abstract, as follows:

"I saw something similar to it in the afternoon preceding the day of the publication. One of the reporters brought it to me. His name was Varian. I do not know where Varian is now. It is about one and one-half years since he has been connected with the Chicago 'Herald.' I don't recall whether letter was in manuscript or typewritten."

Q. — "Is that 'Exhibit I' that you hold in your hand a copy of a communication that Mr. Varian brought you, or not?" (Objection by defendant; sustained.)

Q. — "Of what is that a copy, if you know?" (Objection by defendant; overruled and exception.) *A.* — "To the best of my recollection it is a repro-

duction of that letter brought in by Mr. Varian. I don't recall whether any name was appended to that letter. . . ."

Judge COLLINS. — "Have you made search for that paper writing?" (Objection by defendant as leading; overruled and exception.) *A.* — "No, sir."

Q. — "Have you ordered a search made?" *A.* — "No, sir; it would be absolutely impossible to find it now." (Objected to by defendant as not responsive.)

Witness. — "We destroy manuscript of that kind within a few days after they are used, unless there is some particular occasion for saving it." (Motion to strike out by defendant; denied and exception.) "This was saved for, I think, some little time. Can I state the circumstances under which it was saved?" *A.* — "Yes."

A. — "The letter was of a peculiar character, of course, and I thought perhaps it might be questioned." (Objection by defendant and ordered stricken out.) "And I told the reporter to keep that letter." (Answer objected to by defendant.)

The *Court.* — "What did you do with it? Have you got it now?"

A. — "No, sir."

Judge COLLINS. — "It has been destroyed, has it?" *A.* — "So far as I know, it is destroyed."

Mr. *Saunders.* — "You don't know whether it is destroyed or not, do you?" *A.* — "No, sir. The original letter was kept by the reporter. There is no particular place in the 'Herald' office where such matters are kept."

Q. — "If this has been preserved by the 'Herald' company where would you go to find it?" (Objection by defendant; overruled and exception.) *A.* — "It would be in my possession, most likely." (Answer objected to by defendant with motion to strike out.

Q. — "This article is not now in your possession?" *A.* — "No, sir."

This evidence was insufficient to justify the admission of secondary evidence as to the contents of the communication which was written by the plaintiff in error. The witness testified that search had not been made for the writing; that while it was the custom to destroy manuscripts of that kind, there was an exception to that custom when occasion required, and that under this exception the manuscript in question was saved and not destroyed; that it was given to Varian, the reporter, to be kept by him; that if it had been preserved by the "Herald" company it would most likely be in his (the witness') possession, but that it was kept by said Varian. No effort to procure the manuscript from Varian was proven. It was shown that Varian was not in the employ of the "Times-Herald"; but no attempt was made to show but that he continued to reside in the city, or that he could not be found, or that any effort had been made to find him or to get the paper from him.

The rule is, in order to let in secondary evidence of the contents of a written instrument the person in whose possession it was last traced must be produced, unless shown to be impossible, in which case search among his papers must be proved, if that can be done. In all events, search must be made for the paper with the utmost good faith, and be as thorough and vigilant as if the rule were that all benefit of the paper

would be lost unless it be found. Mariner *v.* Saunders, 5 Gilm. 113; Sturges *v.* Hart, 45 Ill. 103; Chicago & Northwestern Railway Co. *v.* Ingersoll, 65 id. 399; Williams *v.* Case, 79 id. 356. . . .

The judgment of the Appellate Court and that of the Circuit Court are each reversed, and the cause will be remanded to the Circuit Court for such other and further proceedings as to law and justice shall appertain. Reversed and remanded.

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307. ATTORNEY-GENERAL *v.* LE MERCHANT

EXCHEQUER. 1772

2 *T. R.* 201

INFORMATION for the illegal importation of tea. In the course of the trial, the Attorney General offered to read some letters concerning this tea, which had been sent by the defendant to Channon, a witness for the crown, which letters were proved to have come to the defendant's hands under an order made by the Lord Chancellor for the delivery up to him of all papers and letters seized under a commission of bankrupt against Channon, among which were these letters. The solicitor of the excise had contrived to take copies of them whilst they were in the hands of the clerk of the commission; and notice having been given to the defendant to produce the original letters, and that being refused, the Attorney General offered to read these copies.

This was objected to by the counsel for the defendant, upon the ground principally, that a defendant in a criminal case was never bound to produce evidence against himself; that he was guilty of no crime in not producing them; and that the Attorney General had no right to call upon him to produce them, or ask a single question concerning them; consequently no copies could be admitted in evidence.

But EYRE, Baron, admitted the evidence, though he said he had some doubt about it. . . .

SMYTHE, L. C. B. First, it was objected, that copies of letters or papers in the hands of the adversary ought not to be read in criminal cases; that was one general objection. And the other, that supposing, for argument's sake, they ought to be admitted, yet in this particular instance the notice which was given was not sufficient. As to the first objection, that copies are not admissible in any criminal case, because that would be to oblige a man to produce evidence against himself; in answer to it, I do not recollect that they have produced any one case to show any difference at all as to the rule of evidence in criminal, and in civil cases; therefore the rule of evidence in both cases is the same, that is, to have the best evidence that is in the power of the party to produce, which means that, if the original can possibly be had, it shall be required, but if that original be destroyed, or if it be in the hands of the opposite

party who will not produce it, then in case of a deed, a counter one, or sometimes a copy of the deed, or copy of the paper, is evidence to be admitted. . . .

It was likewise said, in support of the motion, that the reason why copies are permitted to be evidence in common cases is because the party who has them in his custody, and does not produce them, is in some fault for not producing them; it is considered as a misbehavior in him in not producing them, and therefore in criminal cases a man who does not produce them is in no fault at all, and for that reason a copy is not admitted. But I do not take that to be the rule; it is not founded upon any misbehavior of the party, or considering him in fault; but the rule is this: the copies are admitted when the originals are in the adversary's hands for the same reason as when the originals are lost by accident; the reason is because the party has not the originals to produce. . . .

Another objection has been made that this notice is not sufficient; the answer is, I know no difference between the rule of evidence in civil and criminal cases. Then, if there be no such difference, the rule which has always been followed and allowed in civil cases is that notice be given to the attorney or agent of the adverse party. Now in this case, without going minutely into the consideration, whether the notice was proved to the defendant himself, and was good, here is unquestionable notice proved to Sayer who is the agent and solicitor of Le Merchant, into whose hands it appears that these letters had actually been delivered; and then there is a notice likewise to Davy, who is the attorney for the defendant in this very cause, and no attempt was made on the part of the defendant to prove what was become of these letters, or that it was not in his power to produce them. Rule discharged.

308. LAWRENCE *v.* CLARK. (1845. Exchequer. 14 M. & W. 250, 253). ALDERSON, B. All these cases depend on their particular circumstances; and the question in each case is whether the notice was given in reasonable time to enable the plaintiff to be prepared to produce the document at the time of the trial. POLLOCK, C. B. What is sufficient in one case may not be so in another; and much therefore must be left to the discretion of the presiding judge, subject, of course, to correction by the Court.

309. DWYER *v.* COLLINS

EXCHEQUER. 1852

7 *Exch.* 639

ACTION by the indorsee against the acceptor of a bill of exchange; to which the defendant pleaded, inter alia, that the bill was given for a gaming debt.

On the trial, before the Lord Chief Baron, the defendant proceeded to prove his plea; and for that purpose gave evidence of the gaming,

and swore that the only bill he ever gave to the drawer of the bill which was declared on, was by way of payment of the debt then incurred. The defendant's counsel, being required to prove that the identical bill declared upon was that which was given on that occasion, called for the bill, which the plaintiff's counsel declined to produce. . . . The plaintiff's attorney having admitted that the bill was in his possession and in Court, the defendant's counsel called for its production; which being refused, he then offered to give secondary evidence of its contents. . . . The plaintiff's counsel objected that there ought to have been a previous notice to produce; and the Lord Chief Baron, after consulting the judges, ruled in favor of the defendants.

Humfrey obtained a rule nisi accordingly. . . .

Hawkins (*James* with him) showed cause. . . . The notice to produce the bill was given in sufficient time, as it was shown that that document was at the time in Court. . . . In Lawrence *v.* Clark, [*ante*, No. 308], where to a declaration upon a bill of exchange the defendant pleaded a plea of fraud and covin, it was held that the plaintiff was not bound to produce the bill on the trial without a notice given in due time; and Alderson, B., in his judgment, says — "All these cases depend on their particular circumstances, and the question in each is, whether the notice was given in reasonable time to enable the plaintiff to be prepared to produce the document at the time of the trial." . . . (Parke, B. . . . The question really turns upon the principle of the rule on which a notice to produce is required. In Starkie on Evidence, p. 404, the rule is laid down in the following terms: — "Proof that the adversary or his attorney has the deed or other instrument in Court does not supersede the necessity of notice; for the object of the notice is not merely to enable the party to bring the instrument itself into Court, but also to provide such evidence as the exigency of the case may require to support or impeach the instrument." If, on the other hand, the object of the notice is to require the production of a particular document, *or*, in case the document is not produced, to authorize the party giving the notice to give secondary evidence of the contents of that document, then all that is necessary is that the notice should be given in sufficient time to the opposite party to enable him to be ready to produce the document at the trial. I have always been of opinion that this is the true object of the notice; and if this be so, the inquiry relating to the sufficiency of the notice is a simple one; but if the proposition laid down by Mr. Starkie in his work be correct, the inquiry would often be one of an extremely complicated character; for it might depend upon the nature of the document and many extrinsic circumstances.) . . .

The Court then called upon

Udal (with whom was *Humfrey*) to support the rule. . . . The notice was insufficient. The authorities and text-writers are expressly in favor of the plaintiff upon this point. . . .

The judgment of the Court was now delivered by

PARKE, B. . . . We do not propose to . . . consider the question, whether the pleadings themselves give as much notice that the bill will be the subject of inquiry as they do in an action of trover for a written instrument, where a notice to produce is unnecessary — it having been decided by the Court of Queen's Bench in Read *v.* Gamble, 10 A. & E. 597, n., and in Goodered *v.* Armour, 3 Q. B. 596, and followed by this Court in Lawrence *v.* Clark, 14 M. & W. 250, that in a case like the present the pleadings do not give constructive notice. We wish to decide this case upon the more general ground, the principal subject of the argument at the bar. . . .

Whether, on his refusal, it was competent for the defendant to give secondary evidence of its contents, no previous notice to produce having been given. We are of opinion that the ruling of my Lord Chief Baron was right. . . .

The question is whether, the bill being admitted to be in court, parol evidence was admissible on its non-production, or whether a previous notice to produce was necessary. On principle, the answer must depend on the reason why notice to produce is required. If it be to give his opponent notice that such a document will be used by a party to the cause, so that he may be enabled to prepare evidence, to explain or confirm it, then no doubt a notice at the trial, though the document be in Court, is too late. But if it be merely to enable the party to have the document in Court, to produce it if he likes, and if he does not, to enable the opponent to give parol evidence, — if it be merely to exclude the argument that the opponent has not taken all reasonable means to procure the original (which he must do before he can be permitted to make use of secondary evidence), then the demand of production at the trial is sufficient. . . . If this [the former] be the true reason, the measure of the reasonable length of notice would not be the time necessary to procure the document — a comparatively simple inquiry, — but the time necessary to procure evidence to explain or support it, — a very complicated one, depending on the nature of the plaintiff's case and the document itself and its bearing on the cause; and in practice such matters have never been inquired into, but only the time with reference to the custody of the document and the residence and convenience of the party to whom notice has been given, and the like. We think the plaintiff's alleged principle is not the true one on which notice to produce is required, but that it is merely to give a sufficient opportunity to the opposite party to produce it and thereby secure if he pleases the best evidence of the contents; and a request to produce immediately is quite sufficient for that purpose, if it be in court. . . .

We think that the rule must be discharged; and it would be some scandal to the administration of the law if the plaintiff's objection had prevailed. Rule discharged.

310. UNITED STATES *v.* DOEBLER

United States District Court. 1832

Baldw. 519; 25 *Fed. Cas.* 883

[Indictment for forging a bank-note. . . . After evidence of the forging of the note in question], one Empich was examined, who proved that at the Lancaster races, at the time testified by Rallston, the defendant delivered him a twenty dollar note, stating that it was not good, and requested the witness to play it off at a faro table, which he did not do, but after some time returned it to the defendant. Mr. Gilpin, after stating that this note was not the subject of an indictment, but that the evidence in relation to it was offered to prove the scienter as to the notes charged in the indictment, asked the witness to describe the twenty dollar note, as to the bank, etc., it was on, which was objected to, on the ground that this was matter collateral to the indictment, of which notice ought to have been given to the defendant, and that it was not evidence of the scienter, because the delivery of the note to Empich was subsequent to the delivery of the note which was the subject matter of the indictment; and the question was elaborately argued. . . .

Baldwin, J. . . . As the intention and knowledge with which the act is done, constitute the crime, it may be made out by evidence of other acts of a similar kind with that charged in the indictment. This being the well settled and well known rule in such cases, the prisoner cannot be taken by surprise; when such evidence is offered, he must come prepared to meet not only the evidence which applies directly to the specific act charged, but all other acts which, according to the known rules of evidence, a prosecutor may adduce to prove the act charged. If the note he is charged with forging, passing, or delivering, is of the same kind with others which he has disposed of or retained in his possession, he has notice in effect that, if practicable to procure it, evidence will be given of their counterfeit character, and of his having passed them as true. It is notice in law, by which a party is as much bound both in civil and in criminal cases as by notice in effect. Notice in fact is notice in form; notice in law is notice in effect; and either are sufficient. . . .

Knowing that proof of all these facts is as competent to the prosecutor as the one specifically charged, no injustice is done him.

He ought to answer for, and be prepared to meet them, on the same rules of evidence which apply to the principal act for which he is on trial. The indictment is notice of that, and we think it also notice of the other acts, which are as admissible in evidence as the one charged. . . . The indictment in all cases of forgery, is in itself notice that all competent evidence will be produced; the defendant cannot, therefore, be taken by surprise, when the passing of any other forged notes of a manufacture similar to the one laid in the indictment is offered; whether the

mode of proof is by the production of letters, copies, or proof of their contents, or by the notes, is immaterial, so that the evidence conduces to prove the scienter as to the one charged.

For these reasons, we are of opinion that the evidence of . . . the note delivered by the defendant to Empich is admissible. . . .

The jury found the defendant not guilty.

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311. EURE *v.* PITTMAN

SUPREME COURT OF NORTH CAROLINA. 1824

3 *Hawks* 364

THE plaintiffs offered for probate a paper writing as the last will and testament of Edward Crowell, deceased; there was a caveat in the county court, and after trial there it was carried by appeal to the superior court. The wife of the legatee named in the paper (Thomas W. Crowell, son of Edward) is now one of the plaintiffs. . . .

The defendant contended that this will was revoked by a subsequent will made by Edward Crowell, and that the last will had been destroyed or suppressed by the plaintiffs or by those under whom they derived an interest, or by some other person under their advice and procurement, and offered to prove the same by the subscribing witnesses to the last will. This was objected to by the plaintiffs, because they had no notice to produce the will. The Court was of opinion, that if the plaintiffs had the last will or had been the cause of its suppression, or claimed under those who had, then such conduct would be illegal and fraudulent, and the defendant was not bound to give notice to produce it in order to be let into parol proof of its contents. The plaintiffs further objected to any parol proof of its contents. . . .

The defendant then called as witnesses, Jacob Pope and his daughter. Pope deposed that Edward Crowell died on Wednesday. On the preceding Sunday, May 26, 1820, he came to the house of Pope, with a paper writing in his hand, having his name signed to it, and said that it was his last will and testament, and requested Pope to attest it; Pope did subscribe it as a witness in Crowell's presence. . . . The defendant then produced another witness, who swore that Crowell, on the 27th of May, 1820, placed the last mentioned will in the possession of one Rebecca Tillery, who was the sister of Mrs. Eure, one of the plaintiffs, and who resided at the house of Mrs. Eure's then husband, Thomas W. Crowell, only son of the testator. . . . Rebecca Tillery was summoned by both parties, but did not appear. . . .

[The Court thus instructed the jury:] The jury should, if they believed the evidence, find the paper now offered to be the last will of Edward Crowell, unless they should be of opinion, from all the evidence, that the last will had been suppressed by the plaintiffs, or those under

whom the plaintiffs claim, or by their advice or procurement; in that case, they ought to find a verdict for the defendant, because they might presume a revocation or contradictory devises from the fact of suppression. But if the jury should be of opinion that Rebecca Tillery, of her own accord, destroyed the last will without the consent or knowledge of the plaintiffs, or those under whom they now claim, or if the testator destroyed it, then, in either of these events, they should find for the plaintiffs. . . .

Verdict for defendant; judgment accordingly, and appeal by plaintiffs.

Gaston, for appellant. 1. Evidence of the execution or contents of the last will was improper under the circumstances. The principle on which we object is that the best evidence is required; the instrument itself shall always be produced if possible. . . . If it was in the possession of the plaintiffs, they should have had notice to produce it. 2 Term R., 201–2.

There was here no proof of its destruction, no subpoena duces tecum to the witness, no notice to the plaintiffs to produce it; in short, no pains taken at all to procure the best evidence, or furnish a legal ground for the admission of inferior testimony. . . .

Seawell, contra. The principle upon which notice to produce a paper is required, is to prevent *surprise*, where, from the nature of the controversy, it is uncertain whether such evidence will be material on the trial. . . . Here there could be no surprise. If the plaintiffs had possession of the will, it was a *fraud* to attempt the proof of the prior will, and in such case no notice is necessary. . . .

Reply: . . . The bare circumstance of a *party* not having it in his power to produce a paper is not sufficient reason for admitting parol evidence. . . . It seems there is no case where parol evidence has been admitted merely because the paper is in the hands of a *third person* and a subpoena duces tecum has been refused. . . .

Taylor, C. J.—There is no proof that the second will was ever in the plaintiff's possession, and therefore a notice to produce it would be totally unnecessary. But there is evidence that the will was placed by the testator in the hands of Rebecca Tillery, since which period it has been traced no farther. Now the ground upon which the defendant offers proof of the execution of the will is the charge of suppression against the plaintiff, or those under whom she claims. It appears to me that this fact should be first established by the best evidence the nature of the case admits of, that is, the testimony of Rebecca Tillery and the production of the paper enforced by a subpoena duces tecum.

I understand it to be an elementary rule that, when the ground of admitting the secondary evidence is the loss of the original, it ought to be shown that diligent inquiry has been made; and the last person into whose possession the paper has been traced should be called to give an account of it. . . . In all such cases the invariable rule is for the Court

to pronounce, in the first instance, whether there is sufficient proof of the loss or destruction of the paper, or whether sufficient inquiry has been made to render parol evidence of the contents admissible. But *here* the whole evidence, that of the suppression of the instrument, and the secondary evidence of its execution, was all submitted to the jury in the first instance, for which practice I cannot find a single authority. And the principle of evidence is directly opposed to it; for if the Court had pronounced in the first instance whether the evidence of the suppression was sufficient to authorize the secondary evidence, it seems evident to me that it must have been rejected, both for its insufficiency as to the suppression and its defect in not showing that proper inquiries respecting the paper had been made of Rebecca Tillery; and then all the evidence respecting the execution of the will, and the inferences drawn from it that it operated a revocation of the first will, must have been excluded. The danger of such evidence consists in this, that it may unconsciously influence the judgment of the jury, and make impressions upon it which no subsequent advice of the Court will be able to deface. The effect of such a procedure in this case has been that, because the will was placed in the hands of Rebecca Tillery, who was a sister to the wife of the younger Crowell, the jury have inferred a suppression by him or by her; and because it was suppressed it was further inferred that it amounted to a revocation of the first will; a string of inferences that might have been broken by the testimony of Rebecca Tillery or by inquiries of her. The paper might have been produced, and might have turned out not to be a will, or, if a will, not amounting to a revocation of the first. . . .

HALL, J. — I think the defendants ought not to have been permitted to prove the execution and existence of another and subsequent will before they made it appear to the Court that they had made reasonable efforts to procure it. . . . For the reason I have first assigned, I think there should be a new trial.

HENDERSON, J., dissenting — The paper which the defendants allege revoked the will in question, not belonging to them or being within their control, excuses them for its non-production on the trial, for the law imposes on no one a thing beyond his power. If the paper is alleged to be in the possession of the adversary, notice must be given to him to produce it on the trial before parol evidence shall be received of its contents; but if it is destroyed, no such notice is necessary. These preliminary facts to let in the secondary evidence, both as to their truth and sufficiency when shown, belong to the Court, and not to the jury. See a very clear and able opinion on the latter question delivered by Judge SPENCER in 16 Johns. 193.

But neither of these questions arises in the present case. . . . From these facts the defendant insisted that Crowell had destroyed the latter writing, and that "in odium spoliatoris" the jury should presume either that the writing contained a clause of revocation or was inconsistent

with the will offered. There was no parol evidence of the contents of the will by copy, or other evidence of a like kind; nor was any argument drawn of its being a revocation, but from the fact of its destruction by Crowell, or some one by his connivance or direction. With the fact of destruction the Court had nothing to do, nor with inferences to be drawn from it. They both belonged to the jury. They were not preliminary questions to the introduction of secondary evidence; for this reason notice to produce the original was unnecessary. And here there was no inferior evidence offered; it was all primary; for every fact deposed to went to the making and destruction of the paper. Whether they were sufficient to establish them belonged to the jury.

312. BOWDEN *v.* ACHOR

SUPREME COURT OF GEORGIA. 1894

95 *Ga.* 243

EQUITABLE petition. Before Judge CLARK. Clayton Superior Court. March Term, 1894. [Petition to set aside deeds obtained by fraud from the petitioner, Lou Achor.] She was the daughter of Nancy Wright, who before her death owned lots 8, 9 and 24 in the 13th district of Clayton county. . . . On September 28, 1887, Nancy Wright by will devised these three lots to petitioner, her only child. . . .

About November 9, 1891, one Morris, with his attorney Albert, visited petitioner's home in Alabama, and after securing the services and influence of J. M. Phillips, who was known by them to be the friend and adviser of petitioner, falsely and fraudulently represented to her that her attorneys could do nothing for her, and by all kinds of misrepresentations and fraudulent practices induced her to sign some kind of paper, she did not know what, except that the same was without consideration save the paltry sum of $100, conveying the land. She has been informed and believes that the $100 was paid by them to Phillips, as the price of his influence with her to induce her to sign papers of their own drawing. She is now informed that this last mentioned paper is claimed to be a deed to Bowden, but he was not present and she believes knew nothing about it and has never even seen the paper. . . .

Under the evidence and charge of the Court, the jury found for the plaintiff. . . . Bowden and Morris moved for a new trial, which was denied; and they excepted. The grounds of the motion proper to be here stated are, in brief, as follows: . . . Error in refusing to allow W. J. Albert to testify, that the power of attorney shown him by Monroe Phillips on November 9, 1891, was from plaintiff, giving Phillips authority to bring suit for the land in dispute, or to compromise whatever right plaintiff might have in said land, but the right to sign conveyances being retained in plaintiff; and that Monroe Phillips was, on November

9, 1891, and ever since had been a citizen of Alabama. This was excluded on the ground that the power of attorney was the best evidence; defendant's counsel contending that as the paper was out of the jurisdiction of the Court, its contents could thus be shown. . . .

LUMPKIN, Justice. . . . Where a paper of any kind is material as bearing upon the issue under investigation, the paper itself is generally the best evidence of its contents. Secondary evidence may be resorted to when the original is inaccessible. The Courts of this State have no power to compel the production of a paper in the possession, custody or control of a person in another State, when such person is not a party to the cause. In such an instance, the paper may well be said to be inaccessible. If it were a duly recorded paper of which a legally certified copy could be obtained, it might be incumbent upon the party desiring the benefit of this evidence to produce such a copy; but where no such secondary evidence is obtainable, a witness may be permitted to testify to the contents of the original, if within his personal knowledge and he is competent to do so. In this connection see Lunday et ux *v.* Thomas et al., 26 Ga. 537. . . . Judgment reversed.

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313. SHEA *v.* SEWERAGE & WATER BOARD

SUPREME COURT OF LOUISIANA. 1909

124 *La.* 299; 50 *So.* 166

APPEAL from Civil District Court, Parish of Orleans; FREDERIC DURIEVE KING, Judge. Action by Thomas J. Shea against the Sewerage & Water Board of New Orleans. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The plaintiff, T. J. Shea, was awarded contracts C. & F. of the numerous contracts for the laying of sewers and appurtenances in the city of New Orleans. He completed contract F., and had constructed the sewers under contract C., and had cleaned the most of them, ready for inspection, when differences arose between him and the defendant board, over the responsibility for failures which had developed in the sewers, which led him to abandon the contract and bring this suit. He avers that he fulfilled these contracts, and demands $145,483.60, which, he alleges, is the balance due him. The claim is divided into amounts for regular work under the contracts, for extras, and for damages. The claims for extras and damages are itemized in exhibits annexed to the petition.

The defenses are a general denial and the special defenses; that plaintiff was paid all that was due under contract F; that he abandoned contract C incomplete; that there was to his credit at that time on the books of defendant $79,607.28; but that defendant has since then completed the sewers at the expense of plaintiff, as it had a right to do under

the contract, at a cost of $54,014.92, and has, moreover, expended, in repairing damage caused by plaintiff and in other extra work, as set forth in detail, $1,564.26; that these expenses offset pro tanto the said credit of plaintiff; and that plaintiff owes, in addition, $41,100, liquidated damages for delay in the completion of said contract, being 411 days at $100 per day, as stipulated in said contract, which more than offsets the balance to the credit of plaintiff, leaving him indebted to the defendant in the sum of $16,378.90, for which defendant prays judgment. . . .

Omer Villere (*E. H. Block* and *Thomas H. Thorpe*, of counsel), for appellants.

McCloskey & Benedict and *Clegg & Quintero*, for appellee.

PROVOSTY, J. (after stating the facts as above). Coming to the consideration of the items which compose the demand of plaintiff, and of the character of evidence and degree of proof which ought to be required of plaintiff, we find that defendant would hold plaintiff to the same strictness of proof as if the case involved but one item and were a mere ordinary case of a plaintiff suing on an open account. But, manifestly, that view cannot be accepted. On that theory the trial of the case, which occupied the lower court some eight months, 128 actual trial days, would have occupied it eight years. The plaintiff, the members of the defendant board, the judge, the lawyers, and the witnesses would all have had time to die before the evidence could have been taken. As matters stand, the case has monopolized the time of the courts far beyond all reasonable limits. By express terms of the contract, the defendant was entitled to have its inspector keep an account of every hour of labor and every piece of material that went into the work, and such an account was kept, and a daily report made of it to defendant, and defendant has these reports in his possession. By means of these reports and of the other data in its office, the defendant could have put its fingers upon every cent of overcharge, if any, contained in the exhibits presented by the plaintiff. These exhibits are models of clearness and precision. They are easily intelligible even to the non-expert. They show exactly what every cent is charged for. As a matter of fact, the engineer of plaintiff and the engineers of the defendant board went over these exhibits together and agreed as to most of the items, and have on the witness stand given the reasons why they disagreed as to the others.

With respect to the admissibility in evidence of summaries, or complications, such as these exhibits, the law is stated by Wigmore, as follows:

"Where a fact could be ascertained only by the inspection of a large number of documents made up of very numerous detailed statements — as, the net balance result from a year's vouchers of a treasurer or a year's account in a bank ledger, — it is obvious that it would often be practically out of the question to apply the present principle by requiring the production of the entire mass of documents and entries to be perused by the jury or read aloud to them. The convenience of trials demands that other evidence be allowed to be offered, in the shape of the testimony of

a competent witness who has perused the entire mass and will state summarily the net results. Such a practice is well established to be proper. Most courts require, as a condition that the mass thus summarily testified to shall, if the occasion seems to require it, be placed at hand in the court, or at least be made accessible to the opposing party in order that the material for cross-examination may be available." Wigmore, Evidence, § 1230, p. 1473. See, also, Greenleaf, Evidence (16th Ed.) Vol. I, p. 690; State *v.* Mathis, 106 La. 263, 30 So. 834.

The requirement that the "mass" or data from which such a compilation has been made should be offered in evidence has been complied with in this case. The said data consists of the reports of plaintiff's foremen on the work, of the notes and calculations of measurements made by the engineer of plaintiff, and of the sheets of defendant's monthly estimates. Only in a few unimportant instances are the compilations not based upon the data in the record. Of these foremen's reports alone there are 2,730. Of the estimates there are 47 large sheets covered with small figures, the labor of going through which would be simply stupendous. Of the other data, there is a large number of bound volumes. . . . We think that, under the peculiar circumstances of this case, and in view of the practical impossibility of trying the case in any other way, the Court can accept the said exhibits as correct, except as to the items specially objected to; and the trial Court is, accordingly, directed so to do. The items specially objected to, we now proceed to consider and pass on, in so far as the condition of the record will permit.

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314. *Chief Baron* Gilbert. *Evidence* (*ante* 1726, fol. 7). Records, being the precedents of the demonstrations of justice, to which every man has a common right to have recourse, cannot be transferred place to place to serve a private purpose; and therefore they have a common repository, from whence they ought not to be removed but by the authority of some other Court; and this is in the treasury of Westminster. And this piece of law is plainly agreeable to all manner of reason and justice; for if one man might demand a record to serve his own occasions, by the same reason any other person might demand it; but both could not possibly possess it at the same time in different places, and therefore it must be kept in one certain place in common for them both. Besides, these records, by being daily removed, would be in great danger of being lost. And consequently, it is on all hands convenient that these monuments of justice should be fixed in a certain place, and that they should not be transferred from thence but by public authority from superior justice. The copies of records must be allowed in evidence, for . . . the rule of evidence demands no farther than to produce the best that the nature of the thing is capable of; for to tie men up to the original that is fixed to a place, and cannot be had, is to totally discard their evidence, . . . for then the rules of law and right would be the authors of injury, which is the highest absurdity.

315. Rex *v.* Gordon. (1781. Dougl. 572, Reporter's note). It is a general notion, that copies of nothing but records are admissible, if the originals exist;

and I remember a motion by *Dunning*, in M. 12 Geo. 3, (27 Nov. 1771), for a rule on the East India Company, to show cause, why they should not permit their original transfer books to be produced, on the ground that copies from them could not be read. He, on that occasion, stated the principle to be what I have just mentioned, and said there had been many nonsuits for want of producing the original journals of the House of Commons. But the Court denied the rule to be as he stated it, and mentioned several instances where copies of matters, not of record, are admissible; as copies of court-rolls, of parish-registers, &c., and Lord MANSFIELD expressly said, that copies of the [Commons] journals are evidence, and that he particularly remembered their being admitted on a trial at bar, in a cause in which he was leading counsel for the late Sir Watkin William Wynne, against Middleton, the sheriff of Denbighshire, on an action for a false return. That Mr. Onslow, then speaker of the House of Commons, made a point with his Lordship, that the copies should be offered in evidence, though nothing would have been so easy in that case as to produce the original journals. The Court added, that the reason "ab inconvenienti," for holding it not necessary to produce records, applied, with still greater force, to such public books as the transfer books of the East India Company; for the utmost confusion would arise, if they could be transported to any the most distant part of the kingdom, whenever their contents should be thought material on the trial of a cause. . . .

The correct principle, therefore, seems to be as laid down by Lord HOLT, in a case of Lynche *v.* Clerke, viz., "That, whenever an original is of a public nature, and would be evidence if produced, an immediate sworn copy thereof will be evidence." 3 Salk. 154, [*post*, No. 318.]

316. HENNELL *v.* LYON

KING'S BENCH. 1817

1. B. & Ald. 182

ASSUMPSIT for goods sold by plaintiff to intestate. Plea, 1. Non assumpsit. 2. Plene administravit. At the trial before ABBOTT, J., at the London sittings, plaintiff having proved the goods sold, in order to show assets in hand of the defendant as administrator, produced an examined copy of a bill, and an answer, purporting to be an answer by Charles Lyon to a bill filed in Chancery against him in his character of administrator of Mary Lyon. The bill was filed by Messrs. Maltby & Co., as well on their own behalf as on that of all other creditors, praying an account. The plaintiff in this action was not a party to that suit. It was objected, that that was insufficient evidence, for it was "res inter alios acta": that the plaintiff should have produced the original answer, and verified the handwriting, or he should have shown that this defendant was the defendant in that suit: that in the absence of such evidence there was no proof of identity. The learned Judge, however, received the evidence, and the jury found a verdict for the plaintiff, *Walton* having obtained a rule nisi for setting aside that verdict, and entering a nonsuit.

Marryat and *Platt* showed cause. To prove matter of record or documents of a public nature, it is not necessary to have the original record or document, or, where it is signed, to verify the handwriting. . . .

Walton, contra. . . .

Lord ELLENBOROUGH, C. J. — The admission of copies in evidence is founded upon a principle of public convenience, in order that documents of great moment should not be ambulatory, and subject to the loss that would be incurred if they were removable. The same has been laid down in respect of proceedings in Courts, not of record, copies whereof are admitted, though not strictly of a public nature. In all these cases it may be laid down as a general principle, that copies should be received. In this case, the answer being a proceeding in a Court of Justice, must have been received there in the usual course, and verified by the person putting it in, as the answer of the person sustaining the character which it imports him to bear; and there is no question here, as to that answer having been put in by a person bearing that name and character. But 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 shown that he is not the same person. . . .

BAYLEY, J. — The bill and answer being proceedings in a Court of Justice, it is of the utmost importance, that the originals should be preserved; and great inconvenience would result if they were moved about from place to place; and indeed they might be wanted at more than one place at the same time. On this ground, therefore, such proceedings are provable by examined copies. Then the question is, whether the copy of the answer in this case was sufficient, or whether the identity should not also have been proved; but I think that it did afford prima facie evidence, to show that the defendant was the same person. . . .

HOLROYD, J. — I am of the same opinion, that the copy of the bill and answer was properly received. It has been holden from the time of HOLT, C. J., that where the original itself is evidence, the immediate copy of the original is also evidence. . . . Rule discharged.

317. CLEMENT *v.* GRAHAM

SUPREME COURT OF VERMONT. 1905

78 *Vt.* 290; 63 *Atl.* 146

PETITION for Mandamus to the Auditor of Accounts, brought to the Supreme Court for Rutland County at its October Term, 1904. Heard at the January Term, 1905, on petition, answer, and testimony taken and filed. The opinion fully states the case.

Cowles and *Moulton*, for the relator. The vouchers required by law to be kept in the office of the State Auditor are public records. . . . A citizen and taxpayer, having a legitimate purpose for so doing, has a right, at proper times and under reasonable regulations, to examine public records. . . .

W. W. Miles, and *Horace F. Graham*, for the defendant. . . . A public record is a written memorial made by a public officer, who is authorized by law to make it. That term does not include the files and papers from which the record is made. . . . If these vouchers are public records, in order to make it the duty of defendant to exhibit them to the relator, he must allege and prove that he has a pecuniary interest in them. . . .

Watson, J. — This is a complaint for mandamus to the Auditor of Accounts commanding him forthwith and without delay to exhibit the vouchers on file in his office to the relator, or to his agent and attorney. . . . The defendant denies that the vouchers which the relator wished to inspect are public records, and if this contention is sound it is decisive against the existence of the right of inspection claimed by the relator.

1. Of what do the vouchers consist? In determining this question, it becomes necessary to examine the statute prescribing the auditor's duties. By Vermont Statutes, . . . Sec. 305, "He shall require all bills presented to him for allowance to be fully itemized and accompanied, as far as possible, with vouchers, which shall be kept in his office." . . . The term "bill," as used in the last named section, includes all claims and accounts which by law may be presented to the auditor for allowance; and the term "vouchers," as there used, includes all books, papers, receipts, receipted bills, and documents which serve to prove the truth of the claims and accounts so presented.

It is a basic principle of evidence that where a document is of a public nature, a copy of it is evidence; for the production of the original is dispensed with on account of the inconvenience which would result from the frequent removal of public documents, and consequently the absence of the original affords no presumption of fraud. Starkie, Evidence, Part III, § 14; Lynch *v.* Clarke, 3 Salk. 154, 11 Eng. R. C. 450; Wigmore, Evidence, § 1218; Mattocks *v.* Bellamy, 8 Vt. 463.

True, under this rule, it had been held in England that copies of the books of the Bank of England and of the East India Company, and perhaps of some other companies, legally private corporations, might be used, since the books are not removable on the ground of public inconvenience. But these books have been held to be of a public nature. Thus they are brought within the rule rather than made an exception to it. Marsh *v.* Collnett, 2 Esp. 665, 11 Eng. R. C. 508; Doe *v.* Roberts, 13 M. & W. 520. The same is true regarding the books of the Bank of the State of Alabama and its branches. The banks are held to be the property of the public and their books are held to be public writings. Crawford *v.* Bank, 8 Ala. 79. In the case of People *v.* Hurst, 41 Mich. 328,

the rule seems to be extended to banks generally, and there may be other instances of like nature. The generally recognized rule, however, at common law is that this principle does not apply to documents of a private nature. Respecting them, a copy is not evidence unless the original is lost, destroyed, or in the hands of a third person who cannot be compelled to produce it.

In Wigmore on Evidence, § 1218, in stating the conceivable scope of this principle allowing proof by copies, it is said among other things:

(1) "When by statute or by regulation a document in official custody is expressly or impliedly *forbidden to be removed*, it is clear that the principle applies and production dispensed with. (2) Where the document is one of the *working documents* of the office containing the official doings or being a paper made and consulted there officially in the course of office duty, it is equally clear that it need not be produced. (3) When the document is one made by a *private person* and *filed* in a public office, the principle does not apply, if a statute or regulation does not expressly require it to be filed and kept there; if it does so require, then the principle applies; although the rulings lay down no clear distinction on the subject, and most of the instances are dealt with by a statute in general or specific terms. (4) Where the document is one made by a private person and required by law to be *recorded* in the public office, but not to be kept there, the principle does not at common law apply. (5) Where the document is made by a public officer and is *delivered, after being recorded, to a private person* (as, a government land-certificate), the principle does not apply; but by statute in many instances it has either been made to apply or the record has been constituted the basis of title, so that the record, as the original being in official custody, need not be produced."

It will be observed by this classification that in all instances where by law or regulation the document is filed in a public office and required to be kept there, it is of a public nature as far as the law of evidence is concerned. The same test has often been applied, and we think rightly so, in determining the nature of books and documents in proceedings to compel the allowance of their inspection.

Claims are not to be allowed against the State unless they are based on law and are supported by evidence equivalent to testimony upon oath, or a certificate of some commissioned officer of the State officially cognizant of the claim. By the provision of the statute that vouchers shall be required by the Auditor to accompany as far as possible all bills presented for allowance, the General Assembly has declared for the production of that which, in contemplation of law, is generally the best evidence for that purpose. And that this evidence may be preserved for any future use or examination which may lawfully be had, the statute provides that the vouchers, whatever may be their specific nature, shall be filed and kept in the Auditor's office. Certainly they are within the first class named by Wigmore, and may be within the third. If vouchers so used, filed, and kept were not before of a public nature because made or presented by some other public officer in the discharge of a public

duty, they thereby are stamped with that character and thenceforth are public documents. Brown *v.* County Treasurer, 54 Mich. 132, 52 Am. Rep. 800; Ferry *v.* Williams, 12 Vroom, 332, 32 Am. Rep. 219; People *v.* Jewell, (Mich.) 101 N. W. 835; Conran *v.* Williams, before cited; Clay *v.* Ballard, 87 Va. 787. . . .

Moreover, it would seem that all vouchers, files, papers, and records required by law to be kept in the office of the Auditor of Accounts are, by the law-making power, deemed of a public character; for at the last session of the General Assembly, the Auditor was made a certifying officer whose certified copy of any such voucher, file, paper, or record, shall be admitted in any suit, civil or criminal. And it is made his duty to furnish such copies to any person desiring the same on the payment or tender of the specified legal fee therefor. Laws of 1904, No. 24.

2. Since the vouchers in question are public documents in a public office, the question arises whether citizens and taxpayers of the State have a right to inspect them. . . .

We think it may be safely said that at common law, when not detrimental to the public interest, the right to inspect public records and public documents exists with all persons who have a sufficient interest in the subject-matter thereof to answer the requirements of the law governing that question. . . . Upon principle and authority we think the interest of the relator, as a citizen and taxpayer, in the matters and things to which the vouchers in question pertain is sufficient to entitle him to an inspection of the vouchers for the purpose which he has stated. . . .

Judgment that the prayer of the complaint is granted. . . .

Munson and Haselton, JJ., dissent.

Start, J., by reason of his illness took no active part in the decision of this case.

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318. Lynch *v.* Clerke. (1696. 3 Salk. 154). Per Holt, C. J. . . . Wherever an original is of a public nature, and would be evidence, if produced, an immediate sworn copy thereof will be evidence, as the copy of a bargain and sale, or of a deed inrolled, or church register, &c.; but where an original is of a private nature, a copy is not evidence, unless the original is lost or burnt.

319. PEAY *v.* PICKET

Court of Appeals of South Carolina. 1825

3 *McC.* 318

This was an action of trespass to try title to 500 acres of land, originally granted to John Heard, on the 25th of August, 1774. The plaintiff would have deduced to himself a title by deed thus: From the guarantee to William Nesbit in 1775; from Nesbit to John Dart, in 1779;

from Dart to Rout, in 1779; the last will and testament of Rout in 1802, to his executors, to sell; and their title to the plaintiff, 25th February 1815.

The only question made, was whether the deed from Nesbit to Dart was sufficiently proved? The original was not produced. It was proved that diligent search had been made for it, without success, in the register's office, and among the papers of Rout, from whom the plaintiff purchased. A certified copy of it from the register's office, in Charleston, which was then the only recording office in the State, was offered in evidence; and besides the certificate of the register, it was proved, by a witness, present in Court, to be a correct copy of the record, with which he had compared it. The deed, of which this was a copy, was dated 10th August, 1779.

This copy was objected to, on the ground that a copy deed was no evidence. . . . It was contended by the counsel for the plaintiff, that after so great a lapse of time, the Court would presume that all had been done which the law required, and that the officer would not have recorded the deed unless it had been proved. And that the evidence of diligent search, without success, and the possession by the plaintiff of all the title deeds from the grant down, together with the ravages of the War of the Revolution, were circumstances sufficient to be left to the jury, and from whence to presume, that the deed had been executed from Nesbit to Dart.

The presiding judge (GANTT, J.), thought otherwise; and said that the act of 1731, (Pub. Laws, 130), admitting copy-deeds, was in abrogation of the common law, and that all acts which are so, must be construed strictly. That by the terms of the Act of Assembly, it appeared, that a copy is only admissible in evidence, when certain prerequisites have been complied with; particularly, that the deed shall have been proved in the usual way, before recorded. So that to entitle such copy to admissibility in evidence it must appear that the deed had been proved and recorded. That the paper adduced, as a copy, purported to be a deed of this land from Nesbit to Dart, but it furnished no evidence of the same having been proved in the "usual" or any other way; it also purported to have been executed in the presence of one witness only; and that the presumption arising from the want of probate of the deed was a fact from whence the conclusion was to be drawn, that it was never proved. He thought that the landed interest of the country would be secured by a tenure most precarious if the rule contended for were to prevail. . . .

The jury found a verdict for the defendant. The plaintiff appealed and moved for a new trial. 1st, Because his Honor, the presiding judge, refused to admit the copy deed from Nesbit to Dart in evidence. . . .

W. F. De Saussure, for the motion, — cited the case of Anderson *v.* Gilbert (1 Bay 368), where a copy of a deed of conveyance, recorded, and certified from the register's office in Charleston, as in this case, was held admissible, and was admitted without any proof of loss. . . .

Clarke, on the same side — said, copies of public records are always admissible. (Lynch *v.* Clark, 3 Salk. 153 [*ante*, No. 318].) A deed of bargain and sale recorded in a public record. (2 Black, 238.) He also cited 2 Bacon, Abridgement, 646, Tit. Evidence, A.

COLCOCK, J. — From the earliest enactments of the British parliament on the subject, to the present day, a period of about 280 years, it has been the established law of that country, that a copy of a deed, duly enrolled, is as good evidence as the original itself (Phill. 351); and I think I do not say too much, when I assert, it was generally considered to be the law of this land from the first enactment on the same subject here, in 1731 (P. L. 133), to the decision of Purvis & Robinson (1 Bay 485), a decision much to be regretted, in which it was determined that the loss of the original must be proved, to admit the introduction of the copy.

But in conformity with that decision, which is considered as obligatory on us, I think the plaintiff entitled to a new trial. All the circumstances of the case and the evidence offered, together with the historical facts of the country, afford sufficient proof of the loss to have authorized the introduction of the office copy; for we are not warranted by any thing in the decision itself of Purvis & Robinson, to suppose that any other evidence of loss was intended than such as is required by the rules of the common law. . . . Now, what are the circumstances and the proof before us in this case? The plaintiff makes out a long chain of title, consisting of seven links, tracing a title back to a grant made in 1774. One of the links in his chain is broken. A deed from Nesbit to Dart, executed in 1779, is lost. To supply the place of which, he offers a copy taken from the register's office in Charleston. He proves that he has made diligent search for it everywhere. But from the facts of the case, connected with the history of the times, in which this deed was made and recorded, there arises a presumption, stronger than is afforded in one case in a thousand, that the deed was lost or destroyed by the enemies of the country. In which case, no further evidence is necessary to be produced. For when it is proved that a deed is destroyed, it follows that there is no occasion to prove that it has been sought for. (Phill. 347.)

This deed was executed in August, 1779. The city of Charleston fell into the hands of the British on the 6th of May following. There was at that time but one recording office in the State, and consequently a great deal of business to be done; so that one would not have had a right to expect that his deed would be very expeditiously recorded. The deed was recorded, but on what particular day does not now appear. Under those circumstances there is a strong probability that the original was yet in the register's office at the time the town fell, and might have been lost or destroyed in the removal of the papers for the purpose of safe keeping. But if it were not lost in this particular manner, the confusion of the times would furnish innumerable occasions on which it might have been lost; and the great length of time which has elapsed

puts it out of the power of the party to furnish any better evidence of the fact. . . .

It is the opinion of the Court that the copy deed should have been admitted, and therefore a new trial is granted.

320. COMMONWEALTH *v.* EMERY

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1854

2 *Gray* 80

THE defendant was tried on the charge of being a common seller of intoxicating liquors. The district attorney, in order to prove that the house was owned by the defendant, and that the business carried on there was his, offered a paper purporting to be a registry copy of a deed of the premises to the defendant, certified by the register of deeds for this county. The defendant objected to the admission of the copy of the deed as evidence, for the reason that he had had no notice to produce the original deed; but PERKINS, J., overrruled the objection.

J. G. Abbott, for the defendant. The copy was erroneously admitted in evidence; the original deed to the defendant must be presumed to be in his possession; and when such is the case, a copy can never be used, without notice to the party to produce the original. . . .

J. H. Clifford, Attorney-General, for the Commonwealth. . . .

SHAW, C. J. — Upon consideration, the Court are of opinion that this copy of a deed ought not to have been admitted, without notice to the defendant to produce the original.

The rule, as to the use of deeds as evidence, in this Commonwealth, is founded partly on the rules of the common law, but modified, to some extent, by the registry system established here by statute. The theory is this: . . . In all cases original deeds should be required if they can be had; but as this would be burdensome and expensive, if not impossible in many cases, some relaxation of this rule was necessary for practical purposes. . . . Our system of conveyancing, modified by the registry law, is that each grantee retains the deed made immediately to himself, to enable him to make good his warranties. Succeeding grantees do not, as a matter of course, take possession of deeds made to preceding parties so as to be able to prove a chain of title by a series of original deeds. Every grantee, therefore, is the keeper of his own deed, and of his own deed only. . . . When, then, he has occasion to prove any fact by such deed, he cannot use a copy, because it would be offering inferior evidence, when in theory of law a superior is in his possession or power; it is only on proof of the loss of the original, in such case, that any secondary evidence can be received. . . .

In cases, therefore, in which the original, in theory of law, is not in the custody or power of the party having occasion to use it, the certified

office copy is prima facie evidence of the original and its execution, subject to be controlled by rebutting evidence. But as this arises from the consideration, that the original is not in the power of the party relying on it, the rule does not apply where such original is, in theory of law, in possession of the adverse party; because upon notice the adverse party is bound to produce it, or put himself in such position that any secondary evidence may be given.

The Court being of opinion that evidence was received which was not competent and ought not to have been admitted, the verdict is set aside, and a new trial ordered in the Court of Common Pleas.

321. Statutes. *California* (C. C. P. 1872, § 1951, as amended March 24, 1874). [A certified copy of a duly recorded instrument affecting realty] may also be read in evidence with the like effect as the original, on proof, by affidavit or otherwise, that the original is not in the possession or under the control of the party producing the certified copy; [amended March 1, 1889, so as to read:] be read in evidence with the like effect as the original instrument without further proof.

Illinois (Rev. St. 1874, c. 30, § 35). If it shall appear to the satisfaction of the Court that the original deed so acknowledged or proved and recorded, is lost, or not in the power of the party wishing to use it [a certified copy is admissible]. *Ibid.*, § 36. Whenever upon the trial of any cause at law or in equity in this State, any party to said cause, or his agent or attorney in his behalf, shall, orally in Court, or by affidavit to be filed in said cause, testify and state under oath that the original [of any instrument affecting land, duly recorded] is lost or not in the power of the party wishing to use it on the trial of said cause, and that to the best of his knowledge said original deed was not intentionally destroyed or in any manner disposed of for the purpose of introducing a copy thereof in place of the original [the record or recorder's certified copy is admissible].

New York (C. C. P. 1877, § 935). A conveyance, acknowledged or proved, and certified, in the manner prescribed by law, to entitle it to be recorded in the county where it is offered, is evidence, without further proof thereof. Except as otherwise specially prescribed by law, the record of a conveyance, duly recorded, within the State, or a transcript thereof, duly certified, is evidence, with like effect as the original conveyance.

Ibid., § 947. An exemplification of the record of a conveyance of real property situated without the State, and within the United States, which has been recorded in the State or territory, where the real property is situated, pursuant to the laws thereof, when certified under the hand and seal of the officer having the custody of the record, is, if the original cannot be produced, presumptive evidence of the conveyance, and of the due execution thereof.

322. SCOTT *v.* BASSETT

Supreme Court of Illinois. 1898

174 *Ill.* 390; 51 *N. E.* 577; 57 *N. E.* 835

Appeal from the Circuit Court of Mercer County; the Hon. John J. Glenn, Judge, presiding.

This is an action of ejectment, brought in the Circuit Court of Mercer county, by the appellees against the appellant, to recover the possession of forty acres of land in that county. The suit was commenced on August 1, 1895. The plea was the general issue of not guilty. The case was tried before the court and a jury. The jury found the defendant guilty, and that the plaintiffs were the owners of the premises in fee simple, and fixed the damages at one cent. Motion for new trial was overruled and judgment was rendered upon the verdict. The present appeal is prosecuted from such judgment. The appellees, who were the plaintiffs below, did not attempt to show themselves to be the owners of the paramount title, but introduced certain deeds as color of title, and sought to establish, by proof, possession and payment of taxes for seven years under such color of title.

Appellees, on the trial below, introduced the records of the following deeds, to-wit:

1. The record of a deed dated November 8, 1867, executed by the master in chancery of Mercer county to one Randolph Keig, conveying the lands described in the declaration, and other lands, and recorded in the Recorder's office of said county.

[2–6. The records of five deeds of intervening grantees.] . . .

7. The record of a deed, executed by F. C. Grabel to Frank C. Taggart, dated September 27, 1886, and conveying said premises.

8. An original deed from Frank C. Taggart and wife to the appellees, dated July 17, 1895, and recorded on July 29, 1895, conveying the said premises. . . .

Scott & Cooke, and *James M. Brock*, for appellant. *Bassett & Bassett*, for appellees.

Mr. Justice MAGRUDER delivered the opinion of the Court.—

In this case we forbear to express any opinion upon the question, whether or not the appellees proved possession and payment of taxes under claim and color of title for seven years. We also forbear to express any opinion as to the validity or invalidity of the tax deed introduced by the appellant upon the trial below.

The appellees introduced only the records of the deeds relied upon by them as color, but did not introduce the originals of any of such deeds, except the last deed from Taggart to themselves. Before they were entitled to introduce the records of the deeds, it was necessary to lay a foundation for the use of secondary evidence. Such a foundation was not here properly laid, so as to justify the introduction of the records instead of the original instruments.

Section 36 of the Act in regard to conveyances is as follows: [printed *ante*, No. 321] . . . The testimony introduced in supposed compliance with this statute did not meet its requirements. One of the appellees took the stand as a witness, and his testimony is the only evidence upon this subject in the record. That testimony is as follows: "I have not the original deeds. They are not in the hands of the plaintiffs in this

case, and never have been, and I have never seen them. I think I did have the original deed from the master in Chancery to Keig. That's the only one I ever had. . . . The deed from the master in chancery is not in my possession. I have no control over it. None of the deeds mentioned are destroyed so far as I know." Joseph S. Bell in his testimony states, that after the death of his father, James C. Bell, his brother, James, took his father's papers to Burlington, Ia., and he says he expects those papers could be found. . . .

In Dickinson *v.* Breeden, 25 Ill. 186, it was held that, where the affidavit of the party disclosed a knowledge of the residence of the grantee in a lost deed, the deposition of such grantee should be taken to prove the existence of the original deed, and that it was lost, or so mislaid that it could not be found after diligent search, and that such grantee had in good faith made such search with a view of finding it. In that case the Court remarked upon the danger of allowing the introduction of copies of deeds conveying valuable lands, without fully establishing the fact of the existence at some time of an original, and of its subsequent loss or destruction, so that after diligent search it could not be found. . . . In Prettyman *v.* Walston, 34 Ill. 175, the affidavit, offered as preliminary proof for the purpose of laying a foundation for the introduction of the record copy of a deed, stated that the affiant "had not in his possession, power, or control" the instrument declared on; and that affiant had not had since the commencement of the suit the original instrument, and had never seen it, and that it was not "within his possession, control or power to produce on the trial." In Nixon *v.* Cobleigh, 52 Ill. 387, the plaintiff swore, in order to lay the foundation for the introduction of the record of a deed, "that he did not have the deed in his possession; that he did not know where it was," and his testimony was held to be sufficient. . . .

The testimony in the case at bar does not go as far as the affidavit in the Prettyman case. That testimony merely states, that the appellee giving it, to-wit, Isaac N. Bassett, had no control over the deed from the master in chancery to Keig, but the testimony does not show that the witness may not have had control over the originals of the other deeds mentioned in the statement preceding this opinion. . . .

The appellee, Isaac N. Bassett, does not state that the original deeds are not "in the power" of the appellees to produce the same, but that they are not "in the hands" of the appellees. A deed might not be in the manual possession of the plaintiff, and yet might be where the plaintiff could control its possession and its production. The statute is, that the preliminary proof must show that the original was lost, or not "in the power" of the party wishing to use it, etc. The testimony here does not come within the purview of the testimony or affidavits in the cases above referred to. Originals of the deeds referred to by the witness, Bassett, may never have been in the hands of himself or his co-appellee, and they may never have seen

such original deeds, and yet it may have been in their power to produce the same.

In addition to this, § 36 of the Act of 1872, which is now in force, requires that the plaintiff in his affidavit or testimony should state, that, to the best of his knowledge, the original deed was not intentionally destroyed, or in any manner disposed of for the purpose of introducing a copy thereof in place of the original. The evidence of the appellee Bassett does not meet this requirement. He merely says: "None of the deeds mentioned are destroyed so far as I know." They may not have been destroyed, and yet in some manner they may have been disposed of for the purpose of introducing copies in place of the originals. . . .

For the reasons above indicated the judgment of the Circuit Court is reversed, and the cause is remanded to the Circuit Court.

Reversed and remanded.

323. CARPENTER *v.* DRESSLER

SUPREME COURT OF ARKANSAS. 1905

76 *Ark.* 400; 89 *S. W.* 89

APPEAL from Circuit Court, Arkansas County; GEORGE M. CHAPLINE, Judge.

Two separate actions by one Carpenter against one Dressler. From judgments for defendant in each action, plaintiff appeals. Reversed.

H. A. & J. R. Parker and *John F. Park*, for appellant. By the statute (Kirby's Dig. §§ 3057, 3064) copies of entries made in the books of the land office, certified by the proper officer, are made evidence to the same extent as the original books and papers would be, if produced. The transcript of the record entries of the land office was sufficient as a link in the chain of title in ejectment. . . .

Lewis & Ingram and *H. Coleman*, for appellee. The certified transcript from the land office is not of equal evidentiary value to the patent itself, but is only secondary evidence of the existence thereof. Cf. Kirby's Dig. §§ 3057, 3064, 4746 et seq. The loss of the patent must be first shown as a foundation for the admission of such secondary evidence. 57 Ark. 158. . . .

H. A. & J. R. Parker and *John F. Park*, for appellant, in reply: The certified copy of the record of the land office was equal in evidentiary value to the patent certificate itself. 55 Ark. 286. . . .

HILL, C. J.—The issues in these cases are identical, and they will be treated for the purposes of the opinion as one case.

1. The first question for consideration is the effect to be given to a certified transcript from the office of the Land Commissioner, when offered in evidence to prove a transfer therein shown. The statute (§ 3064, Kirby's Dig.) only provides that, when properly certified, it

shall be received in evidence of the existence of the records of which the transcript is a copy. It does not provide whether it shall be primary or secondary evidence, and the question here is whether such transcript can be received as original evidence to prove the issuance of a certificate or deed, without first accounting for the deed or certificate. In other words, does this statute make the record of the transaction required by law to be kept in the land office of the same grade of evidence as the certificate or deed issuing from the land office as a result of the transaction there recorded?

One view to take of it is that the law requires a record to be had of the transaction, say a land sale, and as evidence of the consummation of that sale the deed is issued, and it is evidence, but not the only evidence, of the sale; for this record must precede the issuance of the deed, and the deed is based upon the transaction therein recorded. In this view the record and deed would be original evidence of equal grade, and this statute makes the certified transcript of the record equal to the record itself. This is the view taken, under closely analogous statutes, in Mississippi and Alabama. Boddie *v.* Pardee, 74 Miss. 13, 20 So. 1; Wood-Stock Iron Co. *v.* Roberts, 87 Ala. 436, 6 So. 349.

In Boynton *v.* Ashabranner, decided at this term, and reported in 88 S. W. 566, this view prevailed. However, the question was not fully considered, as the Court was then of opinion, as therein indicated, that Dawson *v.* Parham, 55 Ark. 286, 18 S. W. 48, had settled this question in this way. In the argument of this case, counsel pointed out the error of the Court in misconceiving the scope of Dawson *v.* Parham. That case did not reach to this point, but to the effect of the certified transcript being of equal dignity to the record in the land office, and did not decide the effect of the record itself (or its copy made pursuant to the statute), as original evidence to prove the transfer without accounting for the deed or certificate itself. The question arising again in this case and in Covington *v.* Berry (this day decided), 88 S. W. 1005, has caused the Court to re-examine the ruling in Boynton *v.* Ashabranner, as well as in the cases now at bar.

The other view of the question is that the record in the land office is a public memorandum of the transaction, and that the primary evidence of the transaction is the deed or certificate issued by the Land Commissioner, and this public memorandum is only admissible evidence after the loss or destruction of, or inability of the party to produce, the original is shown, and then this public record (and by statute certified transcripts thereof) becomes the highest grade of secondary evidence to prove the transaction therein recorded. This subject is fully and exhaustively treated by Wigmore in his recent treatise on the Law of Evidence, and statutes and decisions from almost every State in the Union are collected, in a note following the discussion on the subject. 2 Wigmore on Evidence, § 1239, and note pages 1484–1488. This latter view is more consonant to the previous decisions of this Court. See

Stewart *v.* Scott, 57 Ark. 158, 20 S. W. 1088; Driver *v.* Evans, 47 Ark. 300, 1 S. W. 518. This view seems to be sustained by the weight of authority also.

The Court concludes that the transcript from the land office is not admissible until the party offering it accounts for the loss or destruction of the deed or certificate, or shows it to be inaccessible to him or the process of the court, or in unknown hands, or otherwise not subject to production, as a foundation to admit the transcript as secondary evidence. A supplemental opinion will be filed in Boynton *v.* Ashabranner to the same effect, and the mandate recalled to contain it.

2. The Court was right, therefore, in excluding the transcript as evidence of the transfer of title; but the Court erred in not then permitting appellant to lay the necessary foundation to admit the transcript, or to allow appellant to take a nonsuit in order to complete his evidence in a new suit. . . .

For the error indicated, the cause is reversed, and remanded for a new trial.

BATTLE, J., absent.

Topic 2. Limits to the Application of the Rule

325. PHILIPSON *v.* CHASE

NISI PRIUS. 1809

2 *Camp.* 110

ACTION on an attorney's bill. Plea, the general issue.

To prove that a copy of the bill had been delivered pursuant to 2 Geo. II, c. 23, the plaintiff's clerk was called, who swore that he had delivered to the defendant a bill signed by the plaintiff, containing an account of the business done. He was then proceeding to state the items of this bill from the plaintiff's books, when the defendant's counsel objected that no notice had been given to produce it.

Topping and *Espinasse*, for the plaintiff, insisted, that this was unnecessary. In Jory *v.* Orchard, 2 Bos. & Pull. 39, the Court of C. P. held, that it was unnecessary to give a notice to produce the written demand of a copy of a warrant pursuant to 24 Geo. II, c. 44, before giving evidence of its contents; and the very point before the Court was decided in Anderson *v.* May, 2 Bos. & Pull. 237, where it was held that a copy of an attorney's bill, the original of which has been delivered to the defendant, may be admitted in evidence without proof of notice to produce the original. This had always been considered like the case of a notice to quit, in which no notice to produce was ever required.

Lord ELLENBOROUGH. — If there are two contemporary writings, the counterparts of each other, one of which is delivered to the opposite party, and the other preserved, as they may both be considered as

originals, and they have equal claims to authenticity, the one which is preserved may be received in evidence, without notice to produce the one which was delivered. So it must have been in the cases which have been cited; and if a duplicate of the bill delivered is offered, I am ready to receive it. But I am quite clear that this evidence from the plaintiff's books is inadmissible to prove that a bill was delivered according to the statute. I approve of the practice as to notices to quit; and I remember when the point was first ruled by Mr. Justice WILSON, who said that if a duplicate of the notice to quit was not of itself sufficient, no more ought a duplicate of the notice to produce, and thus notices might be required in infinitum.

Plaintiff nonsuited.

Topping and *Espinasse*, for the plaintiff. *Garrow*, for the defendant.

326. REX *v.* WATSON

KING'S BENCH. 1817

2 *Starkie*, 116

[HIGH treason. It appeared that on the 26th of November a person of the name of Castle took a manuscript to Seale, a printer, in order that he might print 500 large copies for placards and 4,000 small ones, advertising a meeting at Spa Fields on the 2d of December, and that the prisoner Watson afterwards called upon him, Seale, and took away twenty-five of the large placards. Seale upon the trial produced one of the large ones, and another witness was afterward asked whether similar placards had not been posted upon the walls of the metropolis.]

It was objected for the prisoner, that no evidence of the contents could be received without notice to the prisoner to produce the original manuscript; that the original ought either to be produced, or proved to be destroyed, or in the possession of the prisoner; that notice must be proved to have been given to him to produce it before secondary evidence could be received; that all the printed placards were to be considered as copies, and not as originals; and that it by no means followed that all were alike because all were printed. And the case was assimilated to that of Nodin *v.* Murray, 3 Camp. 228, which was tried before Lord ELLENBOROUGH, where his Lordship held that a copy of a letter proved to have been taken by a letter-copying machine, and which was therefore necessarily a true copy, could not be received in evidence without notice to produce the original. It was also urged that notice ought to have been given to produce the 25 copies which had been taken away by the prisoner.

ELLENBOROUGH, L. C. J. (overruling the objection). An order having been given to print 500 copies, Watson fetched away 25; by this he adopted the printing as done in the execution of an order which he had

given; and when he took away 25 out of a common impression, they must be supposed to agree in the contents.

Bayley, J. — The objection is, that without notice to produce the original any other evidence of the contents is but secondary evidence. It appears to me that that is not the case, for that every one of those worked off are originals, in the nature of duplicate originals; and it is clear that one duplicate may be given in evidence, without notice to produce the other. If the placard were offered in evidence in order to show the contents of the original manuscript, there would be great weight in the objection; but when they are printed they all become originals; the manuscript is discharged; and since it appears that they are from the same press, they must all be the same.

Abbott, J. — If this paper were offered in order to show what were the contents of the original manuscript, it might be contended that sufficient preparatory evidence had not been given. But in another point of view it appears to me that the evidence is admissible, in order to prove that Mr. Watson knew the contents of a placard posted in the streets, relating to a meeting in Spa Fields, on the 2d of December.

327. ANHEUSER-BUSCH BREWING ASSOCIATION *v.* HUTMACHER

Supreme Court of Illinois. 1889

127 *Ill.* 652; 21 *N. E.* 626

Appeal from the Appellate Court for the Third District; heard in that Court on appeal from the Circuit Court of Adams county; the Hon. William Marsh, Judge, presiding.

Mr. *George W. Fogg*, for the appellant. . . . If a telegraph dispatch is sought to be introduced in evidence, the original must be produced and its execution proved precisely as any other instrument, or its loss or destruction shown, and then a copy must be proved to be a true and compared copy. . . .

Messrs. *Carter & Govert*, for the appellee. . . . The telegraph company is the agent of the sender, and the telegram as received at the end of the line is the original, and is primary evidence. . . .

Mr. Justice Bailey delivered the opinion of the Court.

This was a suit in assumpsit, brought by Rudolph Hutmacher against the Anheuser-Busch Brewing Association, a corporation organized and doing business at St. Louis, Missouri, to recover for work, labor and services of the plaintiff in superintending the erection of an ice house and cutting, storing and purchasing ice for the defendant. The trial in the Circuit Court resulted in a judgment in favor of the plaintiff for $1640 and costs, which judgment was affirmed by the Appellate Court

on appeal, and by a further appeal the record has been brought to this court. . . .

A number of telegrams in relation to the labor and services sued for, and purporting to have been sent by the defendant to the plaintiff, were produced by the plaintiff, and on proof that they were received by him from the telegraph company in the usual course of business, they were admitted in evidence, against the objection and exception of the defendant. Several letters, of dates contemporaneous with the telegrams, written by the defendant to the plaintiff, were also read in evidence, in which the defendant admitted having communicated with the plaintiff by telegraph, and in some of which letters copies of the telegrams sent were given, the same being exact copies of telegrams of the same date read in evidence. The position now taken is, that the papers delivered by the telegraph company to the plaintiff are only copies, the originals being the telegrams signed by the defendant and delivered by it to the telegraph office from which the message was sent, and it is urged that such originals should have been produced or some proper foundation laid for the introduction of secondary evidence of their contents.

The application of the rule of evidence here contended for must depend upon whether the messages delivered by the telegraph company to the plaintiff or those delivered by the defendant to the telegraph operator are, as between the parties to this suit, to be deemed the originals. In Durkee *v.* Vermont Central Railroad Co., 29 Vt. 127, the rule which we consider the most reasonable one is laid down, viz., that the original, where the person to whom it is sent takes the risk of its transmission, or is the employer of the telegraph, is the message delivered to the operator; but where the person sending the message takes the initiative, so that the telegraph is to be regarded as his agent, the original is the message actually delivered at the end of the line. See also Saveland *v.* Green, 40 Wis. 431; Western Union Telegraph Co. *v.* Shotter, 71 Ga. 760; Wilson *v.* M. & N. W. Railroad Co., 31 Minn. 481; Dunning *v.* Roberts, 35 Barb. 463; Gray on Communications by Telegraph, §§ 104, 129. The same rule was adopted by this Court in Morgan *v.* The People, 59 Ill. 58. The fact that the defendant took the initiative in sending the telegrams, thus employing the telegraph company as its agent, is clearly shown by its letters to the plaintiff read in evidence. Having thus employed such agent to convey communications to the plaintiff, it must be held to be bound by the acts of its agent to the extent at least of making the messages delivered originals, thereby constituting them primary evidence of the contents of the messages sent.

It should be observed that there is no suggestion that any of these messages were erroneously transmitted, and the case therefore does not present the question, upon which there is some conflict in the authorities, whether the sender of a telegram makes the telegraph company its gen-

eral agent so as to become responsible for the acts of such agent where there is a departure from the authority actually given, by transmitting the message incorrectly. . . .

We find no error in the record, and the judgment of the Appellate Court will therefore be affirmed. Judgment affirmed.

328. PEAKS *v.* COBB

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1906

192 *Mass.* 196; 77 *N. E.* 881

TORT, against the owner of a building number 102 on Huntington Avenue in Boston, by Julia F. Peaks, who hired a room from one Mrs. St. Ledger, the lessee of an apartment or suite of rooms in that building, for personal injuries from falling on a walk leading from the entrance of the building to the sidewalk of Huntington Avenue. Writ dated March 25, 1901.

At the trial in the Superior Court before HITCHCOCK, J., the defendant was allowed, against the objection and exception of the plaintiff, to testify to the language of the covenant in the lease from him to Mrs. St. Ledger which is mentioned in the opinion and under the circumstances there stated. The judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

E. R. Anderson (*A. T. Smith* with him), for the plaintiff.

W. H. Hitchcock, for the defendant.

HAMMOND, J. — One of the grounds of the defence was that in the lease from the defendant to Mrs. St. Ledger, from whom the plaintiff hired the room, there was a clause to the effect that the lessee should not lease, under-let nor permit any other person to occupy the premises named in the lease, without the written consent of the lessor; and the defendant undertook to prove the existence of such a provision.

The lease was executed in duplicate, one being retained by the lessor and the other given by him to the lessee. Each was therefore an original, and as evidence of the contract could have been introduced without the production of the other. The defendant testified that he had searched for his paper and could not find it. Upon this evidence the judge could have found, and it is to be assumed that he did find, that it was lost.

If this had been the only original, secondary evidence of its contents of course could have been admitted. But it was not the only original. The other was presumed to be in the possession of Mrs. St. Ledger, the lessee, to whom the defendant had given it. A witness called by the plaintiff testified on cross-examination that Mrs. St. Ledger was living on Massachusetts Avenue in Boston, the place of the trial, and that the witness knew of no reason why she could not be present at the

trial. It does not appear that any effort whatever was made to procure the original which had been delivered to her. Upon the evidence it is to be presumed that the paper was within the jurisdiction of the Court.

Here, then, is the case of two originals, one lost and one presumably still in the hands of a third party within reach of the Court. Under these circumstances the rule is that no secondary evidence of the contents of either is admissible until it is shown that reasonable effort had been made to procure the other. All originals must be accounted for before secondary evidence can be given of any one. Starkie, Evidence (10th Am. ed.) 542, ad finem, and cases therein cited. 1 Greenleaf, Evidence, § 563, and cases cited. 2 Wigmore, Evidence, § 1233, and cases cited. See also Poignand *v.* Smith, 8 Pick. 272. The exception to the admission of the oral evidence of the contents of the lease must be sustained. . . .

Exceptions sustained.

329. INTERNATIONAL HARVESTER CO. *v.* ELFSTROM

SUPREME COURT OF MINNESOTA. 1907

101 *Minn.* 263; 112 *N. W.* 252

ACTION in the District Court for Chisago county to recover $115, and interest, on an alleged contract. The case was tried before CROSBY, J., and a jury, which rendered a verdict in favor of plaintiff for $116.47. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

George S. Grimes, for appellant. The Court erred in admitting in evidence, and in refusing to strike out, exhibit A, a carbon copy of the contract. Exhibit A was not the best evidence. The original contract was in existence. . . .

Buffington & Buffington, for respondent. Instruments signed in duplicate are both originals. And where a contract is executed in duplicate or triplicate form the parts are denominated duplicate or triplicate originals, the one as much so as the other. It does not require in order to introduce one of the duplicates that notice should be given to produce the other. They are all primary evidence. . . .

ELLIOTT, J. — This was an action brought to recover upon a written contract for the purchase price of a certain McCormick binder, which the plaintiff claimed it sold and delivered to the defendant. The jury returned a verdict in favor of the plaintiff, and the appeal is from an order denying the alternative motions for judgment in favor of the defendant notwithstanding the verdict or for a new trial. . . .

The remaining question relates to the reception in evidence of what the appellant claims was a mere copy of the contract without having first accounted for the absence of the original. This presents an interest-

ing and somewhat novel question, but which, by reason of the introduction of labor-saving devices in modern offices, is liable to arise more frequently in the future. A sheet of carbon paper was placed between two sheets of order paper, so that the writing of the order upon the outside sheet produced a fac-simile upon the one underneath. The signature of the party was thus reproduced by the same stroke of the pen which made the surface, or exposed, impression. In State *v.* Teasdale, 120 Mo. App. 692, 97 S. W. 996, it was held that a carbon copy of a letter was not admissible in evidence until the original letter from which it was made was accounted for. The signature would not, under ordinary circumstances, appear upon the carbon copy of such a letter. In Chesapeake *v.* Stock, 104 Va. 97, 51 S. E. 161, it was held that a carbon copy made at the same time and by the same impression of type may be regarded as a duplicate original of the letter itself and admitted in evidence without notice to produce the letter.

We think this view can be sustained, and that a clear distinction exists between letter-press copies of writings and duplicate writings produced as was the contract in the case at bar. It is well settled that, where a writing is executed in duplicate or multiplicate, each of the parts is the writing which is to be proved, because by the act of the parties each is made as much the legal act as the other. Crossman *v.* Crossman, 95 N. Y. 145, 148; Hubbard *v.* Russell, 24 Barb. 404, 408; Lewis *v.* Payn, 8 Cow. 71, 18 Am. Dec. 427; Jackson *v.* Denison, 4 Wend. 558; Barr *v.* Armstrong, 56 Mo. 577, 586; Weaver *v.* Shipley, 127 Ind. 526, 27 N. E. 146; Cleveland *v.* Perkins, 17 Mich. 296; Philipson *v.* Chase, 2 Camp. 110 [*ante*, No. 325]. It is very generally held that a reproduction of a writing by a letter-press cannot be considered as a duplicate. 2 Wigmore, Evidence, § 1234, and cases there cited; Menasha *v.* Harmon, 128 Wis. 177, 107 N. W. 299.

The distinction between letter-press copies and instruments produced by the use of carbon paper, as in this instance, seems reasonably clear and satisfactory. What makes two numbers of an instrument duplicates and equivalents is the fact that the legal act of the parties as consummated embraces them both. Letter-press copies are produced by an act distinct from and subsequent to the consummation of the legal act of execution. It may or may not be the act of the parties to the contract. We know from common experience that such copies are ordinarily produced by the labor of clerks and other employes, and that the results are not always satisfactory. But all the numbers of a writing result from the completion of the legal act of the parties, although aided by mechanical devices or chemical agencies, meet the requirements of originals. If the reproduction is complete, there is no practical reason why all the products of the single act of writing the contract and affixing a signature thereto should not be regarded as of equal and equivalent value. In this instance the same stroke of the pen produced both signatures. The argument that the recognition of these

instruments as duplicates would encourage fraudulent practices does not touch the principle involved.

The order of the District Court is affirmed.

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330. COLE *v.* GIBSON

CHANCERY. 1750

1 *Ves. Sr.* 503

IN 1733, on a treaty of marriage between Philip Bennet and Miss Hallam, then about twenty years old, articles were entered into, to which were made parties the intended husband and wife, the defendant and Mr. Ralph Allen. The first clause therein was for securing an annuity of £100 to the defendant out of the wife's estate: but every other provision therein for benefit of the wife and issue of the marriage was made revocable by the wife, after the marriage should be had. About the same time with the articles, a bond was given by Mr. Bennet before the marriage to pay the defendant £1000, which bond was afterward delivered up to be canceled; but at what particular time did not appear. A recovery was afterward suffered to the uses of the articles. In 1736 a new grant was made to the defendant of this annuity; which was continued to be paid for some time after the wife's death. But the present bill was now brought to set it aside.

Evidence for the plaintiff to prove the contents of the bond was objected to, as never done unless where the instrument itself cannot be had: whereas it appeared from the answer read, that the bond was delivered up to plaintiff, and must be in his custody. *Counsel for plaintiff.* This bill is not to be relieved against the bond; for then the objection would be good; but here it is made use of as collateral evidence, as being part of the transaction, and to prove that it was on account of the marriage, and on no other consideration.

Lord CHANCELLOR [HARDWICKE]. The objection is founded on the proper and common rule of evidence; and in consequence the plaintiff cannot be admitted to give parol evidence of the contents of this bond, as the case at present stands. The general rule is, the best evidence should be given the nature of the thing will admit: and therefore as to all deeds, writings, and letters they must be proved themselves unless under certain circumstances; as when shown to be in the adverse party's hands; for then you will be permitted to prove the contents; or if shown to be destroyed, you may then read reasonable proof of the destruction and parol evidence to the contents; which is then made the best the thing will admit. . . . The plaintiff has read, what is made evidence out of the answer, that the bond was executed, and that the defendant delivered it up to the plaintiff: which is evidence that it is in plaintiff's custody. And to prove the contents it must be produced. . . .

A distinction is endeavored between a bill to set aside the bond or other instrument, and a case wherein it is made use of only by collateral evidence; but there is no such distinction in point of evidence, the rule being the same whether it comes in by way of collateral evidence, or the very deed which the bill is brought to impeach.

331. LAMB *v.* MOBERLY

COURT OF APPEALS OF KENTUCKY. 1826

3 *T. B. Monr.* 179

THE plaintiff in the Court below, sued the defendant, in an action of assumpsit, for so much money for a note made by a third person, and sold and delivered by the plaintiff to the defendant. On the trial of the issue of non assumpsit, the plaintiff introduced the confessions of the defendant that he had bought such a note, and had promised to pay a certain sum therefor, at a period, or rather on a contingency which had happened, substantially agreeing with some of the counts in the declaration. The counsel for defendant moved the Court to exclude that evidence, until the plaintiff should produce the note itself as the best evidence. The Court sustained this motion.

MILLS, J. (after stating the case as above). We cannot agree with the Court below . . . that the production of the note was necessary. It could only be held necessary by not attending to the distinction between proving the existence and contents of a note and the sale of a note. Of the former, the note is the better evidence; but of the latter the note furnishes no evidence. . . . The existence of a note is as certainly perceived by the senses or acknowledged in conversation as that of any other article of commerce; and it might as well be urged that before the acknowledgments of a sale of any other article could be given in evidence the article itself must be produced in Court in order that the Court might see that it really existed, as that a note thus sold should be produced. Judgment reversed.

332. TILTON *v.* BEECHER

CITY COURT OF BROOKLYN, N. Y. 1875

Abbott's Rep. 1, 389.

[THE plaintiff desired to prove certain admissions made by the defendant.]

Witness for plaintiff: [Mr. Tilton had written the story of the whole affair for publication and wanted Mr. Beecher to hear it before publication,] and Mr. Tilton said to Mr. Beecher, "I will read to you one passage from this statement, and if you can stand that, you can stand

any part of it," and he read to him a passage from the statement, which was about as follows as nearly as I can recollect.

Mr. *Evarts*, for defendant: The statement will speak for itself.

Mr. *Fullerton*, for plaintiff: What did he read?

Mr. *Evarts*: We want that paper and the part of it that was read, as it appeared in that paper, and it is not competent to recite out of a written paper by oral proposition what the written paper is the best evidence of.

Mr. *Fullerton*: I propose to show what communication was made by Mr. Tilton on that occasion to Mr. Beecher; I do not care whether it originated in his own mind, or whether it was read from a paper, printed or written; it makes no difference; what it was that he said to him is what I have a right to.

Judge Neilson: I think the witness can state what was said to Mr. Beecher, although he stated matter that had been incorporated in writing.

333. MASSEY *v.* BANK

Supreme Court of Illinois. 1885

113 *Ill.* 334

Appeal from the Appellate Court for the Third District; — heard in that Court on appeal from the Circuit Court of Sangamon county; the Hon. C. S. Zane, Judge, presiding.

Messrs. *Morrison & Whitlock*, for the appellant. As to the rule requiring the best evidence to be produced, . . . the best evidences were the deeds and mortgages. . . .

Messrs. *Ketcham & Gridley*, and Mr. *L. H. Hatfield*, for the appellee.

Mr. Justice Mulkey, delivered the opinion of the Court:

This is an appeal from a judgment of the Appellate Court for the Third District, affirming a judgment of the Circuit Court of Sangamon county, in favor of the National Bank of Virginia, and against Henderson E. Massey, for the sum of $6439.56. The action below was upon a promissory note purporting to have been executed by Henry C. Massey, Henderson E. Massey and George W. Laurie. . . . The note was given for money borrowed from the bank by Henry C. Massey. The appellant filed a plea, verified by affidavit, denying the execution of the note, and the cause was tried upon that issue, alone. . . .

The point which seems to be chiefly relied on, arises upon a motion to suppress part of the answer to the following interrogatory: "You may state whether the note" (referring to the one sued on) "was a renewal note." Objection being made, unless the note was produced, the witness then, as we understand the record, produced it, and proceeded first to read the credits indorsed on it, the whole answer being as follows: "Paid, July 25, 1879, $275 and interest on note to date. Paid August 5, 1879, $1782.75 and interest on note to date. That $1782.75 my father owed, —

that is, *he gave me a deed to one hundred acres of land in 1866; told me to go to work on it, and improve it, and suit myself,*" (objection by defendant,) "but had never given me a deed, and after he received notice from the bank in 1879, he goes to Jacksonville and deeds this one hundred acres of land away from me, with the exception of forty acres where the house and barn stand, and said to me and told me to give him a mortgage for $3000, and he would enable me to get a loan of $2000 on it, to pay upon this note. He did that. *I had to give him a mortgage for $3000,* while I never owed him a dollar in the world. He did that to fix the bank so they couldn't get anything off of me, and he was going to put his property out of his hands, to avoid this note." . . .

Construing the motion according to its literal terms, the Court really sustained it, instead of denying it, hence there is no ground to complain. We are not inclined, however, to rest our decision of the question solely upon this view, but rather prefer to place it upon the broad ground that the general principle upon which appellant bases the objection, — namely, that the best evidence by which a fact is susceptible of being established must always be produced, or its absence accounted for, — has no application to the facts above stated. We fully recognize the rule that whenever the existence of a deed or other writing is directly involved in a judicial proceeding, whether as proof of the precise question in issue or of some subordinate matter that tends to establish the ultimate fact or facts upon which the case turns, such deed or other writing itself must be produced, or its absence accounted for, before secondary evidence of its contents is admissible. Yet while this rule is fully conceded, it is also true that a witness, when testifying, may, for the purpose of making his statements intelligible, and giving coherence to such of them as are unquestionably admissible in evidence, properly speak of the execution of deeds, the giving of receipts, the writing of a letter, and the like, without producing the instrument or writing referred to. To hold otherwise would certainly be productive of great inconvenience, and in some cases would defeat the ends of justice. References to written instruments by a witness for the purpose stated are to be regarded as but mere inducement to the more material parts of his testimony.

The present case well illustrates the principle in question. As remotely bearing upon the issue to be tried, the plaintiff sought to show the appellant had avowed a purpose not to pay the note — that he had said he was going to put his property out of his hands in order to defeat the claim. Now this, under the issue, is the important part of the answer to the question ["whether the note was a renewal note"], if indeed any of it can be so regarded. All, therefore, that was said about the deeding of the land, the giving of the mortgage, and getting the loan of $2,000, we regard as mere matter of inducement to the more important part of the testimony.

In short, we see no substantial error in the record, and the judgment will therefore be affirmed. Judgment affirmed.

334. MINNESOTA DEBENTURE CO. *v.* JOHNSON

SUPREME COURT OF MINNESOTA. 1906

96 *Minn.* 91; 107 *N. W.* 740

ACTION of ejectment in the District Court for Hennepin county, The case was tried before HOLT, J., who directed a verdict in favor of plaintiff. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Plaintiff moved to dismiss the appeal on the ground of defective notice. Motion to dismiss denied. Order affirmed.

Savage & Purdy, for appellant. *John F. Fitzpatrick*, for respondent. . .

On May 4, 1906, the following opinion was filed:

ELLIOTT, J. — In an action of ejectment the plaintiff prevailed and from an order denying a new trial the defendant appealed to this Court where the order was reversed and a new trial granted. 94 Minn. 150, 102 N. W. 381. After a second trial the case now comes here on appeal by the defendant from an order denying a motion for judgment for the defendant notwithstanding a verdict for the plaintiff, or for a new trial.

The facts are fully stated in the former opinion. On the first trial the plaintiff traced the title from the United States Government by mesne conveyances to George F. Dean and showed the entry of a judgment on February 4, 1899, against Dean, quieting the title to the land in the plaintiff. . . . The plaintiff would therefore be entitled to the land as against Dean, and if the defendant Johnson was Dean's tenant under a lease made after the entry of the judgment, his rights were no greater than those of Dean. Blew *v.* Ritz, 82 Minn. 530; 1 Freeman, Judgments, § 169.

On the second trial the plaintiff, instead of disclosing its title, proved to the satisfaction of the trial Court that Johnson was Dean's tenant and made no other claim to the land. . . . Therefore if Johnson in this action claimed only through Dean, he is in privity with him and bound by the judgment which determined Dean's rights.

The defendant when called by the plaintiff, testified as follows:

Q. — "Did you ever claim, or do you claim now to own the land in this lawsuit, yourself?" *A.* — "No, it is not my land."

Q. — "During all the time that you were on the land, did you hold it under George F. Dean?" *A.* — "Yes, I rented it from him."

This is definite and clear; and it would doubtless surprise Johnson to learn that he was not Dean's tenant and that he has any interest in the land other than as such tenant. He further testified that he first rented the property about 1895; that he had had many leases but did not remember how many, and that he "had one for the year before last," which would be 1903, which he burned up because he moved. It thus clearly appeared that about 1895 Johnson took possession of the property as the

tenant of Dean and that the lease was renewed or a new lease made, after the entry of the judgment in 1899.

But the defendant contends that the evidence by which this was shown was improperly received, because it called for the contents of the written leases and an opinion as to the character of the defendant's possession.

1. It was a question of the application of recognized rules governing the production of evidence. The existence of certain relations, although created by certain instruments in writing, may be shown by parol. Widdifield *v.* Widdifield, 2 Binn. 245; Cutler *v.* Thomas, 25 Vt. 73; Rosenbaum *v.* Howard, 69 Minn. 41, 71 N. W. 823; Alderson *v.* Clay, 1 Starkie, 405. The terms of the tenancy were not in issue. They could have been shown only by the production of the writings or, under proper conditions, by secondary evidence. But whether the witness was in possession of the land as a tenant of Dean was an independent fact within his personal knowledge, and there could be as against him no better evidence of the character of his claim than the witness's own statement. In 1 Greenleaf, Evidence (16th ed.), § 87, it is said that, "if the fact of the occupation of land is alone in issue without respect to the terms of the tenancy, this fact may be proved by any competent oral testimony such as payment of rent or declarations of the tenant, notwithstanding it appears that the occupancy was under an agreement in writing; for here the writing is only collateral to the fact in question." So in 2 Wigmore, Evidence, § 1246, it is said, "the fact that a person occupies the relation of tenant as to a piece of land or its owner, is a distinct fact; for he may have become tenant by parol or by writing and the tenancy is the result of the transaction and is not the transaction itself." The rule is applied in Rex *v.* Holy Trinity, 7 B. & C. 611; Taylor *v.* Peck, 21 Gratt. 1; and Raynor *v.* Lee, 20 Mich. 384. See 1 Elliott, Evidence, § 574 and 1 Greenleaf, Evidence (16th ed.), § 563k.

2. Even though the question directed to the witness called upon him to make admissions as to the contents of written documents, it would not necessarily follow that the rulings of the trial Court were erroneous. There is ample authority to support the rule that it is not necessary to produce a document when its contents can be proven by the admissions of the adverse party. The leading case of Slatterie *v.* Pooley, 6 M. & W. 664 [*post*, No. 335], established the rule in England that a parol admission by a party to a suit is admissible in evidence against him although it relates to the contents of a deed or other written instrument. Although there are American authorities to the contrary, some of which are cited by defendant, the better authorities in this country have apparently accepted the rule of Slatterie *v.* Pooley. The question is fully discussed in 2 Wigmore, Evidence, § 1256, et seq. But we are not required to determine this question, as the case is disposed of by the rule to which reference has already been made.

The order appealed from is affirmed.

335. SLATTERIE *v.* POOLEY

EXCHEQUER. 1840

6 *M. & W.* 664

ACTION on a covenant to indemnify the plaintiff against debts scheduled in a composition-deed and due to creditors not signing it; plea, that the debt in question was not contained in the schedule.

At the trial, the composition deed and schedule were produced in evidence for the plaintiff; but the latter, not being duly stamped, was rejected. Whereupon the plaintiff's counsel tendered in evidence a verbal admission by the defendant that the debt mentioned in the declaration was the same with one entered in the schedule. This evidence was objected to, on the ground that the contents of a written instrument, which was itself inadmissible for want of a proper stamp, could not be proved by parol evidence of any kind; and the learned judge being of that opinion, the plaintiff was nonsuited.

Sir F. *Pollock* and *Warren* showed cause in Michaelmas Term. — This evidence was not receivable. To admit a parol statement of the matter inserted in the schedule in this case, would be a direct violation of a settled principle of the law of evidence, viz., that the contents of a written instrument cannot be proved otherwise than by the instrument itself, unless satisfactory grounds be shown for its non-production, in which case secondary evidence of its contents is receivable. . . . No case appears to have been decided the other way, until that of Earle *v.* Picken (5 C. & P. 542), where PARK, J., certainly laid it down as a general rule of law, that "what a party says is evidence against himself, as an admission, whether it relate to the contents of a written paper, or to anything else." There, however, the admission did not necessarily involve the contents of a written instrument. . . . (PARKE, B. — Other subsequent cases to the same effect are referred to in Phillipps on Evidence, vol. I, p. 364, and a reason is given for the admissibility of the evidence. In one sense, no doubt, the *best* evidence is the production of the instrument itself; but the question is, whether the admission by the party himself of its contents is not receivable, as affording a presumption of truth, whereas parol evidence of its contents aliunde, without its non-production being first accounted for, leads to a contrary presumption.) The admission of such evidence is of dangerous precedent, since thereby as well the rule which enjoins the calling of the subscribing witness, as also the reading of the instrument itself, is dispensed with. . . . Such evidence has in no case been admitted, where the contents of the deed or written instrument *were directly in issue*. . . .

On a subsequent day, *Erle* and *Busby* appeared to support the rule, but

PARKE, B., said: — The Court did not think it necessary to trouble

Mr. *Erle* in support of the rule in this case; as we who heard the argument (my Brother ALDERSON, who is absent, as well as ourselves) entertain no doubt that the defendant's own declarations were admissible in evidence to prove the identity of the debt sued for, with that mentioned in the schedule, although such admissions involved the contents of a written instrument not produced; and I believe my Lord ABINGER, who was not present at the argument, entirely concurs. The authority of Lord TENTERDEN at Nisi Prius, in the case of Bloxam *v.* Elsee (Ry. & M. 187, 1 C. & P. 588), is no doubt to the contrary: but since that case as well as before, there have been many reported decisions, that whatever a party says, or his acts amounting to admissions, are evidence against himself, though such admissions may involve what must necessarily be contained in some deed or writing.

If such evidence were inadmissible, the difficulties thrown in the way of every trial would be nearly insuperable. The reason why such parol statements are admissible . . . is that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth arising from the very nature of the case where better evidence is withheld; whereas what a party himself admits to be true may reasonably be presumed to be so. The weight and value of such testimony is quite another question.

Lord ABINGER, C. B., said, he was not present at the argument, but concurred in what was said by PARKE, B.; and stated that he had always considered it as clear law, that a party's own statements were in all cases admissible against himself, whether they corroborate the contents of a written instrument or not.

GURNEY, B., and ROLFE, B., concurred. Rule absolute.

336. LAWLESS *v.* QUEALE. (1845. Ireland, 8 Ir. L. R. 382, 385). PENNEFATHER, B. I cannot subscribe to what was said by PARKE, B., in that case [of Slatterie *v.* Pooley]. . . . The doctrine there laid down is a most dangerous proposition. By it a man might be deprived of an estate of £10,000 per annum, derived from his ancestors by regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear they heard the defendant say he had conveyed away his interest therein by deed, had mortgaged or otherwise incumbered it; and thus, by this facility so given, the most open door would be given to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty. It is said, it is evidence against the person himself who made this admission, and that there is no danger of untruth in what a man admits against himself. Supposing the admission to be proved, is there no danger of mistake or misconception of the terms of a written instrument? It may be long and difficult; one part or clause may explain or qualify another; an unprofessional or ignorant man may be led to believe it may be so-and-so, whereas the real and true meaning may be the very reverse or something very different. But, produce the deed or writing; "litera scripta manet." On which side is the security, and why depart from the rule that, if you want to give evidence

of the contents of a writing, the writing itself must be produced? Is there no danger of untruth or misrepresentation, when used against the party making the admission? That is the ground put by PARKE, B., and in which I cannot agree, when I know by experience how easy it is to fabricate admissions, and how impossible to come prepared to detect the falsehood. Why are writings prepared at all but to prevent mistakes and misrepresentations? And why, having taken that precaution, with such writing at hand and capable of being produced, is the same to be laid aside and inferior and less satisfactory evidence resorted to?

337. MINNESOTA DEBENTURE CO. *v.* JOHNSON

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[Printed *ante*, as No. 334; Point 2 of the opinion.]

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338. THE QUEEN'S CASE

HOUSE OF LORDS. 1820

2 *B.* & *B.* 286

[BILL for divorce on the ground of adultery and improper conduct. The House of Lords put the following questions to the Judges:] First, whether, in the Courts below, a party on cross-examination would be allowed to represent in the statement of a question the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect, *without having first shown* to the witness the letter, and having asked that witness whether the witness wrote that letter and his admitting that he wrote such letter? . . . Thirdly, whether, when a witness is cross-examined and, upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness can be examined, in the courts below, whether he did not in such letter make statements such as the counsel shall, by questions addressed to the witness, inquire are or are not made therein; or whether the letter itself must be read as the evidence to manifest that such statements are or are not contained therein?

ABBOTT, C. J., for the Judges [answering the first question in the negative]. The contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence; the proper course, therefore, is to ask the witness whether or no that letter is of the handwriting of the witness; if the witness admits that it is of his handwriting, the cross-examining counsel may at his proper season read that letter as evidence. . . .

[The other question was answered thus:] The Judges are of opinion, in the case propounded, that the counsel cannot, by questions addressed to the witness, enquire whether or no such statements are contained in the letter, but that the letter itself must be read, to manifest whether such statements are or are not contained in that letter. . . . [The Judges] found their opinion upon what in their judgment is a rule of evidence as old as any part of the common law of England, namely, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself and not by parol evidence.

339. HENRY BROUGHAM. *Speech on the Courts of Common Law.* (Hansard, Parl. Deb., 2d ser., XVIII, 213, 219, Feb. 7, 1828). If I wish to put a witness' memory to the test, I am not allowed to examine as to the contents of a letter or other paper which he has written. I must put the document into his hands before I ask him any questions upon it, though by so doing he at once becomes acquainted with its contents, and so defeats the object of my inquiry. That question was raised and decided in the Queen's Case, after solemn argument, and, I humbly venture to think, upon a wrong ground, that the writing is the best evidence and ought to be produced, though it is plain that the object is by no means to prove its contents. Neither am I, in like manner, allowed to apply the test to his veracity; and yet, how can a better means be found of sifting a person's credit, supposing his memory to be good, than examining him to the contents of a letter, written by him, and which he believes to be lost? . . . I shall not easily forget a case in which a gentleman of large fortune appeared before an able arbitrator, now filling an eminent judicial place, on some dispute of his own, arising out of an election. It was my lot to cross-examine him. I had got a large number of letters in a pile under my hand, but concealed from him by a desk. He was very eager to be heard in his own cause. I put the question to him: "Did you never say so and so?" His answer was distinct and ready, — "Never." I repeated the question in various forms, and with more particularity, and he repeated his answers, till he had denied most pointedly all he had ever written on the matter in controversy. This passed before the rules in evidence laid down in the Queen's Case; consequently I could examine him without putting the letters into his hand. I then removed the desk, and said, "Do you see what is now under my hand?" pointing to about fifty of his letters. "I advise you to pause before you repeat your answer to the general question, whether or not all you have sworn is correct." He rejected my advice, and not without indignation. Now, those letters of his contained matter in direct contradiction to all he had sworn. I do not say that he perjured himself, — far from it. I do not believe that he intentionally swore what was false; he only forgot what he had written some time before. Nevertheless he had committed himself, and was in my client's power.

340. STATUTES. (1854. England, St. 17 & 18 Vict. c. 125, § 24). A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; provided always that it shall be competent for the judge, at

any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit.

341. THE CHARLES MORGAN

SUPREME COURT OF THE UNITED STATES. 1884

115 *U. S.* 69

THIS is a suit in admiralty, brought by the owners of the steamboat "Cotton Valley," to recover for the loss of their boat, and certain articles of personal property belonging to Martin H. Kouns alone, in a collision on the Mississippi River with the steamboat "Charles Morgan." In the original libel filed in the District Court, claim was made only for the value of the boat, and for an itemized account for clothes, jewelry, furniture, etc., of the libellant Kouns. . . . When the case got into the Circuit Court, leave was granted the libellants to file a supplemental and amended libel setting up their claim for stores, supplies, and cash, proved before the commissioner in the District Court, but rejected by that Court because not included in the original libel. . . . A decree was rendered against the Morgan and her owners and stipulators for the value of the Cotton Valley, and for the value of the personal property belonging to Kouns, the same as in the District Court, and also for the value of the stores, supplies, etc., set forth in the supplemental libel, $1,376.16. From that decree this appeal was taken. . . .

It is also shown by another bill of exceptions in the record, that, after the depositions of Albert Stein, Harry W. Stein, Sylvester Doss, John B. Evelyn, and Livingston McGeary had been read on behalf of the claimant of the Morgan, the libellants, for the purpose of impeaching and contradicting their evidence, offered certain depositions of the same witnesses used on the trial of certain other suits, growing out of the same collision, between one Menge and some insurance companies, to which the claimant was not a party. To the introduction of this evidence the claimant objected, on the ground that no basis for offering said purported depositions had been laid, it not having been shown or pretended that said purported depositions were ever submitted to the said witnesses, or otherwise verified as their evidence in said causes; but as, "in the cross-examination of each of said witnesses in this case, the attention of the witness was called to the evidence given by him in the cases of Menge *v.* Insurance Companies, . . . and the witnesses were specifically examined as to the correctness of said evidence, and admitted having testified therein," and "no objection was made that the evidence offered was not the evidence of said witnesses respectively, or that the same had been imperfectly taken or reported," the depositions were admitted for the purpose for which they were offered. The cross-

examination referred to is not set forth in the bill of exceptions. To the admission of this evidence the claimant excepted. . . .

Mr. *T. D. Lincoln* (Mr. *R. H. Marr* also filed a brief) for appellants.

Mr. *Richard H. Browne* (Mr. *Charles B. Singleton* was with him) for appellees.

Mr. Chief Justice WAITE (after stating the facts as above) delivered the opinion of the Court.

The specific objection to the depositions in the Menge cases that were offered for the purpose of impeachment, is that they were not exhibited to the witnesses whose testimony was to be impeached upon their cross-examination, or otherwise verified, as the evidence of the witnesses in the former causes. The rule is, that the contradictory declarations of a witness, whether oral or in writing, made at another time, cannot be used for the purpose of impeachment until the witness has been examined upon the subject, and his attention particularly directed to the circumstances in such a way as to give him full opportunity for explanation or exculpation, if he desires to make it. Conrad *v.* Griffey, 16 How. 38, 46. If the contradictory declaration is in writing, questions as to its contents, without the production of the instrument itself, are ordinarily inadmissible, and a cross-examination for the purpose of laying the foundation of its use as impeachment would not, except under special circumstances, be allowed until the paper was produced and shown to the witness while under examination.

Circumstances may arise, however, which will excuse its production. All the law requires is, that the memory of the witness shall be so refreshed by the necessary inquiries as to enable him to explain, if he can and desires to do so. Whether this has been done is for the Court to determine before the impeaching evidence is admitted. Here the cross-examination, on which the right to use the depositions depended, has not been put into the record, but the bill of exceptions shows "that, in the cross-examination of each of said witnesses, the attention of the witness was called to the evidence given by him in the cases of Menge, . . . and the said witnesses were specifically examined as to the correctness of said evidence, and admitted having testified therein." From this, and the failure to incorporate the cross-examination into the bill of exceptions, we must presume that ample foundation was laid for the introduction of the evidence, unless the failure to *show* the depositions to the witnesses at the time of their cross-examination was necessarily and under all circumstances fatal. The objection is not to the cross-examination as to the contents of the depositions without their production, but to the admission of the depositions after a cross-examination which was, as we must presume, properly conducted in their absence. It is also stated in the bill of exceptions that, "at the offering, no objection was made that the evidence offered was not the evidence of said witnesses respectively, or that the same had been imperfectly taken or reported." This

shows that the depositions must have been sufficiently identified as the evidence of the witnesses in the former cases.

In the case, as it comes to us, we find no error.

The decree of the Circuit Court is affirmed and interest allowed.

Topic 3. Rules Preferring One Sort of Secondary Evidence to Another

343. DOE DEM. GILBERT *v.* ROSS

EXCHEQUER. 1840

7 *M. & W.* 102

EJECTMENT by the lessors of the plaintiff, who claimed as co-heiresses at law of Arthur Gramer Miller. . . . They sought to give evidence of the marriage settlement of A. G. Miller, executed by him in 1789, after his father's death, in order to show that he had acquired the fee by exercising the power of appointment. This settlement was in the possession of Mr. Baxter, the defendant's attorney, who had been subpoenaed to produce it. . . . Mr. Baxter stated that he claimed a lien on the deeds for professional business done for Mr. Weetman, and he declined to produce it on this ground. Mr. Weetman himself was in Court, but was not examined, or called on to produce the deed.

Upon Mr. Baxter's refusal to produce the deed, the lessors of the plaintiff proposed to give secondary evidence of its contents. This was objected to on the part of the defendants, but Lord DENMAN ruled that such evidence was admissible. The lessors of the plaintiff then tendered in evidence a copy of the deed; but upon examination it appeared that this had been made an attested copy, and was unstamped, and it was consequently rejected. It was then proposed to read, as secondary evidence of the contents of the deed, a short-hand writer's notes of the proceedings of the trial in the former action, when the settlement had been produced and proved by the then defendant Weetman. This evidence was objected to, but Lord DENMAN allowed it to be admitted, and the short-hand writer's notes were read. The ground of appeal was that the short-hand writer's notes were not receivable when it appeared that a copy of the settlement was in existence.

Adams, Serjt., in Easter Term last, moved for a nonsuit or a new trial, on several grounds. . . . 2dly, that even if secondary evidence was receivable, the shorthand writer's notes were not admissible evidence. . . . In Villiers *v.* Villiers, 2 Atk. 71, Lord HARDWICKE says — "The rule of evidence is, that the best evidence that the circumstances allow must be given. If an original deed be lost, the counterpart may be read; and if there is no counterpart forthcoming, then a copy may be admitted; and if there should be no copy, there may be parol evidence of the deed, and of the manner of its being lost." . . . (PARKE, B. — You must

contend, then, that there is to be primary, secondary, and tertiary evidence. If an attested copy is to be one degree of secondary evidence, the next will be a copy not attested; and then an abstract: then would come an inquiry, whether one man has a better memory than another, and we should never know when to stop. . . .) . . . In Buller's Nisi Prius p. 256, the same rule is laid down as in Villiers *v.* Villiers.

Lord ABINGER, C. B. — There can be no rule upon this point. Upon examination of the cases, and upon principle, we think there are no degrees of secondary evidence. The rule is that if you cannot produce the original, you may give parol evidence of its contents. If indeed the party giving such parol evidence appears to have better secondary evidence in his power which he does not produce, that is a fact to go to the jury, from which they might sometimes presume that the evidence kept back would be adverse to the party withholding it. But the law makes no distinction between one class of secondary evidence and another.

PARKE, B. — I concur entirely in refusing the rule on this ground. There can be no doubt that an attested copy is more satisfactory, and therefore, in that sense, better evidence than mere parol testimony; but whether it excludes parol testimony, is a very different thing. . . . As soon as you have accounted for the original document, you may then give secondary evidence of its contents. . . . Does it then become inadmissible, if it be shown from other sources, that a more satisfactory species of secondary evidence exists? I think it does not; and I have always understood the rule to be, that when a party is entitled to give secondary evidence at all, he may give any species of secondary evidence within his power. . . .

ALDERSON, B. — I agree with my Brother PARKE, that the objection must arise from the nature of the evidence itself. If you produce a copy, which shows that there was an original, or if you give parol evidence of the contents of a deed, the evidence itself discloses the existence of the deed. But reverse the case; the existence of an original does not show the existence of any copy; nor does parol evidence of the contents of a deed show the existence of anything except the deed itself. If one species of secondary evidence is to exclude another, a party tendering parol evidence of a deed must account for all the secondary evidence that has existed. He may know of nothing but the original, and the other side at the trial may defeat him by showing a copy, the existence of which he had no means of ascertaining. Fifty copies may be in existence unknown to him, and he would be bound to account for them all.

GURNEY, B., concurred.

344. HARVEY *v.* THORPE. (1856. Alabama, 28 Ala. 250, 262). GOLDTHWAITE, J. [The American weight of authority requires that] the best kind of that character of evidence which appears to be in the power of the party to produce must be offered. We confess that the American rule appears to us more reasonable than the English; and we see great propriety, if there was an examined copy of

an instrument in the possession of a party, in refusing to allow him to prove it by the uncertain memory of witnesses. A copy of a letter, taken by a copying press, would unquestionably be better evidence of the original than the recollection of its contents by a witness; and the same reasons which would require the production of the original if in the control of the party, would operate in favor of the production of the fascimile or of the examined copy. But in all these cases the strength of the proposition consists in the fact that there is secondary evidence in its nature and character better than that which the party offers, and that it is in his power to produce it.

345. STATE *v.* LYNDE

SUPREME JUDICIAL COURT OF MAINE. 1885

77 *Me.* 561; 1 *Atl.* 687

ON Exceptions. Indictment for keeping a liquor nuisance.

At the trial, George S. Winn, a clerk in the office of the collector of internal revenue, testified that he had the custody of the records and had made a true copy therefrom of certain names. This copy was admitted to show that the defendant had procured a license as retail liquor dealer, and the defendant alleged exceptions.

True P. Pierce, county attorney, for the State. . . .

D. N. Mortland and *J. E. Hanley,* for the defendant. — We think it is a well settled rule that the record itself or a copy attested by the proper officer is the only evidence admissible of such a record. 1 Greenleaf, Evidence, 483, 484; Mammatt *v.* Emerson, 27 Maine 308; State *v.* Gray, 39 Maine 353. The fact that the clerk testified that the paper was a true copy of the record did not make the paper admissible; neither was it competent for the clerk to testify, it was nothing more nor less than allowing a person to testify what the record was without producing it. The production of a paper made by himself and which he certified to be a true copy was simply allowing him to testify from a memorandum what the record contained. The collector, himself, could not be permitted to give such testimony while an authentic copy made by him might be evidence.

PETERS, C. J. The original record of payments for licenses, kept in the office of the collector of internal revenue, would have been proper evidence; and a copy of the same, certified by the collector himself, would have been. A copy of the record authenticated merely by a clerk in the collector's office, an unofficial person, standing without other proof, would be neither sufficient nor admissible. But it was in this case supported by the testimony of the clerk as a witness, who swears that he personally examined the record and made a true copy. The copy, sustained by his oath, was admissible, if the mode of proof styled "sworn copies" or "examined copies" is allowable by the practice in this State.

Examined copies are, in England, resorted to as the most usual mode

of proving records. Wharton, Evidence, § 94. The mode is explained and commended in Best's work on evidence, § 468. It seems to have prevailed in many of the States, including Pennsylvania and New York. It was at an early date adopted in some of the federal circuit courts. 4 Dall. 412 (U. S. *v.* Johns). It is not an unknown mode of proof in New England. It is spoken of as a well settled doctrine in New Hampshire. Whitehouse *v.* Bickford, 29 N. H. 471. In Spaulding *v.* Vincent, 24 Vt. 501, it is said: "The more usual method" (of proving a discharge in a foreign court of bankruptcy) "is a sworn copy." Mr. Greenleaf says (1 Evidence, § 485), "Where the proof is by copy, an examined copy, duly made and sworn to by any competent witness, is always admissible." In Atwood *v.* Winterport, 60 Maine 250, the rule is casually approved, APPLETON, C. J., there saying, whilst speaking of the mode of proving an army record, "A sworn copy is admissible or a copy certified by the proper certifying officer."

Why not admissible? The evidence is as satisfactory certainly as a certified copy. In the latter case we depend upon the honor and integrity of an official, and in the former upon the oath of a competent witness. In either case, an error or fraud is easily detectible. Probably the reason why such a mode of proof had not been much known, if known at all, in our practice, is that it is cheaper and easier to produce [certified] copies; and if a witness comes instead, it is more satisfactory to have [as here] the officer who controls the records bring them into Court. . . .

Exceptions overruled.

WALTON, DANFORTH, LIBBEY, EMERY and FOSTER, JJ., concurred.

346. STATE *v.* KNOWLES

SUPREME JUDICIAL COURT OF MAINE. 1904

98 *Me.* 429; 57 *Atl.* 588

EXCEPTIONS by defendants. Overruled. Indictments for burglary in the night time. The respondents were each indicted for breaking and entering the dwelling-house of one John Vehue in the night time. . . .

Fred D. Bartlett, one of the respondents who was a witness, was asked by the County Attorney if he had ever been convicted of crime before, which was objected to, but the Court overruled the objection and directed him to answer.

H. S. Wing, County Attorney, for State.

H. L. Whitcomb, for defendants. In all cases the best evidence is required. It is an indispensable rule of law that evidence of an inferior nature, which supposes evidence of a higher in existence, and which may be had, shall not be admitted. . . . The fact that a witness has been in the house of correction cannot be proved by cross-examination of the witness, but must be proved by the record of his conviction. . . .

Powers, J. — The respondents were severally indicted for burglary and tried together by agreement. . . .

The respondent Bartlett was a witness in his own behalf, and upon cross-examination was asked by the county attorney if he had ever been convicted of crime. Objection was made, but the presiding justice overruled the objection and directed the respondent to answer, and in his charge instructed the jury that the evidence thus elicited could only affect the credibility of the party convicted.

Whether to impeach his credibility the conviction of a witness may be proved by questioning him on cross-examination, has been variously decided by different judicial tribunals. Formerly, when conviction of an infamous crime rendered a witness incompetent, it was universally held that for that purpose the conviction could be proved by the record alone. In many of those jurisdictions, however, where the conviction of crime no longer affects the competency but simply goes to the credibility of the witness, there has been a tendency, sometimes by legislative enactment and sometimes by judicial decision, to broaden the sources of evidence and permit the conviction to be shown by cross-examination of the witness himself. In a technical sense, the record may be the best evidence and the rule of primariness may require its production. This general rule, however, is of no great value unless in its application to the subject under consideration, it is necessary for the interests of justice to avoid error, exclude falsehood, and promote the truth. It can hardly be claimed that a record of conviction is any more convincing to the mind, or less liable to error, than is the witness' own admission of the fact under oath. He may well be presumed to know what the truth is. There is very little possibility of his being mistaken as to the fact of the conviction and none as to the identity of the party convicted. He has every inducement of self-interest to protect his good name and reputation, and it is inconceivable that he will falsely accuse himself. In many cases also the prompt and proper administration of justice requires the acceptance of a broader and more liberal rule of evidence. The opposing party frequently has no knowledge that the witness is to testify until he takes the stand. It may then be too late to obtain a record of his conviction from other courts or counties, or even from distant States, without delaying the trial. Even if possible to obtain it, its production may be accompanied by great expense. Why should this burden be imposed upon a party seeking to impeach the credibility of the witness, if the witness himself is willing to admit the fact sought to be proved? If he does not admit it, it must then be proved by the record and the record is conclusive. If he does admit it, it would seem only reasonable to explore the source of evidence which is ready at hand rather than to seek for that which is far away and which it may require considerable time and money to produce, when there is apparently as little liability of error in the one source of evidence as in the other. Reason is the life of the law. "Cessante ratione legis cessat ipsa lex." . . .

We believe the result here reached to be fully sustained by authority as well as reason. In 1 Greenleaf's Evidence, 16 thed., § 461 b, it is said that "the propriety of proving the conviction by cross-examination has come in most jurisdictions to be conceded." . . .

It is claimed that the question here presented is no longer an open one in this State, but has been settled in support of the respondent's contention. A careful examination of the cases relied upon, while they may contain some dicta favorable to the respondent's contention, shows that the question here raised has not before received the full consideration of this Court. . . .

As we are free, therefore, to follow the dictates of our own reason, and the result reached is not opposed to any previous decision of this Court, but is fully sustained as we believe by other Courts of the highest authority, we hold that when the respondent Bartlett offered himself as a witness in his own behalf his previous conviction might be shown by his own cross-examination. In both cases. Exceptions overruled.

347. STATUTES. *England.* (1854, St. 17 and 18 Vict. c. 125, § 25). A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, [signed by the clerk or other custodian, shall suffice,] upon proof of the identity of the person.

California (C. C. P. 1872, § 2051). It may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony.

Illinois (Revised Statutes, 1874, c. 51, § 1). [Printed *ante*, in No. 207.]

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348. *Chief Baron* GILBERT. *Evidence* (*ante*, 1726, fol. 8). A copy of a copy is no evidence; for the rule demands the best evidence that the nature of the thing admits, and a copy of a copy cannot be the best evidence; for the farther off a thing lies from the first original truth, so much the weaker must the evidence be.

349. CAMERON *v.* PECK

SUPREME COURT OF ERRORS OF CONNECTICUT. 1871

37 *Conn.* 555

ASSUMPSIT for goods sold; brought to the Superior Court in Fairfield County, and tried to the jury, on the general issue, before GRANGER, J. Verdict for the plaintiffs, and motion for a new trial for error in the rulings and charge of the court. The case is sufficiently stated in the opinion.

Sturges, in support of the motion. *Beardsley*, contra.

FOSTER, J. There are not grounds for disturbing the verdict and granting a new trial in this case. . . .

The remaining question is as to the admissibility in evidence of a copy of a letter said to have been written by the plaintiffs to the defendant.

The plaintiffs offered to prove that on the 13th of March, 1868, a letter was written by them addressed to the defendant, in which was enclosed a statement of their account against him, which statement, it was admitted, the defendant had previously requested the plaintiffs to forward him by mail. It must be presumed that defendant was notified to produce this letter, though the motion does not state the fact. It does state however that to prove the contents of the letter, the defendant claiming that the original was not in his possession, the plaintiffs offered a writing which A. J. Cameron, one of the plaintiffs, swore was a true copy of the original letter forwarded by mail to the defendant enclosing a statement of their account. On cross-examination the witness testified that the copy offered in evidence was copied from the plaintiffs' letter book, which contained an impression of the original, made at the time it was written, by the copy-press process, and that he knew this to be an exact copy of the original letter. The defendant objected to the admission of the copy in evidence, solely on the ground that it was a copy of a copy, but the Court admitted it.

This objection is purely technical, and may be considered therefore on technical grounds.

In the argument before us the defendant's counsel assume that the machine copy was in the possession and so in the power of the plaintiffs. Such may have been the fact, but the motion is silent on the subject. For aught that appears the letter book, containing this machine copy, was not in existence. Nor does the motion disclose when the copy offered in evidence was made. It may have been made at the same time that the machine copy was made, and if so it would clearly be admissible as one of two duplicate copies. But if made afterwards, as most probably it was, we still think it was admissible.

The sole objection to its admissibility, it must be borne in mind, is, that it was *a copy of a copy*. The ground of the objection supposes the original to be lost, or out of reach of the plaintiff. If that were not so, the objection to any copy would be insuperable. Now the rule that a copy of a copy is not evidence properly applies to cases where the original is still in existence and capable of being compared with it; or where it is the copy of a copy of a record, the record being still in existence, and being by law as high evidence as the original. The reason of the rule is the same in both cases, the copy offered is two removes from the original. But it is quite a different question where the original is lost, and the record is not deemed in law as high as the original. Winn *v.* Patterson, 9 Pet. Rep. 677, per STORY, J. In Robertson *v.* Lynch, 18 Johns. Rep. 450, after notice to the defendant to produce an original letter, the Court admitted in evidence to prove its contents a copy made from the letter book of the plaintiffs, on the testimony of a clerk who testified that

he copied the original into the letter book, and that the copy offered in evidence was a true copy of the copy in the letter book; on a motion to set aside the verdict and grant a new trial, the case went off on another point, but the Court say, — "We are inclined to think that none of the other objections" (this was one) "are well founded."

The witness in this case testified that he knew the paper offered to be an exact copy of the original letter. That, we think, made it admissible; the proper foundation for the admission of secondary evidence having been previously laid. The facts elicited on the cross-examination, at the most, go no farther than to show that this was a second copy, verified as a true copy of the original. It was properly admitted.

There should be no new trial.

In this opinion the other judges concurred.

SUB-TITLE II. RULES OF PREFERENCE AS BETWEEN DIFFERENT KINDS OF WITNESSES

Topic 1. Rule Preferring the Attesting Witness

351. History.[1] The rule requiring the calling of a person who has attested a deed by his subscription comes down to us as the survival of a very early procedure. The connection by tradition is direct, though the original rule belongs to an epoch wholly alien in its ideas of proof and trial. Its history has been thus set forth:

Professor *James Bradley Thayer*, "Preliminary Treatise on Evidence" (1898, p. 502). "[The rule] has a clear and very old origin. Such persons belonged to that very ancient class of transaction or business witnesses, running far back into the old Germanic law, who were once the only sort of witnesses that could be compelled to come before a court. Their allowing themselves to be called in and set down as attesting witnesses was understood to be an assent in advance to such a compulsory summons. Proof by witnesses could not be made by those who merely happened casually to know the fact. However exact and full the knowledge of any person might be, he could not, in the old Germanic procedure, be called in court as a witness, unless he had been called at the time of the event as a preappointed witness. It was a part of such a system and in accordance with such a set of ideas that witnesses formally allowed their names to be written into deeds in large numbers. When jury trial, or rather proof by jury, as it originally was, came in, the old proof by witnesses was joined with it when the execution of the deed was denied; and the same process that summoned the twelve, summoned also these witnesses. The phrase of the precept to the sheriff was *summone duodecim* (etc. etc.) *cum aliis*. The presence of these witnesses was at first as necessary as that of the jury. Great delays and embarrassments attended such a requirement where the number of witnesses might be so great; the jury was cumbersome enough anyway. Accordingly, in 1318, the presence of the witnesses was made no longer absolutely necessary; they must still be summoned, but the case might go on without them. After another century and a half the process against the witness became no longer a necessity. It was not issued unless it were called for. After still another century, in 1562–3, process against all kinds of witnesses was allowed, requiring them to come in, not with the jury or as a part of the jury, but to testify before them in open court, and then the old procedure of summoning such witnesses with the jury seems to have died out; [but they must still be summoned as witnesses.] . . . As late as the early part of the eighteenth century it was doubtful whether a deed could be proved at all, if the attesting witnesses came in and denied it. Half a century later, Lord Mansfield, while reluctantly yielding to what he stigmatized as a captious objection that you must produce the witness, declared that 'It is a technical rule that the subscribing witness must be produced; and it cannot be dispensed with unless it appeared that his attendance could not be produced.'"

This ancient rule thus continued to be enforced long after the disappearance of the primitive system of trial and the notions of proof in which it had its origin. By the end of the 1700s rules of evidence began to be argued out, but no sound

[1] Adapted from the present Compiler's "Treatise on Evidence" (§ 1287).

reason could in truth be furnished for the strict and entire perpetuation of the rule. Under such circumstances, insufficient and inconsistent reasons were likely to be advanced.

(1) A favorite reason was that *the parties* to the document *had agreed* to make the attester their witness to prove execution. The difficulty about this reason is that no such agreement can be implied, particularly where attestation is required by law.

(2) Another reason, suggested almost as often, was that the opponent is entitled to the *benefit of cross-examining* the attesting-witness as to the circumstances of execution; or, put in another way, that the attester may not only know more than some other person observing the execution, but may be able to speak as to fraud, duress, or other matters of defence. The objections to this reason are numerous. First, it is inconsistent with the rule itself; for the rule applies even where fraud, duress, and time are not in issue, and even where the maker himself is competent as a witness. Again, the attester is in practice not usually a person who knows anything about the circumstances preceding the document's execution, or knows more than any other person who by being present would be a qualified witness. Finally, if the witness does possess special knowledge about some affirmative issue, the opponent is the proper person to call the witness, if he desires him. This reason for the rule, then, is no more capable of defence than the first.

(3) Has the rule, then, no justification in policy? It certainly has none, in its original broad form. But in most jurisdictions it has by statute been limited to documents required by law to be attested; and in this shape it seems to be entirely justifiable. In the first place, the attestation is in such cases required by law as a special precaution against forgery; thus the attestation itself must in any case be proved as an element in the validity of the document, and there seems to be no special hardship in obtaining the witness rather than in obtaining evidence of his signature. In the next place, such documents are, in most jurisdictions, wills of deceased persons and deeds of illiterate persons; for such documents, the maker himself being either deceased or not acquainted with writings, the attester's testimony is almost inevitably the most desirable and most trustworthy source of information as to the fact of execution; moreover, it is in such cases that the defences of fraud or undue influence are most likely to be made, and here also the attester's testimony is likely to be of use and ought to be obtained if possible. Still further, in these and all other cases where attestation is legally required, the situation is one in which by hypothesis the risk of a false document is serious.

At common law the rule was applied to *all kinds of documents* whatever, when purporting to bear an attestation, whether or not the document was sealed, whether or not it was in the nature of a specialty, and whether or not the attestation was required by law as an element of the document's validity. But by the beginning of the 1800s the unnecessary hardship and the mere technicality of the rule in this broadness of scope began to be recognized. It may be supposed, too, that the then increasing resort to handwriting-testimony made it easier to rely less upon attesting witnesses. Accordingly, in 1854, England restricted the rule thereafter to documents required by law to be attested, and this statute has been adopted in Canada also.

In the United States, the common-law doctrine was recognized to have the same scope as in England; except that by a few Courts it was confined to documents under seal. In most jurisdictions, however, a statutory restriction has

been enacted similar to that of England. Under such restrictions, the rule comes into application chiefly for wills and for illiterates' deeds, and, in England, for powers of appointment. Moreover, even where the common-law rule obtains in strictness, the principle which dispenses with it for proof by copies of registered instruments relieves nowadays in most instances from its harshness.

352. STATUTES. *England.* (1854, St. 17 & 18 Vict. c. 125, § 26). It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission, or otherwise, as if there had been no attesting witness thereto.

Illinois. (Revised Statutes 1874, c. 51, § 51). [Whenever any instrument] not required by law to be attested by a subscribing witness [is offered in a civil cause,] and the same shall appear to have been so attested, and it shall become necessary to prove the execution of any such deed or other writing otherwise than as now provided by law, it shall not be necessary to prove the execution of the same by a subscribing witness to the exclusion of other evidence, but the execution of such instrument may be proved by secondary evidence without producing or accounting for the absence of the subscribing witness or witnesses.

Massachusetts. (St. 1897, c. 386, Revised Laws 1902, c. 175, § 70). The signature to an attested instrument or writing, except a will, may be proved in the same manner as if it were not attested.

New York. (Laws 1883, c. 195, § 1). Except in the case of written instruments to the validity of which a subscribing witness, or subscribing witnesses, is, or are necessary, whenever, upon the trial of any action, civil or criminal, or upon the hearing of any judicial proceeding, a written instrument is offered in evidence, to which there is a subscribing witness, it shall not be necessary to call such subscribing witness, but such instrument may be proved in the same manner as it might be proved if there was no subscribing witness thereto.

353. BOOTLE *v.* BLUNDELL

CHANCERY. 1815

19 *Ves. Jr.* 494

THE bill was filed by devisees; praying, that the Will of Henry Blundell may be established against the heir at law.

John Blanchard by his depositions proved the will, dated the 24th of July, 1809, in the regular form; and that the testator at the time of signing and publishing the said Will was of sound and disposing mind, memory, and understanding, as the examinant verily believes. The same witness proved a Codicil, dated the 25th of May, 1810, also in the regular form. . . . When the witnesses were called in, Stonor said aloud to the testator, that the witnesses to the Codicil were come; but the examinant cannot recollect whether he made any answer, either by word, sign, or otherwise.

Henry Holland proved the execution of the Will; and stated, that at the time of signing and publishing the Will he did not form any opinion or belief whether the testator was or was not of sound or disposing mind,

&c., and cannot now say, whether he was or was not so at the time. The testator's butler requested the examinant to go to the testator's house, where he met Blanchard and James Goore in the servant's hall. He imagined they were there to witness Mr. Blundell's Will; as the same persons had done so six or seven times before. They found with the testator Stonor, and a servant woman, named Gibbing. Stonor said to him with a loud voice, "The witnesses to your Will are come, Sir;" and the testator seemed to understand what was said, and said something to the servant, who immediately left the room. The Will was then actually sealed; and the testator then signed his name; and taking a seal, then lying upon the table, in his hand, put it upon the wax; and Stonor said, "Now publish and declare this to be your last Will;" and the testator then uttered those words, or to the like effect. The examinant and the other witnesses then subscribed in the presence of the testator and of Stonor. . . .

This witness also proved the Codicil; but stated, that he had great doubts, whether at the time of signing the Codicil the testator was of sound mind, &c., as it is hard to know what is within a man, except he saw and knew more of a man than he did of Mr. Blundell. He appeared to be dozing. Stonor put his hand on his shoulder, and said, the witnesses were come to witness his will, and Blundell not appearing to understand repeated it; to which he answered by his manner, and the noise, which issued from his mouth, as if he understood and assented to it. The Codicil was then placed before him, and a pen given to him, by Stonor. Blundell began to write his name; but Stonor seeing the pen did not mark, took it up, and dipped it in the ink, and returned it to Blundell; who then signed his name. . . . When they went down to the servant's hall, the examinant declared to the other witnesses, and the butler, that they were damned rogues for what they had just been doing, for there was something damnably wrong, he was sure; at which time there was a general laugh; but Blanchard said, "We do not know what is in a man." After the execution of the Codicil the examinant and the other witnesses signed a paper, written by Stonor, expressing that the testator had acknowledged, that he had heard the Codicil read. . . .

James Goore, the third attesting witness, proved the execution of the Will; and stated, that he cannot tell, whether at the time Mr. Blundell signed he was of sound mind, &c. "I neither believe, nor I don't disbelieve it; for I cannot say it." He also proved the Codicil; stating, that it is more than he can say, whether at the time of signing it Mr. Blundell was of sound and disposing mind, &c. "He was so deaf and blind, that it is more than the examinant can say;" and he never saw him after it was signed.

Mr. Stonor stated, that on the 21st of July he read over and fully explained the draft of the Will to Mr. Blundell; who expressed his satisfaction. . . .

An issue, Devisavit vel non, was directed. At the trial, at the Assizes

for the county of Lancaster, the counsel for the plaintiffs examined Blanchard, to prove the Will and Codicil; declining to call the other two subscribing witnesses; and after the examination of the surgeon and physician, whose evidence was strong as to the general capacity, with temporary stupor, the consequence of an attack of jaundice, the counsel for the defendant, who was present, with his consent gave up the cause.

Sir *Samuel Romilly* and Mr. *Roupell*, for the defendant, moved for a new trial; complaining of the manner in which this issue, directed for the satisfaction of the Court, was tried, without examining all the attesting witnesses.

Mr. *Hart*, Mr. *Bell*, and Mr. *Horne*, for the plaintiffs, contended, that the rule requiring the examination of all the witnesses was confined to the Court of Equity; and could not be applied to a trial at Law either by ejectment or in an issue.

The Lord Chancellor (Eldon). — The rule of this court, requiring that to establish a Will of real estate all the three witnesses shall be examined, is not by any means, as it has been represented, a merely technical rule. . . . This proceeding is in Equity, to establish a Will, aiming to say to the heir, that, if the will shall be once established against him, he can never claim the devised property again, . . . therefore, before an heir shall be deprived of that opportunity which the Law gives him, . . . the Court, as it will know the whole truth, expects that all the witnesses shall be examined on the one side or the other. . . .

February 13th. The Lord Chancellor (Eldon).— From the account I have seen of what passed at the trial, I perceive that one of the counsel, referring to a dictum (2 Bro. C. C. 503) of Lord Thurlow, in the case of Powel *v.* Cleaver, seems to consider the rule of this Court, as to proving a will, doubtful. I now, therefore, state the general rule, that *all* the witnesses must be examined. That rule is laid down by Lord Hardwicke in a MS. note by Mr. Joddrell; where, two only of the witnesses having been examined, it was contended on a Bill of Review, that this was error apparent on the Record; but as the third witness was dead, Lord Hardwicke held that to be a necessary exception out of the rule. So in another case in 1741, Billing *v.* Brooksbank, as the witness, being out of the kingdom, could not be examined, Lord Hardwicke considered that another case of exception out of the general rule; which, I repeat, is, that *all* the witnesses must be examined; that general rule admitting necessary exceptions, and perhaps not applying where the will is not wholly, but only partially, in question. . . .

No one of these three witnesses denies his attestation. Upon the point of competency Blanchard says, he thinks the devisor was of competent mind at the execution of the will, doubting a little as to the codicil. Holland says, he gave a sign, and seemed to assent; and Goore will not say, that he was not competent. If they had all denied their attestation, but it could be proved by circumstances that they unjustly denied it, the will might be proved to be a good will by other circumstances.

The whole of the evidence then must be taken together; and upon the neutral effect of Holland's and Goore's testimony, putting this question to a jury, was he upon the 24th of July, and in that hour (for I should put it as close as that), when he executed his will, competent to understand that, which he did undeniably understand on the 21st, and direct to be prepared for his execution, attending to the rules of evidence, and the legal weight to be given to testimony, both of the attesting witnesses (differing, as I do, in some shades from what I have heard upon that), I should have felt myself bound to say, this was a good will. . . .

Therefore, though the rule is clear, that a will cannot be established, unless all the three witnesses are examined, with the exception of cases of necessity, such as I have mentioned, . . . yet, guarding this case as a precedent, I will not grant a new trial, the heir having judged for himself at the time of this trial; and I so determine with the less reluctance, thinking it impossible to shake this will, and in all probability equally impossible to shake the codicil.

354. HOLMES *v.* HOLLOMAN

SUPREME COURT OF MISSOURI. 1849.

12 *Mo.* 536

APPEAL from Ste. Genevieve Circuit Court.

This was a proceeding in the Circuit Court of Ste. Genevieve county, to establish the will of Elizabeth S. Holmes, probate of which had been denied by the County Court of that county. Richard M. Holmes and James W. Holmes were the attesting witnesses, and they were heirs at law to the testatrix. It appeared that by the will of Elizabeth Holmes, all her property was left to her nephew, Allen Augustus Holloman, a minor, by whose prochein ami this proceeding was instituted. The proceedings of the Probate Court, in relation to the will, which were read in the Circuit Court without objection, showed that the execution of the will was sworn to by both of the attesting witnesses, but one of these testified that the testatrix was of unsound mind.

Upon the trial of the issue, devisavit vel non, in the Circuit Court, the two subscribing witnesses to the will, who had been heirs at law cited to appear, refused to testify. The Court thereupon admitted other witnesses, who established the handwriting of the subscribing witnesses, and the handwriting and signature of the testatrix, as well as the facts that the will was signed and attested by the testatrix, and the witnesses in the presence of each other, and that she was of sound mind. These facts were found by the jury upon instructions from the Court.

Frissell, for appellant. . . . A will cannot be established by other evidence that that of the subscribing witnesses, unless they are dead or out of the jurisdiction of the court. 1 Phillipps' Evidence (Hill &

Cowen) 496. In the probate of a will made in the Circuit Court, the subscribing witnesses must be examined unless they are dead, or cannot be found. Mo. Stat. 1083, § 34.

Fitzgerald, for appellee. . . . If witnesses refuse to testify, the attestation may be proved by other testimony. 1 Starkie's Evidence, 324, and notes. 3rd. If witnesses of a will be interested, on proof of that fact, other testimony may be offered to establish the will. . . .

NAPTON, J. (after stating the facts as above). The only points relied on in this cause are in relation to the admissibility of the witnesses who were permitted to prove the execution of the will. . . . Our statute requires a will to be attested by two or more competent witnesses, but if the witnesses are competent, at the time of the execution of the will, a subsequent incompetency will not affect the validity or formality of its execution. If this was so, the purposes of a testator might be defeated by events which no precaution on his part could anticipate or prevent. Hence, it is held, that where a witness to a will is competent, when he attests, a subsequent commission of a crime or succession to an estate under the devise, will not invalidate the execution, but in such cases the handwriting of the witnesses may be proved.

Our statute has provided for several cases of this kind. Thus, where the witnesses, or either of them, are dead, insane, or their residences unknown, secondary evidence is expressly authorized. These instances are not, I apprehend, to be construed upon the maxim of "expressio unius exclusio alterius," but are merely a codification of what was already the common law, and a recognition of the principle upon which secondary evidence may be admitted. This principle will apply as well to other cases of incompetency arising subsequent to the execution of the will as to the cases put.

The witnesses to the will were clearly competent at the time of subscribing. They were heirs at law, and not legatees or devisees under the will. Their interest was against the establishment of the will, and under such circumstances this Court has recognized their competency in several cases. They relied upon their exemption as parties to the record, and relying upon the privileges incident to such a position, refused to testify. If such a refusal should have the effect now claimed, and prevent the introduction of other testimony to establish the will, the intentions of the testator must be very often liable to be defeated, and a will valid at the date of its execution, be rendered inoperative by subsequent circumstances not likely to be foreseen.

Judgment affirmed.

355. McVICKER *v.* CONKLE

SUPREME COURT OF GEORGIA. 1895

96 *Ga.* 584; 24 *S. E.* 23

COMPLAINT for land. Before Judge HUNT. Henry Superior Court. April Term, 1894.

The plaintiff in error, A. V. McVicker, in his representative capacity as administrator upon the estate of Kellett Babb, brought an action of ejectment against the defendant for the premises involved in the pending controversy. Both parties claimed under Kellett Babb; the former by virtue of his possession as administrator, and the latter, being the grandson of Kellett Babb, claimed title under and by virtue of a deed alleged to have been executed by Kellett Babb on the 11th day of August, 1870, to his daughter Rebecca E. Babb, and a deed from Rebecca E. Babb to himself, dated November 8th, 1890. The deed from Kellett Babb to Rebecca E. Babb purports to have been signed by the maker in the presence of two witnesses, Miles H. Campbell and Colville Babb, a son of Kellett Babb the maker. Upon the trial, it appeared that both the maker and the subscribing witnesses were dead, and it was proven that the names subscribed to the deed as attesting witnesses were in the handwriting, respectively, of the two persons who purported to be subscribing witnesses. No witness testified to the actual signing of the deed by the maker, and no evidence was offered showing the signature of the alleged maker to have been in the handwriting of Kellett Babb. To the introduction of this deed the plaintiff objected, upon the ground that no such evidence of its execution had been submitted as would authorize its admission in evidence, which objection was overruled, and this is one of the principal grounds urged in support of the plaintiff's motion for a new trial which was subsequently made.

E. J. Reagan, for plaintiff. *G. W. Bryan* and *W. T. Dicken*, for defendant.

ATKINSON, Justice (after stating the facts as above). The ruling has been long established, that an instrument purporting to be attested by a subscribing witness must be proved by the testimony of that witness, if he be accessible; the exceptions to the general rule being in favor of ancient documents which, upon the presumption of authenticity resulting from old age and attendant circumstances of verity, are said to prove themselves; official bonds required by law to be approved or attested by a particular officer; those papers which are only incidentally or collaterally material to the case. Our Code provides, that if the witness is not produced, or, being produced, cannot recollect the transaction, the Court may hear any other evidence to prove its execution. See § 3838. If there be several attesting witnesses, the absence of all must be accounted for before secondary evidence will be received; but when

the absence of all the attesting witnesses is accounted for, it will be deemed sufficient, in order to establish the execution of the writing, to prove the handwriting of one of them. In such a case, proof of the subscribing witness' handwriting is evidence of the execution of the instrument by the party therein named whose signature the instrument purports to bear. It will not be necessary to prove the handwriting of the party. Phillipps on Evidence, vol. 2, p. 214. . . .

In the case of Stebbins *v.* Duncan, 108 U. S. 44, the Court, in stating the rule, employs the following language: "As the witnesses to the deed were shown to be dead, the method pointed out by law to establish the execution of the deed was by proof of the handwriting of the witnesses to the deed," citing Clark *v.* Courtney, 5 Peters 319; Cooke *v.* Woodrow, 5 Cranch, 13. . . . In the case of Watts *v.* Kilburn, 7 Ga. 358, Judge LUMPKIN, speaking for the Court, states the rule to be: "But if the witness be dead, or blind, or insane, or infamous, or interested since the execution of the paper, or beyond the process or jurisdiction of the court, or not to be found after diligent search and inquiry, the course is to prove his handwriting." Upon the general features of the rule, he makes the following observation: "Distinguished judges have thought that proof of the handwriting of the party executing the instrument is better evidence of the execution than proof of the handwriting of the attesting witness;" and for this observation, he cites 3 Binn. 192; 2 Johns. 451; 11 Mass. 309. . . .

While, as a rule of evidence, the one announced is too firmly established in the jurisprudence of this State to be called in question or disregarded by the judiciary, the writer, in the discussion which follows, speaking for himself alone, is of the opinion that it may well be doubted whether its literal application is likely to produce the most satisfactory results in the course of judicial investigation. . . . Our investigations have led us to inquire what reasons were assigned by the first judges who undertook to declare the rule in question; for investigation will reveal that none of those rules which enter into and constitute the great body of the law, and which, among the vulgar and uninformed, are sometimes erroneously termed technicalities of the law, were in the first instance either unwise or arbitrary, but were always based upon correct principles of reasoning and made necessary to meet conditions existing in society, and were really designed to be, and were at the time of their adoption, in furtherance of substantial justice. But times change, and men and conditions change with them, and hence that other maxim of the law, that when the reason of the law ceases, the law ceases with it. . . .

In the earlier history of England, when the system of transferring estates by written evidence of title was first invented, but few, even of the nobility, were familiar with the art of writing; and it seems that about the time of the Norman Conquest, and before, seals were employed as representing and standing in lieu of the actual signature to an instrument by the maker. . . . To the end that the fact of execution might be

established, it was requisite that this signing and sealing should be in the presence of witnesses, who, in that day and time, if the deed were called in question, were required to sit upon the jury to assist in arriving at what was the true contract between the parties. . . . From this circumstance, with the advance of knowledge, and the improvements in the method of administering the law, the rule was evolved which required the party affirming a deed to prove its execution by those who were called to witness the same, and not otherwise. . . . Inasmuch as few of them were themselves able to write, they were not required to sign in person their own names upon the deed; but in earlier times they were indorsed there by the clerk or scrivener who drafted the deed, he himself acting in the capacity of a species of superior subscribing witness; and inasmuch as usually the grantor himself was incapable of signing his name, in case of the death or inaccessibility of all of these witnesses especially selected to attest the execution of the instrument, the next highest and best evidence would be proof of the handwriting of the subscribing witnesses. These were the conditions at the time we get the first glimpse of the existence of the rule which authorizes the proof of the execution of an instrument by the maker, by evidence of the handwriting of the subscribing witnesses; and they afford a good reason for the adoption of the rule in question. It arose from the necessity of the case. The dense and almost universal ignorance of letters which prevailed in England, made the adoption of any other impracticable. . . .

If this be the correct reason for the existence of the rule, and we know of no other or better that has been assigned, there is little reason why in this day and generation it should be continued. In the onward march of civilization and of letters, man has advanced to a point where there are relatively but few who cannot now subscribe their names. . . . Therefore, whenever an issue is made upon the execution of a deed, the primary inquiry is, Was it signed by the alleged maker? . . . The real question then upon the execution of a deed being as to the actual signing, the primary inquiry should be as to the fact. . . . Let us assume that the evidence is doubtful as to the signatures of the subscribing witnesses, but direct and positive as to the actual execution of the instrument by the maker; who can doubt but that, in a court of justice seeking for the purest and most direct sources of information, such a deed ought to be established? The real issue being, in such cases, whether the maker in fact signed his name to the paper, the chosen witnesses should first be called to prove that fact; but if they be not in existence or be inaccessible, then the next best evidence is that which establishes most directly the point at issue, and that evidence would be either the testimony of some witness not called upon to attest the deed, but who saw the *maker* sign it, or evidence that the signature attached to the deed was in the actual handwriting of the *maker*. And yet, according to the rule under discussion, Courts are required to reject such direct testimony,

and submit to the jury the question as to whether or not the execution is satisfactorily proven by the inference resulting from proof of the handwriting of the alleged *subscribing witnesses*. . . .

As an abstract principle of law, the rule in question has been always of force in Georgia; but under §§ 3838 and 3839 of the Code, which provide, in speaking of subscribing witnesses, that "if the witness is not produced, or, being produced, cannot recollect the transaction, the Court may hear any other evidence to prove its execution"; "proof of handwriting may be resorted to in the absence of direct evidence of execution," the circuit judges have been accustomed in many instances to relax somewhat of its severity, and, assuming that under the sections quoted, a certain discretion was conferred upon them, in the classification of secondary evidence, have required that the evidence be directed to proof of the handwriting of the maker of the instrument, rather than to the handwriting of the subscribing witnesses. The writer is of the opinion, that since no better reason can be assigned for the existence of this rule than its antiquity, and since under conditions at present existing the reason of the rule has long since ceased, the Legislature might well abrogate it, and substitute therefor another, less arbitrary, less technical, and better adjusted to our judicial system. . . . Judgment reversed.

356. GILLIS *v.* GILLIS

SUPREME COURT OF GEORGIA. 1895

96 *Ga.* 1; 23 *S. E.* 107

APPEAL. Before Judge GAMBLE, Emanuel Superior Court. April Term, 1894.

Williams & Smith, Hines & Hale and *Felder & Davis*, for plaintiffs in error.

Cain & Polhill, Evans & Evans, Alfred Herrington, F. H. Saffold, H. R. Daniel and *H. D. D. Twiggs*, contra.

LUMPKIN, Justice. — The nominated executors of the alleged last will of Sarah Gillis propounded the same for probate, and a caveat was filed by some of her heirs at law. On the trial in the Superior Court, to which court the case had been carried by appeal, there was a verdict for the propounders; and the caveators bring up for review a judgment overruling their motion for a new trial. . . .

The paper purporting to be the will was executed by the testatrix on the 12th day of March, 1873. It bears the names of four witnesses, but it was conceded that the last of them signed his name some time after the execution of the paper by the testatrix and its attestation by the other witnesses, and it does not appear that he signed in her presence. The appearance, therefore, of the name of this witness upon the paper counts for nothing in determining the question of the legality of its execution.

Accordingly, the fact that he signed will be ignored altogether, and it will be understood that in speaking of the subscribing witnesses to the paper, reference to the other three only is intended. One of these signed by making her mark. Another died before the testatrix. The usual and formal attestation clause was used. The paper was offered for probate soon after the death of the testatrix, and about twenty years after its execution and attestation. At the time of probate, the two subscribing witnesses then in life were produced. The one who wrote his own name proved the due execution of the paper as a will. The signature of the deceased witness was shown to be in his handwriting. The illiterate witness testified that she had no recollection of attesting the will, and could not swear to the making of her mark. At the same time, however, she did not expressly swear that she did not attest by her mark the paper propounded. . . .

Error was assigned upon the admission in evidence of the paper propounded, over the objection that there was no sufficient evidence from the subscribing witnesses as to its execution; and also upon admitting the testimony of Mary Gillis as to the execution of the paper by the testatrix and its attestation by the subscribing witnesses, over the objection that she, not being herself a subscribing witness, was incompetent to testify as to these matters.

It is well settled that the subscribing witnesses to a will must, if practicable, be called and examined; but the fate of a will does not depend entirely upon their testimony. Upon the trial of an application to prove a will in solemn form, they are, all of them, unless accounted for, indispensable necessary witnesses; but the testimony, even as to the factum of execution, is not confined to them. The fact to be established is the proper execution of the will. If that is proved by competent testimony, it is sufficient, no matter from what quarter the testimony comes, providing the attesting witnesses are among those who bear testimony, or their absence is explained. The inquiry, as in other cases, is whether, taking all the testimony together, the fact is duly established. It is not required that any one or more of the essential facts should be proved by all, or any number, of the attesting witnesses. The right is simply to have the attesting witnesses examined, no matter what their testimony may be. The law does not allow proof of the valid execution and attestation of a will to be defeated at the time of probate by the failure of the memory on the part of any of the subscribing witnesses. Deupree *v.* Deupree, 45 Ga. 442–443; . . . Lawyer *v.* Smith, 8 Mich. 411, 77 Am. Dec. 460; Brown *v.* Clark, 77 N. Y. 369; . . . Or, by their even denying their signatures to the will altogether, when such denial is overcome by other competent evidence. Pearson *v.* Wightman, 1 Mill 336, 12 Am. Dec. 636; Matter of Higgins, 94 N. Y. 554. . . . Gardner *v.* Granniss, 57 Ga. 555. In Deupree *v.* Deupree, supra, decided in the year 1872, McCay, J., delivering the opinion of the court, said: . . .

"How many wills do not come up for probate until many years after the execution of them! Sometimes, the witnesses can only recognize their own handwriting; sometimes they only remember the fact that the testator signed, and perhaps only that they signed. Who was present, and all other details, have passed from memory. To say that under such circumstances the will is not to be probated, would be a death-blow to wills." . . .

There is nothing in § 2424 of the Code, upon the probate of wills in solemn form, which, rightly construed, conflicts with the law as declared in this opinion. This section does not require that the subscribing witnesses "in existence and within the jurisdiction of the court" shall *each* swear, at the time of probate, to their own subscriptions and to the signature and testamentary capacity of the testator, in order to make a will valid; for thus construing the section would lead to obvious and glaring wrongs and absurdities. It simply means that they must be *produced* for the purpose of testifying to these facts, if competent. This section of the code must be taken, not literally but in accordance with common sense and the usual rules of construction. . . . The main reason of the rule for calling all witnesses in a proceeding for probate in solemn form is, to give the other party an opportunity of cross-examining them; and while the law requires a will to be attested by three witnesses, it does not necessarily mean that all three must concur in their testimony to prove it on probate. To do this would make the validity of the will depend upon the memory and good faith of the witnesses, and not upon that reasonable proof the law demands in other cases. . . .

§ 2424 does not, when considered in connection with the well-established law on the subject of the attestation and proof of wills, as already shown, prevent the probate of a will on account of defect of memory, or even perjury, of a subscribing witness, when the deficiency is supplied by other evidence; because the general rules of evidence, and the force and effect of legal evidence, were not intended to be disregarded in probating wills even in solemn form. . . . Judgment affirmed.

357. MORE *v.* MORE

SUPREME COURT OF ILLINOIS. 1904

211 *Ill.* 268; 71 *N. E.* 988

WRIT of Error to the Circuit Court of DeWitt county; the Hon. W. G. COCHRAN, Judge, presiding.

On the 15th day of October, 1898, the plaintiff in error produced in the County Court of DeWitt county an instrument in writing purporting to be the last will and testament of one George More, together with her certificate and affidavit, duly subscribed and sworn to before the clerk of said county court, showing that the said George More departed this

life on the 27th day of September, 1898. So much of the alleged will as is necessary to be here shown is as follows:

"In the name of God, amen. I, George More, of the county of De Witt, in the State of Illinois, of the age of about fifty-four years, being of sound mind and memory and understanding but considering the uncertainty of this transitory life, do make and publish this my last will and testament in manner and form following, to-wit: . . . (Here follow devises and bequests contained in four clauses not important to be recited.)

"And lastly, I nominate, constitute and appoint my said wife, Matilda More, to be the executrix of this my last will, hereby revoking all other wills by me made and declaring this and no other to be my last will and testament; and further, that my wife have the right to letters of executrix without giving bond.

"In witness whereof I have hereunto set my hand and seal this 17th day of June, A.D. 1881.

George More. (*L. S.*)

"Witnesses: Wm. Fuller, of Clinton, Illinois.
Jas. A. Wilson, Clinton, Illinois."

It was proven that William Fuller and James A. Wilson, whose names appear as witnesses to said will, had each departed this life prior to the death of the said George More, deceased.

Such proceedings were had in said County Court as resulted in an order admitting the instrument to probate as the last will and testament of the said George More, deceased. From this order an appeal was prosecuted to the Circuit Court of DeWitt county. . . . No testimony was offered except that produced in behalf of the plaintiff in error. It appeared from the proof that the will bore the signature of the said George More, deceased, as the maker thereof, and also the genuine signatures of the said William Fuller and James A. Wilson as witnesses thereto; that the body of the will was in the handwriting of the witness William Fuller, and that the word "witnesses" was also in the handwriting of said Fuller; that both of said witnesses were dead and had died prior to the death of the testator, the maker of the will; that said Fuller was a lawyer and had been for many years engaged in the practice of his profession; that James A. Wilson was a well known citizen of DeWitt county and had served for several terms as county treasurer of the county.

The contention of the defendants in error is that there was no proof whatever that the testator was of sound mind and memory when he signed the will, or that the witnesses signed in the presence of each other, or in the presence of the testator, or at his request, as they contend is required by the statute to be proven. . . .

It was adjudged that the evidence produced was insufficient to authorize the probate of the will, and an order was entered refusing probate thereof. This is a writ of error sued out of this court to bring the order of the circuit court into review. . . .

John Fuller and *George W. Herrick*, for plaintiff in error. *O. E. Harris*, and *E. B. Mitchell*, for defendants in error.

Mr. Justice Boggs (after stating the facts above) delivered the opinion of the Court:

Section 2 of chapter 148, entitled "Wills," (Hurd's Stat. 1903, p. 1905), declares what shall be required to be done and proven in order to entitle a will to be probated in cases where the attesting witnesses are living. Section 6 of the same chapter provides for the proof necessary to be made where any one or more of the attesting witnesses shall have died. . . . We think the proof submitted on the hearing in the Circuit Court met the requirements of the provisions of said section 6, and that the trial Court erred in refusing to admit the will to probate.

In Hobart *v.* Hobart, 154 Ill. 610, we said (p. 614):

"The death of the witness merely changes the form of the proof. It permits secondary evidence to be introduced of the due attestation and execution of the will. The attestation is then to be shown, as it would be in case of deeds, by proof of the handwriting of the witness. As to him it is to be presumed that he duly attested the will in the presence of the testator."

Out of the evidence in this case the presumption arose that the witnesses duly attested the will in the presence of the testator. If a perfect and formal attestation clause, reciting that all statutory requirements had been complied with, had been signed by the attesting witnesses, the presumption of regularity and compliance with statutory requirements would have arisen and warranted the admission of the will to probate. (1 Underhill on Wills, 275, 276). . . . It is not indispensable, however, that the witnesses shall sign a formal clause of attestation. (Robinson *v.* Brewster, 140 Ill. 649.) The attestation clause may consist of a single word, as "witness," "attest" or "test," or there may be no words at all. (Robinson *v.* Brewster, supra; 1 Redfield on Wills, 132.) In case of the death of the witnesses to a will which on the face thereof appears to have been regularly executed and is shown to bear the genuine signatures of the testator and the witnesses, compliance with the statutory requirement is to be presumed, in the absence of express recitals to that effect. 1 Jarman on Wills, pp. 219, 220.

The act of attestation of a will is not merely to witness the mere fact that the testator signed the will or acknowdged that he had signed the same, but the attention of the witnesses is called, by the act of attestation, to the mental condition of the testator and as to whether he is possessed of a sound, disposing mind, and, therefore, if the will appears on the face thereof to have been duly executed and it is proven that the signatures thereto are the genuine writing of the maker and the witnesses, if the attesting witnesses be dead an inference arises, from the mere fact of attestation, that the witnesses believed that the testator possessed testamentary capacity at the time of the execution of the will, though there be no formal recital to the effect. . . . This inference fairly arose

in the case at bar, and was supplemented by the testimony which disclosed that the deceased, at the time of making the will, transacted intelligently, ordinary business affairs of life. It was therefore established prima facie by the proof, and the inferences and presumptions legally arising therefrom, that said George More signed the said will in the presence of the said witnesses; that they signed it as witnesses in the presence of the testator and in the presence of each other as attesting witnesses; that they believed him to be of sound and disposing mind and that he in fact had sufficient mental capacity to execute a will.

The will should have been admitted to probate. The order of the Circuit Court will therefore be reversed and the cause will be remanded to that Court, with directions to enter an order admitting the instrument to probate as the last will and testament of the said George More.

Reversed and remanded, with directions.

358. STATUTES. *California.* (C. C. P. 1872, § 1308.) [In uncontested wills,] the testimony of one of the subscribing witnesses [suffices]. Ib. § 1315. [In contested wills] all the subscribing witnesses who are present in the county and who are of sound mind must be produced and examined, and the death, absence, or insanity of any of them must be satisfactorily shown to the Court; if none of the subscribing witnesses reside in the county at the time appointed for proving the will, the Court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and, as evidence of such execution it may admit proof of the handwriting of the testator and of the subscribing witnesses or any of them.

Illinois. (Revised Statutes 1874, c. 148. § 6.) [Where] any one or more of the witnesses of any will . . . shall die, be insane, or remove to parts unknown to the parties concerned, so that his or her testimony cannot be procured, . . . it shall be lawful . . . to admit proof of the handwriting of any such deceased, insane, or absent witness, as aforesaid, and such other secondary evidence as is admissible in courts of justice, to establish written contracts generally in similar cases.

Wisconsin. (Statutes, 1898, § 3788.) If none of the subscribing witnesses shall reside in this State . . . or if any one or more of them shall have gone to parts unknown and the Court shall be satisfied that such witness, after due diligence used, cannot be found, [then the Court may admit other testimony to prove sanity] and the execution of the will, and may admit proof of his handwriting and of the handwriting of the subscribing witnesses.

Topic 2. Rules of Preference for Sundry Kinds of Witnesses

359. UNITED STATES *v.* GIBERT

UNITED STATES CIRCUIT COURT. 1834

2 *Sumner* 19

INDICTMENT against the officers and crew of the ship Panda, for piracy committed on the brig Mexican. The brig Mexican belonged to

Salem, and was owned by Joseph Peabody. It sailed from Salem for Rio Janerio on the 29th August, 1832, under the command of Captain Butman; having on board a valuable cargo, and twenty thousand dollars in specie. On the 20th September, in 33° N. lat. and 34° 30′ W. Lon., she fell in with a suspicious-looking vessel, from which she made many efforts, but unsuccessfully, to escape. . . . Informaton of what had taken place was immediately disseminated throughout this and other countries, and reached the coast of Africa, where Captain Trotter, commanding the British brig of war Curlew, was then cruising. Circumstances led that gentleman to believe that the schooner Panda, then lying in the river Nazareth, was the vessel which had captured the Mexican. He immediately, therefore, proceeded to take measures against her. These measures resulted in the capture of the Panda, but the escape, for the time, of her crew. No ship's papers or log-book were found on board of her, although diligently sought for; and, owing to some accident, she shortly afterwards blew up, thereby killing several of the Curlew's men. Captain Trotter then sailed to other ports, still making efforts to discover the crew of the Panda, and at last succeeded in arresting the prisoners, and carried them into Portsmouth, England. By the British government, they were sent to this country for trial, the offence of which they were charged having been committed on board a vessel of the United States.

After verdict and before judgment, the following motion for a new trial, and in arrest of judgment, was filed by the counsel for the prisoners: . . . 12. Because the said Court declined to instruct the jury that the failure of the government to produce, in evidence of the attempt by said Ruiz to blow up the said Panda, the only witness who saw the match, as applied for that purpose, and who is testified to have removed it, affords a legal presumption against the truth of the alleged attempt by said Ruiz to destroy the said Panda. . . .

Story, J. — The next and last specification under this head is that the Court declined to instruct the jury that the failure of the government to produce the witness, who (it was testified) saw the match applied for the purpose of blowing up the Panda, and removed it, afforded a legal presumption against the truth of the alleged attempt by the prisoner Ruiz to destroy the Panda. . . . The argument now is, that although Mr. Quentin, who was upon the stand, stated that he was on board at the same time with the witness, that he saw the smoke coming from the cabin, and the absent witness go down, and bring up the match, and many other circumstances to establish an intention to set the Panda on fire and blow her up; yet that his testimony was not the best evidence on this point, and ought to be rejected. . . .

It appears to me that the whole basis of the argument is founded upon a mistake of the meaning of the rule of law as to the production of the best evidence. The rule is not applied to evidence of the same nature and degree; but it is applied to reject secondary and inferior evidence

in proof of a fact which leaves evidence of a higher and superior nature behind in the possession or power of the party. Thus, if the party offers a copy of a paper in evidence, when he has the original in his possession, the copy will be rejected, for the original is evidence of a higher nature. . . . But the rule does not apply to several eye-witnesses testifying to the same facts or parts of the same facts, for the testimony is all in the same degree, and where there are several witnesses to the same facts, they may be proved by one only. All need not be produced. If they are not produced, the evidence may be less satisfactory or less conclusive, but still it is not incompetent.

And to apply the principle to the present objection, Mr. Quentin was a competent witness to prove all the facts, which he knew, which went to establish an intention to blow up the Panda. That another witness might have proved more and other facts to the same purpose, which might have been more full and satisfactory and conclusive to the jury, does not render Mr. Quentin's testimony incompetent. The defects in the evidence, whatever they might be, are very proper matters of observation to the jury, to create doubts or justify disbelief of any intention to blow up the Panda. But the jury were to judge of all these matters in weighing the whole evidence on this particular point. A witness who has seen a party write several times is a good witness to prove his handwriting. But a clerk in the counting-room of the party, who has seen him write innumerable times, would be in many cases a more satisfactory witness to prove the handwriting. But nobody can doubt that each would be competent witness of the facts within his knowledge to prove the handwriting. . . .

I agree with the presiding judge, in the views which he has expressed on the motion in arrest of judgment, as well as with those on the motion for a new trial, excepting in the instance which I have specified, and in the result, that the motions be overruled.

360. REGINA *v.* CHRISTOPHER

COURT OF CRIMINAL APPEAL. 1850

4 *Cox Cr.* 76

THE following case was stated by the Recorder of Liverpool, for the opinion of the judges, under stat. 11 & 12 Vict. c. 78.

The prisoners, John Christopher, John Smith, and George Thornton, were indicted at the General Quarter Sessions, holden in and for the borough of Liverpool, on the 22nd day of October, 1849, for felony. When the prisoners were first brought before the magistrate, and charged with the felony, the witnesses were sworn, examined by the magistrate and cross-examined by the prisoners, and written minutes of the examination and cross-examination were made by the clerk of the magistrate under the inspection of the magistrate.

These minutes were then sent to the office of the clerk of the magistrate, and there delivered to a clerk named Tasker, who proceeded to write the depositions from the minutes. The witnesses attended in the office, and in the course of writing the depositions Tasker put some questions to each of them for the purpose of rendering the depositions more correct, clear and complete. The answers given to these questions were inserted in the depositions. The magistrate was not present, nor were the prisoners, at the office of the clerk to the magistrate. The depositions having been thus written, the witnesses appeared again before the magistrate, and in the presence of the prisoners were re-sworn; the depositions were read over to them, and a full opportunity was afforded for cross-examination before the depositions were signed by the witnesses.

Under these circumstances appearing on the trial, the counsel for the prisoners proposed to ask one of the witnesses for the Crown the following question, — "Did you not tell Mr. Tasker that you were watching the prisoner Christopher till a quarter before one o'clock?" This question was material. The question had reference to what was said by the witness in answer to some question put by Mr. Tasker, as above stated, in the course of writing the depositions, and the witness's answer would, according to the evidence, appear on the depositions.

The depositions were not read or tendered in evidence.

The counsel for the prosecution objected to the question proposed, and the question was overruled by the Court.

The prisoners were all convicted of felony.

Judgment was postponed, and the prisoners were committed to prison until it should have been considered and decided whether the question proposed to be asked was properly overruled, and whether the prisoners were duly convicted. . . .

Hills. — Even assuming that the depositions were sufficiently taken to render them admissible in evidence, it by no means follows that the question put to the witness ought not to have been answered. The depositions profess only to contain the statements made before the magistrate, and the question asked related to a statement made, not before the magistrate, but to the magistrate's clerk in the magistrate's absence. Upon what principle can parol evidence of that statement be excluded?

Alderson, B. — What was said to Tasker is not to be excluded because it was also said before the magistrates. Tasker was not a judicial officer, and no one was bound by what he wrote.

Paget, contra, was directed to confine himself, in the first instance, to the last point.

Alderson, B. — Suppose the depositions to be perfect, and that the answer would appear upon them; still, cannot the prisoner ask the witness what he said, not before the magistrate when the depositions were being taken, but at some other time?

Paget. — The finding of the case is conclusive as to that. It is found that "the question had reference to what was said by the witness in answer to some question put by Mr. Tasker, as above stated, in the course of writing the depositions, *and the witness's answer would, according to the evidence, appear on the depositions.*" If that be so, the depositions are the proper evidence.

ALDERSON, B. — There is the fallacy. The depositions contain that which Tasker wrote, and that which the witness afterwards stated to be true. They *may* contain the true answer to the question "What did the witness say to Tasker?" But the witness *might* say that he had given a different answer to Tasker from that which the deposition contained. . . .

Paget. — This statement has been read over to the witness, and signed by him as and for the true account. If the witness had employed Tasker to write his statement, had seen it when written, had signed it and transmitted it to a third party, the witness could not have been asked a question about any statement in that paper until the paper had been put into his hands (The Queen's case, 2 B. & B. 289).

ALDERSON, B. — That was the case of a letter, and it did not appear that the writer had made any statement except in writing. In this case there was an oral statement previously to the writing; could it not have been given in evidence if it had never been written down? . . .

Paget. — For this part of the case the depositions are assumed to be correctly taken under the authority of the magistrate; and the presumption therefore is, that they contain all that was material in the testimony of the witnesses. That being so, they ought to be produced before any question can be asked as to what the witness said. In Leach *v.* Simpson (5 Mee. & W. 312), PARKE, B., said:

> "The presumption is, until the contrary is shown, that the magistrate took down all that was material in the testimony of the witness. The written deposition, therefore, is the best evidence of what he said, and must first be produced before you can inquire by other means as to what passed on the occasion; then, if it appear on production of the deposition that any particular statement alleged to have been made is not contained in it, you may add to it by parol evidence of that statement."

If a merchant were to dictate a letter to a clerk, to sign it, and to send it, he could not be asked what he had dictated unless the letter were first put in.

MAULE, J. — Mr. Tasker was not a subordinate, writing at the dictation of the witness, but a person assuming to have authority to write down what the witness said.

ALDERSON, B. — In such a case it is the communication that is the evidence; the letter is the communication, and therefore the letter must be put in; but in cases in which the declaration is the evidence, and the declaration was by words spoken, the words spoken must be proved, though they were written down after they were spoken. This matter

is correctly and ably treated in a note to Jeans *v.* Wheedon (2 Mo. & R. 487).

Paget. — In that case the document was not signed, and therefore no deposition. As to the first point — (He was stopped.)

WILDE, C. J. — It is unnecessary to hear any further argument on this first point, because we are all of opinion that the question, the right to put which is raised by the second point, ought to have been allowed, and that an answer to it ought to have been required. The question was, "Did you not tell Mr. Tasker that you were watching the prisoner Christopher till a quarter before one o'clock?" The objection was that the answer to the question was to be found in a paper written by Tasker immediately after the supposed statement to Tasker took place, and afterwards signed by the witness. Was that paper the primary evidence of what the witness had told Tasker? . . .

The authority of a deposition is derived from the fact that the law has charged the magistrate with the *duty* of recording what the witness has said. The law presumes that he will do his duty; and, therefore, that which he so does becomes the best evidence. Had *this* paper prepared by Tasker any analogy to the deposition which it afterwards became? Was there in the paper at the time it was written any legal character, the effect of which was to exclude parol evidence of what was in fact said? The Court thinks that there was not. At the time Mr. Tasker wrote, he was doing an act to which the law gave no sanction, and, therefore, doing it as a mere volunteer between himself and the witness. The primary evidence was what the witness said, and what he said cannot be excluded because another man committed it to writing. . . . The law has, in this case, no security that what the witness said at the time to which the question is confined was committed to writing.

We are, therefore, of opinion that the question was improperly overruled, that the conviction cannot be sustained, and that a verdict of not guilty ought to be entered. Conviction reversed.

361. BRICE *v.* MILLER

SUPREME COURT OF SOUTH CAROLINA. 1891

35 *S. C.* 537; 15 *S. E.* 270

BEFORE KERSHAW, J., Fairfield, February, 1891.

Action by Calvin Brice & Co. against Elizabeth Miller. The charge to the jury was as follows:

"This action is founded upon two notes; notes which the defendant here, Mrs. Elizabeth Miller, does not deny that she made. . . . So, if you find that she made these notes and mortgage, your next important inquiry will be whether the transaction was one that had relation to her separate property. . . . I think she is liable, and the plaintiffs ought to have a verdict, if that is the nature of this transaction. . . .

"It has been urged upon me to charge you, . . . that when there is a record kept of a fact in writing made at the time, it is better evidence than the unaided recollection of any one. Now, as to this point, about what this good lady, Mrs. Miller, testified to at the last court: *Mr. Brice undertook to tell what he recollected about it, and it has been urged upon you that his recollection is not correct, and the record kept by the stenographer, a sworn officer of the court, was read, in order to show that Mr. Brice did not recollect what the lady said at the last trial. In a point of that kind, you will go by what the stenographer took her down as saying at the time.* It is more worthy of belief than the statement of the witness; the preponderance is in favor of what the stenographer took down at the time.

"The plaintiff must satisfy you by the preponderance of the testimony that he is entitled to recover. . . . We have the word of Mr. Brice as to what he remembers this lady to have said, and we have the written testimony of the stenographer as to what she said. It is man against man, but the preponderance is in favor of the stenographer's notes rather than the witness. That is what is meant by the preponderance of the evidence. . . ."

Verdict was for plaintiff, and defendant appealed on the following exceptions: . . . 4. For that his honor erred in permitting the plaintiff to testify his recollection as to what the defendant said while testifying on a former trial of this cause, her testimony being in writing and preserved as the records of the court, and she being then in court and subject to examination by him. . . .

Messrs. *Ragsdale & Ragsdale,* for appellant. Messrs. *McDonald & Douglas,* contra.

March 23, 1892. The opinion of the Court was delivered by

Mr. Chief Justice McIver. This is an action on two notes alleged to have been made by the defendant in favor of the plaintiffs, and the complaint is in the ordinary form appropriate to such an action. The only defence was, that defendant is, and was at the time of the execution of the notes, a married woman, and was; therefore, incapable of making the contract evidenced thereby. . . .

The fourth subdivision cannot be sustained. There can be no doubt that it is competent for one party to show what the other party to the action has admitted, or said, as to the subject-matter of controversy on a previous occasion, whether on a former trial or not. But the point of this particular allegation of error seems to be that, inasmuch as the testimony of the defendant at the former trial had been taken down by the stenographer in writing, that constituted the best evidence as to what her testimony had been, and, therefore, it was not competent for the plaintiff to state what the defendant had said on a former trial.

We know of no rule of law which would sustain this position. While it may be true that what a witness writes down himself, or what is contained in some paper written by another and signed by himself, may be the best evidence of what the witness has said on a former occasion, it

does not follow that where a third person, be he a stenographer or not, takes down in writing what a witness said, this writing is the best evidence, in such a sense, as to exclude any other. Stenographers are no more infallible than any other human beings; and while, as a rule, they may be accurate, intelligent, and honest, they are not always so; and therefore it will not do to lay down as a rule that the stenographer's notes, when translated by him, are the best evidence of what a witness has said, in such a sense as to exclude the testimony of an intelligent bystander, who has heard and paid particular attention to the testimony of the witness, as to what such witness may have said on a former trial. The Circuit Judge, in his comments to the jury upon this subject, went quite as far (if not too far) as it was proper to go, when he told them that the stenographer's notes would outweigh the testimony of a person who spoke from memory only. . . .

The judgment of this Court is, that the judgment of the Circuit Court be affirmed.

TITLE III. ANALYTIC RULES (HEARSAY RULE)[1]

SUB-TITLE I. THE HEARSAY RULE ITSELF

Topic 1. Theory and History of the Rule

364. INTRODUCTORY. There is but one rule of the Analytic type, — the Hearsay rule, though this rule rule involves two branches or processes, Cross-examination and Confrontation.

Nature of Hearsay, as an Extra-Judicial Testimonial Assertion. When a witness A on the stand testifies, "B told me that event X occurred," his testimony may be regarded in two ways: (1) He may be regarded as asserting the event X upon his own credit, *i.e.* as a fact to be believed because he asserts that he knows it. But when it thus appears that his assertion is not based on personal observation of event X, his testimony to that event is rejected, because he is not qualified by proper sources of knowledge to speak to it. This involves a general principle of Testimonial Knowledge, already examined (*ante*, Nos. 108–120), and does not involve the Hearsay rule proper.

(2) But suppose, in order to obviate that objection, that we regard A as not making any assertion about event X (of which he has no personal knowledge), but as testifying to the utterance in his hearing of B's statement as to event X. To this, A is clearly qualified to testify, so that no objection can arise on that score. The only question, then, can be whether this assertion of B, reported by A, is admissible as evidence of the event X, asserted by B to have occurred. It is clear that what we are now attempting to do is to prove event X by B's assertion; the utterance of B's assertion being itself proved by A's testimony to it. In other words, merely the making of B's assertion is properly proved by A; but the occurrence of event X is also sought to be proved, by this assertion of B, which was uttered out of court, but is offered testimonially for the same purpose as if it were being made presently by B on the stand. It is these extra-judicial testimonial assertions which the Hearsay rule prohibits. The Hearsay rule points out that B's assertion, offered testimonially, is not made on the stand and presently, but out of court anteriorly, and challenges it upon that ground. It tells us that B's assertion cannot be accepted, because it has not been made at a time and place where it could be subjected to certain essential tests or investigations calculated to demonstrate its real value by exposing such latent sources of error. The Hearsay rule predicates a contrast between assertions untested and assertions tested; it insists upon having the latter.

What is the *nature of the test* thus required by the Hearsay rule?

The fundamental test, shown by experience to be invaluable, is the test of *Cross-examination*. The rule, to be sure, calls for two elements, Cross-examination proper, and Confrontation; but the former is the essential and indispensable feature, the latter is only subordinate and dispensable. The theory of the Hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness may be best brought to light and exposed by the test of Cross-examination.

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[1] In No. 2, *ante*, the distinction between these several groups of rules have been explained.

Confrontation. A process commonly spoken of as Confrontation is also often referred to as an additional and accompanying test or as the sole test. Now Confrontation is, in its main aspect, merely another term for the test of Cross-examination. It is the preliminary step to securing the opportunity of cross-examination. The witness is confronted with the party, so that the party may cross-examine him. Confrontation also involves a subordinate and incidental advantage, namely, the observation by the tribunal of the witness' demeanor on the stand, as a minor means of judging the value of his testimony. But this minor advantage is not regarded as essential, *i.e.* it may be dispensed with when it is not feasible. Cross-examination, however, the essential object of confrontation, remains indispensable.

Cross-examination as a Distinctive and Vital Feature of our Law. For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience. Not even the abuses and the puerilities which are so often found associated with cross-examination have availed to overbalance its value. It may be that (in more than one sense) it takes the place in our system which torture occupied in the medieval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth. However difficult it may be for the layman or the foreign jurist to appreciate this its wonderful power, there has probably never been a moment's doubt upon this point in the mind of a lawyer of experience. "You can do anything," said Wendell Phillips, "with a bayonet — except sit upon it." A lawyer can do anything with a cross-examination, — if he is skilful enough not to impale his own cause upon it. He may, it is true, do more than he ought to do; he may "make the worse appear the better reason, to perplex and dash maturest counsels," — may make the truth appear like falsehood. But this abuse of its power is able to be remedied by proper control. The fact of this unique and irresistible power remains, and is the reason for our faith in its merits. If we omit political considerations of broader range, then cross-examination, not trial by jury, is (as Bentham said) the great and permanent contribution of the Anglo-American system of law to improved methods of trial-procedure.

Striking illustrations of its power to expose inaccuracies and falsehoods are plentiful in our own records.

Illustrations of the theory and the art. To illustrate the theory and the art of cross-examination, the following examples must here suffice.

1. Examples of the utility of a cross-examination, in bringing out *desirable facts of the case, modifying the direct examination* or otherwise *adding to the cross-examiner's own case:*

. David Paul Brown, *The Forum*, (1856) II, 456 [this celebrated Pennsylvanian advocate is describing a case of alleged infanticide by poison, administered by its mother, whose seducer had deserted her:] "It was shown that a day or two before the death of her infant, the mother had sent for half-an-ounce of arsenic to a grocer's. That after the death the arsenic was taken to the grocer's, and was weighed, and had lost twenty-four grains in its weight. This circumstance, together with the opinion of the chemist, presented a

strong case. Neither was sufficient in itself, but together they were dangerous. Of course, the cross-examination as to the weight was very rigid and severe. Upon this particular point it ran thus: 'When the arsenic was purchased, how did you weight it?' 'I weighed it by shot.' 'How many shot?' 'Six.' 'Of what description?' 'No. 8.' 'When it was returned, did you weigh it in the same scales?' 'Yes.' 'Did you weigh it with the same shot?' 'I weighed it with shot of the same number — for I had no other number.' 'How much less did it weigh?' 'Twenty-four grains less.' It was plain that this testimony bore hard upon the prisoner — but at this stage of the case the Court adjourned. Immediately my colleague (Mr. Boyd) and myself visited the stores of all the grocers, and took from various uncut bags of No. 8, the requisite number of shot, subjected them to weight in the most accurate scales, and found that the same number of these different parcels of shot varied more in weight than the difference referred to as detected in the arsenic at the time of its return. The shot — the grocers — the apothecary — the scales — were all brought before the Court. They clearly established the facts stated, and enabled us fairly to contend that there had been no portion of the arsenic used, — which argument, aided by the excellent character of the prisoner, proved entirely successful, and after a painful and prolonged trial, she was acquitted; so that her life may be said to have been saved by a shot."

John C. Reed, *Conduct of a Lawsuit* (1885) § 400: "When your evidence is but slight and that of the other side is very strong, you may be reckless in spurring his witnesses to make a complete statement. Your case is so bad that any change in it may be for the better. We add an entertaining and apt illustration. Some time ago the writer while waiting in Court watched the trial of a case where the plaintiff sought to recover damages for a breach of warranty. The defendant had sold him a horse with an express warranty that he was sound and kind and free from all 'outs.' The next day the plaintiff noticed that a shoe was loose, and he undertook to drive him to a blacksmith's shop to have him shod, when the horse exhibited such violent reluctance that he was obliged to abandon the attempt. Repeated efforts made it evident that he never would be shod willingly, and therefore he was obliged to sell him. The defendant called two witnesses. The first, an honest, clean-looking man, testified that he was a blacksmith, that he knew the horse in question perfectly well, and he had shod him about the time referred to in the plaintiff's testimony. 'Did you have any difficulty in shoeing him?' asked the defendant's counsel. 'Not the least. He stood perfectly quiet. Never had a horse stand quieter.' The other, a venerable-looking man, with a clear, blue eye, testified that he had owned the horse and that he was perfectly kind. 'Did you ever have any trouble about getting him into a blacksmith's shop?' 'Well, sir, I don't remember that I ever had occasion to carry him to a blacksmith's shop while I owned him.' The plaintiff's counsel evidently thought that cross-examination would only develop this unpleasant testimony more strongly, so he let the witnesses go. The jury found for the defendant. The next morning, as the writer was sitting in court waiting for a verdict, a man behind him, whom he recognized as the blacksmith, leaned forward and said, 'You heard that horse case tried yesterday, didn't you? Well, that fellow who tried the case for the plaintiff didn't know how to cross-examine worth a cent. I told him that the horse stood perfectly quiet while I shod him; and so he did. I didn't tell him that I had to hold him by the

nose with a pair of pincers to make him stand. The old man said he never took him to a blacksmith's shop while he had him. No more he did. He had to take him out into an open lot and cast him before he could shoe him.' Of course the plaintiff's counsel should have been more searching in the examination, where he could not possibly have made his own case worse."

2. Examples of the utility of a cross-examination, in bringing out, from the witness himself, *facts to lessen his personal credit.*

LANGHORN'S TRIAL (1679, HOWELL'S *State Trials*, VII, 417, 452). [Oates, the informer, had testified that the Popish Plotters met in London on April 24, and that he had come over to the meeting from the Jesuit College at St. Omer in France with Sir John Warner. One of the Jesuit attendants was put on by the defense to prove that Warner had not left the College at that time.]

Witness: "He lived there all that while."

Mr. J. PEMBERTON: "Was Sir John Warner there all June?" Witness: "My lord, I cannot tell that; I only speak to April and May."

L. C. J. SCROGGS: "Where was Sir John Warner in June and July?" Witness: "I cannot tell."

L. C. J.: "You were gardener there then?" Witness: "Yes, I was."

L. C. J.: "Why cannot you as well tell me, then, where he was in June and July, as in April and May?" Witness: "I cannot be certain."

L. C. J.: "Why not so certain for those two months as you are for the other?" Witness: "Because I did not take so much notice."

L. C. J.: "How came you to take more notice of the one than the other?" Witness: "Because the question that I came for, my lord, did not fall upon that time."

L. C. J.: "That, without all question, is a plain and honest answer."

Mr. J. DOLBEN: "Indeed, he hath forgot his lesson; you should have given him better instructions."

L. C. J.: "Now that does shake all that was said before, and looks as if he came on purpose and prepared for those months."

JAMES RAM, *On Facts as Subjects of Inquiry by a Jury.* (3rd Amer. ed., 1873, p. 140). "Whenever any person makes a relation of facts, be it on a judicial inquiry or not, and whether he tells his story spontaneously, and without being questioned, or on request and through questions put to him, it is certain the tale is often imperfectly or falsely told; and when this is known or suspected to be the case, and it is desired to have the exact truth, to ascertain what part of the story is true, what false, and what is left out, these matters may be learned by searching for them through questions put to the relator; an inquiry that is called cross-examination.

'He that is first in his own cause seemeth just, but his neighbor cometh and searcheth him.' [1]

The command by the mouth of Samuel to Saul was 'Go and smite Amalek, and utterly destroy all that they have; slay both man and woman, infant and suckling, ox and sheep, camel and ass.' Saul's imperfect tale, — 'I have performed the commandment of the Lord,' would not bear the scrutiny of Samuel; who instantly replied, 'What meaneth then this bleating of the sheep in mine ears, and the lowing of the oxen which I hear?' [2] . . .

[1] Proverbs, xviii.

[2] 1 Samuel, xv.

"Fingal being talked of, Dr. Johnson averred his positive disbelief of its authenticity. And on a gentleman then saying, 'Fingal is certainly genuine, for I have heard a great part of it repeated in the original,' Dr. Johnson asked him, 'Sir, do you understand the original?' And the reply being, 'No, sir.' 'Why, then,' said Dr. Johnson, 'we see to what this testimony comes.'" [1]

On a trial, the cross-examination of witnesses is often of the utmost importance and service toward discovering the truth, and the extent to which the witnesses are to be believed. . . . For on every trial, after a witness' examination by his own side, or examination in chief as it is called, is closed, these considerations may arise in the mind of the opposite party: The witness may have spoken truth, but not the whole truth; or he may have spoken the truth, and something besides the truth; or some of the truth may not have been brought out, because questions suited to elicit it were not put to him; the witness may be mistaken in a matter which he has stated as a fact; he may have misapprehended it; he may not have seen what he thinks he saw, or heard what he thinks he heard; he may have spoken to a fact with greater confidence than is justified by his imperfect knowledge of it; his present story may not be consistent with his relation of it on some former occasion; the witness' character may require to be searched into, to judge how far his evidence is to be believed.

On certain criminal trials, a cross-examination has had the following objects:

1. To show that the witness did not *see* what he said he saw: as, . . . that the witness, who said he saw the prisoner coming from a particular place, was at the time of seeing him (as he said) unable, from the distance (220 yards) of the prisoner from him, to recognize the prisoner, to distinguish his features, to know him to be the prisoner; or, that the witness, who said he saw the prisoner fire a pistol at another man, was at the time of seeing him (as he said) unable, from the distance (220 yards) of the prisoner from him, to recognize the prisoner.

2. To show that the witness did not *hear* what he said he heard: as, that the witness, who said he heard particular words spoken by the prisoner to a clamorous mob, was, at the time he heard (as he said) the words, under some agitation of mind, was in a degree in a considerable flurry of spirits; or, that at the time when the witness (as he said) heard certain words spoken by a man at the head of a mob, and addressed to the witness and others, the witness being nearest to the speaker, there was a good deal of noise and confusion; and that the witness was alarmed; and that, considering the noise that prevailed at the time, and the witness' situation, and his alarm, the witness might not be able to swear positively to the precise words used.

3. To show that the witness spoke from *hearsay:* as, that the witness, who said a mob set fire to a chapel, did not see them do it; that it was on fire when the witness first saw it, and who set it on fire he did not know; nor did he know that it was a chapel, only somebody told him so.

4. To test the truth of what the witness has said in general terms, by making him *particularize:* as, when the witness has spoken in general terms of many persons, saying, for instance, that many persons were present at a particular place, or many persons were forced to do a particular act against their will, to test the truth of the witness' evidence by asking him to tell the

[1] "Life of Johnson," by Boswell, Vol. V. p. 138, ed. 1835.

names of some persons, or the name of even one person present, or forced to do the act mentioned; or, when the witness has given evidence of words spoken by the prisoner to a large body of men, to test the truth of his evidence by asking the witness whether he can name any person who was present when the prisoner spoke the words mentioned.

6. To procure an *explanation* of words used by the witness: as, that the witness, who said the prisoner was at home on particular days, did not mean that the prisoner did not go out on those days, but only that he was at home some part of each of those days.

7. To show that the conduct of the prisoner was consistent with his innocence, was *inconsistent with guilt*, was open, without concealment: as, that, with regard to papers which the witness found and seized at the prisoner's house, during the whole time the witness was employed in searching for them, there was not any endeavor made by the prisoner, or any of his family, to conceal or secrete any of them; . . . or, that the prisoner, who went on board a ship at Portsmouth about a week before it sailed, and who, on the part of the prosecution, it was alleged, went on board to fly from the accusation against him, did, when on board, pass by his own name, and at Portsmouth came on shore several times, and went publicly about the streets.

365. HISTORY.[1] I. *Hearsay statements in general.* (1) In the first period, then, there is no exclusion of hearsay statements. Through the 1500s and down beyond the middle of the 1600s, hearsay statements are constantly received, even against opposition. They are often objected to by accused persons, and are sometimes said by the judge to be of no value or to be insufficient of themselves, and are even occasionally excluded. In short, they are regarded as more or less questionable, and the doubt particularly increases in the 1600s; but, in spite of all, they are admissible and admitted. Nor is this result due to any abuse or irregularity peculiar to trials for treason or other State prosecutions; it is equally apparent in the rulings in the few civil cases that are reported. The practice is unmistakable.

(2) In the meantime, the appreciation of the impropriety of using hearsay statements by persons not called is growing steadily. By the second decade after the Restoration, this notion receives a fairly constant enforcement, both in civil and in criminal cases. No precise date or ruling stands out as decisive; but it seems to be between 1675 and 1690 that the fixing of the doctrine takes place.

(3) In the meantime, the general rule excluding hearsay statements came over into the 1700s as something established within living memory. It is clear that its firm fixing (as above observed) did not occur till about 1680; and so in the treatises of the early 1700s the rule is stated with a prefatory "It seems." By the middle of the 1700s the rule is no longer to be struggled against; and henceforth the only question can be how far there are to be specific exceptions to it.

II. *Hearsay statements under oath.* (1) As early as the middle of the 1500s a first step had been attempted by statute towards requiring the personal production of those who had already made a statement upon oath. This requirement was limited to trials for treason.

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[1] Abridged from the present Compiler's "Treatise on Evidence" (1905), Vol. II, § 1364.

This statute of 1553 was St. 5 Edw. VI, c. 12, § 22. This was followed by a similar provision in 1554, St. 1 & 2 P. & M. c. 10, § 11. But this early step was premature; the innovation was too much in advance of the times; and it had only a short life. From the very year of the latter enactment, until the end of the succeeding century, it remained by judicial construction a dead letter. This judicial construction was perhaps strained, and was abandoned after the Revolution and under William III's government. Nevertheless it was clear law for a century and a half; and, when Sir Walter Raleigh insisted so urgently on the production of Lord Cobham, he was truly answered by Chief Justice Popham that "he had no law for it."

Raleigh's trial is a good example of the older practice, before the rule was established:

Sir Walter Raleigh's Case (J. G. Phillimore, "History and Principles of the Law of Evidence," 1850, p. 157). (1603. Raleigh was tried for a conspiracy of treason to dethrone Elizabeth and to put Arabella Stuart in her place, by the aid of Spanish money and intrigue. Sir Edward Coke, attorney-general, conducted the prosecution. The principal evidence against him was the assertion of Lord Cobham, a supposed fellow-conspirator, who had betrayed Raleigh in a sworn statement made before trial. Cobham himself was in prison, and was not produced on the trial.) To dilate upon Sir Walter Raleigh's murder is almost superfluous. No one, without reading it, can form a complete notion of what then went by the name of a trial in an English Court of Justice, or of the unspeakable malignity of Cecil. . . . How the law was enforced, and how these rights were protected by English judges in a criminal trial, where the life of perhaps the most illustrious man England ever has produced was at stake, the following extracts may serve to shew: —

Raleigh. "But it is strange to see how you press me still with my Lord Cobham, and yet will not produce him; it is not for gaining of time or prolonging my life that I urge this; he is in the house hard by, and may soon be brought hither; let him be produced, and if he will yet accuse me or avow this confession of his, it shall convict me and ease you of further proof."

Lord Cecil. "Sir Walter Raleigh presseth often that my Lord Cobham should be brought face to face; if he ask a thing of grace and favour, they must come from him only who can give them; but if he ask a matter of law, then, in order that we, who sit here as commissioners, may be satisfied, I desire to hear the opinions of my Lords, the judges, whether it may be done by law."

The Judges all answered, "that in respect it might be a mean to cover many with treasons, and might be prejudicial to the King, therefore, by the law, it was not sufferable."

Popham, C. J. "There must not such a gap be opened for the destruction of the King as would be if we should grant this; you plead hard for yourself, but the laws plead as hard for the King. Where no circumstances do concur to make a matter probable, then an accuser may be heard; but so many circumstances agreeing and confirming the accusation in this case, the accuser is not to be produced; for, having first confessed against himself voluntarily, and so charged another person, if we shall now hear him again in person, he may, for favour or fear, retract what formerly he hath said, and the jury may, by that means, be inveigled.". . .

Raleigh. — "I never had intelligence with Cobham since I came to the Tower."

Lord Cecil. — "Sir Walter Raleigh, if my Lord Cobham will now affirm, that you were acquainted with his dealings with Count Aremberg, that you knew of the letter he received, that you were the chief instigator of him, will you then be concluded by it?"

Raleigh. — "Let my Lord Cobham speak before God and the King, and deny God and the King if he speak not truly, and will then say that ever I knew of Arabella's matter, or the money out of Spain, or the Surprising Treason, I will put myself upon it."

Lord Henry Howard. — "But what if my Lord Cobham affirm anything equivalent to this; what then?"

Raleigh. — "My Lord, I put myself upon it."

Attorney-General. — "I shall now produce a witness viva voce:"

He then produced one *Dyer*, a pilot, who, being sworn, said, "Being at Lisbon, there came to me a Portugal gentleman, who asked me how the King of England did, and whether he was crowned? I answered him, that I hoped our noble king was well, and crowned by this; but the time was not come when I came from the coast for Spain. 'Nay,' said he 'your king shall never be crowned, for Don Cobham and Don Raleigh will cut his throat before he come to be crowned.' And this, in time, was found to be spoken in mid July."

Raleigh. — "This is the saying of some wild Jesuit or beggarly priest; but what proof is it against me?"

Attorney-General. — "It must perforce arise out of some preceding intelligence, and shews that your treason had wings." . . .

Thus on the single evidence of Cobham, never confronted with Raleigh, who retracted his confession, and then (according to the advocates of the Crown) recalled his retractation, did an English jury, to the amazement and horror of the bystanders, and the perpetual disgrace of the English name, find the most illustrious of their fellow subjects guilty of high treason.

(2) That at this time, then (say, until the early 1600s), the general absence of any hearsay rule allowed the use of extrajudicial statements taken under oath, is clear enough. It appears as well in ordinary felony trials as in treason trials.

(3) About this time, however, and markedly by the middle of the 1600s (coincidently with the general movement already considered), the notion tends to prevail, and gradually becomes definitely fixed, that even an extrajudicial statement under oath should not be used if the deponent *can be personally had* in court. This much has now been gained; and it is seen in civil and in criminal trials equally. But no further settlement came under the Commonwealth, nor under the Restoration, nor directly upon the Revolution.

(4) By 1680–1690 (as already noted) had come the establishment of the general rule against unsworn hearsay statements. This must have helped to emphasize the anomaly of leaving extrajudicial sworn statements unaffected by the same strict rule. By 1696, or nearly a decade after the Revolution, that anomaly ceased substantially to exist. In that year it was decisively achieved in the trials of Paine and of Sir John Fenwick. The former was a ruling by the King's Bench after full argument, and came in January.[1]

[1] R. *v.* Paine, 5 Mod. 163 (libel; a deposition of B., examined by the mayor of Bristol upon oath but not in P.'s presence, was offered; it was objected that

The latter, coming in the next November, involved a lengthy debate in Parliament; and, though the vote finally favored the admission of the deposition, the victory of reaction was in appearance only; for the weighty and earnest speeches in this debate must have burned into the general consciousness the vital importance of the rule securing the right of cross-examination, and made it impossible thereafter to dispute the domination of that rule as a permanent element in the law.[1] From the beginning of the 1700s the writers upon the law assume it as a settled doctrine; and the reason of the rule in this connection is stated in the same language already observed in the history of the rule in general, namely, that statements used as testimony must be made where the maker can be subjected to cross-examination.

Topic 2. Modes of Satisfying the Rule of Cross-Examination

368. CAZENOVE *v.* VAUGHAN

King's Bench. 1813

1 *M. & S.* 4

Park in the last term obtained a rule nisi for entering a nonsuit in this action, which was upon a policy of assurance, (in which the plaintiffs had recovered a verdict before Lord Ellenborough, C. J., at the London sittings,) upon an objection made to the admissibility of the deposition of one Lewis Plitt, which had been received in evidence for the plaintiffs; respecting which it appeared by his Lordship's report, that the plaintiffs, after the commencement of this action on the 5th of May last filed a bill in the Court of Chancery against the defendant, for a commission to examine witnesses abroad, and for the examination of the said Plitt "de bene esse," to which the defendant did not put in any answer; on the 15th of May the plaintiffs obtained an order of the Court for the examination of Plitt de bene esse, and gave regular notice thereof to the

"B. being dead, the defendant had lost all opportunity of cross-examining him," and the use of examinations before coroners and justices rested on the special statutory authority given them to take such depositions; the King's Bench consulted with the Common Pleas, and "it was the opinion of both Courts that these depositions should not be given in evidence, the defendant not being present when they were taken before the mayor and so had lost the benefit of a cross-examination."

[1] Fenwick's Trial, 13 How. St. Tr. 537, 591–607, 618–750 (the sworn statement before a justice of the peace of one Goodman, said to have absented himself by the accused's tampering, was offered on a trial in Parliament; a prolonged debate took place, and this deposition, termed hearsay, was opposed on the precise ground of "a fundamental rule in our law that no evidence shall be given against a man, when he is on trial for his life, but in the presence of the prisoner, because he may cross-examine him who gives such evidence," "by which much false swearing was often detected"; the deposition was finally admitted, Nov. 16, by 218 to 145 in the Commons, and the attainder passed by 189 to 156 in the Commons and by 66 to 60 in the Lords).

defendant, and served him with a copy of the interrogatories in chief; and the witness was examined on the evening of that day; at which time no cross-interrogatories were filed, nor did any one on the part of the defendant attend such examination. On the 25th of June following, the plaintiffs obtained a further order for publication, which after reciting that it was prayed that the depositions of Plitt, taken de bene esse in the cause, under the order of that Court might be published, in order that the same might be read as evidence for the plaintiffs at the trial of this and other actions mentioned in the bill; the order then proceeded thus, "Whereupon and upon hearing counsel for the defendant, this Court doth order that the depositions of L. Plitt in this cause be forthwith published." On the day after his examination, Plitt, who was a foreigner, left London for the coast, from whence he embarked in a few days for Sweden, where he still remains.

The Solicitor-General and *Scarlett*, who now showed cause, after stating that the reading of the deposition was opposed at the trial on the general rule, that depositions before an answer put in are not admitted to be read, agreed to that rule, but contended that it was subject to the following exceptions; viz.: unless the defendant appear to be in contempt, or has had liberty to cross-examine; and that his declining to cross-examine will not vary the exception. The necessity of such qualifications of the rule is apparent, for otherwise it would be in the power of any defendant, by his obstinacy in refusing to answer, or cross-examine the witnesses, to deprive the adverse party of the benefit of their testimony. Here it appears that the defendant had due notice of the interrogatories proposed to be put to the witness, and it was his fault that he did not put cross-interrogatories; he cannot therefore be permitted afterwards to avail himself of his own neglect.

Park, (with *Richardson* and *Newnham*,) contra, admitting the exceptions, contended nevertheless that the general rule ought to prevail, unless the defendant is clearly brought within one of the exceptions; and that the party who claims to read the deposition is bound to show the adverse party either in contempt, or that he has had liberty to cross-examine according to the practice of the court, and has neglected it. Here it is plain the defendant was not in contempt, and it does not appear that according to the practice of the Court of Chancery, he had liberty to cross-examine; for the order for examination was only made on the 15th of May, and on the same evening the witness was examined, and left London the next morning. The presumption therefore is, that the defendant had no time to prepare and file his cross-interrogatories according to the practice of the court.

Lord ELLENBOROUGH, C. J. — Perhaps it may be as well to state what the rule of the common law is upon this subject, which puts an end to the question. The rule of the common law is, that no evidence shall be admitted but what is or might be under the examination of both parties; and it is agreeable also to common sense, that what is imperfect, and,

if I may so say, but half an examination, shall not be used in the same way as if it were complete. But if the adverse party has had liberty to cross-examine, and has not chosen to exercise it, the case is then the same in effect as if he had cross-examined; otherwise the admissibility of the evidence would be made to depend upon his pleasure, whether he will cross-examine or not; which would be a most uncertain and unjust rule.

Here then the question is whether the defendant had an opportunity of cross-examining.

Now it appears that the plaintiffs filed their bill for the express purpose of examining the witness; and when they obtained the order for his examination, gave the defendant a regular notice of it, and of the interrogatories intended to be put to the witness. But it is said that the defendant had no time to file cross-interrogatories, and therefore the notice was of no use; yet if he had intimated a wish to cross-examine, and addressed himself to the Court praying for further time for that purpose, there can be no doubt but that he might have obtained it; but he contents himself simply with paying no attention to the notice. Then comes the order for publication. . . .

I must conclude then that the judge was satisfied before he directed such order to be made, that the adverse party had all the liberty to cross-examine which the practice of the court requires; and upon the principle of the common law I have already stated that there is no objection.

GROSE, J., concurred. . . .

BAYLEY, J. — I think it must be taken, from the circumstances stated, that the defendant had liberty to cross-examine, and did not choose to exercise it; for when the interrogatories in chief were served upon him, he might have applied for time, had he been desirous of putting cross-interrogatories; and there was no proof at the trial that it was his intention to cross-examine. Rule discharged.

369. STATUTES. *England. Rules of the Supreme Court, 1883* (under 38 & 39 Vict. c. 77, § 17), ORDER XXXVII: I. *Evidence Generally.* 1. In the absence of any agreement between the solicitors of all parties, and subject to these Rules, the witnesses at the trial of any action or at any assessment of damages shall be examined *viva voce* and in open court, but the Court or a Judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or Judge may think reasonable, or that any witness whose attendance in court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner; provided that where it appears to the Court or Judge that the other party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

ORDER XXXVIII: *Affidavits and Depositions:* 1. Upon any motion, petition, or summons evidence may be given by affidavit; but the Court or a Judge may,

on the application of either party, order the attendance for cross-examination of the person making any such affidavit.

Order XXXVII, Rule 20: Any party or witness having made an affidavit to be used or which shall be used on any proceeding in the cause or matter shall be bound, on being served with such subpœna [from the opposite party], to attend before such officer or person [appointed by the Court] for cross-examination.

Order XXXVII: II. *Examination of Witnesses.* . . . 5. The Court or a Judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make an order for the examination upon oath before the Court or Judge or any officer of the Court, or any other person, and at any place, of any witness or person, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct. . . . 10, 11. Where any witness or person is ordered to be examined before any officer of the Court, or before any person appointed for the purpose,. . . . the examination shall take place in the presence of the parties, their counsel, solicitors, or agents, and the witnesses shall be subject to cross-examination and re-examination.

United States. (Revised Statutes, 1878. § 863). (For depositions *de bene esse*, "reasonable notice must first be given in writing"; and "whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct"); § 866 (for depositions by "dedimus potestatem" "to prevent a failure or delay of justice," the provisions of the above section "shall not apply").

Illinois. (Revised Statutes, 1874, c. 51). *Depositions of Resident Witnesses, in Chancery.* § 24. When the testimony of any witness, residing or being within this State, shall be necessary in any suit in chancery in this State, the party wishing to use the same may cause the deposition of such witness to be taken before any judge, justice of the peace, clerk of a court, master in chancery or notary public, without a commission or filing interrogations for such purpose, on giving to the adverse party or his attorney ten days' notice of the time and place of taking the same, and one day in addition thereto (Sundays inclusive) for every fifty miles' travel from the place of holding the court to the place where such deposition is to be taken. If the party entitled to notice and his attorney resides in the county where the deposition is to be taken, five days' notice shall be sufficient. (R. S. 1845, p. 234, § 11.)

Deposition of Resident Witnesses, in Law. § 25. And it shall also be lawful, upon satisfactory affidavit being filed, to take the depositions of witnesses residing in this State, to be read in suits at law, in like manner and upon like notice as is above provided, in all cases where the witness resides in a different county from that in which the court is held, is about to depart from the State, is in custody on legal process, or is unable to attend such court on account of advanced age, sickness or other bodily infirmity. (R. S. 1845, p. 234, § 11.)

Deposition — When Witness is Non-Resident, etc. — Notice. § 26. When the testimony of any witness residing within this State more than one hundred miles from the place of holding the court, or not residing in this State, or who is engaged in the military or naval service of this State or of the United States, and is out of this State, shall be necessary in any civil cause pending in any court of law or equity in this State, it shall be lawful for the party wishing to use the same,

on giving to the adverse party, or his attorney, ten days' previous notice, together with a copy of the interrogatories intended to be put to such witness, to sue out from the proper clerk's office a *dedimus potestatem* or commission, under the seal of the court, directed to any competent and disinterested person, as commissioner, or to any judge, master in chancery, notary public or justice of the peace of the county or city in which such witness may reside, or in case it is to take the testimony of a person engaged in such military service, "to any commissioned officer in the military or naval service of this State or the United States," authorize and requiring him to cause such witness to come before him, at such time and place as he may designate and appoint, and faithfully to take his deposition upon all such interrogatories as may be inclosed with or attached to said commission, both on the part of the plaintiff and defendant, and none others; and to certify the same, when thus taken, together with the said commission and interrogatories, into the court in which such cause shall be pending, with the least possible delay. (R. S. 1845, p. 233, § 10).

27. *Notice to Non-Resident Party,* etc. § 27. When the deposition of any witness is desired to be taken under the provisions of this act, and the adverse party is not a resident of the county in which the suit is pending, or is in default, and no attorney has appeared for him in such cause, upon filing an affidavit of such fact and stating the place of residence of such adverse party, if known, or that upon diligent inquiry, his place of residence cannot be ascertained, the notice required by this act may be given by sending a copy thereof by mail, postage paid, addressed to such party at his place of residence, if known, or if not known, by posting a copy of such notice at the door of the court house where the suit is pending, or publishing the same in the nearest newspaper, and when interrogatories are required, filing a copy thereof with the clerk of the court ten days before the time of suing out such commission. (L. 1845, p. 580, § 1).

Oral Examination. § 28. When a party shall desire to take the evidence of a non-resident witness, to be used in any cause pending in this State the party desiring the same, or where notice shall have been given that a commission to take the testimony of a non-resident witness will be applied for, the opposite party, upon giving the other three days' notice in writing of his election so to do, may have a commission directed in the same manner as provided in section 26 of this act, to take such evidence, upon interrogatories to be propounded to the witness orally; upon the taking of which each party may appear before the commission, in person or by attorney, and interrogate the witness. The party desiring such testimony shall give to the other the following notice of the time and place of taking the same, to-wit: ten days, and one day in addition thereto (Sundays included) for every one hundred miles' travel from the place of holding the court to the place where such deposition is to be taken. . . .

How Depositions Taken and Certified. § 30. Previous to the examination of any witness whose deposition is about to be taken as aforesaid, he or she shall be sworn (or affirmed) by the person or persons authorized to take the same, to testify the truth in relation to the matter in controversy, so far as he or she may be interrogated; whereupon the said commissioner, judge, master in chancery, notary public, justice of the peace, clerk, or other person authorized to take depositions (as the case may be), shall proceed to examine such witness upon all such interrogatories as may be inclosed with or attached to any such commission as aforesaid, and which are directed to be put to such witness, or where the testimony is taken upon oral interrogatories, upon all such interrogatories as may be directed to be put by either party litigant; and shall cause such interrogatories,

together with the answers of the witness thereto, to be reduced to writing in the order in which they shall be proposed and answered, and signed by such witness; after which, it shall be the duty of the person taking such deposition to annex at the foot thereof a certificate, subscribed by himself, stating that it was sworn to and signed by the deponent, and the time and place when and where the same was taken. And every such deposition, when thus taken and subscribed, and all exhibits produced to the said commissioner, judge, master in chancery, notary public, justice of the peace, or clerk, or other person authorized to take depositions, as aforesaid, or which shall be proved or referred to by any witness, together with the commission and interrogatories, if any, shall be inclosed, sealed up, and directed to the clerk of the court in which the action shall be pending, with the names of the parties litigant indorsed thereon: *Provided*, that when any deposition shall be taken as aforesaid, by any judge, master in chancery, notary public, or justice of the peace out of this state, or other officer, such return shall be accompanied by a certificate of his official character, under the great seal of the state, or under the seal of the proper court of record of the county or city wherein such deposition shall be taken. (R. S. 1845, p. 234, § 12).

Deposition — Unsealed, Etc. — Informal. § 31. Every deposition that shall be returned to the court unsealed, or the seal of which shall be broken previous to its reception by the clerk to whom it is directed, shall, if objection be made thereto in proper time, be regarded by the court as informal and insufficient. (R. S. 1845, p. 235, § 16).

Opening Deposition — Penalty. § 32. It shall not be lawful for any party litigant, or the clerk of the court into which any deposition may be returned as aforesaid, to break the seal of the same, either in term time or in vacation, unless by consent of parties or their attorneys, indorsed thereon by permission of the court. . . .

Dictating, Etc., Effect of. § 33. The party, his attorney, or any person who shall in anywise be interested in the event of the suit, shall not be permitted to dictate, write or draw up any deposition which may at any time be taken under this Act, or be present during the taking of any deposition by written interrogatories; and every deposition so dictated, written or drawn up, or during the taking of which any such party, his attorney, or any person interested is present when the same is taken upon written interrogatories, as aforesaid, shall be rejected by the court as informal and insufficient. (R. S. 1845, p. 235, § 16).

Effect of Deposition. § 34. Every examination and deposition which shall be taken and returned according to the provisions of this act, may be read as good and competent evidence in the cause in which it shall be taken, as if such witness had been presented and examined by parol in open court, on the hearing or trial thereof. (R. S. 1845, p. 235, § 13).

370. EVANS *v.* ROTHSCHILD

SUPREME COURT OF KANSAS. 1895

54 *Kan.* 747; 39 *Pac.* 701

ERROR from Washington District Court.

Replevin by Emanuel Rothschild & Bros. against Evans, as sheriff, and others. Judgment for plaintiffs. The defendants bring the case here.

This was an action of replevin, brought by the defendants in error as partners, under the firm name of E. Rothschild & Bros., against the sheriff of Washington county, to recover certain merchandise. On his own application, William Morrison was made a party, and answered, claiming ownership of the property in controversy. On the 22d of October, 1890, the plaintiffs served a notice on the attorney for the sheriff that they would take depositions in Chicago on the 28th of October, 1890, between the hours of 8 o'clock A.M. and 6 o'clock P.M. They also, at the same time, served another notice that they would take depositions on the day stated in the other notice, in St. Joseph, Mo. The defendant appeared by attorney, and attended the taking of depositions at St. Joseph, but did not appear at Chicago. Before the commencement of the trial, the defendants duly excepted to the depositions taken at Chicago, on the ground that they had elected to appear and attend the taking of the depositions at St. Joseph, and that they could not be required to attend in two places, distant from each other, at the same time. The Court overruled the exceptions, and permitted both depositions to be read at the trial.

Omar Powell, for plaintiffs in error. *T. P. Roney*, and *J. W. Rector*, for defendants in error.

The opinion of the Court was delivered by

ALLEN, J. (after stating the facts as above).

Section 352 of the Code of Civil Procedure provides for the service of a notice of the time and place of taking depositions, as follows: "The notice shall be served so as to allow the adverse party sufficient time, by the usual route of travel, to attend, and one day for preparation, exclusive of Sunday and the day of service." Does this permit the service of two or more notices to take depositions at places widely separate from each other, on the same day, provided only the notice is served in sufficient time to give the party an opportunity to go to either place designated? We think the spirit, if not the letter, of the statute, clearly prohibits any such practice.

Where testimony is taken by deposition, it is in one sense a part of the trial of the cause, and the only chance given to the opposing party to confront the witnesses whose depositions are taken under the notice is to attend before the officer who takes them. The only opportunity to apply the tests necessary to correct errors or detect falsehood in the statements drawn out on direct examination is that afforded by cross-examination at the same time. A party to an action has a right, if he deems it necessary, to be personally present when depositions are being taken affecting his interests. He is not required to employ a multitude of attorneys to protect his interests at different places on the same day, nor does the fact that he chooses to intrust his interests to the care of an attorney (other than the one who tries the case for him) at one place, require him or his principal counsel to attend on the same day at another place. A reasonable construction of the statute, in the light of its evi-

dent purpose, constrains us to hold that a party giving notices to take depositions at different places must so arrange the times as to allow the adverse party to attend each one, and that sufficient time must elapse after the conclusion of the taking of one deposition to allow the party at least time sufficient to reach the place where another is to be commenced. (Weeks, Dep., § 264; Fant *v.* Miller, 17 Gratt. 187.)

As the testimony included in the deposition taken at Chicago is of vital importance to the plaintiffs' case, and as the defendant had no opportunity to appear and cross-examine the witnesses, the error in refusing to suppress the deposition compels a reversal of the case. . . . The judgment is reversed, and a new trial ordered.

All the justices concurring.

371. WALKERTON *v.* ERDMAN

SUPREME COURT OF CANADA. 1894

23 *Can. Sup.* 352

APPEAL from a decision of the Court of Appeal for Ontario, affirming the judgment of the Divisional Court by which a new trial was ordered.

The action in this case was brought under Lord Campbell's Act in consequence of the death of John B. Erdman, from injuries received by falling into an excavation in one of the streets of the town. Erdman before his death had instituted an action, for damages for such injuries, in which by order of the Court his evidence was taken de bene esse, counsel for the town appearing at such examination and cross-examining. The sole question to be decided on this appeal is whether or not such evidence was admissible on the trial of the present action. . . .

The writ in that action was issued on 9th March, 1892. On 17th March Erdman's solicitors gave to the town notice that they would apply to a master on the 21st March for an order for his examination. Prior to the 21st March the town gave notice to Heughan of a motion to be made to the local High Court Judge that he should be made a co-defendant under the act of Ontario, 55 Vict. c. 42, § 531. Such an order was duly made on the 25th March, 1892. Upon the return of Erdman's summons on 21st March, 1892, the master ordered that the examination of Erdman de bene esse be made on the 23rd March upon notice to defendants, and to Heughan, who was stated in the order to have been served with a third party notice by defendants. The examination of Erdman took place on 23rd March, the solicitor for the town appearing and cross-examining, but, so far as appears, notice of the examination was not served on Heughan, he not having then in fact been made a party to the suit. Erdman died on 1st April, 1892, and his widow, having proved his will, began this action on the 6th June, 1892,

for her own benefit as his widow, and for the benefit of four of his children.

Upon the trial, before STREET, J., the deposition of Erdman was tendered in evidence and rejected, and there being otherwise no proof of the cause of the injury the plaintiff was non-suited. The non-suit was set aside and a new trial ordered by the Divisional Court (ARMOUR, C. J., and FALCONBRIDGE, J.) and such judgment has been affirmed by the unanimous judgment of the Court of Appeal.

Aylesworth, Q. C., for the appellants. Lord Campbell's Act gives a new cause of action and one entirely different from that which deceased had in his lifetime. . . .

As regards this action the plaintiff is in no way in privity with the deceased. . . .

Shaw, Q. C., for respondent. The issues in both actions are substantially the same, and the evidence comes within the rules laid down in the books. . . .

O'Connor, Q. C., for third party.

FOURNIER, J. — I am of opinion that this appeal should be dismissed.

TASCHEREAU, J. — I would allow this appeal. I concur in my brother GWYNNE'S opinion.

GWYNNE, J. . . . The question is whether the depositions of the said John B. Erdman, so taken, are admissible as evidence for the plaintiff in the present action, against the contention of the defendants, the Corporation and Heughan, that they are not; and I am of opinion that the learned trial Judge's decision that they were not was correct and sound, and should be maintained upon the grounds following:

Upon the authority of the recent cases and especially since the judgment of the Privy Council in Robinson *v.* Canadian Pacific Railway Co. (1892, A. C. 481) it cannot be disputed in this court that the present action at the suit of the widow of the deceased, John B. Erdman, is a wholly different action in every particular from that instituted by Erdman in his lifetime. It is between wholly different parties and founded upon wholly different rights. Although the plaintiff is personal representative of the deceased she claims not in right of the deceased or of his estate, but being personal representative she is by statute authorized in that character to assert her own independent rights and those of her children.

The evidence is sought to be used in the present action not only against the Corporation of Walkerton but against the defendant Heughan also, and as no judgment in favor of the plaintiff can be rendered herein which is not conclusively binding upon Heughan as well as upon the corporation, he cannot be affected by depositions taken in an action to which he was not a party; "et ergo" depositions so taken cannot be used as evidence for the plaintiff in the present action. . . .

For these reasons I am of opinion that the learned trial judge was

correct in his ruling at the trial and that therefore this appeal must be allowed with costs and that judgment of non-suit be ordered to be entered in the court below.

SEDGEWICK, J. — I am of opinion that the appeal should be dismissed. I think the evidence was properly admitted.

KING, J. . . . Notwithstanding the able argument of Mr. *Aylesworth*, I think that the judgment of the appeal court should be affirmed.

The rule of evidence is thus stated in Taylor on Evidence, § 464:

"Where a witness has given his testimony under oath in a judicial proceeding, in which the adverse litigant had the power to cross-examine, the testimony so given will, if the witness himself cannot be called, be admitted in any subsequent suit between the same parties, or those claiming under them, provided it relates to the same subject or substantially involves the same material questions."

And thus, in another work on evidence (Stephen, Art. 32.) —

"Evidence given by a witness in a previous action is relevant for the purpose of proving the matter stated in a subsequent proceeding . . . when the witness is dead, provided the person against whom the evidence is to be given had the right and opportunity to cross-examine the declarant when he was examined as a witness; that the questions in issue were substantially the same in the first as in the second proceeding; and that the proceeding, if civil, was between the same parties, or their representatives in interest."

The evidence of Erdman was testimony under oath in a judicial proceeding, and (as Mr. Justice OSLER points out) was not the less so because taken de bene esse and never actually used on the trial of the action in which it was taken.

1. Subject to the observations to be made respecting the position of the third party, it also satisfies the rule that the party against whom it is offered in the present action, viz.: the Corporation of Walkerton, had the right and opportunity to cross-examine the declarant when he was examined as a witness, and in fact exercised the right.

2. Then as to the second requirement of the rule, viz.: that the questions in issue shall be substantially the same, or (as stated in Taylor) that the evidence relate to the same subject, or substantially involve the same material question, — this does not require that *all* the issues in the two actions shall correspond. It is satisfied if the evidence relates to any material issues that are substantially the same in both actions. Now the question of fact whether the injury to Erdman (the alleged cause of his death) was occasioned by the negligent act or omission of the town was a material issue in the action brought by him, and it is equally a material issue in the present action, as the plaintiff is bound to show that the death was occasioned by an act or default of the town which gave to Erdman a right of action against the town at the time of his death. And the evidence in question was tendered in support of that issue.

If indeed the admissibility of the evidence were to depend upon the

causes of action being the same the respondent could not hope to succeed, because it is conclusively established that the cause of action given by the statute is different from that which the deceased had in his lifetime. . . . But, while the present cause of action is new and different from that brought in his lifetime by Erdman, it is nowhere stated that the causes of action are to be *identical* in order to render admissible in a later action evidence given in an earlier one. It is sufficient that material issues to which the evidence is relevant, and for the proof of which it is in each case adduced, are substantially the same in both proceedings. Here the second cause of action embraces what goes to constitute the first together with other things. I conclude therefore that the second requirement of the rule is met.

3. Then as to the third requirement, viz.: that the proceedings in the two actions shall be between the same parties, or those claiming under them. The plaintiff in this action, although suing as executrix, fills a mere nominal or formal position in the action. As expressed in more than one case, the plaintiff so suing is a mere instrument acting on behalf of the person (whether widow, child or parent) claiming to have sustained pecuniary loss through the death of the deceased. What has to be regarded, therefore, is the relation which the beneficial parties to the action bear in point of interest to the deceased. Can they be said to claim under him? . . . In the interpretation of the provision of the statute that the wrongful act causing the death shall be such as would, but for the death, have entitled the person injured to maintain an action, it has been held that this means a right of action subsisting in him down to the time of his death; and that, if previously having a right of action, he released it, or discharged it by accord and satisfaction, the statutory cause of action could not arise upon the death. This is the result of decisions such as Read *v.* Great Eastern Railway Co. (L. R. 3 Q. B. 555), and is supported by the before quoted observations of Lord *Selborne*, in Seward *v.* Vera Cruz, 10 App. Cas. 59. I think it follows upon this that the persons seeking the benefit of this action, the widow and children of Erdman, are in effect claiming through him. . . .

I therefore think that the judgment below is correct.

I also agree that the case is not affected by the circumstance of the third party proceedings. The plaintiff may succeed against the town and fail as to Heughan. . . . In order to make the third party liable it must be established on the trial, as against him, that the damages were sustained by reason of an obstruction, excavation or opening placed, made, left or maintained by him. This is not made out as against him by evidence admissible against the town but not against him, although such evidence may establish a case against the original defendant. . . .

For these reasons I think the appeal should be dismissed.

Appeal dismissed with costs.

372. ANSONIA *v.* COOPER

SUPREME COURT OF ERRORS OF CONNECTICUT. 1895

66 *Conn.* 184; 33 *N. E.* 905

ACTION in the nature of interpleader, brought to the Superior Court in New Haven County and tried to the Court, GEORGE W. WHEELER, J.; facts found and judgment rendered in favor of Henry G. Alling, and appeal by Elizabeth Downs for alleged errors in the ruling of the Court. No error. The case is sufficiently stated in the opinion.

George B. Carroll, for the appellant, Elizabeth Downs. . . . The Court erred in its ruling respecting the depositions. . . .

V. Munger, for the appellee, Henry G. Alling. . . . The Court committed no error in respect to the depositions. The deposition taken at the instance of a party to an action, and not used by him, may be read in evidence by the opposite party, against the objection of the party at whose instance it was taken. . . .

TORRANCE, J. — This is a proceeding in the nature of a bill of interpleader between Henry G. Alling and Elizabeth Downs, to determine which of them is entitled to a fund paid into Court by the town of Ansonia, as the appraised value of land taken by said town for a schoolhouse site. . . .

We come now to the rulings upon questions of evidence, the more important of which relate to the depositions used in the case.

It appears that the appellant had taken in due form the depositions of Alfred Cooper, and of his wife and daughter. Counsel for both parties had stipulated that the depositions should be filed with the clerk, and might be opened and taken away by counsel for Downs, to be typewritten and copied for the convenience of Court and counsel, and that one typewritten copy should be considered as the original. The original and typewritten copy were both lying upon the table before the Court, and apparently in the physical possession of counsel for appellant. Alling offered to read from these depositions and to lay in evidence the portion so read. Thereupon the appellant objected, chiefly on the ground that she herself had not offered them in evidence. The Court, against the objection of the appellant, ruled that under these circumstances Alling might use them.

Upon a careful examination of the record, it is difficult to see how this ruling, even if erroneous, can have harmed the appellant. The depositions were those of her own witnesses, whose testimony, from the nature of the case, would presumably, be favorable to her. A good deal of that testimony, so far as it appears on the record, relates to matters not seriously disputed, and as a whole it appears to be favorable to her, or at least it does her no harm. The fact that the ruling did not harm the appellant would justify us in passing this matter without further con-

sideration; but as the question involved is one which, so far as we are aware, has not been decided by this Court, and is one of some importance in practice, it seems advisable to express our views upon it.

In most cases depositions are taken for the purpose of being used by the party taking them. The cases where they are not so used are comparatively few in number; but in such cases if the right to use the depositions be denied to the adverse party, it may work a great hardship and injustice. It will seldom be known in advance of the actual trial, whether the party taking the deposition does or does not intend to use them, and when it is known that he will not use them, it will usually be too late for the adverse party to avail himself of the testimony of the deponents in any way, although he may have relied on that testimony in support of his case. If this right be denied to the adverse party, it will in very many cases necessitate the taking of two sets of depositions of the same witnesses, involving a useless expenditure of time and money. We see no good reason why this should be done, at least not in cases like the present, where the depositions were filed with the clerk, in whose custody they must by statute remain, unless suppressed by the Court, until final judgment in the cause.

On the whole, we see no good reason on principle for denying this right to the adverse party; and such appears to be the prevailing opinion as expressed in statutes, or rules of practice, or by the decisions of Courts. See the authorities cited in 5 Amer. & Eng. Ency. of Law, p. 607. It is true, as claimed by the appellant, that some of the authorities there cited in support of this right, are not in point, as for instance the case of Henshaw *v.* Clark, 2 Root 103; but after all, we think it does appear that the weight of authority is in favor of this right. We think the Court did not err in ruling as it did on this point. . . .

In this opinion the other judges concurred.

Topic 3. Modes of Satisfying the Rule of Confrontation

373. Introductory. In the period when the Hearsay rule is being established, and ex parte depositions are still used against an accused person, we find him frequently protesting that the witnesses should be "brought face to face," or that he should be "confronted" with the witnesses against him. The final establishment of the Hearsay rule, in the early 1700s, meant that this protest was sanctioned as a just one, — in other words, that Confrontation was required. What was, in principle, the meaning and purpose of this Confrontation?

It is generally agreed that the process of confrontation has two purposes, a main and essential one, and a secondary and subordinate one. (1) The main and essential purpose of confrontation is *to secure the opportunity of cross-examination.* The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining of immediate answers.

(2) There is, however, a secondary advantage to be obtained by the personal

appearance of the witness; the judge and the jury are enabled to obtain the elusive and incommunicable evidence of a *witness' deportment while testifying*, and a certain subjective moral effect is produced upon the witness. This secondary advantage, however, does not arise from the confrontation of the opponent and the *witness;* it is not the consequence of those two being brought face to face. It is the witness' presence before the *tribunal* that secures this secondary advantage, — which might equally be obtained whether the opponent was or was not allowed to cross-examine. In other words, this secondary advantage is a result accidentally associated with the process of confrontation, whose original and fundamental object is the opponent's cross-examination.

Nevertheless, the secondary advantage, incidentally obtained for the tribunal by the witness' presence before it — the demeanor-evidence — is an advantage to be insisted upon wherever it can be had. But it is merely desirable. Where it cannot be obtained, it need not be required. It is no essential part of the notion of confrontation; it stands on no better footing than other evidence to which special value is attached; and just as the original of a document, or a preferred witness, may be dispensed with in case of unavailability, so demeanor-evidence may be dispensed with in a similar necessity. Accordingly, supposing that the indispensable requirement of cross-examination has already been satisfied, the only remaining inquiry is whether the demeanor-evidence, to be obtained by the witness' production before the tribunal, is available.

374. STATUTES. *England.* Rules of Supreme Court, under Judicature Act of 1875, c. 77, Order XXXVII, Rule 18. Except where by this Order otherwise provided, or directed by the Court or a Judge, no deposition shall be given in evidence at the hearing or trial of any cause or matter without the consent of the party against whom the same may be offered, unless the Court or Judge is satisfied that the deponent is dead or beyond the jurisdiction of the Court, or unable from sickness or other infirmity to attend the hearing or trial.

United States. Constitution (1787), *Amendment VI.* In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

Ibid. *Revised Statutes*, 1878, § 861. The mode of proof in trials of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided.

Ib. § 863. In civil cause in a district or circuit court a deposition may be taken "when the witness lives at a greater distance from the place of trial than 100 miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than 100 miles from the place of trial, before the time of trial, or when he is ancient and infirm.

Ib. § 865. Unless it appears to the satisfaction of the Court that the witness is then dead, or gone out of the United States, or to a greater distance than 100 miles from the place where the Court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause.

Ib. § 866. In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a "dedimus potestatem" to take depositions according to common usage; . . . and the provisions of § 863, 864, and 865 shall not apply to any deposition to be taken under the authority of this section.

375. GREENLEE *v.* MOSNAT

SUPREME COURT OF IOWA. 1907

136 *Ia.* 639; 111 *N. W.* 996

APPEAL from District Court, Benton County; OBED CASWELL, Judge.

Action to recover money received by J. J. Mosnat, deceased, as attorney for plaintiff, on certain fire insurance policies placed in his hands by plaintiff for collection. For defendant a settlement was pleaded in which, as alleged, the full amount of the money received by Mosnat beyond his reasonable fees as attorney for plaintiff had been paid over or accounted for. The action was first commenced during the lifetime of Mosnat, and there was a judgment for plaintiff on a verdict in his favor which was reversed on appeal. See 116 Iowa, 535. On a second trial there was again a verdict for plaintiff, which was reversed on appeal. See 126 Iowa 330. Pending the second appeal the death of the defendant was suggested, and his executrix was substituted. The present appeal is by defendant from a judgment on a verdict in plaintiff's favor rendered on the third trial of the case. Reversed.

Tom H. Milner, Nichols & Nichols, and *Randall & Harding,* for appellant.

C. W. E. Snyder, Whipple & Brown, and *Montgomery & Chambers,* for appellee.

MCCLAIN, J.—For the purpose of determining the question of law now submitted to us, it is sufficient to say that the issues of fact were as to whether there was an oral contract between plaintiff and deceased by which deceased was to receive ten per cent. of the money collected for plaintiff on the insurance policies, and was therefore bound to account to plaintiff for all the money received by him as plaintiff's attorney in excess of the agreed consideration, the claim of defendant being that no agreement as to the amount of the fee had been made, and whether a certain payment by check of deceased to plaintiff was in full satisfaction of all claims with reference to the money received by deceased for plaintiff, it being claimed by plaintiff that the check was expressly accepted only as payment on account. On the former trial both plaintiff and the deceased, who was then alive, testified as to whether there was an oral agreement for a ten per cent. fee, and as to whether there was any statement by plaintiff at the time the check was received that it was only accepted in part payment. Testimony of the defendant was offered with reference to services rendered by him to plaintiff as attorney before the insurance policies were placed in his hands for collection, but this testimony was excluded, and the judgment for plaintiff was reversed for this reason. On the trial from the judgment in which his appeal is taken, plaintiff was called as a witness, and testified with reference to

the fire insurance policies and the institution of suit thereon by deceased as his attorney, but his offered testimony as to a conversation with deceased with reference to employment in the insurance cases was objected to because of the incompetency of plaintiff as a witness to testify to personal transactions or communications with deceased in view of the provisions of Code, § 4604, which prohibit a party to any action being "examined as a witness in regard to any personal transaction or communication between such witness and a person in the commencement of such examination deceased, insane or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such deceased person, or the assignee or guardian of such insane person or lunatic." This objection being sustained, the transcript of the shorthand notes of the evidence of plaintiff given on the former trial while Mosnat was living and the defendant in the case was offered, and over defendant's objection was received, as tending to show the terms of the employment of deceased by plaintiff, and as bearing on the question whether the check then given by deceased to plaintiff was accepted in full satisfaction and by way of settlement. In the same manner the transcript of the testimony of plaintiff with reference to a conversation with deceased in the presence of a witness whose testimony on the former trial was read in defendant's behalf was received in rebuttal. The admissibility of the testimony of plaintiff thus introduced by means of the transcript of the shorthand notes of the evidence on the former trial is the sole question presented for consideration. If the ruling of the Court admitting the testimony of plaintiff introduced by means of the transcript was correct, the judgment is to be affirmed. If it was erroneous, a reversal must necessarily follow, for without this testimony plaintiff had no proof of the contract relied upon by him that the fees of deceased should be limited to ten per cent. of the recovery on the insurance policies.

The admissibility in evidence of the transcript of plaintiff's testimony on the former trial is contended for under the provisions of chapter 9, p. 16, Acts 27th Gen. Assem. (Code Supp. 1902, § 245a), the material portion of which is as follows: "The original shorthand notes of the evidence, or any part thereof, heretofore or hereafter taken upon the trial of any cause or proceeding, in any court of record in this State, by the shorthand reporter of such court, or any transcript thereof, duly certified by such reporter, when material and competent, shall be admissible in evidence on any retrial of the case or proceeding in which the same were taken, and for purposes of impeachment in any case, and shall have the same force and effect as a deposition, subject to the same objections so far as applicable." For convenience we will separately discuss two views presented by appellee with reference to the admissibility of plaintiff's evidence given on the former trial: First, would such evidence be competent as against the prohibition of Code, § 4604; and, second, is it rendered competent by an accompanying statutory

provision to which reference will be made in the second division of this opinion?

1. It is evident that the objection under Code, § 4604, is as to the witness as witness, and not to the testimony as evidence. McDonald *v.* Young, 109 Iowa 704; Burdick *v.* Raymond, 107 Iowa 228. The provision is that "no party . . . shall be examined as a witness in regard to any personal transaction," etc. The incompetency of a witness may be based on various grounds. He may be incompetent because of insanity, and the objection on that ground would be available in any case, or at common law he might be incompetent on account of interest in the particular case; and the objection on either ground might exist at one trial, and not at a subsequent trial, or vice versa. It is evident, therefore, that the question of incompetency of a witness depends for its solution on the particular ground as to which it is urged. If the witness has died after the first trial or has become incompetent to testify by reason of insanity or interest under the common-law rule, his testimony on the first trial may be proven. No doubt the same reasoning applies with reference to the common-law rule that conviction for felony disqualifies as a witness, with the result that testimony given before conviction for a felony may be subsequently used when the witness has become incompetent by reason of such conviction. Likewise, inability to produce the witness on account of illness, or infirmity or because he is beyond the reach of process will be a reason for admitting his testimony on a former trial. Central R. & B. Co. *v.* Murray, 97 Ga. 326; Jack *v.* Woods, 29 Pa. 375; State *v.* New Orleans Waterworks Co., 107 La. 1; Evans *v.* Reed, 78 Pa. 415; Wells *v.* Insurance Co., 187 Pa. 166; State *v.* Valentine, 29 N. C. 225; 2 Wigmore, Evidence, §§ 1401–1410; 2 Jones, Evidence, §§ 339–345.

But all of these illustrations relate to incapacity in general to give any testimony whatever at the time of the second trial. The objection we are now considering, however, relates to incapacity to testify as to a particular subject-matter; that is, the objection is not to the capacity of the witness, but to any testimony by him relating to the subject inquired about. The statutory prohibition seems to be as to the admissibility of the witness' testimony at the time of the trial when it is offered, if at the commencement of such trial the other party to the transaction or communication against whose executor or administrator the testimony is to be used is dead; and we think it is immaterial, under the statute, whether the evidence of such witness is offered by way of oral testimony at the trial, or by way of proof of the evidence given by him on a former trial. With reference to such transaction or communication, he has become incompetent to speak, and he can neither speak at that time nor can he then speak through his testimony given at another time. Counsel on either side have referred to several cases in this State as throwing light on the particular question now before us, but we do not find that the point has been considered,

and we must now reach a solution of the language and reason of the statute.

Some light is thrown upon the question, however, by what has been decided with reference to the introduction after the decease of one party of *depositions* previously given by the adverse party with relation to a personal transaction or communication between them. If the witness is in Court, his deposition in a law case cannot be introduced. Lanza *v.* Le Grand Quarry Co., 124 Iowa 659. But in analogy to the rule in regard to testimony given on a former trial it has been held that a deposition taken before the incompetency of the witness accrues may be used after he has become incompetent by reason of insanity, interest, or otherwise, although he is physically present. Tift *v.* Jones, 74 Ga. 469; 2 Wigmore, Evidence, §§ 1401–1411; 13 Cyc. 995. Now, this Court has held prior to the enactment of Code, § 4605, referred to in the second division of this opinion, and under a provision corresponding to Code, § 4604, that the deposition of one party taken before the death of the adverse party, and relating to a personal transaction or communication between them, could not be introduced after the objection by reason of the death of the adverse party had arisen, and the Court says that the objection is as to the right to testify and that by a deposition the witness testifies when such deposition is offered in evidence. Quick *v.* Brooks, 29 Iowa 484. There are cases to the contrary. See Armitage *v.* Snowden, 41 Md. 119; Neis *v.* Farquharson, 9 Wash. 508.

But so much depends on the language of the statute to be construed that we cannot give these cases controlling weight. Our statute says that no party shall be examined as a witness in regard to such transactions, and in the last sentence of the section the question whether the testimony of the living witness shall be received is made to depend on whether the testimony of the deceased party is given in evidence, from which we infer that the whole section has relation to the receipt of the testimony at the trial in whatever form it may be taken or preserved.

Much is said by counsel for appellee in favor of the general proposition that, as plaintiff was competent to testify when his former testimony was given and has only been rendered incompetent by subsequent events, his former testimony ought to be accepted. But the policy of the statute seems not to be in harmony with this view. It is not on account of anything which has happened to the witness that he is unable to testify on this trial. It is because an obstacle has arisen to the enforcement of his claim as based on his own testimony by reason of the death of the other party, and that obstacle, as the statute provides, renders his testimony incompetent, unless in some way such obstacle is removed. If in this conclusion there is any apparent injustice, it is one incident to the application of the Code provision. It is not of infrequent occurrence that the prohibitions of that section prevent the establishment of meritorious claims against the estate of a deceased person. With the general policy of the statute we have nothing to do.

The Legislature has seen fit to fix a rule of evidence for our guidance which in some cases works injustice, but which it must be presumed on the whole tends to the promotion of Justice. The rule may be a hard one in individual cases, but it is not for us to abrogate it on that account.

We think that this case furnishes an illustration of the ultimate expediency of the rule which the Legislature has prescribed. As already indicated, the deceased was denied the right on the former trial, erroneously as was held on the former appeal, to testify with reference to defensive matter against this very claim. If plaintiff is allowed to establish it by his own testimony given on a former trial, the case must now be decided without the advantage which the defendant should have had from such excluded testimony. The best we can do in any event is to apply the rule of the statute in the cases in which it is found to be applicable. . . .

We reach the conclusion that the transcript of plaintiff's testimony in the former trial was erroneously admitted, and the judgment is reversed.

SHERWIN, J.—I cannot agree to the rule announced in the second division of the opinion.

DEEMER, J.—On authority of Lanza *v.* Quarry Co., 124 Iowa 659, 100 N. W. 488, I concur in the dissent of SHERWIN, J. The question is not the competency of the testimony, but of the witness. Under section 4605 the testimony was competent by statute and the witness was made competent by statute. Regard must be had of the change in the statute brought into the law by Chapter 9, p. 16, Acts 27th Gen. Assem.

376. HUGHES *v.* CHICAGO, ST. PAUL, MILWAUKEE & OMAHA R. CO.

SUPREME COURT OF WISCONSIN. 1904

122 *Wis.* 258; 99 *N. W.* 897

APPEAL from Circuit Court, Douglas County; A. J. VINJE, Judge.

Action by Thomas Hughes, by guardian ad litem, against the Chicago, St. Paul, Minneapolis & Omaha Railway Company. From a judgment for plaintiff, defendant appeal. Reversed.

This is an action to recover damages for personal injuries sustained by being struck by an engine of the defendant while crossing Ogden avenue, in Superior. Issue being joined, and trial had, the jury returned a special verdict. . . . From the judgment entered upon that verdict in favor of the plaintiff for the amount stated, the defendant brings this appeal. . . .

Pierce Butler and *S. L. Perrin,* for appellant. *W. P. Crawford* and *W. D. Dyer,* for respondent.

CASSODAY, C. J. (after stating the facts). The defendant claims that a verdict should have been directed in favor of the defendant on several grounds. . . .

5. November 29, 1902, under section 4096, Rev. St. 1898, the plaintiff examined J. P. Cleary, who was the conductor of the train in question at the time of the accident, and also Robert G. Wilson, who was the engineer on the locomotive in question at the time of the accident. At the time of the trial, in June, 1903, and when the plaintiff offered in evidence the depositions of those two witnesses so taken under section 4096, the defendant objected to the same on the ground that both of such witnesses were then and there present in the Court; and it appears in the record that they were both, in fact, then and there present in the courtroom. The Court overruled the objection, and the defendant excepted.

This Court held, 20 years ago, and repeatedly since, that the section of the statute under which these depositions were taken "was intended as a substitute for a bill of discovery," but that "the examination of a party under" that section was "not limited to the cases in which a discovery might have been had in equity." Cleveland *v.* Burnham, 60 Wis. 16; Kelly *v.* C. & N. W. Ry. Co., 60 Wis. 480, 521; Whereatt *v.* Ellis, 65 Wis. 639; Meier *v.* Paulus, 70 Wis. 165, 170, 171; Frawley *v.* Cosgrove, 83 Wis. 441; Schmidt *v.* Menasha Wooden Ware Co., 92 Wis. 529. In Meier *v.* Paulus, supra, Mr. Justice TAYLOR said:

"The very object of the old bill of discovery was to procure evidence against the opposite party, to be used on the trial of an action; and it was never held that the answer of the party to the bill could not be used against him if he appeared at the trial of the action in aid of which it was taken, and was willing to submit himself to an examination in such action. . . . The examination of a party is in the nature of an admission, so far as his answers are material to the issues in the action, and such admissions are always admitted as original evidence against him."

Subsequently to the Revision of 1878 the scope of the section was enlarged so that, "in case a private corporation be a party, the examination of the president, secretary or other principal officer or general managing agent of such corporation" might be taken by deposition at the instance of the adverse party. Section 4096, Rev. St. 1898. By a recent statute the section has, in terms, been extended to the "agent or employé" of such corporation or of such adverse party. Chapter 244, p. 328, Laws 1901.

Neither of the witnesses in question was an officer of the defendant, nor in any sense a party to this action. On the contrary, each was a mere employé in the capacity mentioned. Assuming that their depositions were rightfully taken under the statute cited, the question recurs whether it was error to allow the same to be read in evidence on the trial against the objection of the defendant, when both witnesses were then and there present in Court, subject to be called and examined as witnesses in the ordinary way. Certainly there is no adjudication

of this Court justifying such admission under the circumstances mentioned. The cases cited are to the effect that such "deposition of a party" so taken "is admissible on the trial as original evidence against him, although he is present at the trial," on the ground that such "examination of a party is in the nature of an admission so far as his answers are material to the issues in the action, and such admissions are always admitted as original evidence against him." Meier *v.* Paulus, supra. At the time of Blackstone the want of power to examine witnesses abroad was troublesome to Courts of law, but he said it might "be done indirectly at any time, through the channel of a Court of equity, but that such practice had never been directly adopted as the rule of a Court of law." 3 Blackstone, Commentaries, 383. Mr. Greenleaf discusses at length the question of taking the testimony of absent witnesses by depositions, and, among other things, says, in effect, that "the Court of chancery has always freely exercised this power" of taking depositions in such cases; that the inconvenience to Courts of law was remedied by statutes in England and this country; and finally concludes that "depositions thus taken may be used at the trial by either party, whether the witness was or was not cross-examined, if it shall appear, to the satisfaction of the Court, that the witnesses are then dead, or gone out of the United States, or more than a hundred miles from the place of trial, or that by reason of age, sickness, bodily infirmity, or imprisonment, they are unable to travel and appear at court." 1 Greenleaf, Evidence, §§ 320–322. . . . Mr. Weeks, in his work on the Law of Depositions, gives similar views, and, among other things, says that "depositions are a species of evidence of a secondary character, admissible where the viva voce testimony or examination of the deponent is not attainable." Sections 4–6. Such was the common law when our Constitution was adopted, and that declares that "the testimony in causes in equity shall be taken in like manner as in cases at law, and the office of master in chancery is hereby prohibited." Section 19, art. 7, Const. Wis. This provision seems to recognize the rule of the common law for the taking of testimony "in cases at law," and to require that the "testimony in cases in equity shall be taken in like manner as in cases at law." The question was not squarely involved in Noonan *v.* Orton, 5 Wis. 60, 61, but the Court there said that:

> "We have no doubt that each party to a suit in chancery is, under our Constitution, entitled to have his witnesses examined in open court, subject, of course, to the occasional exceptions provided for in cases at law. He may, perhaps, be entitled, if he demands it, to have the witnesses of the adverse party so examined, subject to the like occasional exceptions."

Such expressions were fully sanctioned in the later case of Brown *v.* Runals, 14 Wis. 693, where it was held that, under the constitutional clause in question, "a party to an action such as was formerly denominated equitable is entitled to have the testimony in the case taken in open Court, subject to the same exceptions as are allowed by law in

actions such as were formerly denominated legal." That was an action in equity, and it was reversed because it was referred to take the testimony against the objection of the defendant. After referring to the clear and terse language of the provision of the Constitution in question, it is said in the opinion of the Court that:

"How is testimony taken in actions at law? With few exceptions, it is taken by the examination of witnesses on the trial before the Court and jury. This is the almost universal practice of taking testimony in common-law cases. And the advantages of this method of investigating facts, where the witnesses are orally examined, and where their appearance, manner, and conduct in giving their testimony can be seen by the Court and jury, are too obvious to need comment. . . . It was the benefit of this system of taking testimony which the framers of the Constitution intended to secure to the parties in equity cases." Page 698.

That opinion was reaffirmed a few months afterwards, and it was held that an act of the Legislature requiring all testimony in a certain class of equity cases to be taken before a referee was void, among other reasons, because it deprived the party of his constitutional right to have his witnesses examined in open Court. Oatman *v.* Bond, 15 Wis. 20, 27, We must hold that it was error to allow the depositions to be read against the objections of the defendant.

The judgment of the Circuit Court is reversed, and the cause is remanded for a new trial.

377. STATE *v.* HEFFERNAN

Supreme Court of South Dakota. 1909

24 *S. D.* 1; 123 *N. W.* 87

On rehearing. Judgment affirmed.

For former report, see 118 N. W. 1027.

McCoy, J.—The former opinion in this case, reversing the judgment of the trial Court, is reported in 118 N. W. 1027. Petition for rehearing having been granted, the cause is again before this Court for all purposes upon reargument of the entire record. There is but one debatable question in the record. The defendants were convicted of the crime of adultery. On the trial in the Circuit Court certain witnesses, children of the defendant Taylor, were absent from this State and beyond the jurisdiction of the trial Court, having but a short time prior to the trial left the State of South Dakota and gone to the State of Iowa. These witnesses testified in behalf of the State on the preliminary examination held before the county judge of Kingsbury county acting as committing magistrate in the presence of defendants, and were cross-examined by defendant's counsel, and the testimony thus given was taken in shorthand by a stenographer. On the trial in the Circuit Court, after showing the absence of these witnesses from the jurisdiction of the Court, the

State called Mr. Scott, the stenographer who took the testimony on the preliminary hearing, as a witness, and by him, using his transcript of the evidence of said witnesses to refresh his memory, gave the testimony of each of said witnesses before the jury. The defendants made proper objections to the offer and admission of this testimony, which objections were overruled, and proper exceptions taken thereto. Defendants now, as on the former hearing, urge that the admission of such evidence was reversible error.

It is contended on the part of defendants that the admission of this testimony was in violation of section 7, Code Cr. Proc., which, among other things, provides that: "In a criminal action the defendant is entitled to be confronted with the witnesses against him in the presence of the Court." It is evident the learned trial Court overrruled the objections to the testimony in question on the theory that it was admissible under a well-known exception to the "hearsay rule." The reason for excluding hearsay evidence is that it was not given under the sanction of an oath, and that there was no opportunity for cross-examination.

It has long been a settled rule of evidence, as one of the exceptions to the general rule excluding hearsay, that the testimony of a witness given in a former action, or at a former stage of the same action, is competent in a subsequent action, or in a subsequent proceeding of the same action, where it is shown that such witness is dead, has become insane or disqualified, is beyond the jurisdiction of the Court (that is, out of the State), cannot conveniently be found, or has been kept away by the opposite party, where it is also shown that the former giving of such testimony was under oath, and that opposing party cross-examined or was afforded an opportunity to cross-examine such witness. This rule has been generally applied in criminal causes, and has been held not to be in conflict with article 6 of the United States Constitution amendments, providing that "in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnessses against him," nor in conflict with the State Constitution, such as ours (article 6, § 7), which provides that "in all criminal prosecutions the accused shall have the right to meet the witnesses against him face to face"; it being held that, where the defendant has once at some proper stage of the proceeding been confronted with and met such witness face to face, has cross-examined him, or been given the privilege to do so, the provisions of these Constitutions have been satisfied, and that such evidence is not objectionable on that account. Elliott, Evidence, § 503; Jones, Evidence, § 339; Wigmore, Evidence, §§ 1365–1395; 12 Cyc. 543; 16 Cyc. 1091; Mattox *v.* United States, 156 U. S. 237, 15 Sup. Ct. 337, 39 L. Ed. 409; Bishop, Crim. Pro. 1194; State *v.* Mannion, 19 Utah, 505, 67 Pac. 542, 45 L. R. A. 638, 75 Am. St. Rep. 753. This rule seems to have come into existence of necessity by reason of the fact that to hold otherwise would often result in a failure or miscarriage of justice. The defendant in the case at bar contends that because the

legislators of this State who framed this section 7, Code Cr. Proc., added thereto the clause "in the presence of the Court," it confers upon a defendant in a criminal action some greater or broader or additional right than is conferred by the provisions of the State and Federal Constitutions, and that the adding of this clause, "in the presence of the Court," has the effect to limit the former testimony that may be given under the above-mentioned exception to the "hearsay rule" to only such testimony as might be given "in the presence of the Court wherein the action is being tried"; or, in other words, that the confrontation mentioned in this section of the Code can only take place in the presence of the Court wherein the action is being tried. Upon further and more careful consideration, we are of the opinion that this position is unsound and untenable, and not sustained by authority.

Formerly, according to the history of these provisions of the State and Federal Constitutions and like statutes, defendants in criminal actions were prosecuted and convicted upon ex parte depositions and affidavits, taken in the absence of the defendant and his counsel, and to remedy this evil such constitutional provisions and statutes were brought into existence, the intended effect of which was to secure to the defendant the right or privilege of cross-examination of the witnesses against him, that he might propound or have propounded to such witnesses personally questions which they were required to answer on oath in his presence. It seems to be held everywhere and by all Courts of last resort that "to be confronted with the witnesses against him" and to "meet the witnesses face to face" mean one and the same thing; that is, that the accused shall have the right or privilege to cross-examine the witnesses against him. To confront a witness means that you shall have the right or privilege or opportunity to meet such witness personally face to face for the purpose of cross-examination. Elliott, Evidence, § 503; Wigmore, Evidence, §§ 1365–1395; 12 Cyc. 543; Mattox *v.* U. S., 156 U. S. 237, 15 Sup. Ct. 337, 39 L. Ed. 409; Bishop, Crim. Pro. 1194, 1197, 1294; State *v.* Mannion, 19 Utah, 505, 57 Pac. 542, 45 L. R. A. 638, 75 Am. St. Rep. 753. It would be an absurdity, and statement of a physical impossibility, to say that the "confrontation" or meeting of a witness "face to face" which resulted in cross-examination in the presence of the defendant could take place without the witness being personally present at the place of the "confrontation" or place of such meeting "face to face." It is plainly apparent that the framers of the State and Federal Constitutions contemplated and had in mind and impliedly intended that this "confrontation" and "meeting face to face" should take place somewhere. It is also plainly apparent that they did not intend that such confrontation and meeting face to face should take place out on the railroad track or in some dimly lighted back alley, but it is evident they intended it should take place in the presence of the Court or tribunal where the cross-examination or opportunity to cross-examine might properly and lawfully take place. Elliott, Evidence §§ 503–507; Wigmore,

Evidence, §§ 1373, 1375, 1395. In general, the principle is clearly accepted that testimony taken before any tribunal employing cross-examination as a part of its procedure is admissible. Wigmore, Evidence, § 1373. These constitutional provisions mean that the "confrontation" or "meeting face to face" must take place in the presence of the Court having jurisdiction to permit the privilege of cross-examination. They could by no possibility mean otherwise. Hence there was nothing added to the legal effect of section 7, Code Cr. Proc., by the incorporation therein of the clause "in the presence of the Court," as used in this section of the statute. . . .

But considering this section of the statute in the light of the purpose sought to be obtained, and in the light of the reasons which brought it about, viz., to remedy the evil of ex parte depositions and affidavits by securing to the defendant the right to cross-examine the witness against him, it is plainly apparent that the legislative mind by the use of the clause "in the presence of the Court" had in view the court wherein this right or privilege of cross-examination might be legally exercised, whether it was Justice court, county court, or Circuit court; the object being to shut out all possibility of the use of ex parte depositions not taken in the presence of the accused. It was simply re-enactment of the constitutional right then already existing. This is, in effect, the view taken by the United States Supreme Court in Mattox *v.* United States, supra. . . . This seems to be the view taken by the Courts of last resort of other States having similar statutes. . . . The case of People *v.* Fish, 125 N. Y. 136, 26 N. E. 319, holds that neither this same section 8, Code Cr. Proc. N. Y., containing this clause, "in the presence of the Court," nor section 14 of the New York Bill of Rights (1 Rev. St. pt. 1, c. 4), nor the Federal Constitution, were ever intended to secure the accused the right to be confronted with the witnesses against him upon his final trial, but to protect him against ex parte affidavits and depositions taken in his absence. . . .

Mr. Wigmore, in his valuable work on Evidence, reaches the same conclusion. He has gone into the history and purpose of this question so thoroughly and to such length that it is impracticable to fully quote the whole of his argument. Volume 2, §§ 1365–1418, inclusive. In the period when the hearsay rule is being established and ex parte depositions are still used against an accused person, we find him frequently protesting that the witnesses should be "brought face to face" or that he should be "confronted" with the witnesses against him. The final establishment of the hearsay rule meant that this protest was sanctioned as a just one; in other words, that confrontation was required. What was, in principle, the meaning and purpose of this confrontation? So far as there is a rule of confrontation, what is the process that satisfies this rule? It is generally agreed that the process of confrontation has two purposes — the main and essential one, and a secondary one. The main and essential purpose of confrontation is to secure the opportunity

of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon a witness or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers. That this is the true and essential significance of confrontation is demonstrated by counsel and judges from the beginning of the hearsay rule to the present day. There is, however, a secondary advantage to be obtained from the personal appearance of the witness. The judge and jury are enabled to obtain the elusive and incommunicable evidence of a witness' deportment while testifying, and a certain subjective moral effect is produced upon the witness. This secondary advantage, however, does not arise from the confrontation of the opponent and the witness. It is not the consequence of those two being brought face to face. It is the witness' presence before the tribunal that secures this secondary advantage, which might equally be obtained whether the opponent was or was not allowed to cross-examine. In other words, this secondary advantage is a result accidentally associated with the process of confrontation, whose original and fundamental object is the opponent's cross-examination. The witness' presence before the tribunal may be dispensed with if not obtainable. The question, then, whether there is a right to be confronted with opposing witnesses, is essentially a question whether there is a right of cross-examination. If there has been a cross-examination, there has been a confrontation. The satisfaction of the right of cross-examination disposes of any objection based on the so-called right of confrontation. Nevertheless, the secondary advantage incidentally obtained for the tribunal by the witness' presence before it — the demeanor-evidence — is an advantage to be insisted upon whenever it can be had. No one has doubted that it is highly desirable if only it is available. But it is merely desirable. Where it cannot be obtained, it need not be required. It is no essential part of the motion of confrontation. It stands on no better footing than other evidence to which special value is attached, and just as the original of a document, or a preferred witness may be dispensed with in case of unavailability, so demeanor-evidence may be dispensed with in a similar necessity. Accordingly, supposing that the indispensable requirement of cross-examination has been satisfied, the only remaining inquiry is whether the demeanor-evidence, to be obtained by the witness' production before the tribunal, is available.

This inquiry, the conditions of unavailability of demeanor-evidence by reason of death, illness, and the like, remains now to be made. But first the effect must be considered of the constitutional sanction in the United States of the principle of confrontation; for this has often erroneously affected the judicial attitude towards demeanor-evidence. In the United States most of the Constitutions have given a permanent sanction to the principle of confrontation by provisions requiring that in criminal cases the accused shall "be confronted with the witnesses

against him" or "brought face to face" with them. The question thus arises whether these constitutional provisions affect the common-law requirement of confrontation otherwise than by putting it beyond the possibility of abolition by an ordinary legislative body. The only opening for argument lies in the circumstance that these brief provisions are unconditional and absolute in form; i.e., they do not say that the accused shall be "confronted" except where the witness is deceased, ill, out of the jurisdiction, or otherwise unavailable, but imperatively prescribes that he "shall be confronted." Upon this feature the argument has many times been founded that, although the accused has had the fullest benefit of cross-examining a witness now deceased or otherwise unavailable, nevertheless, the witness' presence before the tribunal being constitutionally indispensable, his decease or the like is no excuse for dispensing with his presence.

That this argument is unfounded is doubtless; and the answer to it may be put in several forms: (1) There never was at common law any recognized right to an indispensable thing called confrontation as distinguished from cross-examination. There was a right to cross-examine as indispensable, and that right was involved in and secured by confrontation. It was the same right under different names. This much is clear enough from the history of the hearsay rule, and from the continuous understanding and exposition of the idea of confrontation. It follows that, if the accused has had the right of cross-examination, he has had the very privilege secured to him by the Constitution. (2) Moreover, this right of cross-examination thus secured was not a right devoid of exceptions. The right to subject opposing testimony to cross-examination is the right to have the hearsay rule enforced, for the hearsay rule is the rule requiring cross-examination. Now, the hearsay rule is not a rule without exceptions. There never was a time when it was without exceptions. There were a number of well-established ones at the time of the earliest Constitutions, and others might be expected to develop in the future. The rule had always involved the idea of exceptions, and the Constitution makers indorsed the general principle merely as such. They did not care to enumerate exceptions. They merely named and described the principle sufficiently to indicate what was intended. The rule sanctioned by the Constitution is the hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, developed, or created therein. (3) The net result then, under the constitutional rule, is that, so far as testimony is required under the hearsay rule to be taken infrajudicially (that is, within the presence of the Court), it shall be taken in a certain way, namely, subject to cross-examination, not secretly or ex parte away from the accused. 2 Wigmore, Evidence, §§ 1365, 1395, 1396, 1397. For decisions sustaining the view that these provisions of the Constitutions were passed in view of the hearsay rule, and in view of the exceptions thereto, and did not have the effect of destroying such exceptions, see Jackson *v.* State,

81 Wis. 127, 51 N. W. 89; Summons *v.* State, 5 Ohio St. 341; State *v.* McO'Blenis, 24 Mo. 416, 435; Mattox *v.* U. S., supra; State *v.* Mannion, 19 Utah 505, 57 Pac. 542.

And, again, the statute in question is general, and contains no exceptions, any more than does the Federal or State Constitutions. And if it is to receive a literal construction without exception, then it logically and necessarily follows that dying declarations and the former testimony of deceased witnesses must hereafter be rejected in this State, as those exceptions are in the same category and stand upon the same basis as the former testimony of a witness who is beyond the seas or out of the jurisdiction of the Court. But, if it was the intention that this section of our statute was passed in view of the hearsay rule, with all the exceptions thereto, which we are constrained to believe, then all the recognized exceptions to that rule are available just the same under the provisions of the Federal and State Constitutions. . . .

The former testimony of a witness who is absent from the State—that is, beyond the jurisdiction of the Court—is one of the well-recognized necessities within the exceptions of the hearsay rule. A party desiring to offer the testimony of a witness who is out of the jurisdiction and beyond the reach of a subpœna or other compulsory process of the trial Court is helpless. This branch of the rule stands upon the same reasoning and basis as the former testimony of a deceased witness. Wigmore, Evidence, § 1404; Jones, Evidence, § 345; 1 Greenleaf, Evidence, § 163; 1 Elliott, Evidence, § 500.

Finding no error in the record, the judgment of the Circuit Court is affirmed.

Haney, P. J., dissents. Whiting, J., took no part in this decision.

SUB-TITLE II. EXCEPTIONS TO THE HEARSAY RULE

380. INTRODUCTORY. *Principle of the Exceptions to the Hearsay Rule.* The purpose and reason of the Hearsay rule is the key to the exceptions to it. The theory of the Hearsay rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation. Moreover, the test may be impossible of employment — for example, by reason of the death of the declarant—, so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape. These two considerations — a Circumstantial Guarantee of Trustworthiness, and a Necessity for the evidence — may be examined more closely, taking first the latter.

(1) *Necessity.* The Necessity principle implies that since we shall lose the benefit of the evidence entirely unless we accept it untested, there is thus a greater or less necessity for receiving it. The reason why we shall otherwise lose it may be one of two. (1) The person whose assertion is offered may now be dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testing. This is the commoner and more palpable reason. It is found in the exception for Dying Declarations and in the next ensuing ones. (2) The assertion may be such that we cannot expect, again or at this time, to get evidence of the same value from the same or other sources. This appears more or less fully in the exception for Spontaneous Declarations, for Reputation, and in part elsewhere. Here we are not threatened (as in the first case) with the entire loss of a person's evidence, but merely of some valuable source of evidence. The necessity is not so great; perhaps hardly a necessity, only an expediency or convenience, can be predicated. But the principle is the same.

(2) *Circumstantial Guarantee of Trustworthiness.* The second principle, which, combined with the first, satisfies us to accept the evidence untested, is in the nature of a practicable substitute for the ordinary test of cross-examination. This circumstantial guarantee of trustworthiness is found in a variety of circumstances sanctioned by judicial practice. The following different classes of reasons can be distinguished:

(*a*) Where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed;

(*b*) Where, even though a desire to falsify might present itself, other considerations, such as the danger of easy detection or the fear of punishment, would probably counteract its force;

(*c*) Where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected.

It is not always that an exception is founded merely on a single one of these considerations. Often it rests on the operation, in different degrees, of two of them. For example, the exceptions for Declarations of Mental Condition, Spontaneous Declarations, and Declarations against Interest rest entirely on Reason *a;* while the exception for Declarations about Family History (Pedigree),

rests largely upon Reason *a*, though partly also on Reason *c*. The exception for Dying Declarations rests entirely on Reason *b* (the fear of divine punishment). The exception for Regular Entries rests chiefly on Reason *b*, though partly also on Reasons *a* and *c*. The exception for Official Statements rests chiefly on Reasons *b* and *c*, though *a* also enters. Mixed considerations have thus often prevailed. The exceptions have been established casually, in the light of practical good sense, and with little or no effort (except in modern times) at generalization or comprehensive planning. The Courts have had in mind merely to sanction certain situations as a sufficient guarantee of trustworthiness.

(3) *Witness-Qualifications, and other Rules, also to be applied to Statements admitted under the Exceptions.* The Hearsay rule is merely an additional test or safeguard to be applied to testimonial evidence which would be otherwise admissible. Hence, these extrajudicial statements may be inadmissible because of their failure to fulfil the ordinary rules about testimonial qualifications.[1] For example, in the Pedigree Exception there are rules about membership in the family, which rest solely on the necessity of knowledge in the person whose statement is offered, — *i.e.* a rule of Testimonial Qualifications. In the same way, the allowance of an exception to the Hearsay rule does not of itself dispense with the application of the other Auxiliary Rules of Policy, of which the Hearsay rule is only one. For example, when a written entry is offered under an exception to the Hearsay rule, the rule about Producing the Original of a Document comes into application and must be observed; in offering a dying declaration, the rule of Completeness may come into play; and the rules of Testimonial Preference are often invoked throughout the exceptions. These, with the rule of Authentication, and the rule of Integration or Parol Evidence, are the auxiliary rules that find most frequent application to testimony admitted under hearsay exceptions.

Topic 1. Dying Declarations

381. WRIGHT DEM. CLYMER *v.* LITTLER

KING'S BENCH. 1761

3 *Burr.* 1244

THIS was an ejectment for certain copyhold lands within the manor of Barnes in the county of Surrey; in which manor, there is a custom of Burrough-English.

The lessor of the plaintiff, William Clymer, made out his title, under a regular and undisputed will of his grandfather John Clymer, dated 17th February, 1743. . . . The title of the defendants (who were purchasers under another William Clymer, second and youngest son of John, and uncle to William the lessor of the plaintiff) depended upon another subsequent will (or instrument which they called a will) made by the said John, as they alleged, on the 20th of September, 1745; which, they

[1] 1881, Lord Blackburn, in Dysart Peerage Case, L. R. 6 App. Cas. 489, 504: "It is impossible to say that if a person said something, and could not himself if alive have been permitted to give testimony to prove it, he can by dying render that statement admissible. I think that is a self-evident proposition."

contended, was at least a *revocation* of his former will in 1743. And if it be *only* a revocation of the former will, then William the youngest son of John must inherit as heir in Burrough-English. This will or instrument of 1745 (which was *not* under seal) was all written by one William Medlicott, who was son-in-law to the said John Clymer, (having married his only daughter Amey.) It was also endorsed on the back, in the same handwriting of the said William Medlicott, in these words — "The Covenant and Agreement of John Clymer;" and it was witnessed by the same William Medlicott and one Elizabeth Mitchell. . . .

William Medlicott died in May, 1747. He had the custody of *both* wills, till a few weeks before his death. The latter will was found amongst his papers. At the trial, the lessor of the plaintiff produced and proved the will of 1743; under which, he was devisee of this estate, in fee. To encounter this evidence, the defendants produced this will or instrument of 1745; and both the witnesses to it (Elizabeth Mitchell and William Medlicott) being dead, they proved their handwritings, and also the handwriting of old John Clymer, in the common and ordinary form.

Whereupon the plaintiff's counsel insisted, that this will or instrument was, in the first place, an absolute forgery. . . . And they called Mary Victor, sister to the said William Medlicott, who was one of the subscribing witnesses to the will or instrument of 1745: which Mary Victor swore, "That whilst she was attending her said brother William Medlicott in his last illness, and about three weeks before his death, he pulled out of his bosom the will of 1743, and said, 'It was the *true* will of John Clymer;' and then delivered it to her, with directions to deliver it over to William Clymer the lessor of the plaintiff, or to Mr. Faulkner." . . . Upon Mary Victor's cross-examination by the counsel for the defendants, she not only persisted in what she had before deposed, but also added that at the same time that William Medlicott produced the will of 1743, as the *true* will of old John Clymer, *he acknowledged and declared to her* "That the said will or instrument of 1745 *was* forged by himself." No objection was made to this evidence, by the counsel for the defendants, at the trial.

The judge and jury (a special one) perused and examined the two instruments of 1743 and 1745, and their different signatures; — and took notice of the circumstances of the latter, being all of the handwriting of this William Medlicott himself; and disposing of a fee to Medlicott's own wife; and, upon the whole, they were all of opinion, "That it was a forgery." And the judge directed the jury to find for the plaintiff; which they did. . . .

This cause coming on to be argued yesterday, (19th November, 1761,) Mr. Justice WILMOT reported the evidence from Lord Chief Justice WILLES, who tried the cause, and who was satisfied with the evidence, and reported that no objection was made, at the trial, to the evidence given by this witness Mary Victor. . . .

Mr. *Norton* proceeded. He objected to the admission of this evi-

dence, as being only hearsay evidence. What Medlicott said, ought not to be admitted or regarded; for it was not said *upon oath,* nor was there any opportunity of cross-examining him. . . .

Mr. *Harvey* and Mr. *Lee* argued for the lessor of the plaintiff, William Clymer, the grandson. . . . As to the evidence itself, — it was strictly and legally admissible. It was not given in order to prove the forgery; but to discredit their evidence arising from the proof of Medlicott's hand. . . . This evidence is admissible; because it was the solemn declaration of a dying man to his nearest relation; which is equal to an oath; for such declarations of dying men have been admitted as evidence even in cases of murder. So that it ought not to be called "mere hearsay evidence." . . .

Lord MANSFIELD. . . . As to the first ground, the defendants complain, that the Chief Justice misdirected the jury, by leaving to them as evidence of the declaration of Medlicott "That he forged it."

Answer. — It came out upon their *own* examination; they made no objection to it at the trial; and it certainly was a circumstance proper for the jury to consider.

The competence of evidence depends upon the circumstances under which it is given. The will of 1743 is set up after fifteen years. It was necessary to show how it was secreted, and how discovered; the declaration of Medlicott in his last illness, when he produced and delivered it for the use of the plaintiff, is allowed to be competent and material evidence. The instrument of 1743 was equally in his custody and secreted. The account he gave of it in his last moments is equally proper, . . . as the account was a confession of great iniquity, and as he could be under no temptation to say it, but to do justice and ease his conscience; I am of opinion "The evidence was proper to be left to the jury." . . .

The three other judges declared their entire concurrence; but declined expatiating upon it, or entering into particulars, as Lord MANSFIELD had so very fully gone through it.

382. STOBART *v.* DRYDEN

EXCHEQUER. 1836

1 *M. & W.* 615

COVENANT on a mortgage deed for the payment of 800£. with interest at 4£. per cent. Pleas — first, non est factum. . . .

At the trial before Lord ABINGER, C. B., at the last Summer Assizes for Durham, the deed on which the action was brought being produced in evidence there appeared to be two attesting witnesses to its execution by the defendant; one named Potts, the other M'Cree. M'Cree was dead; but Potts being called, denied all recollection of his having attested

such a deed, and stated that he doubted the genuineness both of his own signature and the defendant's. A witness was then called, who proved the handwriting of M'Cree. . . . For the defence, it was proposed to give evidence of certain letters and statements of M'Cree, subsequent to the execution of the deed, which, although they did not in terms admit that the deed was a forgery, contained admissions that he had been guilty of some improper dealings with respect to it, and might, as it was alleged, have induced the jury to believe that the deed was either forged or fraudulently altered by M'Cree. The Lord Chief Baron, however, rejected the evidence. Witnesses were then called, who denied the genuineness of the defendant's and plaintiff's signatures. The jury, however, found a verdict for the plaintiff.

In Michaelmas Term, *Cresswell* obtained a rule nisi for a new trial, on the ground that the evidence rejected ought to have been admitted: citing Wright *v.* Littler, 3 Bur. 1244, 1 W. Bla. 346. . . .

Alexander and *W. H. Watson* showed cause. — The declarations of M'Cree, even assuming that they would have gone to the extent of proving a forgery of the deed, were inadmissible in evidence. . . . Then, does this case fall within any of the recognized exceptions to the general rule of law? They are stated by Mr. Phillipps to consist of the following classes: — First, dying declarations; secondly, hearsay in questions of pedigree; thirdly, hearsay in questions of public right, custom, boundary, &c.; fourthly, old leases, rent-rolls, surveys, &c., in certain cases; fifthly, declarations against interest; sixthly, rectors' and vicars' books; and lastly, tradesmen's books. (PARKE, B. — The sixth are rather a class of the fourth). It is submitted that the declarations tendered in this case fall within none of these classes. It is said that the case of Wright *v.* Littler affords an authority in support of their admissibility; but it is not so, when that case is carefully looked at. . . . At that period, dying declarations were held admissible and material on many questions, though they have since been restricted to the single case where the death of the party is itself the subject of inquiry, Doe *v.* Ridgway, 4 B. & Ald. 53; Rex *v.* Mead, 2 B. & C. 605. . . .

The judgment of the Court was now delivered by

PARKE, B. — This was an action on a covenant in a mortgage deed, to which there was a plea of non est factum. . . . We who heard the argument are all of opinion that the evidence was properly rejected.

The general rule is, that hearsay evidence is not admissible as proof of a fact which has been stated by a third person. This rule has been long established as a fundamental principle of the law of evidence; but certain exceptions have also been recognized, some from very early times, upon the ground of necessity or convenience. The simple question for us to decide is, whether such a declaration as this be one of the allowed exceptions to the general rule. . . .

The first case referred to is that of Wright *v.* Littler [*ante*, No. 381]. . . .

From this report it is clear, that Lord MANSFIELD by no means lays

it down distinctly as an established rule of evidence, that such a declaration, even when made "in extremis," is admissible. If it had been in his opinion a rule of law, that such statements were evidence, it is not likely that he would have assigned so many other reasons for refusing a new trial; and if we look at the report of the same case in Sir William Blackstone's Reports, that impression is confirmed; for his lordship is stated to have declared distinctly, that "no general rule could be drawn from it," and that unless manifest injustice had been done in the whole case, there was no ground for a new trial. . . .

And when it is considered in how qualified a manner the opinion of Lord MANSFIELD, the origin and foundation of the others, is expressed; and when it is recollected that both then and at the time of the Nisi Prius trial before Mr. Justice HEATH, an opinion prevailed (which is now properly exploded), that *any* declaration "in extremis" was admissible, on the ground that the solemnity of the occasion was equivalent to a declaration on oath, which consideration *certainly* had an influence on the mind of Lord MANSFIELD at least, it is impossible to say that there is any such weight of authority, however great our respect for the eminent Judges whose names have been mentioned, as to induce us to hold that this case is established and recognized as an exception from the great principle of our law of evidence, that facts, the truth of which depends on parol evidence, are to be proved by testimony or oath.

If we had to determine the question of the propriety of admitting the proposed evidence, on the ground of convenience, apart from the consideration of the expediency of abiding by general rules, we should say that it was at the least very doubtful, whether, generally speaking, it would not cause greater mischief than advantage in the investigation of truth. An extreme case might occur, as there seems to have done before Mr. Justice HEATH, where the exclusion of evidence of a death-bed declaration would probably have been the exclusion of one mode of discovering the truth. The same may, perhaps, be said of all solemn assertions "in extremis" by deceased witnesses. But, on the other hand, if any declarations, at any time from the mouth of subscribing witnesses who are dead are to be admitted in evidence (and you cannot stop short of that, for no one contends that the exception is to be *confined* to death-bed declarations, and if so confined, the evidence would be inadmissible in the present case), the result would be, that the security of solemn instruments would be much impaired. . . .

We therefore think the rule for a new trial must be discharged.

Rule discharged.

383. J. G. PHILLIMORE. *History and Principles of the Law of Evidence.* (1850. p. 554). I now come to a case which, to the scandal of our jurisprudence, has been overruled; though I still hope, for the honour of the Bar, that such a triumph over reason will not be considered final. I allude to the case of Wright on the demise of Clymer against Littler [*ante*, No. 381], in which Lord Mansfield admitted evidence of the dying declarations of a witness that he had forged a bond.

Inconceivable as the narrowness of our judges often is, and shocking as the consequences are to which it leads, I do not know any case, from Lord Coke downwards, in the whole disgusting series of judicial bigotry, that exemplifies it in a manner more humiliating than that of Stobart *v.* Dryden [*ante*, No. 382], in which this case was overruled. . . .

It shews that the incapacity for large and liberal views, and for reasoning on general principles, which the study of our law develops, becomes, after a certain time, incorrigible. Lord Mansfield, as I have mentioned, had, in the case of Clymer *v.* Littler, admitted the solemn declaration of a dying man that he had forged a will. . . . The ground upon which these cases were placed, was not the narrow and sandy basis suggested by the Court of Exchequer; but the deep, broad, adamantine foundation, which alone can support the pillars of jurisprudence. The reason of its admission was drawn from the principles of our common nature, — principles attested by those for whom the heart of man had no secrets, and whom age after age had revered as the almost inspired oracles of all the hopes, fears, wishes and intentions, that had ever fluttered and throbbed within it. These great men did not think, with the Barons of the Exchequer, that the declarations on a death-bed are lightly made and heedlessly repeated: they thought that

> "The tongues of dying men
> Enforce attention, like deep harmony." . . .

Poets, moralists, and philosophers, have, in all ages, arrived at a conclusion directly the reverse of that which the Barons of the Exchequer have done what they could to brand upon the law of England, by the decision in Stobart *v.* Dryden, — that monumental proof of judge-made law! For the Court of Exchequer were not content without a flimsy distinction: covetous of technicality, they have actually decided that dying declarations are admissible precisely where they are most suspicious; that though they are inadmissible on all other occasions, they may be used to shew how the dying man came by his death, and for no other purpose.

384. MONTGOMERY *v.* STATE

SUPREME COURT OF INDIANA. 1881

80 *Ind.* 338

FROM the Elkhart Circuit Court.

J. M. Vanfleet, for appellant. *D. P. Baldwin*, Attorney-General, *J. S. Drake*, Prosecuting Attorney, and *W. L. Stonex*, for the State.

ELLIOTT, C. J. — Appellant was tried and convicted upon a count in an indictment charging him with a violation of section 1923 of the R. S. of 1881. That section reads thus: "Whoever prescribes or administers to any pregnant woman, or to any woman whom he supposes to be pregnant, any drug, medicine, or substance whatever, with intent thereby to procure the miscarriage of such woman; or, with like intent, uses any instrument or means whatever, unless such miscarriage is necessary to preserve her life, — shall, if the woman miscarries or dies in consequence thereof, be fined not more than five hundred dollars nor less than fifty dollars, and be imprisoned in the State prison not more than fourteen

years nor less than three years." It is charged in the indictment, and there is evidence tending to prove, that the woman upon whom the wrongful act is alleged to have been committed died from its effect.

Over the appellant's objection, the State was permitted to give in evidence the dying declarations of the woman. This ruling presents the controlling question in the case.

1. It is contended on the part of the prosecution that the death of the woman is the gravamen of the offence, and that, where death results from an unlawful act in producing abortion, the crime is homicide. . . . It has long been settled that dying declarations are admissible only in cases of homicide. Starkie says of the rule admitting dying declarations: "But so jealous is the law of any deviation from the general rule, that it confines the exception to the necessity of the case, and only renders such declarations admissible when they relate to the cause of death, and are tendered on a criminal charge respecting it." Starkie, Ev. 32. The generally accepted doctrine is that stated in Rex *v.* Mead, 2 B. & C. 605, where it was said that they are only admissible "where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration." Wharton's Criminal Evidence, § 288; Roscoe's Criminal Evidence, p. 32; 1 Greenleaf, Evidence, § 156. This Court has adopted and enforced this principle. Binns *v.* The State, 46 Ind. 311; Duling *v.* Johnson, 32 Ind. 155; Morgan *v.* The State, 31 Ind. 193. It has been often decided, that in prosecutions for producing an abortion, dying declarations are not admissible. Rex *v.* Lloyd, 4 C. & P. 233; Wilson *v.* Boerem, 15 Johns. 286; Regina *v.* Hind, 8 Cox C. C. 300; Wooten *v.* Wilkins, 39 Ga. 223. If the prosecution were for producing an abortion, and death were not an essential ingredient of the crime, our way would be plain. We should be compelled to declare that the evidence was incompetent.

There are peculiar features distinguishing the case from one where the only charge is that an abortion was produced by the accused. The statute makes death an element of the offence, and death is, therefore, the subject of judicial investigation. The death was the result of an unlawful act, for to produce the abortion was expressly forbidden by law. If there were no special statutory provision upon this subject, the crime of which the appellant is accused would have been a felonious homicide. . . . Is the offence any the less homicide because of the prosecution being under one statute rather than another? Is the manner of the death any the less the subject of investigation than it would have been if the indictment had charged manslaughter or murder? . . .

If the statute had in express terms declared that the offence should be deemed murder or manslaughter, the evidence would have been competent. Can it make any difference that the statute either gives the offence no name or names it something else than murder or manslaughter? Courts are to look to the substance of the offence defined; they are not to be guided by mere names. If, in reality, the offence is

homicide and the subject of inquiry the manner of the deceased's death, the settled rules of evidence which prevail in such cases should be enforced. Wisconsin has a statute very similar to ours. The principal difference between the two statutes is that the former declares that the person producing the abortion which results in death shall be deemed guilty of manslaughter. It was held in State *v.* Dickinson, 41 Wis. 299, that, in a prosecution under the statute referred to, dying declarations were admissible. . . . The statute of Ohio is somewhat like ours, and it was held in The State *v.* Harper, 35 Ohio St. 78, that the dying declarations of the deceased were not competent. . . . We think that the unlawful act possesses all the distinctive and essential features of felonious homicide, and that to declare that it is not homicide is to sacrifice the substance to the shadow. Whether the statute characterizes the act as a felonious killing or not, is immaterial, if it plainly appears that it is such. . . .

We conclude, where death results from the unlawful attempt to produce an abortion, that death is the subject of enquiry, and that dying declarations are competent. If we adopt any other view, we shall sacrifice principle to a mere form of words, and give an effect to a statute, intended to secure punishment by an explicit definition of an offence, exactly the reverse of what its framers intended. We regard the statute as clearly intending that death shall be deemed a controlling element of the offence, and in this respect it differs from the statutes of New York and Ohio, as construed by the courts of those States. . . .

Specific objections were made to the statement of the dying woman, and these now require consideration.

2. It is undoubtedly the law that the statements must be such as would have been admissible had the dying person been sworn as a witness. A statement in a dying declaration, which a witness upon the stand would not be allowed to make, is not competent. Jones *v.* The State, 71 Ind. 66; Binns *v.* The State, 46 Ind. 311. Matters of opinion contained in a dying declaration are not admissible. Wharton, Criminal Evidence, § 294.

It is earnestly contended that the sentence contained in the statement reading as follows: "The operation was performed for the purpose of producing an abortion," should have been excluded. We think this position must be sustained. What the purpose of an act was is an inference from facts, and witnesses must state the facts and not their conclusions. A witness would have been required to state what was said and done. . . . But we need not discuss this question, for it is well settled that dying declarations must speak to facts only, and not to mere matters of opinion. Binns *v.* State, supra; Roscoe's Criminal Evidence, 32; Wharton, Criminal Evidence, § 294; Warren *v.* State, 35 Am. R. 745.

3. Dying declarations are admissible to prove what was done at the time of the commission of the unlawful act which caused death, but they

are not admissible to prove what occurred before or afterwards. The cases of Jones *v.* State, supra, and Binns *v.* State, supra, declare that they are not competent for the purpose of proving what occurred anterior to the time the act which produced death was done, and this doctrine is well supported by the text-writers and the adjudged cases. McHugh *v.* The State, 31 Ala. 317; Barnett *v.* The People, 54 Ill. 325; Mose *v.* The State, 35 Ala. 422; Nelson *v.* The State, 7 Humph. 542. . . . The rule is confined to a statement of the circumstances connected with the fatal act and forming part of the same transaction. . . . In the case at bar, statements were included in the dying declaration, of the condition of the woman several days after the unlawful act was committed, and also of a fact entirely distinct from the act itself. In admitting these statements the Court plainly erred. . . .

Judgment reversed. The clerk will enter the proper order for the return of the prisoner.

Topic 2. Statements of Facts against Interest

385. MIDDLETON *v.* MELTON

KING'S BENCH. 1829

10 *B. & C.* 317

[ACTION against a surety on a bond given by one Squire, a collector of taxes.]

Plea, that Squire in his lifetime paid the sums collected by him, and upon that issue was joined.

At the trial before ALEXANDER, C. B., at the Spring Assizes for the county of Surrey, 1829, it appeared that the defendant, together with John Frost and Squire, had executed the bond stated in the declaration; that a duplicate assessment had been delivered to Squire, in which he occasionally made entries of the sums received from the persons assessed; from the entries made in that assessment, it did not appear that he had received any monies that he had not paid over to the commissioners. It appeared also that for his own convenience he kept a private book, containing entries (copied from the duplicate assessment) of the names of the persons, and of the sums for which they were respectively assessed, and that it was his usual habit to collect by that private book, and to mark with ticks all the sums he received from the several persons therein mentioned. . . . The sums which appeared to be due from Squire by the entries he himself had made in the private book, over and above what appeared by the duplicate assessment to have been collected by him, amounted to 996£.; for some of these sums the plaintiff further produced receipts given to several persons for taxes paid to Squire, and signed by him. It was objected, first, that the receipts were not receivable in evidence, because the parties who paid the money might have been

called; and, secondly, that although entries made by Squire in any book which he in the course of his duty as collector was bound to keep would be evidence against the surety, yet that entries made by him in a private book kept for his own convenience were not receivable in evidence to charge the surety.

The learned Judge received the evidence, but reserved liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion that neither the entries in the private book nor the receipts were evidence, or to reduce the verdict, if they should be of opinion that the entries in the private book were not admissible in evidence, but that the receipts were. A verdict having been found for the plaintiff for 996£. a rule nisi had been obtained pursuant to the leave reserved.

Andrews Serjt. and *Hutchinson*, now showed cause. The entries in the private book of the deceased collector were declarations made by him against his interest, for he thereby charged himself with the receipt of certain sums of money, which he was bound by law to pay over to other persons. The entries were therefore admissible in evidence on the ground that they were made by an individual cognizant of a fact not in dispute, and who at the time when they were made had no interest in making false entries, and that they tended to charge himself. . . .

Spankie Serjt. and *Chitty*, contra. The question is, whether the entries made by Squire in his private book, if that book had been produced, would have been admissible against the defendant as surety? . . . Entries made by a principal for his own purposes might have been evidence against the principal himself, but are not to charge a surety. The best evidence should be produced. Cutler *v.* Newlin (Manning's Digest, 137) shows that an admission by a principal is not, while he is alive, sufficient to charge a surety.

Bayley, J. — The question in this case is, Whether a private book kept by a collector of taxes, containing entries wherein he acknowledges the receipt of sums of money in his character of collector, can be given in evidence against a surety, the collector having been appointed to collect the taxes mentioned in the bond pursuant to the provisions of an act of Parliament. In this case Squire was the collector, and his private book was found after his death, and given by his daughter to the defendant. There was evidence to show, therefore, that it was left in the defendant's possession, and he having refused to produce it at the trial after notice, secondary evidence of its contents was admissible. It was proved that it was the collector's usual habit to collect by his private book, and to mark the sums he received with ticks, and that those ticks denoted that those sums had been received by him. If the entries mentioned in the book were admissible evidence to show that he received those sums, they will be sufficient to entitle the plaintiff to retain the verdict for the full amount; and the question as to the admissibility of the receipts will not necessarily arise. . . . The question then is, Whether such an entry, made by an individual against his own interest, may be evidence of the

fact of the receipt of the money against a third party? It is a general principle of evidence, that declarations or statements of deceased persons are admissible when they appear to have been made against their interest. An entry in a book, whereby the party making it charges himself with the receipt of money on account of a third person, or acknowledges the payment of money due to himself, has been held to be evidence of the receipt or payment of such money. . . . These cases establish that where a person makes an entry charging himself with the receipt of a sum of money, that entry is evidence of the fact of the receipt of that money against a third person. The question as to the receipts then becomes immaterial. But if the entries in the book are admissible in evidence, because the tick marked against them denotes that the collector had received the money, the receipts signed by him must be evidence of the fact of such receipt of the money upon the same principle.

LITTLEDALE, J. — I am of the same opinion. I at one time entertained great doubts whether entries made in a private book kept by a person for his own convenience could be evidence against a third party. . . . Warren *v.* Greenville, 2 Str. 1129, Barry *v.* Bebbington, 4 T. R. 514, and Higham *v.* Ridgway, 10 East, 109, establish this general principle, that where a person has peculiar means of knowing a fact, and makes a declaration or written entry of the fact, which is against his interest at the time, it is evidence of the fact as between third persons after his death.

PARKE, J. — I am of the same opinion. . . . The general rule undoubtedly is, that facts must be proved by testimony upon oath. This case, however, falls within the exception necessarily engrafted upon that rule, viz., that an admission of a fact made by a deceased person, which is against the interest of the party making it at the time, is evidence of that fact as between third persons. Upon that ground entries made by receivers, stewards, and other agents, charging themselves with the receipt of money, have been held, after their death, to be admissible in evidence, to prove the fact of the receipt of such money, and that without reference to the particular character of the person who made such entries. In Warren *v.* Greenville (2 Str. 1129), the party who made the entry was an attorney; in Manning *v.* Lechmere (1 Atk. 453), a bailiff; in Higham *v.* Ridgway (10 East, 109), a surgeon. . . . I think those decisions may be supported on the more general principle, that an entry made by a party cognizant of a fact, and having no interest to make a false entry, whereby he charges himself with the receipt of a sum of money, is evidence of the fact of the receipt of such money. It is unnecessary to consider the question as to the receipts, because the entries in the book, if admissible, are sufficient to entitle the plaintiff to the full amount of the damages which he has recovered. But I cannot help thinking that they were admissible; and I doubt the propriety of that part of the decision in the case of Goss *v.* Watlington (3 Brod. & Bingh. 132), by which the receipts of the deceased collector were held inadmissible. Rule discharged.

386. SMITH *v.* MOORE

SUPREME COURT OF NORTH CAROLINA. 1906

142 *N. C.* 277; 55 *S. E.* 275

APPEAL from Superior Court, New Hanover County; W. R. ALLEN, Judge.

Action by Louise B. Smith against Susan E. Moore and others. From a judgment in favor of plaintiff, defendant Susan E. Moore appeals. Reversed, and new trial granted.

The object of the action is to set aside a deed for a lot in the city of Wilmington at the northeast corner of Second and Red Cross streets which was executed to Mr. Moore, the husband of the defendant Susan E. Moore, and the father of her codefendants, by Mrs. Mary E. Smith and her daughter, the plaintiff, and which it is alleged was obtained by fraud. . . . The plaintiff attacked the deed from her mother and herself to Mr. Moore upon the ground that, at the time it was executed, his attorney stated to her in the presence of her mother and Mr. Moore that it was a will; that she was ill at the time and confined to her bed, and that she signed the deed thinking that it was a will and she did not know it was a deed until after Mr. Moore's death. . . . The plaintiff put in evidence a letter from Mrs. Smith to Mrs. Moore's attorney, dated March 2, 1885, in which she expressed the greatest affection and esteem for her son-in-law, Mr. Moore. . . . The defendant put in evidence the deposition of Mrs. Boudinot, and proposed to prove by her that Mrs. Smith, who was her sister, had stated to her that she had executed the deed to Mr. Moore, and gave substantially the same reasons for so doing as those set forth in the letter to the attorney. The testimony was excluded by the court, and the defendants excepted. On cross-examination she testified that Mrs. Smith had told her the deed had been executed, giving in detail what was said by her about the deed. . . . The jury for their verdict found that the deed was procured by fraud, and, judgment having been entered thereon, the defendant appealed, and especially assigned as errors the several rulings and the instructions of the court to which exceptions had been taken.

Rountree & Carr and *Bellamy & Bellamy*, for appellant. *John D. Bellamy & Son* and *E. K. Bryan*, for appellee.

WALKER, J. (after stating the case). . . .

The second assignment of error, embracing the next six exceptions, relates to the exclusion of a part of Mrs. Boudinot's testimony which was taken by deposition. She deposed, among other things, that Mrs. Smith, who was her sister, had told her that she had made a deed to Mr. Moore for the lot, and, in the conversation with her, used language substantially similar to that which is contained in her letter to Mr. Moore's attorney, dated March 2, 1885. . . . The testimony was evi-

dently ruled out by the Court because it was regarded as nothing more than hearsay, but we think it comes within one of the well-known exceptions to the rule excluding such testimony. Declarations of a person, whether verbal or written, as to facts relevant to the matter of inquiry, are admissible in evidence, even as between third parties, where it appears: (1) That the declarant is dead; (2) that the declaration was against his pecuniary or proprietary interest; (3) that he had competent knowledge of the fact declared; (4) that he had no probable motive to falsify the fact declared. 1 Elliott on Evidence, §§ 439–454, where the subject is fully discussed. . . . The earliest case on the subject of such declarations is Searle *v.* Lord Barrington, 2 Strange, 826; Lord Barrington *v.* Searle (on appeal) 3 Brown's Cases, 535; Id., 8 Mod. 278. In that case, decided in 1730, an indorsement of a payment of interest on a note was admitted to repel the statute of limitations. . . . It is regarded as the first and leading case, and is reviewed, in connection with the subsequent cases on the same question to the year 1833, in Gleadon *v.* Atkin, 3 Tyrwh. 289. . . . The rule as thus established is said to be founded on a knowledge of human nature. Self-interest induces men to be cautious in saying anything against themselves, but free to speak in their own favor. We can safely trust a man when he speaks against himself, and the law, in this instance, substitutes for the sanction of a judicial oath the more powerful one arising out of the sacrifice of a man's own interests. This natural disposition to speak in favor of, rather than against interest, is so strong, that when one has declared anything to his own prejudice, his statement is so stamped with the image and superscription of truth that it is accepted by the law as proof of the correctness and accuracy of what was said, and the fact that it was against interest is taken as a full guaranty of its truthfulness in place, not only of an oath, but of cross-examination as well, they being the usual tests of credibility. A discussion of this rule of evidence, which shows how thoroughly it has been adopted by the Courts, whether the declarations are in the form of mere words or of written entries will be found in 1 Greenleaf, Evidence (16th Ed.) §§ 147–154; 2 Wigmore, Evidence, §§ 1455–1471; McKelvey on Evidence, pp. 254–261. The case of Higham *v.* Ridgeway, 10 East, 109, 3 Smith's L. C. (9th Am. Ed.) 1, recognized the principle to its fullest extent and held that it embraced, not only the particular statement which was against interest, but others contained in it, Lord Ellenborough saying that it is idle to admit a part without the context. "All parts of the speech or entry may be admitted which appear to have been made while the declarant was in the trustworthy condition of mind which permitted him to state what was against his interest." 2 Wigmore, Evidence, § 1465. Especially should the part of the declaration that is not disserving be admitted if it is not in itself self-serving and tending, therefore, to promote the interest of the declarant. . . .

The three leading cases we have cited have been approved in the later decisions, and are regarded by the law-writers as having firmly

settled the principle to which they severally relate. This species of evidence was at one time said to be anomalous and to stand on the ultimate rule of competent testimony, but an unbroken line of decisions in England, and one almost so in this country, have established beyond question that verbal declarations are receivable under the conditions we have mentioned, even in controversies between third parties.

There is nothing that so strongly attests the truth of what a person declares, not even his oath and the searching light of a cross-examination, as when he has asserted the existence of a fact and it appears that his interest at the time lay the other way. Doe *v.* Jones, supra. The words of sacred writ, "He that sweareth to his own hurt and changeth not," were uttered long before the era of our jurisprudence, and set before us, not only one of the most exalted attributes possessed by the exemplar of true virtue and probity, but embodied at the same time the highest standard by which we can safely gauge our trust and confidence in human testimony. It is not at all a matter for surprise, therefore, that the common-law jurists should have regarded it as a perfectly safe test for discerning the truth in judicial investigation.

We must now consider whether the declaration of Mrs. Smith to Mrs. Boudinot comes within the rule stated. Was it a declaration against her interest at the time she made it? We think it was. She was then in possession of the lot and ostensibly the owner thereof, and when she declared that she had parted with her title and did not own the estate of which she was apparently seised, it could not be anything other than such a declaration. We have seen that any other statement associated in the declaration with the one against interest is just as competent as the latter, and especially is that true in a case like the one at bar where the collateral statement bears directly on the other and tends to confirm and strengthen it. The deed to Mr. Moore is attacked for fraud, because what was in fact a deed was represented to be a will, and the declaration by Mrs. Smith to Mrs. Boudinot was, not only that she had made a deed, and therefore, knew the character and contents of the paper writing, but that she executed it upon a meritorious consideration, and substantially that she acted freely and voluntarily when she did so. What could be more against her interest than such a statement, and what could carry with it more conclusive evidence of its truth and accuracy? It was in disparagement of her apparent title and made at a time which was recent with respect to the date of the main transaction, when it must be supposed she had a clear recollection of what had occurred, and also long prior to the beginning of this controversy — ante litem motam. . . . But it may be suggested that she was not in privity with her daughter, the plaintiff, as she had but a life estate and her daughter a contingent remainder, which, since the death of her mother, has become a vested one in interest and possession. This is true, but it does not prevent the application of the rule, for, the declaration being against interest, it is admitted because of the likelihood of its being true and of its

general freedom from any reasonable probability of fraud or imposition, and is for that reason held to be competent as to third parties. It is not, therefore, within the principle of exclusion, as being res inter alios acta. Lyon *v.* Ricker, 141 N. Y. 225; Higham *v.* Ridgeway, supra. . . . We are constrained to think that the evidence is both competent and relevant, and should be heard by the jury in its entirety.

For the reason we have already stated a new trial is awarded.

New trial.

HOKE, J., concurs in the result.

386*a*. DONNELLY *v.* UNITED STATES

SUPREME COURT OF THE UNITED STATES. 1913

228 *U. S.* 243; 33 *Sup.* 449

PLAINTIFF in error was convicted in the Circuit Court of the United States for the Northern District of California, upon an indictment for murder, and, having been sentenced to life imprisonment, sues out this writ of error. The indictment charged him with the murder of one Chickasaw, an Indian, within the limits of an Indian reservation known as the Extension of the Hoopa Valley Reservation, in the County of Humboldt, in the State and Northern District of California. The evidence tended to show that Chickasaw, who was an Indian and a member of the Klamath Tribe, was shot through the body and mortally wounded while he was in or near the edge of the water of the Klamath River, at a place within the exterior limits of the Extension.

The trial proceeded upon the theory that the crime was committed within the river bed and below ordinary high-water mark — a theory favorable to the plaintiff in error, in that it furnishes the basis for one of the principal contentions made in his behalf. . . . It was contended that the Circuit Court was without jurisdiction, first, because the place of the commission of the alleged offence was not within the limits of the Extension of the Hoopa Valley Reservation, but was upon the Klamath River, and therefore outside of those limits; and, secondly, because it did not appear that the defendant was an Indian. . . . In addition, it was contended that the Circuit Court erred in refusing to permit the plaintiff in error to introduce evidence tending to show that one Joe Dick, a deceased Indian, had confessed just before his death that it was he who had shot and killed the Indian Chickasaw.

Mr. Justice PITNEY (after stating the case as above) delivered the opinion of the Court.

. . . In our opinion, the offence with which the plaintiff in error was charged was punishable in the Federal Courts under §§ 2145 and 5339 Rev. Stat.

The only remaining question arises out of the exclusion by the trial

judge of testimony offered by the plaintiff in error for the purpose of showing that one Joe Dick, an Indian, since deceased, had confessed that it was he who had shot Chickasaw. Since the circumstances of the crime, as detailed in the evidence for the Government, strongly tended to exclude the theory that more than one person participated in the shooting, the Dick confession, if admissible, would have directly tended to exculpate the plaintiff in error. By way of foundation for the offer, plaintiff in error showed at the trial that Dick was dead, thereby accounting for his not being called as a witness, and showed in addition certain circumstances that, it was claimed, pointed to him as the guilty man, viz., that he lived in the vicinity and therefore presumably knew the habits of Chickasaw; that the human tracks upon a sand bar at the scene of the crime led in the direction of an acorn camp where Dick was stopping at the time, rather than in the direction of the home of the plaintiff in error; and that beside the track there was at one point an impression as of a person sitting down, indicating, as claimed, a stop caused by shortness of breath, which would be natural to Dick, who was shown to have been a sufferer from consumption.

Hearsay evidence, with a few well recognized exceptions, is excluded by Courts that adhere to the principles of the common law. The chief grounds of its exclusion are, that the reported declaration (if in fact made) is made without the sanction of an oath, with no responsibility on the part of the declarant for error or falsification, without opportunity for the Court, jury, or parties to observe the demeanor and temperament of the witness, and to search his motives and test his accuracy and veracity by cross-examination, these being most important safeguards of the truth, where a witness testifies in person, and as of his own knowledge; and, moreover, he who swears in court to the extra-judicial declaration does so (especially where the alleged declarant is dead) free from the embarrassment of present contradiction and with little or no danger of successful prosecution for perjury. It is commonly recognized that this double relaxation of the ordinary safeguards must very greatly multiply the probabilities of error, and that hearsay evidence is an unsafe reliance in a Court of justice.

One of the exceptions to the rule excluding it is that which permits the reception, under certain circumstances and for limited purposes, of declarations of third parties made contrary to their own interest. But it is almost universally held that this must be an interest of a pecuniary character; and the fact that the declaration, alleged to have been thus extra-judicially made, would probably subject the declarant to a criminal liability is held not to be sufficient to constitute it an exception to the rule against hearsay evidence. So it was held in two notable cases in the House of Lords — Berkeley Peerage Case (1811), 4 Camp. 401; Sussex Peerage Case (1844), 11 Cl. & Fin. 85, 103, 109; 8 Eng. Reprint 1034, 1042, — recognized as of controlling authority in the Courts of England.

In this country there is a great and practically unanimous weight of

authority in the State courts against admitting evidence of confessions of third parties made out of Court and tending to exonerate the accused. . . . A few of them (West *v.* State, 76 Ala. 98; Davis *v.* Commonwealth, 95 Ky. 19; and People *v.* Hall, 94 Cal. 595, 599) are precisely in point with the present case, in that the alleged declarant was shown to be deceased at the time of the trial. . . . In People *v.* Hall it appeared that defendant and one Kingsberry were arrested together for an alleged burglary, attempted to escape, were fired upon and wounded by one of the captors; that a physician was sent for to treat them, and that Kingsberry died from the effects of his wound before any complaint was filed against either of the parties. "In his own behalf the defendant offered to prove that after a careful examination the physician was satisfied that Kingsberry's wounds were necessarily fatal, and that he so informed him at the time; that Kingsberry admitted to the physician that he fully realized that he was mortally wounded and was on the point of death, and had given up all hope of ever getting well; that he was conscious of death, and that thus having a sense of impending death, and without hope of reward, he made a full, free, and complete confession to said physician in relation to this alleged crime, stating that he himself had planned the entire scheme, and that Hall had nothing to do with it and was not connected with the guilt, and was in all respects innocent of any criminal act or intent in the matter." This evidence was excluded, and the Supreme Court of California sustained the ruling, saying: "The rule is settled beyond controversy that in a prosecution for crime the declaration of another person that he committed the crime is not admissible. Proof of such declarations is mere hearsay evidence, and is always excluded, whether the person making it be dead or not" (citing cases that are among those included in the note).

We do not consider it necessary to further review the authorities, for we deem it settled by repeated decisions of this Court, commencing at an early period, that declarations of this character are to be excluded as hearsay: . . . Mima Queen and Child *v.* Hepburn (1813), 7 Cranch. 290, 295; Davis *v.* Wood (1816), 1 Wheat. 6, 8; Lessee of Scott *v.* Ratliffe (1831), 5 Pet. 81, 86; Ellicott *v.* Pearl (1836), 10 Pet. 412, 436, 437; Wilson *v.* Simpson (1850), 9 How. 109, 121; Hopt *v.* Utah (1883), 110 U. S. 574, 581. And see United States *v.* Mulholland, 50 Fed. 413, 419.

The evidence of the Dick confession was properly excluded.

No error appearing in the record, the judgment is

Affirmed.

Mr. Justice Van Deventer concurs in the result.

Mr. Justice Holmes, dissenting. — The confession of Joe Dick, since deceased, that he committed the murder for which the plaintiff in error was tried, coupled with circumstances pointing to its truth, would have a very strong tendency to make any one outside of a Court of justice believe that Donnelly did not commit the crime. (I say this, of course, on the supposition that it should be proved that the confession really was

made, and that there was no ground for connecting Donnelly with Dick.) The rules of evidence in the main are based on experience, logic, and common sense, less hampered by history than some parts of the substantive law. There is no decision by this Court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man, Mattox *v.* United States, 146 U. S. 140; and when we surround the accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight. The history of the law and the arguments against the English doctrine are so well and fully stated by Mr. Wigmore that there is no need to set them forth at greater length. 2 Wigmore, Evidence, §§ 1476, 1477.

Mr. Justice LURTON and Mr. Justice HUGHES concur in this dissent.

Topic 3. Statements about Family History

387. VOWLES *v.* YOUNG

CHANCERY. 1806

13 *Ves. Jr.* 140

AN issue having been directed under a bill of redemption, the plaintiffs claiming as co-heirs at law, upon the trial before Baron GRAHAM, at the Assizes, a verdict was found for the plaintiff.

A motion was made for a new trial, upon two grounds: 1st. That the Judge had improperly rejected the evidence of Thomas Roberts, that he had heard Samuel Noble, the husband of Mary Noble, say, she was illegitimate. . . .

The *Solicitor-General* and Mr. *Hart*, in support of the motion, observed, that the first point was a question rather of construction than of law: viz., whether the husband is to be considered for this purpose as a part of the wife's family; and contended that as the declarations of any person connected with the family of the person from whom the pedigree is deduced, are clearly to be admitted, declarations by the husband ought to be received in preference to those of a first or second cousin. . . .

Serj. *Lens*, Mr. *Richards*, Mr. *Burrough*, and Mr. *Heald*, in support of the verdict. The general rule, that declarations by any person connected with the family are to be received, is admitted. But the effect of the guarded manner in which the question was put to this witness upon the trial, is, that the husband must be considered as a mere stranger; and therefore within the rule, as laid down by Lord KENYON, and

always acted upon, that declarations by a mere stranger to the family cannot be received. . . .

The *Solicitor-General*, in reply. The foundation of this evidence is tradition, collected from declarations at different times as to the fact of legitimacy, by a person a part of the family. . . . The attempt to distinguish the husband from the family, for this purpose, was never before made; and is most unreasonable. Evidence of declarations by a woman, that her third cousins, once removed, were her nearest kin, have been admitted; and can the husband's declarations as to the legitimacy of his wife be refused? A point certainly of some importance to him, if the stigma is considered. . . .

The Lord CHANCELLOR [ERSKINE]. Two questions arise upon this application for a new trial: 1st. Whether Roberts ought to have been received to say that he had heard Samuel Noble declare his wife, Mary Noble, was illegitimate. . . .

The first of these questions is certainly of very considerable moment. Courts of law are obliged in cases of this kind to depart from the ordinary rules of evidence, as it would be impossible to establish descents according to the strict rules by which contracts are established, and subjects of property regulated; requiring the facts from the mouth of the witness who has the knowledge of them. In cases of pedigree therefore recourse is had to a secondary sort of evidence, — the best the nature of the subject will admit, establishing the descent from the only sources that can be had. . . . If the declaration of the husband is not to be received to prove the legitimacy or illegitimacy of his wife, as a distant relation might, which seems to be contended, the extent of that proposition must be considered. Suppose the question were whether she was the daughter of A. or B., his evidence might equally be rejected upon the question whether she descended from one stock or another; yet, as far as hearsay is evidence of anything within the knowledge of a man, no man can be supposed ignorant of the reputation of the descent of his wife; and the law, admitting probability upon such a subject, always receives reputation of descent. . . . Upon questions of pedigree, inscriptions upon tombstones are admitted, as it must be supposed the relations of the family would not permit an inscription without foundation to remain. So engravings upon rings are admitted, upon the presumption that a person would not wear a ring with an error upon it. — I take this question with the qualification that has been stated, not whether the husband had heard the fact from any of his wife's relations, but whether he knew it; viz. whether he had such knowledge as is necessary to establish that kind of fact.

My opinion is, that the Judge has given too narrow a construction to "*the family*" of the person whose descent or legitimacy is to be established. . . . The law resorts to hearsay of relations upon the principle of interest in the person from whom the descent is to be made out; and it is not necessary that evidence of consanguinity should have the

correctness required as to other facts. If a person says another is his relation or next of kin, it is not necessary to state how the consanguinity exists. It is sufficient that he says A. is his relation, without stating the particular degree, which perhaps he could not tell if asked. But it is evidence, from the interest of that person in knowing the connections of the family. Therefore the opinion of the neighborhood, of what passed among acquaintance, will not do. . . .

Upon that point I think there must be a new trial.

388. JOHNSON *v.* LAWSON

COMMON PLEAS. 1824

2 *Bing.* 86

THE question for the jury was, whether one Francis Lidgbird (whose claim the plaintiff supported) or Henry Wilding (whose claim the defendant supported) was heir-at-law to Henry Lidgbird, who died seised of certain lands in October, 1820, and was the son of John Lidgbird, formerly sheriff of Kent. In consequence of a separation having taken place between John the sheriff and his wife, their son Henry was brought up, from about the age of nine months, with Miss Weller, afterwards Mrs. Hollinworth, till he went to college, and he spent his vacations at Mrs. Hollinworth's house: John Lidgbird, the sheriff, was on the point of marriage with Mrs. Hollinworth (which was prevented by his son Henry), and after the death of John, Henry lived with Mrs. Hollinworth for twenty-three or twenty-four years, and she was the only person in his confidence; this was proved by Mrs. Lucretia Pakenham, niece of Mrs. Hollinworth, who had died before the trial. On the part of the plaintiff it was proposed, among other evidence, to give evidence of declarations made by Mrs. Hollinworth, as to Francis Lidgbird being the heir of Henry, who died seised; but the learned judge refused to receive such evidence. It was then proved by Mrs. Elizabeth Withers, that a Mrs. King had been Henry Lidgbird's housekeeper for twenty-four years, and it was proposed to give evidence of declarations by Mrs. King, who was no longer living, as to Francis Lidgbird being the heir to Henry, but this was objected to by defendant's counsel: and Mr. Baron GRAHAM rejected it, saying "that it seemed to him to be carrying the principle of hearsay evidence too far; DE GREY, C. J., having laid it down, that it must be confined to persons who are members of the family."

A verdict having been found for the defendants, *Peake*, Serjt., obtained a rule nisi for a new trial, against which

Taddy, Serjt., was to have shown cause; but the Court called on

Peake to support his rule. In questions concerning pedigree the declarations of persons related to the family have always been received

in evidence, upon the ground, that men are supposed to take an interest in knowing the number and particulars of their kindred. But upon this principle it will be most expedient to admit, and most unjust to exclude, the declarations of persons who have long lived in a family as respected and confidential servants, or as intimate acquaintances. It is obvious that such persons must have a more lively interest in, and from frequent conversation a more accurate knowledge of the concerns of the family, than a distant relation, who may never have conversed with any of the parties concerned; and yet the declarations of such distant relation would be admitted without scruple. . . . The declarations of a husband have been received with regard to the kindred of his wife; and in Vowles *v.* Young, 13 Ves. 146 [*ante*, No. 387], and Whitelocke *v.* Baker, 13 Ves. 514, the arguments of the Lord Chancellor only go to the exclusion of entire strangers. BULLER, J., in Rex *v.* Eriswell, 3 T. R. 719, says, that declarations of persons not of the family may be received, and he refers to Brown *v.* Shelly, Easter, 1776. (BURROUGH, J. — I went the same circuit as BULLER, J., and I never knew such evidence admitted.) . . .

BEST, C. J. — This is a question of great importance. . . . As a general rule, hearsay is not admissible evidence, but to this general rule pedigree-causes form an exception, from the very nature of the case. . . . But evidence of that kind must be subject to limitation, otherwise it would be a source of great uncertainty, and the limitation hitherto pursued, namely, the confining such evidence to the declarations of relations of the family affords a rule at once certain and intelligible. . . . What then, has been the practice? To limit the admissibility to declarations of members of the family. It is true, a different opinion was expressed by a most learned judge in Rex *v.* Eriswell. But that judge must have been misled into the opinion by the manuscript case which has been cited. . . .

PARK, J. — I am of the same opinion. . . . My objection to the proposed evidence is, that if it were to be admitted the practice would be so loose as to occasion great inconvenience; whereas, if the rule be confined to members of a family, the path to be pursued is clear and certain. I think, therefore, we ought to adhere to the old rule, and not admit anything so vague as that which is now proposed.

BURROUGH, J. . . . This exception, from the general rule that hearsay shall not be admitted, must be construed strictly; and the natural limits of it are the declarations of members of the family. If we go beyond, where are we to stop? Is the declaration of a groom to be admitted? of a steward? of a chambermaid? of a nurse? may it be admitted if made a week after they have joined the family? and if not, at what time after? We should have to try in every case the life and habits of the party who made the declaration, and on account of this uncertainty such evidence must be excluded. The argument for the defendant rests on here and there a loose expression from a judge, and on the circumstance that there is no case in which such evidence is

reported to have been excluded; but before we can admit it, we must be referred to some case to warrant its admission. We have heard of no such case, and therefore the present rule must be discharged.

389. HARTMAN'S ESTATE

SUPREME COURT OF CALIFORNIA. 1910

157 *Cal.* 206; 107 *Pac.* 105

APPEAL from the Superior Court of San Joaquin County — FRANK H. SMITH, Judge.

The record presents two appeals, one from an order distributing the estate of William Hartman, deceased, and the other from an order denying a new trial of the matter.

By the provisions of his will the deceased left the sum of two thousand dollars to the Stockton Branch of the California Conference Association of the Seventh Day Adventists, and the entire residue of his estate to the said California Association of the Seventh Day Adventists. The petition for distribution stated these facts and asked distribution accordingly. The last named body is an eleemosynary or charitable corporation and it includes the so-called Stockton Branch, named as the recipient of the two thousand dollar legacy. Hartman executed said will more than thirty days before his death. He died on February 8, 1904. Annie Hartman Burns appeared and filed a counter petition for distribution, alleging that she is the daughter of Peter Hartman, deceased, and that Peter was a brother of the testator, William Hartman, that she is an heir of the testator, that the gift of the entire estate to said charitable corporation is void, under section 1313 of the Civil Code, except as to one-third thereof, and asking that the two-thirds be distributed to her as the only heir. The corporation appeared and denied her relationship to the testator. The Court found that she is a niece of the testator, as alleged, and his only heir at law. Distribution was made, accordingly, of two-thirds to her and one-third to said corporation, $2000 thereof being for the use of the Stockton Branch. The corporation is the appellant.

For Appellants, *E. E. Perlin.* For Respondent, *O. B. Parkinson.* For Executor, *Aylett R. Cotton.*

SHAW, J. (after stating the case as above). The main question presented is the sufficiency of the evidence to support the finding that Annie Hartman Burns is a niece of the testator. We think there was evidence justifying that conclusion. A brief statement of the facts which the evidence tends to prove will show its sufficiency.

William Hartman came to San Joaquin county prior to 1864 and continued to reside there until his death. So far as known, he never married and left no children. He was a native of Hanover, Germany,

and was naturalized in 1866. In 1864 he boarded at a hotel in Stockton, California, kept by Jacob Byer, now of Lancaster, New York. He told Byer at that time that he came from Lancaster, but did not say whether it was in New York or Pennsylvania. In 1862, Peter Hartman lived at Lancaster, New York. He and one William Hartman were together there at that time, in presence of E. J. Silvernail. They called each other brother, and by their first names, William and Peter. William talked of going to California and was trying to persuade Peter not to enlist in the army of the United States. Peter enlisted and in July, 1862, he and Silvernail's father, who had enlisted in the same company, were both injured by lightning and were sent home to Buffalo on furlough. . . . No other William Hartman had ever been known to reside in San Joaquin county. Annie Hartman Burns testified that she was the daughter of Peter Hartman and Mary Hartman, who were husband and wife, that she was born on January 22, 1868, at East Aurora, that her father died at Cowlesville, New York, in 1879, that her mother died in 1903, that she had no living brother, sister or other relative to her knowledge, that her father had told her he had a brother named William Hartman, who had gone to California at the time of the Civil War, and who lived there, that he had received letters from William Hartman, that he several times spoke of having a brother William, in California. East Aurora, Cowlesville, and Lancaster are towns in western New York a few miles apart.

The declarations of Peter Hartman to his daughter, made in the lifetime of William Hartman, that he had a brother William in California, were properly admitted in evidence to prove the relationship. The appellant on this point cites the rule given in Taylor on Evidence and in some of the decisions on the question. Taylor states it as follows: "Before, however, a declaration can be admitted in evidence, the relationship of the declarant with the family must be established by some proof other than the declaration itself." (1 Taylor on Evidence, 640.) To this Mr. Wharton adds: "for it would be a petitio principii to say that the declarations are receivable because he is a member of the family and he is a member of the family because his declarations are receivable." (1 Wharton, Evidence, § 218.)

On the other hand, however, it seems absurd to require, as a foundation for the admission of the declaration, proof of the very fact which the declaration is offered to establish. The preliminary proof would render the main evidence unnecessary. There are statements in the cases which seem to recognize a rule thus rigid and absurd. (Wise *v.* Wynn, 59 Miss. 588; Anderson *v.* Smith, 2 Mackey 381; Blackburn *v.* Crawford, 70 U. S. 187.) But for the most part the statements to this effect in the opinions mean no more than that the declarations of persons not of kin, either to the claimant or to the person from whom descent is claimed, can not be admitted to prove kinship. (See Rulofson *v.* Billings, 140 Cal. 459; Est. of James, 124 Cal. 661.) . . .

In the present case it was sufficiently shown that Peter Hartman was a member of the family, within the meaning of the rule. Annie Hartman Burns, his daughter, is the claimant and she testified to the relationship between herself and Peter Hartman. On this question the latest edition of Greenleaf on Evidence says:

"It is sometimes said that where, for example, the question is whether A is B's heir, the declarant must appear to be related to B, and not merely to A; this seems erroneous, however, since all relationship is mutual, and the question whether A is related to B or a member of B's 'family' is also and just as much a question whether B is related to A or a member of A's family, and on this point a person claiming to belong to A's family is competent to speak; the circumstance that the estate to be claimed is in A's or B's family being immaterial." (1 Greenleaf on Evidence, 16th ed., sec. 114c.)

Mr. Wigmore treats the question at greater length, as follows:

"It follows, in applying the foregoing principle, that where an alleged relationship between Doe and Roe is to be testified to, a relation of Doe may speak to it, because it concerns the relationships of Doe's family, while a relation of Roe may equally speak to it, because it concerns the relationships of Roe's family; hence, all that is required of the declarant is a *connection with either one or the other*, but *not with both*. This truth, however, has been obscured by what must be regarded as erroneous rulings. The question being whether Doe is related to Roe (for example, so as to share in Roe's inheritance), the argument has been that it would be idle to require merely that the declarant should be shown to be related to Doe alone, because then any family could connect itself with any other by its members' mere assertion of the relationship. But the proper way to approach the question seems to be a different one, and is as follows: Any member of D's line may declare as to the relationships (*i.e.* memberships) of that family, and any member of Roe's line may declare as to the relationships (*i.e.* memberships) of that family; and the qualifications of the declarant, as such member, must of course be shown beforehand, like the qualifications of any witness (*ante*, sec. 1486). Thus, before declarations of a supposed member of Doe's family can be admitted, the declarant's membership in Doe's family — for example, that he is Doe's son — must be shown. But that is the whole effect of this requirement. The further question, if any, is, whether a declaration of Doe's son that Doe is related to Roe (for example, is Roe's cousin) *is a declaration as to Doe's family at all*, — *i.e.* whether it is not, for the case in hand, solely a declaration about Roe's family-relationships, as to which Doe's son is by hypothesis not yet shown to be a qualified declarant. Now the state or condition of relationship must always in effect, though not in form, be double or mutual; *i.e.* the fact that Doe is cousin to Roe is also the fact that Roe is related as cousin to Doe. Hence, a statement of Doe's son that Doe is cousin to Roe, though in one form an assertion of Roe's relationships, is also equally a declaration that one of the relations of Doe (*i.e.* one of the members of Doe's family) is Roe, — for example, that one of the grandsons of Doe's grandfather is Roe. It is therefore a declaration upon which Doe's son is qualified to speak. The doubt, then, can only be as to whether it should make any difference that in the case at hand it is Roe's descendants who are seeking Doe's estate, or Doe's who are seeking Roe's estate. This surely can not affect the evidential value of the declarations; for that must depend on the circumstances at the time of making, and no one has ever contended that, apart from the *lis mota* and kindred

limitations (*ante*, secs. 1483, 1484), it makes any difference whether a parent belongs to a poor or obscure branch of the family or to a rich and notorious one. Moreover, it is usually at a later day only that it has become apparent which branch would have a pecuniary interest in connecting itself with the other. The difference, then, is a matter of the form of the statement only, and such assertions as the above must be treated as in substance declarations as to Doe's family-relationships; whether it is Doe's or Roe's family that now happens to be seeking the inheritance is immaterial." (2 Wigmore on Evidence, § 1491.)

The following cases are in accord with this doctrine: Sitler *v.* Gehr, 105 Pa. St. 597; Fowler *v.* Simpson, 79 Tex. 614; Louder *v.* Schluter, 78 Tex. 105; De Leon *v.* McMurray, 5 Tex. Civ. App. 283; Brown *v.* Lazarus, Id. 84.

The confusion seems to have arisen from the idea that such declarations were competent as admissions against interest. They do not derive their evidential value or competency from that consideration. They are admitted from reasons of necessity, because otherwise it would frequently be impossible to prove the kinship of members of a family after those who knew the facts are dead. Their evidential value comes not from their being admissions against the interest of the person making them, but, as Wigmore points out, from "the probability that the 'natural effusions' (to use Lord Eldon's often-quoted phrase) of those who talk over family affairs when no special reason for bias or passion exists are fairly trustworthy." (2 Wigmore on Evidence, sec. 1482.) "The evidence is in its nature of an unsuspicious kind; it is generally brought from remote times, when no question was depending or even thought of, and when no purpose would apparently be answered." (Rex *v.* Eriswell, 3 T. R. 720.)

Such declarations are safe-guarded against the possibility of their being declarations in the interest of the party making them by the requirement that they must appear to have been made before any controversy over the property arose. To satisfy the rule that the best evidence must be produced and to show necessity, it is made a condition of their admission that the declarant is dead at the time they are offered; or out of the jurisdiction; and they are sometimes excluded when it appears that there are living persons whose testimony on the subject could be produced.

. The orders appealed from are affirmed.

Sloss, J., and Angellotti, J., concurred.

Hearing in Bank denied.

Topic 4. Regular Entries

391. History.[1] (1) (*a*) First, there appears in *England*, at least as early as the 1600s, a custom to receive the shop-books of "divers men of trades and handicraftsmen" in evidence of "the particulars and certainty of the wares

[1] Abridged from the present Compiler's "Treatise on Evidence" (1905), Vol. II, § 1518.

delivered"; and this whether the books were kept by the party himself or by a clerk, and whether the entrant were living or dead. But there was more or less abuse of this evidence, in "leaving the same books uncrossed and any way discharged" and still suing for the claim. Moreover, the whole proceeding was also discredited as involving the making of evidence for one's self, for "the rule is that a man cannot make evidence for himself." In 1609, then, a statute (7 Jac. I, c. 12) after reciting these considerations, forbade this use of parties' shop-books "in any action for any money due for wares hereafter to be delivered or for work hereafter to be done," except within one year after the delivery of the wares or the doing of the work, or where a bill of debt existed, or "between merchant and merchant, merchant and tradesman, or between tradesman and tradesman," for matters within the trade. The higher Courts, applying the principle that a man cannot make evidence for himself, ultimately made this exclusion complete, by refusing to recognize these books at all, after the expiration of the year. In the lower courts, it is true (the Small Causes Court of London and provincial Court of Requests, succeeded by the County Courts), where the jurisdiction was limited to small claims, the use of these books continued to be a common practice, in many if not in all, — where indeed the general rules of evidence were perhaps, in the absence of counsel, more or less relaxed. But, apart from this local usage, the books of a party ceased after the 1600s to form the subject of a hearsay exception at common law in England. They came in again only under statutory rules of the late 1800s.

(*b*) Next, however, it appears that before the end of the same century of the above statute (1600) the entries of a deceased clerk (even a clerk of a party) began to be admitted, on a principle distinctly that of the preceding Hearsay exceptions — necessity and trustworthiness. The admission of these books was treated as anomalous, and it was distinctly understood that their use, though affording some concession to parties, was an essentially different thing from the use of books kept by a living party himself. The cases begin with the 1700s; Price *v.* Lord Torrington is the one most frequently taken as the landmark of the rule.

The admission thus far made covered only the books of the clerk of a party. But already there were instances foreshadowing a wider principle. In several rulings, books regularly kept by persons then deceased had been admitted, his death and the regularity of the book being more or less explicitly recognized as the grounds of admission. Finally, in 1832, in Doe *v.* Turford, following one or two minor cases, the doctrine was placed on a firm footing, and the general scope of the exception was recognized. It was understood to cover all entries made "by a person, since deceased, in the ordinary course of his business and duty" whether a person wholly unconnected with the parties, or the clerk of a party; and it is this general exception that to-day is universally recognized.

(2) (*a*) The history of the doctrine was widely different in the *United States*. The English statute of 1609, or a similar one, for parties' shop-books, was in force, to a considerable extent, in the Colonies. In the Plymouth Laws, as well as in the later laws of Massachusetts, Connecticut, and other New England States, the use of parties' account-books was limited, but still authorized, by statutes; a special action of "book-debt" was in some places authorized. In New York and New Jersey the use seems clearly traceable to Dutch practice, which however did not vary in essentials from the English. In most of the jurisdictions (though not in all) the party was allowed and required to verify the accounts by a "supplementory" oath; but in all jurisdictions, though there were practically no limitations

of time (as there were in England) to the use of the books, there were many restrictions as to the kind of business, the kind of transaction, and the like, which rested on the same distrust of a party's own evidence and seriously limited the use of the books. But a cardinal feature of the attitude of the Courts, peculiar to the United States, was that the evidence was treated on the same grounds already set forth as underlying the Hearsay exceptions generally, — the principles of necessity and of a circumstantial guarantee of trustworthiness. The necessity was the fact that so many small traders, in the then condition of the country, keeping no clerk, and being as parties incompetent to take the stand, were totally bereft of any means of proof except their own extrajudicial statements in these books. The guarantee of trustworthiness was that which we now recognize in the regularity of the entries. What is to be noticed, then, is that the books were received practically on the footing of a special Hearsay exception.

At that time the party was unavailable as a witness for himself. But between 1850 and 1870 statutes everywhere made parties competent to take the stand. Thus the necessity for a hearsay exception ceased. Nevertheless, by other statutes this exception had been expressly sanctioned; and these statutes were not repeated. Hence, the Exception survives in statutory form, though needless.

(*b*) Up to the earliest part of the 1800s, no other exception of the sort appears to have been recognized in the United States, — that is, there was no using of regular entries except this limited use of a party's shop-books. But a knowledge of the doctrine of Price *v.* Lord Torrington (1703) seems to have been then brought about; and shortly after 1813, some well-considered rulings established on a firm footing the large and general principle of admitting regular entries by deceased persons. In these two decisions the Exception found a recognition entirely independent of the use of parties' books; and it was only in the course of time, especially through Professor Greenleaf's treatment in his work on Evidence, that the two branches of the exception became associated and their analogy recognized.

When this relation came to be appreciated, certain difficulties had to be solved; for example, one of the questions presented to American Courts was whether the books of a deceased or an absent party should be treated according to the parties'-books doctrine or from the point of view of the broad and inclusive exception admitting regular entries of deceased persons generally. Another and analogous question was the place to be assigned to books kept by a deceased clerk of a party. These questions concerning the delimitation of the two divisions still trouble the waters of precedent.

Sub-topic A. Party's Books of Account

392. EASTMAN *v.* MOULTON

Superior Court of Judicature of New Hampshire. 1825

3 *N. H.* 156

Assumpsit. The defendant pleaded the general issue, and filed, by way of set-off, an account, one item of which was a charge of 1109 yards of cloth, and another item a charge of 187 yards of cloth. The cause was tried here at February term, 1824.

To prove his set-off, the defendant offered in evidence his book of

accounts, accompanied with his own oath, that the book offered contained the original entries of the articles mentioned in his set-off; that the entries were made at the times they purported to be made, and at or near the time when the respective articles were delivered. He was then cross-examined by the plaintiff's counsel in the same manner, that witnesses in chief are cross-examined; . . . He stated, that the said parcels of cloth, mentioned in the set-off, were delivered not to the plaintiff, but to the servants of the plaintiff. After the arguments of counsel to the jury, on both sides, were closed, the plaintiff's counsel objected, that the book of accounts could not go to the jury, as evidence of the delivery of the cloth, because it appeared, that it was in the power of the defendant to produce better evidence, the testimony of those, to whom it was delivered. But the Court overruled the objection, as made too late.

The jury having returned a verdict in favor of the defendant, the plaintiff moved the Court to grant a new trial, on the ground, . . . that the book of the defendant had been improperly submitted to the jury, as evidence of the delivery of the cloth.

Noyes, for the plaintiff.

Webster, for the defendant.

RICHARDSON, C. J.— It has long been the settled practice in this State, to permit the account books of a party, supported by his supplementary oath, to go to the jury, as evidence of the delivery of articles sold, and of the performance of work and labor. But as this is in truth the admission of a party to be a witness in his own cause, the practice is confined to cases where it may be presumed there is no better evidence, and has many limitations.

In the first place, it must appear that the charges are in the handwriting of the party who is sworn; because, if the charges are in the handwriting of a third person, such third person is presumed to know the facts, and may be a witness; so that there is no necessity of admitting the party to testify in his own cause. The book is, therefore, in such a case, rejected.

The charges in the handwriting of the party must appear in such a state, that they may be presumed to have been his daily minutes of his transactions and business. For if it appear in any way, that many charges, purporting to be made at different dates, were in fact made at the same time, the book is not evidence. The charges must appear to be the original or first entries of the party, made at or near the time of the transactions to be proved; and if the contrary appear, the book cannot be admitted as evidence.

There must be no fraudulent appearances upon the book, such as gross alterations. And where it appears by post marks, or otherwise, that the account has been transferred to another book, such other book must be produced.

If it appear by the book itself, or by the examination of the party, that there is better evidence, the book cannot go to the jury as evidence.

Thus, if an article be charged in the book as delivered by or to a third person, or if the party on his examination admit that to be the fact, the book is not evidence of the delivery of such article.

The party, when called, is in the first instance permitted to state only, that the book produced is his book of original entries; that the charges are in his handwriting; that they were made at the times they purport to have been made, and at or near the time of the delivery of the articles, or of the performance of the services. He may, however, be cross-examined by the other party. . . .

[In] the case now before us, as soon as it appeared that the cloth was delivered to a third person, the book became incompetent evidence to prove the delivery of that article; and the jury ought to have been so instructed. New trial granted.

393. STATUTES. *Georgia.* Code 1895, § 5182. The books of account of any merchant, shopkeeper, physician, blacksmith, or other person doing a regular business and keeping daily entries thereof, may be admitted in evidence as proof of such accounts, upon the following conditions: 1. That he kept no clerk, or else the clerk is dead or otherwise inaccessible, or for any other reason the clerk is disqualified from testifying; 2. Upon proof (the party's oath being sufficient) that the book tendered is his book of original entries; 3. Upon proof (by his customers) that he usually kept correct books; 4. Upon inspection by the Court, to see if the books are free from any suspicion of fraud.

Illinois. Revised Statutes 1874, c. 51, § 3. Where in any civil action, suit, or proceeding, the claim or defense is founded on a book account, any party or interested person may testify to his account-book, and the items therein contained; that the same is a book of original entries, and that the entries therein were made by himself, and are true and just; or that the same were made by a deceased person, or by a disinterested person, a non-resident of the State at the time of the trial, and were made by such deceased or disinterested person in the usual course of trade, and of his duty or employment to the party so testifying; and thereupon the said account-book and entries shall be admitted as evidence in the cause.

Iowa. Code 1897, § 4622. The entries and other writings of a decedent, made at or near the time of the transaction and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, . . . 2, when it [the entry] was made in a professional capacity, or in the ordinary course of professional conduct; 3, when it was made in the performance of a duty specially enjoined by law.

Ib. § 4623. Books of account, containing charges by one party against another, made in the ordinary course of business, are receivable in evidence only under the following circumstances. . . . First, the books must show a continuous dealing with persons generally, or several items of charges at different times against the other party in the same book or set of books; Second, it must be shown, by the party's oath or otherwise, that they are his books of original entries; Third, it must be shown in like manner that the charges were made at or near the time of the transaction therein entered, unless satisfactory reasons appear for not making such proof; Fourth, the charges must also be verified by the party or the clerk who made the entries, to the effect that they believe them just and true, or a sufficient reason must be given why the verification is not made.

394. CONKLIN *v.* STAMLER

COMMON PLEAS OF NEW YORK CITY. 1859

8 *Abb. Pr.* 400

APPEAL from a judgment.

By the Court. BRADY, J.—The only proof made in the Court below, was that the plaintiff had no clerk or bookkeeper, and that persons dealing with him had settled with him by his books. There is no evidence either that the defendant dealt with him, or of the delivery of any one of the articles named in the bill of items. The Courts have required, in similar cases, that a foundation should be laid for the introduction of this kind of evidence, which consists of proof that the plaintiff had no clerk; that some of the articles charged have been delivered; that the books produced are the account-books of the party; and that he keeps fair and honest accounts, and this by those who have dealt and settled with him. (Per curiam, Vosburgh *v.* Thayer, 12 Johns. 461; Lemuel *v.* Sutherland, 11 Wend. 568.) The admissibility of the books, on such proofs, is put upon the ground of necessity, arising from the former incompetency of the claimant to be a witness in his own behalf.

The reason of the rule seems to have been destroyed by the act of the Legislature, authorizing the examination of parties in their own behalf; but, however that may be, the testimony on behalf of the plaintiff was not sufficient to make the book produced evidence, and the judgment must be reversed. There was neither evidence that the defendant dealt with the plaintiff, nor of the delivery of any of the articles. Judgment reversed.

DALY, F. J.—In Morrill *a.* Whitehead (4 E. D. Smith 239), it was proved that the books produced were the account-books of the party; that he had no clerk, and that he kept fair and honest accounts; but as there was no proof that any one of the services entered in the book had been actually rendered, we reversed the judgment. This is the first case in this State that has gone, I think, that length, or in which it was distinctly determined that some of the articles or services charged in the account must be shown to have been actually delivered or rendered; though it has been frequently intimated that that proof was essential before the books could be received or used in evidence. (Vosburgh *a.* Thayer, 12 Johns. 461; Sickles *a.* Mather, 20 Wend. 76; Foster *a.* Coleman, 1 E. D. Smith 86.) The decision in Morrill *a.* Whitehead is decisive in the present case, as the only proof before the justice here was that the plaintiff had no clerk, and that persons who had dealt with him and had settled by his books had found them to be correct.

But even if this proof had been supplied, I am of opinion that it would not now be sufficient to authorize a judgment. The practice

of allowing the party's books of accounts to be received as sufficient evidence of the existence of the debt, which was contrary to the English rule, came into use in this State and in New Jersey with the early Dutch colonists, in whose courts merchants and traders were always allowed to exhibit their books of accounts, where it was acknowledged or proved that there had been a dealing between the parties, — provided the books had been regularly kept, with the proper distinction of persons, things, year, month, and day. Full faith and credit were then given to them, especially where they were strengthened by the oath of the party, or where the creditor was dead. And the practice, long established in the Eastern States, of receiving such books as evidence, is presumed to have been introduced by the English colonists from Holland, who settled New England. In the Dutch colonial courts, the parties appeared before the court and made their own statement, and if they differed as to a fact which the Court thought material, either party might be put to his oath; so that the objection made to this species of evidence was, in these tribunals, of less force, as the party who made the entries could be interrogated in respect to the truth or correctness of each item. In New England, they very wisely retained the feature of the suppletory oath of the party substantiating the truth of the entries, in connection with the practice of allowing such books as evidence; and where the matter is not regulated by statute, which is the case in Maine and Rhode Island, long usage has established that the books of account must be supported by the oath of the party. In Case *a.* Porter (8 Johns. 211), the practice of allowing the entries of the parties made in the usual course of business to be received as evidence, was recognized as a usage established in the courts of this State. . . .

But the important change recently made in the law of this State, by which a party may testify the same as any other witness, has obviated the difficulty that was supposed to exist when the rule above referred to was made, and there is now no occasion for resorting to the books, unless it may be to refresh the party's memory as to the items, or in cases where there is a failure of recollection. In the latter case, the books, if they contain the original entries of the transaction, would still, I apprehend, be evidence within the rule recognized in Merrill *a.* Ithaca & Oswego Railroad Company (16 Wend. 586); that is, if the party who made the entries had entirely forgotten the facts which he recorded, but can swear that he would not have entered them if he had not known them at the time to be true, and that he believes them to be correct. But I agree with Judge Brady, that the books, except in the cases above put, can no longer be received as sufficient evidence of the sale and delivery of goods, or of the performance of services, by merely probing the preliminary facts which heretofore made them sufficient evidence; but that the party, if he had no other means of establishing the facts, must go upon the stand as a witness, resorting to his books only where it is necessary to refresh his memory as to the items, or where, from a

failure of recollection, he is compelled to rely upon them alone, and can swear to what is required to warrant their introduction as evidence to be submitted to the tribunal that is to pass upon the facts.

Judgment reversed.

395. HOUSE *v.* BEAK

SUPREME COURT OF ILLINOIS. 1892

141 *Ill.* 290; 30 *N. E.* 1065

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook County; the Hon. GEORGE DRIGGS, Judge, presiding.

This is an action of assumpsit, begun, on April 16, 1889, in the Circuit Court of Cook County, by Amelia Beak and Alfred Bucher, late partners under the firm name of Beak & Bucher, suing for the use of Wight Bros., a firm composed of Louis Wight and J. Franklin Wight against Sidney Guy Lea, Belden Seymour, Jr., W. T. Moore, Frank Conover and Everett House, composing the firm of Lea & Co. Of the defendants, Lea and House alone were served with process; the other defendants were not found by the Sheriff. The declaration consists of the common counts only. Default was entered against Lea. The appellant, House, entered his appearance, and filed plea of general issue, with affidavit of merits. The case was tried before a jury. The only evidence introduced was produced by the plaintiffs. The jury returned a verdict of $4089.91 in favor of the plaintiffs, upon which the Circuit Court entered judgment. The Appellate Court has affirmed the judgment of the Circuit Court, and from such judgment of affirmance the present appeal is prosecuted.

Beak & Bucher were wholesale merchants in Chicago, engaged in the business of manufacturing and selling furs, hats and caps. They failed in the latter part of December, 1885, and assigned their accounts to Wight Bros. . . . By the books and other evidence, it was shown, that, between September 17 and December 23, 1885, Beak & Bucher consigned to Lea & Co. goods to the amount of $6832.03, upon which amount they were entitled to credits of $3097.50, leaving a balance of $3734.53; and that, between September 17 and December 17, 1885, they sold to Lea & Co. goods to the amount of $2257.02, upon which credits to the amount of $1902.44 were due, leaving a balance of $355.38; making the entire claim, on both accounts, $4089.91. The two accounts consisted of a large number of items on both the debit and credit sides thereof.

Alfred Bucher swore that he was the book-keeper of the firm; that Beak & Bucher sold and consigned goods to Lea & Co. . . . that witness made the entries on the ledger and cash-books, but not on the sales-books, or delivery books, or receipt books; . . . . that he had checked up the charges for bills as rendered with the receipts, that is, the total

of each delivery, and found the receipts to correspond. Lewis Henry swore, that he was bill-clerk for plaintiffs during said months; that he entered the charges for goods sold; that he kept the original sales-books and the assignment book and made the entries therein; that the entries were made therein in the regular course of trade at the times when they bear date, and as a part of his duty, and were true and correct; . . .

Charles Felcher also testified, that he drove an express wagon for Beak & Bucher during said period, and delivered to Lea & Co. at their store in Chicago, boxes and packages of goods, and took receipts from them for the goods; . . .

Edward E. Gray, one of the attorneys for plaintiffs, swore that he presented the account sued upon to Lea in the latter part of December, 1885, and informed him of its assignment to Wight Bros., and told him to make payments at the office of said attorneys; that Lea took the account and said "all right;" that the books of Beak & Bucher have been in the possession of said attorneys from December, 1885, to April, 1889, and a great many statements have been made from them and they have been found correct.

Messrs. *Flower, Smith & Musgrave*, for the appellant.

Messrs. *Weigley, Bulkey & Gray*, for the appellees.

Mr. Chief Justice MAGRUDER delivered the opinion of the Court:

It is assigned as error, that the trial Court received in evidence the books of account of Beak & Bucher, showing the items of the accounts sued upon. It is claimed that a proper foundation was not laid for the introduction of the books, and that, therefore, they should not have been admitted.

We think that the books were properly admitted, in connection with the evidence set forth in the statement of facts. . . .

The third section of the Act in regard to Evidence and Depositions in Civil Cases is as follows: [*ante*, No. 393] . . . This statute permits the party himself to testify to his own books. The party himself was not allowed so to testify at common law. The common law requires that the entries in the book should be proved by the clerk or servant who made them, if such clerk or servant be alive and can be produced. (Burnham *v.* Adams, 5 Vt. 313.) . . . Section 3, which was first passed in 1867 (Laws of 1867, § 3, p. 184,) adds to and enlarges, but does not repeal, the common law rule. A contrary statement made in Presbyterian Church *v.* Emerson, 66 Ill. 269, was mere dictum, and not necessary to the decision of the case. It was not the intention of the statute to prohibit the introduction in evidence of account kept by a clerk, when such clerk is living in the State and is able to testify to the correctness of the books. In Taliaferro *v.* Ives, 51 Ill. 247, we said that this statute of 1867 did not materially change the rule announced in Boyer *v.* Sweet, 3 Scam. 120. . . . The existence of the common law rule, which permits the clerk who has kept the books to testify, was again recognized in Stettauer *v.* White, 98 Ill. 72.

In a number of cases, we have held, that there are certain limitations upon the rule permitting such books of account to be introduced in evidence. In Boyer *v.* Sweet, supra, where the party kept the books himself, the books of original entries were held to be admissible to sustain an account composed of many items, upon proof being made that some of the articles were delivered at or about the time the entries purported to have been made; that the entries were in the handwriting of the party producing the books; that he kept no clerk at the time; and that persons having dealings with him had settled by the books, and found them to be fair and correct.

In Humphreys *v.* Spear, 15 Ill. 275, the same state of facts was shown to exist as in Boyer *v.* Sweet, except that the books were kept, not by the tradesman himself, but by his clerk; the clerk was introduced as a witness and gave evidence tending to show the correctness of the account; and we there said:

> "It is very clear that the books were admissible in evidence in connection with the testimony of the clerk. . . . If it appears that some of the goods were delivered contemporaneously with the entries made by the clerk, and that the books were fairly and honestly kept, the jury may reasonably conclude that the entire account is correct."

(See also, Lawrence *v.* Stiles, 16 Brad. 489.) The doctrine of Humphreys *v.* Spear was not changed by the statute of 1867.

In Stettauer *v.* White, supra, it was held, that, where the clerk who makes the entries has no knowledge of their correctness, but makes them as the items are furnished by another, it is essential that the party furnishing the items should testify to their correctness, or that satisfactory proof thereof (such as the transactions were reasonably susceptible of,) from other sources should be produced. It is to be observed that, in the Stettauer case, there was no evidence except the carrier's shipping receipt, that any portion of the articles had been delivered. In Kent *v.* Garvin, 1 Gray 148, one of the cases upon which the Stettauer case is based, the failure "to show that at the time the charges were made, any articles, similar in character to those charged, were delivered by the plaintiff to the defendant" is commented upon as significant.

In the case at bar, there is evidence that, of the goods described in the accounts, an amount exceeding in value $5000.00 was delivered to the defendants; and not only does Henry, who kept the books of original entries, swear to their correctness; but, in addition to this, Richard Beak, who furnished the items to Henry, testifies to the correctness of the items.

The proof establishes all the facts necessary to bring the present case within the requirements of the cases of Boyer *v.* Sweet, Humphreys *v.* Speer, Ruggles *v.* Gatton, (50 Ill. 412) and Stettauer *v.* White, — except as to one matter. We find no evidence by any customer of Beak & Bucher, that he settled with them by their books and found them correct.

(Ingersoll *v.* Banister, 41 Ill. 388.) The failure of the proof, however, in this regard would not have justified the exclusion of the books, in view of the facts that the defendants paid $1000.00 upon the account late in December without questioning it, and accepted a statement of the account as assigned, with the remark that it was "all right," and, although more than three years elapsed after the account was presented before suit was brought, during which time many applications were made to them or some one of them for payment, they at no time ever urged any objections to the correctness of the account. A careful examination of the authorities hereinbefore referred to will show, that, before the statute of 1867 was passed, testimony from third persons as to settlements made by the books was more especially required in cases where the tradesman had no clerk but kept his own books. In such cases, the party testifying to the correctness of the books being interested, it was held that his testimony should be supported by that of customers who had settled by the books. (Boyer *v.* Sweet, supra; Ingersoll *v.* Banister, supra; Ruggles *v.* Gatton, supra; Waggeman *v.* Peters, 22 Ill. 42.) . . .

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

396. LEWIS *v.* ENGLAND

SUPREME COURT OF WYOMING. 1905

14 *Wyo.* 128; 82 *Pac.* 869

ERROR to District Court, Carbon County; DAVID H. CRAIG, Judge.

Action by Ida Lewis, as administratrix of the estate of Charles Lewis, deceased, against Mary England, as administratrix of the estate of Richard England, deceased. From a judgment in favor of defendant, plaintiff brings error. Reversed.

On November 21, 1901, Charles Lewis, as plaintiff, brought an action in the District Court of Carbon county against the defendant in error alleging that Richard England during his lifetime, and on the 26th day of May, 1901, was indebted to the plaintiff in the sum of $1,821.95 for balance due on an account for goods sold and delivered and for divers sums of money advanced to the said England by the plaintiff. The petition further alleges that Richard England died intestate on the 26th day of May, 1901, and thereafter the defendant in error was duly appointed administratrix of the said England's estate, and that on the 18th day of November, 1901, the account sued upon, verified as required by law, was presented to the defendant as administratrix and by her rejected and disallowed. . . . On the 14th day of March following the Court approved and confirmed the report and findings of the commissioner in all respects, and entered judgment generally against the plaintiff and in favor of the defendant. From this judgment, plaintiff prosecutes error to this court.

The original plaintiff, Lewis, was a saloon keeper at Medicine Bow, and, being unable either to read or write, was obliged in the conduct of his business to intrust the keeping of his accounts to others. The evidence discloses that the accounts were kept by his employees, by his wife, and in two instances by school teachers who lived at his house. It also appears that regular books of account, as the term is generally understood, were not kept by the plaintiff. At the saloon there was kept what was called a "tablet," consisting of plain sheets of paper. Each day there was entered on the tablet the charges that were made against various parties during that day; the date being entered at the head of each sheet as the same was used. . . . Each day the sheets containing the charges for the day's business were filed away, and at frequent periods these "day slips," as they were called, were taken to Lewis' house, and there transferred to other slips of paper called "ledger slips." . . . These charges, on being transferred to the ledger slips, were entered against the individuals separately; in other words, the account of each individual was entered on the ledger slips under his name. The day slips and ledger slips were both offered in evidence by the plaintiff and objected to by the defendant. It was contended by counsel for defendant that the day slips and ledger slips had not been kept in such a manner, as books of account, as to entitle them to admission as evidence. The commissioner in his findings admitted the day slips, but refused to admit the ledger slips, on the ground that they did not constitute books of original entry. The failure of the commissioner to admit the ledger slips is assigned as error. . . .

W. R. Stoll, for plaintiff in error. *N. R. Greenfield*, for defendant in error.

Van Orsdel, J. (after stating the facts as above). The law prescribes no regular mode or method in which accounts must be kept in order to make them competent as evidence. The question of competency must be determined by the appearance and character of the book; regard being had to the degree of education of the party, the nature of his business, the manner of his charges against other people, and all other surrounding circumstances. . . .

Certain essential requirements, however, must be observed in order to justify the reception of books of account as evidence.

1. It must appear that they were the regular method of keeping accounts adopted by the party, containing the regular entries of his transactions in the regular course of business, and made so near the time of the transactions as to establish the presumption that they were fairly and honestly kept. . . . We are of the opinion that the evidence sufficiently discloses in this case that the books of account of Lewis were kept with sufficient regularity in the general course of the transaction of his business, and with all persons with whom he did business alike, to render them competent evidence in this case.

2. The day slips having been admitted in evidence, the plaintiff has

no complaint as to their admission. But it is contended that the ledger slips should likewise have been admitted. As above stated, the ledger slips contain many original entries. These entries were sometimes made at the direct request of Lewis or from scraps of paper containing a memorandum of the item or items to be charged. It is clear that the ledger slips, if competent evidence, could only be so in so far as they contain accounts of original entry, or are explanatory of accounts appearing on the day slips. It appears that the amounts charged upon the day slips were indicated by figures, usually without decimal marks, or other specific indication as to whether the figures represented dollars or cents, though we think the various entries on the day-slips, taken together and in connection with the subject of the charges, fairly show the meaning of the several figures. When entered upon the ledger slips, the figures are clearly explained, and in no way contradictory of the day slips in that respect. Hence, for the purpose of explaining such figures in case of doubt, the ledger slips were admissible. McGoldrick *v.* Traphagen, 88 N. Y. 334. We are therefore of the opinion that the ledger slips were admissible for these purposes. . . .

3. The account sued upon contains numerous items of cash advanced from time to time. It appears from the evidence that England was in the habit of borrowing from Lewis small amounts of money at various times. These cash items were sometimes entered upon the day slips, but frequently they were only entered upon the ledger slips, as the evidence discloses that the money was often procured by England at the house, either from Lewis or from Mrs. Lewis, who testified that her husband had directed her to give England money when he requested it. It was held by the commissioner that these cash items were not proper items of book account, and therefore the books could not be considered as competent evidence against the defendant as to such items. There are authorities which hold that there is not and never was a necessity for making books of account evidence of the payment or the lending of money (Inslee *v.* Prall, 23 N. J. Law, 463). But we think the great weight of modern authority is to the effect that where cash entries appear in the general course of accounts, as a part of the regular course of business transacted, that such entries should be admitted as competent evidence. As stated by KILPATRICK, C. J., in Wilson *v.* Wilson, 6 N. J. Law, 99:

"Upon principle I can see no reason why a book should be lawful evidence of one item and not of another, — why it should be evidence of goods sold and delivered, and not of money paid or advanced. Why should there be witnesses called or receipts taken in the one case more than in the other? If necessity be pleaded for the one, may it not for the other also? For they are both transactions in the common course of business, equally necessary, and, I should think, equally frequent or nearly so."

See, also, Wigmore on Evidence, §§ 1548, 1549. . . .

The judgment of the District Court is reversed, and the cause re-

manded for a new trial, in accordance with the views expressed in this opinion.

POTTER, C. J., and BEARD, J., concur.

SUB-TOPIC B. THIRD PERSON'S ENTRIES

397. PRICE *v.* EARL OF TORRINGTON (1703. 2 Ld. Raym. 873). In indebitatus assumpsit for beer sold and delivered to the defendant, upon non assumpsit pleaded, at the trial at Guildhall before HOLT, Chief Justice, the evidence against the defendant was, that the usual way of the plaintiff's trading was, that the drayman came every night to the plaintiff's clerk, and gave account to him of all the beer that he had delivered that day; and an entry was made of it in a book, which the drayman and clerk subscribed; and that there was such an entry of ——— barrels of beer delivered to the defendant, &c., and that the drayman was dead, and the subscription was proved to be of his writing.

And HOLT, Chief Justice, held this good evidence to charge the defendant. And a verdict was given against him, &c.

398. KENNEDY *v.* DOYLE

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1865

10 *All.* 161

THIS action was brought against two sisters upon an agreement of both to pay money borrowed by them on their joint account from the plaintiff. One of them suggested her insolvency and set up no other defence. The other pleaded infancy at the time of the agreement. . . .

The parties being at issue upon the point whether the defendant was of age when she made the agreement, the plaintiff, to prove that she was, offered a book, which was admitted to be the church record of baptisms in a Roman Catholic church in Lowell, regularly kept by McDermott, the priest of that church for a series of years, produced from the custody of O'Brien, the present priest, into whose hands it came upon the death of McDermott, and containing the following entry in McDermott's handwriting, and signed by him: "1837, December 17th. Baptized Joanna, born 12th, of Michael and Mary Doyle. Sponsors, Jeremiah Kennedy and Bridget Doyle." There was also evidence that the defendant in this action was the Joanna Doyle named in this record. It does not appear to have been denied at the trial, and it was assumed at the argument, that the priest performed the rite of baptism and made the entry upon the record in the discharge of his ecclesiastical duty according to the rule and custom of his church. But there was no evidence that he was a sworn officer, or that the book was required by law to be kept; and upon this ground the defendant objected to its admission. The presiding judge, however, admitted it, as competent evidence of the date of the baptism only.

J. P. Converse, for the defendant. *A. R. Brown*, for the plaintiff.

Gray, J. [after stating the case as above, held that the book did not satisfy the requirements of the exception for Official Registers; this part of the opinion being quoted *post*, as No. 416; and then proceeded:]

It becomes necessary, therefore, to determine whether his death has made his register competent evidence [as a book of regular entries]. . . .

The leading cases upon this subject are those in which Lord Holt held that entries, made in a tradesman's books by his servant or drayman in the usual course of his employment, were admissible in evidence after the death of the latter, upon proof of his handwriting. Pitman *v.* Maddox (2 Salk. 690; s. c. 1 Ld. Raym. 732; Holt, 298); Price *v.* Torrington (1 Salk. 285; s. c. 2 Ld. Raym. 873; [*ante*, No. 397]). . . . Lord Chancellor Plunket repeatedly admitted the books of a Roman Catholic chapel in Dublin, made by Roman Catholic priests whose deaths and handwriting were proved, as evidence of marriages and baptisms, and on the last occasion, after argument, gave this reason for their admission: "They are the entries of deceased persons, made in the exercise of their vocation contemporaneously with the events themselves, and without any interest or intention to mislead." O'Connor *v.* Malone (6 Cl. & F. 576, 577); Malone *v.* L'Estrange (2 Irish Eq. R. 16). . . . In the United States, the law is well settled that an entry made by a person in the ordinary course of his business or vocation, with no interest to misrepresent, before any controversy or question has arisen, and in a book produced from the proper custody, is competent evidence, after his death, of the facts thus recorded. In a very early case the Supreme Court of Connecticut admitted the record of a baptism by a minister of a parish, who had since died, as evidence of the fact of baptism. Huntly *v.* Comstock (2 Root 99). It has been repeatedly held in this Commonwealth that the book of a bank messenger or notary public, kept in the usual course of business, though not required by law, is competent evidence after his death. Welsh *v.* Barrett (15 Mass. 380); Porter *v.* Judson (1 Gray 175). . . . In the case before us, the book was kept by the deceased priest in the usual course of his office, and was produced from the custody of his successor; the entry is in his own handwriting, and appears to have been made contemporaneously with the performance of the rite, long before any controversy had arisen, with no inducement to misstate, and no interest except to perform his official duty. The addition of a memorandum that he had been paid a fee for the ceremony could not have added anything to the competency, the credibility, or the weight, of the record as evidence of the fact. An entry made in the performance of a religious duty is certainly of no less value than one made by a clerk, messenger, or notary, an attorney or solicitor, or a physician, in the course of his secular occupation. Exceptions overruled.

399. DELANEY *v.* FRAMINGHAM GAS, FUEL & POWER CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1909

202 *Mass.* 359; 88 *N. E.* 776

TORT for personal injuries received by the plaintiff while in the defendant's employ, as stated in the opinion. The declaration contained two counts, the first being at common law, alleging failure on the part to the defendant to supply the plaintiff with a reasonably safe place in which, or materials with which to work, or to warn him of the dangers surrounding his work, and the second being under R. L. c. 106, § 71, cl. 2, alleging negligence of the defendant's superintendent. Writ in the Superior Court for the county of Middlesex, dated April 24, 1906.

The case was tried before BELL, J. . . .

The jury found for the plaintiff; and the defendant alleged exceptions.

R. Spring (*W. Rand* with him), for the defendant. *C. F. Choate, Jr.*, for the plaintiff.

HAMMOND, J. . . . The records of the Massachusetts General Hospital were properly excluded.

1. The defendant does not contend that they were admissible under the common law, but insists that they are admissible under St. 1905, c. 330. But the records were made before that statute. The first section of the statute imposes upon certain hospitals, including, as we understand, the Massachusetts General Hospital, the duty "to keep records of the cases under their care and the history of the same in books kept for that purpose." The words "such records" in the second section embrace only the records which thereafter shall be kept under the first section. The question is not whether the statute is retroactive, as a rule of evidence or of procedure, in the sense in which those words are used in cases like Stocker *v.* Foster, 178 Mass. 501, and Woodvine *v.* Dean, 194 Mass. 40, as contended by the defendant, but rather what kind of records shall be admitted. If the records are those described in the statute, then they are admissible without reference to the time of the trial; but if they are not of the kind described in the statute, then they are not admissible, no matter what may be the time of the trial. The records of the hospital were not those described in the statute, and were therefore inadmissible. This statute has since been amended (St. 1908, c. 269), but the case was tried before the amending statute became operative. So far as respects the admissibility of the records of the Carney Hospital under St. 1905, c. 330, the same rule applies, because these records also were made before it was passed.

2. The defendant insists, however, that the records of this hospital are admissible under the common law. While it is true that the records were not made in accordance with a requirement of law and therefore were not legal records within the meaning of the rule that legal records

or copies thereof are generally admissible, still it appears that they were made in the usual course of business by a person in the discharge of a duty, who appears not only as the maker of them but as their custodian. If she had died and her handwriting had been proved, in the absence of any other testimony as to the manner in which they were made up, they would have been admissible. As in the case of Townsend *v.* Pepperell, 99 Mass. 40, it would have been assumed that the records were of facts known to her.

The rule applicable to such records ordinarily is that the entries must be made by a person having personal knowledge of the truthfulness of the statements. This test has been applied by this Court in the case of shop books offered to prove delivery of goods, and it has been held that where the clerk who made the entries had no knowledge of the facts the entries are not admissible, although the clerk testified that he correctly put down the information he received from the person by whom the delivery was said to be made. Kent *v.* Garvin, 1 Gray, 148. Miller *v.* Shay, 145 Mass. 162. It is true that this rule has not been applied with the same strictness to other memoranda. But in substance the general principle is the same. . . . And the rule has been adhered to quite generally, except where in the course of the business the clerk making the entry receives his information either orally or in writing from various persons whom he cannot expect to remember and whom it will be impracticable to call. To apply the rule in such a case and to require the evidence of every person in the long line of persons who have had anything to do with the transaction recorded, would be practically impossible, and so as a practical necessity the record is admitted upon the oath of the recorder, if alive, or upon proof of handwriting if he be dead. It is probable that the exception has been carried farther elsewhere than in this State. For a general discussion of the subject see Wigmore on Evidence, § 1530, and cases cited in the notes. In our own State this exception seems to have been recognized in Briggs *v.* Rafferty, 14 Gray 525; Adams *v.* Coulliard, 102 Mass. 167.

In the present case the records were produced by the witness Gahagan. It appeared that the records were made by her, and that she was the proper custodian of them. But it further appeared that she never had any personal knowledge of the facts stated therein; that she received slips of paper from Dr. Painter, the physician, and copied them into the record; and that was all she knew about them. The record was offered as evidence to show that the statements therein made were true. As handed to the witness by the physician they were simply statements of the physician as to what the patient had said to him, or as to the diagnosis made by the physician. The records were comparatively recent. It was not shown that the physician was not living and within the jurisdiction of the court. No necessity was shown, therefore, for the introduction of this hearsay testimony. For aught that appeared there was better evidence. Under these circumstances the reason upon which

the general rule was based, namely, that the record should be a record of facts of which the writer had personal knowledge, should be applied. The case is not within the above mentioned exception to the general rule. . . . These records were properly excluded. . . .

Exceptions overruled.

400. LOUISVILLE & NASHVILLE R. CO. *v.* DANIEL

COURT OF APPEALS OF KENTUCKY. 1906

122 *Ky.* 256; 91 *S. W.* 691

APPEAL from Circuit Court, Hopkins County. Action by Louis Daniel against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Benjamin D. Warfield and *Clifton J. Waddill*, for appellant. *Gordon, Gordon & Cox*, for appellee.

O'REAR, J.—Appellee alleges that while walking across appellant's railroad tracks in its yard at Madisonville, at a point between Broadway and Sugg streets, where the public had been permitted by the railroad company to so use its tracks as a passway for more than 20 years, he was injured by being run against by a car detached from the engine. . . . It is conceded that appellee was stealing a ride on one of appellant's freight trains passing through Madisonville. . . . Appellee does not claim that he was injured while on this train, or was injured by it. His claim is that it stopped at Madisonville, and then he got off and started to cross another track; that he saw an engine coming down the track, and after it passed he undertook to cross the track behind it, when he was hallooed at by some one in the dark. Looking up, he saw a freight car rapidly approaching him on the same track, following the engine, but without a light; that he had not seen or heard it before, and, not knowing of it, it ran against him before he could get out of the way. Appellant contends that his story is a fabrication or an hallucination. It asserts that there was no other engine or train at Madisonville at that time, nor for some hours before or after. . . . It was, therefore, very material to show whether there was any other train at that point at or near that time. The depot agent and the operator and assistant testify that there was not. The engineer, conductor, and brakeman also testify to the same fact. They all testify, also, that that freight train did not stop at Madisonville on that occasion.

Appellant offered to prove by its train dispatcher that he kept an accurate record of the movements of all trains on that division of appellant's road; that it was his duty to do so; that this record was made up at the time from his own orders, upon which all trains on that division moved, and from telegraphic reports transmitted to him from the stations along the line as each train arrived and departed, from which he at the

time made an entry on his record; that the record was made accurately at the time, and was true. He produced his record, called a "train sheet," or telegraphic register of trains. This sheet purported to show the time of the arrival and departure of every train passing over that road on that day, at Madisonville, as well as all other telegraphic stations on that division. Appellant offered to introduce it as evidence on its behalf on this trial, but upon objection of appellee it was rejected. The witness was permitted to state what he knew personally about it, based upon his personal knowledge and recollection. But he was compelled to state and did state that he had little or no personal knowledge on the point, as he was stationed at Earlington, the end of the division, and not at Madisonville, on that date, and could not recollect, from the nature of the business, many days afterwards, where so many trains were at a given day and moment; that he had to rely and did rely exclusively upon his record, made at the time as stated. The question for decision is, was the record admissible as evidence on appellant's behalf? We think it was, and will give our reasons for the ruling.

Books of original entry, called shopkeepers or parties' books, have for centuries been admitted as evidence in favor of the party keeping them. Numerous limitations upon the rule are noted. The rule itself has been subjected to not a few changes in judicial application, and to many more by legislative action. While very narrow originally, the tendency has been upon the whole to broaden its application, though it is believed that the first principles upon which it was founded are to be clearly recognized in every change that it has undergone. These are, in fine, that, as the Courts require the production of the best evidence the nature of the case admits of, necessity and circumstantial guaranty of trustworthiness of such entries may render them, not only the best, but the only reliable, evidence practicable to be obtained to establish the disputed fact. It is scarcely within the scope of the questions here involved, even if it were necessary at this day, to trace the origin of the rule or to follow its course and deviations. Of this rule of the common law, as interpreted by English and American Courts, it can be truly said, as of many others, proving the wisdom and elasticity of the systems, that it adapts itself logically to conditions undreamed of in its origin. Commerce has grown enormously in magnitude and variety since then. What was possible, and not unreasonably practicable, a century ago, would be intolerable in the conducting of business in this age. But the necessity of rules of evidence are the same, and the reasons for them, in the main, are not different. If a fact is in dispute, to be determined in or out of court, the safe course is a resort to the best evidence of which the nature of the case will admit, and such as has been found most reliable in the practical adjustment of such matters among those whose constant business it is to adjust them. Mercantile and industrial life, producing, as they do, nearly all the transactions of men that come before the courts of law and equity, are essentially practical. That which is the final basis

of action, of calculation, reliance, investment, and general confidence in every business enterprise, may safely, in general, be resorted to to prove the main fact. The Courts need not discredit what the common experience of mankind relies upon.

Such is the use of books or records of original entries made under circumstances that are a guaranty of their trustworthiness. In the conduct of a modern railroad system, it is indispensable that in the movement of trains an exact knowledge should be had, at a central point of observation and direction, of the location of each train in operation over a given line or between given terminals, and that this knowledge should accompany each movement of each train until it has arrived at its destination. . . . The train dispatcher, who directs them and who keeps tab on the movement of each, and maintains as it were a birdseye view of the whole system under his control, is the practical solution of this difficulty as it now exists. It would be folly for him to endeavor to trust to his memory, even for the hour, as to the whereabouts or condition of each train. He must have a record before him upon which he can rely, to which he can resort at any moment to acquaint his mind with those important facts as verities. As the district within his charge usually covers a considerable distance, say 100 miles or more, he can know only what is reported to him from the numerous intermediate points of observation by those in charge. This is done by the use of the telegraph. Thus as promptly as by word of mouth by clerks in his presence he gets the information. He immediately records it on the record, which he is required to and does keep for that purpose. The very nature of the matter, its grave importance to so many lives, not to mention fortunes, dependent upon his record's being accurately kept, are the strongest possible guaranties to the general accuracy of the entries. No motive, not criminal in the highest degree, could exist for fabrication in making such original entries. He has no personal interest whatever to serve by making a knowingly false entry. On the contrary, the security of his position, the prospect of advancement, the fear of the awful consequences of mistake, the impossibility of keeping a false record as a working record in the matter without immediate disaster and detection, all combine to insure against any motive on his part for fabrication.

To the objection that his record is not his own personal knowledge, the answer is that the intelligence transmitted to him by his subordinates is all of the same kind and grade as that recorded in his entries. Its trustworthiness is supported by the same considerations. It is at least as reliable as salesmen's, draymen's, porters', or wharfingers' information conveyed to a bookkeeper, who makes the original entries thereof, all of which is now nearly everywhere allowed to be proven by the introduction of the book entries so made, as evidence of the facts shown by the entries. Wigmore on Evidence, § 1530. The entrant discharges a duty which he has assumed only in the keeping of an accurate record of his entries. He makes them contemporaneously with the act which they represent.

They are made in the regular course of transactions, which, to be utilized in the business, must from greatest necessity be precise and true. They are made in the habit and system of keeping such a record with regularity. Every consideration by which it is possible to establish the existence of a past event, by testing the accuracy of the evidence of it, is satisfied by such a record. It is less apt to be mistaken than the person who made it would be if testifying to it from memory subsequently. That it is made up of details furnished by different persons widely apart, and all acting under a high incentive for accuracy, and who report that which is transpiring at the moment under their eyes, is better evidence, because more apt to be a true picture of the real situation, than if it were possible for one person to have the whole as a panorama before his own eyes, and then attempt to set it down in the record, much less to have to depend on his memory afterward to truthfully recall and relate it. If every telegraph operator along the line were to come to court, and all testify to their recollections of the position of trains at or near their stations at a given hour and day, the result would be neither more certain, nor the truth clearer, than by the use of the original record made at the time the events were happening. In addition, to call all these men away from their posts to the court, to bring a regiment of witnesses to prove minute details of a status more easily and truly shown by a contemporaneous record, would be to discard the better for the worse, and to trammel the administration of justice. . . . Records of the kind offered and rejected in this case, and now being discussed, were admitted in Donovan *v.* B. & M. R. Co. (Mass.) 33 N. E. 583, Fireman's Ins. Co. *v.* Seaboard Air Line Ry. (N. C.) 50 S. E. 452, and T. & P. Ry. Co. *v.* Birdwell (Tex. Civ. App.) 86 S. W. 1067. Where the witness who made the record is produced, if within the jurisdiction of the court, and testifies that the record offered was made by him in the regular course of the business, that it was his duty to keep such a record, and that its entries were correct when made, nothing appearing to show that the record has since been altered, it is receivable as evidence of the fact it recites; or if the person who made the record be dead, or beyond the jurisdiction of the court, if the record be otherwise proved to be the original entry so kept, it is receivable on the same grounds and to the same extent as any other book or record of original entry. . . .

The Court is further of opinion that a new trial should have been granted in this case because the verdict was palpably against the weight of the evidence.

Judgment reversed, and cause remanded, with directions to award a new trial under proceedings not inconsistent herewith.

401. COOLIDGE *v.* TAYLOR

SUPREME COURT OF VERMONT. 1911

85 *Vt.*—; 80 *Atl.* 1039

EXCEPTIONS from Windsor County Court; E. L. WATERMAN, Judge.

Action by John C. Coolidge against Warren R. Taylor, defendant, and another, as trustee. Verdict and judgment for plaintiff, and defendant excepted. Judgment reversed and remanded.

Argued before ROWELL, C. J., and MUNSON and WATSON, JJ.

William W. Stickney, John G. Sargent, and *Homer L. Skeels,* for plaintiff. *Davis & Davis* and *Frank A. Waker,* for defendant.

ROWELL, C. J. This is a statutory "trustee suit" for the collection of a tax assessed against the defendant on his grand list in Plymouth in 1898. . . .

The defendant claimed, and his evidence tended to show, that his taxable residence was in Woodstock the 1st day of April, 1898, whither he moved from Sherburn in March of that year. It appeared that he hired a box in the Woodstock post office, and held it during that year, and received his and his wife's mail through that office. . . . The defendant claimed, and his evidence tended to show, that he moved from the Taylor farm in Plymouth to Sherburn in the spring of 1888, and resided in Sherburn till he moved to Woodstock in March, 1898.

It was error to admit the milk book of the cheese factory containing entries purporting to show the delivery of milk there in 1897 in the name of the defendant, and to admit the testimony of the secretary of the cheese company based thereon, who knew nothing about the correctness of the entries except that he transcribed them from daily memoranda kept by the cheesemaker as the milk was delivered, and who was not called as a witness nor his absence accounted for.

It is not that the entries are not original because thus transcribed, but that the correctness of the memoranda was not shown by the person who made them, nor in any other way. Without this, the entries in the book, and the testimony of the witness based thereon, were mere hearsay. In Chaffee *v.* United States, 18 Wall. 516, 541, the rule that governs the admissibility of entries made by private persons in the ordinary course of business is said to require, with some exceptions not included in that case, not merely that they shall be contemporaneous with the facts to which they relate, but that they shall have been made by persons having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting if dead, insane, or beyond the reach of the process or commission of the Court. And this, because the testimony of living witnesses personally cognizant of the facts of which they speak, given under the

sanction of an oath in open Court, where they may be subjected to cross-examination, affords the greatest security for truth; but that their declarations, verbal or written, must sometimes be admitted when they themselves cannot be called, in order to prevent a failure of justice, in which cases the admissibility of the declarations is limited by the necessity on which it is based. Connecticut Mutual Life Ins. Co. *v.* Schwenk, 94 U. S. 593, 598, is to the same effect.

Mr. Wigmore says that there can be no doubt that the general principles of testimonial evidence should apply here as elsewhere; namely, that the person whose statement is received as testimony should speak from personal observation or knowledge, and that this principle has often been invoked in excluding entries made by a person who had no personal knowledge of the supposed facts recorded. But he suggests that this principle does not necessarily exclude all entries made by persons not having personal knowledge of the facts entered, and submits that where an entry is made by one person in the regular course of business, recording an oral or a written report made to him by one or more other persons in regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry, provided the practical inconvenience of producing on the stand the numerous persons thus concerned would, in the particular case, outweigh the probable utility of doing so. 2 Wigmore, Evidence, § 1530. But, however that may be, this case does not come within that suggestion, but belongs to the same class as Chaffee *v.* United States and Connecticut Mutual Life *v.* Schwenk, to which we have referred. See, also, 17 Cyc. 392, 394; Kent *v.* Garvin, 1 Gray (Mass.) 148; Stettauer *v.* White, 98 Ill. 72, stated in House *v.* Beak, 141 Ill. 290 [*ante*, No. 395]. . . .

Both judgments reversed and cause remanded.

On reargument. . . . It appears from the amended exceptions that the secretary of the company was also its treasurer and financial man, and received the avails of cheese sold, and distributed them to the patrons in proportion to the milk delivered by them, after deducting the cost of making. . . . The plaintiff claims that . . . the book as made by the treasurer was used by him as a basis for computing the dividends, and in connection with his testimony, and to the extent used, was properly admitted, (1) because the witness could use it as a memorandum used by him at the time he made the dividends, to refresh his recollection, and (2) because it was not directly in issue, but related to a collateral matter, and so not within the best evidence rule.

But this claim still erroneously assumes that the book was evidence that milk *was* delivered from the Taylor farm. And, as to refreshing recollection, it could refresh no further than to the fact that the witness made the entries in the book from memoranda kept by the cheesemaker, about the correctness of which he knew nothing. Such a refreshing did not make the book admissible for what the plaintiff says it was used.

Nor does the fact, if it is a fact, that the book relates to collateral

matter, and not within the best evidence rule, make any difference, for this is not a question of degree, but of admissibility regardless of degree. . . . Reversed and remanded as before.

Topic 5. Statements by Deceased Persons in General

402. SUGDEN *v.* ST. LEONARDS. (1876. L. R. 1. P. D. 154). MELLISH, L. J. I have not the least hesitation in saying that I think it would be a highly desirable improvement in the law if the rule was that all statements, made by persons who are dead, respecting matters of which they had a personal knowledge, and made "ante litem motam," should be admitted. There is no doubt that by rejecting such evidence we do reject a most valuable source of evidence. . . . [But] it appears to me that it would be better to leave it to the Legislature to make the improvement, which in my opinion ought to be made, in our present rules with regard to the admissibility of evidence of that description.

403. STATUTES. *Massachusetts.* (St. 1898, c. 535, Rev. L. 1902, c. 175, § 66). No declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay, if it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant.

404. NAGLE *v.* BOSTON & NORTHERN STREET R. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1905

188 *Mass.* 38; 73 *N. E.* 1019

Two actions of Tort against the Boston and Northern Street Railway Company for the suffering and death of one motorman and for injuries to another from a collision of two cars running in opposite directions upon the same single track of the defendant, the first action by the administratrix of the estate of James E. Nagle, who also sued under R. L. c. 106, § 73, as his widow, and the second by Henry P. Hart. Writs dated February 27, 1902, and January 20, 1902.

In the Superior Court the cases were tried together before GASKILL, J. Against the objection of the defendant, the judge admitted the declarations of James E. Nagle, which are stated in the opinion, and refused to order a verdict for the defendant. In each case the jury returned a verdict for the plaintiff, in the first case in the sum of $5,000, of which $3,000 was for conscious suffering of the plaintiff's intestate, and $2,000 for causing the death of the plaintiff's husband, and in the second case in the sum of $350. The defendant alleged exceptions.

J. P. Sweeney, for the defendant. *J. G. Walsh,* for Nagle. *W. J. Bradley,* for Hart, submitted a brief.

BARKER, J.: . . . The collision occurred because the car of which Nagle was motorman, instead of stopping at the point where under the

general running orders in force it should stop, unless in any instance special directions otherwise had been given, until the car of which Hart was motorman had arrived and passed upon a double track, failed to stop, and ran on upon a single track leading to the Willows. Hart's car was running in accordance with the general order.

As Nagle's car went on to the single track instead of stopping, his conductor said to him, "Jim, did you have orders to go to the Willows?" Nagle said, "Yes," and nodded. After the collision, as the conductor was riding in the ambulance with Nagle, the conductor said to him, "Jim, did you get orders to go to the Willows?" and he said, "Yes, I did." This was the evidence admitted under exception.

It is urged in support of the exception, that the declarations of Nagle were inadmissible because made in answer to leading questions, and because they merely embody the declarant's inference as to what had been done or said by others. But the statute applies to every declaration of a deceased person found to be made in good faith before the commencement of the action and upon the personal knowledge of the declarant. If the statute was not intended to apply to declarations made in answer to leading questions, the Legislature would have so said. Its words are not to be "narrowed from their natural meaning." O'Driscoll *v.* Lynn & Boston Railroad, 180 Mass. 187, 189.

We think the questions put by the conductor were such under the circumstances as clearly to call upon Nagle for a fact within his own knowledge rather than any inference of his own; and that it was for the jury to say whether he proceeded without stopping to wait for the other car in consequence of an express order to that effect given to him. See Huebener *v.* Childs, 180 Mass. 483, 485. The statute has been construed liberally, the declarations when admitted being regarded as those of a witness and given probative effect. . . . We think the evidence was admitted rightly. . . . Exceptions overruled.

Topic 6. Reputation

407. BADGER *v.* BADGER

COURT OF APPEALS OF NEW YORK. 1882

88 *N. Y.* 546

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made September 13, 1881, which affirmed a judgment in favor of defendants, entered upon a decision of the Court on trial at Special Term. This action was brought for admeasurement of dower. The plaintiff claims dower in the lands of Jacob Badger, deceased, whom she alleges to have been her husband. The defendants deny the marriage, and so raise an issue of fact which forms the vital point of the controversy. No formal or cere-

monial marriage is proven, nor any express agreement between the parties constituting such relation. The proof offered is that of cohabitation continued for a long period of time, and characterized by general repute, and by conduct and conversation indicating, as is claimed, an intercourse rather matrimonial than meretricious. . . .

George B. Ely, for appellant. The proof of acknowledgment of marriage, matrimonial cohabitation, habit and repute was so clear and for so long a period as to establish the marriage, and the burden of disproving it was upon the defendants. . . .

S. M. Parsons, for respondents. A local or a partial divided repute of marriage is of no avail. . . .

FINCH, J. (after stating the facts as above). The decedent appears to have lived two lives. They ran parallel with each other for more than a third of a century, and without approach or collision. In one locality, and among his own relatives and friends, he seemed to be a bachelor possessing considerable wealth; at the head of a respectable business; occupying rooms with his sister and with others during much of the period; and if not always at home, yet not so frequently absent as to arouse suspicion or remark. In another locality in the same city, but perhaps in an humbler neighborhood, he appears as John Baker; living with the plaintiff as his wife; introducing her as such; called uncle by her nephew, and deemed father by her daughter; paying her bills and expenses; furnishing her with the food and shelter which he shared; nursing her through severe and continued illness; seldom absent at night; attending her mother's funeral as one of the family of mourners; the intercourse creating no scandal, but reputed to be virtuous and respectable, and that of husband and wife. It is over this cohabitation, and its true character and meaning, that the controversy arises. . . .

The reputation attending this cohabitation in the neighborhood where it existed and was known among those brought into its presence by relationship, business, or society, was that which ordinarily attends the dwelling together of husband and wife. It has been well described as the shadow cast by their daily lives. (1 Bishop on Marriage and Divorce, § 438.) In the general repute surrounding them, the slow growth of months and years, the resultant picture of forgotten incidents, passing events, habitual and daily conduct, presumably honest because disinterested, and safer to be trusted because prone to suspect, we are enabled to see the character of the cohabitation, and discern its distinctive features. It is for that reason that such general repute is permitted to be proven. It sums up a multitude of trivial details. It compacts into the brief phrase of a verdict the teaching of many incidents and the conduct of years. It is the average intelligence drawing its conclusions. . . .

The defendants were permitted to prove, under repeated objections and exceptions, that Jacob Badger was reputed to be a bachelor and unmarried. This proof was given by persons who were his friends and

acquaintances, but who knew nothing of the plaintiff, were unconscious of her existence, and in total ignorance of her cohabitation with the decedent. The repute thus proven was not the product of the cohabitation, and did not tend to explain it, or solve its character. It could not by possibility bear upon it. It was not its shadow, for it cast none into the locality where these witnesses were. . . . The life of John Baker in McDougal street was ambiguous, in the sense that it might indicate an illicit intercourse or a matrimonial connection. To ascertain which, the shadow it cast upon surrounding society could be examined and studied usefully for the solution of the doubt. The life of Jacob Badger in Joralemon street was not ambiguous at all, and needed no help to solve its character. It is, indeed, said that the purpose was to show a divided repute, and so contradict the reputation of marriage, which to be effective must be general. But the general repute proved, and that required to be shown, does not and cannot go beyond the range of knowledge of the cohabitation. If within that range there is division as to the character of the fact, the divided repute merely continues the ambiguity and determines nothing.

In Clayton *v.* Wardell (4 N. Y. 230), the divided repute was of a marriage, among some friends, and a disreputable connection, among others; thus negativing a general repute of connubial intercourse among those having knowledge of the cohabitation. In Commonwealth *v.* Stump (53 Penn. St. 135), the reputation shown related to the parties and their association, and was that they were not married. . . . In Lyle *v.* Ellwood (L. R. 19 Eq. Cas. 98), the repute was divided, and that of marriage allowed to prevail, but it was among those cognizant of the cohabitation and having reference to it as a fact to be explained. We have been able to find no case where such evidence as was here given, upon its admissibility being challenged by objection, has been held competent.

The evidence of reputation, when admitted, is an exception to general rules. . . . In its application to the fact of marriage it is more than mere hearsay. It involves and is made up of social conduct and recognition, giving character to an admitted and unconcealed cohabitation. But, in its application to a man living in appearance a single life, it adds nothing to that fact, it creates no further contradiction to an intercourse carried on elsewhere under the appearance of matrimony, and throws no additional light upon it. It amounts to bare hearsay, and the unsworn declarations of persons knowing nothing of the facts in controversy. In the present case twenty-three different witnesses were allowed to testify to the reputation of the decedent as a bachelor, not one of whom before his death had seen or heard of the plaintiff, or known of her connection with him. We do not think this evidence was admissible. Its very volume and frequency indicates the dangerous effect it may have produced upon the mind of the Court, and we cannot disregard the error. . . .

The judgment should be reversed, and new trial granted, costs to abide the event.

All concur.

ANDREWS, Ch. J., MILLER and TRACY, JJ., concurring in result.

Judgment reversed.

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408. BLAND *v.* BEASLEY

SUPREME COURT OF NORTH CAROLINA. 1906

140 *N. C.* 628; 53 *S. E.* 443

APPEAL from Superior Court, Pender County; COUNCILL, Judge.

Action by J. T. Bland and others against L. A. Beasley and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Civil action to recover land. The plaintiffs derive title by mesne conveyances under a grant from the State to William and James Hall dated December 22, 1819. The question at issue was one chiefly of boundary, and depended to a great extent on the correct location of this grant. The description was said to begin on "a pine, Abram Hall's corner." As an aid to the true location of this corner, the plaintiffs put in evidence a grant to Abram Hall dated May, 1816, which was said to "begin at a pine on Halsey's line," and as a further circumstance tending to show that the beginning corner of his grant was located as claimed by the plaintiffs, it became material, certainly relevant, to show that the beginning corner of this Abram Hall grant was at a pine in "Halsey's line," and in this way the existence and correct placing of this "Halsey line" became relevant. For that purpose the surveyor (Colvin) in the course of his examination by the plaintiffs was asked: "*Q.* — Do you know where the Halsey line is? *A.* — I only know what people say. *Q.* — What indicates the Halsey line on the map? *A.* — The line A, D, K, 43, 42, and from 42 back to A. *Q.* — Did you ever run that patent except in 1884? *A.* — No. *Q.* — How long have you known that line by general reputation as the Halsey line? *A.* — Since 1884. The eastern end of the line is at A. The western end is at K." To all and each of these questions and answers, except the first, the defendants excepted. On cross-examination, touching this Abram Hall patent and Halsey line, the same witness made answer to questions as follows: "*Q.* — Who first told you, since the survey began, that that was the Halsey line from 30 to the ditch branch, and from A to K? *A.* — All I know is from the survey. *Q.* — You say Jim Cowan is the only man you ever heard say that was the Halsey line? *A.* — Yes." Jim Cowan was living, and a witness in the case. The defendants then moved to strike out the testimony of this witness as to reputation of the location of the Halsey line. The motion was denied and the defendants excepted. The evidence was admitted as substantive evidence on the

location of the Halsey line. Verdict and judgment for the plaintiffs, and the defendants excepted and appealed.

Stevens, Beasley & Weeks and *Shepherd & Shepherd,* for appellants. *Jas. O. Carr, J. D. Kerr,* and *E. K. Bryan,* for appellees.

HOKE, J. (after stating the case). The correct placing of the Halsey line was a fact pertinent to the issue, but if the plaintiffs considered this material to the case they should have established it by proper testimony. It is contended by the plaintiffs that common reputation is admissible on questions of boundary, that the testimony above set out is of that character and the rulings of the Court concerning it can be sustained on that ground. It is true that evidence of both hearsay and common reputation is received with us in cases of disputed private boundary. But this is an exception to the general rule, which requires that the rights of ligitants must be determined on sworn testimony. Such testimony, in England, is not admitted in questions of private right, and the principle was only adopted here from necessity, and where, from lapse of time or changing conditions, it has become "difficult, if not impossible," that better evidence should be had. Speaking of such testimony (hearsay) in Sasser *v.* Herring, 14 N. C. 342, HENDERSON, J., says:

"It is the well established law in this State. And if the propriety of the rule was now res integra, perhaps the necessity of the case, arising from the situation of our country, and the want of self-evident termini of our lands would require its adoption. For although it sometimes leads to falsehood, it more often tends to the establishment of truth. From necessity, we have in this instance sacrificed the principles upon which the rules of evidence are founded."

While such testimony is thus received of necessity, it should be confined to the reasonable requirements of the necessity that called it forth, and the rules and limitations for safeguarding its application should be carefully observed. In Hemphill *v.* Hemphill, 138 N. C. 504, the Court in speaking of this character of evidence said:

"It is the law of this State that, under certain restrictions, both hearsay evidence and common reputation are admissible on questions of private boundary."

Citing Sasser *v.* Herring, 14 N. C. 340, Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154, and Yow *v.* Hamilton, 136 N. C. 357, 48 S. E. 782. And in the same opinion, speaking of the restrictions placed upon evidence of common reputation, the Court said:

"'This reputation whether by parol or otherwise should have its origin at a time comparatively remote and always 'ante litem motam.' Second, It should attach itself to some monument of boundary or natural object, or be fortified by evidence of occupation and acquiescence tending to give the land some fixed and definite location."

Citing Tate *v.* Southard, 8 N. C. 45, Dobson *v.* Finley, 53 N. C. 496, Mendenhall *v.* Cassells, 20 N. C. 43, Westfelt *v.* Adams, 131 N. C. 379, and Shaffer *v.* Gaynor, 117 N. C. 15.

Applying the principles set forth in these cases, we are of the opinion

that the testimony of the witness Colvin on the matter in question does not comply with the conditions required for its reception. Here, the true location of the Halsey line had become a relevant circumstance, and, granting for the present that the statement of this witness amounts to evidence of common reputation, this line as shown by the plat was one boundary line of a large tract of land lying adjacent to the land in dispute. No deed covering this tract of land is introduced, no monument or natural object is shown as marking the boundary of this tract, and no occupation or possession of any such tract by Halsey, or any of his descendants or grantees, is established tending to give it any fixed or definite location. As said by DANIEL, J., in Mendenhall *v.* Cassells, 20 N. C. 45:

"In a country recently and of course thinly settled, and where the monuments of boundaries were neither so extensively known nor so permanent in their nature as in the country of our ancestors, we have from necessity departed somewhat from the English rule as to traditionary evidence. We receive it in regard to private boundaries, but we require that it should either have something definite to which it can adhere, or that it should be supported by proof of correspondent enjoyment and acquiescence. A tree, line, or watercourse may be shown to have been pointed out by persons of a bygone generation as the true line or watercourse called for in an old deed or grant. A field, house, meadow, or wood may be shown to have been reputed the property of a particular man or family, and to have been claimed, enjoyed, and occupied as such. But a mere report, unfortified by evidence of enjoyment or acquiescence, that a man's paper title covers certain territory, is too slight and unsatisfactory to warrant a rational and conscientious person in making it the basis of a decision affecting important rights of his fellow men, and therefore, as far as we are advised, has never been received as competent testimony."

And, in reference to the time, it has been held in this State that in order to admit evidence of general reputation, unlike hearsay in this particular, it is not necessary to show that such reputation had its origin in the declarations of persons who are dead. Dobson *v.* Finley, *supra.* But the decisions are also to the effect that, to justify the reception of such evidence, the time at which the common reputation had its origin should be at a remote period. "Comparatively remote" is the term used in Hemphill's Case, *supra.* It was so used for the reason that, as the principle was established of necessity, when from changing conditions and the absence of permanent monuments, better evidence of boundary could not be procured; so the time may vary to some extent, as the facts and circumstances may show that the necessity does or does not exist. On the admission of such testimony as to the time required, and the test to be applied, it is held in Nieman *v.* Ward, 1 Watts & S. (Pa.) 68, that: "Reputation and hearsay is such evidence as is entitled to respect when the lapse of time is so great as to render it difficult to prove the existence of original landmarks." This alleged general reputation had its origin no further back than 1884, less than 17 years before action brought. It

grew out of the survey, the witness said, and on the facts and circumstances of the case we are of opinion that it is not sufficiently remote to be admitted as evidence.

2. While we have discussed the question on the idea that a general reputation has been testified to, because it was very earnestly contended that the ruling of the Court should be sustained on that principle, as a matter of fact the testimony does not make out a case of general reputation at all, and we could well hold that there was error in not striking out this portion of the evidence in accordance with the defendant's motion. The witness said he knew the line was the Halsey line from "what people said." Again, he said his knowledge grew out of the survey in 1884; and the only person he ever heard say so was Jim Cowan, who was alive and a witness in the case. This is no testimony of a general reputation, but simply the assertion of a fact by an individual who is still living. A general reputation must be the common report of the community, and while it may be established by the assertion of individuals "such assertion must be in effect the statement of the reputation." As stated in the books, "an individual declaration must thus appear to be the result of a received reputation, and the individual declarant is thus merely the mouthpiece of the reputation." 1 Greenleaf, Evidence, § 139; 2 Wigmore, Evidence, § 1584 — both authors citing Wood, Baron, in Moseley *v.* Davis, 11 Price 180.

There was error in admitting the testimony, and a new trial is awarded.

New trial.

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409. Bucklin *v.* State. (1851. Ohio. 20 Oh. 23). Caldwell, J. The term "character," when more strictly applied, refers to the inherent qualities of the person, rather than to any opinion that may be formed or expressed of him by others. The term "reputation" applies to the opinion which others may have formed and expressed of his character. So that, as has been remarked in some of the books, when treating on this subject, a man's "character" may really be good when his "reputation" is bad, and, on the other hand, his "reputation" may be good when his "character" is bad. But, as we have before intimated, the terms when used in connection with this subject are generally used in contradiction to this distinction, — the term "general character" being used in legal signification, as it is frequently used in common parlance, to express the *opinion* that has generally obtained of a person's character, — the estimate the community generally has formed of it. When you ask a witness, then, in this sense of the term, what a man's "general character" is for truth and veracity, he is called on to answer as to what opinion is generally entertained and expressed of him by those acquainted with him.

410. ATLANTIC & BIRMINGHAM R. CO. *v.* REYNOLDS

SUPREME COURT OF GEORGIA. 1903

117 *Ga.* 47; 43 *S. E.* 456

ACTION for damages. Before Judge DART. City Court of Douglas. May 13, 1902.

Reynolds sued the Waycross Air Line Railroad Company for damages alleged to have been sustained by him in consequence of injuries received by the falling of a telephone pole, forming a part of a telephone line owned and operated by the defendant company, which pole he, in the course of his employment by the company as a lineman, had ascended for the purpose of repairing a broken telephone wire. One of the grounds of the motion for a new trial alleges that the Court erred in "sustaining the objections of plaintiff's counsel to defendant's witnesses C. J. Hendry, John Hayes, J. B. Quarterman, and Dan Hall, testifying that, while they did not know plaintiff's reputation where he lived in Waycross, yet they were well acquainted with him and knew his general reputation up and down the Waycross Air Line Railroad, where he worked, which was bad, and from that they would not believe him on oath." Upon the trial there was a verdict and judgment in favor of the plaintiff. The defendant moved for a new trial, which motion being overruled, it excepted.

J. L. Sweat, for plaintiff in error.

Leon A. Wilson and *Quincey & McDonald*, contra.

FISH, J. (after stating the facts as above): We think that the ground for the motion was well taken. . . . As the general reputation of a man is usually formed in the neighborhood where he spends most of his time, and most frequently comes in social and business contact with his fellowmen, it is usual to limit the inquiry as to a witness' general character to his general reputation in the neighborhood where he lives; that is, where he has his home. We do not think, however, there is any hard and fast rule which requires this to be done in every possible case. The very reason for so limiting the inquiry generally may be a good reason for allowing more latitude in an exceptional case. The reason for so limiting the inquiry generally, as already indicated, is that the place in which to ascertain a man's true reputation is the place where people generally have had the best opportunities of forming a correct estimate of his character. It is obvious that this may not, in every instance, be the neighborhood where a man's home is situated. . . . We apprehend that there may be cases in which a person has established no general reputation in the immediate neighborhood of his home, but has established such a reputation elsewhere. This may arise from the fact that his home is located in one place and his daily business or work is carried

on in another, in which latter place he spends nearly all of his time, and hence is well known to people generally, while he rarely comes in social or business contact with people, outside of his family circle, in the neighborhood of his home.

That the general reputation with which a witness called to impeach another, under this section of the Civil Code, must be acquainted, before he is qualified to testify upon the subject, is not necessarily confined to general reputation in the immediate neighborhood where the witness sought to be impeached resides, is shown by the decision of this Court in Boswell *v.* Blackman, 12 Ga. 591. In that case the defendants in the Court below introduced two witnesses for the purpose of impeaching Burrel Blackman, a witness who had testified for the plaintiff. These two witnesses testified that they had known the witness Blackman, for the last eight or ten years, in Russell County, Alabama; that he was generally known and had a general reputation in that county. Defendants then proposed to ask these witnesses if they knew the general character of Blackman for truth and veracity in the county of Russell; the Court ruled out the question, deciding that it should be confined to the character of the witness in the *neighborhood* where he lived; this ruling was excepted to, and this Court held that it was erroneous; NISBET, J., who delivered the opinion, said:

"The impeachment must be by persons acquainted with the witness. And they are called to speak of his general character for truth and veracity — not the world over, or in London, or Paris, or Columbus, but in that circle where his real character is best known, to wit, in the neighborhood where he lives. Now, when a witness is generally known, and has a general reputation in a county, that county may be fairly considered his vicinage; it is fair to infer, under such circumstances, that his true character for truth is as well known in that county, as men's character for truth ordinarily is known in their neighborhood." . . .

Here, again, we see that the paramount idea is, that the witness called to impeach another must know what the general reputation of the latter is in a neighborhood or community the people of which have had good opportunities for ascertaining his true character, and that if the impeaching witness does know this, he is not disqualified to testify on the subject because he does not know what the general reputation of the other witness is in the particular neighborhood where he happens to live at the time that the attack is sought to be made upon his testimony.

In the present case, the witness sought to be impeached was a telephone lineman, who lived in Waycross, but was employed by the defendant railroad company to keep the wires and telephones of its telephone line, running along its railroad from Waycross to Fitzgerald, in proper order and condition; and we think that witnesses who did not know his general reputation in the city of Waycross, but "were well acquainted with him and knew his general reputation up and down the Waycross Air Line Railroad where he worked," were competent to testify as to

his general character, and whether, from that character, they would believe him upon his oath, the weight of such testimony being a matter for the jury. . . .

Judgment reversed. By five Justices.

Topic 7. Official Statements

412. Introductory. Official statements may of course be classified from various points of view. The material one here is the implied authority of officers, which suggests something as to the admissibility of a given document. The form and the custody of the document are important. As to *form*, the statements may be regularly made in a series and collected in a general register or record, or they may be drawn up for each occasion as separate documents. As to *custody*, they may be preserved by the officer in official custody, or they may be given out to be carried away by the person wishing to use them. There thus arises three classes, in general sufficiently distinct, within which all the various sorts of documents may be subsumed, namely, Registers (or Records), Returns (including Reports), and Certificates (including Certified Copies).

A *register* or record differs from a return or report in that it comprises in a single volume a series of homogeneous statements, recorded by entries made more or less regularly; it differs from a certificate in that it is kept in the official custody. A *return* or report differs from a register in that it is a single document, made separately for each transaction as occasion arises, — perhaps filed or indexed with others, but having a separate existence of its own; usually because it deals with something done without the official precincts and therefore not so fitted for entry in a single office volume. The return differs from the certificate in that it is preserved in official custody. A further distinction, within this class, between a return proper and a report is that the former deals with something personally done or observed by the officer himself, while the latter may record the results of his investigations as to something that has occurred out of his presence. A *certificate* differs from a return in that it is not preserved by the official, but is given out by him to an applicant for the latter's use. It differs from a register in that it is not a series of entries in a single volume.

In general, the practical importance of this distinction of terms appears in the following ways: A *register* is usually authorized by implication to be kept by every officer to record his doings, and is therefore generally admissible without express authority to keep it. A *return* is also usually by implication authorized for any officer whose duties involve the doing of things outside of the premises of his office, — for example, a sheriff or a surveyor; yet, so far as it is merely a report — *i.e.* not based on personal knowledge — few officers, if any, are found vested by implication with such authority, and consequently an express authority must be sought; moreover, the number of officers whose duties necessarily authorize the making of a return proper is small. A *certificate* seems at common law rarely, if ever, to have been regarded as authorized by implication, and therefore an express authority must be sought in each instance. Thus, the distinction between the three classes has important consequences in determining the admissibility of the various sorts of official statements.

The terms above taken are not, it is true, employed in common usage with such precision to mark these specific distinctions; nevertheless, they are sufficiently typical.

413. Rex *v.* Aickles. (Nisi Prius. 1785. 1 Leach Cr. L. 3d ed. 436). Indictment for returning from transportation beyond seas within seven years after discharge from jail. It was held incumbent on the prosecutor to prove the precise day on which the prisoner was discharged; and for this purpose Mr. Newman, clerk of the papers of the prison, produced a daily book, which he kept, containing entries of the names of all the debtors and criminals who are brought into the prison, and the times when they were discharged. But it appeared that those entries were not made from Mr. Newman's own knowledge of the facts, but that he generally made them from the information of the turnkeys, and frequently from the turnkey's indorsements on the back of warrants, which warrants were afterwards regularly filed.

It was contended by the prisoner's counsel, Mr. Garrow, that these were not original entries of the facts; and therefore that the turnkey himself by whom Aickles was discharged, or the original minute from which the entry of his discharge had been made, should be produced, because they alone were the best evidence upon this subject, and it was in the prosecutor's power to produce them. It was compared to the production of a tradesman's ledger in order to prove the delivery of goods, instead of producing the original memorandum or day-book from which the ledger had been posted; and it was argued, that no credit could be given to entries made entirely from hearsay and information, and therefore they ought not to be received as evidence.

Per Curiam (admitting the book). The law reposes such confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity; and therefore whatever acts they do in discharge of their public duty may be given in evidence and shall be taken to be true, under such a degree of caution as the nature and circumstances of each case may appear to require. . . . In the present case Mr. N. has no private interest whatsoever in this book to induce him to make factitious entries in it. He is a public officer recording a public transaction.

414. Gaines *v.* Relf. (1851. Federal Supreme Court. 12 How. 472, 570). Wayne, J. Such writings [those which the law requires to be kept for the public benefit] are admissible in evidence on account of their public nature, though their authenticity be not confirmed by the usual tests of truth, namely, the swearing and the cross-examination of the persons who prepared them. They are entitled to this extraordinary degree of confidence partly because they are required by law to be kept, partly because their contents are of public interest and notoriety, but principally because they are made under the sanction of an oath of office, or at least under that of official duty, by accredited agents appointed for that purpose. Moreover, as the facts stated in them are entries of a public nature, it would often be difficult to prove them by means of sworn witnesses.

Sub-topic A. Registers and Records

415. MERRICK *v.* WAKLEY

King's Bench. 1838

8 *A. & E.* 170

Case for a libel imputing mala praxis to the plaintiff as a surgeon employed to attend the poor of a parochial union under stat. 4 & 5 W.

IV, c. 76. The defendant pleaded the general issue and pleas of justification, to which the plaintiff replied de injuria, and issues were joined thereupon.

On the trial, before ALDERSON, B., at the last Herefordshire assizes, it appeared that the plaintiff, at the time in question, was employed as a medical officer of the Kington union, Herefordshire, by appointment of the guardians; and that the poor-law commissioners, acting under stat. 4 & 5 W. IV, c. 76, s. 15, had duly made rules and regulations for the government of the workhouse of the above union, prescribing, among other things, the duties of the medical officer. One of these was stated as follows: "To make a weekly return to the board of guardians in a book prepared according to the form I." (subjoined); "in which book he shall insert the date of every attendance at the workhouse, and make any reports relative to the sickness prevalent within his district which the board of guardians or the poor-law commissioners may require; and shall attend the board of guardians when summoned by them for that purpose." The plaintiff kept such a book, which was laid on the table of the guardians at their weekly meetings, to be inspected by them. The book was produced and identified at the trial; and the plaintiff's counsel proposed to read some entries in it, for the purpose of showing what had been the plaintiff's attendance upon, and treatment of, a person whose case was commented upon in the libel, and whom the plaintiff was therein alleged to have neglected. The learned judge held this evidence inadmissible for the plaintiff. A verdict was given for one farthing damages, and the learned judge certified to deprive of costs, under stat. 43 Eliz. c. 6, s. 2. In this term,

Ludlow, Serjt., moved for a new trial, stating, as one ground, the rejection of the above evidence. . . . The book made up and left for inspection at the meetings of guardians, in pursuance of such rules, was admissible in evidence as a public book, kept under the direct authority of an act of parliament. It may indeed be considered as embodied in the rules, and sanctioned by the act in the same degree as they are. The entries were made before any dispute on the matters involved in this action.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.

A point of evidence which arose in this case was, whether certain entries could be read from a book kept by the plaintiff as a medical officer, under rules of the poor-law commissioners, which book contained entries of professional visits, and was produced at the weekly meetings of the guardians. The endeavor was to put this document upon the same footing with the register of the Navy-office, the log-book of a man of war, the books of the Master's office, and other public books which are held to be admissible in evidence. But in these cases the entries are made by an officer in discharge of a public duty; they are accredited by those who have to act upon the statements; and they are made for

the benefit of third persons. Here, it is true, the book is kept by a public officer; but no credit is given him in respect of the entries; they are merely a check upon himself. If we held this book admissible, we should make the entries of any public accountant evidence on a similar occasion. There will therefore be no rule. Rule refused.

416. KENNEDY *v.* DOYLE

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1865

10 *All.* 161

[The facts and the evidence in this case have been already given in No. 398, *ante*.]

GRAY, J. . . . In England, a church record of baptisms, kept by a clergyman of the Established Church, is admissible, even before his death, accompanied by evidence of the identity of the child, to prove the date of its baptism; but not the time of its birth, because the clergyman has no authority to make inquiry about the time of birth or any entry concerning it in the register: Draycott *v.* Talbott (3 Bro. P. C. (2d ed.) 564); May *v.* May (2 Stra. 1073); Wihen *v.* Law (3 Stark. R. 63), and other cases cited in Stark. Ev. (4th Eng. ed.) 299, note f.; Doe *v.* Barnes (1 M. & Rob. 389). In the Church of England, from the time of the Reformation, registers of baptisms, weddings, and burials were kept by order of the Crown as head of that church; and in the words applied by Lord Chief Baron Gilbert to the original order of Henry VIII. on this subject, "when a book was appointed by public authority it must be a public evidence." Gilb. Ev. (3d ed.) 77. . . . The English judges, adhering to the principle of admitting in evidence as public documents those registers only which the law required to be kept, have considered all others as mere private memoranda, and have refused to admit registers regularly kept by dissenters unless supported by the testimony of the person keeping them by other witnesses: Birt *v.* Barlow (1 Doug. 171); Newham *v.* Raithby (1 Phillim. R. 315); *Ex parte* Taylor (1 Jac. & Walk. 483; s. c. 3 Man. & Ry. 430 n.); Doe *v.* Bray (8 B. & C. 813; s. c. 3 Man. & Ry. 428); Whittuck *v.* Waters (4 C. & P. 375). Vice Chancellor SHADWELL refused even to admit an entry in the register of the Roman Catholic chapel of the Sardinian ambassador in London as evidence of the baptism of the ambassador's son; D'Aglie *v.* Fryer (13 Law Journal, N. S. Ch. 398). "The principle on which entries in a register are admitted," said Mr. Justice ERLE in a recent case, "depends upon the public duty of the person who keeps the register to make such entries in it, after satisfying himself of their truth." Doe *v.* Andrews (15 Q. B. 759).

Almost two centuries before the passage of the statute of Will. IV., the founders of the Massachusetts Colony, though not less attached

than other Englishmen to their own forms of religious worship, had the wisdom to perceive that it was more important for the civil government to preserve exact records of the dates of births and deaths, than of religious ceremonies from which they might be imperfectly inferred; and that the importance of recording those facts did not depend on the particular creed or church government of the individual, but applied equally to the whole people. They accordingly left the baptism of the living and the burial of the dead to the churches; but by an ordinance of 1639 enacted "that there be records kept of the days of every marriage, birth and death of every person within this jurisdiction;" and similar statutes have been ever since in force in Massachusetts. The record of a marriage by the justice of the peace or minister, or the town clerk's or registrar's record of births, marriages, and deaths, kept as required by these statutes, or a duly certified copy of either, is held competent evidence; 2 Dane Ab. 296; Milford *v.* Worcester (7 Mass. 56); Commonwealth *v.* Norcross (9 Mass. 492). . . . Similar decisions have been made in other States, generally upon the ground of the record having been kept in the performance of a duty imposed by law; and those cases, in the reports of which no statute is referred to, may yet have controlled by statute. . . .

It is perfectly true that in this Commonwealth the law makes no distinction between different sects of Christians, and the record of a Roman Catholic priest is of no less weight as evidence than that of a Congregational, or Protestant Episcopal, or any other minister. But our law not requiring any record of baptisms, the church book offered in evidence in this case, not having been kept under any requirement of law, was not a public record, and would not, had the priest who made the entries been still alive, have been admissible in evidence, unsupported by his testimony.[1]

417. DELANEY *v.* FRAMINGHAM GAS, FUEL & POWER CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1909

203 *Mass.* 359; 88 *N. E.* 776

[Printed as No. 399, *ante;* Point 1 of the opinion.]

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418. HISTORY.[2] No general system of *registration of deeds* was ever adopted in England down to the end of the 1800s. But statutes of a narrow scope had existed for several centuries. These statutes, seven in substance, covered, first,

[1] [The remainder of the opinion, on another rule of law, is printed *ante*, No. 398.]

[2] [Abridged from the present Compiler's "Treatise on Evidence" (1905), Vol. III, § 1650.]

all deeds in the ancient form of bargain and sale, and, next, all deeds whatever in the counties of York and Middlesex and certain Crown lands. In some of them a means of probate by witnesses before the registrar was provided for, and in some of these the grantor's acknowledgment was also sanctioned; in two alone (the North Riding of York and Crown lands) was it expressly declared that the registry-copy should be admissible to prove (apparently) the deed's execution, and this only where the original was accidentally destroyed. There was therefore ample opportunity for the judicial development of a principle to test the admissibility of such registers as evidence of the recorded deed's execution. But the rulings unfortunately present only a perplexing conflict. Up to the middle of the 1700s, it may be gathered that the enrolment or registry of a deed belonging to the class *authorized* or *required* to be enrolled was regarded as admissible. But it was otherwise for deeds enrolled (as was not uncommon, for example, for safe custody in a court) without statutory authority (although even for these last, the enrolment was receivable as against the party enrolling, because it virtually contained his admission). This much is clearly laid down in accordance with strict and straightforward principle, by Chief Baron Gilbert, writing in the early 1700s:

Gilbert, C. B. *Evidence* (*ante* 1726), p. 24, 97: "Where the deed *needs* enrolment, there the enrolment is the sign of the lawful execution of such deed, and the officer appointed to authenticate such deeds by enrolment is also empowered to take care of the fairness and legality of such deeds. . . . But where a deed *needs no* enrolment, there, though it be enrolled, the *inspeximus* of such enrolment is no evidence; because since the officer *hath no authority* to enrol them, such enrolment cannot make them public acts."

Nevertheless, by the beginnings of the 1800s the rulings bear increasingly against that proposition. By the end of the first half of the 1800s the opinion seems clearly to prevail in England that it is not the law; as the following passage indicates:

Thomas Starkie. *Evidence* (1824) p. 412: "It would be manifestly inconsistent with the plainest principles of justice to admit such enrolments to be evidence against those who have not acknowledged them, without proof of the execution of the deeds; . . . and although it appears that an opinion once prevailed to this effect, yet it seems to be so destitute of principle that it is not probable it would now be acted upon."

But the rule of Chief Baron Gilbert was to our early judges an inherited common-law principle, and is constantly thus referred to in their opinions. At an early date there had grown up a general registry-system in the colonies and the original States. In every jurisdiction where the inquiry came before the Courts, the conclusion was reached that the register was admissible, on common-law principles, as evidence of the execution and contents of the recorded deed.[1] In

[1] Womack *v.* Hughes (1821. Kentucky. Litt. Sel. C. 291, 294). Mills, J. The Acts directing the mode of recording deeds do not *direct* that they shall thereafter be given in evidence in any court on the trial of an issue without any other proof than the ex parte authentication which entitles it to a place on its own record; nor is there any statutory provision which so directs, within the recollection of the Court. But the common-law principle relative to enrolled deeds has been uniformly applied by this Court to deeds recorded according to our statutes.

It is not, however, every placing a deed upon record which makes it a record

only a few of the earlier States was this result expressly provided for by statute. But as time went on, and other States were formed, express statutory declarations became common; and now in almost every jurisdiction such provisions exist. For judicial rulings, then, the field is now restricted chiefly to two classes of questions, — the kind of document thus provable, and the regularity of the recording under the statutory requirements.

419. STATUTES. *California* (C. C. P. 1872, § 1919). A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record.

Ib. §1951 (as amended by St. 1889, no. 45). Every instrument conveying or affecting real property, acknowledged or proved and certified as provided in the Civil Code [may be read] without further proof; . . . also, the original record of such conveyance or instrument thus acknowledged or proved, may be read in evidence, with the like effect as the original instrument, without further proof.

Georgia (Code 1895, § 3628). A registered deed shall be admitted in evidence . . . without further proof, [unless the maker or heir or opponent makes affidavit that it is a forgery, whereon an issue of genuineness shall be tried].

Illinois (Rev. St. 1874, c. 30, § 20). [For deeds, etc., without the State and within the United States or any Territory or dependency or the District of Columbia, an acknowledgment of proof may be made] in conformity with the laws of the State, Territory, dependency, or District where it is made; . . . if any clerk of a court of record within such State, Territory, dependency, or District shall under his hand and the seal of such court certify [to the conformity of the acknowledgment, or the conformity shall appear by the laws thereof,] such instrument, or a duly proved and certified copy of the record of such deed, mortgage, or other instrument relating to real estate, heretofore or hereafter made and recorded in the proper county, may be read in evidence as in other cases of such certified copies.

New York (C. C. P. 1877, §935). [A duly recorded conveyance is provable by the record or by a certified copy] without further proof; [unless proof was taken on the oath of] an interested or incompetent witness.

420. EADY *v.* SHIVEY

SUPREME COURT OF GEORGIA. 1870

40 *Ga.* 684

EJECTMENT. Evidence. Before Judge HARRELL. Clay Superior Court. April Term, 1870.

Doe, on the demise of Eady, Thomas J. Smith and Sarah A. Cook, executrix of W. C. Cook, and others, brought ejectment against Roe,

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deed. The statutes usually point out the officer or Court before whom the deed is to be acknowledged, what the acknowledgment shall consist of, and how and to whom it shall be certified, and they are equally positive as to the time in which the different acts shall be done. Within these periods the recording officers have authority to record the instrument; afterwards, such authority ceases.

casual ejector, and C. B. Shivey, tenant in possession, for lot number 366 in said county. Plaintiff's counsel read in evidence a grant of said lot from the State to Eady, dated January 15, 1821. They then produced an affidavit by said Smith, "that the title deeds composing the chain of title from the owners and as they are recorded are not in his possession, power or custody, that he has made diligent search and inquiry and has been unable to find them; hence he believes they are lost or destroyed;" and an affidavit from said Sarah A. Cook, stating, "that the deeds that appear on record in the Clerk's office of said county, to lot of land number 366, in the 26th district, the lot for which the said S. A. Cook, executrix, and Thomas J. Smith, are suing C. B. Shivey, in an action of ejectment, are not in her possession, and, as she believes, are lost or destroyed and she makes this affidavit that copies of the same from the records may be used in said case."

Thereupon, plaintiff's attorneys offered in evidence copies of deeds to said lot, duly certified from the records, from Eady to Thomas Broddus, from Broddus to David Merriwether and others, a deed from them, the heirs of Broddus, to said Smith, and from Smith to said Cook. Defendant's counsel objected to these copies; and they were rejected, upon the ground (as was said in argument) that there was no proof that such original deeds had ever existed.

McCay, J.— We think the Court erred in rejecting the copy deeds. The affidavits conformed strictly to the forty-second rule of Court.

It is true, there was nothing in the affidavits affirming, directly, the existence and genuineness of the originals. We are of the opinion that this was proven prima facie, by the certified copies from the record. . . . Why should not the existence of a proper record be evidence of the existence and contents of a lost original? To go to record, a deed must be probated, either executed or acknowledged before a magistrate, or proven by the affidavit of one of the witnesses. The very object of the record is to preserve a copy of the deed to be used if the original is lost or destroyed; and it would largely lessen the uses of a record if it were necessary before it could be used to prove the existence of the original by any other evidence. . . . Unless there be forgery or false swearing, nothing but a genuine existing deed can go upon the record properly, and the copy will show upon its face if the requirements of the statute have been complied with. We recognize fully the rule that the genuineness and existence of an original must be shown before the contents of it can be shown by secondary evidence. But in our judgment this is done by evidence that there is a duly executed record of what purported to be an original duly probated according to law.

The cases referred to, 13 Ga. 515, 14 Ga. 185, 16 Ga. 268, and 30 Ga. 391, do not support the position of the plaintiff in error. In Jones *v.* Morgan, 16 Ga. 515, the deed had not been properly recorded, it did not purport to have been delivered, and this court put its decision rejecting the copy, on that ground. The case in 30 Ga. 391 turned upon

the same principle; the copy produced, showed a deed executed by two witnesses, neither of them a magistrate and there was no probate. This want of a proper probate was the ground on which the court put both those cases, and so far from being against the position we take, they are authorities in favor of it, — since both cases admit that if the deed had been *properly recorded*, the copies would have been admissible.

The other cases referred to were not copies of records, and only establish, what is without doubt the law, that the existence and genuineness of an original must be proven.

More especially is this use of a copy of the record proper under our law. The opposite party can always force upon the producer of even an original deed the proof of its execution, by making the affidavit required by section 2670 of the Code. He can thus do away with the effect of the record. He can force the actual proof of existence and genuineness of a lost, or destroyed original, in case like the present, in the same manner. Until that affidavit is made, we hold that the existence and genuineness of the original deeds, as well as their contents, is proven by the production of a copy from the record of duly probated and recorded originals: See Code, § 2671.

Upon the other point we express no opinion, as we think a new trial ought to be had, on the first point.

421. WILCOX *v.* BERGMAN

SUPREME COURT OF MINNESOTA. 1905

96 *Minn.* 219; 104 *N. W.* 955

APPEAL from District Court, Pine County; F. M. CROSBY, Judge.

Action by C. H. Wilcox against Christina C. Bergman and August Bergman. Judgment for defendant. From an order denying a new trial, plaintiff appeals. Affirmed.

C. D. Austin and *Robert C. Saunders*, for appellant. *Gjertsen & Lund*, for respondents.

BROWN, J.— This action was brought to recover damages for the alleged fraud of defendants in conveying certain property to a third person after having previously conveyed it by warranty deed to plaintiff. The complaint alleges, among other things, that the defendant Christina Bergman was on the 10th day of August, 1900, the owner of the land mentioned, and that she and her husband, defendant August Bergman, for a valuable consideration, conveyed the same by warranty deed to plaintiff; that by inadvertence plaintiff neglected to record the deed in the office of the register of deeds, as required by the laws of the state of North Dakota, where the land was located; that thereafter, in February, 1902, defendants conveyed the same land by warranty deed to one A. L

Beggs, an innocent purchaser for value and without notice of the prior deed; and that Beggs in turn conveyed to one Rickords, who was also an innocent purchaser for value and without notice of the deed to plaintiff. Both the later deeds were, the complaint alleges, duly recorded in the proper office of the register of deeds of North Dakota. The complaint also alleges that provision is made by the statutes of the State of North Dakota for the record of all deeds and other instruments affecting the title to real property located in that State, and that by reason of the record of the deeds to Beggs and Rickords plaintiff has been wholly deprived of the property conveyed to him by his unrecorded deed. The answer is a general denial. When the case came on for trial plaintiff offered in evidence the deed claimed to have been executed and delivered to him by defendants, which was received over defendants' objection, and then offered a copy of the deeds to Beggs and Rickords, properly certified by the register of deeds of Dickey county, N.D., wherein they were recorded. These documents were objected to on the ground that "there is no statute in Minnesota authorizing the introduction in evidence of recorded title in a foreign State by certified evidence," and on the further ground that the evidence was incompetent, irrelevant, and immaterial, and not the best evidence. The objection was sustained, whereupon plaintiff rested his case, and on motion of defendants it was dismissed for failure on the part of plaintiff to prove the allegations of his complaint. Thereafter plaintiff moved for a new trial, and appealed from an order denying it.

The only question presented for consideration upon this appeal is whether the Court below erred in excluding the certified copies of the North Dakota records. . . .

The Constitution of the United States (article 4, § 1) provides that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, and that Congress may prescribe the manner in which such acts and proceedings shall be proved, and the effect thereof. In 1790, by authority of this provision of the Constitution, Congress prescribed the manner in which judicial acts and proceedings might be proven in the Courts of the several States, but made no provision respecting the proof of other records. Section 906, Rev. St. U. S. [*post*, No. 439], covering all records other than those of a judicial character, was enacted in 1804. . . . There is no question in the case at bar that the records here sought to be introduced in evidence were properly authenticated as required by this act of Congress; but, as already stated, there was no offer of the statutes of North Dakota, from which the records came, either showing that such records were there provided for, or showing the effect given to properly authenticated copies as evidence in that State. We have no statute in this State under which certified copies of documents, not of a judicial nature, coming from a sister State, may be used as evidence in our Courts. Judicial records are provided for, but records of that nature only (Gen. St. 1894, § 5706);

and the question presented is whether the act of Congress is valid as a rule of evidence by which the Courts of this State are controlled.

Whether Congress may establish a rule of evidence for State Courts, and whether the act of Congress just referred to is binding upon the Courts of the several States, is a question that has been more or less discussed by the various State Courts. By the later authorities the rule is laid down that the act of Congress is a valid exercise of the powers given by the Constitution, and binding on the State Courts. The better opinion is that the act of Congress should be sustained, not only because authorized by the Constitution, but for the further reason that it establishes a uniform, definite, and certain rule by which official records in the several States may be shown. If the record of instruments be provided for by the laws of the several States, and certified copies thereof made evidence in the State where made, either by statute or rule of court, no reason occurs to us why the act of Congress should not be applied and enforced by the Courts of all other States. Its enactment was clearly within the terms of the Constitution, for authority is there conferred to prescribe rules of evidence, not only with reference to judicial acts and records, but all other official records. The question recently came before the Supreme Court of New Jersey (Chase *v.* Caryl, 57 N. J. Law, 545, 31 Atl. 1024), where it received a very thorough and careful consideration, and the act of Congress was held controlling in that State. A large number of authorities are collected and analyzed, and we refer to it as a complete answer to every objection that may be raised against the operation and validity of the act. See, also, 2 Elliott on Evidence, § 1349; 1 Jones on Evidence, § 551; 3 Wigmore, Evidence, § 1648; 17 Cyc. 323 et seq., and cases cited.

But to render copies of such records competent evidence under the act of Congress in the Courts of other States it must appear (1) that the statutes of the States in which the record was made provided for and authorized it, and (2) the force and effect given to such evidence in the Courts of that State. In the absence of such showing, copies are incompetent and inadmissible. While the decisions of the Courts and text-writers are not, perhaps, in entire harmony upon this subject, it occurs to us that the act of Congress will permit of no other view. The act declares that properly authenticated records shall have such force and effect given them in every Court within the United States as they have by the law of the State from which they are taken. In cases like the case at bar, when by the pleadings the execution of the instrument, a copy of which is offered in evidence, is in issue, the original document is the best evidence, and must be produced, unless by some statute or rule of court of the State from which it is taken a certified copy of the record thereof prima facie establishes that fact. But there is no presumption that such effect is given to copies of records in another State. At least, this Court has held that no judicial notice will be taken of the statutory law of a sister jurisdiction. Myers *v.* Ry. Co., 69 Minn. 476. In this State

a certified copy is received in evidence with like force and effect as the original, and prima facie proves the execution of the original. Gen. St. 1894, § 5733; Ellingboe *v.* Brakken, 36 Minn. 156. But we cannot presume that such rule obtains in North Dakota.

The question has come before several of the leading State courts, where the subject is not expressly covered by local statutes, and the rule here indicated had been laid down and followed. Florsheim *v.* Fry, 109 Mo. App. 487. . . . In Garrigues *v.* Harris, 17 Pa. 344, it was held that the record of a mortgage of land in New Jersey, though but an abstract of the mortgage, the record being according to the laws of New Jersey, is competent evidence in Pennsylvania, when authenticated according to the act of Congress. "We are required to take judicial notice that the recording of an 'abstract' of a mortgage is all that there is there enjoined, and that a certified copy of that record is competent evidence in that State." The case goes further than the authorities generally will warrant. At least the decisions of our State, as already suggested, are to the effect that no presumption exists that the statutes of foreign States are the same as our own. The common law is presumed to be the same in all States, but not the statutes. Crandall *v.* Great Northern Ry. Co., 83 Minn. 190. . . . In Lee *v.* Mathews, 10 Ala. 682, it was held that, to authorize the certified copy of the deed by the public register of Halifax county, N. C., to be read in evidence, it was necessary to prove by the law of that State that such instruments were required to be recorded. See, also, 3 Wigmore on Evidence, § 1652. . . .

Our conclusion is that, to render certified copies of records from a sister State competent evidence in the Courts of this State, it must be shown that the statutes of that State provided for and authorized the record to be made, and also the particular force and effect given to certified copies as evidence in the Courts of that State. And, for the reason that there was no proof of the statutes of North Dakota in the case at bar, the objection to the introduction of the copies was properly sustained. We are not aware of any rule of evidence at common law under which certified copies of foreign records of the character of these here mentioned are admissible in evidence in the absence of proof of the statutes under which they were made. . . . Order affirmed.

422. CHESAPEAKE & OHIO R. CO. *v.* DEEPWATER R. CO.

Supreme Court of Appeals of West Virginia. 1905

57 *W. Va.* 643; 50 *S. E.* 890

[Printed *post*, as No. 846]

Sub-topic B. Reports and Returns

423. ELLICOTT *v.* PEARL

Supreme Court of the United States. 1836

10 *Pet.* 412

In error to the Circuit Court of the United States, for the district of Kentucky. The plaintiffs in error, citizens of the State of Maryland, on the 17th day of January, 1831, sued out of the Circuit Court of the United States for the District of Kentucky, a writ of right against William Pearl, for a tenement containing one thousand acres of land, in the county of Laurel, in the State of Kentucky. . . . At May Term, 1834, the case was tried by a jury, who returned into court the following verdict: "We, the jury, find that the tenant has more right to have the tenement, as he now holds it, than the demandants to have it;" and the Circuit Court gave judgment for the tenant accordingly. . . .

On the trial of the case, the following bill of exceptions was filed: . . . The tenants, in order to prove the boundaries of the demandants' land, as laid down in the plat, and claimed by them; gave in evidence the original plats and certificates of survey of Kincaid's two thousand and one thousand acre tracts; and then examined M'Neal, a witness of the demandants, who was first introduced to prove their boundary: who stated that the water courses, as found on the ground, did not correspond with those represented on the said plats: and after being examined by the demandants, for the purpose of proving that the marks on the trees, claimed by them as the corner and lines of their surveys, were as ancient as the said surveys, and also as to the position and otherwise of the lines and corners claimed by them, and represented on the plat made and used at the trial: stated, on the cross-examination of the tenants' counsel, that some of the lines, marked to suit the calls of the said surveys, appeared to be younger, and others, from their appearance, might be as old as the date of the said plats. The demandants, to counteract this evidence, and to sustain their claim, offered in evidence a survey, made out by M'Neal, in an action of ejectment formerly depending between the same parties for the same land, of which survey Pearl had due notice. The tenants objected to the reading of the explanatory report accompanying this survey, and the Court refused to allow so much thereof as stated the appearance as to age and otherwise of the lines and corners to go in evidence to the jury; and accordingly caused to be erased from the plat the words following, viz. "ancients" (chops); — "John Forbes, Jun., states he cut the same letters and figures;" — "on the east side, the chops appear to have been marked with a larger axe, than the chops on the beginning tree;" — and then permitted the residue of the report and plat to go in evidence. This constitutes the third exception of the demandants. . . .

The case was argued by Mr. *Underwood*, and by Mr. *Hardin*, for the plaintiffs in error. No counsel appeared for the defendant.

Mr. Justice Story delivered the opinion of the Court.

We are of opinion, that there was no error in this refusal of the Court.

The evidence was inadmissible upon general principles. It was mere hearsay. The survey, made by a surveyor, being under oath [of office] is evidence as to all things which are properly within the line of his duty. But his duty is confined to describing and marking on the plat the lines, corners, trees, and other objects on the ground, and to subjoin such remarks as may explain them. But in all other respects, and as to all other facts, he stands, like any other witness, to be examined on oath in the presence of the parties and subject to cross-examination. . . . It has never been supposed that if in such a survey the surveyor should go on to state collateral facts, or declarations of the parties, or other matters not within the scope of his proper official functions, he could thereby make them evidence as between third persons. . . .

424. UNITED STATES LIFE INSURANCE CO. *v.* VOCKE

Supreme Court of Illinois. 1889

129 *Ill.* 557; 22 *N. E.* 463

Appeal from the Appellate Court for the First District; — heard in that court on appeal from the Superior Court of Cook County; the Hon. Kirk Hawes, Judge, presiding.

This was assumpsit, originally brought by Elizabeth Kielgast, administratrix of the estate of Otto Wilhelm Kielgast, deceased, against the appellant, to recover upon a policy of life insurance on the life of the intestate. The policy was dated July 22, 1884, and contained, among other things, a condition that if, within three years of said date, the insured should die by any act of self-destruction, whether voluntary or involuntary, whether sane or insane, the contract of insurance should become null and void. The insured died January 17, 1885. The material facts appear in the opinion of the court.

Messrs. *Isham, Lincoln & Beale*, for the appellant. . . . The certified copy of the verdict of the coroner's jury was admissible in evidence as part of these proofs. . . . Inquisitions of lunacy are admissible in evidence. . . . Inquests of office are admissible in evidence, and a coroner's inquest was, at common law, simply an inquest of office. . . .

Mr. *George F. Westover*, for the appellee. The proceedings before the coroner were properly excluded from the jury, because they were no part of plaintiff's proof of death of the assured. . . . The verdict at the coroner's inquest could not bind plaintiff in this case. . . .

Mr. Justice Craig delivered the opinion of the Court: . . .

It appears that a coroner's inquest was held over the body of the

deceased by the coroner of Cook county and a jury, and in making proofs of death a certified copy of the record of the coroner's inquest, consisting of the inquisition and the deposition of three witnesses, was returned to the insurance company as a part of the proofs of death. The inquisition shows on its face that Kielgast came to his death on the 17th day of January, 1885; that the death was caused by a pistol shot fired by the hand of the deceased while laboring under a fit of temporary insanity. On the trial the defendant offered in evidence the certified copy of the inquisition, which had been returned to defendant as a part of the proofs of death. The Court excluded the evidence. The defendant then offered in evidence the original papers of which those previously offered were copies, offering the entire set of papers together, including the verdict and testimony. This evidence was also excluded. The defendant excepted to the decision of the Court in excluding the evidence so offered, and the determination of the ruling of the Court on the evidence is the principal question presented by the record. . . .

We shall not stop to inquire whether the Court erred in excluding the offered evidence as a part of the proofs of death. But we will proceed at once to determine the question whether the inquisition was competent evidence for the defendant, under its special plea, tending to prove that Kielgast came to his death by his own hand.

The office of coroner, at the common law, is an ancient one. . . . Blackstone says, (1 Blackstone's Com. 348): "The office and power of a coroner are also, like those of a sheriff, either judicial or ministerial, but principally judicial. This is in great measure ascertained by statute 4 Edw. I, 'de officio coronatoris,' and consists, first, in inquiring, when any person is slain, or dies suddenly, or in prison, concerning the manner of his death. And this must be 'super visum corporis,' for, if the body be not found, the coroner can not sit." . . .

The earliest English statute relating to coroners was passed in the fourth year of Edward I, and it is said by Jarvis on Coroners, 29, that it was merely directory, and in affirmance of the common law. The first act of the Legislature of this State regulating the duties of coroners was passed March 2, 1819. The next statute was passed January 20, 1821. (Laws of 1821, p. 22.) This act, upon an examination, will be found to be substantially like the statute of 4 Edw. I. Our present statute does not differ materially from the earlier acts. . . . Section 21 requires the coroner to reduce to writing the testimony of each witness examined at the inquest, which testimony shall be filed by the coroner in his office and preserved. Section 22 provides that the coroner shall keep a record of each inquest. Section 26 provides that if a person implicated by the inquest is not in custody, the coroner shall apprehend and commit such person to the jail of the county, there to remain until discharged by due course of law.

The foregoing are the principal sections of the statute which relate to the inquest of the coroner, and, from the nature and character of the

proceeding as it has been recognized by Courts and law writers, we must determine whether a coroner's inquest should be used as evidence in a case of this character. It will be observed that the evidence of all witnesses examined before the coroner is required to remain in his office, while the inquest must be sealed up and returned to the clerk of the circuit court of the county, where it shall be filed. Thus the inquest becomes, by force of the statute, a record of the circuit court, — a public record of the county where the inquest is held. It is a record containing the results of a public inquiry, made by a public officer under authority of law, relating to matters in which the public have an interest. Shall it be held that a public record of this character shall not be evidence, in a judicial proceeding, tending to prove the facts found to be true on the face of such record? We are not prepared to adopt a rule of that kind; moreover, we believe the weight of authority to be in favor of the admission of such evidence.

Starkie (vol. 1, p. 258,) seems to lay down the rule that an inquisition is admissible in evidence. . . . Greenleaf, (vol. 1, § 556,) in speaking of inquisitions, says:

"These are the result of inquiries, made under competent public authority, to ascertain matters of public interest and concern. They are said to be analogous to proceedings *in rem*, — being made in behalf of the public, — and that therefore no one can strictly be said to be a stranger to them. But the principle of their admissibility in evidence between private persons seems to be, that they are matters of public and general interest, and therefore within some of the exceptions to the general rule in regard to hearsay evidence." . . .

In the People *v.* Devine, 44 Cal. 542, the question arose whether the evidence of a witness taken before the coroner could be used to contradict the evidence of the same witness subsequently given on a trial in court. In considering the question it is said: . . .

"In our investigations we have not found any authority in text-books or adjudicated cases which distinguish between these and any other official proceedings taken and returned in the discharge of official duty, as to their admissibility in evidence upon the principle referred to."

See, also, Fielder *v.* Silk, 3 Campb. 126, and Silas *v.* Brown, 38 E. C. L. 601.

The citation of other authorities would seem to be unnecessary. We are satisfied, both upon principle and authority, that the coroner's inquisition was admissible in evidence. The inquisition was made by a public officer, acting under the sanction of an official oath, in the discharge of a public duty enjoined upon him by the law, and when it is returned into court, and is filed, we see no reason why it should not be competent evidence tending to prove any matter properly before the coroner which appears upon the face of the inquisition. We do not hold that such evidence is conclusive, but only that it is competent evidence to be considered. . . .

We are of opinion that the Court erred in excluding the inquisition,

and for that reason the judgments of the Appellate and Superior courts will be reversed, and the cause remanded to the Superior Court for another trial. Judgment reversed.

Mr. Justice BAILEY, having heard this case in the Appellate Court, took no part in its decision here.

Separate opinion by Mr. Justice BAKER — I concur in the view of the case taken in the opinion of Mr. Justice CRAIG. . . . At common law, and in this State until the adoption of the Constitution of 1848, a coroner and his jury holding an inquest post mortem constituted a court with judicial powers. . . .

The rule which now obtains, as appears from the text-books, and also, almost without exception, from the decided cases, is that inquisitions post mortem are admissible in evidence, but are not conclusive. The general doctrine, as stated in 1 Greenleaf on Evidence (§ 556), is, that these inquisitions are within the exceptions to the rule in regard to hearsay evidence, and are distinguished from other hearsay evidence in having peculiar guarantees for their accuracy, and are the results of inquiries, made under competent public authority, to ascertain matters of public interest and concern, and that no one can be considered a stranger to them. The only difficulty in respect to the admissibility in evidence of the inquisition itself, is found in the fact that section 1 of Art. 6 of the Constitution of 1870 provides that "the judicial powers, except as in this article is otherwise provided, shall be vested in one Supreme Court, circuit courts, county courts, justices of the peace, police magistrates, and in such courts as may be created by law in and for cities and incorporated towns." Said article 6 disposes of all the judicial power of the State, and completely exhausts the subject, and a coroner's inquest is not provided for therein. So it is certain that in this State, and under its present constitution, the coroner and his jury do not constitute a court, and are not clothed with judicial powers, as was the case at common law.

The inquisition not being the result of a judicial proceeding, is the old common law rule of evidence, that it is competent testimony, thereby abrogated? I think not, and am of opinion that common law principles and the analogies of the law, and the decisions of this Court, justify such conclusion. The provision found in section 1 of article 5 of the Constitution of 1848 was substantially that contained in the present Constitution. An act of March 3, 1845, made provision for an inquiry before a sheriff and a jury, into the right of parties claiming property on which the sheriff had levied an execution. In Rowe *v.* Bowen, 28 Ill. 116, the point was made that this inquest or trial of the right of property, created by the statute for the purpose of enabling the sheriff to interpose the verdict of a jury as his justification for selling the property or restoring it to the claimant, as the verdict might direct, had been abolished by the constitution of 1848. The Court held otherwise, and that said law was in no respect in derogation of the Constitution. . . .

So, also, at common law, inquisitions of lunacy and inquests of office are admissible in evidence, and it is not understood that the provision of our State Constitution in question has rendered them incompetent as testimony. Moreover, under our statutes, the findings, reports or schedules of various commissioners, boards and officers are either made competent evidence or prima facie evidence in express terms, or are given the legal effect of evidence. . . .

My conclusion is, that while, under the Constitution, the coroner and coroner's jury no longer compose a court with judicial powers, yet the inquisition or verdict made by them, and which is required to be returned to and filed in the office of the clerk of the Circuit Court, and which thereby becomes a record of that court, is competent testimony, and that the ruling of the trial court in the case at bar, refusing to admit in evidence the verdict of the coroner's jury which inquired into the matter of the death of Otto Wilhelm Kielgast, deceased, was erroneous, and I concur in the conclusion that for that error the judgment should be reversed, and the cause remanded to the Superior Court for another trial.

425. JONES *v.* GUANO CO.

Supreme Court of Georgia. 1894

94 *Ga.* 14; 20 *S. E.* 265

Complaint on note. Before Judge Fish. Lee Superior Court. March Term, 1893. The Guano Company sued Jones and Gill upon a promissory note for $1,000, dated March 9, 1891, due October 15, 1891, given for four hundred sacks of "Pride of Dooly" guano. The noted stated that the guaranteed analysis was on each sack as required by law, and that the guano was purchased on the judgment of the makers, waiving all guarantee as to its effects on crops. Defendants pleaded the general issue; failure of consideration, in that the guano was worthless and not reasonably suited for the use for which it was bought, and was of no benefit to the crops whereon it was used. . . .

On the trial plaintiff introduced the note, and closed. Gill testified that the note was given for a lot of guano bought of plaintiff, witness taking part and Jones the remainder; . . . that of the guano which the witness got he, when he used it in March or April, took a bottle full out of one of the sacks and kept it carefully locked up in his bureau; that no representative of plaintiff was present when he did so; that in July of that year he carried the bottle of guano to Atlanta and delivered it for analysis to the State commissioners of agriculture, who called the State chemist and ordered him to have it analyzed, and he took it off to analyze it. . . .

Defendants offered the certificate or document addressed to Gill, dated July 16, 1892, showing the analysis of said sample made for Gill

by Payne, chemist for the department of agriculture, certified to be a true and correct copy from the records, and signed "R. T. Nesbitt, commissioner of agriculture, per W. H. Joyner, clerk." Plaintiff objected on the grounds, that the act of 1890 had not been complied with, and that the certificate had not been proved. This objection was sustained. . . .

Verdict and judgment for the amount of the note were rendered for plaintiff, and defendants excepted.

Fort & Watson and *Wooten & Wooten*, for plaintiffs in error. *Clarke & Hooper*, contra.

LUMPKIN, J.—Section 1553b of the Code declares that "a copy of the official analysis of any fertilizer or chemical, under seal of the department of agriculture, shall be admissible as evidence in any of the courts of this State, on the trial of any issue involving the merits of said fertilizer." As it requires express legislation to render any copy of an analysis of a fertilizer admissible as original evidence, necessarily the terms of the law must be fully and exactly complied with, in order to obtain the benefit of its provisions. Therefore, the analysis must be an official one, or a copy of it taken from the records of the department of agriculture cannot be introduced. As we understand our system for the inspection and analysis of commercial fertilizers, samples are taken by the inspectors, and submitted for analysis to the State chemist, who makes reports to the commissioner of agriculture, which reports are recorded in the office of the latter. Analyses thus made are official. We know of no law making official an analysis by the State chemist at the instance or request of a purchaser of fertilizers. Indeed, as we understand it, the State chemist is under no obligation to make an analysis for any private person at all. If he does so, it is simply a matter of courtesy; and although he may report an analysis thus made to the department of agriculture and it may be entered upon the records of that department, this will not give to that analysis an official character by virtue of which a copy of it will be rendered admissible as evidence in the courts.

Strictly speaking, the commissioner of agriculture should not have recorded in his department any analysis made by the State chemist, except such as the law requires the latter to make and report to that department. It follows that any analysis which is of record in the agricultural department is prima facie official, because, presumably, any analysis of fertilizers made by the State chemist and reported by him to the commissioner of agriculture is of a sample, or samples, furnished the chemist officially by an inspector of fertilizers. Therefore, unless it appears that an analysis of fertilizers made by the State chemist was of a sample received from some other source, a copy of an analysis made by him and certified under the seal of the department of agriculture is admissible in evidence under the section of the code above cited. . . .

Judgment reversed.

Sub-topic C. Certificates

427. Omichund *v.* Barker. (1744. Willes 538, 549). Willes, L. C. J. [Disapproving the latter part of the ruling in Alsop *v.* Bowtrell, Cro. Jac. 541, where a foreign clergyman's certificate was admitted to show not only his performance of the marriage ceremony, but also the parties' subsequent cohabitation]. For our law never allows a certificate of a mere matter of fact, not coupled with any matter of law, to be admitted as evidence. Even the certificate of the King under his sign manual of a matter of fact (except in one old case in Chancery) has been always refused. . . . Besides, it is not the best evidence that the nature of the thing will admit; but the proper and usual evidence of a fact arising beyond sea is an affidavit or deposition. . . .

428. TOWNSLEY *v.* SUMRALL

United States Supreme Court. 1829

2 *Pet.* 170

The original action was brought by the defendant in error against the plaintiff in error, as one of the firm of Thomas F. Townsley & Co., to recover the amount of a bill of exchange, drawn, at Maysville in Kentucky, on the 27th of November, 1827, by one Richard S. Waters, on Messrs. Townsley & Co., at New Orleans, at 120 days after date for $2000, payable to Sumrall or order, which had been dishonored by the drawees. . . .

The bill was drawn and remitted to New Orleans, and not being paid, was returned under protest to Kentucky, and this suit was brought. . . . The bill of exceptions stated, that the plaintiff offered in evidence the bill of exchange and the protest of the notary public at New Orleans, to which evidence the defendant objected, but the Court admitted the testimony.

Mr. *Coxe*, for the plaintiff in error, contended: . . .

Upon the question, whether, if a bill be drawn in Kentucky, on a person in New Orleans, the protest is, in itself, evidence of demand and refusal: in Nichols *v.* Webb, 8 Wheaton, 326, it was held, that the protest of a foreign bill is sufficient; but a distinction is taken between foreign bills, and those instruments in which a protest is not necessary, and therefore not the official act of the officers. In cases of inland bills the protest cannot be read. Chesmer *v.* Noyes, 4 Camp. 129. 2 Barn. & Ald. 696. . . .

Mr. *Nicholas*, for the defendant in error. . . .

The law of Kentucky requires that a bill drawn on a person out of the State shall be protested. 2 Littell's Laws, 103, 105. It not only authorizes a protest, but upon its being made, creates an additional liability for damages. Thus, therefore, the protest is by a statute, by provision, made necessary, and it becomes of course prima facie evidence of demand and refusal to pay. . . .

Mr. Justice STORY delivered the opinion of the Court.

This is a writ of error to the Circuit Court of the district of Kentucky. . . . The first question that arises is upon the admissibility of the protest of the notary public at New Orleans, as proof of the dishonor of the bill. The protest is for non-payment for want of funds; and it does not appear that there had been any prior protest for non-acceptance. Bills of exchange payable at a given day after date, need not be presented for acceptance at all; and payment may at once be demanded at their maturity. The objection now made does not turn upon this point, but upon the point, that the present is not a foreign, but an inland bill of exchange; being drawn in Kentucky, and payable at New Orleans in Louisiana; and that a notarial protest is not in such cases evidence of a demand and refusal of payment. We do not think it necessary in this case to decide, whether a bill drawn in one State upon persons resident in another State, within the union, is to be deemed a foreign, or an inland bill of exchange. . . . It is admitted, that in respect to foreign bills of exchange the notarial certificate of protest is of itself sufficient proof of the dishonour of a bill without any auxiliary evidence. It has long been adopted into the jurisprudence of the common law, upon the ground that such protests are required by the custom of merchants; and being founded in public convenience, they ought, everywhere, to be allowed as evidence of the facts which they purport to state. The negotiability of such bills, and the facility as well as certainty of the proof of dishonor, would be materially affected by a different course; a foreign merchant might otherwise be compelled to rely on mere parol proof of presentment and dishonor, and be subjected to many chances of delay, and sometimes to absolute loss, from the want of sufficient means to obtain the necessary and satisfactory proofs. The rule, therefore, being founded in public convenience, has been ratified by courts of law as a binding usage. But where parties reside in the same kingdom or country, there is not the same necessity for giving entire verity and credit to the notarial protest. The parties may produce the witnesses upon the stand, or compel them to give their depositions. And accordingly, even in cases of foreign bills, drawn upon, and protested in another country, if the protest has been made in the country where the suit is brought; Courts of justice sitting under the common law, require that the notary himself should be produced if within the reach of process, and his certificate is not per se evidence. This was so held by Lord ELLENBOROUGH, in Chesmer *vs.* Noyes, 2 Campbell's R. 129.

It is not disputed, that by the general custom of merchants in the United States, bills of exchange drawn in one State on another State, are, if dishonoured, protested by a notary; and the production of such protest is the customary document of the dishonor. It is a practice founded in general convenience, and has been adopted for the same reasons which apply to foreign bills in the strictest sense. The distance between some of these States, and the difficulty of obtaining other evi-

dence, is far greater than between England and France, or between the continental nations of Europe, where the general rule prevails. We think upon this ground alone, the reason for admitting foreign protests would apply to cases like the present, and furnish a just analogy to govern it. . . . Wherever a protest is required to fix the title of the parties; or by the custom of merchants is used to establish a presentment or dishonour of a bill; it is competent evidence between the parties, who contract with reference to the presentment and dishonor of such bill.

Judgment affirmed.

429. STATUTES. *Illinois. Revised Statutes* (1874, c. 99, §§ 10–13). *Protests — Notices.* § 10. It shall be the duty of each and every notary public in this State, whenever any bill of exchange, promissory note or other written instrument, shall be by him protested for non-acceptance or non-payment, to give notice in writing thereof to the maker, and to each and every indorser of any bill of exchange, and to the maker or makers of, and each and every security or indorser of any promissory note or other written instrument, on the same day the said protest is made, or within forty-eight hours from the time of such protest. (R. S. 1845, p. 392, § 4.

Notice of Protest. § 11. It shall be the duty of each and every notary public personally to serve the notice upon the person or persons protested against, provided he or they reside in the town, precinct, city or village where such protest was made, or within one mile thereof; but if such person or persons reside more than one mile from such town, precinct, city or village, then the said notice may be forwarded by mail or other safe conveyance. If the city where the protest is made contains ten thousand or more inhabitants, the notice may be forwarded by mail. (R. S. 1845, p. 392, § 6.

Record. § 12. Each notary public shall keep a correct record of all such notices, and of the time and manner in which the same are served, the names of all the parties to whom the same are directed, and the description and amount of the instrument protested. (R. S. 1845, p. 392, § 5.

Evidence. § 13. Said record, or copy thereof, duly certified, under the hand and seal of the notary public or county clerk having the custody of the original record, shall be competent evidence to prove the facts therein stated, but the same may be contradicted by other competent evidence. (R. S. 1845, p. 392, § 5.

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430. KIDD'S ADMINISTRATOR *v.* ALEXANDER'S ADMINISTRATOR

COURT OF APPEALS OF VIRGINIA. 1823

1 *Rand.* 456

THE administrators of Isaac Kidd, filed their bill to enjoin a judgment obtained against them by Benjamin Alexander, on a bond executed by their intestate, as security to one John Segar. They allege that considerable payments had been made towards the discharge of the said bond; one in particular, in William Hill's bond for 106£. paid to John

Scott, to whom at that time the bond aforesaid of John Segar had been transferred, though not legally assigned. . . . They therefore pray an injunction, and other relief. The injunction was awarded.

The deposition of one John Scott, a transferee, was objected to on the ground of his interest. Before his deposition was taken, Israel and John Pleasants executed a release to Scott under their seal, relinquishing all claim on the said Scott, on account of the transfer of the bond to them. The execution of this release was certified by John Gill, notary public of the State of Maryland, in the form in which notarial acts are usually executed. . . .

The chancellor referred the accounts between the parties to a commissioner, who reported a balance of $399.48, to be due from Segar and Kidd, to Israel and John P. Pleasants. Exceptions were filed, and the chancellor decreed, that the injunction should be dissolved as to the sum of $177.15, with interest, &c. (that being the balance due, after applying to the plaintiff's credit due proportion of Hill's bond, in the proceedings mentioned,) and that the injunction be perpetuated as to the residue of the said judgment. From this decree, the plaintiffs appealed.

BROOKE, J. — The Court, not deciding whether, if proved, the release in the record would be effectual to bind the late house of Israel and John P. Pleasants, is of opinion, that the certificate of the notary public, John Gill, that John P. Pleasants, partner in the late house of Israel and John P. Pleasants, acknowledged it to be his act and deed, was inadmissible evidence to prove the execution of the said release. To effect that object, the deposition of the notary public, or some equivalent testimony ought to be before the Court. In the absence of such proof, the Court is of opinion, that John Scott, the assignee of the bond in question, was an incompetent witness, and his deposition and affidavit, also inadmissible testimony. Decree reversed.

431. STATUTES. *California* (C. C. P. 1872, § 1948). Every private writing, except last wills and testaments, may be acknowledged or proved and certified [like conveyances of realty, and the certificate is evidence of execution].

Illinois (Rev. St. 1874, c. 30, § 35). [An instrument affecting land, duly acknowledged or proved,] whether the same be recorded or not, may be read in evidence without any further proof of the execution thereof.

Iowa (Code 1897, § 4621). Every private writing, except a last will and testament, after being acknowledged or proved and certified in the manner prescribed for the proof or acknowledgment of conveyances of real property, may be read in evidence without further proof.

432. JOHN H. WIGMORE. *A Treatise on Evidence* (1905. Vol. III, § 1676). Not only did the common law not recognize any officer having power to certify to the *execution of an unrecorded deed or other instrument* of grant or contract; but its peoples seem also to have felt a repugnance to any system of authenticating deeds in that manner; so that a long time elapsed, even after the institution of the registry system, before such an innovation was attempted. The notary, that prominent figure in the legal profession on the Continent, who draws up the

"act" for the parties and proves its execution by his certificate, is wanting in our legal history. First appearing, with the introduction of written documents, in the countries of southern Europe, he seems never to have found favor among Germanic peoples, except as a character imported with the Roman and Italian law.

In this country an occasional early statute made provision for recognizing the certificates of foreign notaries or magistrates. The habits of the civil law of Europe had been adopted from the beginning into Louisiana practice, and had also become familiar to the profession in Missouri, Texas, and California, where the French and Spanish archives of the original governments were a part of the legal sources. Moreover, in Pennsylvania, the practice was already sanctioned before the 1800s by a venturesome piece of judicial legislation. But these instances seem to have remained purely local. The doctrine of the common law, refusing to recognize such certificates, prevailed in the general understanding and practice. The codification reforms in New York, between 1830 and 1840, under the leadership of Mr. David Dudley Field, made apparently the first important attempt to introduce the broad functions of the Continental notary into our jurisprudence. The draft of those laws served as a model for the early Codes of Dakota, California, and Iowa. The lack of appurtenant traditions, and of a true notarial profession, and the loose and informal methods thus likely to prevail, were unfavorable to a wide recognition of the notary's functions and a thorough trust in his services. Yet the new system was carried by these Codes into a number of other jurisdictions, and finally found a legal recognition even in the home of the great Code champion himself. Still, however, the marks of racial tradition and cautious hesitation are easily to be traced; for the method is in several States adopted to a limited extent only, and is expressly refused sanction for commercial paper and testaments. There is no reason why the system should not with us be as extensive in scope and practice as on the Continent and in the rest of the world, provided only the administrative machinery is duly furnished and safeguarded.

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433. *Chief Baron* GILBERT. *Evidence*, 11 (*ante* 1726). The next thing is the copies of all other records [than statutes] and they are twofold: under seal, and not under seal.

First, under seal; and these are called by a particular name, Exemplifications, and are of better credence than any sworn copy; for the Courts of justice that put their seals to the copy are supposed more capable to examine and more critical and exact in their examinations than any other person is or can be; and besides there is more credit to be given to their seal than to the testimony of any private person. . . .

Exemplifications are twofold: under the Broad [Great] Seal, or under the seal of the Court. . . . When a record is exemplified under the Great Seal, it must either be a record of the Court of Chancery, or be sent for by a *certiorari* into the Chancery (which is the centre of all Courts), and from thence the subjects receive a copy under the attestation of the Great Seal; for in the first distribution of the Courts, the Chancery held the Broad Seal, from whence the authority issued to all proceedings, and those proceedings cannot be copied under the Great Seal unless they come into the Court where that seal is lodged. . . .

The second sort of copies under seal are the exemplifications under the seal of the Court, and these are of higher credit than a sworn copy. . . . Seals of

public credit are the seals of the King and of the public Courts of justice, time out of mind. . . . But the seals of private Courts or of private persons are not full evidence by themselves without an oath concurring to their credibility. . . .

The *second* sort of copies are those that are not under seal, and these are of two sorts, sworn copies, and office-copies. . . . A copy given out by the officer of the Court that is not trusted to the purpose . . . is not evidence without proving it actually examined.

434. Justice Buller. *Trials at Nisi Prius*, 229 (*ante* 1767). Here a difference is taken between a copy authenticated by a person trusted for that purpose, for there that copy is evidence without proof; and a copy given out by an officer of the court, who is not trusted for that purpose, which is not evidence without proving it actually examined. The reason of the difference is, that where the law has appointed any person for any purpose, the law must trust him as far as he acts under its authority; therefore the chirograph of a fine is evidence of such fine, because the chirographer is appointed to give out copies of the agreements between the parties that are lodged of record. . . . Therefore it is not enough to give in evidence a copy of a judgment, though it be examined by the clerk of the Treasury, because it is no part of the necessary office of clerk, for he is only intrusted to keep the records for the benefit of all men's perusal, and not to make out copies of them.

435. Appleton *v.* Braybrook. (1816. 6 M. & S. 37). Holroyd, J. The distinction is plain between that which proceeds from the officer in the course of his duty in the office, and that which he is not specially authorized by his office to do. . . . An exemplification is under the seal of the Court, which shows it to be the act of the Court, and it is equivalent when the act is done by an officer who has a duty cast on him for the express purpose.

436. CHURCH *v.* HUBBART

Supreme Court of the United States. 1804

2 *Cr.* 187, 198, 239

Action on policies of marine insurance; defence, that the vessels were seized by the Portuguese and condemned for illicit trade, within the exceptions of liability in the policy. To prove this defence, certain laws and proceedings were offered, with the following certificates of copy: "I, William Jarvis, consul of the United States of America, in this city of Lisbon, &c., do hereby certify to all whom it may or doth concern, that the law in the Portuguese language, hereunto annexed, dated from 18th March, 1605, is a true and literal copy from the original law of this realm of that date, prohibiting the entry of foreign vessels into the colonies of this kingdom, and as such, full faith and credit ought to be given it in courts of judicature or elsewhere. I further certify, that the foregoing is a just and true translation of the aforesaid law.

"In testimony whereof, I have hereunto set my hand and affixed my seal of office, at Lisbon, this 12th day of April, 1803.

(Signed) "William Jarvis."

"Para, 27th June, 1801. D. Jono de Almeida de Mello de Castro, of the Council of State of the Prince Regent our Lord and his Minister and Secretary of State of the foreign affairs and war departments, &c., do hereby certify that the present is a faithful copy taken from the original deeds relative to the brig Aurora. In witness whereof I order this attestation to be passed and goes by me signed and sealed with the seal of my arms. Lisbon the 27th January, 1803.

(Signed) "D. Jono de Almeida de Mello de Castro."

"I, William Jarvis, Consul of the United States of America in this city of Lisbon, &c. do hereby certify unto all whom it may concern that the foregoing is a true and just translation of a copy from the proceedings against the brig Aurora, Nathaniel Shaler, master, at Para in the Brazils which is hereto annexed and attested by his Excellency Don Jono de Almeida de Mello de Castro, whose attestation is dated the 27th January, 1803.

"In testimony whereof, I have hereunto set my hand and affixed my seal of office, in Lisbon, this 16th day of April, one thousand eight hundred and three. "William Jarvis."

Over objection, these documents were admitted.

Stockton, for plaintiff in error, contended that, . . . the Circuit Court erred in admitting the evidence which was objected to. It did not appear to be the sentence of a Court having competent jurisdiction. . . .

But the laws themselves are not sufficiently authenticated. They are only certified by a Secretary of State with his sign manual and private seal. They ought at least to be certified under the great seal. A private act of this country must be proved by a sworn copy compared with the roll. So of foreign laws. They must be proved *as facts*, by testimony in court. . . .

The sentence is not duly authenticated. Is a secretary of State a proper certifying officer of a judgment of a Court in the colonies? To ascertain what is a sufficient mode of authentication, the principles of the common law must be our guide. By that law there are only three modes: 1. Exemplification under the great seal. 2. A sworn copy proved by a person who has compared the copy with the original. 3. The certificate of an officer specially authorized ad hoc.

It has not even the seal of the Court. If the Court had no seal, that fact ought to have been proved. Why was it not certified under the great seal? One nation will take notice of the national seal of another. Why was not the American consul sworn? Of what validity is the certificate, or the seal of a consul? Why have they not produced a sworn copy of the proceedings? An American consul is not a certifying officer. The Court can take no more notice of his certificate, than that of a private person. There is no case to be found in a court of common law where it has ever been received as evidence. Buller, N. P. 226. . . .

Adams, for defendant. . . . The objection against the evidence divides itself into two branches: 1. Against the two Portuguese laws. 2. Against the sentence of condemnation by the governor at Para. . . .

1. It is said that foreign laws must be put on the footing of private laws, and must be authenticated, 1st, by an exemplification under the great seal; or, 2d, by a sworn copy from the rolls.

To this we answer, First, That the rules for the proof of foreign laws, ought not to be put upon the footing of private laws. . . . It is not the practice of all foreign governments to issue exemplifications under the great seal; or to keep their laws in rolls of parchment. It is not the practice, for instance, in Portugal, as is apparent from these laws themselves. . . . A copy from the rolls, therefore, where there are no rolls to copy; an exemplification under the great seal of Portugal, of records in the chancery of Spain, are impossible things; a party can never be required to produce them. . . .

But with all submission to the opinion of the Court, I contend, that under the circumstances of this case, the certificate of the consul was the best evidence, which in the nature of the thing could be produced, of these laws. To whom else could the parties have applied? Even in England, a copy of public acts of parliament, from the rolls, would not be furnished to individual applicants. In Portugal there is every reason to presume no such copy could be obtained. . . . And after all, when obtained, would the great seal of Portugal, or the signature of the chancellor of Portugal, have been so well known to this Court as the seal and signature of an officer of our own government residing there?

We are asked for an *office* copy, certified by an officer entrusted ad hoc. But why is credit given to *office* copies? Because the officer is publicly known; because his business to keep the records is equally notorious, and courts of justice will take notice of it. Surely this can give no credit to the office copy of a Portuguese clerk or secretary. Surely neither the name, nor office, nor trust, nor duty of a scribe in the chancery at Lisbon, can be so well known to this Court, as the consul, commissioned by the executive government of our own country.

We are called upon for a *sworn* copy; but by whom should the affidavit be made? By the consul, said the gentleman. And before whom? This he did not say, but it could be only before a Portuguese magistrate. And who is to authenticate the magistrate's certificate of the oath? The consul. So that in the end the authenticity of the whole transaction must depend upon the consul's certificate. . . .

2. The same reasons apply still more forcibly to the *sentence* of the Governor of Para. How is it possible to require that a suitor should produce an *exemplification*, a *sworn copy* or an *office copy*, of a document, when he is forbidden, on pain of death and confiscation, to set his foot in the country where alone those modes of authentication *could* be obtained? The practice of the Portuguese government appears upon the face of these papers. The Governor transmits to the Secretary of State at Lisbon

the original sentence of condemnation, with the proceedings upon which it was founded. And the Secretary of State, who remains in possession of these original papers, furnishes, under his hand and seal, a copy of them to the public agent of the nation to which the condemned vessel and cargo belonged. . . .

The laws, therefore, and the sentence of the Governor, are authenticated by the best evidence which, in the nature of things, was attainable by the party.

Marshall, C. J. — To prove that the Aurora and her cargo were sequestered at Para, in conformity with the laws of Portugal, two edicts and the judgment of sequestration have been produced by the defendants in the Circuit Court. These documents were objected to on the principle that they were not properly authenticated, but the objection was overruled, and the judges permitted them to go to the jury.

The edicts of the crown are certified by the American consul at Lisbon to be copies from the original law of the realm, and this certificate is granted under his official seal. . . . In this case the edicts produced are not verified by an oath. The consul has not sworn; he has only certified that they are truly copied from the original. To give to this certificate the force of testimony it will be necessary to show that this is one of those consular functions to which, to use its own language, the laws of this country attach full faith and credit. Consuls, it is said, are officers known to the law of nations, and are entrusted with high powers. This is very true, but they do not appear to be entrusted with the power of authenticating the laws of foreign nations. They are not the keepers of those laws. They can grant no official copies of them. There appears no reason for assigning to their certificates respecting a foreign law any higher or different degree of credit, than would be assigned to their certificates of any other fact. . . . The paper offered to the Court is certified to be a copy compared with the original. It is impossible to suppose that this copy might not have been authenticated by the oath of the consul as well as by his certificate. It is asked in what manner this oath should itself have been authenticated, and it is supposed that the consular seal must ultimately have been resorted to for this purpose. But no such necessity exists. Commissions are always granted for taking testimony abroad, and the commissioners have authority to administer oaths and to certify the depositions by them taken. The edicts of Portugal, then, not having been proved, ought not to have been laid before the jury.

2. The paper offered as a true copy from the original proceedings against the Aurora, is certified under the seal of his arms by D. Jono de Almeida de Mello de Castro, who states himself to be the Secretary of State for foreign affairs, and the consul certifies the English copy which accompanies it to be a true translation of the Portuguese original. Foreign judgments are authenticated [either], 1, by an exemplification under the Great Seal, [or] 2, by a copy proved to be a true copy, [or] 3,

by the certificate of an officer authorized by law, which certificate must itself be properly authenticated. These are the usual, and appear to be the most proper, if not the only, modes of verifying foreign judgments. . . . If it be true that the decrees of the colonies are transmitted to the seat of government and registered in the department of State, a certificate of that fact under the Great Seal, with a copy of the decree authenticated in the same manner, would be sufficient evidence of the verity of what was so certified, but the certificate offered to the Court is under the private seal of the person giving it, which cannot be known to this Court, and of consequence can authenticate nothing. The paper, therefore, purporting to be a sequestration of the Aurora and her cargo in Para ought not to have been laid before the jury. . . .

The judgment must be reversed with costs and the cause remanded to be again tried in the Circuit Court, with instructions not to permit the copies of the edicts of Portugal and the sentence in the proceedings mentioned, to go to the jury, unless they be authenticated according to law.

437. UNITED STATES *v.* PERCHEMAN

SUPREME COURT OF THE UNITED STATES. 1833

7 *Pet.* 51, 85

APPEAL from the Superior Court for the eastern district of Florida.

On the 17th of September, 1830, Juan Percheman filed in the clerk's office of the Superior Court for the eastern district of Florida, a petition, setting forth his claim to a tract of land containing two thousand acres, within the district of East Florida, situated at a place called the Ocklikwaha, along the margin of the river St. John. The petitioner stated that he derived his title to the said tract of land under a grant made to him on the 12th day of December, 1815, by Governor Estrada, then Spanish governor of East Florida, and whilst East Florida belonged to Spain. The documents exhibiting the alleged title annexed to the petition were the following: . . .

"St. Augustine, of Florida, 12th December, 1815. Whereas this officer, the party interested, by the two certificates inclosed, and which will be returned to him for the purposes which may be convenient to him, has proved the services which he rendered in the defense of this province, and in consideration also of what is provided in the royal order of the 29th March last past, which he cites, I do grant him the two thousand acres of land which he solicits, in absolute property, in the indicated place; to which effect let a certified copy of this petition and decree be issued to him from the secretary's office, in order that it may be to him in all events an equivalent of a title in form. ESTRADA."

. . . . . .

"I, Don Thomas de Aguilar, under-lieutenant of the army, and secretary for his majesty of the government of this place, and of the

province thereof, do certify that the preceding copy is faithfully drawn from the original, which exists in the secretary's office, under my charge: and in obedience to what is ordered, I give the present in St. Augustine, of Florida, on the 12th of December, 1815. TOMAS DE AGUILAR."

. . . . . .

On the hearing of the case before the Supreme Court for the district of East Florida, the claimant, by his counsel, offered in evidence a copy from the office of the keeper of public archives of the original grant on which this claim is founded; to the receiving of which in evidence the said attorney for the United States objected, alleging that the original grant itself should be produced, and its execution proved, before it could be admitted in evidence, and that the original only could be received in evidence; which objection, after argument from the counsel, was overruled by the Court, and the copy from the office of the keeper of the public archives, certified according to law, was ordered to be received in evidence. . . . The Court proceeded to a decree in the case, and adjudged that the claim of the petitioner as presented was within its jurisdiction — "that the grant is valid, that it ought to be, and by virtue of the statute of the 26th of May, 1830, and of the late treaty between the United States and Spain, it is confirmed."

The United States appealed to this Court.

The case was argued by Mr. *Taney*, Attorney-General, for the United States; and by Mr. *White*, for the appellee.

For the *United States* it was contended: 1. That the copy of the grant and other proceedings produced by the petitioner, were not admissible in evidence, but the original papers ought to have been produced. . . .

Mr. *White*, for the appellee. . . . How is it attempted by the government agents to defeat so just and equitable a claim? The first ground taken is, that "the copy of the grant is not admissible evidence; but the *original* ought to have been produced and proved." This involves the question, what is *a copy*, and what an original, under the Spanish government; as defined by the Spanish laws. This is a paper certified by the escribano of government to be a full copy of the petition and decree of the governor of East Florida. It is, in fact, the original grant. The petition and decree of the governor are preserved in the office of the escribano, are placed there in paper books as composing the diligencias of his office. These papers never go out, any more than the notes of the surveyors, upon which a grant issues in the United States. In this country the original patent, signed by the governor or president, is delivered to the patentee, and the copy is retained in the office. Now, if we are asked why this is so, the answer is, "ita lex scripta est." It is the law and the custom of Spain and her provinces; and it would be as reasonable to ask, why has she not adopted the common law of England? The decree of the governor has been certified under his seal of office, and the seal and signature proved. . . .

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

This is an appeal from a decree pronounced by the judge of the Superior Court for the district of East Florida, confirming the title of the appellee to two thousand acres of land lying in that territory, which he claimed by virtue of a grant from the Spanish governor, made in December, 1815. . . .

It appears, from the words of the grant, that the original was not in possession of the grantee. The decree which constitutes the title, appears to be addressed to the officer of the government whose duty it was to keep the originals and to issue a copy. Its language, after granting in absolute property, is, "for the attainment of which let a certified copy of this petition and decree be issued to him from the secretary's office, in order that it may be to him in all events equivalent to a title in form." This copy is, in contemplation of law, an original. . . . The act of the 26th of May, 1824, "enabling the claimants of lands within the limits of the State of Missouri and territory of Arkansas to institute proceedings to try the validity of their claims," in its fourth section, makes it the duty of "the keeper of any public records who may have possession of the records and evidence of the different tribunals which have been constituted by law for the adjustment of land titles in Missouri, as held by France, upon the application of any person or persons whose claims to land have been rejected by such tribunals or either of them, or on the application of any person interested, or by the Attorney of the United States for the district of Missouri, to furnish copies of such evidence, certified under his official signature, with the seal of office thereto annexed, if there be a seal of office." . . . Whether these acts be or be not construed to authorize the admission of the copies offered in this cause, we think, that, on general principles of law, a copy given by a public officer whose duty it is to keep the original, ought to be received in evidence.

We are all satisfied that the opinion was perfectly correct, and that the copies ought to have been admitted.

438. FERGUSON *v.* CLIFFORD. (1858. New Hampshire, 37 N. H. 86, 95). FOWLER, J. Books, or records of this character, being themselves evidence, and being usually restricted to a particular custody, their contents may be proved by an immediate copy. . . . Whether a copy, certified by the officer making the record, or having the legal custody of the book or document — he not being specially appointed by law to furnish copies — is admissible, has been doubted in many cases; but the weight of authority seems to have established the rule, that a copy, given by a public officer whose duty is to keep the original record, ought to be received in evidence. . . . United States *v.* Percheman, 7 Peters 85.

439. STATUTES. *England* (1851. St. 14 & 15 Vict. c. 99, Lord Brougham's Act, § 14). Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any Court

of justice . . . , provided it be proved to be an examined copy or extract, or provided it purport to be signed or certified as a true copy or extract by the officer to whose custody the original is intrusted.

California (C. C. P. 1872, § 1893). [A certified copy by] every public officer having custody of a public writing which a citizen has a right to inspect, [is admissible] with like effect as the original writing.

Ib., § 1901: [A certified copy of a] written law or other public writing of any State or county [by] the officer having charge of the original, under the public seal of the State or country, is receivable.

Ib., § 1918. Other official documents may be proved as follows: 1, Acts of the Executive of the State, by the records of the State department of the State; and of the United States, by the records of the State department of the United States, certified by the heads of those departments respectively. . . . 2, The proceedings of the Legislature of this State, or of Congress, by the journals of those bodies respectively, or either house thereof, or by published statutes or resolutions, or by copies certified by the clerk. . . . 3, The acts of the Executive, or the proceedings of the Legislature of a sister State, in the same manner; 4, The acts of the Executive, or the proceedings of the Legislature of a foreign country, . . . by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public act of the Executive of the United States; 5, Acts of a municipal corporation of this State, or of a board or department thereof, by a copy, certified by the legal keeper thereof. . . . 6, Documents of any other class in this State, by the original, or by a copy, certified by the legal keeper thereof; 7, Documents of any other class in a sister State, by the original, or by a copy certified by the legal keeper thereof, together with a certificate of the Secretary of State, judge of the supreme, superior, or county court, or mayor of a city of such State, that the copy is duly certified by the officer having the legal custody of the original; 8, Documents of any other class in a foreign country, by the original, or by a copy certified by the legal keeper thereof, with a certificate, under seal of the country or sovereign, that the document is a valid and subsisting document of such country, and that the copy is duly certified by the officer having the legal custody; 9, Documents in the departments of the United States government, by the certificates of the legal custodian thereof.

Ib., §1905. A judicial record of this State or of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or other person having the legal custody thereof. That of a sister State may be approved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate that the attestation is in due form.

Ib., §1906. A judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk and a seal, or of the legal keeper of the record, with the seal of his office annexed, if there be a seal, together with a certificate of the chief judge or presiding magistrate that the person making the attestation is the clerk of the court or the legal keeper of the record, and in either case, that the signature of such person is genuine, and that the attestation is in due form. The signature of the chief judge or presiding magistrate must be authenticated by the certificate of the minister or ambassador, or a consul, vice-consul, or consular agent of the United States in such foreign country.

Illinois (Rev. St. 1874, c. 51, § 13). The papers, entries, and records of courts may be proved by a copy thereof certified under the hand of the clerk of

the court having the custody thereof, and the seal of the court, or by the judge of the court if there be no clerk.

Iowa (Code 1897, § 4635). Duly certified copies of all records and entries or papers belonging to any public office or by authority of law required to be filed therein [are admissible].

United States (Constitution 1789, Art. IV, § 1). Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Ib. (Rev. St. 1878, § 905, St. 1790, May 26). The acts of the Legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. . . .

The records and judicial proceedings of the Courts of any State or Territory, or of any such country [subject to the jurisdiction of the U. S.], shall be proved or admitted in any other Court within the United States, by the attestation of the clerk, and the seal of the Court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form.

Ib., § 906 (St. 1804, March 27). All records and exemplifications of books which may be kept in any public office of any State or Territory or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, secretary of state, the chancellor or keeper of the great seal, of the State or Territory or country, that the said attestation is in due form and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made.

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440. *Chief Baron* GILBERT. *Evidence*, 11 (*ante* 1726). My Lord Chief Justice Parker allowed the printed statute to be evidence, in the case of the College of Physicians and Dr. West, of the truth of a private act of Parliament touching the institution of the College of Physicians; because the printed statute-book is printed by the Queen's authority, and therefore, though it be not so good evidence as an exemplification under seal, yet it must be supposed as good an evidence of the truth of a copy as a copy compared with the rolls and sworn to by the testimony of any witness, which is allowed daily as a good proof of the copy of a record; for a copy printed by the public authority derives more credit from that authority than it would from the testimony of any living witness that had compared it.

441. STATUTES. *California* (C. C. P. 1872, § 1900). Books printed under the authority of a sister State or foreign country, and purporting to contain the statutes, code, or other written law of such State or country, or proved to be

commonly admitted in the tribunals of such State or country as evidence of the written law thereof, [are receivable.]

Ib., § 1963. [There is a presumption] that a printed and published book purporting to be printed or published by public authority was so printed or published.

Nebraska (Comp. St. 1899, § 5970). Printed copies in volumes of statutes, code, or other written law, enacted by any other Territory, or State, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law [in the courts thereof, are admissible].

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442. WILLOCK *v.* WILSON

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1901

178 *Mass.* 68; 59 *N. E.* 757

[Printed *post*, as No. 562]

Topic 8. Statements of a Physical or Mental Condition

445. AVESON *v.* KINNAIRD. (1805. 6 East 195). [Evidence was offered of declarations on a sickbed by the plaintiff's wife that she was not well on the previous Tuesday, when she went to be insured.] ELLENBOROUGH, L. C. J. A witness has been received to relate that which has always been received from patients to explain — her own account of the cause of her being in bed at an unseasonable hour with the appearance of being ill. . . . What were the complaints, what the symptoms, what the conduct of the parties themselves at the time, are always received upon such inquiries, and must be resorted to from the very nature of the thing. . . . The declaration was upon the subject of her own health at the time which is a fact of which her own declaration is evidence; and that too made unawares before she could contrive any answer for her own advantage and that of her husband, and therefore falling within the principle of the case in Skinner which I have alluded to.

446. BACON *v.* CHARLTON

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1851

7 *Cush.* 581

ACTION on the case to recover damages for an injury sustained by the plaintiff, in being thrown from his carriage, while traveling through the town of Charlton, in consequence of an obstruction in the highway. . . . The presiding judge ruled that groans or exclamations of pain, made by the plaintiff, at any time, were admissible in evidence, although they referred either by word or gesture to the locality of the pain; as if a man should put his hand upon his side and groan, or should say, "Oh, my head!" or utter similar complaints, being an expression of present

pain or agony; but that any statement of his condition or feelings, made in answer to a question, or as a narrative, or with a view to communicate information, was not admissible. And a witness was accordingly allowed, against the defendant's objection, to testify that the plaintiff made exclamations of pain all the way home from the place of the accident; that he made complaints of pain for three or four days after the accident, and stated the locality of the pains; and that he sometimes put his hand upon his hip and sometimes upon his left side.

The jury returned a verdict for the plaintiff in the sum of $561, and the defendant's alleged exceptions.

E. Washburn, for the defendants. The plaintiff's own declarations as to the extent and degree of the injury, made subsequent to the time of the injury, and especially those made after the lapse of one or two days, were not admissible in evidence.

B. F. Thomas and *G. F. Hoar*, for the plaintiff.

Bigelow, J. — The next objection raised by the exceptions relates to the admission in evidence of expressions and complaints of pain by the plaintiff, after the accident. The rule of law is now well settled, and it forms an exception to the general rules of evidence, that, Where the bodily or mental feeling of a party are to be proved, the usual and natural expressions of such feelings, made at the time, are considered competent and original evidence in his favor. And the rule is founded upon the consideration that such expressions are the natural and necessary language of emotion, of the existence of which, from the very nature of the case, there can be no other evidence. . . .

Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Anything in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations, and expressions as usually and naturally accompany and furnish evidence of a present existing pain or malady. . . .

These remarks as to the limitation of the rule are not intended to apply to the statements made by a patient to a medical man, to which a different rule may be applicable.

The ruling of the Court below on this point was strictly in conformity with the rules of law, and was properly guarded and limited.

Exceptions overruled.

447. ROOSA *v.* LOAN CO.

Supreme Judicial Court of Massachusetts. 1882

132 *Mass.* 439

Tort for assault and battery. At the trial in the Superior Court, before Brigham, C. J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

N. B. Bryant, for the defendant.

G. W. Morse, for the plaintiff.

Endicott, J. — When the bodily or mental feelings of a party are to be proved, his exclamations or expressions indicating present pain or malady are competent evidence; and in Bacon *v.* Charlton, 7 Cush. 581, 586, where this rule is stated, it was said by the Court: "Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Anything in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations, and expressions as usually and naturally accompany, and furnish evidence of, a present existing pain or malady." The opinion closes with this precaution: "These remarks as to the limitation of the rule are not intended to apply to the statements made by a patient to a medical man, to which a different rule may be applicable." In Chapin *v.* Marlborough, 9 Gray 244, it was held, on the authority of Bacon *v.* Charlton, that a physician could not testify to a statement, made by the plaintiff, that his leg had been struck by a horse.

The facts in that case, as in Chapin *v.* Marlborough, are similar to those recited in this bill of exceptions. The plaintiff here testified that she was struck in the stomach by the defendant's servant. The physician, in answer to the question, "What did the plaintiff tell you about her condition?" replied, "She stated that she had received a blow in the stomach." It would clearly have been competent for a physician, after having testified to the condition of the plaintiff, and to the complaints and symptoms of pain and suffering stated by her, to have given his opinion that they were such as might have been expected to follow the infliction of a severe blow. Such evidence was admitted without objection. But it was not competent for the physician to testify to her statement that she had received a blow in the stomach.

While a witness, not an expert, can testify only to such exclamations and complaints as indicate present existing pain and suffering, a physician may testify to a statement or narrative given by his patient in relation to his condition, symptoms, sensations, and feelings, both past and present. In both cases these declarations are admitted from necessity, because in this way only can the bodily condition of the party, who is the subject of the injury, and who seeks to obtain damages, be ascertained. But the necessity does not extend to declarations by the party as to the cause of the injury, which is the principal subject-matter of inquiry, and which may be proved by other evidence.

Exceptions sustained.

448. ROCHE *v.* RAILROAD CO.

Court of Appeals of New York. 1887

105 *N. Y.* 294; 11 *N. E.* 630

Appeal from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made Septem-

ber 9, 1884, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for personal injuries received by plaintiff while a passenger on one of defendant's cars, and alleged to have been caused by defendant's negligence.

The facts, so far as material to the questions discussed, are stated in the opinion.

Samuel D. Morris, for appellant. The Court erred in allowing the witness McElroy, who was not an expert, to testify as to the condition of plaintiff's arm and as to what she said about it.

George W. Roderick, for respondent. . . .

PECKHAM, J. — The only question in this case arises upon the admission of the testimony of a third party that the plaintiff, some days after the happening of the accident which caused her injury, complained that she was suffering pain in her injured arm. The witness did not testify that on these occasions the plaintiff screamed or groaned, or gave other manifestations of a seemingly involuntary nature and indicative of bodily suffering, but he proved simple statements or declarations made by plaintiff, that she was at the time of making them suffering with pain in her arm. The plaintiff was herself sworn and proved the injury and the pain. The condition of the arm the night of the accident was also proved; that it was very much swollen and black all around it, and subsequently red and inflamed, and continued swollen and inflamed more or less for a long time. The defendant challenges the evidence of complaints of pain thus made, on the ground that it was incompetent, and the argument made was that the evidence as to the injury and its extent could not be thus corroborated by mere hearsay.

Prior to the time when parties were allowed to be witnesses, the rule in this class of cases permitted evidence of this nature. Caldwell *v.* Murphy, 11 N. Y. 416; Werely *v.* Persons, 28 N. Y. 344. These cases show that the evidence was not confined to the time of the injury, or to mere exclamations of pain. The admissibility of the evidence was put, in the opinion of Judge DENIO, in 11 N. Y., supra, upon the necessity of the case, as being the only means by which the condition of the sufferer as to enduring pain could, in many instances, be proved. . . . After the adoption of the amendment to the Code, permitting parties to be witnesses, the question under discussion was somewhat mooted in Reed *v.* Railroad, 45 N. Y. 574, by ALLEN, J., in the course of his opinion, although the precise point was not before the court. . . . The case of Hagenlocher *v.* Brooklyn R. R., 99 N. Y. 136, decides that, even since the Code, evidence of exclamations indicative of pain made by the party injured is admissible. The case does not confine proof of these exclamations to the time of the injury. The question was asked of the plaintiff's mother: "How long after injury was your daughter confined in the bed?" Answer: "She was for about four weeks." Question: "What expressions did she make, or what manifestations, showing that

she suffered pain?" This shows there was no confinement of the evidence to the time of the injury. The evidence given, however, was of screams when the plaintiff's foot was touched, and of her exclamations of pain when even the sheet was permitted to touch the foot. The evidence was permitted on the ground that it was of a nature which substantially corroborated the plaintiff as to her condition.

Having thus admitted evidence of this kind since the adoption of the Code amendment permitting parties to be witnesses, the question is whether there is such a clear distinction between it and evidence of simple declarations of a party that he was then suffering pain, but giving no other indications thereof, as to call for the adoption of a different rule. It seems to us that there is. Evidence of exclamations, groans, and screams is now permitted, more upon the ground that it is a better and clearer and more vigorous description of the then existing physical condition of the party by an eye-witness than could be given in any other way. It characterizes and explains such condition. Thus, in the very last case cited, it was shown that the foot was very much swollen, and so sore that the sheet could not touch it. How was the condition of soreness to be shown better than by the statement that, when so light an article as a sheet touched the foot, the patient screamed with pain? It was an involuntary and natural exhibition and proof of the existence of intense soreness and pain therefrom. True, it might be simulated, but this possibility is not strong enough to outweigh the propriety of permitting such evidence as fair, natural, and original corroborative evidence of the plaintiff as to his then physical condition. Its weight and propriety are not, therefore, now sustained upon the old idea of the necessity of the case.

But evidence of simple declarations of a party, made some time after the injury, and not to a physician for the purpose of being attended to professionally, and simply making the statement that he or she is then suffering pain, is evidence of a totally different nature, is easily stated, liable to gross exaggeration, and of a most dangerous tendency, while the former necessity for its admission has wholly ceased. As is said by Judge ALLEN, in Reed *v.* Railroad, supra, the necessity for giving such declarations in evidence, where the party is living and can be sworn, no longer existing, and that being the reason for its admission, the reason of the rule ceasing, the rule itself, adopted with reluctance and followed cautiously, should also cease. . . . For these reasons, the evidence of Mr. McElroy, as to the plaintiff's declarations of existing pain, when they were walking in the street together, long after the accident, should not have been received.

The judgment of the General Term and Circuit should be reversed and new trial granted, costs to abide event.

All concur, except DANFORTH, J., dissenting.

Judgment reversed.

449. WILLIAMS *v.* GREAT NORTHERN R. CO. (1897. 68 Minn. 55, 70 N. W. 860). MITCHELL, J. — It is necessary to note the distinction, often overlooked, between mere descriptive statements of pain, or other subjective symptoms of a malady which furnish no intrinsic evidence of their existence, and those exclamations or complaints which are the spontaneous manifestations of distress, and which naturally and instinctively accompany and furnish evidence of existing suffering. . . .

It may not always be easy to draw the line between such complaints or expressions and mere descriptive statements, but the authorities all recognize and make the distinction, which is one that accords with the experience and observation of every one. Hagenlocher *v.* Coney Island, 99 N. Y. 137; Roche *v.* Brooklyn, 105 N. Y. 294, [*ante*, No. 448]. . . .

According to the great weight of modern authorities, the mere descriptive statements of a sick or injured person as to the symptoms and effects of his malady are only admissible under the following circumstances: First,—They must have been made to a medical attendant for the purposes of medical treatment. Second, — They must relate to existing pain or other symptoms from which the patient is suffering at the time, and must not relate to past transactions or symptoms, however closely related to the present sickness. This was probably always the rule, but the Courts are now disposed to apply it more strictly than formerly. Third, — Such statements are only admissible when the medical attendant is called upon to give an expert opinion based in part upon them. . . .

CANTY, J. — I concur in the result arrived at in this case, but not in the distinctions made in the foregoing opinion between statements that are admissible when made to a layman. Where the statements of the person are representations or complaints as to his then existing pain or suffering, the law should hold such statements to be a part of the res gestae, and competent evidence, whether made to a physician or a layman. To be strictly logical, perhaps, nothing should be regarded as a part of the res gestae except those gestures, exclamations, and expressions of suffering which are forced from the person when the pain or affliction itself speaks. But so narrow and strict a rule is not practicable. The expression of suffering may be one-half groans and exclamations and one-half words, or nine-tenths of the former and one-tenth or the latter, or vice versa. How can the law say how much of the utterance shall consist of words, and how much of groans, sighs, and exclamations; or that it may not all consist of words? Again, how can the law say with what degree of anguish the words shall be uttered? One person complains cheerfully, and even laughs and jokes, when he is suffering intense agony, while another complains most dolefully about the slightest affliction. For these reasons I cannot agree with the majority, or with the New York cases, which attempt to make a distinction between words describing present existing suffering and other exclamations indicating such suffering, but such words as well as such exclamations should be held to be a part of the res gestae.

But, as to statements made by the patient to his physician, the great weight of authority goes much further than this, and holds that evidence of such statements, describing *past* suffering or *past* symptoms, is admissible as original evidence to prove that such suffering or such symptoms existed as stated. In my opinion, such a statement, even though made to a physician, is neither independent, original evidence, nor corroborative evidence. It is admissible merely for the purpose of showing that at the time the physician was correctly informed, made his investigations in the light of all the known facts, and was therefore

likely to have reached a correct conclusion as to the nature, extent, and cause of the malady. . . .

I concede that the weight of authority is against my position here, as well as against the position taken in the majority opinion. But if that authority is clearly and unquestionably wrong, the Courts ought not to follow it. The Courts have simply been running in a rut of error, and the longer they so run, the deeper the rut will become.

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450. DOE DEM. SHALLCROSS *v.* PALMER

QUEEN'S BENCH. 1851

16 *Q. B.* 747

EJECTMENT. The plaintiff's lessor claimed as devisee of Francis Brookes, who was heir-at-law of his brother William Brookes. The defendant claimed in right of his wife Appollina, as devisee of William Brookes. The will appeared to have been drawn originally so as to give the property in fee to Francis, and to have been changed in William's handwriting so as to give it to Francis for life with remainder to Appollina. The question was whether the alterations had been made before or after the execution of the will.

The defendant's counsel proposed to call witnesses to prove declarations of the testator, before the will was executed, that he intended to make provision by his will for Appollina Biddulph. This evidence was objected to; but the Lord Chief Justice received it, subject to the opinion of the Court upon its admissibility.

Dr. Knight, a physician at Stafford, was then called, and stated, in his examination in chief, that he knew the testator well, and attended him professionally; that he was one of his executors; that he had heard him talk of a testamentary disposition; and that he had frequently heard testator say that he should make provision for Appollina Biddulph, of whom he appeared to be very fond. . . . Ann Lockesly was recalled, and stated that, many a time before the will was executed in July, she had heard the testator say that, die when he might, he would leave Appollina two or three houses. . . .

The Lord Chief Justice permitted the jury to look at the will, and left it to them to say whether, from the evidence, they were satisfied that the alteration was made before the will was executed. The jury said they were so satisfied. The Lord Chief Justice then directed a verdict for the defendants, with leave to move to enter a verdict for the lessor of the plaintiff if the Court should be of opinion that there was no admissible evidence to show that the alteration was made before the will was executed.

Whateley, in the ensuing term, obtained a rule nisi accordingly. In Hilary Term and Vacation, 1851, *Keating* and *Whitmore* showed cause, and *Whateley* and *Phipson* supported the rule. . . .

The counsel for the defendants contended that . . . the fact that the testator, at the time the will was executed, intended to execute a will providing for Appollina Biddulph, raised a presumption that the alterations which provided for her were made at that time; and that the testator's intention at that time was properly proved by declarations either previous to or shortly after the execution of the will. . . .

For the plaintiff it was argued that declarations by a testator, though admissible for many purposes, were not admissible to show the time of alteration.

CAMPBELL, L. C. J. — The evidence relied upon consisted of declarations by the testator, frequently made, before and nearly down to the time when the will was executed, that he intended to make provision by his will for Appollina Biddulph (the now defendant, Mrs. Palmer), coupled with the fact that without this alteration the will, which disposes of the whole of his property, real and personal, makes no provision for her. . . . I allow we cannot be guided alone by the consideration that both parties claim under the testator; for declarations of the testator *after* the time when a controverted will is supposed to have been executed would not be admissible to prove that it had been duly signed and attested as the law requires; and, for the same reason, a declaration by the testator after the will was executed, that the alteration had been made previously, would be inadmissible. But the *previous* declarations of the testator as to his testamentary intentions do not seem to be liable to the same objections. They demonstrate that the alteration is not an after-thought. . . .

Although no decision can be quoted in which such evidence for rebutting this specific presumption has been admitted, no case has occurred in which it has been rejected; and in cases closely analogous similar evidence has often been received. . . .

We therefore think that the jury were fully justified in coming to the conclusion that the alteration was made before the will was executed. . . . It being quite certain that the testator intended that Appollina Biddulph should take the premises after the death of Francis, and the intention appearing to us to be testified according to the rules of law, we think that she ought to be allowed to remain in the possession of them; and that this rule to enter the verdict for the lessor of the plaintiff ought to be discharged. Rule discharged.

451. COMMONWEALTH *v.* TREFETHEN

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1892

157 *Mass.* 180; 31 *N. E.* 961

EXCEPTIONS from Superior Court, Middlesex County.

Indictment against James Albert Trefethen and William H. Smith for the murder of Deltena H. Davis by drowning. There was a ver-

dict of guilty as to Trefethen and not guilty as to Smith. Defendant Trefethen excepted, and asked that the case be reported to this Court for determination. Verdict against Trefethen set aside.

A. E. Pillsbury, Atty.-Gen., for the Commonwealth. *John D. Long* and *Wm. Schofield*, for defendants.

Field, C. J. — The principal exception is to the refusal of the Court to admit the testimony of Sarah L. Hubert. The exceptions recite that: "Sarah L. Hubert, a witness called in behalf of the defendant, testified that her business, which she advertised in the newspapers, was that of a trance medium; that on December 22, 1891, in the forenoon, after 10 o'clock, a young woman called at her place of business in Boston for consultation. There was sufficient evidence to go to the jury of her identification as Deltena J. Davis. Upon objection being made to the testimony of this witness, counsel for the defendants stated to the Court, aside from the jury, that they offered to prove by this witness that at the interview on December 22d, the young woman aforesaid stated to the witness that she was five months pregnant with child, and had come to consult as to what to do, and added later in the interview that she was going to drown herself. The Court refused to admit the testimony, and the defendants duly excepted. . . . On the 10th day of January, 1892, her dead body was found in the Mystic river, a short distance below the Wellington bridge, about three miles from her home. . . . There was evidence in the case tending to negative the circumstances relied upon by the Commonwealth, and to support the theory of suicide." . . . When evidence of declarations of any person is offered for the purpose of showing the state of mind or intention of that person at the time the declarations were made, the declarations undoubtedly may be so remote in point of time, or so altered in import by subsequent change in the circumstances of the maker, as to be wholly immaterial, and wisely to be rejected by the judge. . . .

In the case at bar the evidence offered was that the declaration of the deceased was made the day before her death, and was made in a conversation concerning her pregnancy, which continued until her death. The declaration, therefore, was not made at a time remote from the time of her death, and there had been no change of circumstances which made it inapplicable to the condition of the deceased at the time of her death. It was clearly competent for the jury to find from the evidence recited in the exceptions that, if Deltena J. Davis had an intention to commit suicide on December 22d, she continued to have the same intention on December 23d. . . .

The main argument of the attorney general is: *First*, that it is immaterial whether the deceased, at or before the time of her death, had or had not an intention to commit suicide; and, *secondly*, that, if she had such an intention, it could not be proved by evidence of her declarations that she was going to drown herself. . . . If it could be shown that she actually had an intention to commit suicide, it would be more probable

that she did in fact commit it than if she had had no such intention. . . . It is a question of more difficulty whether evidence of the declarations of the deceased can be admitted to show such an intention. The argument, in short, is that such evidence is hearsay. It is argued that such declarations are not made under the sanction of an oath, and that there is no opportunity to examine and cross-examine the person making them, so as to test his sincerity and truthfulness, or the accuracy and completeness with which the declarations describe his intention or state of mind; and that, even if such declarations would have some moral weight in the determination of the issue before the court, they are not within any of the exceptions, to the exclusion of hearsay, which the common law recognizes.

The counsel for the defendant concede that the declaration in this case is not, under our decisions, admissible as a part of what has been called the "res gestæ," although they contend that some courts have admitted similar declarations on that ground. They concede that to make a declaration admissible on that ground it must accompany an act which, directly or indirectly, is relevant to the issue to be tried, and must in some way qualify, explain, or characterize that act, and be, in a legal sense, a part of it. . . . They contend that the declaration is some evidence of the state of mind or intention of the deceased at the time she made it, and that the intention which it tends to prove is a material fact, which, in connection with other facts proved, tends to support the theory of suicide. They contend that the state of mind or intention in the mind of a person, when material, can be proved by evidence of his declarations as well as of his acts, particularly when that person has deceased, and cannot be called as witness, and the declarations were made before the controversy arose which is the subject of the trial. . . .

The fundamental proposition is that an intention in the mind of a person can only be shown by some external manifestation, which must be some look or appearance of the face or body, or some act or speech; and that proof of either or all of these, for the sole purpose of showing the existing state of mind or intention, may be inferred. For example, the exceptions recite that on the day when the deceased disappeared Trefethen called at the house of her mother "about 10 in the forenoon, and was there some time with Tena, and that Tena that day appeared bright and cheerful, and 'full of smiles,' but at times during the month prior thereto had been depressed in spirits." The only apparent object of this testimony was to show that on the day she disappeared she was happy, and, therefore, could not have contemplated suicide. Her bright and cheerful appearance might have been real or feigned, but this was for the jury. If the deceased at the same interview had said, "I was never so happy in my life as I am to-day," it is contended that this declaration might be as significant of her state of mind as her cheerful appearance, and that speaking, as an indication of what is in the mind of the speaker, is as

much an act as smiling or conduct generally. The only obvious distinction between speech and conduct is that speech is often not only an indication of the existing state of mind of the speaker, but a statement of a fact external to the mind, and as evidence of that it is clearly hearsay. There is, of course, danger that a jury may not always observe this distinction, but that has not availed to exclude testimony which is admissible for one purpose and not admissible for another, to which there is danger the jury may apply it. . . . If, the day before her death, she had written a note, addressed to her mother, stating her condition, and declaring her intention to drown herself, and had left it in her desk when she went from home the following day, the admissibility of such a letter in evidence, after proof that she had written it, depends upon the same considerations as the admissibility of evidence of similar oral declarations. . . . Certainly, to confine the evidence to acts, appearance, or speech which is wholly involuntary, would be impracticable and unreasonable, for almost every expression of thought or feeling can be simulated; and, although evidence of the conscious declarations of a person as indications of his state of mind has in it some of the elements of hearsay, yet it closely resembles evidence of the natural expressions of feeling, which has always been regarded in the law not as hearsay, but as original evidence, — 1 Greenleaf, Evidence § 102, (5th Ed.;) and when the person making the declarations is dead, such evidence is often not only the best, but the only, evidence of what was in his mind at the time. On principle, therefore, we think it clear that when evidence of the declarations of a person is introduced solely for the purpose of showing what the state of mind or intention of that person was at the time the declarations were made, the declarations are to be regarded as acts from which the state of mind or intention may be inferred in the same manner as from the appearance of the person, or his behavior, or his actions generally. In the present case the declaration, evidence of which was offered, contained nothing in the nature of narrative, and was significant only as showing the state of mind or intention of the deceased.

But it is argued that this is not the law, and that it is not competent for this Court to change the established rules of evidence. We have been shown no case exactly like the present, but there are decisions closely analogous, and, while they are not uniform, yet we think the weight of modern authority is in favor of admitting evidence like that offered in the present case for the purpose stated. The latest decision on the subject is Hillmon *v.* Insurance Co., 145 U. S. 285, 12 Sup. Ct. Rep. 909, and many of the cases are cited in the opinion. See, also, Puryear *v.* Com., 1 S. E. Rep. 512; Blackburn *v.* State, 23 Ohio St. 146; Boyd *v.* State, 14 Lea, 162; Goersen *v.* Com., 99 Pa. St. 388; Jumpertz *v.* People, 21 Ill. 375. . . . This Court admits exclamations and declarations as evidence of existing pain in case of injuries. In the case of wills, upon the issue of sanity or undue influence, this Court has always admitted evidence of declarations which tend to show the condition of

the mind of the testator, and his intention with regard to the disposition of his property, or his fear of the person alleged to have exercised undue influence. . . . In actions by the husband for seducing his wife and alienating her affections from him the declarations and statements of the wife, made before the alleged seduction, indicating the state of her affections towards her husband, have uniformly been admitted upon the question of damages. Palmer *v.* Crook, 7 Gray, 418. . . . Evidence of threats of the deceased against the defendant have been admitted when the question was whether the defendant or the deceased made the first assault, and whether the defendant acted in self-defense. Wiggins *v.* People, 93 U. S. 465. . . . It is not necessary, in the present case, to determine what limitations, if any, in practice must be put upon the admission of this kind of evidence, because all the limitations exist which have ever been suggested as necessary. The person making the declaration, if one was made, is dead. She had an opportunity to commit suicide, and it was competent for the jury to find that she had a motive to commit it; and the declaration, if made, was made under circumstances which exclude any suspicion of an intention to make evidence to be used at the trial. . . . We are of opinion that the presiding judges erred in refusing to receive this evidence, and that, for this reason, the verdict against Trefethen must be set aside. . . .

452. WATERMAN *v.* WHITNEY

COURT OF APPEALS OF NEW YORK. 1854

11 *N. Y.* 157

JOSHUA WHITNEY died in April, 1845, and in July, 1846, the surrogate of Broome county made an order refusing to admit his will to probate; from this order, Waterman and others appealed to the circuit judge, who reversed the order, and directed feigned issues to be made: 1. As to whether the alleged will was duly made and executed by the testator; 2. As to whether the testator, at the time of the execution, was of sound and disposing mind; 3. As to whether the alleged will was procured by undue influence, fraud or deception.

On the trial of the issues, before MASON, J., after evidence had been given tending to prove want of mental capacity in the testator, the defendants called one Emory, as a witness, and offered to prove by him, that after the execution of the will, the testator stated to him, how he had disposed of his property, which entirely differed from that made by the will in question. This was overruled, and an exception taken. The defendants further offered to prove, that the deceased "made similar declarations to others, from the time of the execution of the will, up to the time of his death." This was also excluded, and an exception taken.

The jury found for the plaintiffs, Waterman and others, upon all

the issues, thereby establishing the will; and the Supreme Court having denied a motion for a new trial, upon a bill of exceptions, the parties contesting the probate took this appeal.

Dickenson, for the appellants. *Noxon*, for the respondents.

SELDEN, J. — The principal question presented by the bill of exceptions in this case is, as to the admissibility of the declarations of the testator, made *after* the execution of the will.

The subject to which this question belongs is of very considerable interest, and one upon which the decisions are to some extent in conflict. Much of the difficulty, however, has arisen from the omission to distinguish with sufficient clearness, between the different objects for which the declarations of testators may be offered in evidence, in cases involving the validity of their wills. It will tend to elucidate the subject, to consider it under the following classification of the purposes for which the evidence may be offered, viz.: 1. To show a *revocation* of a will, admitted to have been once valid. 2. To impeach the validity of a will, for *duress*, or on account of some fraud or imposition practised upon the testator, or for some other cause not involving his mental condition. 3. To show the *mental incapacity* of the testator, or that the will was procured by *undue influence*. The rules by which the admissibility of the evidence is governed, naturally arrange themselves in accordance with this classification. . . .

1. Under these statutes, therefore, the only possible purpose for which evidence of the declarations of the testator can be given, upon a question of revocation, is to establish the "animus revocandi"; in other words, to show the intent with which the act relied upon as a revocation was done. The cases on this subject are in the main in harmony with each other. . . .

I consider these cases as establishing the doctrine that, upon a question of revocation, no declarations of the testator are admissible, except such as accompany the act by which the will is revoked; such declarations being received as part of the res gestae, and for the purpose of showing the intent of the act. . . .

2. In regard to the second class of cases, viz., where the validity of a will is disputed on the ground of fraud, duress, mistake or some similar cause, aside from the mental weakness of the testator, I think it equally clear, that no declarations of the testator himself can be received in evidence, except such as were made at the time of the execution of the will, and are strictly a part of the res gestae. . . .

3. I have referred thus particularly to these numerous cases, in which the declarations of testators have been held *inadmissible*, upon contests respecting the validity of their wills, for the purpose of showing that they all apply to one or the other of the first two of the three classes into which I have divided the cases, on the subject. None of them have any application to cases in which the will is assailed on account of the insanity or mental incapacity of the testator, at the

time the will was executed, or on the ground that the will was obtained by undue influence.

The difference is certainly very obvious, between receiving the declarations of a testator, to prove a distinct external fact, such as duress or fraud, for instance, and as evidence merely of the mental condition of the testator. In the former case, it is mere hearsay, and liable to all the objections, to which the mere declarations of third persons are subject; while in the latter, it is the most direct and appropriate species of evidence. . . . It is abundantly settled that, upon either of these questions, the declarations of the testator, made *at or before* the time of the execution of the will, are competent evidence. The only doubt, which exists on the subject is, whether declarations made *subsequent* thereto may also be received.

Clear and accurate writers have been led into confusion on this subject, by not attending to the distinctions growing out of the different purposes for which the evidence may be offered. . . . The case of Reel *v.* Reel, 1 Hawks 247, is a leading case on this subject. . . . The offer in Reel *v.* Reel was, to prove repeated declarations of the testator, made *after* the execution of the will, in which he stated its contents to be materially and utterly different from what they were. These declarations were offered in connection with conflicting testimony upon the point of testamentary capacity. . . . The decision of the Court, in holding the evidence admissible, is not in conflict, so far as I have been able to discover, with any adjudged case, either in this country or in England, and on the other hand, is in entire harmony with what seems to be the established doctrine, that the insanity or imbecility of the testator, subsequent to making the will, may be proved, in connection with other evidence, with a view to its reflex influence upon the question of his condition at the time of executing the will. Indeed, if the latter doctrine be sound, it necessarily follows that the decision is right.

The conclusion is, of course, decisive of the present case, which is identical in principle with that of Reel *v.* Reel. . . .

It does not follow from this, that evidence of this nature is necessarily to be received, however remote it may be in point of time, from the execution of the will. The object of the evidence is, to show the mental state of the testator, at the time when the will was executed. Of course, therefore, it is admissible only where it has a legitimate bearing upon that question; and of this, the Court must judge, as in every other case, where the relevancy of testimony is denied. . . .

There is no conflict between the doctrine here advanced, in regard to the admissibility of the species of evidence in question, and the rule before adverted to, which excludes it, when the issue is as to the revocation of a will. The difference between the two cases consists in the different nature of the inquiries involved; one relates to a voluntary and conscious act of the mind; the other, to its involuntary state or condition. To receive evidence of subsequent declarations, in the former case, would

be attended with all the dangers which could grow out of changes of purpose, or of external motives operating upon an intelligent mind; no such dangers would attend the evidence, upon inquiries in relation to the sanity or capacity of the testator. . . .

Judgment reversed, and new trial ordered.

GARDINER, C. J., dissented.

453. SUGDEN *v.* ST. LEONARDS

PROBATE DIVISION. 1876

L. R. 1 *P. D.* 154

THE plaintiffs, the Hon. and Rev. Frank Sugden, the Hon. Charlotte Sugden, and John Reilly, propounded, as executors, the contents of a lost will dated on or about the 13th of January, 1870, of the Right Hon. Edward Burtenshaw [Sugden,] Baron St. Leonards, late of Boyle Farm, in the county of Surrey, deceased, who died at Boyle Farm on the 29th of January, 1875, at the age of ninety-three. They also propounded eight codicils to the said will, such codicils being produced and filed in the registry.

The declarations, after alleging, 1st, the due execution of the will and codicils, went on to allege: —

2. That the said will never was revoked or destroyed by the testator, nor by any other person in his presence or by his direction, with the intention of revoking the same, and that the same was, at the time of his death, a valid and subsisting will, but that the same cannot be found.

3. That the contents of the said will were, in substance or to the effect, as follows: . . .

The defendant, the Right Hon. Edward Burtenshaw Lord St. Leonards, the grandson and heir-at-law of the deceased, and his brothers and sisters, who were minors, and appeared by their mother as their guardian, pleaded. . . .

2. That the said alleged will was duly revoked by the said deceased by destroying the same with the intention of revoking it.

3. That the contents of the said alleged will were not as set out in the declaration. . . .

On the 17th of November, 1875, the cause came on for hearing before Sir J. HANNEN (President) without a jury. . . .

The principal witness as to the preparation and the execution of the will, and the only witness who was able to give evidence as to its contents, was the Hon. Charlotte Sugden, one of the plaintiffs. She was the only unmarried daughter of the deceased, and had lived with him for many years prior to and up to the time of his death. . . . The will and all the codicils were holograph, that they were all kept in a small black box, something like a dispatch box, of which the deceased had the key; that the box was usually placed in the saloon used by the deceased as his

sitting-room at Boyle Farm; that the will was last seen by Miss Sugden on the 20th of August, 1873, when the last codicil was executed, and it was then replaced in the box; that during an illness of the deceased from September, 1873, until December, 1873, and again from March, 1874, when the deceased was attacked with his last illness, until his death, the box was in the custody of Miss Charlotte Sugden, and that after his death, although the codicils and some other testamentary papers were found in the box, the will was not there. Every possible search had been made for it, but it could not be found. There was evidence that the box was usually kept locked, and that the key was on a bunch kept by the deceased; that there was a duplicate key kept in an escritoire; and that there were five keys in the house by which the escritoire could be opened, one of these keys belonging to a wine cupboard in charge of the butler. Immediately after the will was found to be missing from the box, Miss Charlotte Sugden said that she recollected its contents, and then, at the suggestion of her solicitor, Mr. Trollope, she wrote out from memory, without reference to the codicils and other testamentary papers which were in the box, the following statement. . . .

At the close of the evidence, . . .

Nov. 25, Sir J. HANNEN (President). — I have on this occasion to discharge the functions of a jury, and to give my verdict upon certain questions of fact. . . . Believing, as I do, the testator made these statements [alluding to the existence of the will] showing a belief in his mind that the will was in existence at a time subsequently to that at which he could have revoked it, I am led to the conclusion that he had not in fact revoked it at any time when he had the opportunity of getting access to it. . . . I come to the conclusion that his declarations down to the latest period of his life show that he died under the belief that that will was still in existence, and rebut the presumption that he had revoked it. . . . I find, as a fact, that the will of 1870 was duly executed and attested; that the several codicils were also duly executed and attested; and I further find that the contents of the will were as set out in the declaration, with the exception I have mentioned. . . .

An appeal was also brought by Mr. and Mrs. Henderson. The appeals came on to be heard on the 7th of March, 1876. On the opening of the appeals,

Hawkins, Q. C., *Inderwick*, Q. C., and Dr. *Tristram*, for the plaintiffs. . . .

Sir *H. Giffard*, S. G. (Dr. *Deane*, Q. C., and *Bayford* with him), for Lord St. Leonards, and some of his brothers and sisters. . . .

Thesiger, Q. C., and *Bayford*, for brothers and sisters of Lord St. Leonards.

Davey, Q. C. (with whom was *G. Browne*, and *Keogh*), for Mr. and Mrs. Henderson.

COCKBURN, L. C. J. — This is an appeal against a decree of the President of the Probate Division, granting probate of a paper purporting

to be the substance of the will of the late Lord St. Leonards. The will was last seen on the 20th of August, 1873; the death of the testator took place on the 29th of January, 1875. The will was kept in a small box placed on the floor of a room called the saloon, on the ground floor of the testator's house. Upon his death it was looked for in that box by the solicitor employed by the executors, and it could not be found. Several questions arise from this state of facts. In the first place, was the will destroyed by the testator *animo revocandi* or not; secondly, can secondary evidence be given of its contents; thirdly, if so, have we satisfactory evidence of the contents; and lastly, if the evidence is satisfactory, so far as it goes, but not altogether complete, ought probate to be granted, so far as the evidence which we have before us shows what were the contents? . . . The last time the will was seen was by Miss Sugden, on the 20th of August, 1873. Lord St. Leonards was taken ill in September, 1873, and was confined to his room from that time to Christmas, 1873, and during the whole of that time the box was kept by Miss Sugden, as she tells us, in her own room; when he again rejoined the family down stairs, she replaced the box in the saloon, that he might not miss it, and it remained there until his last illness commenced, in March, 1874. It was then again taken possession of by Miss Sugden, and kept by her until Lord St. Leonards' death; therefore it could only have been got at by him between Christmas, 1873, and March, 1874. Long after March, when he was stricken with his last illness, and from which time he was confined to his own bed-room, he again and again referred to the various provisions he had made by the will, in other words, referred to the will itself as still subsisting, and this again adds to the vast improbability of his having destroyed the will. . . .

Declarations of deceased persons are in several instances admitted as exceptions to the general rule; where such persons have had peculiar means of knowledge and may be supposed to have been without motive to speak otherwise than according to the truth. It is obvious that a man who has made his will stands pre-eminently in that position. He must be taken to know the contents of the instrument he has executed. If he speaks of its provisions, he can have no motive for misrepresenting them, except in the rare instances in which a testator may have the intention of misleading by his statements respecting his will. Generally speaking, statements of this kind are honestly made, and this class of evidence may be put on the same footing with the declarations of members of a family in matters of pedigree. . . . I am at a loss to see why, when such evidence is held to be admissible for the two purposes just referred to, it should not be equally receivable as proving the contents of the will. If the exception to the general rule of law which excludes hearsay evidence is admitted, on account of the exceptional position of a testator, for one purpose, why should it not be for another, where there is an equal degree of knowledge, and an equal absence of motive to speak untruly?

Jessel, M. R. — [The reasons for the exceptions to the Hearsay rule]

all exist in the case of a testator declaring the contents of his will. . . . Having regard to the reasons and principles which have induced the Courts of this country to admit exceptions in the other cases to which I have referred, we should be equally justified and equally bound to admit it in this case. . . . We have a witness peculiarly likely to know what the contents of the will were. Besides that, we have a witness of unimpeached and unimpeachable integrity. We have the gratification of knowing, in deciding this case, that there has been no question raised as to the credibility of Miss Sugden, and this appears to be an answer to that assumed danger which might apply to other cases in allowing such proof as this to establish wills. . . . The case is singular in that respect, and I should think it is very likely to remain singular, as regards subsequent cases; therefore there is no danger in admitting this evidence in this particular case, and I see no reason why we should refuse to do justice now because other persons, not credible witnesses, may be induced in other cases to attempt to substantiate fictitious wills.

JAMES, L. J. . . . In this case it is conceded that every one of those declarations was admissible and was properly admitted for some purpose in the cause, and thereby those declarations of the testator have become legitimately known to me. I believe them to have been made by him, and I believe them to be true, and, having those declarations before me and so believing them, it would be a judicial lie if I were to pretend that I did not act upon them in coming to the conclusion that the evidence of the witness as to the actual contents of the will is true.

MELLISH, L. J. . . . The difficulty I feel is this, that I cannot satisfactorily to my own mind find any distinction between the statement of a testator as to the contents of his will, and any other statement of a deceased person as to any fact peculiarly within his knowledge, which, beyond all question, as the law now stands, we are not as a general rule entitled to receive. . . . A declaration *after* he has made his will, of what the contents of the will are, is not a statement of anything which is passing in his mind at the time; it is simply a statement of a fact within his knowledge, and therefore you cannot admit it unless you can bring it within some of the exceptions to the general rule that hearsay evidence is not admissible to prove a fact which is stated in the declaration. It does not come within any of the rules which have been hitherto established, and I doubt whether it is an advisable thing to establish new exceptions in a case which has never happened before, and may never happen again, for you then establish an exception which more or less throws a doubt on the law.

The Master of the Rolls has referred to the several exceptions which have been made to the rule, but none of them appear to me to be applicable to this case. I think there is a most material distinction, as was pointed out by Lord CAMPBELL in Doe *v.* Palmer, 16 Q. B. 747 [*ante*, No. 450], between declarations made before a will is executed, and declarations made subsequently. The declarations which are made *before*

the will are not, I apprehend, to be taken as [direct] evidence of the contents of the *will* which is subsequently made — they obviously do not prove *it;* and [but?] wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his *intentions*, there you may prove what he said, because that is the only means by which you can find out what his intentions were.

It appears to me that it would be better to leave it to the Legislature to make the improvement, which, in my opinion, ought to be made, in our present rules with regard to the admissibility of evidence of that description. In all other respects I entirely agree with the judgments which have been given.

Baggallay, J. A. . . . I particularly desire to express my concurrence in that portion of the judgment which has reference to the admissibility, as evidence, of the declarations made by the testator in this case. . . .

Cockburn, C. J. The appeals will be dismissed with costs.

Appeals dismissed.[1]

454. MOONEY *v.* OLSEN

Supreme Court of Kansas. 1879

22 *Kan.* 62

Error from Leavenworth district court.

Action brought by Olsen against Mooney and another to set aside the will of Lydia Foster, who died July 8, 1876. Trial by a jury, at the March term, 1877, of the district court, and verdict against the will. The defendants below filed their motion for a new trial, which was overruled, and judgment rendered in favor of the plaintiff, Olsen, upon the verdict of the jury. Defendants bring the case here.

Taylor & Gillpatrick, for plaintiffs in error. . . .

The only issues involved in this case were, was Lydia Foster of sound mind and memory at the time she executed her will? and, if so, did she execute the same by reason of undue influence? These being the issues, the court permitted the plaintiff below, time and again, over the objections of the defendants below, to introduce incompetent, irrelevant, immaterial, and hearsay testimony, which tended to and did prejudice the substantial rights of the defendants below. The declarations of a party to a deed or will, whether previous or subsequent to its execution, are nothing more than hearsay evidence, and nothing can be more dangerous than the admission of it to destroy the construction of the

[1] [Lord Blackburn, in Woodward *v.* Goulstone, L. R. 11 App. Cas. 469 (1886): I wish to guard myself, as the Lord Chancellor did, against being supposed, except so far as it is necessary for the present case, to be either affirming or disaffirming the decision which was come to in Sugden *v.* Lord St. Leonards, or the propositions of law there laid down. I wish to leave them just in the same way as before, as far as I am concerned.]

instrument, or to support or destroy its validity. Jackson *v.* Kniffen, 2 Johns. 31. . . .

H. T. Green, for defendant in error. . . . The plaintiffs in error insist that the declarations of Lydia Foster before and after the signing of the will were not competent evidence. Why? Those made before the will were competent to show that she did not like Dennis Mooney; he was no friend of hers; she feared him; and the other statement, on page 9 of plaintiffs' brief, shows every reason why she would not, if not under duress, have given him anything, she believing that he tried to kill her husband, and, while she was helpless, his intrusion into her house was enough to arouse her fears and overpower her free will.

These declarations, taken in connection with the five hours spent in forcing her to make the will, throw light on the subject, and were competent evidence. Redfield, Wills, 510, 511, note 2.

Brewer, J. — Action to set aside a will. Trial by a jury, and verdict against the will. The first matter which we shall notice is the alleged error in the admission of testimony. The will was challenged on the ground of undue influence, as well as on the ground that the decedent, at the time of its execution, was not of sound mind and memory. It appeared that the decedent was taken sick July 3d, and died on the 8th; that Dennis Mooney and Mrs. Mary McCarthy, the principal devisees and legatees under the will, were in attendance upon her during most of this time, and that the will was written the day before her death. Over objection, the court permitted testimony of the conduct of these devisees, not merely at the time of making the will, but also while present at the home of the decedent during the sickness, and immediately after her death; also of the statements of the decedent made prior to her sickness, (some a long time prior,) showing estrangement from and ill feeling towards Dennis Mooney; also of letters from him to her tending to show the same state of facts; also of an engagement of marriage, expected to be consummated on the tenth of July, to one who was present during most of the sickness, and was not mentioned in the will. . . .

The question of undue influence is one of peculiar character. It does not arise until after the death of the one who alone fully knows the influences which have produced the instrument. It does not touch the outward act, the form of the instrument, the signature, the acknowledgment; it enters the shadowy land of the mind in search of its condition and processes. Was the mind strong, or weak? clear of comprehension, or only feebly grasping the facts suggested? Was the will resolute and firm, or enfeebled by disease and bodily weakness? What prompted the making of the will? Was it the thought of the testatrix, or the suggestion of interested parties? What influences were brought to bear to secure its execution, or the disposition of any specific property? These are inquiries always difficult of solution, often made more so by the fact that the parties most competent to give information are the ones most interested to withhold it. To fully inform the jury, they should know the

condition of the testatrix's mind at the time of the execution, the circumstances attending the execution, the relations and affections of the testatrix, and such other matters as tend to show what disposition if in health and strength, and uninfluenced, she would probably have made of her property. This opens a broad field of inquiry, and gives to such a contest over a will a wider scope of investigation than exists in ordinary litigation. "Put Yourself in His Place," is the title of a recent popular novel, and is appropriate to indicate the scope of such an inquiry. . . .

It is sometimes broadly stated that the declarations of a testator, whether prior or subsequent to the execution of the will, are inadmissible for the purpose of impeaching it. In a certain sense this is doubtless true. As a mere matter of impeaching the will, they are hearsay and inadmissible. They are not like statements of an ancestor in derogation of title or elimination of estate, which, being declarations against interest, are admissible against the heir, for there is no adverse interest in a devisor against the will or the devisee. They are more like declarations of a grantor, after grant, in limitation of his grant, and are strictly hearsay. Thus, if a testator, after executing a will, should say that the will was forced from him, or that it was executed against his will, and through undue influence, such statement, of itself, would be hearsay and inadmissible. . . .

But while declarations are not admissible as mere impeachment of the validity of a will, they are admissible as evidence of the testator's state of mind. A man's words show his mental condition. It is common to prove insanity by the party's sayings as well as by his acts. One's likes and dislikes, fears and friendships, hopes and intentions, are shown by his utterances; so that it is generally true that, whenever a party's state of mind is a subject of inquiry, his declarations are admissible as evidence thereof. In other words a declaration which is sought as mere evidence of an external fact, and whose force depends upon its credit for truth, is always mere hearsay if not made upon oath; but a declaration which is sought as evidence of what the declarant thought or felt, or of his mental capacity, is of the best kind of evidence. . . . Therefore where, as in a case like this, the circumstances attending the execution raise a doubt as to the mental strength of the testatrix, evidence that the disposition of the property runs along the line of her established friendships and previously-expressed intentions tends strongly against the idea of any undue influence; while evidence that it is contrary to such friendships and intentions makes in favor of improper influences. The testimony of her declarations shows a state of mind unfriendly to one of the principal devisees, and his letters to her indicate a mutual understanding of this estrangement and ill-will. Such an estrangement is out of harmony with the recognition in the will.

We see nothing in the record to justify a reversal of the judgment, and it will be affirmed.

VALENTINE, J., concurring. HORTON, C. J., dissenting.

455. HOBSON *v.* MOORMAN

SUPREME COURT OF TENNESSEE. 1905

115 *Tenn.* 73; 90 *S. W.* 152

APPEAL from Circuit Court, Fayette County; R. E. MAIDUN, Judge.

Petition by H. C. Moorman, as executor of the will of Jane B. George, deceased, to establish the same, to which Dan Hobson and others filed objections. From a decree sustaining the will contestants appeal. Affirmed.

Bullock & Timberlake and *Chas. A. Stainback*, for appellants. *T. K. Riddick, T. J. Flippin, Wm. M. Mayo*, and *C. W. Crawford*, for appellee.

MCALISTER, J. This is an issue of devisavit vel non from the circuit court of Fayette county. The will in controversy was executed by Mrs. Jane B. George, on the 23d day of October, 1899, and is attacked upon the ground of undue influence and want of testamentary capacity. The contestants are Lizzie Hobson, John D. Boyd, and Harry Boyd, family servants of the testatrix, and legatees under a prior will executed on the 29th day of June, 1898. The proponent of the present will is H. C. Moorman, who was appointed administrator cum testamento annexo. . . . The last trial, in November term, 1904, resulted in a verdict sustaining said paper writing as the last will and testament of Mrs. Jane B. George. . . . Under the first will the testatrix made no bequest whatever to Mrs. Mattie Goosman, while under the last will she is given an undivided one-sixth interest in the estate, after deducting the legacy given to her son George. . . . It is said in the brief of counsel for the proponent, that . . . shortly after the execution of the codicils to the first will, in April and September, 1899, Mrs. George sustained a very serious fall, which confined her to her bed, and that while so prostrated she fell under the influence of Mrs. Goosman, Mrs. Riley, and others, who induced her to make the second will, which did not represent her testamentary wishes, but in reality was the testament of those exerting this undue influence. . . .

On the other hand, the theory of the proponent is thus stated in the language of his counsel, which we quote from his brief as follows:

"Up to June, 1898, Mrs. George had intended to bequeath her property to Mrs. Goosman, her son, George Goosman, and to the nieces and nephews of Mrs. George herself. Mrs. Goosman was the second cousin and adopted daughter of Mrs. George. Their relations were as intimate and friendly as they could have been, until June, 1898, when Mrs. George was led to believe that Mr. and Mrs. Goosman tried to poison her in order to get her property. Under the influence of this belief, she made a will, on June 29, 1898, disposing of her property in an entirely different way from what she had previously contemplated. There is no pretense that this belief was well founded, but Mrs. George

persisted in it for several months. Proponent's theory is that she was encouraged in this belief by Mrs. Hazelwood, Lizzie Hobson, and John Harvey McElwee, but they deny it. Early in the year 1899, however, she became convinced that she had been poisoned, and immediately began to change her will. She added one codicil in April, 1899, and one in September, 1899. These codicils changed the will so much that, to use her own expression, she 'hardly knew what was in it.' So she finally resolved to make a new will altogether, which she did on October 23, 1899. This contained practically the same disposition of her property which she intended to make prior to the poisoning episode, and is the will now under contest." . . .

The first assignment of error made by contestants is based upon the action of the trial judge in excluding evidence of the declarations of the testatrix, made prior to the execution of the will in issue, for the purpose of establishing undue influence. . . .

As illustrating the effect of the charge of the Court in excluding evidence of previous declarations on the part of the testatrix, counsel for contestants have formulated the following propositions, viz.:

"(1) The hostile feelings of testatrix for Mrs. Goosman and her intention to exclude her from any testamentary disposition, evidenced by her declarations to third parties, her letters, and the first will, were competent and material facts to be considered as directly bearing upon the issue of undue influence; that is to say, whether the change in the will in issue from the previously expressed feelings and intentions of testatrix was attributable to the volition of the testatrix or to the exercise of an undue influence. . . .

"(7) That the declarations of Mrs. George, to the effect that Mrs. Goosman was intimidating her and endeavoring to get her to make another will, were competent and material evidence to be considered as bearing directly upon the question of undue influence." . . .

An examination of the record will show that a very wide scope was given to the introduction of the declarations of the testatrix as evidence, and that they were held competent by the circuit judge in his instructions to the jury for every purpose, except to establish the fact of undue influence.

The cardinal inquiry presented upon the first assignment of error is whether as a matter of law such declarations were competent as substantive evidence of undue influence. It is conceded on the brief of counsel for contestants that subsequent declarations are not competent evidence to establish undue influence. The law on this subject is well settled in this State. Peery *v.* Peery, 94 Tenn. 328, 29 S. W. 1; Earp *v.* Edgington, 107 Tenn. 31, 64 S. W. 40. But the contention now made is that there is a difference in principle between declarations of the testatrix, made prior to the execution of the will, and those subsequently made. Hence it is earnestly insisted that, while the evidence of subsequent declarations has been uniformly rejected, proof of prior declara-

tions, tending to establish the fact of undue influence, has been received in this State. It will be useful at this point to review our decisions on this subject, at least so far as they are claimed by contestants to support the propositions now propounded. . . .

Mr. Wigmore, in his exhaustive treatise on the Law of Evidence (volume 3, § 1734), divides the declarations of a testator into seven different classifications, and states that in using any of these it is essential to keep in mind (1) what is the fact which the utterance is offered to evidence; (2) whether this fact is relevant, and in what way; (3) supposing it to be relevant, whether the utterance is admissible to evidence it. Under the fifth classification the author considers declarations that a particular will was procured by fraud or undue influence. At § 1738 the author treats this subject as follows:

"Utterances of the fifth and sixth classes, already enumerated, may be regarded in several aspects. The chief distinction is between their use as direct assertions of the fact of fraud or undue influence, for here they are met immediately by the hearsay rule, and their use as indicating directly or indirectly a condition of mind relevant to the issue, for here they are admissible either as circumstantial evidence or as statements of a mental condition under the present exception.

"The testator's assertion that a person, named or unnamed, has procured him, by fraud or by pressure, to execute a will, or to insert a provision, is plainly obnoxious to the hearsay rule, if offered as evidence that the fact asserted did occur:

"1868, Colt, J., in Shailer *v.* Bumstead, 99 Mass. 122: When used for such purpose, they are mere hearsay, which, by reason of the death of the party whose statements are so offered, can never be explained or contradicted by him. Obtained, it may be, by deception or persuasion, and always liable to the infirmities of human recollection, their admission for such purposes would go far to destroy the security which it is essential to preserve. They are thus inadmissible, so far as they form 'a declaration or narrative to show the fact of fraud or undue influence at a previous period.' . . .

"But these utterances may be nevertheless availed of as evidence of the testator's mental condition, if the latter fact is relevant. Though the issue is as to his mental condition, with regard to deception or duress at the time of execution, yet his mental state, both before and afterwards, is admissible as evidence of his state at that time (on the principles of sections 230, 242, 394, 395, ante). Thus the question is reduced to a simple one, namely, what particular mental conditions of the testator, thus evidenced, are material as being involved in the broader issue of deception or undue influence? There are here recognized by the Courts two distinct sorts of mental condition.

"(1) The existence of undue influence or deception involves incidentally a consideration of the testator's incapacity to resist pressure and his susceptibility to deceit, whether in general or by a particular person. This requires a consideration of many circumstances, including his

state of affections or dislike for particular persons benefited or not benefited by the will, of his inclinations to obey or to resist these persons, and, in general, of his mental and emotional condition, with reference to its being affected by any of the persons concerned. All utterances and conduct, therefore, affording any indication of this sort of mental condition, are admissible, in order that from these the condition at various times not too remote may be used as the basis for inferring his condition at the time in issue. This use of such data is universally conceded to be proper:

"1883, Dixon, J., in Rusling *v.* Rusling, 36 N. J. Eq. 603, 607: 'When undue influence is set up in impeachment of a will, the ground of invalidity to be established is that the conduct of others has so operated upon the testator's mind as to constrain him to execute an instrument to which of his free will he would not have assented. This involves two things: First, the conduct of those by whom the influence is said to have been exerted; second, the mental state of the testator, as produced by such conduct, which may require a disclosure of the strength of mind of the decedent and his testamentary purposes, both immediately before the conduct complained of and while subjected to its influence. In order to show the testator's mental state at any given time, his declarations at that time are competent, because the conditions of the mind are revealed to us only by its external manifestations, of which speech is one. Likewise the state of mind at one time is competent evidence of its state at other times not too remote, because mental conditions have some degree of permanency. Hence, in an inquiry respecting the testator's state of mind, before or pending the exertion of the alleged influence, his words, as well as his other behavior, may be shown for the purpose of bringing into view the mental condition which produced them, and, through that, the antecedent and subsequent conditions. To this extent his declarations have legal value. But, for the purpose of proving matters not related to his existing mental state, the assertions of the testator are mere hearsay. They cannot be regarded as evidence of previous occurrences, unless they come within one of the recognized exceptions to the rule excluding hearsay testimony.'" . . .

Now, recurring to the charge of the Court in the present case, we have already seen that his honor distinctly instructed the jury that they might look to the previous and subsequent declarations of Mrs. George, along with all the other proof in the case, for the purpose of determining what the condition of her mind was, at the time she performed the alleged testamentary act. The authorities already cited announce this rule so distinctly charged by the trial judge.

It is insisted, however, that he erred in his instruction that they could not look to these declarations as substantive evidence of undue influence, or, as he expressed it in another place, "such declarations could not be regarded as evidence of or as proving the fact of undue influence." . . . This question has been much mooted in the Courts of very many of the States, but has never been distinctly decided in this State, so far as we are apprised by any reported opinion.

In our opinion, the great weight of authority confirms the rule, an-

nounced by the circuit judge in his instructions to the jury, that such previous declarations are always admissible for the purpose of illustrating the mental capacity of the testator and his susceptibility to extraneous influence, and also to show his feelings, intentions, and relations to his kindred and friends, but such declarations are not admissible as substantive evidence of undue influence. . . .

For the reasons herein stated the judgment of the Circuit Court is affirmed.

Topic 9. Spontaneous Exclamations

457. THOMPSON *v.* TREVANION. (1693. King's Bench, Skinner, 402). Ruled upon evidence, that a mayhem may be given in evidence, in an action of trespass of assault, battery, and wounding, as an evidence of wounding, per HOLT, Chief Justice; and in this case he also allowed, that what the wife said immediate upon the hurt received, and before that she had time to devise or contrive any thing for her own advantage, might be given in evidence; quod nota; this was at Nisi Prius in Middlesex for wounding of the wife of the plaintiff.

458. UNITED STATES *v.* KING. (1888. 34 Fed. 314). LACOMBE, J., (charging the jury). There is a principle in the law of evidence which is known as "res gestae," that is, the declarations of an individual made at the moment of a particular occurrence, when the circumstances are such that we may assume that his mind is controlled by the event, may be received in evidence, because they are supposed to be expressions involuntarily forced out of him by the particular event, and thus have an element of truthfulness they might otherwise not have. . . . But you are not to give any more weight to a declaration thus made, or any weight at all, unless you are satisfied that it was made at a time when it was forced out as the utterance of a truth, forced out against his will or without his will, and at a period of time so closely connected with the transaction that there has been no opportunity for subsequent reflection or determination as to what it might or might not be wise for him to say.

459. TRAVELERS' INSURANCE CO. *v.* SHEPPARD

SUPREME COURT OF GEORGIA. 1890

85 *Ga.* 751, 768; 12 *S. E.* 18

[ACTION on a policy of life insurance. Sheppard, the insured, was said to have been drowned, while on a hunting trip. The defence maintained that Sheppard had planned to defraud the insurers by pretending death; that he had in fact got out of his boat and swam ashore, and was now in hiding. See the further facts given *ante*, in No. 149.]

Boykin and Turner were the persons engaged with Sheppard in the hunt for deer which terminated in Sheppard's disappearance. . . . Turner was examined by interrogatories, and a portion of his testimony, some of it in answer to direct and some to cross-interrogatories, was,

in substance, as follows: "Boykin and myself were to go down the river by land, and Sheppard was to run down in a boat, about three quarters of a mile, to a certain shanty, there to get out and make a stand. We were to rejoin him at that point. I went out 100 or 150 yards from the river, and Boykin was between the river and me, but how far from the river I do not know. As we were driving along down the river for deer, I heard a gun fire in the direction of the river, and afterwards some noise, but for some time I did not stop to listen. When I did stop, I heard some one calling me excitedly, and I went in that direction, and in a very short time met Boykin coming towards me in a run, and calling as he came. He was very much excited and looked very wild. When he came up he said, *Tom Sheppard had killed himself,* or *had shot himself;* which of these expressions he used I do not remember. We hurried back to the place. On the way back he said *he heard the gun fire and heard a splash in the water, and thought he glimpsed Sheppard as he fell from the boat.* He said *he was right out there,* indicating with his hand a spot about 15 or 20 yards from where Sheppard was, and there was a thick strip of canebreak between him and Sheppard. . . . The boat was found about 200 yards below where Boykin and I got out, and about 100 or 150 yards from where I was when the gun fired, at which time I had gone about 300 or 400 yards. I saw Boykin in a few minutes after I heard the gun." BLECKLEY, C. J. . . . Were the declarations made by Boykin to Turner admissible evidence as part of the res gestae?

The fact in issue was the accidental death of Sheppard. No witness saw him die or knew certainly that he was dead. . . . "Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, are admissible in evidence as part of res gestae." Code, § 3733. What the law altogether distrusts is not after-speech but after-thought. The Code introduces no new rule, but frankly recognizes in its letter the full breadth of the temporal element in the rule which it found existing, as expounded in the luminous and able opinion of Judge NISBET in Mitchum *v.* State, 11 Ga. 615, an opinion delivered in 1852. . . .

The rule contemplates that all the res gestae, including declarations forming part thereof, must transpire within the present time of the transaction. But that time, while it cannot be less, may be more extended than the present of the principal fact, in some instances a little, in others much, and in others very much more. Usually if they can all be ascertained, some of the res gestae will be found simultaneous with, and some anterior and others posterior to the principal fact. Thus, suppose an electric discharge during a summer shower to be the principal fact, the formation of the cloud, the falling of the rain, the thunder and its reverberation would all, for some purposes, be within the res gestae of the event, though the principal fact was but a flash of lightning.

This example may serve as a figure to characterize the instances in which declarations subsequent to the fact are receivable in evidence.

Let thunder represent mental impressions produced by the event. Then reverberation will represent admissible declarations reporting these impressions. It will represent them by a close analogy in two respects, first in being speedy, second in being spontaneous. That they shall be or appear to be spontaneous is indispensable, and it is for this reason alone that they are required to be speedy. There must be no fair opportunity for the will of the speaker to mould or modify them. His will must have become and remained dormant, so far as any deliberation in concocting matter for speech or selecting words is concerned. Moreover, his speech, besides being in the present time of the transaction, must be in the presence of it in respect to space. He must be on or near the scene of action or of some material part of the action. His declarations must be the utterance of human nature, of the genus homo, rather than of the individual. Only an oath can guarantee individual veracity. But spontaneous impulse may be a sufficient sanction for the speech of man as such, man as distinguished from this or that particular man. True, the verbal deliverance in each instance is that of an individual person. But if the state of his mind be such that his individuality is for the time being suppressed and silenced, so that he utters the voice of humanity rather than of himself, what he says is regarded by the law as in some degree trustworthy. Boykin's connection with Sheppard, his interest in what befel him, and his relation to Turner rendered it proper for him to make the communication which he did to Turner, and he made it upon the first opportunity, which opportunity was gained by running in quest of him, and in such a short time as reasonably to exclude any suspicion of device or afterthought. . . .

While we think it is not necessary to invoke the rule of discretion, yet under the operation of that rule it is safe to hold that there was no error in admitting the evidence.

460. Pittsburgh, Cincinnati, Chicago & S. Louis R. Co. *v.* Haislup. (1907. 39 Ind. App. 394, 79 N. E. 1035). Roby, P. J. — A standard author states: "The typical case presented is a statement or exclamation by an injured person immediately after the injury, declaring the circumstances of the injury, or by a person present at an affray, a railroad collision, or other exciting occasion, asserting the circumstances of it as observed by him." 3 Wigmore on Evidence, § 1746, p. 2248. The general rule relative to the admission of evidence of this character has been frequently stated by the Courts of this State. . . . In the application of this general rule there is the greatest difficulty. "There is a lamentable waste of time by Supreme Courts in here attempting either to create or to respect precedents. Instead of struggling weakly for the impossible, they should decisively insist that every case be treated upon its own circumstances. They should, if they are able, lift themselves sensibly to the even greater height of leaving the application of the principle absolutely to the determination of the trial court. Until such a beneficial result is reached, their lucubrations over the details of each case will continue to multiply the tedious reading of the profession." 3 Wigmore on Evidence, § 1750, p. 2257.

SUB-TITLE III. HEARSAY RULE NOT APPLICABLE (RES GESTAE)

462. Introductory. The prohibition of the Hearsay rule, then, *does not apply to all words or utterances merely as such.* If this fundamental principle is clearly realized, its application is a comparatively simple matter. The Hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely, as assertions to evidence the truth of the matter asserted.

What here remains, then, is to distinguish and mark off the various classes of utterances which legally pass the gauntlet of the Hearsay rule because it does not apply to them. The classes of utterances thus exempt may be grouped under three heads:

1. Utterances material to the case as a *part of the issue;*

2. Utterances accompanying an ambiguous or equivocal act, itself material, and serving to complete the act and give it definite legal significance; *i.e. verbal parts of an act;*

3. Utterances used *circumstantially,* as giving rise to indirect inferences, but not as assertions to prove the matter asserted.

463. *Professor* James Bradley Thayer. (XV American Law Review 5, 81; 1881). If it be true, as it seems to be, that the phrase [res gestae] first came into use in evidence near the end of the last century, one would like to know what started the use of it just then. That is matter for conjecture rather than opinion. It would seem probable that it was called into use mainly on account of its "convenient obscurity." . . . The law of hearsay at that time was quite unsettled; lawyers and judges seem to have caught at the term "res gesta,"—. . . which was a foreign term, a little vague in its application, and yet in some applications of it precise, — they seem to have caught at this expression as one that gave them relief at a pinch. They could not, in the stress of business, stop to analyze minutely; this valuable phrase did for them what the limbo of the theologians did for them, what a "catch-all" does for a busy housekeeper or an untidy one — some things belonged there, other things might for purposes of present convenience be put there. We have seen that the singular form of phrase soon began to give place to the plural; this made it considerably more convenient; whatever multiplied its ambiguity, multiplied its capacity; it was a larger "catch-all." To be sure, this was a dangerous way of finding relief, and judges, text-writers, and students have found themselves sadly embarrassed by the growing and intolerable vagueness of the expression.

464. Cherry *v.* Slade. (1823. North Carolina. 2 Hawks 400). Mr. Gaston (afterwards Judge), (arguing *pro querente* against declarations of residence): It is sometimes said that there is an exception when words are the "res gestae" or part of the "res gestae." But this seems not to be accurate. The words are then received, not as evidence of the *truth* of what was declared, but because the speaking of the words *is the fact,* or part of the fact, to be investigated. There may be a controversy whether A. B. at a certain time spoke certain words, and those who heard him are of course received to prove the fact. The words spoken concurrently with an act done are often a part of the act, and give it a precise

and peculiar character, and therefore must be testified, — not to show that the words spoken are true, but to show that they were in fact spoken. For example: Did A commit an assault on B? What he said when he laid his hands on B will show whether it was an angry or friendly act. Did the agent of defendant make a certain representation in the course of a bargain? If so, that representation was an ingredient in the bargain.

465. FABRIGAS *v.* MOSTYN

King's Bench. 1773

20 *How. St. Tr.* 137

[Action for false imprisonment of the plaintiff by the Governor of Minorca; defence, that the plaintiff excited sedition and riot. The reasonableness of the governor's apprehension of riot came into issue. The aide-de-camp to the governor testified that a native magistrate came to him to report that "Fabrigas said he would come with a mob . . . and they would see better days tomorrow."]

Mr. *Peckham* (for the defence). — You need not mention what the mustastaph told you; that is not regular.

Mr. J. Gould. — I should be glad to know how the Governor can be apprized of any danger unless it is by one or other of his officers informing him there is likely to be such and such a thing happen?

Mr. *Peckham*. — Hearsay is no evidence. . . .

Mr. J. Gould. — We do not take it for granted that it is really so; only that this gentleman, hearing of this, tells the Governor.

Mr. *Lee* (for the defence). — It is no evidence of the *fact;* if you mean it only as a *report,* we do not object.

466. TILTON *v.* BEECHER

City Court of Brooklyn, N. Y. 1875

Abbott's Rep. I, 800

[Action for criminal conversation. With reference to the plaintiff's having made inconsistent statements or admissions of the falsity of his claim, by stifling the matter when first publicly investigated, it was desired on his behalf to show the true significance of his conduct in handing to his agent, Mr. Moulton, a statement to be given by the agent to the investigating committee, appointed by the church to which the parties belonged.]

Mr. *Fullerton* (for the plaintiff, to the witness, Mr. Moulton). — What did he [the plaintiff] say in regard to it at the time he gave it to you? [Objected to.] . . . If I hand your Honor a certain paper, with a request to do a certain thing with it, for a certain purpose, is not that direction evidence?

Mr. *Beach* (for the plaintiff). — Let me put an illustration to your Honor. . . . Suppose Mr. Evarts comes to me and delivers a blow in my face, and at the instant of delivering that blow he accuses me of having injured him in some form; he gives the motives and the purpose with which he delivers that act; can that act be proved against Mr. Evarts, without permitting him to give the declaration accompanying the act?

Mr. *Evarts* (for the defendant). — That is a spoken act. That is not hearsay. It is a part of the blow; it is a spoken act. Some confusion, no doubt arises in lawyers' discussions about hearsay evidence that comes by word of mouth in connection with that act; but your Honor is familiar with the distinction that our learned friend has given. . . . Now if he [Mr. Tilton] gave instructions to take that paper and lay it before the council, or carry it to Mr. Beecher, that is a part of the act of delivering it to him. But this question is large enough to draw out, and so I suppose is intended to draw out, a larger line of hearsay evidence, to wit, conversations between Mr. Moulton and Mr. Tilton, with which Mr. Beecher cannot be affected.

Judge Neilson. — That distinction must be observed.

467. PARNELL COMMISSION'S PROCEEDINGS

Special Court. 1888

11th, 13th, 17th, 18th days, *Times' Rep.* p. 103, 179

[The Irish Land League and its leaders being charged by "The Times" with a conspiracy to encourage outrage and agrarian violence, and the general state of the country as to disquiet and apprehension being a part of the issue, it was conceded that the fact of repeated complaints being made to the police and to employers by tenants and others was provable. In this process, testimony was offered, by "The Times," from employers, as to reports made to them by herdsmen and others of injuries to cattle, etc.; the reports being offered in verbal detail. To this Sir Charles *Russell* objected, for Mr. Parnell, as hearsay.]

The *Attorney-General* (in reply). — I would respectfully submit that my learned friend has forgotten the rule that the "res gestæ" may be proved; and if in the course of the proof of the facts it is shown that servants have made inquiries with regard to them and reported the result, those reports form part of the "res gestæ" for the purpose of ascertaining under what circumstances the occurrences took place.

Sir C. *Russell*. — As regards the "res gestæ," what is the "res"? That certain cattle were injured. How can it be part of the "res gestæ" that a man who was present, and saw the injury, afterwards made a statement to a third person of what he had seen? To say that this is part of the "res gestæ" is an entire misapprehension of the rule. . . .

President HANSEN. — The *fact* that a particular report had been made by a person in discharge of his duty was admissible in evidence, not that the *contents* of that report should be taken as evidence of the facts to which it related. If the matter rested there, without there being any other evidence of the facts except that contained in the report, that could not be regarded as evidence of the facts by the Court. . . . There is a broad distinction between a thing being merely admissible in evidence and its being taken as proof of the facts alleged.

468. WEBB *v.* RICHARDSON

SUPREME COURT OF VERMONT. 1869

42 *Vt.* 462

TRESPASS, q. c. f. Plea, the general issue. Trial by jury, September term, 1868, STEELE, J., presiding. Special verdict for the defendant. Exceptions by the plaintiff. This suit was commenced January 18, 1866. The land in question is lot 64, 2d div., Brunswick, except the north twenty acres. . . . The plaintiff did not claim to hold the land by any title derived by deed or chain of deeds from the original proprietor, but before resting offered evidence tending to prove that his possession was earlier than the defendant's, and also to prove that he had acquired the land by fifteen years' adverse possession. . . . The defendant claimed that the plaintiff could avail himself of no possession prior to 1822, because he had no color of title, but the Court ruled that inasmuch as there was a good line of marked trees around the lot, though not marked by Hawkins, that if Hawkins occupied a part of the lot and claimed the whole of it prior to 1822, that time should be reckoned in determining whether the plaintiff's grantors acquired the lot by possession. . . . This lot (64) has never been enclosed, and the larger part of it has never been improved, but the plaintiff's evidence tended to show that the plaintiff's grantors, in his said line of deeds from Reuben Hawkins, had used different parts of it at different times and seasons for wood, timber, pasture, and crops, continuously since 1814, and had during the same period occupied the other lands covered by the said deed. The defendant's evidence tended to prove the contrary. In March and April, 1800, Reuben Hawkins purchased the rights of Stephen Noble and Zadoc Clark, one from Joseph Wait, the other from Hazen French, and these made what in some of the deeds in the plaintiff's chain of colorable title is called the "Hawkins Farm"; adjacent to this farm, and within sight of the buildings, was this lot 64. The plaintiff was permitted, against the defendant's objection, to prove that, prior to 1822, Reuben Hawkins, while working on lot 64, called it his "possession lot," and explained that he was claiming and getting it by possession, to which the defendant excepted. The plaintiff offered also to show that, at other

times prior to 1822, the said Hawkins said the same things, when not on lot 64, but at his house and in sight of it, and pointing it out; which testimony the Court excluded, to which the plaintiff excepted. . . .

The jury found against the plaintiff in each respect.

H. & G. A. Bingham, for the plaintiff. *Ray & Ladd* and *Henry Heywood*, for the defendant.

The opinion of the Court was delivered by

Peck, J. — The Court properly admitted proof of the declarations of Reuben Hawkins, made while working on lot sixty-four to the effect that he called it his "possession lot," and that he was claiming and getting it by possession.

But the Court was in error in excluding "evidence to show that at other times, prior to 1822, the said Hawkins said the same things when not on lot sixty-four, but at his house and in sight of it, and pointing it out." To constitute a continuous possession it is not necessary that the occupant should be actually upon the premises continually. The mere fact that time intervenes between successive acts of occupancy does not necessarily destroy the continuity of the possession. The kind and frequency of the acts of occupancy, necessary to constitute a continuous possession, depend somewhat on the condition of the property, and the uses to which it is adapted in reference to the circumstances and situation of the possessor, and partly on his intention. If, in the intermediate time between the different acts of occupancy, there is no existing intention to continue the possession, or to return to the enjoyment of the premises, the possession, if it has not ripened into a title, terminates, and cannot afterward be connected with a subsequent occupation so as to be made available toward gaining title; while such continual intention might, and generally would, preserve the possession unbroken. This principle is tersely stated in the civil law, thus: a man may retain possession by intention alone, yet this is not sufficient for the acquisition of possession. . . . If the admissibility of such declarations is put on the ground of declarations constituting part of the res gestæ, they are admissible, as the res gestæ is not confined to a particular act of occupancy done upon the premises, but is the continual possession, which includes the successive acts of occupancy. Since a party who has once commenced a possession of land, by actual entry and acts of occupancy upon it, may continue to possess it during intervals when not upon it, he may claim it during such intervals as well as when actually upon the land doing acts of possession; and the fact of his making such claim is provable by evidence of his declarations made at the time, in the same manner and to the same effect as if made while on the land, doing an act of possession. Such declarations to show the adverse character of the possession are quite as much in the nature of facts as in the nature of a medium of proof.

The judgment of the County Court is reversed, and a new trial granted.

469. STATE *v.* FOX

SUPREME COURT OF NEW JERSEY. 1856

25 *N. J. L.* 566, 602

[MURDER. A witness for the prosecution testified to meeting the accused on the day of the murder, and proceeded to fix the time and place.] "It was between twenty and twenty-five minutes past ten o'clock when I reached home; I cannot fix the time by any other way than what my sister said; my sister remarked that I had been very quick, and that made me look at the clock." The counsel for the defendant here objected to the reception of the conversation of the said witness with her said sister as evidence in this cause, and moved the Court to overrule the same. The counsel for the State objected, and the Court thereupon admitted the said conversation in evidence, and refused to overrule the same.

To the question, "When was your attention first called to the fact of meeting the man referred to by you," the witness answered: "My attention was first called to the matter by being sent for to Brunswick by Mr. Jenkins. I first saw it in the papers; I think it was the 'New York Daily Times;' I think this was the following Tuesday. I heard of it from a neighbor before I left Brunswick, but I did not know that I knew about the affair. . . . What I saw in the 'Times' called my attention to the fact of having been to Brunswick that day, and meeting that man, and I mentioned it." *Q.* — "What particular feature in the affair did the neighbor call your attention to before you left New Brunswick?" *A.* — "She said, perhaps the man I met on Thursday morning might have had something to do with it." The counsel for the defendant here objected to the reception, as evidence in this cause, of the said conversation of the said witness with the said neighbor, and the remark of the said neighbor to the said witness, and moved to overrule the same. To which the counsel for the State objected. The Court thereupon admitted the said conversation and remark in evidence. . . .

The fifth and sixth errors assigned are, that the Court admitted in evidence the conversations of third persons with the witness.

GREEN, C. J. — The evidence was not offered or admitted to prove the truth of the facts stated to the witness, but merely to show what it was that called the attention of the witness to a fact stated by her or that fixed the fact in her recollection. Whether the statement of the third person was true or false was perfectly immaterial. The fact that the communication was made, and not its truth or falsity, was the only material point. The conversations were not hearsay, within the proper meaning of the term.

There is no error apparent in the record. The judgment must be affirmed.

470. STATE BANK *v.* HUTCHINSON

SUPREME COURT OF KANSAS. 1900

62 *Kan.* 9; 61 *Pac.* 443

ERROR from Reno District Court; MATTHEW P. SIMPSON, Judge. Opinion filed June 9, 1900. Affirmed.

This was an action brought by the State Bank of Chatham, New York, against W. E. Hutchinson, and Annie P. Hutchinson, his wife, on two promissory notes and separate mortgages securing them. One of the notes was for $4000, and the mortgage securing it was given on property in the city of Hutchinson, part of which constituted the homestead of the Hutchinsons. The other note was for $6000, and the mortgage securing it was given on a section of farming land. The Valley State Bank and the Bank of Hutchinson, being claimants to a mortgage lien on the section of land, were made defendants to the action.

W. E. Hutchinson was the president of the Valley State Bank, of Hutchinson. He was indebted to the State Bank of Chatham on a personal obligation in the sum of $10,000. As collateral security to his indebtedness, he had transferred certain notes and chattel mortgages on cattle. One George L. Morris, the president of the plaintiff bank, came to Kansas to investigate the chattel-mortgage collaterals and adjust the Hutchinson indebtedness. He could not find the cattle described in the mortgages nor the makers of those instruments. He accused Hutchinson of fraud, and threatened to prosecute him criminally and cause him to be sent to the penitentiary unless the indebtedness due to his bank was at once paid or secured. These threats were not made to Hutchinson personally, but were made to one C. B. Wilfley and one John J. Welch, officers of the bank of which Hutchinson was president. They communicated the threats to Hutchinson, who, in turn, communicated them to his wife. In order to satisfy Morris, as agent of the plaintiff bank, and induce him to forego a criminal prosecution against Hutchinson, the latter, together with Wilfley and Welch, the other officers of the Valley State Bank, agreed with Morris to convey to Mrs. Hutchinson a section of farming land, owned by the bank, in order that the Hutchinsons might give a mortgage on it, along with their homestead and other city property, as security for the debt which Hutchinson owed to the State Bank of Chatham. This conveyance was made. . . .

The jury found that the note and mortgage of $4000 on the homestead were executed by Mrs. Hutchinson under the duress of her fears excited by Morris's threat to arrest and criminally prosecute her husband. As before stated, this threat was not made to her, nor was it made to her husband, but it was made to her husband's business asso-

ciates and by them communicated to him and by him to her. A daughter of the Hutchinsons testified that she overheard the conversation between her father and mother, in which the former disclosed to the latter the threats which Morris had made. This was objected to, and its admission was assigned as error.

McKinstry & Fairchild, for plaintiff in error. The daughter's testimony to what the father said was hearsay.

Martin & Roberts, and *H. Whiteside*, for defendants in error.

The opinion of the Court was delivered by

DOSTER, C. J. (after stating the facts as above). . . . Counsel for plaintiff in error contend against the admissibility of this testimony, upon the ground that it was hearsay in character. . . . Neither of these contentions is sound.

There were three substantive litigated questions in the case — First, were threats made? And, if so, secondly, were they communicated to Mrs. Hutchinson? And, if so, thirdly, did they produce the claimed effect? As to the second of these as well as the first, the meritorious question was, had a verbal act been done? That is, had a communication been made? That act, if done, was not incidental or collateral in nature. It was one of the three principal litigated matters in the case, and, being such, the performance of the act was provable by the testimony of any one who, if competent, was a witness to it. The question was not whether Hutchinson's communication to his wife was truthful, but it was whether the communication had been in fact made. The rule is general that, where a substantive litigated fact is the speech of a person, one who heard the utterance is admitted to testify to it, and the testimony so received is not hearsay. . . . It is a general rule in the law of evidence that, when the inducing cause of the action of a person is the subject of inquiry, the information upon which he acted may be stated, although it consists of the speech of third persons. A familiar illustration of this rule is afforded in cases of defense against assaults. It is always admissible in such case to show the making of threats by those who overheard them, and their communication to the defendant, upon the strength of which he armed himself, and resisted the assault of his antagonist. Judgment affirmed.

471. PIEDMONT SAVINGS BANK *v.* LEVY

SUPREME COURT OF NORTH CAROLINA. 1905

138 *N. C.* 274; 50 *S. E.* 657

APPEAL from Superior Court, Surry County; O. H. ALLEN, Judge.

Action by the Piedmont Savings Bank, as trustee, against L. Levy. From a judgment in favor of defendant, plaintiff appeals. Reversed.

This is an action by the plaintiff, as trustee in bankruptcy of N. D.

Young & Co., against the defendant, for the recovery of possession of a stock of goods which the defendant had acquired from the bankrupt a short time prior to the bankruptcy. Upon the trial below the Court submitted the following issues: (1) Was the conveyance of the stock of goods from Young & Co. to Levy made with the intent and purpose on their part, or either of them, to hinder, delay, or defraud their creditors, or any of them? Ans. Yes: (2) Did the defendant purchase in good faith, and without knowledge or notice of such fraudulent intent on the part of Young & Co., or either of them? Ans. Yes. (3) Is the plaintiff trustee the owner and entitled to the immediate possession of the property described in the complaint? Ans. . . .

Louis M. Swink, Lindsay Paterson, and *Watson, Buxton & Watson,* for appellant. *Manly & Hendred,* for appellee.

Brown, J.—Upon the trial of this action the plaintiff, for the purpose of proving fraud on the part of the transferrors, N. D. Young & Co., as well as the transferee, the defendant, offered in evidence certain declarations of John A. Stone, which were admitted by the Court upon the first issue, but excluded as evidence against the defendant on the second issue. As this was erroneous, and necessitates a new trial, we will notice no other exception.

The entire evidence tended to prove that John A. Stone was the owner of the business, goods, and merchandise of Young & Co., at Pilot Mountain; that Young "loaned Stone the use of his name," and acted as clerk. It is contended by defendant that this stock of goods, which is the subject of the controversy, was purchased by the defendant from Stone on April 6, 1903. There is no evidence that Young knew anything of such alleged purchase until April 21, 1903. There is no evidence that the goods were taken possession of by the defendant until after April 21st. The defendant himself testifies that he did not take possession until April 21st, when a deputy sheriff levied on the goods under an execution against N. D. Young & Co., but claims that Stone was to hold the goods for the defendant as his bailee. Defendant never notified Young that he claimed the goods or had any interest in them until April 21st. All the evidence shows that the goods were in the actual possession of John A. Stone and his clerk, Young, up to April 21st, and that the receipts from sales were paid over to Stone every day by Young, and the business conducted just as it had been since its establishment in December, 1902.

The declarations of Stone, claiming the goods, and inconsistent with an absolute sale, made to several persons at different times between April 6th and April 21st, are contended by plaintiff to be competent evidence upon the question of fraud as against the defendant upon two grounds: (1) Because there is evidence tending to prove a conspiracy between Stone and Levy to defraud Stone's creditors; (2) because Stone remained in actual possession and control of the goods until April 21st, and there was no change in the conduct of the business until then.

As we think the evidence is clearly competent against the defendant upon the second ground, we will not consider the first. . . . .

(2) The possession and control of the goods having been retained by the debtor, Stone, up to April 21st, and after his alleged sale to the defendant on April 6th, was sufficient of itself to impress upon the transaction a fraudulent character. It was incumbent upon the defendant to explain the character of that possession. The defendant offered his own evidence, tending to remove the legal presumption of fraud, and to prove that, without any knowledge upon the part of Young, or any one else, the defendant left Stone in possession as defendant's agent and bailee. Was such possession of Stone in fact and truth the possession of a bailee of the purchaser, or was it merely colorable, and a part of the machinery of fraud? The character of Stone's possession thus became a most material inquiry upon the second issue. This rule of evidence is the same in respect to real and personal property. Wigmore on Evidence, § 1083.

The general doctrine, as laid down by all the text-writers and innumerable adjudications, is that the declarations of the vendor made after the sale may be given in evidence if the vendor continues to hold possession of the goods. The rule is often stated that the declarations of a party in possession either of real or personal property explanatory of and characterizing his possession constitute a part of the res gestæ, and may properly be allowed in evidence. . . . The underlying basic principle of the rule is that, the debtor transferror's intent being a necessary part of the issue of fraud, all his conduct and declarations while in possession of the property, real or personal, and dealings with it, which indicate his intent, are receivable in evidence against him and his transferee, inasmuch as the conduct and utterances of a person are indicative of his knowledge, beliefs, purposes, or intent when they are facts in issue. . . . In Askew *v.* Reynolds,[1] which is a case on all fours with this, Judge Gaston, after stating that the possession of the slaves having been retained by the debtor after the execution of his bill of sale was sufficient to impress upon the transaction the character of a fraudulent transfer, unless from other facts and circumstances another character could clearly be assigned to it, decides that the declarations of the grantor, as evidence against the grantee upon the question of fraud, were competent, and should have been received in evidence. This learned and accomplished jurist says:

"Generally the acts or declarations of a grantor after the conveyance made are not to be received to impeach his grant. The rights of the grantee ought not to be prejudiced by the conduct of one who at the time is a stranger to him and to the subject-matter of those rights. But the acts and declarations rejected in this case were those of the possessor of the property, were connected with that possession, and formed a part of its attendant circumstances. They were collat-

[1] 18 N. C. 368.

eral indications of the nature, extent, and purposes of that possession. They were to be admitted, not because of any credit due to him by whom they were done or uttered, but because they qualified and characterized, or tended to qualify and characterize, the very fact to be investigated."

Prof. Wigmore, in his elaborate treatise on Evidence, § 1086, p. 1300, quotes the larger part of Judge Gaston's opinion, and says: "This theory can hardly be impugned in its logic. Reduced to a rule, it admits the declarations when made during possession, whether or not the debtor is a party to the cause." We have not only the high authority of Judge Gaston in support of our view, but we have the equally high authority of Chief Justice RUFFIN, who says in Foster *v.* Woodfin, 33 N. C. 339, after fully endorsing the opinion of Judge GASTON:

"Where a man has conveyed a personal chattel, but still retains the possession, his acts and declarations, even subsequent to such conveyances, while he remains in possession, are evidence against the vendee or grantee on a question of fraud." . . .

There are a number of other cases in our own Reports, which with striking uniformity sustain the view we have here presented. It would be a work of supererogation to add anything more to the weight of authority which we have invoked.

As there was much debate as to the competency and scope of the evidence offered, we have gone into the question more fully than we otherwise would. . . .

New trial.

TITLE IV. PROPHYLACTIC RULES

472. Introductory. These Prophylactic Rules operate in one or both of two slightly different ways. The expedient which they apply serves either to *eliminate* the supposed testimonial danger by counteracting its influence in advance, or to furnish a means by which it can be *discovered* and other measures can be taken to counteract it at the trial. The Oath operates in the first way only, by setting against the witness' motives to falsify his fear of divine punishment and thus nullifying in advance the influence of the former. The Perjury-Penalty operates in the same way, merely substituting the fear of temporal punishment for the fear of divine punishment. The Publicity rule operates in both of the above ways, first, by subjecting the witness to the fear of the later consequences of public opinion and of a present exposure by interested bystanders, and, next, by providing the means of counteracting his possible falsities through the presence of those who can contradict him. The Sequestration of Witnesses operates partly in the first way, by preventing collusion, but chiefly in the second way, by furnishing a means of exposing that collusion if it has already taken place. The Notice of Evidence to the Opponent operates only in the second way, by furnishing the opponent, in advance of the trial, with knowledge of the proposed evidence, and by thus enabling him to prepare to expose false evidence; though perhaps there is also involved an effect of the first sort, in subjectively deterring the opponent from offering that which he knows can be shown false.

SUB-TITLE I. OATH

473. History. The employment of oaths takes our history back to the origins of Germanic law and custom, where, as in all primitive civilizations, the appeal to the supernatural plays an important part in the administration of justice. But the use of oaths for witnesses appears as only a single and subordinate phase of the general resort to oaths. The early Germanic modes of trial consisted largely in a reference, in one form or another, to the *judicium Dei*. By oaths formally taken one might even establish his claim or his plea beyond attack. It was not a matter of weighing the credibility of a sworn statement; the thought was rather that such an appeal could not be falsely made with impunity. To such an invocation a judicial and determinative effect was attributed by the religious notions of the times.

The progress from this notion of the oath at large (which left its traces as late as the 1800s in some of the common modes of procedure) to the second stage of a test or security for credibility was slow and gradual.

In the 1700s came the beginning of a third stage of development, in which legislation sanctioned what the community had come finally to believe, namely, that the inexorable requirement of an oath worked injustice and that theological belief should not obstruct the admission of competent witnesses. In this stage the tendency has been either to make the application of the oath optional with the witness, or to abandon its essential feature by rendering theological belief unnecessary.

It is with the second stage that the common law has to deal; the ideas of the first stage having practically disappeared entirely from the common law of the

last three centuries. The changes constituting the third stage of abandonment or election have everywhere been made by legislation. The common-law questions are: (1) What was the *nature* and what the *form* of a testimonial oath? (2) What was the *capacity* necessary in order to be able to take the oath? (3) What testimony is required to be *subjected* to it?

474. Joseph Chitty. *The Practice of the Law.* 4th Amer. ed., (1841) I, 616. The form at the assizes or sessions is, for the clerk of arraigns or of the peace to desire the witness to take the book in one hand, and, when that is done, to say to him, "The evidence you shall give between our sovereign lord the king and the prisoner at the bar shall be the truth, the whole truth, and nothing but the truth, So help you God!" upon which the witness kisses the book.[1]

475. Clinton *v.* State (1877, Ohio, 33 Oh. St. 33). Ashburn, J. The purpose of the oath is not to call the attention of God to the witness, but the attention of the witness to God; not to call upon Him to punish the false-swearer, but on the witness to remember that he will surely do so. By thus laying hold of the conscience of the witness and appealing to his sense of accountability, law best insures the utterance of truth.

476. Lady Lisle's Trial. (1685, Winchester, 11 How. St. Tr. 325). [The duke of Monmouth had raised a rebellion in the West, to dethrone James II and oust the Roman Catholic influence. The duke's army was made up of Puritans and other sections of Protestants. It was defeated and fled. To try the captured rebels, Chief Justice Jeffreys started on the "Bloody Assizes" in August. At Winchester, Lady Lisle, sainted and honoured in the community, was charged with harboring some of the fleeing rebels, was found guilty, and executed. The following testimony was exacted from one of the rebels who had received the shelter.]

Mr. *Pollexfen.* — Next, my lord, we come to prove the message and correspondence between this same Hicks, and the prisoner Mrs. Lisle.

Mr. *Jennings.* — Swear Mr. James Dunne. (Which was done.)

Mr. *Pollexfen.* — If your lordship please to observe, . . . I must acquaint your lordship, that this fellow, Dunne, is a very unwilling witness; and therefore, with submission to your lordship, we do humbly desire your lordship would please to examine him a little more strictly.

L. C. J. — You say well. Now mark what I say to you, friend. . . . Thou hast a precious immortal soul, and there is nothing in the world equal to it in value. . . . Consider that the Great God of Heaven and Earth, before whose tribunal thou and we and all persons are to stand at the last day, will call thee to an account for the rescinding his truth, and take vengeance of thee for every falsehood thou tellest. I charge thee, therefore, as thou will answer it to the Great God, the judge of all the earth, that thou do not dare to waver one tittle from the truth, upon any account or pretense whatsoever; . . . for that God of Heaven may justly strike thee into eternal flames and make thee drop into the bottomless

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[1] The usual form of words in civil cases differed slightly:

"The evidence that you shall give to the Court and jury, touching the matters in question, shall be the truth, the whole truth, and nothing but the truth; So help you God!"

lake of fire and brimstone, if thou offer to deviate the least from the truth and nothing but the truth. . . .

According to the command of that oath that thou hast taken, tell us who employed you, when you were employed, and where? Who caused you to go on this message, and what the message was? . . .

L. C. J. — Who shewed thee the way to thy lodgings? *Dunne.* — The girl.

L. C. J. — Who else didst thou see in the house? *Dunne.* — I saw no body at all.

L. C. J. — Then who shewed thee thy way to the stable, and helped thee with horse-meat? *Dunne.* — Nobody helped me to horse-meat.

L. C. J. — Why, thy horse did not feed on thy cake and cheese, did he? *Dunne.* — There was hay in the rack, my lord.

L. C. J. — Was the stable door locked or open? *Dunne.* — The stable door was latched, and I plucked up the latch. . . .

L. C. J. — . . . . Didst thou see that man Carpenter the bailiff that thou spokest of? *Dunne.* — Mr. Carpenter gave my horse hay. . . .

L. C. J. — Did you see anybody else but that girl you speak of? *Dunne.*— My lord, I did see the girl there. . . .

L. C. J. . . . . Sirrah, tell me plainly did you see nobody else? *Dunne.* — No, my lord.

L, C . J. — Not anybody? *Dunne.* — No, my lord, not any one. . . .

L. C. J. — Recollect yourself, and consider well of it. *Dunne.* — Truly, my lord, I do not know of anybody else.

L. C. J. — Now upon your oath tell me truly, who it was that opened the stable door, was it Carpenter or you? *Dunne.* — It was Carpenter, my lord.

L. C. J. — Why thou vile wretch, didst not thou tell me just now, that *thou* pluckedst up the latch? Dost thou take the God of heaven not to be a God of truth, and that he is not a witness of all thou sayest? Dost thou think because thou prevaricatest with the court here, thou canst do so with God above, who knows thy thoughts? And it is infinite mercy, that, for those falsehoods of thine, he does not immediately strike thee into hell! Jesus God! there is no sort of conversation nor human society to be kept with such people as these are, who have no other religion but only in pretence, and no way to uphold themselves but by countenancing lying and villainy! Did not you tell me that you opened the latch yourself, and that you saw nobody else but a girl? How durst you offer to tell such horrid lies in the presence of God and of a court of justice? . . . Thou art a strange prevaricating, shuffling, sniveling, lying rascal.

Mr. *Pollexfen.* — We will set him by for the present, and call Barter, that is the other fellow. . . .

L. C. J. — Then let my honest man, Mr. Dunne, stand forward a little. Come, friend, you have had some time to recollect yourself; let us see whether we can have the truth out of you now. . . . I charge thee, therefore, as thou wilt answer it to that God of truth, and that thou mayest be called to do, for aught I know, the very next minute, and there thou wilt not be able to palliate the truth; what was that business you and my lady spoke of? (Then Dunne paused for half a quarter of an hour, and at last said):

Dunne. — I cannot give an account of it, my lord.

L. C. J. — Oh blessed God! Was there ever such a villain upon the face of the earth; to what times are we reversed! Dost thou believe that there is a God? *Dunne.* — Yes, my lord, I do.

L. C. J. — Dost thou believe, that that God can endure a lie? *Dunne.* — No, my lord, I know he cannot.

L. C. J. — And dost thou believe then that He is a God of truth? *Dunne.* — Yes, my lord, I do.

L. C. J. — Dost thou think, that that God of truth may immediately sink thee into hell-fire if thou tellest a lie? *Dunne.* — I do, my lord.

L. C. J. — I therefore once more adjure thee, as thou wilt answer it to that God, that is the Searcher of the hearts and trier of the reins, to whom all hearts are open, and from whom no secrets are hid, that thou make me a plain answer to my question; and as thou hast called God to bear witness to the truth of the evidence thou givest here in this court, so I charge thee, in His name, to declare the truth, and nothing but the truth. Now tell us what was the business you spoke of? (But he made no answer.) . . .

Mr. *Rumsey.* — Now, my lord, Dunne says he will tell all, whether it make for or against him.

L. C. J. — Let him but tell the truth, and I am satisfied. *Dunne.* — Sure, my lord, . . . when we came to my Lady Lisle's on the Tuesday night, somebody took the two horses, I cannot tell who, if I were to die; the two went in; and after I had set up my horse, I went in along with Carpenter up into the chamber to my lady, and to this Hicks and Nelthorp; and when I came there, I heard my lady bid them welcome to her house; and Mr. Carpenter, or the maid, I cannot tell which, brought in the supper, and set it on the table. . . .

L. C. J. — And why didst thou tell so many lies then? Jesus God! that we should live to see any such creatures among mankind. . . . I pity thee with all my soul and pray for thee, but it cannot but make all mankind to tremble and be filled with horror, that such a wretched creature should live upon the earth.

477. OMICHUND *v.* BARKER

CHANCERY. 1744

Willes 538; 1 *Atk.* 45; 1 *Wils.* 84

SEVERAL persons resident in the East Indies and professing the Gentoo religion, having been examined on oath administered according to the ceremonies of their religion under a commission sent there from the Court of Chancery, it became a question whether those depositions could be read in evidence here; and the Lord Chancellor, conceiving it to be a question of considerable importance, desired the assistance of LEE, Lord Chief Justice, B. R., WILLES, Lord Chief Justice, C. B., and the Lord Chief Baron PARKER, who after hearing the case argued[1] were unanimously of the opinion that the depositions ought to be read. . . .

WILLES, C. J. — As to the general question, Lord Coke has resolved it

[1] A case of which Burke said in 1794 (Works, Little, Brown & Co's. ed., XI, 77): "one of the cases the most solemnly argued that has been in man's memory, with the aid of the greatest learning at the bar, and with the aid of all the learning on the bench, both bench and bar being then supplied with men of the first form."

in the negative, Co. Lit. 6 b, — that an infidel cannot be a witness; and it is plain by this word "infidel" he meant Jews as well as heathens, that is, all who did not believe the Christian religion. . . . Having now, I think, sufficiently shown that Lord Coke's rule is without foundation either in Scripture, reason, or law, that I may not be understood in too general a sense, I shall repeat it over again, that I only give my opinion that such infidels who believe a God and that he will punish them if they swear falsely, in some cases and under some circumstances, may and ought to be admitted as witnesses in this though a Christian country. And on the other hand, I am clearly of opinion that such infidels (if any such there be) who either do not believe a God, or if they do, do not think that he will either reward or punish them in this world or in the next, cannot be witnesses in any case nor under any circumstances, for this plain reason, because an oath cannot possibly be any tie or obligation upon them.[1] . . .

In order to obtain justice the plaintiff in this cause laid his case properly before the Court of Chancery, and prayed a commission to Calcutta; and the Court of Chancery, I think very rightly and with great justice, ordered a commission to go, and that the words "on the Holy Evangelists" should be omitted, and the word "solemnly" inserted in their room; and likewise very prudently directed that the commissioners should certify upon the return of the commission in what manner the oath was administered to the witnesses examined on the commission; and what religion they were of. The commissioners accordingly returned that the oath was administered to the witnesses in the same words as here in England, which fully answers the objection (if there was anything in it) that the form of the oath cannot be altered; and they certified that after the oath was read and interpreted to them, they touched the Bramin's hand or foot, the same being the usual and most solemn manner in which oaths are administered to witnesses who profess the Gentoo religion, and in the same manner in which oaths are usually administered to persons who profess the Gentoo religion on their examination as witnesses in the Courts of justice erected by virtue of his Majesty's letters-patent at Calcutta; and they further certified that the witnesses so examined were all of the Gentoo religion. This certificate, I think, fully answers the objection that it does not appear that the witnesses believe a God, or that he will punish them if they swear falsely; which, as I have already said, I admit to be requisites absolutely necessary to qualify a person to take an oath. . . . Lord Stairs, in his Institutes of the Laws of Scotland, p. 692, confirms this, where he says, "It is the duty of Judges in taking the oaths of witnesses to do it in those forms that will

[1] [In another of the reports, his words are: "Though I am of opinion that infidels who believe a God *and* future rewards and punishments in the other world may be witnesses, yet I am as clearly of opinion that if they do not believe a God *or* future rewards and punishments, they ought not to be admitted as witnesses." Ed.]

most touch the conscience of the swearers according to their persuasion and custom; and though Quakers and fanatics deviating from the common sentiments of mankind refuse to give a formal oath, yet if they do that which is materially the same, it is materially an oath." . . . The form of oaths varies in countries according to different laws and constitutions, but the substance is the same in all. . . . It would be absurd for him to swear according to the Christian oath, which he does not believe; and therefore, out of necessity, he must be allowed to swear according to his own notion of an oath.

HARDWICKE, L. C. . . . (approving a passage from Bishop Sanderson): "Juramentum," saith he, "est affirmatio religiosa." All that is necessary to an oath is an appeal to the Supreme Being, as thinking him the rewarder of truth and the avenger of falsehood. . . .

The next thing . . . is the form of the oath. It is laid down by all writers that the outward act is not essential to the oath. . . . It has been the wisdom of all nations to administer such oaths as are agreeable to the notion of the person taking.

478. MILLER *v.* SALOMONS. (1852. Exchequer. 7 Exch. 535, 558, 615). ALDERSON, B. Omichund *v.* Barker has settled that it ought to be taken in that form and upon that sanction which most effectually binds the conscience of the party swearing. Thus, a Jew is to be sworn on the Book of the Law and with his head covered, a Brahmin by the mode prescribed by his peculiar faith, a Chinese by his special ceremonies, and the like.

POLLOCK, C. B. . . . It appears to me to have decided merely this, — that the common law of England agrees with the law of nations, that the form of an oath is to be accommodated to the religious persuasion which the swearer entertains.

MARTIN, B. . . . The doctrine laid down [in Omichund *v.* Barker] was that the essence of another oath was an appeal to the Supreme Being in whose existence the person taking the oath believed, and whom he also believed to be a rewarder of truth and an avenger of falsehood.

479. PEOPLE *v.* MATTESON. (1824. New York. 2 Cow. 433). WALWORTH, J. I apprehend the true test of the competency of a witness to be this: Has the obligation of an oath any binding tie upon his conscience? Or in other words, does the witness believe in the existence of a God who will punish his perjury? If he swears falsely, does he believe he will be punished by an overruling Providence, either in this world or in the world to come?

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480. BRADDON'S TRIAL

(1684. 9 *How. St. Tr.* 1127, 1148)

Attorney General. What age are you of? *Witness.* I am thirteen, my lord.

A. G. Do you know what an oath is? *W.* No.

L. C. J. JEFFERIES. Suppose you should tell a lie; do you know who is the father of liars? *W.* Yes.

L. C. J. Who is it? *W.* The devil.

L. C. J. And if you should tell a lie, do you know what will become of you? *W.* Yes.

L. C. J. If you should call God to witness to a lie, what would become of you then? *W.* I should go to hell-fire. *L. C. J.* That is a terrible thing. [And the child was admitted].

481. CHARLES DICKENS. *Bleak House* (1852). Chap. XI. [Little Joe, the crossing-sweeper, is called to the coroner's inquest, to say what he knows of the dead lodger, and these are his answers]: "Name, Jo. Nothing else that he knows on. . . . No father, no mother, no friends. Never been to school. What's home? Knows a broom's a broom, and knows it's wicked to tell a lie. Don't recollect who told him about the broom, or about the lie, but knows both. Can't exactly say what'll be done to him after he's dead if he tells a lie to the gentlemen here, but believes it'll be something wery bad to punish him, and serve him right, and so he'll tell the truth." "This won't do, gentlemen!" says the coroner, with a melancholy shake of the head. "Don't you think you can receive his evidence, sir?" asks an attentive juryman. "Out of the question," says the coroner. "You have heard the boy. 'Can't exactly say,' won't do, you know. We can't take *that*, in a court of justice, gentlemen! It's terrible depravity. Put the boy aside." Boy put aside; to the great edification of the audience; especially of Little Swills, the comic vocalist.

482. HUGHES *v.* DETROIT, GRAND HAVEN & MILWAUKEE R. CO.

SUPREME COURT OF MICHIGAN. 1887

65 *Mich.* 10; 31 *N. W.* 605

ERROR to Superior Court of Detroit. (CHIPMAN, J.) Argued October 21 and 22, 1886. Decided February 10, 1887. Case. Defendant brings error. Reversed.

Plaintiff, a little colored boy, who is now between six and seven years old, and was, when injured, five years old or under, recovered judgment in the superior court of Detroit for personal injuries causing the loss of a leg and some other damage. In July, 1884, towards the close of the day, but during daylight, according to the claim of his declaration, he was on the front of a switching locomotive which was making up and distributing freight trains, and standing upon a plank step used for switchmen and brakemen to stand upon in their yard-work, and, as he asserts, was thrown off by a sudden start or a sudden stop, and run over. The negligence alleged was the failure of the train-men to put him off before moving, and the rapid action in starting and stopping. . . .

George Jerome (*E. W. Meddaugh, of* counsel), for appellant. *S. E. Engle*, for plaintiff.

CAMPBELL, C. J. (after stating the facts as above). . . . Under the charge, as already given, the jury were directed not to find for plaintiff unless the engineer actually saw the plaintiff on the foot-board. . . . It was not disputed, but admitted on the argument in this court, that, if the engineer actually saw the boy on the foot-board before moving, he would be bound to use efficient care to prevent injury to him; but he is denied that he was on the foot-board, or, if so, was seen by the engineer, or any one else, in that position. The fact that the boy himself is the only witness who says the engineer saw him renders another question important, which is how far this testimony was admissible. . . .

There was conflicting testimony as to the likelihood or possibility of seeing him on the board. He himself says he ran back and forth over it while the engine was not moving, and finally got on it just before starting, and then stayed on till he fell off. He also says he faced the engine, while the other testimony would not so indicate. All of this shows the great importance of this particular fact, and the danger of assuming it when the testimony conflicted. So it was equally important to know whether, if seen at all, he was seen before starting. . . . The boy's own testimony as to how he fell off is not quite the same in the direct as on the cross-examination. On the direct, the impression he gives is that he was thrown off by a sudden starting and jerk. On the cross-examination he says he was carried forward, and in no other direction, with the engine, until near the switch, and then fell off close by the switch. Rosa Bushy, one of his witnesses, on the other hand, says the engine went back with him towards Hastings street before taking him east to the switch. . . .

The charge seemed to go upon the idea that the plaintiff's account was the one to be chiefly acted on by the jury. . . . Passing by minor points, this makes it necessary to determine concerning the admissibility of this proof. It has been held by this Court, as well as Courts generally, that the fact that a child is under seven years does not create an absolute disability to testify. This was held in McGuire *v.* People, 44 Mich. 286, and is the doctrine of the text-books. But the authorities all agree that a child cannot testify unless capable of appreciating the obligation of oath, if he takes an oath, or of his affirmation if that is substituted. And this is upon the ground that a witness must be under some pressure, arising out of the solemnity of the occasion, beyond the ordinary obligation of truth-telling. 1 Greenleaf, Evidence, § 367; 1 Phillipps, c. 2, (C. & H.) and notes. One or the other of these methods of attestation is required of all witnesses, children or adults, and persons unsworn cannot testify unless they prefer the other form, which in this State is under the pains and penalties of perjury.

The fact that the child was to be put under oath or affirmation was not brought to his attention at all, so as to show whether he did or did not understand the bearing or effect of it. He merely said he must tell the truth, or he would go to hell; but, when asked about any other consequences, he showed entire ignorance, and only said that his mother

told him the day before that he would go to hell if he did not speak the truth. This is all that he said bearing on his veracity. He was examined by counsel, and not particularly tested by the Court, and the Court, without making any personal examination, certifying or in any way giving an opinion that the boy understood the nature or obligation of an oath or affirmation, left it all to the jury, to be tested by the ordinary questioning and cross-questioning by counsel. This is what might, no doubt, be safe with many other persons besides children who usually tell the truth, and may have their truth substantially tested, whether sworn or not. But the law entitled parties to insist that all witnesses shall be put under some solemn obligation before testifying, and excludes witnesses who are incapable of understanding its sanction. . . . It is necessary to be left very much to the discretion of the trial judge if he undertakes to exercise that discretion, and acts upon such an examination as satisfies his own mind. He should conduct this examination as in his judgment will be effectual. It cannot safely be left to counsel to make the examination. In McGuire's Case, before referred to, the judge gave a careful personal examination to the child, and formed a distinct opinion of his own, founded on that examination. As the preliminary inquiry cannot be and is not under oath, there is the strongest reason for very careful action by the judge himself on his official responsibility. The cases and text-books recognize this distinctly. See 1 Greenleaf, Evidence, §§ 367, 368, and notes; 1 Edw. Phillipps, Evidence, 11, and notes. In England it has been held that recent teaching for the occasion is not in itself sufficient, because the knowledge thus received may not be comprehended. 1 Edw. Phillipps, Evidence, 11; Rex *v.* Williams, 7 Car. & P. 320.

. . . We are compelled to apply the law as we find it, until changed by legislation.[1] But we are greatly impressed with the practical imperfection of the present rules. In France, and probably elsewhere, the courts refuse to administer an oath to children of tender years, and allow them to be examined without anything more than suitable cautions, leaving their statement on direct and cross examination to be taken for what they are worth. This seems to be a sensible proceeding, and is probably quite as efficacious as our own system, and less likely to abuse. There is a proper desire in courts to receive such testimony as will throw light on the case, and there is no doubt that in practice children are often allowed to testify whose legal capacity to do so is very liberally construed.

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[1] Act No. 82, Laws of 1887, provides:

"That whenever a child under the age of ten years is produced as a witness, the Court shall, by an examination made by itself publicly or separately and apart, ascertain to its own satisfaction whether such child has sufficient intelligence and sense of obligation to tell the truth to be safely admitted to testify, and in such case such testimony may be given on a *promise* to tell the truth, instead of upon oath or statutory affirmation, and shall be given such credit as to the court or jury, if there be a jury, it may appear to deserve."

It would be better, we think, to put their testimony on the more rational ground that it is calculated to be of some value, and capable, under a proper examination, of being reasonably well weighed for what it is worth.

For the reasons given, the judgment should be reversed, and a new trial granted.

CHAMPLIN and SHERWOOD, JJ., concurred.

MORSE, J.—In this case there is ample testimony, outside of the evidence of Hughes, that the boy was standing on the foot-board of the engine in such a position as to be easily discernible by the engineer and fireman.

In order to prevent a recovery in this case it is necessary to get rid of the boy's testimony; and an earnest argument was directed to this court to establish the proposition that the age of the child, and his ignorance of the nature of an oath, as developed by his preliminary examination in the court below, should have led in that court to the rejection of his testimony. I, for one, take no stock in this proposition, and have but little patience to examine such an argument. I cannot consent for a moment to any rule of law, however fortified by remote or later decisions of the courts, that will practically exclude the testimony of children under seven years of age, and leave them, in many cases, without redress for wrongs committed upon them. Our criminal annals are full of cases where little girls under seven years of age are outraged and maltreated by fiends in human form. They are entitled, above all others, to the thorough and complete protection of the law; and I shall place no obstacles in the way of the punishment of the miserable and depraved beings who are capable of such crimes against nature and the law. If an extraordinary intelligence is required in the child, if she must understand the nature of an oath or affirmation, and that without any recent teaching, as one English case seems to hold, (Rex *v.* Williams, 7 Car. & P. 320,) before she can testify, then there is necessarily an absolute prohibition against her testimony; and any injury to her, unless some one is present to witness the act except the perpetrator, must go unpunished and unredressed. The most ignorant and depraved adult, under all the authorities, can testify under oath or by affirmation, and no preliminary examination to test his intelligence is required or provided for. There can be found but few, if any, children of the age of this colored boy that have any idea, without teaching, of the nature of an oath. Though we may take pains to instruct our children from the moment they can prattle that they must tell the truth, it is seldom, if ever, that we take the trouble to instruct our infants in the practice of the courts, or the nature or the obligations of oaths there taken. But if an injury should happen to one of them, which ought to find redress in the courts, we would be apt, and I think we would have the right, to then instruct the child, not only to tell the truth, but of the nature and obligation of the oath which it would be required to take. The object of all judicial inquiry is to ascertain and determine the truth, and an oath is but a means to that end.

It is not necessary now that an adult should believe in hell, or any other punishment after death, in order to be a competent witness; and the catechism of a child upon that subject, as was done in this case, is not only ridiculous, but absurd. Children should have at least equal rights with adults in this respect. There can be but little, if any, trouble, in these cases, of determining the truth or falsity of the testimony of a child. The danger of perjury comes from the examination of older and more experienced persons, who take the oath at once, without fear and without question. The proper way, in my judgment, is to examine the child upon the subject of its intelligence, and, if found capable by the trial judge of understanding the nature and force of the oath or obligation to be taken, after proper instruction by the Court as to the duty of telling the truth, and the consequences attending falsehood, the oath should be administered, and the testimony received by the court, to be tested and weighed by the jury according to the usual standard.

In the present case, the boy evidently understood that he must tell the truth, and that he would be punished here for a falsehood, though he did not know what the punishment would be, and thought that God would inflict it. Who will say that he was not right even in this, or deny that Deity does not in this world find means to punish the evil-doer with the pangs of conscience, if not otherwise? . . .

I think the Court did not err in this action, and that his remarks were sound, in common sense and in law. The boy was clearly and keenly cross-examined by competent and shrewd counsel, and displayed an intelligence upon such examination not surpassed by any witness, and not equaled by some. And his evidence impresses me with its truth. His story of the transaction is candid and straightforward throughout, and unusually intelligent in its detail. The jury believed it, and there is, in my opinion, absolutely no reason for shutting it out of the case. If we are to discard the simple, unaffected narration of this child because he is not of an age to be punished criminally for telling a lie, and yet to receive in all cases, as we do, the evidence of suspected and condemned felons, subject only to the credence that a jury may give them, then the law is not, as I understand it, a safeguard and a protection to the innocent, and a terror to the evil-doer.

I find no error in the proceedings, and believe that the judgment is right as it now stands.

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483. STATUTES. *California* (Const. 1879, Art. I, § 4). No person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief.

Illinois (Const. 1870, Art. II, § 3). No person shall be denied any civil or political right, privilege, or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations.

Ib. (Rev. St. 1874, c. 101, § 3). [An oath may lawfully be administered] in

the following form, to-wit: The person swearing shall, with his hand uplifted, swear by the everliving God, and shall not be compelled to lay the hand on or kiss the gospels.

Ib., § 4. [When] such person shall have conscientious scruples against taking an oath, he shall be admitted, instead of taking an oath, to make his solemn affirmation or declaration in the following form, to-wit: You do solemnly, sincerely, and truly declare and affirm.

Massachusetts (Rev. L. 1902, c. 175, § 18). Every person who declares that he has conscientious scruples against taking any oath shall, when called upon for that purpose, be permitted to affirm in the manner prescribed for Quakers, if the Court or magistrate on inquiry is satisfied of the truth of such declaration.

Ib., § 19. Every person believing in any other than the Christian religion may be sworn according to the peculiar ceremonies of his religion, if there are any such. Every person not a believer in any religion shall be required to testify truly under the pains and penalties of perjury; and the evidence of such person's disbelief in the existence of God may be received to affect his credibility as a witness.

484. HRONEK *v.* PEOPLE

SUPREME COURT OF ILLINOIS. 1890

134 *Ill.* 139; 24 *N. E.* 861

WRIT of Error to the Criminal Court of Cook county; the Hon. LORIN C. COLLINS, Judge, presiding.

The plaintiff in error, John Hronek, was indicted, with Frank Chapek, Frank Chleboun and Rudolph Sevic, for violation of an act of the Legislature of this State, entitled "An act to regulate the manufacture, transportation, use and sale of explosives, and to punish an improper use of the same," approved June 16, 1887, and in force July 1, 1887. . . . The defendant Hronek was alone put upon trial, and that trial resulted in a verdict of guilty, and fixing his punishment at twelve years' imprisonment in the penitentiary. . . .

Objection was made to the competency of Frank Chleboun, a witness for the People, who was permitted to testify, over the objection of the defendant. He was examined upon his voir dire, and avowed his belief in the existence of God, and "a hereafter;" that he believed if he swore falsely he would be punished under the criminal laws of the State; that he had never thought seriously of whether God would punish him, either in this world or the next, and had never considered the question whether he would be punished for false swearing in any other way than by that inflicted by the law. He had, it seems, no religious belief or conviction of his accountability to the Supreme Being, either in this world or in any after life.

Mr. *Julius Goldzier*, for the plaintiff in error. . . . Chleboun, not believing in a future state of existence and future rewards and punishment, was not a competent witness. . . .

Mr. *George Hunt*, Attorney-General, for the People. . . .

Mr. Justice Baker (after stating the case as above) delivered the opinion of the Court:

1. The test of the competency of a witness in respect to religious belief, as generally held, is, does the witness believe in God, and that He will punish him if he swears falsely. . . . In Central Military Tract Railroad Co. *v.* Rockafellow, 17 Ill. 541, where, after a consideration of the authorities, it was held that all persons are competent to be sworn as witnesses who believe there is a God, and that He will punish them, either in this world or in the next, if they swear falsely; and that a want of such belief rendered them incompetent to take an oath as witnesses. This case, seemingly, overruled the doctrine of the earlier case of Noble *v.* The People, Beecher's Breese, 54.

Without pausing here to determine whether the Court erred in subjecting the witness to an examination touching his religious belief, (Rapalje on Witnesses, § 12, and cases cited), it may be said that the better practice, and that which now prevails, forbids the examination of the witness in respect thereof on his voir dire. If there was error in this regard, it was committed at the instance of the defendant, and in his interest, and he can not complain.

Returning to the question of the competency of the witness, the rule seems to be as above stated, unless changed by constitutional provision or legislative enactment. The tendency of modern times, by the Courts and in legislation, is towards liberalizing the rule, and in many jurisdictions incompetency for the want of religious belief has been abolished. See Rapalje on Witnesses, § 13; Wharton on Evidence, § 395.

2. Has the rule announced by this Court in Central Military Tract Railroad Co. *v.* Rockafellow, been changed in this State? By section 3 of article 2 of the Constitution of 1870, it would seem that a radical change was effected in respect to the matter under consideration. This section guarantees non-interference of the State with the religious faith of its citizens. . . . No religious belief is required to qualify a citizen to take an oath, and no citizen can be excused from taking an oath or affirmation because of his religious belief. The liberty of conscience secured by the Constitution is not to be construed as dispensing with oaths or affirmations in cases where the same are required by law. No man, because of his religious belief, is to be held to be excused from taking the prescribed oath of office before entering upon the discharge of the public duty; nor can he be permitted to testify, because of such religious belief or opinion, except upon taking the oath or making the affirmation required by law. Now, as before the adoption of this provision, oaths are to be taken and affirmations made whenever required by law, but the right to take such oath or make such affirmation, if such right be a civil right, privilege or capacity, can not be denied to any citizen. . . . The Constitution provides that no person shall be denied any civil or political right, privilege or capacity on account of his religious opinions. . . . The obvious meaning of the provision in the Constitution is, that what-

ever civil rights, privileges or capacities belong to or are enjoyed by citizens generally, shall not be taken from or denied to any person on account of his religious opinions. As said by the Court of Appeals of Kentucky, in construing a similar provision of the Constitution of that State in Bush *v.* Commonwealth, 80 Ky 244:

"It is a declaration of an absolute equality, which is violated when one class of citizens is held to have the civil capacity to testify in a court of justice because they entertain certain opinions in regard to religion, while another class is denied to possess that capacity because they do not conform to the prescribed belief."

It is manifest, that if the Legislature may prescribe the test of belief in rewards and punishments, they may impose any other test or qualification that, in the judgment of those entertaining the dominant belief, may be necessary to afford the requisite sanction. . . .

We are of the opinion that the effect of this constitutional provision is to abrogate the rule which obtained in this State prior to the constitution of 1870, and that there is no longer any test or qualification in respect to religious opinion or belief, or want of the same, which affects the competency of citizens to testify as witnesses in courts of justice. It follows, that there was no error in permitting the witness to testify. . . .

Judgment affirmed.

SUB-TITLE II. SEQUESTRATION OF WITNESSES

486. The History of Susanna. (*Apocrypha*). [Two elders coveted Susanna, a very fair woman and pure, the wife of Joacim; they tempted her, but she resisted; then they plotted, and charged her with adultery; and she was brought before the assembly to be tried;] and the elders said: "As we walked in the garden [of Joacim] alone, this woman came in with two maids, and shut the garden doors, and sent the maids away. Then a young man, who there was hid, came unto her, and lay with her. Then we that stood in the corner of the garden, seeing this wickedness, ran unto them. And when we saw them together, the man we could not hold, for he was stronger than we and opened the door and leaped out. But having taken this woman, we asked who the young man was, but she would not tell us. These things do we testify." Then the assembly believed them, as those that were the elders and judges of the people. . . . [But Daniel,] standing in the midst of them, said . . . "Are ye such fools, ye sons of Israel, that without examination or knowledge of the truth ye have condemned a daughter of Israel?" . . . Then Daniel said unto them, "Put these two aside, one far from another, and I will examine them." So when they were put asunder one from another, he called one of them, and said unto him: "Now then, if thou hast seen her, tell me, under what tree sawest thou them companying together?" who answered, "Under a mastick tree." And Daniel said, "Very well; thou hast lied against thine own head." . . . So he put him aside, and commanded to bring the other, and said unto him, . . . "Now therefore tell me, under what tree didst thou take them companying together?" who answered, "Under an holm tree." Then said Daniel unto him: Well; thou hast also lied against thine own head." . . . With that, all the assembly cried out with a loud voice, and praised God who saveth them that trust in him. And they arose against the two elders, for Daniel had convicted them of false witness, by their own mouth. . . . From that day forth was Daniel had in great reputation in the sight of the people.

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487. Kerne's Trial. (1679, 7 How. St. Tr. 707, 709). [Charge of being a Roman priest; two women, Edwards and Jones, were offered to testify to hearing him say mass.]

Defendant. I desire to ask her what discourse she had with Mary Jones, the other witness, for she has been instructing her what to say, and that they may be examined asunder; (which was granted).

L. C. J. Scroggs. Did she [Jones] tell you what she could say?

Edwards. She did.

L. C. J. What?

Edwards. She went once to hearken, and she heard Mr. Kerne say something in Latin, which she said was mass.

L. C. J. Call the other woman; you shall now see how these women agree.

Clerk. Call Mary Jones.

L. C. J. Let the other woman [Edwards] go out. . . . What did you [Jones] tell her you could say?

Jones. I told her . . . he said somewhat aloud that I did not understand.

L. C. J. Did you not tell Margaret Edwards that you heard him say mass?

Jones. No, my lord.

L. C. J. Call Margaret Edwards again. Margaret Edwards, did Mary Jones tell you that she heard Mr. Kerne say mass?

Edwards. Yes, my lord.

Jones. No, I am sure I did not, for I never heard the word before, do not know what it means.

L. C. J. So they contradict one another in that.

488. Golden *v.* State. (1858. Arkansas, 19 Ark. 590). Hanley, J. The course in such case is either to require the names of the witnesses to be stated by the counsel of the respective parties by whom they were summoned, and to direct the sheriff to keep them in a separate room until they are called for; or, more usually, to cause them to withdraw by an order from the bench accompanied with notice that if they remain they will not be examined.

489. Louisville & Nashville R. Co. *v.* York. (1902. Alabama, 128 Ala. 305). McClellan, C. J. The purpose to be subserved in putting witnesses under the rule is that they may not be able to strengthen or color their own testimony, or to testify to greater advantage in line with their bias, or to have their memories refreshed, sometimes unduly, by hearing the testimony of other witnesses; and it is legitimate argument against the veracity or fairness of a witness to say that his testimony has been developed along the lines of his inclination in the case by the opportunities he has had, from hearing the other witnesses, to refute them or to amplify his own statements to meet the exigencies of the trial.

490. Statutes. *California* (P. C. 1872, § 867). [A committing magistrate] may exclude all witnesses who have not been examined; he may also cause the witnesses to be kept separate, and to be prevented from conversing with each other until they are all examined.

Ib., § 868. [He] must also, upon the request of the defendant, exclude from the examination every person except his clerk, the prosecutor and his counsel, the attorney-general, the district attorney of the county, the defendant and his counsel, and the officers having the defendant in custody.

Ib. (C. C. P. 1872, § 2043). If either party requires it, the judge may exclude from the court-room any witness of the adverse party; [amended by the Commissioners in 1901, by adding:] but a party to the action or proceeding cannot be so excluded, and if a corporation is a party thereto, it is entitled to the presence of one of its officers, to be designated by its attorney.

491. LAUGHLIN *v.* STATE

SUPREME COURT OF OHIO. 1849

18 *Oh.* 99, 102

THE plaintiff in error was indicted for rape, and for an assault with intent to commit a rape, and convicted and sentenced upon the latter charge. . . .

Before the examination of the witnesses had been commenced, the counsel for the defendant requested that the witnesses for the State should be examined out of the hearing of each other; and that they should be ordered to withdraw from the court room, and the order was made as requested. Notwithstanding this order, Robert Johnson, the father of the girl, whose name was not on the subpœna as a witness, but who was sworn with the other witnesses before they retired, and who remained in court, seated by the counsel for the State, and heard the testimony of his daughter and the other witnesses who were examined, was offered as a witness on the part of the State. The counsel for the defendant objected to his being examined, he having, contrary to the order of the Court, remained within the bar. When inquired of by the Court why he disobeyed the order in remaining within the bar, he stated that he heard the order of the Court, but did not understand the meaning of it. The Court overruled the objection, and Johnson was examined as a witness. . . .

CALDWELL, J. The most important question arising in the case, and the only one that the counsel for the accused have relied on in argument, arises on the admission of Robert Johnson, the father of the girl, as a witness.

This is a question of no little delicacy. It relates exclusively to the fairness of proceeding on the trial. Much may be said on both sides of the case, and on part of the accused in this case, many considerations meriting a careful examination have been presented. On the one side, where the order of the Court has been made for the witnesses to retire, and be examined out of the hearing of each other, if a witness remains in violation of the order, it furnishes strong ground of suspicion that the witness is not fairly disposed in the cause, and that he wishes to avail himself of the testimony of the other witnesses, in order to make his statements as potent as possible, by making them correspond with theirs. Where, too, a party in interest in the cause, after the order has been made, should procure his witnesses to be present in violation of such order, it is equally suspicious that he intends a similar degree of wrong and unfairness. On the other hand, when we consider the little control that a party can have over his witnesses; the little attention he is likely to be able to give to their movements; the crowds and the confusion that generally exist during exciting trials; the questions that may arise

on the trial that could not be anticipated, and which may require bystanders to be called in as witnesses, who have been present and heard the other witnesses testify, — these, and other considerations which might be presented, render it difficult and we think impossible to establish any general rule of exclusion that would not in many cases deprive parties of important and necessary testimony for the fair presentation of their cause.

We do not find that any rule has been established, in this country, that would justify this Court, as a Court of errors, in deciding that it was error in an inferior Court to admit a witness who had violated the order, and heard the other witnesses testify. We think the law is the other way; and that the Court of Common Pleas in this instance had the right, in their discretion, to admit the witness. Judgment affirmed.

SUB-TITLE III. DISCOVERY BEFORE TRIAL.

492. History. I. Discovery of one's evidence to the opponent before trial is a measure which assists greatly to promote fairness and to shorten controversy.

Where the testimony intended to be produced is false, the opponent would thus have the knowledge and opportunity to demonstrate on the trial its falsity, by bringing other testimony; without such prior knowledge, he would not be prepared; it would be an instance of "unfair surprise" (*ante*, No. 2). Moreover, even where the testimony is not actually false, yet it might be explainable or rebuttable by other facts, and here also a prior knowledge would be fair and useful.

Furthermore, controversy would be shortened; because a party who might otherwise intend to adduce false or misleading testimony would know it to be useless, if the opponent could have prior notice and an opportunity to prepare to refute or to explain it. Thus, a false claim or defense would often be abandoned, and a settlement reached, without trial, because the attempt to prove it on the trial would be futile.

For these reasons, discovery to the opponent before trial is a valuable prophylactic measure.

Nevertheless, it involves dangers. It presupposes the party thus forced to give discovery is the party having a dishonest or unfounded claim or defense, and that the opponent is the honest party who needs protection. But in fact the case may be the exact opposite; and thus the prior discovery given by the honest party may enable the dishonest opponent to prepare false testimony in refutation. Experience shows this to be a frequent situation. Hence, a rule requiring unlimited discovery is not of unalloyed benefit. Just where the line should be drawn practically is a difficult question.

II. But at common law there was little or no attempt to draw a line. The principle of common law trials was in general that no discovery at all need be given. Each party went to the trial without being obliged to disclose to the opponent the evidence held in readiness. This feature was due to the surrounding — the Anglo-Norman traditions of landed aristocracy and bold manhood — amidst which the common law was developed.

The common law, originating in a community of sports and games, was permeated essentially by the instincts of sportsmanship. This has had both its higher aspects and its lower aspect. On the one hand, it has contributed a sense of fairness, of gentlemanliness, of chivalrous behavior to a worthy adversary, of carrying out a contest on equal and honorable terms. The presumption of innocence, the character rule, the privilege against self-crimination, and other specific rules (to name those of evidence alone), show the effect of this instinct against taking undue advantage of an adversary. The minor rules of professional etiquette (now surviving much more markedly in England than in the United States) illustrate the same tendency even more clearly. On the other hand, it has contributed to lower the system of administering justice, and in particular of ascertaining truth in litigation, to the level of a mere game of skill or chance. Now one of the cardinal moral assumptions in a contest of skill or chance is that a player need not betray beforehand his strength of resource, and that the opponent cannot complain of being surprised. The accepted laws and moral

standards of whist protect the player from exposing his cards before playing them; the owner of the racing-stable keeps as a valuable secret the time made by his horse in the last private trial before the race; and a chess-player's skill consists largely in concealing from his opponent the far-seeing sequence of moves which he has planned. It is this feature of games and sports that has influenced powerfully the policy of the common law in the present aspect. "Nemo tenetur armare adversarium suum contra se." To require the disclosure to an adversary of the evidence that is to be produced, would be repugnant to all sportsmanlike instincts. Rather permit you to preserve the secret of your tactics, to lock up your documents in the vault, to send your witness to board in some obscure village, and then, reserving your evidential resources until the final moment, to marshal them at the trial before your surprised and dismayed antagonist, and thus overwhelm him. Such was the spirit of the common law; and such in part it still is. It did not defend or condone trickery and deception; but it did regard the concealment of one's evidential resources and the preservation of the opponent's defenceless ignorance as a fair and irreproachable accompaniment of the game of litigation. There is no accounting for this except as in part a product of a characteristic instinct of the Anglo-Norman community in which our law grew up.

There were but two marked exceptions to the rule that no discovery need be given before trial. (*a*) The ancient doctrine of Profert and Oyer permitted a party to obtain inspection, before trial, of sealed instruments material to his opponent's case. The principle was partly extended by Lord Mansfield; but this extension lost ground after his death. (*b*) In Chancery, a bill of discovery would enable a party to obtain discovery of documents in the opponent's possession and of the opponent's personal testimony. But even this bill of discovery was limited in its scope; and the expense and tediousness of employing it made it useless except in the most important litigation.

III. By the middle of the 1800s, the obstructions to justice, due to a lack of discovery in common law trials, was fully appreciated. Long before this, indeed, an early step had been taken in criminal cases (in the early 1700s), by a statute allowing the accused to be furnished with a list of the prosecution's intended witnesses; but this applied only to trials for treason. By the middle of the 1800s, statutes had everywhere made large inroads upon the common law rules.

In *criminal* cases, the prosecution was required to furnish the accused, on demand, with a list of the witnesses.

In *civil* cases, the party was required (*a*) to give discovery of his own testimony to the opponent, though not to give discovery of the names or expected testimony of his witnesses, and (*b*) to give discovery of his documents. In some statutes the apparent object was merely to transfer to common law trials the chancery practice, with its existing limitations; in others the apparent purpose was a broader one.

The construction of the effect of these statutes upon the traditional common law practice is the main subject of present-day judicial rulings.

Topic 1. Testimony

Sub-topic A. Criminal Cases

493. Stephen Colledge's Trial (1681. Howell's State Trials, VIII, 569). [The accused was a Protestant joiner at Oxford, charged with fomenting a so-

called Presbyterian plot against the King. Chroniclers agree that the politicians in power were determined to convict him, as an example against meddlers. The principal witnesses against him turned out later to be arrant perjurers. On his arraignment Colledge thus complained of his unfair treatment.]

Then the prisoner was brought to the bar.

Cl. of Cr. — Stephen Colledge, hold up thy hand. (Which he did). . . . How sayest thou, Stephen Colledge, art thou guilty of this high treason, whereof thou standest indicted, and hast now been arraigned, or not guilty?

Colledge. — My lord, I do desire, if it please your lordship, to be heard a few words.

L. C. J. Scroggs. — Look you, Mr. Colledge, the matter that hath been here read unto you is a plain matter, and it hath been read to you in English, that you may understand it. It is an indictment of High Treason. . . .

Colledge. — Will you please to spare me, that I may be heard a few words. I have been kept a close prisoner in the Tower ever since I was taken. I was all along unacquainted with what was charged upon me. I knew not what was sworn against me, nor the persons that did swear it against me, and therefore I am wholly ignorant of the matter. I do humbly desire, I may have a copy of the indictment, and a copy of the jury that is to pass upon me, and that I may have counsel assigned me, to advise me, whether I have not something in law pleadable in bar of this indictment.

L. C. J. — These are the things you ask, you would have a copy of the indictment, you would have counsel assigned to you, to advise you in matter of law, and a copy of the jury. . . . Now for those things that you demand, you cannot have them by law. No man can have a copy of the indictment by law. . . . For a copy of the jury, that you cannot have neither, for there is no such thing as yet. . . . So as to what you say as to want of preparation for your trial, we cannot enquire what notice you have had; and yet if you had never so little time, there is no cause why you should not plead, though you were but just now taken and brought to the bar to answer it, and never heard of any thing of it before. So that I think you ought to plead presently. . . .

Colledge. — I had some papers, my lord, that were taken from me, which I desire may be restored to me. I only plead, that I may have my birthright, and that which the law gives me; if I may have justice, I desire no more. Those papers were taken from me in the house over the way since I was brought from the prison; they were papers that concerned my defence; some directions and instructions how to manage myself in that defence. If you please to let me have those papers, I will not take up much of your time; I desire to have but common justice, and that which is my right by law. . . .

L. C. J. — You can say whether you are not guilty, without any papers. . . .

Colledge. — If I had those papers, I could tell what I should plead. . . .

Cl. of Cr. — You have heard the opinion of the Court, you must first plead.

Colledge — I cannot plead first. I must lose my life, if I must; I neither know who accuses me, nor what it is they accuse me of; it is impossible I could defend myself if I have not my papers.

L. C. J. — We know not what papers you mean.

Colledge. — The gaoler took them from me, and one of the king's messengers. . . .

Just. Jones. — But this is a matter of fact, and therefore you may plead not guilty, as well without your papers, as if you had them. . . .

L. C. J. — Why don't you plead not guilty, then? . . . .

Colledge. — Mr. Attorney, pray let me have a copy of the indictment.

Att. Gen. — Apply yourself to the Court for it, we must receive our directions from thence.

L. C. J. — You have had the opinion of the Court, you can't have it. . . . If you desire the indictment read over again distinctly, that you may have.

Att. Gen. — Ay, with all my heart.

Colledge. — Pray let me hear it again, my lord, if you please.

L. C. J. — Read it over again to him, and read it distinctly. . . .

Colledge. — Pray, my lord, either give me my papers or assign me counsel, or else I may throw away my life, for I am wholly ignorant of the law.

L. C. J. — When you have pleaded, we will hear any motion you will make, and do that which is just upon it; but I see no use you can have of papers to plead guilty, or not guilty, which is the only question is asked you. . . .

Just. Jones. — You have heard the indictment read, what say you? For you must propose the matter. . . .

Colledge. — I pray I may have my papers again; if there be no other plea for me, pray let me have my papers again.

L. C. J. — You have heard the opinion of the Court; you must plead. . . .

Cl. of Cr. — Are you guilty or not guilty?

Colledge. — Why then, as they have laid it in that indictment, in manner and form as it is there laid, I am not guilty. . . .

L. C. J. — Now he has pleaded, Mr. Attorney. He speaks of some papers, if there be any memorandums, or anything that must assist him that is necessary for his defence in his trial in those papers, it will be hard to deny him them.

Att. Gen. — If your lordships please to give me leave, I will give you an account of them. The messengers just now did deliver these papers to be delivered to the Court. . . . But if it please your lordship, I desire you would enter into the examination of this matter; for I have an account from London by a special messenger, that there are several persons go up and down to procure witnesses against the king's evidence, making it a public cause; and here, my lord, is another paper which is a list of men as witnesses picked up together against the king's witnesses.

L. C. J. — He must have that, deliver him that presently.

Att. Gen. — But, my lords, others have gone about and framed witnesses for him.

L. C. J. — You must give him the list of his witnesses, for I see not what use you can make of it. . . . What hurt is there, if the papers be put into some trusty hands, that the prisoner may make the best use of them he can, and yet they remain ready to be produced upon occasion: if a man be speaking for his life, though he speak that which is not material, or nothing to the purpose, there will be no harm to permit that. . . .

Att. Gen. — If people are permitted to go up and down and ask counsel of persons, and bring it in papers to the prisoner, it is the same thing as if counsel came to him. . . .

Colledge. — Shall I not have the use of my papers, my lord: will you not please to deliver them back to me now you have perused them? . . .

L. C. J. — For that which contains the names of the witnesses, that you have again: for the other matters, the instructions in point of law, . . . that were to give you counsel in an indirect way, which the law gives you not directly.

Colledge. — If I am ignorant what question to ask of the witnesses, shall not my friends help me, my lord?

L. C. J. — We will sift out the truth as well as we can, you need not fear it. . . .

Colledge. — Will you please to give me the paper that has the questions in it, to ask the witnesses?

L. C. J. — There are no papers with any particular questions to any one witness, but only instructions how to carry yourself in this case. . . . We have ordered that you shall have a transcript of the paper of instructions, leaving out that which is scandalous.

Colledge. — I desire I may have a copy of the whole.

Just. JONES. — No, we do not think fit to do that.

Colledge. — Pray let me know which you do except against.

L. C. J. — Look you, Mr. Attorney, I think we may let him have a copy of the whole.

494. *Sir* JAMES STEPHEN. *History of the Criminal Law.* (1883, Vol. I, pp. 225, 398). I do not think any part of the old procedure operated more harshly upon prisoners than the summary and secret way in which justices of the peace, acting frequently the part of detective officers, took their examinations and committed them for trial. It was a constant and most natural and reasonable topic of complaint by the prisoners who were tried for the Popish Plot that they had been taken without warrant, kept close prisoners from the time of their arrest, and kept in ignorance of the evidence against them till the very moment when they were brought into Court to be tried. This is set in a strong light by the provisions of [1709, St. 7 Anne, c. 21, § 14, allowing a list of witnesses in treason]. . . . This was considered as an extraordinary effort of liberality. It proves, in fact, that even at the beginning of the eighteenth century, and after the experience of the State trials held under the Stuarts, it did not occur to the Legislature that, if a man is to be tried for his life, he ought to know beforehand what the evidence against him is, and that it did appear to them that to let him know even what were the names of the witnesses was so great a favor that it ought to be reserved for people accused of a crime for which legislators themselves or their friends and connections were likely to be prosecuted. It was a matter of direct personal interest to many members of Parliament that trials for political offences should not be grossly unfair; but they were comparatively indifferent as to the fate of people accused of sheep-stealing or burglary or murder. . . . [The prisoner] was not allowed as a matter of right, but only as an occasional exceptional favor, . . . to see his [own] witnesses or put their evidence in order. When he came into Court, he was set to fight for his life with absolutely no knowledge of the evidence to be produced against him.

495. STATUTES. *Michigan.* Compiled Laws 1897, § 11883. [The foreman of the grand jury shall return to Court or deliver to the prosecuting attorney] a list of all the witnesses sworn before the grand jury, [when an indictment is found].

Ib., § 11893. [The indictment], with the names of the complainant and all the witnesses indorsed on the back thereof, [is to be filed].

Ib., § 11934. [The prosecuting attorney, on filing an information, shall] indorse thereon the names of all the witnesses known to him at the time of filing the same, and at such time before the trial of any case as the Court may by rule or

otherwise prescribe, he shall also endorse thereon the names of such other witnesses as shall then be known to him.

United States. St. 1790, April 30, § 29, Rev. St. 1878, § 1033. [A list] of the witnesses to be produced on the trial by proving the indictment, stating the place of abode, [is to be delivered] at least three entire days [before trial, for treason, and] at least two entire days [before, for other capital offenses].

496. STATE *v.* MYERS

SUPREME COURT OF MISSOURI. 1906

198 *Mo.* 225; 94 *S. W.* 242

APPEAL from Clay Circuit Court. — Hon. J. W. ALEXANDER, Judge. Affirmed.

At a special term of the Circuit Court of Clay county, convened on the 5th day of June, 1905, the defendant was put upon her trial and convicted of murder in the first degree. Motions for a new trial and in arrest of judgment were duly filed, heard, and overruled, and exceptions saved. Thereupon the defendant was duly sentenced on the 24th day of June, 1905, in accordance with the verdict of the jury. From that judgment and sentence she has appealed to this Court. . . .

The first error alleged by the defendant is the refusal of the Circuit Court to grant the defendant a continuance after both parties had announced ready for trial, and after the jury had been impaneled, on the grounds that the names of the witnesses Frank Hottman, Nettie Hottman, Bertha Hottman, Ella Hottman, and John Hottman were not indorsed upon the information until after the jury were sworn to try the case, and because the defendant had not been otherwise notified that said witnesses were to be used against her until after the jury was sworn. The names of 54 witnesses were indorsed on the information. The record does not disclose what names of witnesses were indorsed when the information was filed in court, but it does show that 49 names were indorsed on the information by the prosecuting attorney by leave of the Court on the 16th day of March, 1905. After the jury was sworn to try the case, and before any evidence was offered, the prosecuting attorney by leave of the Court, over the objection of the defendant, indorsed on the information the additional names of the witnesses Frank, Nettie, Bertha, Ella, and John Hottman. After the opening statement of the prosecuting attorney, the defendant further objected to going to trial, for the reason that the opening statement of the prosecuting attorney of Jackson county, Mo., to the jury, disclosed a state of facts which was to be sustained and proved only by said Hottmans, and that the defendant was not prepared to meet their testimony. The Court overruled the objection, and the defendant excepted. The defendant afterward filed an affidavit in support of her exception and objection.

Frank Gordon, R. B. Ruff, W. E. Fowler, and *Jos. S. Brooks,* for

appellant. (1) The Court erred in refusing to grant defendant a continuance, on the ground that the names of the witnesses Frank Hottman, Nettie Hottman, Bertha Hottman, Ella Hottman and John Hottman, were not indorsed upon the information, and defendant was not otherwise notified that such witnesses were to be used against her till after the jury was impaneled and sworn to try the cause. Sec. 2517, R. S. 1899. . . .

Herbert S. Hadley, Attorney-General, and *John Kennish*, Assistant Attorney-General, for the State. (1) The Court did not err in refusing to grant the defendant a continuance on the ground that the names of Frank Hottman, Nettie Hottman, Ella Hottman and John Hottman, witnesses for the State, were not indorsed upon the information and that defendant was not otherwise notified that such witnesses were to be used against her until after the jury was impaneled and sworn to try the cause. . . . If during the trial of the case it had been made to appear to the Court that the State had taken an undue advantage of defendant by purposely refraining from indorsing on the information the names of the material witnesses for the State, it would nevertheless have been the duty of the Court to have proceeded with the trial, and in case the jury returned a verdict of guilty to have granted a new trial to defendant for that reason.

GANTT, J. (after stating the case as above): The action of the Court in permitting the State to call, and the said witnesses to testify, as witnesses for the State presents the first question for our determination. The contention of the defendant, it will be observed, is based upon section 2517, Rev. St. 1899, which provides: "When an indictment is found by the grand jury, the names of all the material witnesses must be endorsed upon the indictment; other witnesses may be subpœnaed or sworn by the State, but no continuance shall be granted to the State on account of the absence of any witness whose name is not thus endorsed on the indictment, unless upon the affidavit of the prosecuting attorney showing good cause for such continuance." This statute has been before this Court for construction many times. It was enacted for the first time in 1879 as section 1802.

The common law did not require the names of any of the witnesses to be indorsed upon the indictment for any purpose connected with the trial. In Hill *v.* People, 26 Mich. 496, CHRISTIANCY, C. J., said:

"But, as the witnesses who were to testify before the grand jury were sworn in open Court before they were sent to the grand jury, a list of the witnesses intended to be examined before that jury was required to be indorsed on the back of the bill as drawn up to be laid before them. This was required for two purposes: First that the crier, or other officer whose duty it was to swear the witnesses, might know who would be called and sworn, and that he might certify to their being sworn, which he did by adding after their names 'sworn in Court'; and second, that the grand jury might know what witness to call and who had been sworn. In this mode, it is true, a defendant for a misdemeanor incidentally got the benefit of a list of the witnesses who had testified before the grand jury,

because, in cases of misdemeanor, he was entitled to a copy of the indictment. But, in cases of felony, he failed to receive even this incidental benefit, as in such cases he was not entitled to a copy of the indictment. It follows that, apart from the express or implied requirement of some statute, there is at common law no rule of evidence excluding witnesses whose names have not been furnished to the accused; nor is there any rule of preliminary procedure permitting the accused to obtain such a list by motion before trial."

3 Wigmore on Evidence, § 1850; 1 Bishop, New Crim. Proc. § 869a; Ballard *v.* State, 19 Neb. 609, 28 N. W. 271.

Our statute was evidently enacted to cure this defect in the common law. It was ruled in State *v.* Roy, 83 Mo. 268, and State *v.* Grady, 84 Mo. 220, that a complete failure to indorse the names of the material witnesses on an indictment was a sufficient ground to quash it. . . . It is right that, when a citizen's liberty or life is endangered, he should know the names of the witnesses by whom the charge is to be made good, but, while this is true, it cannot be said that, if the State discovers evidence that the grand jury could not obtain, the State shall not avail itself of this evidence if discovered before it closes its case. Indeed, section 4097, Rev. St. 1889, now 2517, Rev. St. 1899, expressly provides: "Other witnesses may be subpœnaed or sworn by the State." And in State *v.* Henderson, 186 Mo., loc. cit. 482, it was said:

> We have not held in any case that, where the prosecuting attorney has indorsed the names of the witnesses for the State, the omission of one name would afford a ground for new trial on the mere objection that the name of such witness had not been indorsed on the indictment or information.

And in the recent case of State *v.* Barrington this same view was expressed.

In the Henderson Case and in the Barrington Case, the view was expressed that there might be a case so flagrant as to amount to a surprise, and upon a proper showing that the defendant, if advised that the particular witness would be called against him, would have been able to impeach his character or contradict his testimony by other witnesses and in such a case, the Court, by virtue of its inherent power and in furtherance of justice, could grant a new trial. But, in this case, it is not contended that the prosecuting attorney purposely refrained from indorsing the names of the witnesses on the information, in order to obtain an undue advantage of the defendant. Indeed, the testimony of the prosecuting attorney clearly negatives such a purpose. To hold that the State cannot use any witness other than those indorsed upon the indictment or information would be to nullify that portion of the section which gives to the State the right to use other witnesses than those whose names are indorsed on the indictment, although the prosecuting attorney learned of their evidence after the finding of the indictment or the filing of the information, and although the common law made no such requirement. We are of the opinion that the Circuit Court committed no error in permitting the State to call and examine the witnesses above named who were not indorsed upon the information, and did not err in refusing to grant a

continuance on the ground that other names were not indorsed on the information, and this ruling is applicable likewise to the witnesses Meinsen, McClaskey, Prewitt, Bowen, and Stohl, whose names also were not indorsed on the information. . . .

The judgment of the Circuit Court must be and is affirmed, and the sentence which the law pronounces is directed to be carried into execution.

Burgess, P. J., and Fox, J., concur.

Sub-topic B. Civil Cases

497. *Sir* James Wigram, V. C. *Discovery.* (1836. §§ 31, 32, 148). Proposition I: It is the right, as a general rule, of a plaintiff in equity to examine the defendant as to all matters of fact which, being well pleaded in the bill, are material to the proof of the plaintiff's case and which the defendant does not by his form of pleading admit. Proposition II: Courts of equity, as a general rule, obliged defendant to pledge his oath to the truth of his defense. With this (if a) qualification, the right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the plaintiff's case, and does not extend to a discovery of the manner in which or the evidence by means of which the defendant's case is to be established, or to any discovery of the defendant's evidence. . . . If it were now for the first time to be determined whether in the investigation of disputed facts truth would be best elicited by allowing each of the contending parties to know before the trial in what manner and by what evidence his adversary proposed to establish his own case, arguments of some weight might "a priori" be adduced in support of the affirmative of this important question. Experience, however, has shown — or, at least, Courts of justice in this country act upon the principle — that the possible mischiefs of surprise at a trial are more than counterbalanced by the danger of perjury which must inevitably be incurred when either party is permitted before a trial to know the precise evidence against which he has to contend. And accordingly, by the settled rules of Courts of justice in this country (approved as well as acknowledged) each party in a cause has thrown upon him the onus of supporting his own case and meeting that of his adversary without knowing beforehand by what evidence the case of his adversary is to be supported or his own opposed.

498. Common Law Practice Commissioners. *Second Report* (1853), p. 35. As to facts within the knowledge of an adverse party, the Courts of law possess no power of compelling discovery; except, indeed, that by the recent change [of 1851] in the law each party may be called as a witness [on the trial] by his opponent; but it is obvious that this course will only be resorted to in the most desperate emergency. It cannot reasonably be expected that a party ignorant of what his adversary may be prepared to swear, shall put so adverse and interested a witness into the box, without having had any opportunity of previous interrogation. For the purpose of discovery, previous to the trial, whether of facts or of documents, the party desiring it has now no alternative but to resort to a Court of equity. We have no hesitation in saying that this is altogether wrong. We assert as an indisputable proposition, that every Court ought to possess within itself the means of administering complete justice within the scope of its jurisdiction. . . . This opportunity for examination prior to the trial will be useful, not

only for the purpose of discovering facts exclusively in the knowledge of the opposite party, but as the means of sparing the trouble and expense of producing evidence of facts which he may be prepared to admit; while, on the other hand, it will tend to make more clearly manifest the matters which are alone in contest between the parties. In some cases, such a preliminary discovery may even altogether obviate the necessity of any trial, by compelling the one party or the other to admit facts decisive of the case upon the merits, so as to show that proceeding to trial would be a mere abuse of the forms of justice. A power of preliminary discovery would likewise tend to expose the motives of groundless actions brought for vexation, and of unfounded defences set up and persisted in for delay. It would, moreover, have a most wholesome effect in preventing false pleas from being put on the record; for as soon as the examination of the party had made manifest the falsehood of the plea, a judge might be applied to disallow the pleading at the expense of the party pleading it. If the very existence of such a power had not the effect of preventing the necessity of its exercise, it would at least aid the Court in extirpating frivolous and improper litigation.

We propose that either party in a cause shall be at liberty to deliver to the opposite party, provided such party would be liable to be called as a witness, or his attorney, written questions on the subjects on which discovery is sought; and to require such party, within a time to be fixed, to answer the questions in writing upon oath, sworn and filed in the same manner and under the same sanction, in case of falsehood, as an affidavit; and that the party omitting to answer within the prescribed time shall be subject to the consequences of a contempt of the Court. But we by no means propose to confine the power of interrogating such adverse party to the written questions above referred to. We think that in many cases an opportunity should be afforded for oral examination. At the same time, care must be taken that the power of personal examination be not abused by being made a means of vexation and oppression, when used against weak or timid persons. We propose, therefore, not to leave it at the option of a party to demand an oral examination, but to give the Court, or a judge, discretion, on the application of either party, in case of an insufficient answer to the written questions before referred to, or in any other case in which it may be made to appear essential to justice, to direct an oral examination of the other party before either a judge or a master of the Court.

499. Statutes. *Illinois.* Revised Statutes, 1874, c. 51, § 6. Any party to any civil action, suit or proceeding, may compel any adverse party or person for whose benefit such action, suit, or proceeding is brought, instituted, prosecuted, or defended, to testify as a witness at the trial, or by deposition, taken as other depositions are by law required, in the same manner, and subject to the same rules, as other witnesses.

St. 1905, May 18 (Municipal Court in Chicago), § 32. The Municipal Court in any civil suit pending therein, at any time before the trial or final hearing thereof, may permit the filing therein of interrogatories to be answered by any party to such suit or any person for whose immediate benefit such suit is prosecuted or defended, or by the directors, officers, superintendent or managing agents of any corporation which is a party to the record in such suit, at the instance of the adverse party or parties or any of them, and to require an answer under oath to all such interrogatories as the party to be interrogated might be required to answer, if called as a witness upon the trial or hearing of such suit, but the party

filing such interrogatories shall not be concluded by the answers thereto, if he shall elect to introduce the same or any or either of them upon the trial or final hearing.

Massachusetts. Revised Laws, 1902, c. 173, §§ 35, 57–63 (quoted *post*, No. 396).

New York. C. C. P. 1877, § 870. The deposition of a party to an action pending in a Court of record, or of a person who expects to be a party . . . may be taken at his own instance or at the instance of an adverse party or of a co-plaintiff or co-defendant at any time before the trial.

500. Ex parte SCHOEPF

Supreme Court of Ohio. 1906

74 *Oh.* 1; 77 *N. E.* 276

Error to Circuit Court, Hamilton County. Habeas corpus proceedings by J. H. Schoepf to secure petitioner's discharge from custody. From a judgment remanding petitioner, he brings error. Judgment reversed, and petitioner discharged.

On the 18th day of June, 1902, one Josephine Pace filed a petition in the court of common pleas of Hamilton county against the Cincinnati Traction Company, alleging in substance that the defendant is a corporation organized and doing business under the laws of the State of Ohio; that it owned and used a street railroad leading from Cincinnati to the village of College Hill, on which cars were operated by means of electricity; and that on the 17th day of May, 1902, while the plaintiff was a passenger on one of the cars of the defendant, "the said defendant, by its agents or servants, so carelessly, negligently, and unskillfully and improperly managed and conducted said car that the same was caused to run roughly and unevenly and was jolted so that this plaintiff, through no fault or negligence on her part, was violently jolted and thrown from the said car and on to the street or roadway alongside said railroad," whereby she was severely injured. On the 26th day of July, 1902, the defendant answered the said petition, admitting that it was a corporation as alleged, and that it used a certain street railroad leading from Cincinnati to College Hill, with cars operated by means of electricity; but it denied that it owned the said street railroad, and denied each and every allegation contained in the petition, except as expressly admitted in said answer. Thereafter, on the 11th day of August, 1904, one Charles E. Tenney, a notary public, before whom notice had been given to take depositions, issued a subpœna duces tecum to the plaintiff in error, J. H. Schoepf, to appear before him and give testimony in the case then pending, wherein Josephine Pace was plaintiff and the Cincinnati Traction Company was defendant, and containing the following clause: "And to bring with you any reports you may have control over, or in your possession, made by the motorman or conductor of a College Hill-Main car of the Cincinnati Traction Com-

pany, concerning any accident occurring May 17, 1902, because of which this suit was brought."

The plaintiff in error appeared before the said notary public on the 16th day of August, 1902, pursuant to the subpœna, and on examination testified that he was the claim agent of the Cincinnati Traction Company. . . . He was asked: "Q. 3. On the 17th day of May, 1902, a woman fell or was thrown off a car belonging to the Cincinnati Traction Company, at or near the corner of Oak and Belmont streets, College Hill. Who was the conductor in charge of this car?" Also the following question: "Q. 5. Do you know the name of this conductor?" Also the following question: "Q. 6. Do you know the name of the motorman of this car?" Also the following question: "Q. 7. Were there any other persons on this car besides the plaintiff, conductor, and motorman?" Also the following question: "Q. 8. Were there any persons that you know of, besides the plaintiff, conductor, and motorman, present at the time of the accident, and who witnessed it?" To each of the aforesaid questions the counsel for the defendant company objected, and the witness refused to answer the same upon the advice of counsel, for the reason that the same were immaterial, irrelevant, and incompetent, and for the reason that these questions call for hearsay testimony. . . . Thereupon the said notary public ordered the plaintiff in error to be committed to jail until he should answer the said questions and produce the said reports.

Plaintiff in error began these proceedings by an application in the Court of Common Pleas of Hamilton county for a writ of habeas corpus. . . . The Circuit Court held that these five questions should be answered, and ordered that Schoepf be remanded to the custody of the sheriff until he should answer the . . . five questions above set forth, and also should produce the said reports. This judgment of the Circuit Court is here assigned for error; plaintiff in error seeking to have both the judgment of the Circuit Court and the judgment of the Court of Common Pleas reversed and held for naught.

Kittredge & Wilby, Joseph Wilby, John W. Warrington, George H. Warrington, Outcalt & Foraker, and *Ellis G. Kinkead,* for plaintiff in error.

Oliver S. Bryant and *Charles B. Wilby,* for defendant in error.

Davis, J.[1] (after stating the facts). — 1. It is earnestly argued in behalf of the defendant in error, and that also seems to be the view entertained by the Circuit Court and the court of Common Pleas, that a witness who is testifying in a deposition before a notary public may be compelled to produce any document which by any possibility may become pertinent on the trial of the case in which the deposition is taken. It is asserted that In re Rauh, 65 Ohio St. 128, 61 N. E. 701, is authority for this proposition; and it is contended that the reports which had been made to the plaintiff in error, as the claim agent of the company, are admissions by the company, and that if the motorman and conductor

[1] [Point 2 of the opinion is the only one here involved. — Ed.]

who made these reports should testify on the trial of the case, the company and its agents might be compelled to produce the reports for the possible purpose of contradiction. It is also asserted, although it is not even suggested how or why it might be so, that these reports *may* become evidence relating to the merits of the action, and as such the company *might* be compelled to produce them for evidence or inspection. It is even seriously maintained that a party taking a deposition has a greater privilege under the law than he would have on the trial of his case, in that the witness must produce any document called for, although he may believe that it is privileged, and in that the witness must answer impertinent and incompetent questions, although he may believe that the answers would be privileged, and although the answers would not be admissible if offered to the jury on the trial of the case. And here again it is claimed that the case of Rauh, supra, and other cases in this court and elsewhere, support this contention. It was clearly pointed out in Ex parte Jennings, 60 Ohio St. 319, 54 N. E. 262, [*post*, No. 703,] that neither the officer who takes a deposition nor the court on the trial of the case has power to punish a witness for disobedience of a subpœna or a refusal to answer except when the witness has been "lawfully ordered." Section 5252, Rev. St. 1906. And in that case and the Rauh Case also it was said that when the witness undertakes to decide upon the question whether he has been "lawfully ordered" he does so at his own peril. It is the same whether a question of privilege is involved, or whether it is only a matter of incompetent or irrelevant evidence. It is true that in the Rauh Case the qualifying clause, "unless the interrogatory involves a question of privilege," was thrown in. It would have been clearer if that clause had been omitted or if it had been said "a question of conceded privilege"; but it is plain that when the privilege claimed is disputed the witness takes the same chances upon a refusal that he does upon a refusal to answer an incompetent question. Accordingly it was nowhere said in either of the decisions of this Court already referred to, nor was it intended to be inferred, that a witness might be compelled to surrender to his adversary a coveted document, before the right to compel production of it had been submitted to the judgment of a competent tribunal; but the correlative proposition that a witness might take the chances of being sustained on a refusal to answer an incompetent or irrelevant question was distinctly asserted. It would seem, therefore, that the power of a notary public in the taking of depositions and the limitations imposed thereon have been clearly defined by the statutes and the previous decisions of this Court.

The counsel for the defendant in error concede in their brief that questions 3, 5, 6, 7, and 8, which the witness refused to answer upon advice of counsel because they were immaterial, irrelevant, and incompetent and because they call for hearsay testimony, "would be inadmissible if offered to a jury on the trial of the case, because of the rule against hearsay." Yet counsel still insist that the witness may be compelled

by imprisonment to disclose facts which they admit could not be admissible on the trial. From what we have already said, it results that the notary public had no such power. In Ex parte Jennings, it was said in the opinion: "Indeed, it does not seem to have been finally determined in any case that the personal liberty of the citizen is of so little importance that it should yield to a desire to gather food for idle gossip." But in the present case this is all that such a fruitless extortion of testimony would result in, unless it would be to disclose to the plaintiff the names of witnesses for or against her adversary; and it is elementary that a party cannot be required to aid his opponent in that way.

In answer to this, it is urged that an objection to the relevancy or competency of evidence cannot be made by a mere witness, but it must come from a party to the action. However plausible this argument may seem, Ex parte Jennings conclusively shows that it is not universally sound. Besides, the witness in this case was an officer and representative of the defendant company, and it is through and by means of him that the plaintiff is here seeking to compel answers to questions and to compel the production of papers which are shown not to be in the possession or control of the witness, except constructively by virtue of his authority as an official of the defendant company. The Common Pleas Court held that the witness was not in contempt for refusing to answer these questions, and in this we think the judgment of that Court was right. . . .

[Had the desired answers been relevant, the notary could enforce them, unless some privilege protected them.] It was held in the Case of Rauh, supra, that a notary public has power to punish a witness for contempt by imprisonment when the witness refuses to obey a subpœna duces tecum directing him to bring with him any book, writing, or other thing under his control, which he may be compelled to produce as evidence.

2. What may he be compelled to produce? And how may he be compelled to produce it?

These questions are clearly answered by sections 5289 to 5293, inclusive, of the Revised Statutes, of 1906. Section 5289 provides that the Court may require the parties to an action "to produce books and writings in their possession or power which contain evidence pertinent to the issues, in cases and under circumstances where they might heretofore have been compelled to produce the same by the ordinary rules of proceeding in chancery." The sections providing for inspections and copies of writings for reference to a master and for action for discovery may be passed over as not material to the present discussion. Section 5289 limits the power to compel the production of books and writings (1) to such as are pertinent to the issue, and (2) to cases and under circumstances where the parties might heretofore have been compelled to produce the same by the ordinary rules of proceeding in chancery. Under these limitations, could the court compel the production of the reports which

were made to this witness under the rules of his company and for the purpose stated?

The rule in chancery as to compelling the production of documents for the purposes of evidence and inspection is generally recognized and clearly defined. It is to the effect that a plaintiff is entitled to a discovery of such facts or documents in the defendant's possession or under his control as are material and necessary to the plaintiff's case, but that this right does not extend to a discovery of the manner in which the defendant's case is to be established, nor to evidence which relates exclusively to the defendant's case. This rule is also applied conversely, to the defendant in an action. Wigram on Discovery, Prop. 3, § 342–347; Combe *v.* Loudon, 4 Y. & C. 139, 155; 6 Ency. Pl. & Prac. 791, 792, 794, 795, 804–806. "It may be added that the principle of a bill of discovery was never considered to be applicable to third persons not parties so as to secure from them before trial a disclosure of possible evidence." 3 Wigmore on Evidence, p. 2427, § 1856. One question here is whether the reports which were sent to the witness and which were by him turned over to the counsel for the corporation relate to the plaintiff's case and are necessary and material in establishing her case. It lies upon the plaintiff to show this, and we think that she has not done so. The efforts of the plaintiff appear to us to be directly toward "fishing" for the nature of the defense and the persons by whom it is to be established, rather than to obtain competent and necessary evidence to sustain the plaintiff's petition.

3. Another question is: Are the reports privileged? The statement of the witness that the reports were made in anticipation of a possible litigation and that they are in possession of counsel for use in the suit which did ensue stands uncontradicted, and must, therefore, be taken as true. This clearly brings the documents within the rule as to privilege; and we see no reason to limit or modify the rule because the defendant is a corporation and obtained its information and made its memoranda for the purpose stated, through the usual agencies of a corporation. 23 Am. & Eng. Ency. Law (2d Ed.) 99, 100, notes 1, 2, and 3; Davenport Co. *v.* Railroad Co., 166 Pa. 480, 31 Atl. 245; Carrol *v.* Railway Co., 82 Ga. 452, 10 S. E. 163, 6 L. R. A. 214; Cully *v.* Railway Co., 35 Wash. 241, 77 Pac. 202. The plaintiff's counsel argue with a great deal of earnestness that they have the right to extort the reports from the defendant for the purpose of using them as admissions against interest. While it does not appear what the reports contain, nor whether they contain any statements which would make against the defendant on the trial, it is certain that the defendant has not made any statement to another which could be used against it; for confidential communications between a principal and his agent are not admissions. In re Devala, 22 Ch. Div., 593.

We are of the opinion that the commitment of the witness for refusal to answer any of the questions which he did refuse to answer, and for refusal to produce the reports was not "lawfully ordered"; and accord-

ingly the judgments of the Circuit Court and the Court of Common Pleas are reversed, and the petitioner discharged.

Shauck, C. J., and Price, Crew, Summers, and Spear, JJ., concur.

500*a*. Meier *v.* Paulus. (1887. 70 Wis. 165, 35 N. W. 301). Taylor, J. — Was it error to refuse to permit the plaintiff to read to the jury the deposition of the defendant taken before the trial in the manner by § 4096, R. S.? It seems to us very clear that the very object of the statute giving a party the right to examine the opposite party, when such examination is made after issue joined in the action, was for the purpose of obtaining evidence in favor of the party seeking the examination and against the party examined. . . . The statute declares that this examination shall in all respects take the place of the old bill of discovery. The very object of the old bill of discovery was to procure evidence against the opposite party, to be used on the trial of an action. . . . The statute undoubtedly goes further than the bill of discovery, and not only allows an examination of the party as to those matters which the party seeking the examination cannot prove by other witnesses or testimony, but it allows an examination as to all the material issues in the action. . . . The examination of a party is in the nature of an admission so far as his answers are material to the issues in the action, and such admissions are always admitted as original evidence against him.

Topic 2. Documents

501. Wm. Tidd. *Practice*. (9th ed., 1828, I, 586). Oyer of deeds, etc., is demandable by the defendant or by the plaintiff. If the plaintiff in his declaration necessarily make a "profert in curia" of any deed, writing, letters of administration, or the like, the defendant may pray oyer of the deed, etc., and must have a copy delivered to him, if demanded, paying for the same at the rate of fourpence per sheet. And a defendant who prays oyer of a deed is entitled to a copy of the attestation and names of the witnesses, as well as of every other part of the deed. So likewise, if the defendant in his plea makes a necessary "profert in curia" of any deed, etc., the plaintiff may pray oyer, and shall have a copy at the like rate. And the party of whom oyer is demanded is bound to carry the deed to the adverse party. . . . Formerly all demands of oyer were made in court, where the deed is by intendment of law when it is pleaded with a profert in curia; and therefore, when oyer is craved, it is supposed to be of the Court, and not of the party; and the words "ei legitur in hæc verba," etc., are the act of the Court. In practice, however, oyer is now usually demanded and granted by the attorneys.

502. BOLTON *v.* LIVERPOOL

Chancery. 1833

1 *Myl. & K.* 88, 91

The plaintiffs, who were merchants and copartners in Liverpool, were defendants in an action, brought by the corporation, for the recovery of

certain dues levied by the corporation upon the traders of that town. The bill was filed for the purpose of obtaining a discovery from the corporation in aid of the plaintiff's defence to the action at law. The bill among other things charged that divers cases had been lately submitted to counsel, for their opinion, touching the right of the corporation to receive the tolls and duties, and from which, if produced, it would appear that the corporation had no such right, and that all such cases were then in the possession or power of the defendants; and it further charged that the defendants had in their possession or power divers charters, grants, deeds, books, accounts, letters, copies of and extracts from letters, cases, written statements, tables or lists of town dues, tolls or duties, bills, informations, pleas, answers, memorandums, papers, and writings, relating to the matters contained in the bill; and by which, if produced, the truth of those matters would appear.

The defendants admitted that they had then, in their possession, certain grants, deeds, documents, and papers, relating to the matters aforesaid, and that they had in the third schedule to their said answer, and which they prayed might be taken as part thereof, set forth a list of such grants, deeds, documents and papers. But the defendants said that many of such grants, deeds, and documents were the title deeds and documents evidencing and showing the title of the corporation to the town and lordship of Liverpool, and to the town dues and customs aforesaid; and that many of such documents and papers were copies of accounts from public offices, and that they had in the said schedule particularized and distinguished which of the said grants, deeds, and documents were the title deeds and documents evidencing the title of the corporation to the town and lordship of Liverpool, and town dues and customs aforesaid, and which of the said documents and papers were copies of accounts from public offices; and the defendants submitted that they ought not to be compelled to produce such grants, deeds, documents, and papers.

A motion was made before the Vice-Chancellor that the plaintiffs and their agents might be at liberty to inspect and take copies of the cases or statements and documents mentioned in the defendants' further answer, and in the second and third schedules thereto. The Vice-Chancellor refused the application, except in so far as it related to certain cases submitted to counsel on the defendants' behalf many years ago, and long before the present legal proceedings were in contemplation. And the motion was now renewed.

Mr. *Pepys* and Mr. *Kindersley*, for the motion; and the Solicitor-General (Sir *W. Horne*), Sir *C. Wetherell*, Sir *E. Sugden*, and Mr. *Duckworth*, against it, followed. . . .

Brougham, L. C. — I take the principle to be this: A party has a right to the production of deeds sustaining his own title affirmatively, but not of those which are not immediately connected with the support of his own title and which form part of his adversary's. He cannot call

for those which, instead of supporting his title, defeat it by entitling his adversary. Those under which both claim he may have, or those under which he alone claims. . . . The plaintiff here does not claim anything positively or affirmatively under the documents in question; he only defends himself against the claims of the corporation, and suggests that the documents evidencing their title may aid his defence. How? By proving his title, he says. But how can those documents prove his title? Only by disclosing some defect in that of the corporation. . . . He rests on the right which he has in common with all mankind to be exempt from dues and customs; and he says, "Prove me liable if you can." The corporation have certain documents which they say prove this liability. He cannot call for these documents merely because they may upon inspection be found not to prove his liability, and so help him and hurt his adversary whose title they are.

The case of the Princess of Wales *v.* Lord Liverpool, 1 Swan., 114, 580, was cited; and it is, perhaps, a strong case. But it is a peculiar one. Lord ELDON at first refused the application, and then granted it in the special circumstances. The instruments were two promissory notes, upon which the suit was brought against executors. Lord ELDON, in delivering judgment upon that case, threw out many observations as to what might appear on an inspection. The notes, he said, might be duplicates; they might have important variations; some question might arise on the stamps, and they might, at any rate, said his lordship, be given up at the hearing; for an indemnity will not do; at least that is questionable. Yet he held all this matter of surmise not to be enough; for he required the defendant to state in what respect the inspection of the notes was material for his defence, and upon affidavits of circumstances impeaching their genuineness, he thought enough appeared to warrant an order that the defendant should not be compelled to answer till he had obtained the inspection. It must be admitted, that there the thing sought, and in substance allowed to be inspected, was not any matter collateral, but the very instrument on which the title of the plaintiff rested, and which could only be the title of the defendant by failing to support that of the plaintiff. His Lordship may have considered the instruments as a sort of title common to both parties; but it could only be so by the one party setting them up, and the other impeaching them on flaws discoverable by inspection. It must, however, be observed that this was a kind of case in which, at law, inspection would have been given.

In this case, therefore, I can, upon the whole, see no reason for coming to a different conclusion from that at which His Honour arrived, when he refused inspection of those parts of the corporation's title, as being theirs, and not the plaintiff's, and not common to both.

503. HENRY BROUGHAM. *Speech on the Courts of Common Law.* (Feb. 7, 1828; Hans. Parl. Deb., 2d ser., § VIII, 188). Whatever brings the parties to

their senses as soon as possible, especially by giving each a clear view of his chance of success or failure, and, above all things, making him well acquainted with his adversary's case at the earliest possible moment, will always be for the interests of justice, of the parties themselves, and indeed, of all but the practitioners. It is the practitioners generally, that determine how the matter shall proceed, and it may be imagined that their own interests are not the last attended to. The seeming interest of two parties disposed to be litigious, in many cases appears to be different from the interests of justice, although their real interest, if strictly examined, will not unfrequently be found to be the same. Now, justice is embarrassed by the disingenuousness of conflicting parties; justice wants the cases of both to be fully and early stated; but both parties take care to inform each other as little as possible, and as late as possible, of their respective merits. One tells as much of his case as he thinks good for the furtherance of his claim, and the frustration of the enemy's — so does the other, only as much of his answer as may help him, without aiding his adversary; and the judge is oftentimes left to guess at the truth in the trick and conflict of the two. The interest of the Court of Justice being to make both parties come out with the whole of their case as early as possible, the law should never lend itself to their concealments. This remark extends to the proof as well as the statement of the case; an intimation of what the evidence is may often stop a cause at once.

In Scotland, the law in this respect is better than ours, for no man can produce a written instrument on trial without having previously shown it to his adversary. For want of this salutary rule I have often seen the most useless litigation protracted for the sole benefit of practitioners. I was myself lately engaged in a cause, the circumstances of which will give the House an idea of the mischief. I was instructed not to show a certain receipt to the opposite party, as my client, the defendant, meant to nonsuit his adversary in great style, as he would call it. Well, the plaintiff, (an executor), stated his case, and called his witnesses to prove the debt. I did not take the trouble to cross-examine, which would have been quite unnecessary. Equally so was it to address the jury. I acknowledged the truth of all that had been sworn on the other side, but added that it was all useless, as I happened to have a receipt for the money, which had been paid to the testator. This, of course, put an end to the case. The sum sought to be recovered did not exceed twenty pounds, and the expenses could not have been less than a hundred.

504. Common Law Practice Commissioners. *Third Report* (1831), p. 45. By law, no profert is required to be made and consequently no oyer can be demanded of any instrument, except private deeds, letters testamentary, and letters of administration. If there are other cases, they are unfrequent and obscure. The following are consequently excluded: records and public writings of whatever description, private writings under seal but not falling within the legal definition of deeds (for example, a sealed will or a sealed award), and private writings not under seal of whatever description; and even of private deeds a numerous class is excepted, viz., such as take effect either by livery of seisin or by operation of the statute of uses. . . . The whole of this practice appears to be too strict, too intricate, too prolix, and in some parts of it obscure and unsettled. It is strongly calculated to give rise to technical difficulty and formal objection, and tends in some other respects also to produce unnecessary delay and expense. The truth is that the law of profert and oyer was originally devised in reference to a state of things that no longer exists; being altogether founded on that method, now for so many ages obsolete, of oral pleading between litigants actually confronting

each other in open Court. . . . The present practice of profert and oyer, though in its present form chargeable with many defects, is in its principle of the highest importance. It is manifestly essential to the interests of justice that a party against whom his own written instrument or the instrument of another person is pleaded should have the means of inspection, and, if necessary, of procuring a copy before he is called upon to answer. . . .

We can see no good reason why, in every case in which profert would be required of a bond or other deed, it should not also be made of any other instrument of whatever description, which is either alleged to be or which may be presumed to be in writing. Such an alteration of the law would prevent the delay, expense, and uncertainty which attends an application to the Court or a judge, and place the whole practice on this subject on a more simple and uniform as well as a more equitable footing.

505. STATUTES. *England.* St. 14 & 15 Vict. 1851, c. 99. § 6 [Upon action pending, any judge may on application by either party] compel the opposing party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same or procure the same to be duly stamped, in all cases in which previous to the passing of this act a discovery might have been obtained by filing a bill or by any other proceeding in a Court of equity.

St. 17 & 18 Vict. 1854, c. 125, § 50. Upon the application of either party to any cause or other civil proceeding in any of the superior Courts upon an affidavit by such party of his belief that any document to the production of which he is entitled for the purpose of discovery or otherwise is in the possession or power of the opposite party, it shall be lawful for the Court or judge to order [that the opponent answer as to such custody and as to the objection if any to production; and then] the Court or judge may make such further order thereon as shall be just.

Illinois. Revised Statutes, 1874, c. 51, § 9. [Courts are empowered] in any action pending before them, upon motion, and good and sufficient cause shown, and reasonable notice thereof given, to require the parties or either of them to produce books or writings in their possession or power which contain evidence pertinent to the issue.

Ib. c. 110, § 20. It shall not be necessary in any pleading to make profert of the instrument alleged; but in any action or defence upon an instrument in writing, whether under seal or not, if the same is not lost or destroyed, the opposite party may have oyer thereof and proceed thereon in the same manner as if profert had been properly made according to the common law.

Kansas. General Statutes, 1897, c. 95, § 380. [Either party may demand of the opponent] an inspection and copy, or permission to take a copy, of a book or paper or document in his possession or under his control containing evidence relating to the merits of the action or defense therein; [the demand to be written and to specify particulars; on refusal within four days, the Court may on motion and notice order such inspection or copy, and on failure to comply with the order, may exclude the document or direct it to be presumed to be as alleged].

Ib. § 381. [Either party, if required, shall deliver to the other] a copy of any deed, instrument or other writing whereon his action or defense is founded or which he intends to offer in evidence at the trial; on refusal, the party's original shall be excluded at the trial.

Massachusetts. Revised Laws, 1902, c. 173, § 6. [Written instruments shall

be declared on, except insurance policies, by setting out a copy or the part relied on, or the legal effect]; if the whole contract is not set out, a copy of the original, as the Court may require, shall be filed upon motion of the defendant, [and the copy may be made a part of the record as if oyer had been granted]; no profert or excuse therefor need be inserted in a declaration.

Ib. § 35. No party shall be required [in his pleading] to state evidence, or to disclose the means by which he intends to prove his cause.

Ib. §§ 57–63. [Interrogatories may be filed, after entry of action or answer, and before a trial on the merits,] for the discovery of facts and documents material to the support or defence of the action, [to be answered on oath by the adverse party]; documents containing matters not pertinent to the subject of the action may be protected from inspection; no party shall be obliged] to disclose his title to any property the title whereof is not material to the trial of the action in the course of which he is interrogated, or to disclose the names of the witnesses by whom or the manner in which he proposes to prove his own case.

United States. St. 1789, c. 20, § 15, Revised Statutes, 1878, c. 12, § 724. [In trials at law, the U. S. Courts may on motion require the parties] to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; [on failure to produce, judgment of nonsuit or default may be given].

506. SWEDISH-AMERICAN TELEPHONE CO. *v.* FIDELITY & CASUALTY CO.

SUPREME COURT OF ILLINOIS. 1904

208 *Ill.* 562; 70 *N. E.* 768

APPEAL from Circuit Court, Cook County; E. F. DUNNE, Judge. Action by the Fidelity & Casualty Company of New York against the Swedish-American Telephone Company and another. From a judgment adjudging the telephone company and its officers and attorney guilty of contempt, they appeal. Affirmed.

This is an appeal from an order, entered by the Circuit Court of Cook county on January 9, 1904, in a certain suit in assumpsit, brought by the appellee against the appellant the Swedish-American Telephone Company, imposing a fine upon said telephone company of $25, and imposing a fine upon the appellant Fayette S. Munro of $1,050, for contempt of court in refusing to comply with an order for the production of the ledger and journal of the telephone company, and all sheets and memoranda, which were a part thereof, showing the entries or memoranda contained therein, "which pertain to money expended as compensation to employés of the said defendant for services rendered during the time covered by the policy of insurance issued by the plaintiff to said defendant, to wit, from the 7th day of June, A.D. 1901, to the 7th day of June, A.D. 1902, inclusive, within 10 days from this date, upon plaintiff giving to the defendant 24 hours' notice, said examination to take place at the office of

defendant's attorney, room 734, 159 La Salle street, Chicago, Illinois," which said order was entered on the 27th day of November, 1903.

The suit in assumpsit was begun on January 6, 1903, by the appellee, the Fidelity & Casualty Company of New York, against the said telephone company. . . . The consideration, stated in the contract of insurance or indemnity, was twofold: First, the sum of $84 as a premium; and, second, a promise by the telephone company to pay an additional premium, to be computed upon a percentage of its pay roll, to wit, a sum of money equal to $\frac{42}{100}$ of 1 per cent. of the total amount that the telephone company should expend during the period covered by the insurance contract for labor and services of its employés employed on its premises in Chicago. The amended or additional count averred that the pay roll at the end of the year June 7, 1902, exceeded the sum of $20,000, etc. . . . It was thereupon, on December 16, 1903, ordered by the Court that the telephone company, its president, secretary, and attorney, should each appear before the Court within three days from that date to show cause why they and each of them should not be attached and be punished for contempt. . . . The objections were overruled by the Court; to which action of the Court the telephone company took exception. . . .

Fayette S. Munro, for appellants. *O. W. Dynes*, for appellee.

MAGRUDER, J. (after stating the facts). The order punishing the appellants herein for contempt of court was made under and in pursuance of section 9 of chapter 51 of the Revised Statutes (Hurd's Rev. St. 1901), in regard to evidence, etc. Section 9 is as follows: "The several Courts shall have power in any action pending before them upon motion, and good and sufficient cause shown, and reasonable notice thereof given, to require the parties, or either of them, to produce books or writings in their possession or power, which contain evidence pertinent to the issue." . . .

Second. The contention of the appellant company is that section 9 of chapter 51, as above quoted, does not confer upon the Circuit Court power to compel the production of documents *prior to the trial* of the case, but should be construed to apply only to the production of documents at the trial of the case. It is also contended by the appellant company that the proper method for a party litigant to obtain evidence pertinent to the issue and in the control of his adversary is by a bill of discovery, or a subpœna duces tecum.

The language of section 9 does not limit the time when books or writings are to be produced to the trial of the cause. On the contrary, the several Courts are given power to require the production of such books or writings "upon motion and good and sufficient cause shown," whether before the trial, for the purpose of preparing for the same, or at the trial, to be used as evidence. The contract of the parties here provides that the appellee shall have the right and opportunity to examine the books of the assured "at all reasonable times." We see no reason why an

examination of the books at a time before the trial, in order to prepare for trial, is not as much an examination at a reasonable time as an examination of the books upon the trial itself. At common law, in an action ex contractu, where the instrument sued upon was in the possession of the defendant, and where the plaintiff was either an actual party or a party in interest, and was refused inspection of the instrument upon request, the Court was authorized to grant a rule on the defendant to produce the documents, or give the plaintiff a copy, when the production was necessary to enable him to declare against the defendant. 1 Greenleaf on Evidence (15th Ed.) § 559. In the case at bar, from the very nature of the contract between the parties, the only method by which the amount due to the plaintiff below could be ascertained was by an examination of the defendant's books, and the parties, in view of this situation, have expressly agreed that the plaintiff should be entitled to such examination. Without that examination the appellee would not be able to set up in its declaration the amount of premium due to it, because such amount is dependent upon the amount paid as compensation to the employés of the telephone company. There may be expressions in the case of Lester *v.* People, supra, which limit the production of the books of the opposite party to the trial of the cause; but a careful examination of the language in that case will show that it was not intended to make such limitation, provided a proper showing was made that the books contained entries tending to prove the issues.

Nor do we think that it was necessary to file a bill of discovery in order to secure an examination of the books. In Lester *v.* People, supra, it was said in reference to section 9 above quoted, as follows: "The evident purpose and design of this statute was to furnish to a party litigant a speedy and summary mode by which, under the order of the Court, to obtain written evidence, pertinent to the issue, which might be in the possession and control of his adversary, and thus obviate the necessity of a bill of discovery, seeking the same end." . . . Section 9 was intended in actions at law to be a substitute for the bill of discovery. The order provided for in that section may be made "in any action pending before them" (the courts). The words, "in any action pending before them," exclude the idea that the evidence sought to be obtained can only be acquired by a bill of discovery. "Any action" includes a suit at law as well as a bill in chancery. . . . The judgment of the circuit court of Cook county is affirmed. Judgment affirmed.

507. REYNOLDS *v.* BURGESS SULPHITE FIBRE CO.

SUPREME COURT OF NEW HAMPSHIRE. 1902

71 *N. H.* 332; 51 *Atl.* 1075

ACTION by Elizabeth Reynolds, administratrix, against the Burgess Sulphite Fibre Company. . . . Bill in equity. The bill alleges that the

plaintiff has commenced an action at law against the defendants to recover damages for negligently causing the death of the plaintiff's intestate by furnishing him for use in his employment improper, unsuitable, and dangerous machinery; that on April 9, 1899, while the intestate was in the employ of the defendants, he was killed by falling against the governor of an engine; that the engine gave indications, by an unusual noise, that it was in a defective condition, and, shortly afterward the strap on its connecting rod broke, and caused the connecting rod to break through the outer casing with a loud crash, and thereby caused the intestate's fatal fall; that the broken pieces of the strap are in the defendants' possession; that, to properly prepare the plaintiff's action at law for trial, it is necessary that these pieces should be examined by the plaintiff's attorneys, and also by competent persons, with a view of testifying; and that the defendants, though requested, have refused to permit such examination. The prayer is for a discovery of the pieces of the broken strap, and for an inspection of the same by the plaintiff's attorneys and such other persons as she may desire. The defendants filed a demurrer, which was sustained pro forma, subject to the plaintiff's exception.

Crawford D. Hening, for the plaintiff. *Chamberlin & Rich* and *Orville D. Baker* (of Maine), for the defendants.

Chase, J. — Whatever may have been the fact prior to 1842 (Laws 1832, c. 89, s. 9; Dover *v.* Portsmouth Bridge, 17 N. H. 200), there can be no doubt that, ever since that date, courts of this State have possessed full equity powers in respect to discovery. R. S., c. 171, s. 6; G. S. c. 190, s. 1; G. L. c. 209, s. 1; P. S. c. 205, s. 1. . . . It is necessary to have in mind the origin, purpose, and general nature of this remedy.

"The common law laid down as a maxim, 'Nemo tenetur armare adversarium suum contra se'; in furtherance of which principle it generally allowed litigant parties to conceal from each other, up to the time of trial, the evidence on which they meant to rely, and would not compel either of them to supply the other with any evidence, parol or otherwise, to assist him in the conduct of his cause." Best, Evidence, s. 624; 1 Greenleaf, Evidence, s. 329. A different rule grew up in equity. . . . Unless the equitable remedy of discovery has been superseded by the provision of some plain, adequate, and complete remedy at law, or is not applicable to a case of tort like that alleged in the plaintiff's action at law, — points that are hereinafter considered, — it is certain that the defendants, through their officers and agents, might be compelled in a suit like the present one to discover the form in which the strap was constructed, the character of the workmanship by which and the materials from which it was made; in short, all the facts within their knowledge, information, or belief tending to show that it was defective. If they had in their possession a plan of the strap or of the broken pieces, they might be compelled to produce it for examination by the plaintiff. Why, then, may they not be compelled to produce the broken pieces themselves?

Two reasons are suggested: One — positive, and, if well founded,

substantial — that the defendants' right to possess and control the property, growing out of their ownership of it, cannot be infringed in this way; and the other — negative, and not applying to the merits of the question — that there is no precedent for a discovery and inspection of such property.

(1) The defendants say that this case is not within this equitable jurisdiction, because the discovery and inspection sought is of articles of personal property belonging to them, in which the plaintiff has no right of property or possession. The gist of the action at law, in aid of which this suit was brought, is the negligence of the defendants in furnishing the plaintiff's intestate, their employee, with improper, unsuitable, and dangerous machinery for use in his employment. It is a necessary inference from the allegations of the bill that the "improper, unsuitable, and dangerous" element in the machinery existed in the strap on the connecting rod of the engine. This broke and, it is alleged, caused the intestate's death. The alleged unsuitableness of the strap may be due to inadequacy of size, error in form, imperfection in construction, or inferiority of the materials from which it was made. An inspection of the fragments will evidently aid in determining whether there was one or more of these defects in it, and if so, which. . . . The bill alleges that the plaintiff cannot properly prepare her action at law for trial without an inspection and examination of them. By reason of the demurrer, this allegation must be taken as true.

It must be admitted that the defendants' right of property in the broken strap will be interfered with to some extent if they are required to produce it, and allow the plaintiff and others to examine it. But such interference will not differ in kind or degree from that which occurs when a party is required to produce his letters, deeds, plans, other documents, or books for inspection. The rights of the defendants arising from the ownership of the strap are no more sacred than would be their rights arising from the ownership of a plan of the strap, if they had one. The infringement of property rights in such cases is justified upon the ground that it is necessary to the administration of justice. Such necessity is alleged by the plaintiff and admitted by the defendants. It is apparent that an examination of the strap will afford a better means of ascertaining the truth in respect to its suitableness or unsuitableness for the office it was to perform than any possible description or plan of it could afford, and the necessity for an inspection of it is correspondingly greater than the necessity for an oral description or a plan. . . .

(2) The defendants' second objection is because the discovery and inspection are sought for the purpose of having the broken strap examined by persons with a view of enabling them to testify as experts in the action at law. This objection must also be overruled. It is evident that expert testimony may be competent upon the issue to be tried, whether it relate to the form of the strap, the manner of its construction, or the character of the materials from which it was made. The defendants

have ample opportunity to procure such testimony. Justice requires that the plaintiff shall also have an opportunity to have the strap examined by persons in whose skill and scientific knowledge she has confidence. There cannot be a fair trial of the case unless such opportunity is given to the plaintiff. Indeed, it may be that she cannot establish her right — if she have one — without having the opportunity. . . .

(3) The defendants place much reliance upon their third point, viz., that the equitable remedy for discovery cannot be invoked in aid of an action at law for a personal tort. They do not question, and, in view of the authorities, cannot question, the proposition that discovery may be had in aid of actions of tort relating to property, such as trover, detinue, trespass, waste, etc. But they say that a defendant cannot be called upon to implicate himself directly or indirectly in a personal tort, because it would tend to show moral turpitude, and so is inconsistent with principles of natural justice. . . . If the absence of authorities is entitled to any weight, it is, under the circumstances, very slight. Cases for personal torts arising from the action of the defendant, — wilful torts, so to speak, — in which the defendant could make discovery without incriminating himself, must, from the nature of the case, be very rare. It is possible that there have been none excepting Macaulay *v.* Shackell, and cases of like nature that have been decided in accordance therewith without again raising the question. Cases for negligence were not common prior to the middle of the last century. The use of steam and electricity, and the commercial activity consequent thereon, have immensely multiplied cases of this kind. Lord Campbell's act for giving compensation to the families of persons killed by the negligence of others was enacted in 1846. Eight years later a procedure bill was passed, largely through the agency of Lord Campbell (17 & 18 Vict. c. 125), by which, among other things, it was provided that either party to a civil action in the superior courts shall be at liberty to apply to the Court or judge for a rule or order for the inspection by the jury, or by himself, or by his witnesses of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute." . . . In passing, it may be remarked that if the act and the reason of its enactment do not show that its author understood that courts of equity had jurisdiction to order an inspection of real or personal property when such inspection was material to the proper determination of an issue, it certainly shows that he felt there was a necessity for such inspection in the administration of justice. The act relieved parties from the necessity of resorting to equity for discovery, and reasonably accounts for the absence, in England, of bill of discovery in aid of actions at law for negligence since that time. . . . If Macaulay *v.* Shackell and Wilmot *v.* Maccabe, 4 Sim. 263, are not authorities in favor of the maintenance of the plaintiff's bill, the general principles governing the remedy of discovery certainly justify its maintenance. The case may be a new

case in specie, so far as discovery is concerned, but it belongs to a class to which the remedy of discovery is applicable.

(4) It has been suggested that this is a "fishing bill," and should be dismissed for that reason. The plaintiff is not endeavoring to ascertain what defence the defendants contemplate making, nor facts that exclusively relate to the defendants' case, but is seeking discovery of facts that will enable her to prove her case. It is not a fishing bill.

(5) The defendants further say that the statutes of the State removing the disability of parties as witnesses (P. S., c. 224, s. 13), authorizing the taking of depositions before trial (P. S., c. 225), and giving the court authority to order a view at the trial (P. S., c. 227, s. 19), furnish a full, complete, and adequate remedy at law for obtaining the testimony which the plaintiff seeks, and so ousts the court of its equitable jurisdiction. If these statutes have such effect in cases where the testimony sought may be obtained under them, which is doubtful, . . . it does not appear that the plaintiff could obtain by virtue of them an inspection of the broken strap prior to the trial. . . .

Exception sustained. All concurred.

TITLE V. SYNTHETIC RULES

509. Introductory. The various Quantitative or Synthetic rules[1] may best be classified for practical purposes under four heads; the first and second concern testimonial evidence only; the third concerns all kinds of evidence whatsoever, as well as all material forming a part of the issue itself; the fourth concerns circumstantial evidence only.

I. First, there are rules as to the Number of Witnesses required; the question throughout being whether a single witness is in certain situations sufficient, and if not, what other evidence will suffice therewith.

II. Secondly, there are rules as to the Kind of Witness required; the question here being whether for certain issues a certain kind of witness must always be present among the general mass of evidence; practically, the only kind of necessary witness recognized in our law is the eye-witness.

III. Thirdly, there is a rule of Verbal Completeness, *i.e.* that the whole of a document or of an oral utterance must be offered, in order that any part of it may be received.

IV. Fourthly, in the Authentication of documents (*i.e.* proving their genuineness, or due execution), there are rules which declare certain kinds of circumstantial evidence to be insufficient or necessary.

SUB-TITLE I. NUMBER OF WITNESSES REQUIRED

510. History.[2] It is well known that in the civil law of Continental Europe, the great rival of the English common law, its process of proof rested fundamentally on a *numerical* or *quantitative* system. By that system, a single witness to a fact was in general not sufficient; specific numbers of witnesses were in certain cases required; and in some regions, and for some purposes, the weight to be given to each witness' testimony was measured and represented in numerical values, even by counting halves and quarters of a witness; and this system continued in force down to comparatively recent times. In the English common-law institution of jury trial, on the other hand, it was completely otherwise. At common law, there was but a single instance, and that a borrowed and modern one, of almost accidental and of anomalous origin (the rule in perjury), in which a numerical rule existed; what little else there is to-day of that sort has come into our system either by express statutes (all but one dating since 1800), or by the filtration of civil-law rules through the Court of Chancery, or by local judicial invention. The reason of this contrast, and of our successful resistance to the civil-law rules, and the causes of our freedom from a principle of evidence now generally acknowledged to be unsound and deleterious, form a history worth examining.

(1) It has been doubted whether the Roman law in its prime (that is, before 300 A.D.) proceeded upon a numerical system in its treatment of witnesses. But it is clear that by the time of the Emperor Constantine, and also in the later codifi-

[1] Defined *ante*, in No. 2.

[2] Abridged from the present Compiler's "Treatise on Evidence" (1905), Vol. III, § 2032.

cation of the Emperor Justinian, which served as a sufficient foundation for the Continental civil law, the Roman law had adopted the general rule that one witness alone was insufficient upon any material point. This rule later came to be adopted in the Continental civil law, founded in part on the Roman law. But, long before this, it had become a part of the canon or ecclesiastical law, which for much of its material was accustomed to draw upon the Roman law. The ecclesiastical law developed the numerical principle freely, and elaborated many specific rules as to the number of witnesses necessary in various situations; against a cardinal, for example, twelve or perhaps forty-four witnesses were required. It is enough to note that its general and fundamental rule was that a single witness was in no case sufficient. In the Church's system, however, this rule received an additional sanction, over and above the mere precedent of Roman law, from the law of God as revealed in Holy Writ; for passages in the Bible, both in Old and New Testaments, were confidently appealed to as justifying and requiring this rule by Divine command; and this sanction sufficed to give to the numerical system of the ecclesiastical law an overbearing momentum and a sacred orthodoxy which must be considered in order to appreciate the force against which in due time the common-law judges had to struggle.[1]

The truth was, however, that at this time of the Papal Decretals, and even after the end of the Middle Ages, the rule precisely accorded with the testimonial notions of the time. It was not, in its spirit, an invention of the ecclesiastical lawyers, nor yet a mere continuance of Roman precedent; it was a natural reflection of the fixed popular probative notions of the time, — notions which prevailed as well in the sturdy, self-centred island of England as on the Continent at large. The prevalence and meaning of this underlying notion must now be examined.

(2) Civilization, needless to say, almost began over again with the invasion and settlement of southern and western Europe by the Gothic hordes in the 400s and 500s. Primitive notions prevailed once more, and the slow process of development had to be repeated, — repeated for the law as well as for other departments of life. Much Roman law remained in the South, and a large body of it was received in a mass in Germany in the 1500s; but this affected chiefly specific rules; the popular and general instinctive legal notions had to grow once more out of primitive into advanced forms.

Now one of the universal and marked primitive notions is that of the oath as a formal act, mechanically and *ipso facto* efficacious (like the ordeal and the trial by battle), and quantitative in its nature. This notion is merely one particular phase of the entire system of formalism inherent in the stage of intellectual development at which our Germanic ancestors were in that epoch. It is a matter of the whole spirit of the times, not of a particular or local belief.

> Professor *Andreas Heusler*, "Institutions of Germanic Private Law," (1885) I, 45, 49, 52: ". . . By 'legal formalism' I mean that condition of legal thought in which the sensibly perceivable is accepted as the only or at least the dominant element producing legal effects, and the inward circumstances of a spiritual sort — dispositions, volitions, purposes, and the like — are excluded or forced into the background. In this larger sense the term 'formalism' is ordinarily not taken; we are apt rather by that term to mean

[1] For an account of the quantitative system of so-called "legal proofs" on the Continent, see *Esmein's* "History of Continental Criminal Procedure" (1913. Continental Legal History Series; Little, Brown & Co.).

merely the notion that transactions which are to have legal significance must have a prescribed form, *i.e.* a certain mode of utterance or action which is alien to the speech or doing of ordinary life. This external aspect of 'formalism' is, however, only the half of that which I here include by that name; the other half is what may be called the inward formalism, and it consists in this, that the substantial effect, the intrinsic value of the incidents of legal life, is estimated by (as it were) stencils fixed by law. Thus, for example, we contrast the formal and the rational theory of proof, and under the former we class the rule that for full proof a single witness does not suffice, but that two credible witnesses are necessary. Where lies the formalism here? This rule has nothing to do with 'form' in the narrow sense noted above; the real element of formalism in it is that (by reason of long experience with the untrustworthiness of witnesses) a rule of thumb has been made, which denies to the judge his free discretion in the estimation of testimony and lays down a fixed law, not trusting to the often deceptive valuation of each man's credibility, character, and the like, but finding its security in the external mark of numbers."

The oath, then, in the Germanic epoch is but a single product of the pervading formalistic conception of procedure and of proof. All through the Saxon and Norman times, the oath is a verbal formula, which, if successfully performed without immediate disaster, is conceded to be efficacious *per se*, and irrespective of personal credit. It follows, too, since the performance of this act is in itself efficacious, that the multiple performance of it, if persons can be obtained who will achieve this, must multiply its probative value proportionately. This numerical conception is inherent in the general formalism of it. Thus, again, all through these times, the oath is for greater causes sworn by greater numbers, sometimes six-handed, or twelve-handed, or twenty-four-handed; that is, a degree of greater certainty is thought to be attained, not by analyzing the significance of each oath in itself and relatively to the person, but by increasing the number of the oaths. An oath was *one* oath; and though as between persons of inferior and superior rank certain differences were sometimes recognized, yet in general and between persons of the same rank one oath was equal to any other oath, with no distinctions based on their testimonial equipment for the case in hand. In short, whatever varieties of probative situations present themselves, the only expedient that suggests itself seems to be some change in the number of oaths.

Little by little, to be sure, a newer idea develops. Numerous oaths may be required to overcome certain strong masses of (what we should now call) presumptive evidence. The classes of cases in which oaths are allowed operative force *per se* are diminished. Most important of all, witnesses may be examined briefly before being allowed to take the oath, and witnesses showing a total lack of knowledge may not be allowed to swear; and of a piece with this comes the separate examination of witnesses swearing on the same side, for a conflict in their stories when separately examined resulted in discrediting their oaths. But these steps of progress in popular conceptions of the nature of proof are only slow and gradual, — much more so than one might suppose. The merely superstitious and extreme notion of a witness' oath dies out; but the mechanical, quantitative, formal conception persists for many centuries:

Professor *J. B. Thayer*, "Preliminary Treatise on Evidence," 23: "We read [in a case of *cui in vita*, in 1308], that they were at issue *issint eesti qui mieulx*

prove mieulx ay, and the tenant proves by sixteen men, etc., and the demandant by twelve; and because the tenant's proof '*fuit greindr* than the demandant's, it was awarded,' etc. If we take Fitzherbert's account to be accurate, it might appear that the twelve men on each side cancelled each other and left a total of four to the credit of the tenant, a result which left his proof the better."

It is surprising to us to-day to note how long this conception of the oath (*i.e.* of a single testimonial assertion) persisted. As a popular notion and instinctive mental attitude it was still in almost full force in the 1500s, at the time when the conflict of the common law and the ecclesiastical system came upon the stage. Even to-day, among juries in some places, there is no doubt a mere counting of oaths or witnesses. This trait has been very well phrased by Sir James Stephen:

Sir *James Stephen*, "History of the Criminal Law," I, 400: "The opinion of the time [before 1700] seems to have been that, if a man came and swore to anything whatever, he ought to be believed, unless he was directly contradicted. . . . The juries seem to have thought (as they very often still think) that a direct unqualified oath by an eye- or ear-witness has, so to speak, a mechanical value and must be believed unless it is distinctly contradicted. . . . If the Court regarded a man as a 'good' (*i.e.* a competent) 'witness,' the jury seem to have believed him as a matter of course, unless he was contradicted; though there are a few exceptions. . . . The most remarkable illustration of these remarks is to be found in the trial of the five Jesuits. . . . [Chief Justice Scroggs says:] 'Mr. Fenwick says to all this, "Here is nothing against us but talking and swearing." But, for that, he hath been told (if it were possible for him to learn) that all testimony is but talking and swearing; for all things, all men's lives and fortunes, are determined by an oath, and an oath is by talking, by kissing the Book, and calling God to witness to the truth of what is said.' . . . Scroggs was right as to what it [the practice of juries] actually was, and to a certain extent still is. It is true that juries do attach extraordinary importance to the dead weight of an oath."

(3) There was, therefore (and this is at once the sum of the foregoing and the key to the ensuing history), in the English common-law Courts of the 1500s, nothing at all of repugnance to the numerical system already fully accepted in the ecclesiastical law. The same popular probative notion there prevailed among judges, juries, and counsellors as on the Continent. They were equally prepared and accustomed to weigh testimonies by numbers, and therefore would see nothing fallacious in a rule declaring one witness not enough, and requiring specified numbers of witnesses. And this adoption was in fact frequently demanded of the common-law Courts. The conflict between the ecclesiastical and the common-law Courts was at its last and perhaps its crucial stage, — a conflict important in other respects to the rules of evidence. The methods of the ecclesiastical Courts were forming those of the Courts of chancery and of admiralty; the ecclesiastical lawyers were a distinguished and powerful body; their influence was notably felt in politics and in political trials; and there was no way of yet knowing whether their system and not the common-law system might ultimately preponderate in the shaping of English jurisprudence.[1] The attempt was now repeatedly

[1] See *Professor F. W. Maitland's* enlightening essay, "English Law and the Renaissance" (1901, reprinted in "Select Essays in Anglo-American Legal History," Vol. I).

made to fix upon jury trials at common law the fundamental rule of the ecclesiastical law, and it is apparent, from the utterances recorded as late as the early 1600s, that there was no certainty that the attempt would not succeed.

(4) But the attempt failed, — and failed absolutely. After the middle of the 1600s there never was any doubt that the common law of England in jury trials rejected entirely the numerical system of counting witnesses and of requiring specific numbers. The only exception to this — the case of perjury — "proves the rule," because it was not established until the early 1700s, when the rejection of the numerical system had been already definitely accomplished.

(5) What, then, was the reason why the common-law Court, in their system of evidence for jury trials, declined to number witnesses like the ecclesiastical Court, and to lay down the rule that a single witness was insufficient? Briefly, the different nature of the tribunal. The situation which would call for such a rule simply did not exist for the common-law judge. The case of having merely one witness could not arise; for the jurymen were already witnesses to themselves, as well as triers. It is unnecessary here to do more than recall that vital circumstance which has in so many ways affected the history of our rules of evidence, namely, that the jury, until at least the early 1700s, were in legal theory entitled to avail themselves of information contributed personally by themselves and obtained independently of the witnesses produced in Court; and that during the 1500s and 1600s this joint quality of witnesses and jurors still obtained practically for a more or less considerable part of their evidential material.[1] The situation was, therefore, radically different for the common-law judge and the ecclesiastical judge. The former need not and could not measure the witnesses that appeared before him. He could not declare one insufficient and two or more necessary, for this was not all the evidence. There was always, besides the witnesses produced in Court, an indefinite and supplementary quantity of evidence existing in the breasts of the jurors. There were (as Fortescue says) twelve other witnesses besides the one produced before the bar; and, as to the extent of the evidential contribution of these others, the judge did not know and had no right to know what it amounted to. It was therefore impossible and preposterous for him to attempt to declare insufficient and to reject the one or more witnesses produced in Court. The jury might still go out and find a verdict upon no witnesses (of the ordinary kind) at all. Judicial rules of number would thus be wholly vain and out of place. Such was the logical and necessary answer to any attempt to introduce the numerical system in jury trials.

(6) There did come into our law, however, sooner or later, a few specific rules of the numerical sort; all of them being of the simple type that declares a single witness insufficient and requires additionally either a second witness or corroborating circumstances. Some of these — namely, the Chancery rule requiring two witnesses to overcome a denial on oath, the rule requiring two witnesses to a will of personalty, and the rule requiring two witnesses to a cause for divorce — existed only in the practice of the ecclesiastical Courts or that of chancery founded upon it; and wherever they came over into American common-law Courts, they were direct borrowings. Others, namely, the rule requiring an accomplice or a complainant in rape, or the like, to be corroborated, are either express statutory inventions or plain judicial creations; in either case modern innovations, as well as local in the United States, and not a part of the inherited common law. There

[1] *Thayer*, "Preliminary Treatise on Evidence," pp. 137–170; and see *ante*, No. 1, in the present volume.

remain two specific rules — the rule in treason and the rule in perjury — which do come down to us as inheritances; though these also are in strictness not common-law rules, the one being statutory in origin, and the other an indirect grafting from the ecclesiastical law.

(7) For the policy of a numerical, or of any quantitative system nobody at the present day finds anything to be said. The probative value of a witness' assertion is utterly incapable of being measured by arithmetic. All the considerations which operate to discredit testimony affect it in such varying ways for different witnesses that the net trustworthiness of each one's testimony is not to be estimated, either in itself or in reference to others' testimony, by any uniform numerical standard. The personal element behind the assertion is the vital one, and is too multifarious to be measured by rule. "Testimony," as Boyle well said, "is like the shot of a long-bow, which owes its efficacy to the force of the shooter; argument [*i.e.* circumstantial inference] is like the shot of a cross-bow, equally forcible whether discharged by a giant or a dwarf." The cross-bow notion of testimony — the notion that one shot is as forceful as any other shot — can find no defenders to-day.

511. INDIANAPOLIS STREET R. CO. *v.* JOHNSON

SUPREME COURT OF INDIANA. 1904

163 *Ind.* 518; 72 *N. E.* 571

FROM Boone Circuit Court; SAMUEL R. ARTMAN, Judge.

Action by Mary E. Johnson against the Indianapolis Street Railway Company for damages for personal injuries. From a judgment on a verdict for $3,125, the defendant appeals. Transferred from the Appellate Court under § 1337u, Burns 1901. Affirmed.

F. Winter, S. M. Ralston, and *W. H. Latta,* for appellant. *W. J. Beckett,* for appellee.

JORDAN, J. . . . The Court gave to the jury what apparently is a carefully prepared charge, but certain parts thereof are criticized by counsel for appellant. By the third instruction the jury was advised that, in order to entitle the plaintiff to recover, she must prove by a preponderance of all of the evidence all the material allegations contained in the complaint. Immediately following this statement, the Court, in the same instruction, stated to the jury that "*the preponderance of evidence does not depend upon the number of witnesses, and does not mean the greater number of witnesses. It does depend upon the weight of the evidence, and means the greater weight of the evidence.*" (Our italics.)

Appellant criticizes that part italicized, for the reason asserted that it does not state the law correctly, and was an invasion of the province of the jury. They assert that where the witnesses are equally credible in respect to their character, the preponderance of the evidence does depend upon the number of witnesses, and that the preponderance thereof is necessarily determined by the greater number of witnesses.

As a general rule, the preponderance of the evidence in a case does not

depend upon or mean the greater number of witnesses testifying upon the matter or matters in issue. Counsel mistake the law in their contention that where the witnesses in a case are equally credible in respect to their character, then, in such case, the preponderance of the evidence depends upon the number of witnesses testifying. This certainly is not the true test in any case. Any number of witnesses may be of equal credibility and possess equal information, and still differ greatly in the amount or weight of their evidence. The authorities generally affirm that the number of witnesses are not to be counted by the jury or Court trying the case in order to determine upon which side is the preponderance, but the evidence given by them is to be weighed, and the preponderance thereof does not depend on the greater number of the witnesses in the particular case. Wray *v.* Tindall (1874), 45 Ind. 517; . . . Village of North Alton *v.* Dorsett (1895), 59 Ill. App. 612; Bishop *v.* Busse (1873), 69 Ill. 402. . . . The instruction in question is not open to the objections urged by counsel for appellant. . . .

We find no available error, and the judgment is therefore affirmed.

512. Summary. The common law, then, in repudiating the numerical system, lays down three general principles:

(*a*) In general, the testimony of a *single witness*, no matter what the issue or who the person, *may legally suffice as evidence upon which the jury may found a verdict.*

(*b*) Conversely, the *mere assertion of any witness* does not of itself need to be believed, *even though he is unimpeached* in any manner; because to require such belief would be to give a quantitative and impersonal measure to testimony:

(*c*) As a corollary of the first proposition, *all rules requiring two witnesses*, or declaring *one witness insufficient without corroboration*, are exceptions to the general principle.

There are several such exceptions. But they are connected by no system; they depend in part on local statutes or decisions, and no one of them is extensive or complicated enough to merit scientific study. It is here neither feasible nor profitable to take them up. A brief enumeration of the chief ones will suffice. They may be classified according to whether they apply (*a*) to a certain *issue* (*i.e.* to any witness on that issue), or (*b*) to a certain *kind of witness* (*i.e.* to that kind of person on any issue).

A. *Issues.* 1. In *treason*, one witness alone is not sufficient; there must be two witnesses testifying to the same overt act.

2. In *perjury*, one witness to the falsity is not sufficient; his testimony must be corroborated.

3. In *sundry crimes*, by local statutes, one witness alone is not sufficient; he must be corroborated.

4. In *chancery* cases, where the allegations of the bill are denied, one witness alone is not sufficient to sustain them; this leads into several complicating details.

5. In *testamentary* cases one witness to the execution is not sufficient; statutes prescribe two or three. In Pennsylvania, following the English ecclesiastical rule, these may be any competent persons. Elsewhere, they must be attesting witnesses; this rule has been examined *ante*, Nos. 351–358. — For a nuncupative

will, a specific number is everywhere prescribed. For a revocation or alteration statutes sometimes prescribe a specific number. — For the contents of a last will, similar rules are found.

B. *Persons.* 1. An *accomplice's* testimony alone is not sufficient, in most jurisdictions; it must be corroborated by additional evidence.

2. A *woman-complainant's* testimony, in rape, seduction, bastardy, breach of marriage-promise, etc., is not sufficient, in many jurisdictions; there must be corroborating evidence.

3. *Sundry kinds of persons'* testimony, in various jurisdictions, is not sufficient without corroboration.

4. The *confession* of a *respondent in divorce* is not sufficient, without corroboration.

5. The extra judicial *confession* of an *accused* in a *criminal case* is not sufficient, without corroboration, in most jurisdictions.

SUB-TITLE II. KINDS OF WITNESSES REQUIRED

513. Introductory. The distinction between the preceding sort of Quantitative rules and the present sort is that those require a specified *number* of witnesses, while these require a specified *kind* of witness. For example, a rule requiring that among the evidence of a certain fact there should always be the testimony of a white person, or the testimony of a male person, or the testimony of a military officer, or the testimony of a citizen, would be a rule of the present sort.

In fact, however, rules of this sort are almost wholly lacking in our law. They rest upon the assumption that, no matter how strong and complete the remainder of the evidence may be, a particular kind of testimony will always be, for the subject in hand, relatively so valuable that it should be indispensably required in every case whatever. There has been practically no attempt to establish such a rule except for one class of testimony, namely, *eye-witnesses*, or, more loosely, *direct* testimony. Even for that class, there is to-day no universally accepted rule making an eye-witness indispensable. This type of rule is opposed to the genius and traditions of the common law.

There are three supposed rules of this sort: (1) The rule that all *eye-witnesses* of a *crime* must be produced and used by the prosecution; (2) The rule that the "corpus delicti" of a *crime* must be evidenced by *direct testimony:* (3) The rule that a *marriage by informal consent* must be evidenced by an *eye-witness;* this last rule has such relations to the substantive law that space does not suffice to examine it here.

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514. Rex *v.* Simmonds. (1823. 1 C. & P. 84. Larceny). Hullock, B.—Though the counsel for the prosecution is not bound to call every witness whose name is on the back of the indictment, it is usual for him to do so; and if he does not, I, as the judge, will call the witness, that the prisoner's counsel may have an opportunity of cross-examining him.

515. STATE *v.* BARRETT

Supreme Court of Oregon. 1898

33 *Or.* 194; 54 *Pac.* 807

From Multnomah; Melvin C. George, Judge.

George Barrett was convicted of manslaughter and appeals. Reversed.

For appellant there was a brief and an oral argument by Mr. *Wilson T. Hume.*

For the State there was a brief and an oral argument by Messrs. *Cicero M. Idleman*, Attorney-General, *Russell E. Sewall*, District Attorney, and *Roscoe R. Giltner*, Deputy District Attorney.

Mr. Justice Bean delivered the opinion.

The defendant was convicted of the crime of manslaughter, for shoot-

ing and killing one Williams in a saloon conducted by himself and one Levison, and brings this appeal to reverse the judgment. . . .

1. . . For this reason the judgment of the Court below must be reversed, and a new trial ordered. But as there are other questions in the case, which may arise on another trial, it is thought proper to notice them briefly at this time.

2. The district attorney having closed the case for the State without calling any of the persons who were in the saloon at the time of the homicide, on the ground that they were the associates and employés of the defendant, and in his opinion their testimony would be unworthy of belief, although one of them was then in custody in default of an undertaking to appear and testify on behalf of the State at the trial, and another was on bail for that purpose, the defendant's counsel moved the Court to require such persons to be called as witnesses for the State. The Court declined to do so, and the defendant excepted. The parties referred to were then called by the defense, and testified, and the ruling of the Court in not compelling the State to produce them on the stand is assigned as error.

" There is a diversity of judicial opinion as to whether, in a criminal case, the prosecuting officer is compelled to call as witnesses all the persons present at the commission of the alleged crime. There are some early English cases which seem to lay down the rule with more or less distinctness to that effect. Reg. *v.* Holden, 8 Car. & P. 606; Reg. *v.* Chapman, 8 Car. & P. 558; Reg. *v.* Stroner, 1 Car. & K. 650; Roscoe, Criminal Evidence, 139. And in this country it is the rule, in Michigan and Montana, that the prosecuting officer is bound to show the res gestae, or entire transaction, by calling all the obtainable witnesses present at the time, unless it appears that the testimony of those not called would be merely cumulative: People *v.* Germaine, 101 Mich. 485; Territory *v.* Hanna, 5 Mont. 248; State *v.* Metcalf, 17 Mont. 417. But this doctrine is denied and repudiated, and we think rightfully, by a great majority of the Courts in which the question has come up for adjudication: State *v.* Martin, 2 Ired. 101; Selph *v.* State, 22 Fla. 537; State *v.* Eaton, 75 Mo. 587, 593; Bozeman *v.* State, 34 Tex. Cr. R. 503; Kidwell *v.* State, 35 Tex. Cr. R. 264; Williford *v.* State, 36 Tex. Cr. R. 414; Morrow *v.* State, 57 Miss. 836; Carlisle *v.* State, 73 Miss. 387; State *v.* Cain, 20 W. Va. 679.

. . . It probably came into use in England at a time when the right of a defendant in a criminal case to be represented by counsel, or to have witnesses appear and testify in his behalf, was either denied entirely, or very much abridged. Under such circumstances, it was, of course, important that the prosecution be compelled to prove the entire transaction, and to call all the witnesses present at the time, whether they would testify for or against the defendant. But these restrictions upon the rights of a defendant do not, and never did, exist in this country. Here the right of the accused to appear by counsel, and to have com-

pulsory process for obtaining witnesses in his favor, is everywhere recognized, and generally guaranteed by the fundamental law. There is therefore no necessity for requiring the State to call all the persons who were present when the offense was committed, or any particular number of them. The rights of the defendant are not in any way abridged by a failure to do so. He has the assistance and advice of counsel selected by himself, if able to employ one, and, if not, appointed by the Court, and compulsory process for obtaining witnesses at the public expense. In addition to this, the State is bound to make out its case beyond a reasonable doubt; and if the prosecuting officer does not call sufficient witnesses for that purpose, or if any unfavorable inference can be drawn from his failure to call any witness, the defendant is not likely to suffer by the omission; and if he calls only such witnesses as are favorable to the State, the defendant has a right to call any others which he may suppose will relate the facts favorable to him.

It does not seem to us, therefore, that the State should be compelled to call and vouch for a witness, even though it be evident that he knows all about the facts, when the prosecuting officer, acting in good faith, and under his official oath, is of the opinion that he will, by false swearing, or by the concealment of material facts, attempt to establish the innocence of the accused. . . .

The judgment of the Court below is reversed, and the cause remanded for a new trial. Reversed.

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516. *Sir* Matthew Hale. *Pleas of the Crown.* (*ante* 1680. II, 290). I would never convict any person for stealing the goods "cujusdam ignoti" merely because he would not give an account how he came by them, unless there was due proof made that felony was committed of these goods. I would never convict any person of murder or manslaughter, unless the fact was proved to be done, or at least the body found dead, — for the sake of two cases, one mentioned in my lord Coke's P. C. cap. 104, p. 232, a Warwickshire case, another that happened in my remembrance in Staffordshire.

517. Commonwealth *v.* Webster. (*Massachusetts.* 1850. 5 Cush. 295, 308, and Bemis' Rep. 473). Shaw, C. J. The prisoner at the bar is charged with the wilful murder of Dr. George Parkman. This charge divides itself into two principal questions, to be resolved by the proof: first, whether the party alleged to have been murdered came to his death by an act of violence inflicted by any person; and if so, secondly, whether the act was committed by the accused. Under the first head we are to inquire and ascertain, whether the party alleged to have been slain is actually dead; and, if so, whether the evidence is such as to exclude, beyond reasonable doubt, the supposition that such death was occasioned by accident or suicide, and to show that it must have been the result of an act of violence. When the dead body of a person is found, whose life seems to have been destroyed by violence, three questions naturally arise. Did he destroy his own life? Was his death caused by accident? Or was it caused by violence inflicted on him by others? In most instances, there are facts and circumstances surrounding the case, which, taken in connection with the age, character, and

relations of the deceased, will put this beyond doubt. In a charge of criminal homicide, it is necessary in the first place by full and substantial evidence to establish what is technically called the *corpus delicti*, — the actual offense committed; that is, that the person alleged to be dead is in fact so; that he came to his death by violence and under such circumstances as to exclude the supposition of a death by accident or suicide and warranting the conclusion that such death was inflicted by a human agent; leaving the question who that guilty agent is to after consideration. . . .

It has sometimes been said by judges that a jury ought never to convict in a case of homicide unless the dead body be found and identified. This, as a general proposition, is undoubtedly true and correct; and disastrous and lamentable consequences have resulted from disregarding the rule. But, like other general rules, it is to be taken with some qualification. It may sometimes happen that the dead body cannot be produced, although the proof of the death is clear and satisfactory; as in a case of murder at sea, where the body is thrown overboard in a dark and stormy night, at a great distance from land or any vessel; although the body cannot be found, nobody can doubt that the author of that crime is chargeable with murder.

518. BUEL *v.* STATE

SUPREME COURT OF WISCONSIN. 1899

104 *Wis.* 133; 80 *N. W.* 78

ERROR to Circuit Court, Sawyer county; JOHN K. PARISH, Judge.

Eugene Buel was convicted of murder, and brings error. Reversed.

J. B. Alexander and *V. W. James*, for plaintiff in error. *C. E. Buell*, First Asst. Atty. Gen., for the State.

MARSHALL, J. — The evidence produced on the trial established or tended to establish the following: Peter F. Nelson, an unmarried man of about 24 years of age, who had resided for a considerable length of time prior to the 17th day of September, 1896, with the plaintiff in error, Eugene Buel, a man of about 36 years of age, near the Indian reservation in a thinly-settled district in Sawyer county about nine miles from the village of Hayward, — in August, 1896, was charged by one Wettenhall with being guilty of having sustained criminal relations with the latter's daughter, and being the cause of her supposed condition of pregnancy. That resulted in Wettenhall and Nelson meeting a day or two thereafter, by appointment, at the village of Hayward, where Wettenhall insisted on Nelson marrying the daughter, which he declined to do. Soon thereafter, on the same day, on hearing that he was about to be prosecuted respecting the charge of causing the pregnancy of the Wettenhall girl, Nelson fled from the county and thereafter remained in hiding till about the 16th day of September following, when he met Buel, by appointment, at a railway station a short distance from Hayward, from which point the two traveled together to Hayward, arriving there about daylight on the succeeding day. The purpose of the trip

to Hayward was to enable Nelson to draw some $400 which he had in the Sawyer County Bank and then leave the county before his presence at Hayward could become sufficiently known to lead to his arrest. Pugh, the cashier of the bank, was called upon by Nelson and Buel at his house before daylight on the day named and informed of the purpose of Nelson as stated, and that he intended to go to Chicago by way of Ashland. Pugh acceded to the request to immediately get the money for Nelson and to aid in keeping his presence in Hayward secret, and thereupon went to the bank and obtained such money, Buel and a policeman going with him, and Nelson remaining at the house. Pugh returned to his house with the money and paid it to Nelson, whereupon the latter and Buel immediately departed, going in the direction of Buel's home. The last that was seen of Nelson alive, he was in the company of Buel a few miles from the latter's home on the day in question. The day of the occurrence related, Buel was observed traveling on the road from Hayward towards his home alone, carrying a satchel, and later in the day he left his home with a pail and gun under the pretense that he was going to carry a lunch to Nelson; and still later the same day he returned home in a nervous condition and reported that Nelson complained that he had been chased by Indians. After the disappearance of Nelson as related, he did not write to any of his old neighbors or acquaintances as he was accustomed to do when away from home. . . . In July of the next year after the occurrences detailed in the foregoing, the remains of a human being were found lying on the back in a bunch of thick bushes a few miles from where Nelson was last seen with Buel and within about one-half a mile from an unoccupied homestead claim of Buel, and somewhat further from such a claim which belonged to Nelson. The location of the discovery was in an out of the way place some four miles from any inhabited building except an old logging camp about a mile and a half away, which was occupied by a watchman. It was near an old Indian trail and the usual route from Buel's place of residence to his homestead claim. The fragments of the skull indicated that either before or after death it was broken in by some crushing blow or blows. The shoes were on the feet and the clothing was sufficiently preserved to show the color. No money or thing of value was found near the remains except a pocket-knife, which was identified as one of two knives that had been sold by a merchant in Hayward, one of which was sold to Nelson. The trousers and shoes found on the remains were similar to those worn by Nelson. . . . Evidence was produced to explain or discredit much of the evidence of the circumstantial evidentiary facts mentioned, and to impair the probative force of circumstances established, pointing to the guilt of Buel. The jury found him guilty of murder in the first degree and judgment was entered accordingly.

The evidence was all circumstantial, but that does not count strongly against the conviction, since a conviction may as well rest on circumstantial evidence as on direct evidence, if it has the necessary probative

power to convince the mind beyond a reasonable doubt of the existence of each of the elements requisite to make out the charge and exclude to a moral certainty every other reasonable hypothesis. . . .

It appears to be strongly urged that the verdict was not warranted by the evidence as to the corpus delicti, because, on that subject there must be positive evidence, or circumstantial evidence of such probative power as to convince the mind beyond the possibility of error. To support that contention, State *v.* Davidson, 30 Vt. 377, was cited to our attention, where it is said that "the cases all hold that where the corpus delicti is attempted to be shown by circumstantial evidence, it must be positively established so as to exclude all uncertainty or doubt from the minds of the jury; not that each particular circumstance must be of that conclusive character, but all combined must produce the same degree of certainty as positive proof." That must be construed to mean that circumstantial evidence is competent and sufficient to establish every element of the corpus delicti if as convincing as positive or direct evidence. It recognizes the sufficiency of circumstantial evidence, and as to each element of the subject under consideration. . . .

There are many authorities that might be cited to support the doctrine that positive evidence is required to establish at least the element of death by criminal means, and in many legal opinions language is used which would indicate a holding that positive evidence must go further and establish the fact of identity. In Ruloff *v.* People, 18 N. Y. 179, it was stated as the undisputed law, that no one should be convicted of murder upon circumstantial evidence unless the body of the person supposed to have been murdered has been found, or there be other clear, irresistible proof that such person is actually dead. Baron Parke, in Reg. *v.* Tawell, a case not easily found reported in the books, but referred to in Will's Circumstantial Evidence (3d Ed.) 181, and contained in Trials for Murder by Poisoning, compiled by Brown (1883), used substantially the same language, and the conclusion was reached that as to the death of the party supposed to have been murdered, positive evidence is necessary. Such appears to be the fair reading of the early New York cases, but that is denied, or if not denied overrruled, in more recent decisions. . . .

This Court has spoken in no uncertain language on the subject under consideration. No question in regard to it is open in this State. A reference to authorities elsewhere is here made because of the importance of the question in this case, and to demonstrate the universality of the doctrine here applied. . . . There are many striking illustrations of this doctrine in the books. In Ex parte Kearny, 55 Cal. 212, the body of the murdered man was destroyed by fire so that no part of it was ever discovered but some pieces of bone, not recognizable as human bones. In State *v.* Ah Chuey, 14 Nev. 79, the body was destroyed by fire beyond recognition. So in Com. *v.* Webster, 5 Cush. 295, the body had been dissected and many parts of it completely destroyed, particularly in the

head, leaving no part that could be positively said to have been a part of the body of the supposed murdered man. . . .

So it may be taken as the settled law that the corpus delicti in criminal homicide, and each element of it, may be established by circumstantial evidence, and that no greater degree of certainty is required than in regard to the fact of the guilt of the person charged. Any language in State *v.* Davidson, supra, indicating that the former element must be established with such certainty as to exclude any doubt on the question, is not correct. True, the initial question when criminal homicide is charged is, was a human being deprived of life by criminal means? and the next question, was he the person alleged to have been murdered? And such questions, particularly the first, because of their supreme importance, require, ordinarily, stronger evidence than the questions which follow. Such importance is obvious from the well-known fact that convictions and executions have taken place, and thereafter the persons supposed to have been murdered have been discovered alive. The more important the question in any case, the greater the proof required to establish moral certainty in the mind, but when that certainty is established, whether by circumstantial or direct evidence, the fact itself must be said to be established. Enough has been said to show that there was ample evidence in this case to go to the jury on every element of the corpus delicti, and that the assignments of error on that subject cannot be sustained. . . .

[Judgment reversed on other grounds.]

SUB-TITLE III. VERBAL COMPLETENESS

520. Algernon Sidney's Trial. (1683. 9 How. St. Tr. 817, 829, 868). [Seditious libel. Mr. *Williams*, his counsel, had instructed the accused: "In the evidence against you for your writing, take care that all that was writt by you on that subject be produced, and that it be not given in evidence against you by pieces, which must invert your sense;" on the trial, one of the passages read against Sidney from his manuscript was: "The general revolt of a nation from its own magistrates can never be called rebellion." At the trial, *Sidney*, arguing against using these passages piecemeal, said]:

My lord, if you will take Scripture by pieces, you will make all the penmen of Scripture blasphemous. You may accuse David of saying, "There is no God," and accuse the Evangelists of saying, "Christ was a blasphemer and a seducer," and the Apostles, that they were drunk.

Jeffries, L. C. J. — "Look you, Mr. Sidney, if there be any part of it that explains the sense of it, you shall have it read. Indeed, we are trifled with a little. It is true, in Scripture it is said, "There is no God"; and you must not take that alone, but you must say, "*The fool hath said* in his heart, There is no God." Now here is a thing imputed to you in the libel; if you can say there is any part that is in excuse of it, call for it.

521. Thomas Starkie. *Evidence.* (1824. 7th Am. ed.) II, 549. Of all kinds of evidence, that of extrajudicial and casual observations is the weakest and most unsatisfactory. Such words are often spoken without serious intention, and they are always liable to be mistaken and misremembered, and their meaning is apt to be misrepresented and exaggerated. I once heard a learned judge (now no more), in summing up on a trial for forgery, inform the jury that the prisoner, in a conversation which he had had with one of the witnesses, had said, "I *am* the drawer, the acceptor, and the indorser of the bill." Whilst the learned judge was commenting on the force of these expressions, he was, at the instance of the prisoner, set right as to the statement of the witness, which was that the prisoner had said, "I *know* the drawer, the acceptor, and the indorser of the bill." Had the witness, and not the judge, made the mistake, the consequences might have been fatal. The prisoner was acquitted.

522. Tilton *v.* Beecher. (N. Y. 1875. Abbott's Rep. II, 837.) Neilson J.) on certain quotations being cited to him). When you and I were boys, we found that general principle cited in all the text-books very much after the form that you have put it. . . . Perhaps the best statement of that has been given in Starkie on Evidence, to the effect that this kind of testimony is dangerous, first, because it may be misapprehended by the person who hears it; secondly, it may not be well-remembered; thirdly, it may not be correctly repeated.

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523. Commonwealth *v.* Keyes. (*Massachusetts.* 1858. 11 Gray 323, 324). Merrick, J. It is undoubtedly the general rule that whenever the statements, declarations or admissions of a party are made subjects of proof, all that was said by him at the same time and upon the same subject is admissible in his

favor, and the whole should be taken and considered together. This is essential to a complete understanding of what he intended to express by the particular phrases and language which he used. To give effect to general statements, without regard to the qualifications with which they are accompanied, and by which they may be materially modified, would manifestly lead to error, and be likely to be directly productive of injustice. All therefore is to be heard and weighed before it can be affirmed that the force and effect of language, whether written or spoken, are fully and justly apprehended. In the construction of contracts, the same principle prevails, requiring that each particular part shall be examined and considered, in order to learn and comprehend the scope and purport of the whole. All writings, whether of a public or private character, are to be subjected to the same kind of scrutiny. No provision of a statute, however minute, is to be overlooked when searching for the design and object of the Legislature in its enactment, and in considering how it ought to be interpreted and explained; just as particular covenants in a deed, or devises in a will, are to be construed according to the intent of the parties in the one case, and of the testator in the other, so far as it can be ascertained by bringing into view all the expressions and provisions contained in these respective instruments.

Topic 1. Compulsory Completeness

525. SUMMONS *v.* STATE

SUPREME COURT OF OHIO. 1856

5 *Oh. St.* 325

MURDER by poisoning. One Mary Clinch, a witness at the first trial, had since died. Thomas A. Logan was offered, on the third trial, to prove her former testimony. . . . He testified that he was present at the first trial, and was the student and clerk of Judge Walker, one of the counsel for the State; that he heard all the testimony given by Mary Clinch, and thought he had taken it all down in writing, and could give the substance of all she testified from his recollection, aided by reference to his notes. On cross-examination as to this point, he stated that he took down, as nearly as possible, the substance of all that Mary Clinch testified on examination, cross-examination, re-examination, and in rebutter. That he recollected, without reference to his notes, the main points of her testimony, and recollected the substance of all of it, by refreshing his recollection with his notes. That he could not say he took everything, but he thought he took the substance of everything. That the cross-examination was rapid, but Judge Walker frequently stopped the witness, Mary Clinch, to enable him to get it all down. . . . Logan was then requested by counsel for the State to give the testimony of Mary Clinch from his recollection, refreshed by his notes, which he had with him in court, but the notes were not offered in evidence. Defendant's counsel objected. The objection was overruled, which was excepted to. . . .

The charge of the Court as to the evidence of Logan, detailing the testimony of Mary Clinch, was as follows: . . . "Mr. Logan's testimony is to be received with the greatest caution; and we have no hesitation in ruling that a witness, called to narrate the evidence of a deceased witness, should recollect the order and connection of the testimony, so far as such order and connection are necessary to convey an accurate understanding of what the deceased said and meant, and the influence and credit to be given to the testimony. But we are not prepared to say, that if Mr. Logan has failed to give the substance of all Mary Clinch's evidence, that therefore you must entirely reject his testimony; provided that, taking his testimony and that of the other witnesses who have detailed what she testified to, you are satisfied that you have the substance, correctly, of all her testimony." . . .

The jury found the prisoner guilty of murder in the first degree. . . . To reverse this judgment, the present writ of error is prosecuted, and the following matters are assigned for error:

1. The Court admitted Thomas A. Logan to repeat the testimony of Mary Clinch, a witness who testified at a former trial, and since deceased. . . . 3. The Court directed the jury, "That, if they were satisfied from the testimony of all the witnesses, that they had before them the substance of all the evidence of the deceased witness, the testimony must be considered." . . .

F. T. Chambers, N. C. Read, and *R. B. Hayes,* for plaintiff in error.

R. B. Hayes, submitted the following points and authorities on behalf of plaintiff in error: . . . 11. Such testimony is not admissible in criminal cases, unless the very language of the deceased witness can be repeated by the person who undertakes to give it. . . .

C. P. Wolcott, Attorney-General, submitted the following points and authorities for the State: . . . Though it was formerly held that the testimony of a deceased witness could not be proved except in his very words, yet such is not the general modern rule. . . . The position taken by the counsel for the plaintiff in error, that unless the person called to prove the former testimony can state the substance of *all* of it, he is an *incompetent* witness, does not seem to be sanctioned by reason, or borne out by the authorities. . . .

Bartley, C. J., delivered the opinion of the Court. . . .

1. Is it essential to the competency of the testimony in question, that it be a narration of the statements of the deceased witness ipsissimis verbis?

The doctrine, that the testimony must be in the words of the deceased witness, appears to have taken its origin from a dictum of Lord Kenyon, in the case of Rex *v.* Jolliffe, 4 Term, 385, as follows:

"The evidence which the witness gave on a former trial, may be used in a subsequent one, if he die in the interim, as I remember was agreed on all hands,

on a trial at bar in the instance of Lord Palmerston; but as the person who wished to give Lord Palmerston's evidence could not undertake to give *his words*, but could *merely swear to the effect of them*, he was rejected."

This remark of Lord KENYON, which appears to have been thrown in rather by way of illustration than otherwise, has been adopted by some elementary writers on evidence, and given as the true rule. . . .

In Massachusetts the rule requiring the statements of the deceased witness at a former trial to be ipsissimis verbis, is laid down in its utmost strictness in the case of the Commonwealth *v.* Richards, 18 Pick. 434. And in Warren *v.* Nicols, 6 Met. 261, the doctrine was affirmed, HUBBARD, J., dissenting. In the latter case, however, the majority of the Court drew a distinction between giving the *substance* of the deceased witness' testimony and the *substance of his language;* requiring only that his *language* should be stated *substantially*, and in all *material particulars*, and not "ipsissimis verbis." It is not very easy to perceive how this distinction can be reconciled in this regard, with the decision in the case of the Commonwealth *v.* Richards. . . .

In Ohio it has been settled, in a well-considered decision in the case of Wagers *v.* Dickey, 17 Ohio, 440, that it is sufficient for the witness to give the *substance* of what the deceased witness testified on the former trial. . . .

There would seem to be no sound reason for subjecting it [former testimony] to a rigid rule amounting to its almost total exclusion, which is inapplicable in other cases where testimony showing words spoken or the statements of a party or other person is admissible. In prosecutions for perjury, the testimony of the accused upon which perjury is assigned is not required to be "ipsissimis verbis," but allowed to be given in substance; so with the declarations of a co-conspirator, declarations made "in extremis" or the admissions or confessions of a party. So also with testimony of a verbal slander, or the declarations or statements of a party or witness, offered for purposes of contradiction or impeachment. . . . What sufficient reason can exist for a departure from the rule in case of the testimony of a deceased witness on a former trial? . . . It is apparent, from a review of the decisions on this question, that the weight of authority is very decidedly against the rule which requires an exact recital of the words used by the deceased witness. The difficulty which appears to have troubled courts so long on the question, has been a controversy about *words*, rather than *facts*. The efficacy of the testimony consists, not in the mere *words* used, but the *matters of fact* stated by the deceased witness. If the facts stated by the deceased witness on the former trial, can be narrated with substantial accuracy in all their material particulars, there would seem to be no good reason for cavil about the very words. . . .

There is a distinction, however, between *narrating the statements* made by the deceased witness and *giving the effect* of his testimony.

This distinction may be illustrated thus: If a witness state that A, as a witness on a former trial, proved the execution of a written instrument by B, that would be giving the effect, which is nothing else than the result or conclusion produced by A's testimony. But if the witness states that A testified that he had often seen B write, that he was acquainted with his handwriting, and that the name subscribed to the instrument of writing exhibited was B's signature, that would be giving the substance of A's testimony, though it might not be in the exact words. . . . While, therefore, a witness should not be trammeled by a rule restricting him to the words used by the deceased witness, he should not be allowed the latitude of giving the mere effect or result of the deceased witness' testimony.

2. Was there error in the charge of the Court to the jury, that if they should find that Logan had not stated the substance of *all* that the deceased witness had sworn to on the former trial, they should not, for that reason, exclude it from their consideration, provided that by taking this testimony in connection with the testimony of other witnesses, they were satisfied that they had the substance of all the testimony given by Mary Clineh on the former trial? . . . Shall the testimony be excluded because it can not all be given by one witness, when it can be all, with equal accuracy and certainty, had, in distinct parts, from two witnesses? The requirement of the rule is satisfied, provided *all* that the deceased witness had sworn to be given the jury. There can be no substantial reason for requiring it all from one witness. . . .

Judgment of the District Court affirmed, and Friday, the 17th day of April next, appointed as the day for the execution of the sentence.

Bowen, J., dissented.

526. STATE *v.* LU SING

Supreme Court of Montana. 1906

34 *Mont.* 31; 85 *Pac.* 521

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge. Lu Sing was convicted of murder, and he appeals. Affirmed.

J. L. Staats, for appellant. *Albert J. Galen*, Attorney-General, and *E. M. Hall*, Assistant Attorney-General, for the State.

Holloway, J. Lu Sing was convicted of murder of the first degree, and appeals from the judgment and from an order denying him a new trial. . . .

E. H. Williams, a policeman in the city of Bozeman, who arrested the defendant soon after the homicide was committed, testified for the State, over the objection of the defendant, to a part of a conversation which took place between himself and the defendant on their way to and at the city jail. The witness testified that the defendant spoke English very

poorly, and that he could not understand all that defendant said, but did understand the defendant's statement: "If I kill him, me good man. If I no kill him, no good." And again: "If me no kill him, me no good man; and if Tom Sing dead, me die happy." Defendant moved to strike out the testimony of the witness, on the ground that he had not understood all that the defendant said to him and ought not to be permitted to testify to a portion only. The motion was denied, and error is predicated on this ruling.

In support of his contention, counsel for appellant cites People *v.* Gelabert, 39 Cal. 663, decided in 1870, and State *v.* Buster, 23 Nev. 346, 47 Pac. 194, decided in 1896. The opinion in People *v.* Gelabert is very brief and cites no authorities in support of the conclusion reached. The reason given for the conclusion goes to the weight, rather than to the competency, of the evidence. 1 Greenleaf on Evidence, §214, is cited, not, however, in support of the conclusion reached by the Court, but in support of the oft-repeated declaration of Courts and text-writers that evidence of extrajudicial confessions should be received with great caution, because of the danger of mistake of the witness arising from his misapprehending what the defendant said, his unintentional misuse of a particular word; or, if the witness does not remember the exact words used by the defendant, his failure to express in his own language the meaning intended to be conveyed by the defendant; and, finally, because of the infirmity of memory. But all of this is directed to the weight, rather than the competency, of the evidence, and it is well for the trial Court to warn the jury as to the caution to be exercised respecting this character of evidence (Code Civ. Proc. § 3390, subd. 4) as indicated above, as was fully done by the trial Court in this case. . . .

No fault is found with the authorities which hold that where the State offers only a part of the conversation embodying a confession, the defendant has a right to have the whole of the conversation before the jury; but the great weight of authority and reason hold that merely because a witness did not hear all of the conversation, or did not understand it all, does not render incompetent what he did hear or understand. The evidence goes to the jury for what it is worth. Its value may be greatly impaired by the fact that the witness heard or understood only a part of what was said. But where the jury is cautioned, as was done in this case, there can be no error in the reception of the evidence, merely because the witness can give only a portion of what was said. Westmoreland *v.* State, 45 Ga. 225; . . . 3 Wigmore on Evidence, § 2100; Wharton's Criminal Evidence, § 688. Long after the decision in People *v.* Gelabert was rendered, the Supreme Court of California held to this same doctrine announced by the Courts above. People *v.* Daniels, 105 Cal. 262, 38 Pac. 720; People *v.* Dice, 120 Cal. 189, 52 Pac. 477. There cannot be any reason advanced for the admission of the testimony of witnesses who heard only a part of a conversation which will not apply equally to the testimony of a witness who heard it all but only

understood or remembered a portion of it. We think the evidence was properly admitted. . . .

The judgment and order are affirmed. Affirmed.

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527. READ *v.* HIDE. (1613. *Coke's Third Institute*, 173). . . . It was resolved that no exemplification ought to be of any letters patent or of any other record, or of the inrolment thereof, but the whole record or the inrolment thereof ought to be exemplified; so that the whole truth may appear, and not of such part as makes for the one party and nothing that makes against him or that manifesteth the truth.

528. VANCE *v.* REARDON

CONSTITUTIONAL COURT OF SOUTH CAROLINA. 1820

2 *N. & McC.* 299, 303

TROVER for a slave, claimed by the plaintiff under a sheriff's sale under an execution on a judgment against William Harville, at Orangeburgh, in 1806. The plaintiff produced a paper purporting to be an exemplification of the proceedings, certified by the clerk. It contained a literal copy of the process, (being within the summary jurisdiction), the judgment and the first execution. This execution was for $95, including debt, interest, and costs, and was entered in the sheriff's office the 5th November, 1806. Instead of a literal copy of the second execution, the clerk furnished only an abstract, containing the names of the parties, the amount of debt, interest, and costs, with a memorandum of an entry in the sheriff's office, 2d July, 1808; and a return of "nulla bona," without date; and also, that a third execution was signed, 19th March, 1808. There was also a similar abstract of a third execution, entered in the sheriff's office, 19th March, 1808, on which the following return was stated to have been made, "levied on a negro man named Joe, sold the same on the 4th April, 1808, purchased by William Vance, for $251.10." The certificate of the clerk to these exemplifications was in these words: "I, Samuel P. Jones, Clerk of the Court of Common Pleas, for the district of Orangeburgh, do hereby certify, that the two sheets of paper hereunto annexed, do contain a true copy (or extract), of the proceedings in a certain cause, wherein Robert Tutle is plaintiff, and William Harville is defendant," etc. Upon closing this evidence the motion was made for a nonsuit by the defendant, on the ground, that the exemplification was only legal evidence so far as it professed to give a copy of the proceedings, and there being only an abstract of the execution, under which the sale, if any, was made, the plaintiff had failed in the proof of property. This motion was overruled. . . .

The defendant moved for a new trial on the following grounds: . . . 2. Because the Court erred in admitting the exemplification in the form presented as evidence of the second and third executions. . . .

The opinion of the Court was delivered by

JOHNSON, J. . . . The next question arises out of the admissibility of the exemplifications so far as they profess only to give *extracts* of the proceedings in relation to the second and third executions, under the latter of which the levy and sale is alleged to have been made.

The Act of the Legislature of 1721, P. L. 117, 1 Brev. Dig. 315, authorizes attested copies of all records, certified by the clerks of the Courts, to be given in evidence. . . . It appears to me obvious that the Legislature never intended by the term *copies*, to make *extracts* evidence; the terms themselves are of different import, and besides the mischief of confounding them appears to me too manifest to need exposure. A party is not presumed, nor is he bound, to know what evidence his adversary will adduce against him; and if he [the adversary] be permitted to extract from a record only so much as he may deem necessary to his own side of the question and to give it in as evidence, he will always take care to leave out that which makes against him. By the same rule, the opposite party would have the same right to extract so much as was subservient to his side of the question, which, from the specimen of extraction furnished by this case, would produce inexplicable difficulties. Thus, in this case, we find that on the first fi. fa., when only $95 was due, $110 had been paid, and yet an alias issued, and also a pluries; and, as if to force conviction upon me of the necessity of a literal copy, the extract represents the pluries to have been entered in the sheriff's office on the 19th March, 1808, and the alias, which must necessarily precede it, as having been entered on the 2d July, 1808, nearly four months after.

But it has been argued, that these extracts were permissible as prima facie evidence of the existence of such judgments and executions. I confess I do not understand how this sort of evidence can apply to a case, when the Court sees from the evidence produced, that better and more ample proof of the fact does exist, and is in the power of the party. And it appears to me to be at war with that universal rule, that the best evidence should always be adduced, and can only apply when there is no higher evidence.

I think, therefore, these abstracts were inadmissible, and if admitted, they proved nothing, and the motion ought to be granted.

NOTT and HUGER, JJ., concurred.

COLCOCK, J., dissented. . . . If it were necessary, to the support of plaintiff's case, that the exemplification should be considered as complete, I conceive, by a critical examination of it, it will be found to be so. . . . It is apparent that the officer professes to set forth all that is within and without the papers in the case, except that he does not repeat the words of the second and third executions. And this I did consider, and do still consider, as wholly immaterial, for if it had been found, upon their being set forth, that there had been any error, it was amendable, and would be amended by the Court to perfect the sale; see the case of Toomer *v.* Purkey, 1 Con. Rep. 323, which is only a repetition of what has often

been decided in our Courts. Now if it is immaterial whether the words were those which, according to the forms of our proceedings, ought to have been used, I am at a loss to conceive why they should have been put down, to the great trouble of the officer and expense of the party.

Again, is there any prescribed mode and form of exemplification? I know of none. It is admitted that in exemplifications the whole is exemplified. But much depends on the purposes for which they are to be used. It is said, Something is kept back. I ask if the officer does not say what that is? I think he does, as plainly as if he had said that "I deem it unnecessary to repeat the body or formal part of the execution; but I give you all the endorsements thereon, and these it is to be observed, cite the only important parts of the execution." . . .

Bay, J., concurred with Colcock, J.

Simons, for the motion. *Hunt*, contra.

529. PERRY *v.* BURTON

Supreme Court of Illinois. 1884

111 *Ill.* 138

Appeal from the Superior Court of Cook county; the Hon. John A. Jameson, Judge, presiding.

Mr. *Edmund S. Holbrook*, for the appellants. Messrs. *Moore & Browning*, for the appellees. Messrs. *G. & W. Garnett*, for the Louisville Banking Company.

Mr. Chief Justice Scholfield delivered the opinion of the Court:

This was a bill for the partition, as first drawn, of a tract of eighty acres of land in Cook county, and to quiet the title thereto. The tract was entered by Isaac Cook on the 30th of November, 1835, and he conveyed the undivided half thereof to Asa M. Chambers and Sheldon Benedict, by warranty deed, on the 7th of February, 1836. In November, 1848, Benedict conveyed his interest in the tract to Chambers, and on the 10th of November, 1871, Chambers conveyed his interest in the tract to the appellants, James S. Perry and John N. Henderson. No question is made as to any of these conveyances, except that by Benedict to Chambers. The deed effecting that conveyance was lost, and its execution and contents were proved by oral evidence only, and counsel for appellees insist that such evidence was not sufficiently full and satisfactory.

We can not concur in this view. The facts that the deed was executed and was afterwards lost were clearly proved. . . . His testimony as to the contents of the deed, we think, is sufficiently full. A witness testifying to the contents of a lost deed is not to be expected to be able to repeat it verbatim from memory. Indeed, if he were to do so, that circumstance would, in itself, be so conspicuous as to call for an explanation. . . . All that parties, in such cases, can be expected to remember is that they

made a deed, to whom, and about what time, for what consideration, whether warranty or quitclaim, and for what party. To require more would, in most instances, practically amount to an exclusion of oral evidence in the case of a lost or destroyed deed. The evidence here meets the requirements suggested, and in the absence of contradiction or impeachment, was sufficient to authorize the Court to decree upon the faith of it.

530. TILTON *v.* BEECHER

City Court of Brooklyn, N. Y. 1875

Abbott's Rep. II, 270

[Action for criminal conversation.]

Mr. *Evarts* (cross-examining). Look at this article, Mr. Tilton, . . . and say if it was written by you and published in your newspaper. A. Yes, sir.

Mr. *Shearman*. — It is an article entitled, "Mr. Tilton's Rejoinder to Mr. Greeley."

Mr. *Fullerton*. — If we have the sermon, let us have the text.

Mr. *Beach*. — I think it is the rule, sir, that where an answering letter is read, the letter to which it was a reply should be read also.

Judge Neilson. — That is the rule. Perhaps if counsel will look at it they can judge whether it is material.

Mr. *Evarts*. — Your Honor, we understand exactly what the rule is. All that can be claimed by our learned friends is that it gives them a right to read any part of the paper to which is it a reply, if they see fit. They cannot make us read it.

Judge Neilson. — I have had occasion to say that where one party puts a paper in they were at liberty to read a part of it. But it was deemed all put in by *them*, and the other side could read any portion of it they thought proper.

Mr. *Fullerton*. — That does not present this case.

Mr. *Evarts*. — How does it fail to present this case? Supposing it is all in, are we obliged to read it all? . . . I do not understand that we are obliged to read the whole article to get at the point which is important to us.

Judge Neilson. — The whole must be *deemed* put in by you.

Mr. *Evarts*. — That may be.

Judge Neilson. — And you read such part as you now think proper, and they can afterwards call attention to other parts. I think that will answer.

531. PARNELL COMMISSION'S PROCEEDINGS

SPECIAL COURT, LONDON. 1888

Times' Rep. pt. 1, *p.* 236, *pt.* 2, *pp.* 28, 104, 109; *pt.* 23, *p.* 60

[The Land League and its leaders were charged with encouraging outrage and crime, and numerous speeches of the leaders were offered to prove this; repeated discussion took place, during the trial, as to the fair and proper way of using the passages relied upon. In the Attorney-General's opening, the following statements were made.]

Attorney-General. — I have not got the whole of the speeches; I have only reports. A man may speak for two hours, but I may have only a few lines of his speech.

President HANNEN. — If you have not got the whole of them, it will be open to Sir Charles Russell [for the opposite side] to correct you by referring to such reports as do exist; but what you do use [in your opening address] you will put in the whole of it [in evidence later].

Attorney-General. — Without exception, the whole extract at my command of every speech I read shall be put in. . . .

[Then at a later day, when certain speeches were put in evidence by Sir *H. James* from constables' notes, Mr. *Healy* having claimed that "the proper course is to read the entire speech,"]

President HANNEN. — It is not necessary for you, Sir Henry, to read the whole speech, but only those portions on which you rely. . . . The only regular course is this (and whatever it leads to, it must be followed): You, Sir Henry, will call attention to what you consider the material parts of the speech, and Sir C. Russell can on cross-examination refer to other portions which he may consider, and, if necessary, the cross-examination can be postponed until he has had an opportunity of seeing the full speeches. . . .

[Shortly afterwards, the counsel for the *Times* proposed an arrangement by which copies of all the reports of speeches were to be prepared and underlined and furnished to all parties for convenient reference.]

Mr. *Healy.* — Some of the speeches made would cover two or three columns if taken verbatim, but they have been condensed [in the constable's notes] into three or four sentences. What is the intention with regard to them?

Sir *H. James.* — We can only present the short report in those cases, because that is all we have got. . . . [On a still later occasion,

Mr. *Reid*, the counsel for Mr. O'Brien, read passages from his speeches showing his opposition to criminal methods, and was interrupted by the]

Attorney-General. — You have omitted a passage which precedes that.

Mr. *Reid.* — I thought the rule was that what you wished to read should be read subsequently.

Attorney-General. — I was only suggesting that the course which has been pursued on every other occasion by Sir Charles Russell and yourself should be pursued now.

President HANNEN (to Mr. Reid). — This question arose before, and there was great complaint on your part that the Attorney-General did not read all, and then you read, or Sir C. Russell read something. But I have laid down the rule that, unless you can come to a compromise, the true rule is for you to read what you attach importance to and for the other side to do the same.

Topic 2. Optional Completeness

532. THE QUEEN'S CASE. (House of Lords. 2 B. & B. 297. 1820.) ABBOTT C. J. — The conversations of a party to the suit, relative to the subject-matter of the suit, are in themselves evidence against him in the suit, and if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the Court the whole which was said by his client in the same conversation, — not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion.

533. PRINCE *v.* SAMO

QUEENS' BENCH. 1838

7 *A. & E.* 627

THIS was an action for malicious arrest on a false suggestion that money was lent by defendant to plaintiff, when it had been in fact given. The plaintiff called his attorney as a witness; he happened to have been present at the trial of a prosecution for perjury instituted by the plaintiff against a witness in the action wherein he had been arrested. The defendant's counsel inquired of him, in cross-examination, whether the plaintiff had not, on the trial for perjury, stated that he himself had been insolvent repeatedly, and remanded by the Court. This question was not objected to. On his re-examination, the same witness was asked whether plaintiff had not also on that occasion, given an account of the circumstances out of which the arrest had arisen, and what that account was, for the purpose of laying before the jury proof that the arrest was without cause, and malicious, of both which facts there was scarcely any, if any, evidence whatever. This question, expressly confined to that purpose, was whether plaintiff did not say, in the course of his examination, that the money was given, and not lent. To this question the de-

fendant's counsel objected, not on account of its leading form, but because the defendant's having proved one detached expression that fell from the plaintiff when a witness does not make the whole of what he then said evidence in his own favour. . . .

DENMAN, L. C. J. (after stating the case as above).—My opinion was that the witness might be asked as to everything said by the plaintiff, when he appeared on the trial of the indictment, that could in any way qualify or explain the statement as to which he had been cross-examined; but that he had no right to add any independent history of transactions wholly unconnected with it. . . . Upon the whole, we think it must be taken as settled that proof of a detached statement made by a witness at a former time does not authorize proof by the party calling that witness of all that he said at the same time, but only of so much as can be in some way connected with the statement proved. . . . We cannot assent to [the rule as stated in the above passage of the opinion in The Queen's Case]. We will merely observe that it was not introduced as an answer to any question proposed by the House of Lords, and may therefore be strictly regarded as extrajudicial; that it was not necessary as a reason for the answer to the question that was proposed; that it was not in terms adopted by Lord Eldon or any of the other Judges who concurred; that it was expressly denied by Lords Redesdale and Wynford; and that it does not rest on any previous authority.

534. PEOPLE *v.* SCHLESSEL. (1909. 196 N. Y. 476, 90 N. E. 44). WILLARD BARTLETT, J.—In respect to the right of a party against whom part of an utterance has been put in evidence to complement it by putting in the remainder, in order that the Court may completely understand the total tenor and effect of the utterance, Professor Wigmore correctly states that the right is subject to a threefold limitation: (*a*) No utterance irrelevant to the issue is receivable; (*b*) no more of the remainder of the utterance than concerns the same subject and is explanatory of the first part is receivable; (*c*) the remainder thus received merely aids in the construction of the utterance as a whole, and is not in itself testimony. 3 Wigmore on Evidence, § 2113.

535. DEWEY *v.* HOTCHKISS

COURT OF APPEALS OF NEW YORK. 1864

30 *N. Y.* 497, 502

ACTION for the price of goods sold and delivered. The plaintiff's clerks proved from his account-books items amounting to $1,269.72. The defendant having, on the cross-examination, shown that the books so produced, were the plaintiff's books of original entry, read therefrom certain items of credit, amounting to $152.09; and the plaintiff's counsel, thereupon, offered to read from the said books, other charges against the

defendant, which had not been proved by the plaintiff's witnesses. The defendant objected to the reading of these entries, but the referee overruled the objection, and an exception was taken.

The items so admitted amounted to $137.49, and were allowed by the referee, who reported a balance due the plaintiff of $299.62. And the judgment entered on his report having been affirmed at general term, the defendant took this appeal.

Clark, for the appellant. *Strong*, for the respondent.

Hogeboom, J. — The plaintiff's account-books, it is conceded, were properly in evidence. In connection with the oral testimony of the clerks, they established the larger part of the plaintiff's claim. Being in evidence, the defendant availed himself of them, to prove thereby credits in his own favor. There were equally well established, whether they were in the plaintiffs' handwriting or not. The plaintiffs had brought them forward as their books, claiming for them authenticity and credit, and could not deny their admissibility and force, even when they operated against themselves. In using them for his purpose, the defendant apparently traveled over their entire contents, selecting his items wherever he pleased, without reference to dates or subject-matter, or their connection or relation to the charges read by the plaintiffs. Thus, he selected from the day-books three different items, each of considerable amount, of the respective dates of 2d May 1848, 22d March 1849, and 27th October 1849. He selected from the cash-book eight different items, ranging between the dates of 21st July 1848, and 19th November 1851. He had, therefore, used the whole of the books indifferently for his purpose. He had taken the entire account between the plaintiffs and the defendant, adopted it for his own benefit, and was not, I think, at liberty to renounce it, where it made against him. . . . The books constituted one entire series of accounts between these parties, and, for the purpose of this case, may be regarded as if they contained nothing else whatever — indeed, as if they had all been presented in court by the plaintiffs on a single paper or account current. In such case could the defendant be permitted to cull particular entries from the account and exclude the residue? I think not.

The rule that a party whose oral declarations, in a conversation are improved in evidence by his adversary, is not thereby permitted to introduce in his own favor disconnected portions of the same conversation having reference to distinct and independent matters, has no close application to such a case; 1st, Because the account must be regarded as the single, entire and continuous statement of the party offering it, presenting his version of the true state of the business transactions between the parties, — not necessarily entitled to credit in every part, if discredited by other evidence, but admissible for the consideration of the jury; 2d, Because the defendant, having adopted the whole statement by ranging through its entire scope and contents, has given currency to the whole, and has made it necessary to examine and take in the whole, in order

to determine how far the portions rejected by him bear upon, affect, or qualify the portions selected. There is no evidence that the portions of the account introduced by the plaintiff, after those introduced by the defendant, do not materially qualify the effect of the latter items, and do not in fact relate to the same precise subject-matter.

Judgment affirmed.

536. ATHERTON *v.* DEFREEZE

SUPREME COURT OF MICHIGAN. 1902

129 *Mich.* 364; 88 *N. W.* 886

ERROR to Shiawassee; SMITH, J. Submitted January 7, 1902. Decided January 28, 1902. Replevin by John J. Atherton against Aaron Defreeze. From a judgment for defendant, plaintiff brings error. Reversed.

A. J. Kellogg (*John T. McCurdy*, of counsel), for appellant. *Martin V. B. Wixom*, for appellee.

GRANT, J. — This is an action of replevin for two horses, and originated in justice's Court. Plaintiff derived his title from one Susan Whitman by a bill of sale. . . . The title to the horses was the issue, and upon this the testimony was conflicting. . . .

One Miller, who formerly owned the horses, testified that he sold them to Mrs. Whitman, and that, after the suit was brought, he had a conversation with defendant; that defendant asked him what he knew about the case; that witness told him that, at the time of the sale, defendant said that the cows, for which he exchanged the horses, belonged to Mrs. Whitman; and that defendant said it looked as though he would get beaten. On cross-examination by the defendant's attorney, the witness, in reply to the question, "What else did he say?" said: "He said he was so blind he couldn't see; and I asked him about how much the colts were worth, and he said about $300, and, if he didn't get them, he would go to the poorhouse." Plaintiff's attorney moved to strike out the answer as incompetent, immaterial, and not relative to the issue. The Court denied the motion; holding the answer "competent as testing the recollection of the witness, and as a conversation between him and the defendant."

The motion should have been granted. . . . Parts of a conversation having no reference whatever to the issue upon trial, are not admissible under the rule that a party is entitled to the entire conversation. The rule means only that he is entitled to the entire conversation bearing upon the subject in controversy. Ten subjects may be talked about in one conversation. When one of the ten is the subject of litigation, it is not competent to put in evidence the conversation about the other nine. Defendant's blindness and poverty had nothing to do with the title to the property. . . .

Judgment reversed, and new trial ordered.

Hooker, C. J., Moore and Montgomery, JJ., concurred.

Long, J., did not sit.

537. LOMBARD *v.* CHAPLIN

Supreme Judicial Court of Maine. 1903

98 *Me.* 309; 56 *Atl.* 903

On motion and exceptions by defendant. Exceptions sustained. Motion not considered.

Case for personal injuries which the plaintiff alleged she sustained while driving upon a public street, April 22, 1902, in the City of Portland, by reason of the defendant's negligence in the operation of his automobile. The jury rendered a verdict for the plaintiff and assessed the damages at six hundred dollars. After the verdict, the defendant, besides the usual motion for a new trial, excepted to the rulings of the presiding justice in refusing to admit in evidence, upon defendant's request, a certain letter in the plaintiff's possession. The letter was written by the defendant to the plaintiff's husband, and from it the defendant claimed that plaintiff's counsel had cross-examined him in such a manner as to get a part of it before the jury, to his prejudice. The exceptions appear in the opinion.

Frank H. Haskell and *Enoch Foster*, for plaintiff. . . . *Wm. C. Eaton*, for defendant.

Sitting: Emery, Whitehouse, Strout, Savage, Powers, Spear, JJ.

Spear, J. — This is an action in which the plaintiff seeks to recover damages of the defendant for alleged negligence on his part in running and operating the automobile, in which he was riding, so carelessly that the horse which the plaintiff was driving became frightened and ran away, throwing the plaintiff from her carriage and causing her to be injured. The case comes up on motion and exceptions by the defendant, but, as the exceptions must be sustained, it becomes necessary to consider the motion.

It appeared from the development of the evidence in the case that the defendant had written a letter to Dr. Lombard, husband of the plaintiff. This letter was in the possession of the plaintiff's counsel and used by him in connection with his cross-examination of the defendant, and the question is, was it such a use as made the exclusion of the whole letter, when offered later by the defendant, a matter of exception?

The plaintiff's counsel, during the cross-examination of the defendant, passed the letter to the defendant with the following inquiries:

Q. — "Will you look and see if you recognize that letter?" *A.* — "That is my signature."

After putting several other interrogatories, — . . .

Q. — "That was over two hundred feet away and the horse was running directly towards you?" *A.* — "I said that was my idea of the way she was running."

Q. — "When did you say that?" *A.* — "I just said it."

Q. — "Did you ever say it to anybody before to-night?" *A.* — "I don't remember."

Q. — "*Did you write it* to Dr. Lombard?" *A.* — "What?"

Q. — "That the horse was running furiously toward you?" *A.* — "I think I did. *You have it in your hand. . . .*"

Did the putting in evidence a part of the letter, as above shown, entitle the defendant to the right to put in the whole letter? We think it did.

1. It is claimed that the whole letter is inadmissible, even if a part of it had been put in evidence, as it was a self-serving, not self-disserving, statement made to a third party. If the writer of the letter was a witness only, it is true that the letter could be used only to contradict him and impeach his credibility, and not for the purpose of proving or disproving any fact material to the issue involved. But when the writer is also a party, this rule does not apply, for every statement in his letter, to whomsoever written, may be taken as an admission to prove or disprove any fact relevant to the issue. In the former case, where the writer is a witness only, his letter would be admissible only to contradict his present testimony. But in the latter case, where the writer is also a party, his statement may be used to contradict his present testimony, or as an admission of fact if material to the issue. In the case at bar, the extracts from the defendant's letter could not have been used to contradict his present testimony, for no such contradiction appeared or was claimed; hence they must necessarily have been used as admissions of fact on the part of the defendant.

2. Considering this letter then as an admission previously made by the defendant, did counsel for the plaintiff, by introducing a part of it, thereby give the defendant the right to introduce the balance? We think he did. This Court in Storer *v.* Gowen, 18 Maine 176, have held that,

"It is a principle well settled that the admissions of a party, when given in evidence, must be taken together as well what makes in his favor as against him. Both are equally evidence to the jury, who will give every part of the testimony such credence as it may appear to deserve." Hammatt *v.* Emerson, 27 Maine, 308, 336, 46 Am. Dec. 598.

In an early decision in Massachusetts, Whitwell *v.* Wyer, 11 Mass. 91, this is the language of the Court:

"Where you rely upon a confession you must take it all together."

And the same Court says in O'Brien *v.* Cheney, 5 Cush. 148:

"The general principle for which the defendant contends, namely, that, when the admission of a part is offered in evidence, he is entitled to have the whole of

what he said on the subject, at that interview, stated as a part of the evidence, is correct and is not denied."

See also Adam *v.* Eames, 107 Mass. 276; Dole *v.* Wooldredge, 142 Mass. 161. In regard to the admission of the defendant, the Court say in Mattocks *v.* Lyman, 18 Vt. 102:

"That the whole declaration of the party made at one time, as well that in his favor as that which is against him, must be received and weighed."

And in Moore *v.* Wright, 90 Ill. 473, the Court holds that,

"Where a party's admissions are called for, the party calling for the same is bound to take all the other party said upon the occasion concerning the matter in dispute, whether it makes for or against him."

It is unnecessary to make further citations. The above, we think, is a fair statement of the practice both in this country and England with respect to the admissibility of admissions as testimony. . . .

In Maine the whole of an oral admission is admissible, although it may contain a reference to matters entirely impertinent to the issue to be tried, if so connected that it cannot be separated from the whole. It was so held in Lord *v.* Moore, 37 Maine, 217, 218. . . .

Exceptions sustained.

SUB-TITLE IV. AUTHENTICATION OF DOCUMENTS

538. Horne Tooke's Trial. (1794. 25 How. St. Tr. 78). [High treason. A book purporting to be the minutes of the Constitutional Society, at a meeting of March 28, 1794, with Mr. Tooke as chairman, was offered to be read by the prosecution, after some evidence of the handwriting.]

Mr. *Tooke*. — Is the insertion of my name in that book evidence of my being present at the time?

Lord Chief Justice Eyre. — It is certainly evidence to go to the jury of your being present.

Mr. *Tooke*. — My name being found in any book! That will be the most extraordinary evidence I ever heard of. The bulk of the trash that is to be found in that book I never saw or heard of before. But that every time that my name is to be found in the book, that that is to be evidence that I was present is a most extraordinary proposition. If *I* wrote my name in the book, that would be evidence that I was there when I wrote it; but my name being written in a book does not prove my being there when it was wrote. . . . If this evidence were to be admitted in a charge of high treason, and it should therefore follow that I partake of whatever is over or under my name, it would be the most extraordinary evidence that ever was admitted in a Court of justice.

Lord Chief Justice Eyre. — You are perfectly right, if the state of the evidence depended entirely upon your name being found in a book in possession of a Daniel Adams; undoubtedly, in order to prove your being present at these meetings, they must go a great deal farther — they must show that these are the books of the society, they must give probable evidence that these were books which you had access to, which you acted upon, and that you gave credit to the entries that were in it by some conduct of yours. This is only one step toward the evidence, to fix you with being a person present at this meeting. . . .

Mr. (later L. C.) *Erskine* (arguing against the reading of the treasonable paper).—Would it be said that this should be read as evidence against the prisoner before his connexion with it is proved to have had an existence? I take the reason of that to be this — and I take the reason of it to be founded in great wisdom, in that which in my opinion forms the glory of the English law in all its parts, in an acquaintance with the human character, in the recognition of all that belongs to the principles of the human mind, in the recollection of our wise ancestors that men are not angels, — that they carry about them (and your lordships even carry about you) all the infirmities of humanity, and that it therefore shall not be permitted to make a strong impression upon the minds of men by reading matters at which . . . the mind of man revolts, and so in the course of a long trial the jury afterwards cannot discharge from their recollection what they have heard. They do not remember with precision whether that which was read was brought home to the prisoner; and then they mix up in their imagination and recollection matters which they may disapprove with disapprobation of the person who is on trial before them. I take that, with humility to be the principle. . . . It must be brought home to the person who is to be affected by it, before it is suffered to be read; for after it is read, the effect is had, and that is the danger I complain of.

L. C. J. Eyre. — If the question is whether it is now to be read, I think the

objection is good. If the question is whether it is evidence admissible, not yet to be read, but to be read or not as other evidence shall bring the matter of it sufficiently home to the prisoner, then the objection is ill-founded.

539. Wilson *v.* Betts. (1847. New York 4 Den. 201, 213). Bronson, C. J. In the ordinary affairs of men, it is very often assumed, without proof, that he whose name has been affixed to a written instrument placed it there himself. But when the signing becomes a matter of legal controversy, it must be established by proof.

540. Stamper *v.* Griffin. (1856. Georgia. 20 Ga. 312, 320). Benning, J. No writing can be received in evidence as a genuine writing until it has been proved to be a genuine one, and none as a forgery until it has been proved to be a forgery. A writing, of itself, is not evidence of the one thing or of the other. A writing, of itself, is evidence of nothing, and therefore is not, unless accompanied by proof of some sort, admissible as evidence.

541. Siegfried *v.* Levan. (1820. Pennsylvania. 6 S. & R. 308, 311). Duncan, J. This was an action for debt on bond; the plea, non est factum. The plaintiff gave evidence, as stated in the bill of exceptions, and then offered the bond (of which he had made profert and given oyer) to the jury in evidence; this was objected to, and the Court sustained the objection, and would not suffer the bond to be read in evidence. The exception to be considered is to this opinion of the Court. . . .

The mistake arises from supposing that the Court, in suffering the deed to go in evidence to the jury, decide the issue; nothing can be more unfounded. . . . All that is done by the Court, in admitting the deed in evidence, is this: That if the execution of the deed is proved by the subscribing witness, the party has made out a prima facie case, — not a conclusive one; or, in cases where recourse is had to the secondary evidence, that the collateral proof is such that a jury might presume [*i.e.* infer] the execution; and then these facts are submitted to the jury to exercise their own judgment, to draw their own conclusion of the sealing and delivery. . . . If the bond is proved by the subscribing witness, it is read in evidence. Why? Not because the Court pronounce, by admitting it in evidence, that it *is* the deed of the party; but because the party has given *evidence of* its execution. So, where the execution is to be made out by facts and circumstances, it is admitted, not because the Court draw any conclusion of the fact in issue, but because *some evidence* is offered from which the jury might presume [*i.e.* infer] the fact in issue, the sealing and delivery of the bond.

If there be no evidence of the execution, the Court will not permit the bond to be read in evidence. But if there be any fact or circumstance tending to prove the execution or from which the execution might be presumed, then like other presumptive evidence it is open for the decision of the jury.

542. Modes of Authenticating Documents.[1] Some of the various possible modes of proving a document's genuineness are, of course, never questioned to be sufficient to entitle it to go to the jury. Those about which question has arisen are only certain kinds of circumstantial evidence. It will be necessary

[1] From the present Compiler's "Treatise on Evidence" (1905), Vol. III, § 2131.

therefore to eliminate at the outset the kinds of evidence as to which there is no dispute from the present point of view.

Evidence may be of three different sorts, namely, "real evidence," testimonial evidence, and circumstantial evidence.

(1) Autoptic proference (or "*real evidence*"), occurs, for the execution of writings, when the *act of writing* is done *in the presence of the tribunal*. The sufficiency of this is plain.

(2) *Testimonial evidence* is always regarded as sufficient; the only questions being the ordinary ones as to the qualifications of the witness by knowledge. Ordinary *admissions* of a party are a sort of evidence always regarded as sufficient to admit a document to the jury, but they are to be distinguished from judicial admissions.

(3) *Circumstantial evidence* is of various sorts; and first, of those not here involved:

(*a*) *Style of handwriting, i.e.* similarity between that of the document and that of the person alleged as its maker, is a sort of circumstantial evidence undisputed in its sufficiency; the controversies have arisen over the proper modes of proving the fact of similarity.

(*b*) *Sundry circumstances* preceding or following the act of writing may be appealed to as evidence. For example, if an unsigned writing is left in a room with pen and ink, and Doe goes alone into the room, then comes out with fresh ink-marks on his hand, and the writing is then found to bear his name in signature, this would be regarded, no doubt, as sufficient evidence to go to the jury; it is the same sort of evidence that might be used to prove a murder or any other act done in that room. For evidence of this sort there seem to be no specific rules of sufficiency.

(*c*) The remaining sorts of circumstantial evidence are those which give rise to quantitative rulings of sufficiency. They consist of groups of circumstances, each by itself perhaps insufficient, but all combined amounting in common experience to a sufficiency. They fall, roughly, under four heads: (A) *Age;* (B) *Contents;* (C) *Custody;* (D) *Signature* or *Seal.*

Topic 1. Authentication by Age

544. MIDDLETON *v.* MASS

CONSTITUTIONAL COURT OF SOUTH CAROLINA. 1819

2 *N. & McC.* 55

THIS was an action of trespass, to try the title to a tract of land originally granted to Wm. Bull, in 1737. The grant to Bull was produced on the part of the plaintiff, and he then offered in evidence a deed from Bull to James Oglethorpe, under whom he claimed, and from whom he deduced a title, dated in 1739, which had been proved before a magistrate, and recorded in the auditor's office, a few days after its execution; but he offered no proof of its execution, nor did he prove any possession of the land, or any act of ownership over it, by himself or any other person, through or from whom he deduced his title: so that the question was,

whether it was admissible as an ancient deed, without proof of its execution? The presiding judge being of opinion that it was not, the plaintiff then offered to prove that the deed had been in the possession of himself and those under whom he claimed, for more than thirty years, and contended that it ought to be admitted on this proof; but the Court thought otherwise, and the plaintiff was nonsuited. A motion was now made to set aside the nonsuit, on the ground that the deed ought to have been received in evidence, as an ancient deed, on proof of the possession of the deed, alone, for the time mentioned.

JOHNSON, J. — Until this case occurred, I did not suppose that this question admitted of any doubt; for the converse of the proposition contained in the motion, is certainly recognized in the case of Thompson *v.* Bullock, 1 Bay, 357, and the practice, so far as I have been conversant with it, accords with that view of it. But the question is made, and I understand that there is some diversity in the practice in the different parts of the State, and in the opinions entertained by the bar on the subject; it becomes, therefore, necessary to consider it and to put it to rest.

Mr. Justice BULLER, in his introduction to the law relative to trials, at Nisi Prius, 56, from whence the whole doctrine is drawn, says, if the deed be thirty years old, it may be "given in evidence, without any proof of its execution." "There ought," he adds, "to be some account given of the deed, where found, &c." Regarding this as a finished sentence, it would seem to follow, that it was only necessary to show, that the deed had been in the possession of the party claiming under it, or in a place where, from the nature of its provisions, it would probably be deposited; and this is doubtless a correct conclusion, so far as it relates to a peculiar species of writings which are, in some measure, to be regarded as public property, and partake in some degree of the character of records. . . . It is not, therefore, the place only, where an ancient deed is found, that always makes it evidence, but it is when the possession is according to the provisions of the deed. *Vide* Phillips, 349. Dunlap's Ed. and note *a*.

Independent, however, of authority, it appears to me the reason and propriety of the rule is apparent, and the more so from the only reason which I have seen in opposition to it. It is because old things are hard to be proved. Now, if this be a good reason, it operates with a twofold force on the opposite side of this question: for it is certainly more difficult, to say the least of it, to disprove an old thing than to prove it, especially when in most cases the party would be called on to do so without notice of its antiquity or the necessity of doing it. Policy requires, that the possession of individuals to their landed estates should be shielded by every legitimate means; for it is, in truth, the sheet anchor of the right of a great proportion of the citizens of this country, to such property And hence it is, that after a lapse of thirty years, when it may be reasonably presumed, that the witnesses to the deed are dead, or in the transi-

tory state of the community, they are removed without the knowledge of the party, the law will presume the legal execution of the deed in favor of a possession, according to its provisions. . . . No such indulgence is due to him who, as in the present case, neglects for almost a century to assert his claim, by one single act of ownership. The doctrine contended for on the part of the motion might in its consequences be productive of incalculable mischiefs; for, although it is not now usual to enter upon a course of villainy the fruits of which are not to be reaped for thirty years to come, yet establish the rule contended for, and it opens the door, and many will no doubt find an easy entry. On the other hand, it is conceived, that no such mischiefs can ensue. Apprize the owner of the danger to which he is exposed, he has the power, and will avert its consequences.

The motion must be discharged.

COLCOCK, NOTT and GANTT, JJ., concurred.

545. McGUIRE *v.* BLOUNT

SUPREME COURT OF THE UNITED STATES. 1905

199 *U. S.* 142; 26 *Sup.* 1

THIS case was begun in the Circuit Court of the United States for the Northern District of Florida, to recover in ejectment certain lands described in the declaration. The defendants answered, and issues were joined as to the right of possession of the lands in question. Upon the trial, after the testimony was submitted and the cause argued, the Court instructed the jury to find for the defendants. . . .

The petitioners, who were plaintiffs in the original case, sought to recover the tract of land as the heirs of one Gabriel Rivas. The tract originally owned by him consisted of about three hundred "arpents" of land near the city of Pensacola, Florida. The defendants at the trial undertook to defeat the plaintiffs' right of recovery, not by establishing a perfect title in themselves, but relied upon showing the divestiture of the plaintiffs' title as heirs of Gabriel Rivas. . . .

The defendants sought to show, by the production of certain ancient documents, bound together, styled a protocol, that Gabriel Rivas' will had been established by proceedings had during the Spanish control of Florida, which showed that Rivas, who had received the lands in controversy by grant of November 10, 1806, from Morales, intendant, etc., of Spain, had died on April 28, 1808, his will being probated by certain proceedings approved by the Governor of Florida, on May 2, 1808. . . . These original documents, evidencing the probate of the will of Rivas and the sale of the lands, including those in controversy, were presented to this Court, having been admitted in testimony at the trial against the objections of plaintiffs under the stipulation that they came from

the custody of the surveyor general of the United States, keeper of the archives.

Mr. *Benjamin Micou*, with whom Mr. *Hilary A. Herbert*, Mr. *E. T. Davis* and Mr. *Simeon S. Belden*, were on the brief for plaintiff in error.

Mr. *William A. Blount* in propria persona, and for other respondents, and with whom Mr. *A. C. Blount, Jr.*, was on the brief.

Mr. Justice Day (after stating the case as above) delivered the opinion of the Court.

Many objections are urged to the authenticity and admissibility of these documents as well as to the regularity of the proceedings under the Spanish law. The production of the originals of these documents has given the Court an opportunity to inspect them. They bear upon their face every evidence of age and authenticity. There is nothing about them to suggest that they have been forged or tampered with. They present an honest as well as ancient appearance and come from official custody. To such public and proprietary records the Courts have applied the rules of admissibility governing ancient documents. 3 Wigmore, Evidence, § 2145, and notes. With reference to such documents and records it is only necessary to show that they are of the age of thirty years and come from a natural and reasonable custody; from a place where they might reasonably be expected to be found. 3 Wigmore, §§ 2138 and 2139. While the testimony tends to show that these documents were subjected to various changes of possession during the transition of the government of Florida from Spain to the United States and upon the evacuation of Pensacola during the civil war, there is nothing to establish that they were ever out of the hands of a proper custodian. Nor is there proof to show that the originals were lost, or any evidence of a fraudulent substitution of a made-up record in the interest of parties to be benefited thereby.

In view of the frequency with which these proceedings have been given express or tacit recognition in subsequent official investigations and conveyances of the lands, corroborating the inference of genuineness to be gathered from the appearance and history of these documents, and the possession of the lands conveyed, we have no question that the Court properly admitted them in evidence.

Topic 2. Authentication by Contents

546. INTERNATIONAL HARVESTER CO. *v.* CAMPBELL

Court of Civil Appeals of Texas. 1906

43 *Tex. Civ. App.* 421; 96 *S. W.* 92

Appeal from District Court, Bexar County; A. W. Seeligson, Judge. Action by R. A. Campbell against the International Harvester Company of America. From a judgment for plaintiff, defendant appeals. Affirmed.

Cobbs & Hildebrand and *Wm. Aubrey*, for appellant. *Davis & McFarland*, for appellee.

NEILL, J. — This suit was brought by appellee against the appellant to recover $660 damages for a breach of contract of employment. The appeal is from a judgment for $570 in favor of the appellee. . . .

The second assignment of error is that "the Court erred in permitting plaintiff to testify, over the objections of defendant that a letter alleged to have been written by defendant to J. D. Cameron as follows, viz.: 'We have received your letter, also Mr. Campbell's references which are good. You are on the ground, employ him' — as appears more fully by defendant's bill of exceptions No. 1."

The bill of exceptions discloses a number of objections to the testimony, but as the proposition under the assignment embraces only one, it alone will be considered. It is: "In order to admit parol evidence of the contents of a letter, its genuineness must be established." This proposition involves only the establishment of the genuineness of the letter. If, then, there was sufficient evidence of its genuineness to admit its contents in evidence, the assignment should be overruled, regardless of any other objection that may have been urged upon the trial to the introduction of such testimony, for no other objection is presented for our consideration.

The genuineness of a writing may be proved by indirect or circumstantial evidence, as other facts; and in some instances, this is the only character of evidence that can be adduced. Before the testimony complained of was introduced, it was shown by the testimony of appellee that the letter in question was written on one of the International Company's letterheads; that Mr. Cameron, the agent of the company, showed him the letter about the first of June, 1903; that the signature was the same as that affixed to a letter he had received from the company a few days before and to other letters of the company written to Mr. Boldic, its traveling agent. The defendant and its attorney had been duly notified to produce the letter upon the trial, or that secondary evidence would be introduced to prove its contents. It was not denied by defendant or its counsel that such letter had been written, or was in their possession. The only challenge to plaintiff was: "You must show the genuineness of such letter before you can prove its contents." These circumstances, when taken in connection with the contents of the letter, fully meet the challenge.

Upon the subject of authentication of a writing by its contents, Wigmore on Evidence, § 2148, observes:

> "If Doe is the sole person who knows the circumstances of a certain event, and if a letter arrives purporting to be from Doe and stating those circumstances, and the statements appear by subsequent development to be accurate, it would be a simple matter, for the law, as well as for common sense, to deem that sufficient evidence of Doe's authorship had been furnished."

Campbell was seeking employment from the company; its agent, Cameron, had written informing the company of the fact; Campbell's references had been sent to the company; a letter is received in reply written from the company's office in Chicago, on one of its letterheads, bearing the same signature as other letters of the company to its agent, in which it is said: "We have received your letter, also Mr. Campbell's references, which are good." As no one, save the company, could have received the letter and references mentioned in the letter received by Cameron, and shown to plaintiff, its contents, when taken in connection with other facts, are, under the principle quoted, cogent evidence of its genuineness. We by no means wish to be understood as holding that the mere contents of a written communication, purporting to be a particular person's, are of themselves, sufficient evidence of genuineness, for the contrary is the rule. . . .

The judgment is affirmed.

547. Barham *v.* Bank of Delight. (1910. 94 Ark. 158, 126 S. W. 396). Frauenthal, J. — As a general rule, a letter that is offered in evidence must be authenticated by proving the genuineness of the signature of the writer. But when a letter is received in the due course of mail, and purports to be in answer to a letter that was previously duly addressed and mailed, the presumption arises that such letter is the genuine instrument of the purported writer; it is then sufficiently authenticated to go to the jury; and, upon its genuineness being denied, it then becomes a question of fact for the jury to determine as to whether the letter is genuine or not. 3 Wigmore on Evidence, 2153; Lancaster *v.* Ames, 103 Me. 87.

548. COBB *v.* GLENN BOOM & LUMBER CO.

Court of Appeals of West Virginia. 1905

57 *W. Va.* 49; 49 *S. E.* 1005

Error to Circuit Court, Rueker County. Action by W. H. Cobb against the Glenn Boom & Lumber Company. Judgment for defendant, and plaintiff brings error. Affirmed.

This is an action of assumpsit brought in the Circuit Court of Tucker county, wherein the plaintiff claims that he entered into an executory contract with the defendant by which he purchased from it 800 acres of land, lying in Randolph county, at $15.00 per acre, and that after the making of said contract, the defendant sold the timber on said land to another person, thereby rendering it impossible for it to carry out its contract with him; and claiming damages in the sum of $5,000. The defendant pleaded non-assumpsit, and filed an affidavit denying that it signed or authorized the signing of the telegrams in the declaration mentioned, and upon this issue the case was tried. After the plaintiff introduced all his evidence, the Court, upon motion of the defendant, excluded it from the jury, and instructed them to find a verdict in favor

of the defendant. The jury returned a verdict as instructed, and the Court rendered judgment thereon, and it is this judgment that we are now asked to review. . . .

To establish his case plaintiff relies upon certain letters and telegraphic communications, which, in order to get a more complete understanding of the case, are here given in extenso:

"Sunbury, Pa., Nov. 25, 1901. W. H. Cobb, Esqr., Elkins, W. Va. Dear Sir: — Your valued communication of 22nd inst. just at hand. . . . But we do not think the price you offer ($12.50) per acre for the land on Otter Creek side is sufficient for it. . . . Yours truly, Glenn Boom & Lumber Co. per W. H. Sager, Secty."

"Elkins, W. Va., Nov. 27th, 1901. To W. H. Sager, care Glenn Boom & Lumber Co., Sunbury, Pa. Wire best cash price on Otter Creek land. My order about limit. W. H. Cobb."

"Sunbury, Pa., Nov. 27th, 1901. Fifteen dollars. W. H. Sager."

"Elkins, W. Va., Nov. 27, 1901. To W. H. Sager, care Glenn Boom & Lumber Co., Sunbury, Pa. Will take Otter Creek land at price named. W. H. Cobb."

"Sunbury, Pa., Nov. 28th, 1901. To W. H. Cobb, Elkins, W. Va. Our Mr. Chester will reach Elkins Monday to consult with you. Letter today. W. H. Sager."

"Sunbury, Pa., Nov. 28th, 1901. W. H. Cobb, Elkins, W. Va. Dear Sir: Your telegram of 27th rec'd. Our Mr. Chester will reach Elkins about Monday evening to arrange terms of sale with you and enter into agreement with you if satisfactory all around. Yours truly, W. H. Sager, Secty Glenn Boom & Lumber Co."

The Court sustained the objection to the introduction of all the telegrams, except the first one mentioned, sent by the plaintiff to Sager, care of the defendant, inquiring the price of the land, and also sustained the objection to the introduction of the letter dated November 28, 1901.

W. B. Maxwell and *J. P. Scott*, for plaintiff in error. *A. Jay Valentine* and *L. Hansford*, for defendant in error.

SANDERS, Judge (after stating the case as above). . . .

1. While these letters and telegrams constitute a complete contract between the parties to them, yet, if they were written and sent by some person other than the one who is sought to be charged, it is necessary that the authority of the person writing and sending them should be shown. The defendant filed an affidavit with its plea as provided by § 40, c. 125 of the Code, denying that it signed or authorized the signing of the telegrams which are claimed to have been received by the plaintiff. . . . The secretary not having authority by virtue of his office to make such a contract as is relied upon by the plaintiff for the basis of this suit, the defendant cannot be held liable by reason of the letters and telegrams sent by Sager, unless he had, at the time, express authority from the corporation to make sale of this land, or unless he

was held out by the defendant in such a way as to make it apparent that he had such authority, or unless the contract was ratified by the defendant. . . .

It is claimed that the letter of the 25th day of November, 1901, addressed to the plaintiff and signed by Glenn Boom & Lumber Co., per W. H. Sager, Secty., shows that negotiations were pending for the sale of this land, and that the telegrams sent by Sager to the plaintiff in reply to the plaintiff's telegram, having come from the proper place, and the proper officer of the defendant, raises the presumption that they were directed to be sent by the defendant. There is no such presumption arising from the facts in this case. While the letter shows that it was signed by the defendant, per Sager, Secretary, yet that does not show that Sager had authority to sign it. . . .

2. But even if Sager had been shown to have authority to make this sale for the defendant, the telegrams sent by Sager were not proper to be admitted as evidence, because their genuineness had not been shown. There is nothing to show that they had in reality been written and signed by Sager. From the authorities there is some difficulty in determining *what are original telegrams* within the meaning of the rule that the best evidence must be produced. . . . "Of course, there must be competent *proof* that the alleged sender did actually *send* or *authorize* the sending of the message in question. . . . In *proving a contract* by telegrams, the best evidence is the telegram containing the offer as received at the point of destination and the dispatch containing the acceptance as delivered for transmission." Jones on Evidence, § 209.

Now, in this case, the plaintiff adopted the telegraphic system as a means for making the contract here relied upon, and made inquiry of Sager as to what he would take for the land in question, to which Sager replied, giving him the price, which plaintiff accepted. Now, in accordance with the above authority, the best evidence is the telegrams of the plaintiff as received at their destination and the telegram of Sager at the place at which it was delivered for its transmission. But then, again, there is no evidence, as we have noticed above, that Sager, in sending the telegrams, was acting as the agent of the defendant, and, of course, for that reason they were inadmissible.

It is argued that the telegrams are without the jurisdiction of the Court, and, even if this is true, it does not authorize the introduction of copies of them until their genuineness has been shown, and the authority of the person sending them to do so. If such a message as the plaintiff claims was sent to him, he could have shown the authenticity of it when delivered to be telegraphed to him, and then show, that, as it was delivered to the telegraph company, it was transmitted and delivered at the place of destination. But whether a copy is introduced or the original, it is necessary that the genuineness of it should be shown before it becomes competent evidence. "A dispatch or a copy of a dispatch purporting to have been sent by A. B., as Cashier, to C. D., cannot be read in evi-

dence without first proving that it was genuine paper, that is, that it was written and sent by the party whose name it bears." National Bank *v.* Bank, 7 W. Va. 544. And also see Smith & Whiting *v.* Easton, 54 Md. 138; Jones on Evidence, § 209. There being no evidence to show or tending to show that these telegrams which were claimed to have been sent by Sager were signed by him and delivered to the telegraph company for transmission, the Court committed no error in rejecting them.

For the foregoing reasons we find no error in the judgment of the Circuit Court, and it must, therefore, be affirmed. Affirmed.

549. BARRETT *v.* MAGNER

SUPREME COURT OF MINNESOTA. 1908

105 *Minn.* 118; 117 *N. W.* 245

ACTION in the Municipal Court of Minneapolis to recover possession of certain personal property or $355, its value. Defendant Daniel J. Molan alone answered. The case was tried before CHARLES L. SMITH, J., and a jury, which rendered a verdict in favor of defendant. From an order denying their motion for a new trial, plaintiffs appealed. Reversed and new trial granted.

March 30, 1907, appellants sold to B. J. Magner, in consideration of $525, a team of horses and a set of harness. Magner paid $100 cash and executed a chattel mortgage upon the team and harness, and upon three other horses, two other sets of harness, and a wagon, as security for the deferred payments. The mortgage was duly filed in the office of the city clerk of Minneapolis, April 2, 1907. The following May 22d respondent Molan purchased from Magner the team which had been sold to him by appellants, and this action was brought in replevin to recover possession of the team. Molan claimed to be an innocent purchaser, without notice of appellants' mortgage, and upon the issues presented recovered a verdict in the trial court. One of the issues at the trial was that appellants had given Magner permission to sell the team, and that he had accordingly acted upon appellants' suggestion and sold the team to Molan, without conveying to him knowledge of the fact that the mortgage was in existence. Magner testified that after he had purchased the team from appellants, and before he knew anything about Molan, he had a personal conversation with Mr. Zimmerman, which took place on or about the 10th or 12th of April, at which he told Mr. Zimmerman that one of the horses was balky; that he could not do anything with it so far as hauling heavy loads was concerned, and that he (Magner) wanted to get rid of the team; that appellants would have to take it back or let him sell it; that Zimmerman had replied: "Let them go. Sell them, if you can." After this conversation Magner advertised the team for sale in the Minneapolis newspapers, and in

response Molan appeared as a prospective purchaser. Before any deal was closed, Magner called up appellants on the telephone and asked to talk with Zimmerman, and his testimony on that point is as follows: "They said he was out, and I says: 'Can I talk with him?' And they brought some one to the telephone. Whoever it was, it was supposed to be him. I don't know whether it was or not. I couldn't swear to it. I had occasion, prior to the month of May, 1907, to call up Barrett & Zimmerman at different times over the 'phone. . . . *Q.* — Whom did you ask for over the 'phone? *A.* — I asked for Mr. Zimmerman, and received the reply that he was out, but that they would call him in; and I waited until they answered again, and some one else came to the 'phone, and I told him who I was, and I said, 'I have a chance to sell that team,' and he said, 'Go ahead, sell them,' if I wanted to." This testimony was objected to upon the ground that it was incompetent, that no proper foundation was laid, and that it was not shown that Mr. Zimmerman had any authority with reference to the matter under consideration.

Simon Meyers, for appellants. *James E. O'Brien*, for respondent Molan.

Lewis, J. (after stating the case as above). . . . Was it error to receive in evidence a telephonic conversation testified to by Molan as having taken place between himself and Moses Zimmerman, appellants' manager? . . .

Appellants make the point that it does not appear from the telephone conversation whether Magner referred to the team which he had bought, and which is involved in this action, or not; that the evidence is not sufficient to identify Zimmerman as the party at the other end of the telephone. In the case note to Planters' Cotton Oil Co. *v.* Western Union Telegraph Company (Ga.) 6 L. R. A. (N. S.) 1180, the authorities upon this subject have been collected and carefully analyzed, and the editor states as a general proposition:

"When the admissibility of a telephonic communication depends upon its having been made with a particular individual, and not merely with a person connected with a certain office or place of business, it is clear that the identification of the office or place of business will not be sufficient to lay the foundation for the admission of the telephonic communication, unless under the circumstances of a particular case the identification of the office amounts to a practical identification of the individual."

For instance, in R. I. & P. Ry. Co. *v.* Potter, 36 Ill. App. 590, the testimony of a witness that he inquired by telephone of the railroad telegraph office, where the consignees generally got their information, with reference to a certain shipment, and that some one answered giving him the information he sought, was held sufficient to show prima facie that the answer came from an agent of the railroad company, and to make it admissible against the railroad company. . . .

However, when the communication is of such a nature as to require

identification of the individual, there must be evidence of such identity, in addition to the mere fact that the witness asked for a connection with his place of business, and that when the connection was made some one who claimed or assumed to be such person responded. This is illustrated by the case of Oberman Brewing Co. *v.* Adams, 35 Ill. App. 540. It was there held error for the Court to admit the testimony of the plaintiff to the effect that he called up the brewery over the 'phone, and that the individual at the other end of the wire assured him that the party inquired about had authority to purchase goods on credit; the witness having admitted that he did not recognize the voice of the individual who spoke with him through the 'phone, as he never knew any of the people connected with the brewery company. . . . While the identification of the voice of the party responding at the 'phone has, in many cases, been held sufficient to establish identification prima facie, it does not follow that the recognition of the voice is the exclusive means of identifying the party. Surrounding circumstances may be taken into account. Davis *v.* Walter & Son, 70 Iowa, 465, 30 N. W. 804; Wolfe *v.* Mo. P. Ry. Co., 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331; Godair *v.* The Nat. Bank, 225 Ill. 572, 80 N. E. 407, 116 Am. St. Rep. 172; Wigmore on Evidence, § 2155.

Magner had already testified that soon after making the purchase of the horses he found that one of them was balky; that he then had a personal conversation with Mr. Zimmerman, and told him the condition of the horse, and that he wanted to get rid of the team; that Mr. Zimmerman would have to take it back, or let him sell it; and that Zimmerman told him to sell them if he wanted to. Assuming that the sale was consummated entirely by Zimmerman as appellants' manager, and that such a personal conversation had taken place, we are inclined to the opinion that sufficient ground was laid for the introduction of the evidence as to the telephone conversation. While Magner did not identify Zimmerman as the person who answered the telephone, a failure in that respect did not necessarily make the conversation inadmissible. Had there been no previous personal conversation, a failure to identify the party under such circumstances might not be sufficient to make it admissible prima facie. Afterwards, in the course of the trial, Mr. Zimmerman testified that he never had any conversation whatever with Magner, either personally or by telephone, and that he had never in any way consented that the mortgaged property might be sold free from the mortgage. But, conceding that such denial conclusively overcame the effect of the evidence already introduced, no motion was made to strike it out, and, so far as the question now before the Court is concerned, we hold that the evidence was competent. Conkling *v.* Standard Oil Co. (Iowa) 116 N. W. 822. . . .

The jury returned a general verdict in favor of defendant. It was error to submit to the jury the question of the sufficiency of the description in the mortgage, for the reason discussed in the second branch of the

opinion; and, it being impossible to determine upon which ground the jury based the verdict, a new trial must be granted. Peterson *v.* C., M. & St. P. Ry. Co., 36 Minn. 399, 31 N. W. 515.

Reversed. New trial.

Topic 3. Authentication by Official Custody

550. ADAMTHWAITE *v.* SYNGE

Nisi Prius. 1816

4 *Camp.* 372; 1 *Stark.* 183

Debt on a judgment recovered in the Court of Exchequer in Ireland. The witness called to prove an examined copy of the judgment, stated, that at the request of an attorney in Dublin, he went to the building where the four courts are held, and there compared the copy produced with a parchment roll produced by the attorney.

Lord Ellenborough deemed this evidence insufficient, without either showing that the original came from the proper place of deposit or out of the hands of the officer in whose custody the records of the Exchequer were kept.

Courthope, for the plaintiff, suggested, that from the contents of the copy, it would appear, that the original was a record of the Exchequer.

Ellenborough, L. C. J.—It must in the first place be proved by the witness that the original came out of the proper custody; this cannot be shown by any light reflected from the record itself, which may have been improperly placed where it was found.

It then appeared, that the records of the different courts in Dublin were all kept in one room, but in different presses.

Ellenborough, L. C. J.—Since the records are kept in different presses, the same difficulty still presents itself; it is very distressing to strain the rules of law, when evidence might so easily have been procured. If the witness had stated, that the record came out of the hands of the proper officer, it would have been sufficient. The evidence must be launched by proving that the document came either from the proper person or proper place; till then I cannot look upon it as a record. To admit this evidence would afford a precedent for laxity of proof in other cases.

Plaintiff nonsuited.

Topic 4. Authentication by Official Seal

552. J. C. Jeaffreson. *A Book about Lawyers.* (1867) I, 21. *The Great Seal.* In days when writing was an art almost entirely confined to religious per-

sons, sealing was a far more important and efficacious means of testifying the genuineness of documents than it is at present. . . . In the feudal ages any needy clerk who had turned his attention to caligraphy, could have perpetrated forgeries in perfect confidence that they would endure the scrutiny of the most accurate and skilful of living readers. But the necessity for sealing placed almost insuperable obstacles in the way of those who were best qualified and most desirous to triumph over right by fictitious deeds. It was no easy matter to procure seals of any kind; it was very difficult to obtain for dishonest ends the temporary possession of well-known seals. . . . Great barons, ecclesiastical dignitaries, secular and religious corporations, had distinctive seals at an early date; but they were confided to the care of trusty keepers, and were guarded with jealousy. When an official seal was used, its keeper brought it with reverential care from its customary place of concealment, and it was not applied to any document without satisfactory cause shown why its sanction was required. An obscure tamperer with parchments could not hope to lay his hand on one of these important seals. If he procured an impression of a respected seal, he could not obtain a fac-simile of the original. Seal-engraving was an art in which there were but few adepts; and the artists were for the most part men to whom no rogue would dare propose the hazardous task of counterfeiting an official device. . . . The forger of deeds in older time had not overcome all difficulties, when he had surreptitiously obtained a seal. The mere act of sealing was by no means the simple matter that it is now a days. To place the seal on fit labels rightly placed, and in all respects to make the fictitious deed an accurate imitation of the intended deeds to which the particular seal of a particular great man was applied, were no trifling feats of dexterity ere scriveners had congregated into fraternities, and law-stationers had been called into existence. To get a supply of suitable wax was an undertaking by no means easy in accomplishment. Sealing-wax was not to be bought by the pound or stick in every street of feudal London. *Cire d'Espagne* — sealing-wax akin to the bright, vermilion compound now in use — was not invented till the middle of the sixteenth century. William Howe assures his readers that "the earliest letter known to have been sealed with it was written from London August 3, 1554, to Heingrave Philip Francis von Daun, by his agent in England, Gerrand Herman," and long after that date the manufacture of sealing-wax was a secret known to comparatively few persons. In feudal England there were divers adhesive compounds used for sealing. Every keeper of an official seal had his own recipe for wax. Sometimes the wax was white; sometimes it was yellow; occasionally it was tinged with vegetable dyes; most frequently it was a mess bearing much resemblance to the dirt-pies of little children. But its combination was a mystery to the vulgar; and no man could safely counterfeit a sealing-impression who had not at command a stock of a particular sealing-earth or paste, or wax. Eyes powerless to detect the falsity of a forger's handwriting could see at a glance whether his wax was of the right colour. Moreover, this practice of attesting private deeds by public or well-known seals gave to transactions a publicity which was the most valuable sort of attestation. A simple knight could not obtain the impression of his feudal chieftain's seal without a formal request, and a full statement of the business in hand. The wealthy burgher, who obtained permission to affix a municipal seal to a private parchment, proclaimed the transaction which occasioned the request. The thriving freeholder, who was allowed the use of his lord's graven device, had first sought for the privilege openly. "Quia sigillum meum plurimis est incognitum" were the words introduced into the clause of attestation; and the words show that publicity was his

object. And to attain that object the seal was pressed in open court, in the presence of many witnesses.[1]

553. *Chief Baron* GILBERT. *Evidence. p.* 19 (*ante* 1726). The distinction is to be made between seals of public and seals of private credit; for seals of public credit are full evidence in themselves, without any oath made; but seals of private credit are no evidence but by an oath concurring to their credibility. Seals of public credit are the seals of the King, and of the public courts of justice, time out of mind.

554. THEORY OF AUTHENTICATION BY SEAL.[2] — When a document bearing a purporting official seal — a notary's certificate of protest, for example — is offered in court, then, if the Court accepts it for the offered purpose, this involves the assumption of four things; namely,

(1) that there is an official of that name,

(2) that this is genuinely his seal's impression,

(3) that this seal-impression was affixed by him; and, furthermore,

(4) that it is allowable to receive his hearsay official statement as testimony to the fact stated by him.

The first three of these elements go to the matter of the genuineness of the document; that is to say, the document purports to be that of J. S., a notary, asserting a certain fact, and the net result of the first three elements is that we accept as a fact that J. S., a notary, did make this written assertion. If there were a signature only, with no seal, and the document was similarly accepted, the second and third elements would merge (*i.e.*, the purporting J. S.'s signature is accepted as written by him); it is only in the case of a seal that they are distinct (for it might be his seal's impression yet and another person might have affixed it). Thus it is that the second and third elements are always judicially united, *i.e.*, any presumption of genuineness, whenever made, covers both elements; there is no case presuming the seal's impression to have been of his seal but not affixed by him, nor vice versa.

Hence, in effect, the situation, for seal or signature alike, is reducible to the following elements and is so in practice treated: (1) that there is an *official of that name;* (2) (3) that this document was genuinely *executed by him.* The remaining element (4), that this hearsay statement of his is admissible, is obviously concerned with the Hearsay rule only, and may therefore be dismissed as having no present relation with the principle of Authentication.

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[1] [For an account of the history of the seal, in its other function of making the document unimpeachable as a correct memorial of an oral transaction, see *post*, No. 820.]

[2] [From the present Compiler's "Treatise on Evidence" (1905), Vol. III, § 2161.]

555. CHURCH *v.* HUBBART

SUPREME COURT OF THE UNITED STATES. 1804

2 *Cr.* 186, 238

[Printed *ante*, as No. 436; Point 2 of the opinion.]

556. GRISWOLD *v.* PITCAIRN

SUPREME COURT OF ERRORS OF CONNECTICUT. 1816

2 *Conn.* 85, 90

ASSUMPSIT on a charter party; plea in bar, a judgment of the same cause in the Supreme Court of Denmark, at Copenhagen, affirming a judgment of the Sea Court. A purporting copy of this record was offered. The record was authenticated by the great seal of Denmark. There was no certificate that the decree, &c. offered in evidence, was a copy of record, but below the seal was the signature Colbiornsen, without any addition of his official character. The translator of the record, deposed, that he knew the seal attached to the original to be the royal seal of the kingdom of Denmark. J. M. Forbes, Esq. agent of the United States at Copenhagen, certified, that the signature at the foot of the record was that of the counsellor of conferences, Colbiornsen, chief judge of the highest court. To the admission of this record the plaintiff objected.

The Court also instructed the jury, that if they should find the document shown in evidence of the proceedings in the court of Denmark to be genuine, — and it was to be presumed to be genuine until the contrary was shown, — their verdict upon the second issue should be for the defendant. The jury having found a verdict for the defendant on both issues, the plaintiffs moved for a new trial; and the questions arising on such motion were reserved for the consideration and advice of the nine judges.

The case was very fully discussed, by *Dagget* and *Cleaveland*, in support of the motion, and by *Law* and *Brainard*, contra.

The former contended, among other points, which, from the decision of the Court, it has become unnecessary to state, 1. That the writing given in evidence as the record of a court in Denmark, was not properly authenticated as a *genuine* document. Moses *v.* Thornton, 8 Term Rep. 303. Henry *v.* Adey, 3 East. 221. 2. That admitting the document to be genuine, yet it was not a *legal exemplification*. It does not purport to be a copy of an original record; nor does it appear from extrinsic evidence that it was so. 2 Cranch, 237, 8. 8 Term Rep. 307, 8. It is signed by an individual, without any addition to show that he was

an officer of the court, or if he was, that he was then acting in his official capacity. Nor does it appear, by whom or by what authority the seal was affixed. . . .

On the other side, it was insisted, 1. That the record of the Danish court being authenticated under the *national seal*, was proved by the highest evidence which could be given. The affixing of a national seal to an instrument, is symbolical language, importing absolute verity, which the courts of other nations judicially take notice of, and give credit to. Swift's Ev. 8. Peake's Ev. 73. (q). 4 Dall. 416. . . .

SWIFT, Ch. J. . . . It is contended for the plaintiffs, that this record ought not to have been admitted in evidence, because it is not duly authenticated, and does not appear to have been certified by any officer having power to do it. But this Court does not know the form of making up, attesting or certifying their record. If it appear to be a judicial proceeding under the great seal, it is to be presumed, that all the formalities required by their law, have been complied with. This appears to be the record of a judgment rendered in a court of the kingdom of Denmark, under the great seal of the king. This seal proves itself, and the Court is bound to take judicial notice of it. This is all the evidence required by our law to prove a foreign judgment, and the record was properly admitted. . . .

I would not advise a new trial.

GOULD, J. . . . It is first objected that the record in question is not duly authenticated, — *i.e.* not accompanied with sufficient evidence of its being genuine. But, in the proof of foreign documents, there must from the nature and necessity of the case be some ultimate limit, beyond which no solemnity of authentication can be required. And the public national seal of a Kingdom or sovereign State is, by the common consent and usage of civilized communities, the highest evidence and the most solemn sanction of authenticity, in relation to proceedings either diplomatic or judicial, that is known in the intercourse of nations. The seals of foreign municipal courts, on the contrary, must be proved by extrinsic evidence. . . . In the present case, the proof of the genuineness of the record, given in evidence, is, in point of solemnity, the highest possible, the national seal of the kingdom of Denmark. And, as if the production of the seal were not, of itself sufficient; its genuineness has been proved by evidence aliunde, to which there was no objection. . . .

But there is no evidence, it is said, that the seal was affixed by a proper officer. Assuming the seal to be genuine, that fact must of course be presumed, unless the contrary is shown. For any higher evidence of the fact, appearing upon the face of the record, than the seal itself imports is impossible, and to require extrinsic evidence of it would be to subvert the rule itself that a national seal is the highest proof of authenticity, and as such, is taken notice of, judicially, by Courts of justice in other States.

The Danish record, then, was clearly admissible; and if so, I am at a

loss to discover how the direction to the jury could have been substantially otherwise than it was; except, indeed, that, in relation to the genuineness of the seal, it was somewhat more qualified in favor of the plaintiffs than it might have been. . . .

The other judges concurred, except GODDARD, J., who declined acting, having been of counsel in the cause.

New trial not to be granted.

557. WALDRON *v.* TURPIN

SUPREME COURT OF LOUISIANA. 1840

15 *La.* 552

APPEAL from the Court of the First Judicial District.

This is an action on two promissory notes for five hundred and ninety-three dollars and twenty-three cents, and five hundred and ninety-five dollars and thirty-seven cents, signed by White, Turpin & Nephew, a commercial firm residing and doing business at Grand Gulf, in the State of Mississippi, dated the 7th April, 1838, payable on the 15th of November, and 1st of December following, to the order of the plaintiffs, at the Grand Gulf Railroad and Banking Company, in Mississippi, and protested for non-payment at maturity. . . . The defendant pleaded the general issue, and avers that he is no way liable to pay said notes; and that one of them has been extinguished by a draft given by him. He prays to be dismissed from said suit.

The principal question, on which the whole case turns, is embraced in a bill of exceptions, taken by the defendant's counsel to the *admissibility of the protest of the notes in evidence*, to prove demand of payment at the place where made payable, on the ground that the signature and official capacity of the notary or justice of the peace, who purports to have made the protest, *was not, and should be first proved.* The Court overruled the exception, and admitted the protests to go in evidence, without such preliminary proof, wherefore the defendant's counsel took his bill of exception to the opinion of the Court.

There was judgment for the plaintiffs, and the defendant appealed.

Wharton, for the plaintiffs, insisted on the affirmance of the judgment. He contended that, by the commercial law, it was not required to prove signatures, or the authority of notaries to protest bills and notes. That in aid of commerce, this preliminary proof was dispensed with.

T. Slidell, for the defendant, argued, . . . that there was no evidence authenticating the signature and capacity of the notary; but the Court, as defendant contends, improperly permitted the introduction of said protests.

MORPHY, J.—This action is brought on two promissory notes, dated at Grand Gulf, in the State of Mississippi, drawn to the order of plaintiff, by the firm of White, Turpin & Nephew, of which defendant was a mem-

ber, and made payable at the Grand Gulf Railroad and Banking Company, in that State. Defendant pleaded the general issue and novation, as to one of the two notes. Judgment being rendered in favor of the plaintiffs, this appeal was taken. To prove the demand at the place mentioned in the body of the notes sued on, two documents were offered in evidence, purporting to be notarial protests of the notes. Their introduction was opposed, on the ground that no proof had been adduced of the signature and official capacity of the person who made them. This objection having been overruled by the judge, a bill of exceptions to his opinion was taken, to which our attention has been particularly requested.

We understand the general rule on this subject to be, that the signature and official capacity of persons assuming the character of public officers in foreign countries, must be proved when contested in a court of justice. The different States of the Union must, we apprehend, be viewed in the light of foreign countries, with regard to each other, so far as their municipal laws, and the individual sovereignty retained by each of them, are concerned; and the Courts of one State can have or be presumed to have no more knowledge of the signature and capacity of the public officers of another State than of any other foreign country.

To the above rule there exists an exception as regards notarial protests of foreign bills of exchange. It has been introduced in aid of commerce, founded wholly upon the custom of merchants and public convenience; it has been acknowledged and maintained by the Courts of law, and such protests receive credit everywhere without any auxiliary evidence. We are now asked to extend this exception to the protests of two notes, executed and payable in the State of Mississippi, and to receive such protests as evidence per se, of a demand of payment at the indicated place. No adjudged cases have been shown to us, nor have we been able to find any in which the extension contended for has been allowed, nor do we see any good reason why it should. The importance and almost universal use of bills of exchange as the means of remittances from one country to another; the great commercial facilities they have found to offer; and the delay and trouble of procuring evidence from distant places are among the grounds upon which this exception has grown up. They do not apply to promissory notes, or other moneyed obligations, more limited in their circulation and general usefulness to foreign trade.

We are then of opinion that the documents objected to are improperly admitted, and do not establish a demand of payment at the place mentioned in the notes. Without this no recovery can be had. 3 Mart. N. S. 423; 10 Id. 552.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and that there be judgment as in a case of nonsuit; the plaintiffs and appellees paying the costs in both courts.

558. STATUTES. [Printed *ante*, as No. 429].

559. COMMONWEALTH *v.* PHILLIPS

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1831

11 *Pick.* 28, 30

INFORMATION praying for additional punishment for one convicted for the third time of larceny. The prior convictions were to be proved. It was objected that the exemplification of the record of the conviction, before the Supreme Judicial Court in Middlesex, certified by the clerk, under the seal of the Court, was not properly authenticated without the certificate of the chief justice, that the person certifying was the clerk duly authorized, and that it was not competent evidence of such conviction to go to the jury. On this point the prisoner's counsel remarked, that the clerk is appointed by the Supreme Court; that his certificate used before another tribunal, in a different place, has no validity "proprio vigore," because the judges of other courts have no means of knowing whether he is the clerk lawfully appointed, or a usurper of the office; and that the seal of the Court, without a clerk's signature, is insufficient, for a stranger might get possession of the seal.

SHAW, J. C.—Without expressing any opinion as to the requisites for giving authenticity to records of other governments and states so as to entitle them to be received as evidence in this commonwealth, the Court are of the opinion, that a copy of the proceedings of any court of record in this Commonwealth, certified to be a true copy of the record of such court, by the clerk of such court, under the seal thereof, is competent evidence of the existence of such record in every other judicial tribunal in the Commonwealth.

560. STATUTES. [Printed *ante*, as No. 393.]

561. GARDEN CITY SAND CO. *v.* MILLER

SUPREME COURT OF ILLINOIS. 1895

157 *Ill.* 225; 41 *N. E.* 753

APPEAL from the Circuit Court of Cook County; the Hon. L. C. COLLINS, Judge, presiding. Appellees, as vendors, filed their bill for specific performance against appellant, as assignee of one Harpold, vendee of certain lands in Manitou county, State of Michigan. . . .

On the hearing there was offered in evidence a transcript of certain proceedings in chancery in the Circuit Court of Mackinac county, Michigan. . . . The transcript of the proceedings in chancery in the Circuit Court of Mackinac county, relating to the matter of guardianship referred to above, is certified by only the clerk of that court, the judge not having added his certificate that the clerk's attestation is in due form. A decree was entered for complainants, as prayed.

Edwin C. Crawford, for appellant. . . . The records of the proceedings of a Court of another State must be proved, in a suit in this State, by the attestation of the clerk of the former court and the seal of the same, together with a certificate of the judge of said court that said attestation is in due form. U. S. Rev. Stat. (2d ed.) 1878, title 13, chap. 17; McMillan *v.* Lovejoy, 115 Ill. 498. . . .

F. W. Becker, for appellees. . . . The act of Congress on evidence is not exclusive. . . . Section 13, chapter 51, of the Revised Statutes, supplements it, and the common law rule as to transcripts of record of a Court in this State introduced in another court in this State is the same as in Massachusetts. Commonwealth *v.* Phillips, 11 Pick. 27 [*ante*, No. 559]. . . .

Per Curiam:—The transcript of the Chancery Court of Michigan which authorized the guardian to make the sale and approved the contract is attested by the certificate of the clerk, under the seal of the Court. The attestation is not in accordance with the act of Congress, which requires the presiding judge to certify the attestation of the clerk is in due form. The admission of that transcript in evidence is assigned as error.

Prior to 1872 there was no statute in this State providing for the manner of attestation of the judgments of the Courts of another State to make the same evidence in the courts of this State. In the absence of such legislation this Court held, in numerous cases, that where a judgment of a foreign State was sought to be introduced in evidence in the courts of this State it was necessary that it should be attested by the clerk, under the seal of the Court, together with a certificate of the presiding judge that the attestation was in due form. Among the cases declaring such rule we refer to Brackett *v.* People ex rel., 64 Ill. 170.

By section 13, chapter 51, of Hurd's Statutes, enacted in 1872, it was declared by the Legislature of this State that "the papers, entries and records of Courts may be proved by a copy thereof, certified under the hand of the clerk of the Court having the custody thereof, and the seal of the Court, or by the judge of the court if there be no clerk." Since that legislation, the question of the admissibility in evidence of the transcripts of records of the Courts of other States has been frequently before this Court. . . .

Before the enactment of 1872 the records of judgments of Courts of this State, when offered in evidence in other Courts of this State, were attested as at common law. There was no statutory provision on the subject. At common law the manner of authentication was by certificate of the officer having custody of the record, or by exemplification, — that is, affixing the Great Seal of State. It has been universally held a sufficient authentication of a record of a judgment of a Court of a State, when offered in evidence in another Court of the same State, that it be certified by the clerk, under the seal of the Court. This was evidence at common law, and was the rule in this State when the act of 1872 was

adopted. So far as the admissibility of evidence was concerned, section 13 of chapter 51 made no new rule with reference to domestic judgments. That section changed no rule of law by adding to or limiting the admissibility of evidence of domestic judgments within the Courts of this State from what the rule was at common law. The intention of the Legislature could not have been to declare as a rule of evidence that which had immemorially existed. By the enactment of section 13 of chapter 51 there is no limitation as to the class of judgments to be so authenticated, and the language used includes both domestic and foreign judgments.

The Act of Congress as to the manner of authentication of judgments of sister States does not abrogate common law proof, and is not exclusive. The States may pass laws as to what shall be evidence of foreign records within their Courts, not inconsistent with the Acts of Congress yet waiving some of the requirements of that act. Ordway *v.* Conroe, 4 Wis. 45; Goodwyn *v.* Goodwyn, 25 Ga. 203; Karr *v.* Jackon, 28 Mo., 316; Dean *v.* Chapin, 22 Mich. 275; Ex parte Povall, 3 Leigh, 816; Kingman *v.* Cowles, 103 Mass. 283.

The record of the Chancery Court of Michigan, though not certified in accordance with the Act of Congress, was authenticated in consonance with section 13 of chapter 51 of the Revised Statutes, and was admissible in evidence. . . .

We find no sufficient evidence in the record to justify the vendee in his refusal to perform the contract. The decree of the Circuit Court will therefore be affirmed. Degree affirmed.

562. WILLOCK *v.* WILSON

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1901

178 *Mass.* 68; 59 *N. E.* 757

CONTRACT on a judgment obtained in the District Court of Shawnee County, Kansas, Third Judicial District, by the plaintiff, a resident of the State of Missouri, against Edwin E. Wilson, of this Commonwealth, and William B. Johnson, of the State of Vermont, copartners, having a usual place of business in Boston in this Commonwealth. Writ dated August 14, 1899.

At the trial in the Superior Court, before HARDY, J., the plaintiff offered in evidence a certificate of the proceedings in the Kansas court. . . . The certificate of proceedings purported to be attested by the clerk of the above named Kansas court, but was signed "A. M. Callaghan, Clerk District Court, by J. F. Curtis, Dep. Clerk." There was also a certificate of the judge of the court that A. M. Callaghan was the clerk of that court; but no certificate or other verification as to J. F. Curtis, who signed the certificate, and no signature or certificate by A. M. Callaghan. There was a third certificate, purporting to be by "A. M.

Callaghan, Clerk of the District Court of the Third Judicial District of Shawnee County in the State of Kansas," that the judge signing the preceding certificate was the judge of that court. This certificate was also signed "A. M. Callaghan, Clerk District Court, by J. F. Curtis, Deputy Clerk." These certificates were under the seal of the Kansas court.

The certificate of the judge was as follows: "State of Kansas, Shawnee County, ss. I, Z. T. Hazen, Judge of the District Court in and for the county and State aforesaid, and of the Third Judicial District, do hereby certify that A. M. Callaghan, whose name is subscribed to the foregoing certificate of attestation, now is, and was at the time of sealing the same, the clerk of said court whereof I am the judge, and the keeper of the records and seal thereof, duly elected, commissioned and qualified as such clerk. The signature to the above certificate is in his handwriting, and said attestation is in due form of law and made by the proper officers. In witness whereof, I have hereunto set my hand, at Topeka in said State and county, this second day of March, 1899. Z. T. Hazen, Judge of the District Court." The seal of the court was attached. . . .

The defendant objected to the admission of the certificate of proceedings in evidence, but the judge admitted it and the defendant excepted. The defendant requested the judge to rule that upon all the evidence the plaintiff was not entitled to recover.

The judge refused so to rule and found for the plaintiff; and the defendant, Wilson, alleged exceptions.

J. E. Kelley, for Wilson. *E. C. Bates*, for the plaintiff.

Hammond, J.—This is an action on a judgment rendered by a court in the State of Kansas against the defendant Wilson, of this Commonwealth, and one Johnson, of the State of Vermont. . . . At the trial the plaintiff offered in evidence a certificate of the proceedings in the Kansas Court. . . .

2. The defendant further objected to the admission of the certificate upon the ground that it was not properly authenticated, because it does not appear that the judge who signed it was the sole or presiding justice of the court, and because the attestation of the records is made by the deputy clerk. The Federal statute upon this subject requires that the records shall be proved "by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice or presiding magistrate that the attestation is in due form." Rev. St. U. S. 1878, § 905. The officers are the judge and the clerk. The judge in his certificate in this case says that Callaghan is the "clerk of said court whereof I am the judge." He uses the definite article, "the judge," in the very language of the statute; and the fair inference is that he is the sole judge of the court, and the proper person to sign the attestation. But the certificate as to the records is not signed by the clerk, but by a deputy clerk. The statute requires that the attestation shall be made by the clerk. An attestation by a deputy clerk

is not within its terms. 1 Greenleaf, Evidence, § 506; Morris *v.* Patchin, 24 N. Y. 394; Sampson *v.* Overton, 4 Bibb 409; Lothrop *v.* Blake, 3 Pa. St. 483; Ensign *v.* Kindred, 163 Pa. St. 638. And that would be so even if the State in which the Court existed had given to the deputy clerk the same power to certify as to the clerk. To hold otherwise would leave it in the power of the State to change the Federal statute in respect to the persons who should certify the records under it, or, in other words, to modify or control an Act of Congress, where by the Constitution of the United States that Act was supreme. Lothrop *v.* Blake, 3 Pa. St. 483.

Nor is this defect cured by the certificate of the judge that the attestation is in the handwriting of the clerk, and that the attestation is made by the proper officers. The only thing to which, under the statute, the judge can certify, is that the "attestation is in due form." This is a certificate simply that in the attestation the forms in use in the State from which the record comes have been observed, and this is necessary, because the Courts of one state do not officially know the forms in use in another State. The certificate of the judge as prescribed by the statute is that the attestation of the clerk is in due form, but he is not authorized to certify that the certificate of the deputy clerk is of equal validity with that of the clerk in the State where made. Morris *v.* Patchin, ubi supra. It follows that the record was not attested by the proper officer, and that it was not admissible under the Federal statute.

3. But that statute was passed for the purpose of prescribing the kind of proof of the existence of a record of a court in one State upon which a sister State might insist before it could be called upon to give to the record the full faith and credit imposed by the Federal Constitution; and it is well settled that the method of authentication therein prescribed is not exclusive. Neither the Federal Constitution nor the statute forbids the States from authorizing the proof of records in other modes in their own State courts, providing always, of course, that the State statute, if put into force, shall not have the effect of excluding a record authenticated according to the requirements of the Federal statute. 1 Greenleaf, Evidence, § 505; Kingman *v.* Cowles, 103 Mass. 283.

It remains to be seen whether the record was admissible under our own statute, which, so far as material, is as follows: "The records and judicial proceedings of any court of another state . . . shall be admissible in evidence . . . when authenticated by the attestation of the clerk, prothonotary, or other officer having charge of the records of such court, with the seal of such court annexed." Pub. St. c. 169, § 67. It is not necessary, under this statute, that there should be any certificate by the judge of the court; although in Capen *v.* Emery, 5 Metc. 436, his certificate under seal of the court that the court in which the judgment was rendered was abolished, and the records transferred to his court, was taken as evidence of those facts. The clerk is the proper custodian of the records of a court, and the seal of the court attached to his certificate attests the possession of the records in the person who certifies, and a

record so certified is admitted under our statutes without further proof. But where the certifying officer is other than the clerk it should appear by the certificate or otherwise that he has "charge of the records." Kingman *v.* Cowles, ubi supra. The person attesting the records in this case is the deputy clerk acting in the name of the clerk. It should, therefore, be made to appear somewhere that the deputy clerk is in charge of the records. Upon looking into the attestation, it appears that they are under the custody of the clerk; and the judge certifies under the seal of the court that the clerk "is the keeper of the records and seal," and it is nowhere stated that the records are at any time in the custody of the deputy clerk. The attestation, therefore, does not appear to have been made by the person having the charge of the records, within the meaning of Pub. St. c. 169, § 67.

It is true that the judge certifies that the signature is in the handwriting of Callaghan, the clerk, and that the attestation is in due form and made by the proper officers. We hardly see how it happened that if the clerk desired to make an attestation himself, and was present, with pen in hand, to do it, he concluded to affix the name of the deputy clerk, so as to make it appear not as his own personal act, but as that of his deputy acting for him; and the most natural explanation of the judge's certificate is that he took a printed form to be used by him when the attestation was signed by the clerk, and inadvertently signed it without erasing or modifying the printed clause. At any rate, even if we are to consider the certificate of the judge as evidence of the statements therein contained, it still appears that the attestation is, in form and in law, not the clerk's own personal act, but the act of his deputy in the name of the clerk. The further statement of the judge that the attestation is in due form and made by the proper officers, especially when taken in connection with the statement that the clerk is the keeper of the records, falls far short of a statement that the person personally making the attestation, namely, the deputy clerk, is the one having charge of the records. The result is that the attestation did not meet the requirements of the federal or State statute, and the record was not admissible. . . .

Exceptions sustained.

563. Mode of Authenticating when Genuineness is not Presumed; Certificates of Attestation; Statutes Presuming Genuineness.[1] Suppose, now, that the seal or signature is one of a kind which does not sufficiently evidence its own genuineness, — a tax-collector in another State, for example. Its genuineness therefore remains to be proved by testimony. The inconvenience of producing a witness who of his knowledge can testify to the genuineness of the seal or signature would be intolerable, and a resort to hearsay testimony in the shape of official statements has long been accepted as proper. But who is the appropriate officer to make such statements? Naturally, at common law, that chief officer, at the source of executive power, who knows what persons have

[1] [From the present Compiler's "Treatise on Evidence" (1905), Vol. III, § 2162].

been appointed and what are their seals or signatures. He must also know their duties and be authorized to certify to these, because the document, being usually offered as a hearsay statement, must appear to have been made under an official duty. Finally, the certifying officer must himself have such a seal as is presumed genuine, because otherwise the process of certifying would only have to be repeated anew. Such a seal, at common law, would practically be the seal of State only, for foreign officers at least, though for domestic officers it might be one of a lower grade. It will thus be seen that at common law, whenever a seal not itself presumed genuine is to be authenticated otherwise than by testimony on the stand, *two distinct rules are always involved* in practice; namely, the *admissibility of the hearsay certifying officer's statement* (*ante*, Nos. 427–442), and the *genuineness of his purporting certificate*.

In other words, two questions must be answered: (1) *What higher officer is authorized to certify* to the authority of the lower office, the official incumbency of the person exercising it, and the genuineness of the document purporting to be executed by him; and (2) *Is this higher officer's purporting certificate to be presumed genuine?* The one requirement might be satisfied without the other, for example, (1) a judge of court might be a proper officer to certify to a clerk's authority to copy the records and to the genuineness of a copy purporting to be by the clerk; but (2) the judge's own purporting certificate might not be sufficiently authenticated by his seal if from a foreign State, though it might be from the domestic jurisdiction; and resort might further be required to the seal of State, which would be presumed genuine. Now it is the Authentication principle which answers the second question, and the Hearsay exception which answers the first question.

The matter is further complicated by the circumstance that most statutes dealing with the subject provide in the same section for both sets of rules, *i.e.* they not only declare the higher officers authorized to certify to other official documents, but also declare how far up the process must be continued before reaching a seal which will be presumed genuine. For example, they may provide that a city tax-collector's certified copy may be authenticated by the mayor's certificate under city seal, and this in turn by the seal of the governor, or chancellor, or secretary of State under seal of State. Every such statute includes a declaration of the Authentication rule as well as of the rule of the Hearsay exception.

The following English statute is an example of the few that keep the two principles distinct: 1845, St. 8 & 9 Vict. c. 113, § 1. "Whereas it is provided by many statutes . . . [that various official documents, corporation proceedings, certified copies, etc., shall be admissible when duly authenticated], and whereas the beneficial effect of these provisions has been found by experience to be greatly diminished by the difficulty of proving that the said documents are genuine, and it is expedient to facilitate the admission in evidence of such and the like documents," it is enacted that whenever any certificate, official document, etc., is receivable in evidence, it shall be admitted if it "purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts . . . without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence."

PART II. RULES OF EXTRINSIC POLICY

565. Introductory. Rules of Extrinsic Policy (*ante*, No. 1) forbid the use of certain kinds of evidence because their use would contravene some extrinsic policy of substantive law or of general ethics which is regarded as more important for the time being than is the investigation of truth by this particular means.

The most natural grouping of these rules of Extrinsic Policy is that which regards them according as they are *absolute* or *conditional*.

The former class of prohibitions would be such as are invariably and impersonally enforced by the Court, like other rules of evidence; the latter would be such as are applied only on demand of the person who is supposed to be affected in his interests by the extrinsic policy in question and to be protected by the rule from an injury to that interest.

The latter class of rules — the rules of Privilege — have features in common, which sharply distinguish them from the former. The former class is practically non-existent; it can hardly be said that there are any definite and well-established rules of exclusion of that type; they have usually been discountenanced in judicial opinion. The rules of the latter class, on the contrary, are numerous and well established, and affect in a marked degree the daily course of proof in litigation.

TITLE I. RULES OF ABSOLUTE EXCLUSION

566. Stevison *v.* Earnest. (1875. Illinois. 80 Ill. 513). Scholfield, J. (answering an objection that certain records offered in evidence were obtained in violation of law): It is contemplated, and such ought ever to be the fact, that the records of Courts remain permanently in the places assigned by the law for their custody. It does not logically follow, however, that the records, being obtained, cannot be used as instruments of evidence; for the mere fact of [illegally] obtaining them does not change that which is written in them. . . . Suppose the presence of a witness to have been procured by fraud or violence, while the party thus procuring the attendance of the witness would be liable to severe punishment, surely that could not be urged against the competency of the witness. If it could not, why shall a record, although illegally taken from its proper place of custody and brought before the Court, but otherwise free from suspicion, be held incompetent?

567. WILLIAMS *v.* STATE

Supreme Court of Georgia. 1897

100 *Ga.* 511; 28 *S. E.* 624

Error from City Court of Macon; J. P. Ross, Judge.

Sarah Williams was convicted of violating the Sunday liquor law, and brings error. Affirmed.

Marion Harris, for plaintiff in error. *Robt. Hodges*, Solicitor-General, for the State.

LUMPKIN, P. J.—1. On the trial of this case in the court below, Jenkins, a detective, was introduced as a witness in behalf of the State. It appeared from his testimony that on Sunday morning, the 2d day of August, 1896, Mose Lucas and Jessie Bunkley (both colored) came to his house in Macon, and woke him up; Lucas saying that, if he "wanted to catch those parties down on Third street selling whisky, now was the time." He gave to Lucas "a silver quarter, marked with a cross," and "an empty half-pint whisky flask, with a file on the neck thereof," and to Bunkley "a silver ten-cent piece, marked with a cross on the woman's head." Both then went on down the street, in the direction of the house of Sarah Williams, the accused. "In about five minutes these two men came out of Sarah's back yard, and Mose Lucas handed [Jenkins] the same bottle that [he] had given him, and in the same condition, except that it was full of whisky." As to what then transpired, Jenkins testified: "I called Police Officer Charley Moseley, and we went to Sarah's house. We went in, and I walked up to Sarah and put my hand in her apron pocket, took out her purse, and found these two pieces of money in it. The two pieces of money are the same I marked and gave to Lucas and Bunkley. I then searched her house, and found a gallon jug of blackberry wine, and three bottles, to wit, two quart bottles and one half-gallon bottle. One of the bottles was nearly full of whisky, another had only the bottom covered with whisky, and the third, the half-gallon bottle, was full of something that looked like whisky, though I have never opened it, and do not know for certain what it contains. . . . I had no search warrant to search either the defendant or the house." Moseley, the police officer, who also appeared at the trial as a witness, corroborated Jenkins as to the account above given of the search made by them, and the finding and seizure of the marked coins and the liquor, and identified a small tin funnel as having also been found at the same time. The "jug of wine, the half-gallon bottle of whisky, the quart bottle of whisky, partly used, and the other bottle of whisky, which contained a little bit in the bottom of it," together with the tin funnel and "the twenty-five cent and ten cent pieces of silver money," were then tendered in evidence by the State, and admitted over objection by the accused.

All of the testimony of Jenkins and Moseley with regard to the search of the person and premises of the accused, and the seizure of the articles above enumerated, was also specifically objected to on the grounds that this evidence "was obtained under the circumstances just narrated, and particularly that it was obtained from defendant and her house without a search warrant; that this search was an illegal search and seizure, in violation of the constitutional rights guarantied to defendant, as a citizen of the State and of the United States, under paragraph 16 of the bill of rights of the State constitution of 1877, and under the United States Constitution; that this was a constitutional right of defendant, to be secure, in her person, property, home, and

effects, from such unlawful, unreasonable, and outrageous searches and seizures."

The position assumed by counsel for the accused does not present for determination a new question. That evidence pertinent and material to the issue is admissible, notwithstanding it may have been illegally procured by the party producing it, was early settled by the English courts. The case of Legatt *v.* Tollervey, 14 East 302, to this effect, decided in 1811, followed a previous ruling made in Jordan *v.* Lewis (1739), the substance of which is stated in a note, as the report of the latter case in 2 Strange 1122, was meager and imperfect. And such was the rule observed in subsequent decisions. Caddy *v.* Barlow, 1 Man. & R. 275; Stockfleth *v.* De Tastet, 4 Camp. 10; Robson *v.* Alexander, 1 Moore & P. 448. In this country the question certainly arose as early as 1841. Com. *v.* Dana, 2 Metc. (Mass.) 329. There it was insisted that the issuing of a warrant authorizing a search of the premises of the accused, who was suspected of having in his possession lottery tickets, invaded his constitutional right to be secure against unreasonable searches and seizures, and "that the seizure of the lottery tickets and materials for a lottery, for the purpose of using them as evidence against the defendant, [was] virtually compelling him to furnish evidence against himself, in violation of another article in the declaration of rights." But WILDE, J., speaking for the Supreme Court of Massachusetts, summarily disposed of this contention by saying:

"Admitting that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence, the Court can take no notice how they were obtained, whether lawfully or unlawfully, nor would [it] form a collateral issue to determine that question;" citing Legatt *v.* Tollervey and Jordan *v.* Lewis, *supra*, and adding, "We are entirely satisfied that the principle on which these cases were decided is sound and well established."

Such has been the view since entertained, and consistently adhered to, by the Massachusetts court. Com. *v.* Lottery Tickets, 5 Cush. 369, 374; Com. *v.* Intoxicating Liquors, 4 Allen 593, 600; Com. *v.* Welsh, 110 Mass. 359, 360; Com. *v.* Taylor, 132 Mass. 261, 262; Com. *v.* Henderson, 140 Mass. 303, 305; Com. *v.* Keenan, 148 Mass. 470, 472; Com. *v.* Ryan, 157 Mass. 403, 405; Com. *v.* Tibbetts, 157 Mass. 519, 521; Com. *v.* Hurley, 158 Mass. 159; Com. *v.* Brelsford, 161 Mass. 61, 64; Com. *v.* Welch, 163 Mass. 372; Com. *v.* Smith, 166 Mass. 370, 376.

It may here be remarked that no distinction is, or should be, observed between an unauthorized search of the person, and one which merely involves an invasion of the citizen's constitutional right to be secure in his "houses, papers and effects"; for none is recognized either by the

federal or by our State constitution, the right to be secure in the lawful possession and enjoyment of property evidently being regarded as no less sacred than the citizen's right to immunity from an unreasonable search of his person. In Welch's Case, just cited, it appeared that an officer unlawfully seized an object which a daughter of the accused was carrying under the folds of a loose dress, suspecting it to be a bottle of whisky, over the protest of the accused, who was present; but, though the knowledge so acquired by the officer was thus wrongfully obtained, he was nevertheless permitted to testify that the object she was carrying was, "in size and shape, like a quart bottle." In State *v.* Flynn, 36 N. H. 64, No. 599, the Court was called upon to pass on the same constitutional questions raised in Dana's Case, supra, and unhesitatingly adopted as sound the conclusions reached by the Massachusetts court; holding that

"evidence obtained by means of a search warrant is not inadmissible, either upon the ground that it is in the nature of admissions made under duress, or that it is evidence which the defendant has been compelled to furnish against himself, or on the ground that the evidence has been unfairly or illegally obtained, even if it appears that the search warrant was illegally issued." . . .

Mr. Greenleaf evidently regarded the admissibility of evidence of this character as no longer a vexed, but as a definitely settled, question; for in his treatise on the Law of Evidence (section 254a) he thus briefly deals with the subject:

"It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The Court will not take notice how they were obtained, — whether lawfully or unlawfully, — nor will it form an issue to determine that question."

Almost identically the same language is to be found in 2 Taylor, Ev. (9th Ed.) § 922. The correctness of the view announced by the Supreme Court of Massachusetts in the earlier part of this century has long been acquiesced in. In more recent years a few attempts have been made in this country to overturn this now well-established rule of evidence. They have, however, met with anything but success. In Illinois, South Carolina, Alabama, Missouri, Connecticut, and Arkansas, the Courts of last resort have declined to venture a departure from this sound doctrine. See Gindrat *v.* People, 138 Ill. 103, wherein it was held that

"the fact that evidences of the commission of a crime are found by a mere private detective on an unauthorized search of a party's rooms will not, of itself, render the evidence thus found incompetent against the party in whose possession the articles are found, if such evidence is otherwise competent."

which ruling was followed in the later cases of Siebert *v.* People, 143 Ill. 571, and Trask *v.* People, 151 Ill. 523. . . .

Irrespective of the many respectable authorities above referred to,

and speaking for ourselves, we are satisfied that the contention of the accused, that her constitutional rights were infringed by the ruling of the trial judge admitting the evidence complained of, ought not to be sustained. As we understand it, the main, if not the sole, purpose of our constitutional inhibitions against unreasonable searches and seizures, was to place a salutary restriction upon the powers of government. That is to say, we believe the framers of the constitutions of the United States and of this and other States merely sought to provide against any attempt, by legislation or otherwise, to authorize, justify, or declare lawful, any unreasonable search or seizure. This wise restriction was intended to operate upon legislative bodies, so as to render ineffectual any effort to legalize by statute what the people expressly stipulated could in no event be made lawful; upon executives, so that no law violative of this constitutional inhibition should ever be enforced; and upon the judiciary, so as to render it the duty of the courts to denounce as unlawful every unreasonable search and seizure, whether confessedly without any color of authority, or sought to be justified under the guise of legislative sanction. For the misconduct of private persons, acting upon their individual responsibility and of their own volition, surely none of the three divisions of government is responsible. If an official, or a mere petty agent of the State, exceeds or abuses the authority with which he is clothed, he is to be deemed as acting, not for the State, but for himself only; and therefore he alone, and not the State, should be held accountable for his acts. If the constitutional rights of a citizen are invaded by a mere individual, the most that any branch of government can do is to afford the citizen such redress as is possible, and bring the wrongdoer to account for his unlawful conduct. The office of the Federal and State Constitutions is simply to create and declare these rights. To the legislative branch of government is confided the power, and upon that branch alone devolves the duty, of framing such remedial laws as are best calculated to protect the citizen in the enjoyment of such rights, and as will render the same a real, and not an empty, blessing. With faithfully enforcing such laws as are thus provided, the responsibility devolving upon the executive and judicial branches must necessarily end. We know of no law in Georgia which renders inadmissible in evidence the fruits of an illegal and wrongful search and seizure, nor are we aware of any statute from which it could be logically gathered that the admission of such evidence violates any recognized principle of public policy. Whether or not prohibiting the Courts from receiving evidence of this character would have any practical and salutary effect in discouraging unreasonable searches and seizures, and thus tend towards the preservation of the citizen's constitutional right to immunity therefrom, is a matter for legislative determination. . . . We have therefore reached the conclusion that for no reason assigned by the accused, or disclosed by the record brought to this court, should her conviction be set aside.

Judgment affirmed.

TITLE II. RULES OF CONDITIONAL EXCLUSION (PRIVILEGE)

568. History.[1] To understand the history of Testimonial Privileges, we must consider the history of Testimonial Duty, to which all such privileges are exceptions. And the history of testimonial duty is united with the history of the process used for compelling attendance, and of jury trial in general.

It must be kept in mind that, up to the 1400s, the modern witness is practically unknown in jury trials, and that not until the 1500s is he a common figure in the trial and an important source of information for the jury.[2] Even in Coke's time, in the early 1600s, it is a comparatively recent feature that he is alluding to when he remarks "most commonly juries are led by the depositions of witnesses." Up to that period the jury had fulfilled the double capacity of triers and of witnesses; their own knowledge of the affair, acquired as neighbors of the parties or by searching about for evidence before the trial, had been a chief source of that information which is nowadays furnished to them by ordinary witnesses.

In the meantime the ordinary modern witness — *i.e.*, the person who happens to know something on the matter in issue — was gradually appearing, and was asked by the party to come and contribute his help, or he came of his own motion and interest in the cause. But he could not be compelled to come. A marked feature of the primitive Germanic law was the failure to recognize any general testimonial duty. There must be some specific pledge of faith beforehand (as in the case of the deed-witness or transaction-witness) to bear testimony for the party when called on.[3] This tradition was inherited by our law, and was at the period in question (the end of the 1400s) still a living force.

But more than this. The ordinary witness (such as we now know him) was not only not compelled; he was not welcomed. There was a radical and strict discouragement of maintenance. And the man who comes to labor privately with his neighbors on the jury by generally urging his influence in favor of one of the parties was not carefully distinguished from the man who comes merely to tell them what he knows of the facts. He is, in either case (they thought), trying to make them decide for one of the parties rather than the other; he is a meddler. This feature of the thought of the times is perhaps difficult nowadays to conceive. But it contains the whole explanation of the ordinary witness' position in the 1400s.

The result of this rooted opposition to whatever bore the semblance of maintenance was that anybody who was not somehow concerned as a party or a

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[1] [Abridged from the present Compiler's "Treatise on Evidence" (1905), Vol. III, § 2190.]

[2] Thayer, "A Preliminary Treatise on Evidence," pp. 122–134.

[3] Schroeder, "Lehrbuch der deutschen Rechtsgeschichte," 4th ed., 1902, pp. 86, 365 ("In order to bind document-witnesses once for all to a subsequent giving of testimony, the party had to pay document-money or give wine; for no public testimonial obligation existed [in the Frankish period], and a civil obligation could be created only by a contract entered into with a consideration"); Pollock and Maitland, 1895, "Hist. Eng. Law," II, 599 ("It seems to have been a general rule

counsel in the cause ran the risk, if he came forward to testify to the jury, of being afterwards sued for maintenance by the party against whom he had spoken.[1] "If he had come to the bar out of his own head and spoken for one or the other," says a judge in 1450,[2] "it is maintenance, and he will be punished for it. And if the jurors *come to* a man where he lives, in the country, to have knowledge of the truth of the matter, and he informs them, it is justifiable; but if *he* comes *to* the jurors or labors to inform them of the truth, it is maintenance, and he will be punished for it." Thus the state of things was that the person informing the jury must (if he would escape a charge of maintenance) either be an interested party, or his counsel or his servant or tenant or relative — in short, so situated that "the law presumes him bound to be with the party"[3] — or he must have been officially called upon, either by summons as a juror or deed-witness, or by the express request of the jury or of the judge — in short, by "compulsion of law";[4] since "what a man does by compulsion of law cannot be called maintenance."[5] This state of things lasted well on into the 1500s.[6]

But gradually it became intolerable, as may be imagined. By that time the jury was less and less able to do justice to the cause through the means of its own neighborhood-knowledge. The summoning of deed-witnesses and transaction witnesses with the jury (a method in any event available in only certain classes of cases) had through its cumbrousness fallen into disuse. No other form of compulsory summons than that appropriate to jurors and these quasi-jurors was known in tradition.[7] The doctrine of maintenance was a harsh obstacle in the way of obtaining by persuasion the attendance of any other persons capable of giving material information. In these conditions, the trend of the law was naturally marked out by the circumstances.

The lead was furnished by the existing qualification, already noted, that "what a man does by compulsion of law cannot be called maintenance." Create a general compulsion of law for all persons whose information may be needed or desired as useful by the parties, and the obstacle to getting witnesses would be removed. Let an order of the judge, commanding such a person's appearance, be obtainable, as of course, before the trial, and the risk of a charge of maintenance would be removed, and no man need fear to come forward as a witness. Such was the expedient which was plainly dictated by the exigency; and such, beyond a doubt, was the genesis — slow though the creative process was — of

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that no one could be compelled, or even suffered, to testify to a fact, unless when that fact happened he was solemnly 'taken to witness'"). It has been pointed out by Professor Glasson ("Histoire du droit et des institutions de la France, 1895, VI, 540") that the liability of the witness, if his oath were challenged as false by the opponent, to vindicate himself by judicial combat, was a serious one, and naturally prevented the recognition of any legal obligation to appear as a witness; and he notes the contrast in the ecclesiastical courts, where the testimonial obligation already existed.

[1] The data are given in Thayer, 124–129.

[2] Y. B. 28 H. VI, 6, 1; quoted in Thayer, 129.

[3] Cheyne, C. J., in 1433, Y. B. 11 H. VI, 43, 36; quoted in Thayer, 126.

[4] 1406, Y. B. 9 H. IV, pl. 24; Y. B. 8 id. 6, 8; quoted in Thayer, 125.

[5] Littleton, arguing, in 1450, Y. B. 28 H. VI, 6, 1; quoted in Thayer, 128.

[6] 1537, Y. B. 27 H. VIII, 2, 6; quoted *ante*, § 575.

[7] As late as 1481 (Y. B. 28 Ed. IV, 28, 1; quoted in Thayer, 129, note) a judge even refuses to compel a man to testify who is already in the court.

the notable statute of Elizabeth, in 1562–3, by which a penalty was imposed and a civil action was granted against any person who refused to attend, after service of process and tender of expenses.

> St. 5 Eliz. c. 9, § 12: "If any person or persons upon whom any process out of any of the courts of record within this realm or Wales shall be served to testify or depose concerning any cause or matter depending in any of the same courts, and having tendered unto him or them, according to his or their countenance or calling, such reasonable sums of money for his or their costs or charges as having regard to the distance of the places is necessary to be allowed in that behalf, do not appear according to the tenor of the said process, having not a lawful and reasonable let or impediment to the contrary, that then the party making default" shall forfeit £10 and give further recompense for the harm suffered by the party aggrieved.

No doubt a process had been issued on demand, increasingly often, in the preceding generation; but this appears as the first definite recognition of the general right to have that process and the general duty implied by it. This statute did for testimony at common law what John de Waltham's subpœna had done for testimony in chancery, more than a hundred years before, by an expedient almost precisely similar.[1]

This statute of Elizabeth, then, which in our day appears merely to supply a means of getting a hold upon persons who are not willing to testify, and typifies the *duty* of being a witness, appears in its inception as serving also a different and more restricted purpose. By giving a command to those who were willing enough, but were timorous, it represented their *right* to come and to testify, unmolested by the apprehension of maintenance-proceedings. Of a legal duty to attend or to give testimony, it can hardly be said that there is at this stage any settled recognition. The effort is rather merely to create a freedom to attend. As this freedom came to be exercised more and more generally, and the ordinary witness became, by the 1600s, the chief source of the jury's information, the notion of a duty was naturally developed from and added to the notion of a

[1] "He first framed it in its present form, when a clerk in Chancery, in the latter end of the reign of Edward III [about 1375]; but the invention consisted in merely adding to the old clause 'quibusdam certis de causis,' the words 'et hoc sub pœna centum librorum nullatenus omittas;' and I am at a loss to conceive how such importance was attached to it, or how it was supposed to have brought about so complete a revolution in equitable proceedings; for the penalty was never enforced, and if the party failed to appear, his default was treated (according to the practice prevailing to our own time) as a contempt of court, and made the foundation of compulsory process" (Campbell, "Lives of the Chancellors," 5th ed., I, 259). The learned writer would not have been "at a loss to conceive" the importance of the expedient, if he could have been acquainted with the modern researches into the history of witnesses. There had been before that time no compulsion; and the "pœna" of "centum libri" effectually supplied the compulsion. We may well understand that a "revolution in equitable proceedings" was by this "sub pœna" clause brought about. This and the statute of Elizabeth mark an epoch in the history of legal theory and practice. The history of the subpœna is further noticed in Leadam's Introduction to "Select Cases in the Star Chamber," p. xxii (Selden Society Publications, vol. XVI).

freedom or right.[1] In the next century, and hardly before then, do we find a plain recognition of the duty.

And it is noticeable that there are two stages of development, for the duty of attendance to be sworn comes earlier than the duty of disclosure of knowledge. The obligation to attend and bear testimony generally had been settled; but for some time afterwards there appears still to be lacking the full conception that the answer to a specific question on the stand can be compelled; and that all desired facts are bound to be disclosed.[2] The history of the various claims of exemption, from that time onward, shows that the final achievement was in the early 1600s distinctly a new one:

> Sir *Francis Bacon*, in the *Countess of Shrewsbury's Trial*, 1612, 2 How. St. Tr. 769, 778: "You must know that all subjects, without distinction of degrees, owe to the king tribute and service, not only of their deed and hand, but of their knowledge and discovery. If there be anything that imports the king's service, they ought themselves undemanded to impart it; much more, if they be called and examined, whether it be of their own fact or of another's, they ought to make direct answer."

But as yet there was one important step to be taken. The statute of Elizabeth had apparently intended to provide only for civil causes. In criminal causes, the date when process began to be issued for the Crown's witnesses does not appear; though presumably it preceded the time of Elizabeth's statute. But the accused in a criminal cause was not allowed to have witnesses at all, — much less to have compulsory process for them. By the early 1600s this disqualification began to disappear, and the accused was occasionally allowed to put on witnesses, who spoke without oath. After two generations, and by 1679, under the Restoration, the judges began to grant him, by special order, compulsory process to bring them; and finally, at slow intervals, in 1695 and in 1701, he was guaranteed this right by general statutes.[3] This guarantee was afterwards embodied in most of the constitutions of the United States.[4]

In the remaining important field of jurisdiction, the Court of Chancery, the general doctrine becomes a part of English history at a time when it was already in part achieved in another system of law. When the Chancellors

[1] 1599, Dobson *v.* Crew, Cro. Eliz. 705 (bond to give testimony; the Court said that, even apart from the bond, "he is compellable by the law").

[2] As late as about 1630, a clerk of the Star Chamber, Hudson, is found writing ("Treatise on the Star Chamber," part III, § 21, Hargraves' Collectanea Juridica, II, 209) that "the great question hath been, whether a witness which in examination will not give any answer shall be compelled to make answer to the interrogatories; . . . [and Lord Chancellor Egerton] gave me answer, that he knew no law to compel a witness to speak more than he would of his own accord."

[3] 1695–6, St. 7 & 8 W. III, c. 3, § 7 (persons indicted for treason and misprision "shall have the like processe of the court where they shall bee tryed, to compell their witnesses to appeare for them att any such tryal or tryals as is usually granted to compell witnesses to appear against them"); 1702, St. 1 Anne, c. 9, § 3 (requires that witnesses produced for the accused in felony shall be sworn); the latter statute was treated by implication as authorizing compulsory process: 1824, Starkie, Evidence, I, 86.

[4] The usual provision is that in criminal cases the accused shall have the right to "compulsory process for obtaining witnesses" (or, "process to compel the attendance of witnesses") "in his favor" (or, "in his behalf").

in the 1400s were forming the procedure of their court after the model of the ecclesiastical law, they found a doctrine "de testibus cogendis" long canvassed as a theoretic principle in the system from which they borrowed. There had indeed been a time when that system was passing through a development something like our own, — at least, when the compellability of witnesses was a new thing; the decretals of the 1200s indicate this;[1] and a final settlement had not been reached when the English Court of Chancery began to flourish, and to borrow the Continental rules.[2] But the Chancellors, without waiting, pushed the principle to the extreme test of practicality, and invented the keen compulsory weapon of the subpœna writ. This gave them more than a century's start of the common-law Courts in the recognition of a definite testimonial compulsion and duty.

For three hundred years, then, the fundamental maxim has been that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. We may start, in examining the various claims of exemption, with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are so many derogations from a positive general rule.

569. INTRODUCTORY. KINDS OF PRIVILEGE, SUMMARIZED. The kinds of exemption which are accorded to a person in respect of his testimonial duty may be grouped under two heads, according as they exempt him either merely from the task of travelling to and attending the court where his testimony is desired, or, having attended, from disclosing a certain part of his knowledge. An exemption of the first sort — which may be termed *viatorial privilege* — may and sometimes does result in an exemption also of the second sort, *i.e.*, from giving any testimony whatever; but this is rather an accidental and not an intended effect — as appears when a witness is exempted from attendance at the court-room, but is nevertheless still liable to testify before a commissioner sent to take his deposition at his residence. An exemption of the second sort, which may be termed *testimonial privilege*, or Privilege proper, never includes or effects an exemption of the first sort.

The *viatorial privilege* consists in exempting the witness from attendance until three conditions are fulfilled: first, he is to have *notice* that his testimony is required, and be *summoned* to attend; secondly, he is, in some cases, to receive in advance an *indemnity for his expenses;* and, thirdly, he is to be ex-

[1] "Corpus Juris Canonici," Decretal. II, 20 (de testibus et attest.), 21 (de testibus cogendis); Glasson, cited *supra*, note 8.

[2] That law seems to have suffered an arrest of development, and never to have reached explicitly the complete conception of a testimonial duty. "The canon law recognized a public duty and liability to bear witness, . . . although to be sure the earlier doctrine had partially refused this recognition, for criminal cases in general, or at least for the *accusatio*-proceeding in particular" (Hinschius, "Kirchenrecht," 1897, VI, pt. 1, § 364, p. 97, note 1). The modern Church jurists, in regard to the coercion of a witness, "incline to hold it allowable, at least when proof cannot be supplied in any other manner" (Droste, "Canonical Procedure," tr. Messmer, 1887, § 66). Even in modern French criminal procedure (which is founded on canon-law methods), a witness who refuses on the stand to answer a specific question cannot be compelled (Bodington, "French Law of Evidence," 1904, p. 116).

cused where his health or other sufficient circumstance constitutes an *inability to attend*.

The *testimonial privileges* fall naturally under two heads, according as the disclosure which they affect is a *topic* or class of facts in his knowledge, or is a *communication* from or to another person, irrespective of its subject.

The concededly *privileged topics* are some half-dozen in number, although others have been from time to time sought to be added to the list.

The *privileged communications*, as universally conceded, are those made by persons holding a certain confidential relation, — in particular, that of husband and wife, attorney and client, fellow-jurors, and government and informer; to these are added, in some jurisdictions, the relations of priest and penitent, and physician and patient; and occasionally sundry other additions have been attempted.

SUB-TITLE I. VIATORIAL PRIVILEGE

570. BRADDON'S TRIAL

(1684. 9 *How. St.* 1127, 1167.)

Mr. *Thompson*. Call Mr. Fielder, and Mrs. Mewx, and Mr. Lewes.

Lewes appeared.

Crier. Lay your hand on the book.

Lewes. My lord, I desire my charges may be paid, before I swear.

L. C. J. Jefferies. Pr'ythee, what have I to do with thy charges? I won't make bargains between thee. If you have any evidence to give, and will give it, do; if not let it alone.

Lewes. My lord, I shall not give any evidence till I have my charges.

L. C. J. Braddon, If you will have your witnesses swear, you must pay them their charges.

Mr. *Braddon*. My lord, I am ready to pay it, I never refused it; but what shall I give him?

L. C. J. Nay, I am not to make bargains between you, agree as you can.

Mr. *Thompson*. My lord, we are willing to do what is reasonable. You, Lewes, what do you demand?

Lewes. He can't give me less than 6*s*. a day?

L. C. J. Why, where dost thou live?

Lewes. At Marlborough.

L. C. J. Why, canst thou earn 6*s*. a day by thy own labour at Marlborough?

Lewes. My lord, I am at 40*s*. or 3*l*. a week charge with my family and servants.

L. C. J. What trade art thou?

Lewes. A stapler.

L. C. J. And does your trade stand still while you are in town?

Lewes. Yes, to be sure it can't go well on.

L. C. J. Well, I say that for you, you value your labor high enough,

I know not what your evidence may be, but, Mr. Braddon, you must pay your witness, if you will have him.

Mr. *Braddon*. I will, my lord, very readily. What will you have? I have paid you something already.

Lewes. Give me 20*s*. more then. You can't give me less.

Then Mr. Braddon paid him 20*s*., and he was sworn.

571. WEST *v.* STATE

SUPREME COURT OF WISCONSIN. 1853

1 *Wis*. 210, 230

THE plaintiff in error was indicted at the April term of the circuit court for the county of Fond du Lac, for the seduction of Eliza Pierce. Before the trial commenced, the defendant, by his counsel, moved the Court for an attachment against one Ashel Brooks, on whom a subpœna, as a witness in behalf of the defendant had been regularly served, and who had been in attendance as such witness, in obedience to said subpœna, during that term, but had left and gone home the day before the application was made. No fees had been paid or tendered the witness, and it appeared that his testimony was material to the defense. The motion was denied by the Court, on the ground that no fees had been paid or tendered to the witness by the defendant. To which decision of the Court, the defendant excepted. . . .

SMITH, J.:—It is alleged for error, that before the trial commenced, the defendant, by his counsel, moved the Court for an attachment against one Ashel Brooks, who, it appeared, had been duly subpœnaed to attend as a witness on behalf of the defendant, and who had been in attendance, but had left and gone home the day before the trial; which said motion was overruled by the Court, on the ground that no fees had been paid or tendered to the witness. . . .

1. It was, anciently, the commonly received practice, in the common law courts, that no counsel should be allowed the defendant upon his trial upon the general issue, in any capital crime, unless some point of law arose, proper to be debated. . . . At different times afterwards, the rule was so modified by acts of parliament, as to admit the examination of witnesses on oath, in behalf of the defendant, in particular cases; until at length, it was declared by statute (1 Ann. St. 2 c. 9), "that in all cases of treason and felony, all witnesses for the prisoner should be examined upon oath, in like manner as the witnesses against him." . . . And in conformity with the full equity of the rule, the Constitution of the United States, and of this State, declares "that in all criminal prosecutions, the accused shall enjoy the right to be heard by himself and counsel for assistance in his defense, and to have compulsory process to compel the attendance of witnesses in his behalf." . . .

The right to compulsory process, secured by the provisions of the Constitution, above referred to, cannot be taken away by legislative enactment, and ought not to be hampered by judicial construction. The Legislature, so far from attempting to restrict this right, have expressly recognized it, and provided ample means for its full enjoyment. Section 8 of chapter 146 of the Wisconsin Revised Statutes, page 724, is in the following words: "It shall not be necessary to pay or tender any fees to any witness who is subpœnaed in any criminal prosecution, but every such witness shall be bound to attend, and be punishable for nonattendance, in the same manner as if the fees allowed by law had been paid him." By no rule of construction, can this section be restricted to witnesses subpœnaed on behalf of the State. It is evidently enacted in aid of the constitutional guaranty above mentioned, and includes, as well the witnesses for the defendant, as those for the State.

2. But, it is urged, that this section of the statute, if held to refer to witnesses summoned on behalf of the defendant, is repugnant to that provision of the Constitution, which provides that "the property of no person shall be taken for public use, without just compensation therefor." The time and labor of attendance of the witness are said to be as much property, within the meaning of the Constitution, as are chattels or land. . . . But, in no just sense, can the requisition upon the citizen of his attendance upon the Courts to testify as a witness, be considered as the taking of private property for public use, within the meaning of the Constitution. The object of that provision in the fundamental law, was to protect the citizen from the grasping demands of government, not to absolve him from any of those various personal duties which every good citizen owes to his country; such as the performance of militia duty, obedience to the call of the proper authority for his personal service in suppressing a riot, the apprehension of a felon, affording assistance to officers in making arrests when resisted, and the like. There are very many instances in which the citizen is required to perform personal service, or render aid to his government, without other compensation than that of his participation in the general good, and his enjoyment of the general security and advantage which result from common acquiescence in such obligations on the part of all the citizens alike, and which is essential to the existence and safety of society. . . . We hold, therefore, that a witness is bound to obey the process of subpœna in a criminal prosecution, as well on the part of the defendant as on that of the State, without payment or tender of fees.

3. But it does not follow that the refusal by the Court, to grant an attachment against the witness for non-attendance, is error. The award of the attachment rests in the sound discretion of the Court, to whom application was made, and whose process is disobeyed. It is somewhat like a motion for continuance, or new trial, and other like matters addressed to the discretion of the Court, the refusal of which is not necessarily error, and only becomes so when that discretion is clearly

abused, to the manifest injury of the party, or to the perversion of justice. No such abuse, nor indeed any abuse of discretion, appears in this case. It is true, the defendant in his affidavit, alleges that the witness was material. But he does not apply for a continuance on account of his absence; he does not state that he cannot prove the same facts by other witnesses, or that he cannot safely proceed to trial without his testimony; nor does any fact appear, that in the least evinces an improper exercise of the discretion of the Court. All that does appear is, that the Court assigned an erroneous reason for its judgment, which may, for aught that is apparent upon the record, have been correct.

572. PEOPLE *v.* DAVIS

SUPREME COURT OF NEW YORK. 1836

15 *Wend.* 602, 608

THE defendant was brought up on an attachment for disobedience to a subpœna served upon him to attend as a witness for the plaintiff in a cause of Kelley *v.* De Forrest, noticed for trial at the Warren circuit, on the first Tuesday of June last. The defendant was duly subpœnaed on the 26th May, (13 days before the circuit), at the city of New-York, where he resided. Ten dollars were given to him to pay his expenses. He did not attend. Being brought into court, interrogatories were filed, to which he answered. . . .

The substance of the answers is that he is entirely insolvent, and had, when subpœnaed, delivered up all his property without reserve, into the hands of his assignees under the insolvent law, except what was exempt from execution; that he had a wife and three children for whom he provided, and that two of his children were at the time when the subpœna was served, and up to the time of the circuit, so sick as to render it improper for him to leave them; that his family were wholly dependent on his daily labor for their daily support, and that they must have suffered, if left, for the common necessaries of life; that his wife was unable to attend the children alone during nights, and he could not procure her any assistance; that the ten dollars which he received as witness's fee would not, as he believes, have defrayed his expenses of travel by the public conveyances; that he advised with his friend, and leaving the fees with him, procured him to write to the plaintiff's attorney, stating his excuse. . . .

COWEN, J.—It was the duty of the witness to obey the subpœna; and he is guilty of a contempt in disregarding it, and must be punished unless he has furnished us with a legal excuse. Both insolvency and poverty in the witness are sworn to by himself and Mr. Lamb, who was one of his assignees. But it is scarcely necessary to observe that these form no excuse in the abstract. If received at all it must be in connec-

tion with the situation of the family, or as showing the utter inability of the defendant to defray his expenses. In rendering these excuses of sickness and extreme poverty, while we are not disposed to deny the validity of either if clearly made out in a proper degree, we cannot allow the witness to judge for himself. Were we to stop and be content with his telling us in this general way, "some of my family were so sick that, with want of assistance and considering our poverty, I deemed it improper to leave home," we should surrender our own judgment. . . . The process of subpœna demands great and extraordinary efforts on the part of the witness to obey. It commands him expressly to lay aside his business and excuses; and, while it lays him under severe obligations, it clears away obstructions in the path of obedience; the witness was always privileged from arrest on civil process in going, staying, and returning. It is not denied that serious sickness in his family, such as would prevent a prudent father or husband from leaving home on his own important business, would save him from the imputation of a contempt and, perhaps from an action. But such a cause ought clearly to be shown to the Court. . . . Above all, where the summons allows him full time, he should struggle to get ready, as he would to go abroad on his own pressing business. If inevitably disappointed, after exhausting every reasonable expedient, he ought certainly to be excused from the payment of a penalty which presupposes some degree of neglect, at least. Witnesses are the summary instruments of investigation in all our common-law courts. It is not until a positive disability is apparent that their domestic examination will be received as a substitute for their actual presence. The important right of oral examination and cross-examination is at stake; and every good citizen, if he could be supposed to regard nothing beyond his own rights, should struggle for the front rank in the order of obedience. The least we can say of the case before us is, that it presents an unpleasant contrast to all this; great diligence, from first to last, in devising colorable excuses, without lifting a finger in preparation to go forward.

The defendant must be fined, and the fine ought, at least, to be so large as to indemnify the plaintiff Kelley against the expenses of the last circuit, with the costs of this proceeding.

573. STATUTES. *California.* P. C. 1872, § 1330. (No person is obliged to attend out of the county of residence or of service of subpœna, unless a subpœna is indorsed by the trial judge's order, or a judge of the Supreme or Superior Court, on affidavit of the party "stating that he believes" the evidence to be material and attendance necessary.)

United States. Revised Statutes, 1878, § 870. (No witness is compellable to attend for a *dedimus* deposition "out of the county where he resides, nor more than forty miles from the place of his residence." No witness subpœnæd to depose under a *dedimus potestatem* "shall be deemed guilty of contempt for disobeying . . . unless his fee for going to, returning from, and one day's attendance at, the place of examination, are paid or tendered to him at the time of the service of the subpœna.")

Ibid. § 876. (In civil cases, a subpœna shall not run more than one hundred miles from the place of the Court, if the witness lives out of the district of the Court.)

574. DIXON *v.* PEOPLE

SUPREME COURT OF ILLINOIS. 1897

168 *Ill.* 179; 48 *N. E.* 108

APPEAL from the Appellate Court for the Third District; — heard in that court on appeal from the Circuit Court of Sangamon county, the Hon. JAMES A. CREIGHTON, Judge, presiding.

At the January term, 1895, of the Circuit Court of Sangamon county, the case of Olive Purdy against the city of Springfield was on trial. It was a suit for damages for injury caused by a defective sidewalk. The appellant, Dr. J. N. Dixon, was called as an expert witness on the part of the city, and testified that he was a physician and surgeon; that he had practiced, as such, twenty-one years, and nineteen of them in Springfield; that he was a surgeon for five railroads running into said city, and had been such surgeon from two to seventeen years; and that he was a graduate of regular schools of medicine, and had been practicing general surgery for eighteen years. The witness was then asked this question: "Dr. Dixon, suppose a patient, . . . what would you say as to such injuries being the probable results of such fall?" This question the witness declined to answer, stating the following, as his reason for so declining: "On the ground that an expert witness is entitled to a different and greater compensation than an ordinary witness is allowed, and that an expert is not required to give expert testimony without compensation as an expert, unless a reasonable compensation shall have been paid or provided for. My reasonable fee for an expert or professional opinion in this case is $10.00. I have not been paid, nor offered anything for compensation for my expert or professional opinion in this case, nor has said compensation been in any way promised to me or provided for. On the contrary, it has been expressly refused. Therefore I decline to testify until such fee is provided for." It was conceded, that the witness knew nothing about the facts of the case, and was called as an expert only. It was also conceded, that the charge of $10.00 as a fee, if a legal one, was reasonable, but that the city had no means provided for paying such fee, and had not promised to pay the same. The witness was brought into court by a regular subpœna, the same as any ordinary witness. . . .

In answer to a further question by the Court the witness stated, that he was not willing to testify, although informed by the Court that it was his duty to do so; and the witness refused to answer the question. . . . Thereupon the Court found him guilty of contempt, and, for such contempt, fined him in the sum of $25.00. This order, fining the witness,

was excepted to, and his counsel made a motion for remission of the fine, which motion was overruled by the Court. To the order overruling the motion exception was taken, and an appeal was brought to the Appellate Court. The Appellate Court has affirmed the judgment of the Circuit Court and given a certificate of importance. The present appeal is prosecuted from such judgment of affirmance so entered by the Appellate Court.

Conkling & Grout, for appellant. . . . In England the statute of 5 Eliz. chap. 9 [*ante*, No. 565] doubtless formulated a pre-existing custom, and provided that witnesses should be paid, according to their countenance and calling, a reasonable sum. . . . There seems to be a reasonable distinction between the case of a witness called to depose to a fact and one who is called to speak to a matter of opinion depending on his skill in a particular profession or trade. The former is bound, as a matter of public duty, to speak to the fact which has occurred within his knowledge; but the latter is under no such obligation, and is selected by the party to give his opinion, merely, and he is entitled, therefore, to demand a compensation for loss of time. 2 Phillips on Evidence, (4th Am. ed.) 828. . . .

The English practice is now settled that extra compensation to scientific witnesses may be taxed. . . . The question as to what constitutes the "reasonable costs and charges" of a witness under the statute of 5 Eliz. was left in former times very much to the discretion of the tax officers. . . .

James M. Graham, State's Attorney, for the People. . . . It will be well to bear in mind from the outset that at common law no witness fees were paid, and that in the absence of a statute authorizing it no fees can now be taxed as costs or recovered. . . . A professional witness in the discharge of his duty as a good citizen is, like any other person, whether he be laborer, merchant, broker, manufacturer or banker, compellable to attend in obedience to process and to testify as to what he may know, whether it be observed facts or accumulated knowledge acquired by study and experience. . . .

Mr. Justice MAGRUDER delivered the opinion of the Court:

The question in this case is, whether a physician, who has been subpœnaed and is interrogated as an expert witness only, can be punished as for a contempt for refusing to testify, when no compensation, greater than that allowed to an ordinary witness, has been paid to him or promised to him.

The question here involved has never been directly decided by this Court. . . .

1. At common law no witness fees were paid. Costs are a creature of the statute, and, in the absence of a statute authorizing it, no fees can now be taxed as costs or recovered. (3 Blackstone's Commentaries, 366; Constant *v.* Matteson, 22 Ill. 546; Elmer *v.* Eimer, 47 id. 373; Smith *v.* McLaughlin, 77 id. 596; County Commissioners *v.* Lee, 3 Col. Ct. App.

177.) Section 47 of chapter 53 of the Revised Statutes of this State provides that "every witness attending in his own county upon trials in the court of record shall be entitled to receive the sum of one dollar for each day's attendance and five cents per mile each way for necessary travel." There is also a provision for paying witnesses from a foreign county in criminal cases. As, therefore, such fees only can be taxed as costs, as are provided for in the statute, and as only such witness fees, as are specified in said section 47, are provided for in the statute, it is manifest, that no extra compensation for the services of an expert witness, testifying to a matter of opinion, can be taxed as costs against the defeated party.

Many of the cases in England, which are referred to as sustaining the doctrine that such expert witness may be allowed an extra fee for his services are based upon the statute of 5 Eliz. chap. 9, which enacted that the witness must "have tendered to him according to his countenance or calling his reasonable charges." Greenleaf in his work on Evidence (15th ed. § 310) says, that "in this country these reasonable expenses are settled by statutes, at a fixed sum for each day's actual attendance, and for each mile's travel, from the residence of the witness to the place of the trial and back, without regard to the employment of the witness, or his rank in life." Our statute treats all witnesses alike, regardless of their "countenance or calling," whether they be physicians, or lawyers, or ordinary citizens, so far as the question of the taxation of their fees as costs is concerned. . . .

It follows, that, in this case, the Court could not fix a compensation to be paid to appellant, nor order his fee of $10.00 to be taxed as costs nor order the party calling the witness to pay or secure to him compensation.

2. It is claimed, however, that, in a civil suit, a witness, who is called to testify as an expert only, should not be punished for contempt in refusing to testify because no compensation is provided for his professional opinion other than ordinary witness fees.

The grounds upon which the right to such extra compensation on the part of expert witnesses has been sustained have generally been three in number.

[1] The first ground is that the time of the expert witness is more valuable than the time of ordinary men and that, by attendance at court to give his testimony, such a witness meets with a loss of time. . . . Loss of time, as a ground for claiming extra compensation for services as a witness, applies as well to all ordinary witnesses as to expert witnesses. It is conceded that when any witness, whether he is an expert witness or not, is acquainted with any facts which bear upon the matter in controversy in a litigation, he is obliged to testify; and a distinction is drawn between the testimony of an expert witness who is acquainted with the facts about which he testifies, and an expert witness who is called upon to give his opinion, in reply to a hypothetical question, without any

knowledge of facts. Manifestly, the witness who goes to court and testifies as to the facts of which he knows is subjected to a loss of his time as much as a witness who goes there to testify as an expert upon a mere matter of opinion.

[2] The second ground upon which the claim for such extra compensation is based is that the skill and accumulated knowledge of the expert are his property, and that a man's property should not be taken without just compensation. . . . There is no infringement here to a property right. It may be conceded that in a certain sense the knowledge of the physician, acquired by special study, is property; but the question here is, not so much whether certain knowledge is property, as whether the requirement that he shall answer a hypothetical question is a taking of his property. Where he is required to make an application of his knowledge to a particular case, so as to secure a particular result, — such as, for instance, the curing of a disease or the healing of a wound, — then he would undoubtedly be entitled to compensation. A physician or surgeon cannot be punished for a contempt for refusing to make a post mortem examination unless paid therefor; nor can he be required to prepare himself in advance for testifying in court, by making an examination, or performing an operation, or resorting to a certain amount of study, without being paid therefor. But when he is required to answer a hypothetical question, which involves a special knowledge peculiar to his calling, he is merely required to do what every good citizen is required to do in behalf of public peace and public order. . . .

[3] If the precedent is once established that expert witnesses must be paid a reasonable compensation for their testimony, then it will not be long before such testimony will be offered to the highest bidder. The temptation will be to give opinions in favor of that party to the suit who will pay the highest price. The testimony of expert witnesses will thus become partisan and one-sided. The theory upon which such witnesses are required to testify in cases like this is that they are "amici curiæ," and that, testifying under the sanction of an oath, they do so, not with intent to take the part of either contestant in the suit, but with a view to arriving at the truth of the matter, and for the purpose of aiding the Court to pronounce a correct judgment. . . . Moreover, if a physician is to be allowed extra compensation as an expert witness, then men pursuing other occupations which require special experience will have the same right to demand extra fees. A banker will claim that he has earned extra compensation, a merchant will make the same claim, and so with men engaged in other branches of business. It will be easy to say in such cases that the testimony called for is the result of special knowledge and required skill, and therefore should be paid for. Almost every law suit involves testimony which is in the nature of opinion, in addition to testimony which speaks of the mere facts within the knowledge of the witness. For instance, A sells B a certain quantity of wheat, and delivers the same, and sues for the price of the wheat. One witness testifies as

to the contract, which he heard the parties make. Another testifies to the delivery of the wheat, which he saw delivered. These witnesses testify to actual facts heard and seen. But still another witness, who may know nothing about the facts, may yet be required to state the value of the wheat at the time of the contract, or at the time of the delivery; and he may be required to testify from his knowledge of the market prices of wheat, as given in the market quotations. Such a witness, however, as to the value, and as to market prices, is not regarded as an expert witness who is entitled to extra compensation. . . .

It can make no difference whether the suit in which the witness is called upon to testify is a suit between private parties, or is a suit between the State and an alleged criminal. In either case the object is to promote public justice, and to aid the due administration of justice. It is just as important to the peace and good order of society that private controversies should be settled upon correct proofs, and in accordance with truthful testimony, as that criminals who violate the laws of the State should be punished. It is the duty of the ordinary witness and of the expert witness to testify as to facts within his knowledge which bear upon the decision of controversies in the courts. Such duty devolves upon him as a citizen; and in view of the protection which he receives from the laws of the country, in the matter of his personal liberty, and in the matter of the protection of his property, this duty devolves as much upon a physician who is required to testify as an expert witness in answer to hypothetical questions as it does upon the ordinary witness testifying to facts within his knowledge.

Accordingly, the judgments of the Appellate Court and of the Circuit Court are affirmed. Judgment affirmed.

575. In re Shaw

United States Circuit Court, Southern District of New York. 1909

172 *Fed.* 520

Applications for Orders Quashing Subpœnas.

De Lancey Nicoll and *John M. Bowers*, for petitioners. *Henry L. Stimson*, United States Attorney.

Ward, Circuit Judge. This is a motion to quash and set aside subpœnas served on witnesses Shaw and McLaughlin; the subpœna ticket being in the following form:

"U. S. Grand Jury:—By virtue of a writ of subpœna to you directed and herewith shown, you are commanded and firmly enjoined that laying all other matters aside, and notwithstanding any excuse, you be and appear in your proper person before the grand inquest of the body of the people of the United States of America for the Southern district of New York at a Circuit Court to be held at the United States Court and Post

Office Building, room 119, fourth floor, in the city of New York in and for the said Southern district on the 18th day of January, 1909, at 10:30 o'clock in the forenoon of the same day, to testify all and everything which you may know *generally* on the part of the said United States. And this you are not to omit under the penalty of two hundred and fifty dollars.

"Dated this 4th day of January, 1909.

"By the Court, Henry L. Stimson, U. S. Attorney."

There were struck out of the printed form the words "to give evidence in a certain cause now depending in the said court between the United States of America and," and the word "generally" substituted. The statutory form of subpœna in the State of New York (section 612, Code Cr. Proc.) contains a similar provision to the one struck out, viz., to appear "as a witness in a criminal action prosecuted by the people of the state of New York against." The form of subpœna in the Federal courts is not prescribed by law. The only regulation on the subject is section 877, Rev. St. U. S. . . .

The form used in this district indicates at least a general intention that a witness shall be informed of the matter about which he will be called upon to testify. I think it is proper that he should be. . . . It is quite clear that the ordinary citizen called upon to testify in the strange environment of the grand jury room under the interrogation of the United States attorney will be quite unable to assert his rights, even if he knows what they are. He ought to have an opportunity to consult counsel and be advised of the extent of his right to refuse to testify, and of the way in which to protect himself against giving testimony that might incriminate him.

The United States attorney contends that in this country the grand jury has an inquisitorial power to investigate of its own motion, and that in some instances the utmost secrecy may be necessary to the success of its inquiry, and that the protection of witnesses may safely rest on the presumption that neither the grand jury nor the United States attorney will do anything unfair or oppressive. [To this it may be answered that] It would also contribute greatly to the success and celerity of some investigations if the authorities had an unlimited right to search and seize persons, houses, and papers. But the right of the citizen against such proceedings is not left to depend upon any such presumption. He is guaranteed against unreasonable searches and seizures by the fourth amendment to the Constitution. So it would unquestionably speed the detection and conviction of crime to compel suspected persons to testify; but no principle of our law is better settled than that this cannot be done.

The subpœna being the Court's writ, it is the duty of the Court, consistently with existing statutes, to regulate the use of it. It is not a question of the nature of the particular subject now under consideration by the grand jury, nor of the fairness of the present United States attor-

ney and his assistants and of the present grand jury; but the question is to determine the practice to be followed in this district in all cases by all United States attorneys and grand juries, a matter concededly of the utmost moment.

It is pointed out [on behalf of the Government] that the grand jury may often be unable to name any person as connected with the subject that it is investigating of its own inquisitorial power, and, if it cannot subpœna witnesses without meaning some person, the inquiry must be altogether abandoned. I think the answer to this is that it can in such a case state in the subpœna the subject of its inquiry, and so fix some definition of and limit to the examination to which the witness may be subjected. This was done in the subpœna issued out of this court in the case of United States *v.* Kimball, (C. C.) 117 Fed. 156. It must be admitted that there is a strange absence of authority upon the subject; but Justice Brown, in Hale *v.* Henkel, 201 U. S. 43, 65, said:

"We deem it is entirely clear that under the practice in this country, at least, the examination of witnesses need not be preceded by a presentment or indictment formally drawn up, but that the grand jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the Court has been committed, that the result of their investigations may be subsequently embodied in an indictment, and that in summoning witnesses it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called upon to testify, without indicating the nature of the charge against them." . . .

It is quite in line with his view that, if the witness cannot be apprised of the name of the person so charged, he should be informed of the subject about which he will be called upon to testify. . . .

The motion to quash and set aside the subpœnas is therefore granted.

SUB-TITLE II. PRIVILEGED TOPICS

576. DOE *dem.* EGREMONT *v.* DATE

QUEEN'S BENCH. 1842.

3 *Q. B.* 609, 621

EJECTMENT for lands in Somersetshire. The lessor of the plaintiff, George, Earl of Egremont, claimed under the demise of Charles, late Earl of Egremont, who died in 1763, leaving his will dated 30th July, 1761. By the will, lands were devised to George O'Brien, late Earl of Egremont, for life, with limitations over in remainder, under which remainder the lessor of the plaintiff was now entitled as tenant in tail. . . . In order to show that the lands in question were part of the lands devised, and had been the property of the devisor, it was proposed to prove that they had been held by the tenant for life, the late George O'Brien, Earl of Egremont, as landlord.

The evidence opened in support of this was a rent book, belonging to the late tenant for life, and now in the hands of his executor, Colonel Wyndham, in which was an entry of the receipt of rent for his property, by the steward of the tenant for life, in 1800. A subpœna duces tecum, to produce the book, was served on Colonel Wyndham: and (by consent of the parties) Mr. Murray, Colonel Wyndham's attorney, appeared for him, with it. . . . He then objected to produce the rent book, on the ground that it was a document relating to the title of Colonel Wyndham; but the learned judge overruled the objection; and the book was produced. Verdict for the plaintiff.

Sir *W. W. Follett, Erle, Crowder*, and *Montague Smith* showed cause. First, even if the witness was not compellable to produce the book, that is no ground for a new trial on the application of one of the parties. The book being, in itself, legitimate evidence, what right has the party against whom it is produced to make the objection? The only person injured, if any, is the owner of the book: but he is not the party making the application.

Lord DENMAN, C. J.—Surely injustice is done to the defendant if that is admitted in evidence against him which ought not to have been admitted. It seems very difficult to say that such a situation is not to be reviewed.

Kelly, Bere and *Butt*, contra. . . . Even where the judge directs the witness to produce the evidence, if the witness still refuse, all that the judge can do is to punish him for contempt; and yet, if the judge improperly refuse to order the evidence to be produced, it is admitted that this is a ground for a new trial.

PATTESON, J.—Taking that to be so, it shows only that a party to the suit has a right to complain that the judge has not exercised on his

behalf the power which ought to have been exercised; but, where a judge refuses to protect a witness from giving the evidence, that is not a decision against either party in the cause. . . .

Lord DENMAN, C. J.—With respect to the preliminary point, I may perhaps have expressed myself too strongly during the argument, considering the case of Marston *v.* Downes, 1 A. & E. 31, which was not present to my mind at the moment. I must own, however, that I am not altogether satisfied with the principle of that decision. Perhaps I might be inclined to put the argument thus. A party to a suit has a right to insist that no evidence shall be produced against him, except such as can be given legally. Now, if a witness be compelled by a judge at Nisi Prius to produce a title-deed which he is legally entitled to withhold, it strikes me that the party to the suit against whom the evidence is produced, is affected by that which ought not to have been laid before the jury. . . .

These observations, however, are only thrown out for the purpose of indicating a doubt upon a question of considerable importance, which seems to me to have arisen quite unnecessarily in this case. For I have not the least doubt that the witness was compellable to produce the book in question. . . .

COLERIDGE, J.: . . . I must say that I entertain great doubt whether we could have reviewed the decision of the learned judge. There is a very broad distinction between cases where the privilege has been allowed, and those where it has been disallowed. In the former case, a party has been precluded from proving that which he was entitled to prove. In the latter case, the party whose privilege has been disallowed has no "locus standi in banco." I recollect a case on the western circuit, in which I was retained as counsel for a witness, to resist his being compelled to produce some evidence. Mr. Justice PARK, who was perfectly familiar with the course of practice at Nisi Prius, would not for a moment allow me to appear in that character. He said, "I must be left to take care of the witness, and I alone; I shall not hear counsel on his behalf." If counsel cannot be heard for a witness at Nisi Prius, certainly he cannot be heard for that witness in banc. And, if the witness cannot call upon us to review the decision, can the party to the cause do so? Legitimate evidence has been produced against him: he is not prejudiced by that, and can have no ground of complaint.

577. GREAT WESTERN TURNPIKE CO. *v.* LOOMIS

(1865. NEW YORK. 32 *N. Y.* 127, 138.)

LOOMIS, J.—Strictly speaking, there is no case in which a witness is at liberty to object to a *question*. That is the office of the party or of the Court. The right of the witness is to decline an *answer*, if the Court sustains his claim of privilege.

When the question is relevant, it cannot be excluded on the objection of the party, and the witness is free to assert or to waive his privilege. But when the question is irrelevant, the objection properly proceeds from the party, and the witness has no concern in the matter unless it be overruled by the judge.

Topic 1. Privilege for Party-Opponent in Civil Cases

578. History. It is a little singular that the oldest and once the most firmly established of all the privileges should be also the most obscure in its history and precise mode of origin. That the party-opponent in a jury-trial at common law was not compellable to be a witness seems unquestioned, since the beginning of recorded trials, though it is not explicitly stated until the late 1700s. On the other hand, that a party-opponent in chancery was compellable to answer interrogatories under oath, like any witness, is equally clear, from the beginning of systematic chancery-practice. The absence of a privilege in chancery is easily explainable; because the Chancellor merely adopted the system of the ecclesiastical Courts, in this as in so many other respects; and the ecclesiastical practice regarded as compellable the party, no less than other persons. But why was this not done in common-law trials also? Before the statute of Elizabeth, which virtually created compulsory process for witnesses in jury-trials, it is easy to see that a party-opponent was not compellable to appear; but, after that time, from the middle of the 1500s, why were not parties summoned by subpœna like other desired witnesses, as they were in chancery?

How readily the common-law practice has been grafted with the chancery rule, may be seen from the circumstance that this very measure was taken in Massachusetts by the colonists, two centuries before the general reform of the law in that direction.[1]

As to the policy of such a privilege, it is amazing that there should have been so long a continuance in its recognition. The very denial of it in chancery, alongside of its recognition at common law, was an anomaly and an absurdity; and the great commentator himself had long ago pointed out[2] that "it seems the height of judicial absurdity that in the same cause between the same parties in the examination of the same facts a discovery by the oath of the parties should be permitted on one side of Westminster Hall and denied on the other." The benighted doctrine of the common-law Courts could not prevail, when the force of reason and common sense was once brought to bear, and, by the middle of the 1800s, statutes had everywhere abolished the privilege. There were four modes in which the privilege might conceivably apply, though the statutes dealt expressly with two only. These four were: (1) The party's *personal testimony;* (2) *Documents* in his possession; (3) *Premises* or *chattels* in his possession; (4) His own *corporal condition.*

(1) *Personal testimony.* The common-law rule was abolished by statutes dating from the second half of the 1800s. A few of these statutes, indeed, particularly in the Southern States and in special classes of litigation, had before

[1] 1641, Mass. Body of Liberties (Whitmore's ed.) § 26 (every man may have help in pleading his cause, but "this shall not exempt the partie himself from answering such questions in person as the court shall thinke meete to demand of him").

[2] Blackstone, Commentaries, III, 382.

that date made the opponent compellable, but not competent, as a witness; but the great majority employed a single enactment to declare him both competent and compellable.

The statutory enactments are usually of two sorts, corresponding to the two purposes that were to be accomplished. One of these was the recognition of the right to compel the opponent to *testify at the trial;* this was in most jurisdictions provided in express terms. The other was the securing of the right to *discovery* of his evidence *before trial* (*ante*, Nos. 497–500). This was usually accomplished by authorizing the filing of written interrogatories, and thus transferred to common-law Courts the chancery method of a bill of discovery. But this latter measure virtually accomplished also, at the same time, the former purpose; for the answers to these interrogatories could be put in at the trial as his admissions, without actually calling him to the stand; hence, in a few jurisdictions, this latter mode remains as the only one, and is regarded as sufficiently attaining both ends. In most jurisdictions, both modes are provided for, as they should be, by separate statutes.

(2) *Documents.* By the middle of the 1800s, statutes began to be passed, in nearly every jurisdiction, effectually annulling the common-law privilege and providing a means for compelling disclosure. These statutes, like those compelling the opponent's oral testimony, of which indeed they were the historical associates, either directly required production at the trial, or authorized inspection before trial, in the manner of a bill of discovery, or made both these provisions. The effect was to destroy the common-law privilege entirely, except as far as the limitations of the chancery rule for discovery were in some statutes maintained. Under the principle of these statutes, it has usually and properly been held that the simple method of subpœna duces tecum (which was indeed the earliest proceeding for this purpose), instead of the more formal motion to produce, may be used for compelling production of documents by the opponent at the trial."

579. STATUTES. [Printed *ante*, as Nos. 499, 505]

580. REYNOLDS *v.* BURGESS SULPHITE FIBRE CO.

SUPREME COURT OF NEW HAMPSHIRE. 1902

71 *N. H.* 332; 51 *Atl.* 1075

[Printed *ante*, as No. 507]

581. WANEK *v.* WINONA

SUPREME COURT OF MINNESOTA. 1899

78 *Minn.* 98; 80 *N. W.* 851

ACTION in the District Court for Winona county to recover $10,050 for personal injuries. The case was tried before SNOW, J., and a jury, which rendered a verdict in favor of plaintiff for $4,000. The Court made an order granting a motion for a new trial, unless plaintiff should

consent to a reduction of the verdict to $3,000 and otherwise denying the motion. Plaintiff consented to the reduction, and from the order defendant appealed. Reversed.

The alleged injuries were sustained October 19, 1898. The plaintiff's notice of his claim for damages was served on the city November 14, 1898. This action was commenced December 9 of the same year, and defendant's application for a physical examination was made May 1, 1899, the first day of the term at which the action was tried. The complaint alleged that the injuries would be permanent, and the existence or nonexistence of at least some of the injuries could only be ascertained by a physical examination of plaintiff's person. The trial Court denied the application upon the grounds, as shown by his memorandum: First, that he had no power in any case to order a party to submit to a physical examination of his person; and, second, even if he had the power, he would, in the exercise of his discretion, have refused, under the circumstances of the case, to grant defendant's application.

W. A. Finkelnburg and *O. B. Gould*, for appellant. The overwhelming weight of authority sustains the power of the Court, as a matter of right, to order an examination. . . .

H. M. Lamberton and *Brown & Abbott*, for respondents. The Court had power in its discretion to deny the application for an examination. Hatfield *v.* St. Paul & D. R. Co. 33 Minn. 130. It is true that where the Court has discretion, but refuses to exercise it on the ground that such discretion does not exist, error is committed. But the reason for the rule is that if the discretion had been exercised, it might have been in favor of the complaining party. Leonard *v.* Green, 30 Minn. 496; Seibert *v.* Minneapolis & St. L. R. Co. 58 Minn. 58. In this case the denial was on the merits. The Court has, however, no power to grant such examination. Union Pacific Ry. Co. *v.* Botsford, 141 U. S. 250; . . . Peoria *v.* Rice, 144 Ill. 227; Cole *v.* Fall Brook, 159 N. Y. 59.

Mitchell, J. (after stating the case in part as above). 1. We are very clearly of the opinion that the Court has the power, in a case of this kind, to order the plaintiff to submit to a physical examination of his person. We shall not go into any extended discussion of a question which has been so much and so often discussed by Courts and text writers. Upon both principle and reason we are of opinion that in a civil action for physical injuries, where the plaintiff tenders an issue as to his physical condition, and appeals to the Courts of justice for redress, it is within the power of the trial Court in the exercise of a sound discretion, in proper cases, upon an application reasonably made, under proper safeguards designed to preserve the rights of both parties, to order such an inspection, and to require the plaintiff to submit to it under the penalty of having his action dismissed in case he refuses to do so.

We are aware that there are some eminent authorities to the contrary. But, with all due deference to them, we cannot avoid thinking that they base their conclusion upon a fallacious and somewhat sentimental line of

argument as to the inviolability and sacredness of a man's own person, and his right to its possession and control free from all restraint or interference of others. This, rightly understood, is all true, but his right to the possession and control of his person is no more sacred than the cause of justice. When a person appeals to the State for justice, tendering an issue as to his own physical condition, he impliedly consents in advance to the doing justice to the other party, and to make any disclosure which is necessary to be made in order that justice may be done. No one claims that he can be compelled to submit to such an examination. But he must either submit to it, or have his action dismissed. Any other rule in these personal injury cases would often result in an entire denial of justice to the defendant, and leave him wholly at the mercy of the plaintiff's witnesses. In very many cases the actual nature and extent of the injuries can only be ascertained by a physical examination of the person of the injured party. Such actions were formerly very infrequent, but of late years they constitute one of the largest branches of legal industry, and are not infrequently attempted to be sustained by malingering on the part of the plaintiff, false testimony, or the very unreliable speculations of so-called "medical experts." To allow the plaintiff in such cases, if he sees fit to display his injuries to the jury, to call in as many friendly physicians as he pleases, and have them examine his person, and then produce them as expert witnesses on the trial, but at the same time deny to the defendant the right in any case to have a physical examination of plaintiff's person, and leave him wholly at the mercy of such witnesses as the plaintiff sees fit to call, constitutes a denial of justice too gross, in our judgment, to be tolerated for one moment.

2. The next question is whether there was an abuse of discretion in denying plaintiff's request. . . . We are of opinion that the trial Court erred in not granting defendant's application.

We discover no other error in the record, but for this one the order appealed from must be reversed, and a new trial granted. It is so ordered.

Topic 2. Privilege for Anti-Marital Facts

583. *Sir* Edward Coke. *Commentary upon Littleton, 6b* (1629). . . . Note, it hath been resolved by the justices that a wife cannot be produced either against or for her husband, "qua sunt duæ animæ in carne una;" and it might be a cause of implacable discord and dissention between the husband and wife, and a meane of great inconvenience; but in some cases women are by law wholly excluded to bear testimony, as to prove a man to be a villain.

584. Lady Ivy's Trial. (1684. Mossam *v.* Ivy, Howell's State Trials, X, 555, 628.) [Lady Ivy's title rested on certain deeds, said to have been forged by her procurement. Mrs. Duffett had testified that her husband, now dead, was the forger, and had been paid for it by Lady Ivy. The defence now offers to impeach Mrs. Duffett, by her husband's deposition.] *Sol. Gen.* — My lord, I submit what I offer for my client to the judgment of the Court. But that

which I would say now, is this: We have here the husband's oath concerning this matter, that this woman who now takes upon her to swear these forgeries and things, told him she could have £500 if she would swear against my Lady Ivy.

L. C. J. JEFFREYS — Is that evidence against the wife?

Sol. Gen. — He is now dead, it seems; but here is his oath.

L. C. J. — Pray, consider with yourself; could the husband have been a witness against the wife about what she told him upon an information for that offence of subornation?

Sol. Gen. — No, my lord, I think not.

L. C. J. — Could the wife be an evidence against the husband for the forgery?

Sol. Gen. — No, my lord, she could not; and yet she swears it upon him here.

L. C. J. — That is not against him, man; he is out of the case; but against my Lady Ivy; and how can the oath of the husband be evidence here? . . .

Sol. Gen. — Suppose, my lord, that both husband and wife were brought as evidence against my Lady Ivy, were that good?

L. C. J. — Certainly, that were very good.

Sol. Gen. — Why then, my lord, one of them says, that she saw such and such things done by Lady Ivy, and by him for her; and the other says, such things were not done, but she confessed she could have £500 to swear they were done; shall not this evidence be admitted to contradict the other?

L. C. J. — Why, good Lord! gentlemen, is the philosophy of this so witty, that it need be so confidently urged? Is it good logic, that because they both were good witnesses against my Lady Ivy, therefore, either of them is a good witness against the other? Shall the husband's oath be read against the wife, to fix a crime upon her? Sure you do not intend this shall pass for argument, but to spend time. . . . Nay, be not angry, Mr. Solicitor; for if you be, we cannot help that neither. The law is the law for you as well as me.

Sol. Gen. — My lord, I must take the rule from you, *now*.

L. C. J. — And so you shall, Sir, from the Court, as long as I sit here; and so shall everybody else, by the grace of God. I assure you I care not whether it please or displease. . . .

They would have read her husband's oath, he being dead; but that is no point of evidence at all neither; for in case the man were alive, it would not be evidence what he should have heard his own wife say. If both of them indeed had been heard together, and testified against my Lady Ivy, it had been good evidence; or they both might have testified for her. But by the law the husband cannot be a witness against his wife, nor a wife against her husband, to charge them with anything criminal, except only in cases of high treason. This is so known a common rule, that I thought it could never have borne any question or debate.

585. REX *v.* ALL SAINTS

KING'S BENCH. 1817

6 *M. & S.* 195

UPON appeal the sessions confirmed an order for the removal of Esther Newman, otherwise Esther Willis, from the parish of Cheltenham, in the county of Gloucester, to the parish of All Saints, in the city of Worcester, subject to the opinion of this Court on the following case:

The appellants having produced the pauper, the counsel for the respondents began their case by calling a witness, named Ann Willis, for the purpose of proving that she had been married in Ireland to one George Willis. The counsel for the appellants objected to the competency of this witness, declaring themselves prepared with evidence of the subsequent marriage of the same George Willis to Esther the pauper; but the Court determined to admit the witness.

Scarlett and *Campbell*, in support of the order of sessions, argued that Ann Willis was a competent witness to prove her marriage with George Willis. . . . In order to maintain this position it was not necessary to dispute the rule that husband and wife cannot be witnesses for each other, nor against each other, provided the rule were limited to cases where the interest of husband and wife is the matter in controversy, as where either of them is party to the record. But suppose an issue between A. and B., and A. calls a witness, who proves certain facts, and also calls the wife of that witness, with a view of confirming his evidence; if the wife, instead of confirming, should contradict her husband, this testimony, according to the argument below at the sessions, must be rejected, otherwise it may tend to shew her husband guilty of perjury. But would it not be a strange anomaly in the law, if the competency of a feme covert to be a witness should depend upon whether her evidence would or would not agree with the evidence of her husband, his interest not being in litgation? It seems, indeed, as if some such doctrine had led to the decision of Rex *v.* Cliviger, 2 T. R. 263, where, upon a question touching the settlement of A. and B. his wife, A. having denied a former marriage with C., C. was held an incompetent witness to prove that marriage.

Jervis, *Taunton*, and *Twiss*, *contra*, argued that Rex *v.* Cliviger was decisive of this question . . . for although in that case the husband was one of the parties included in the order of removal, and had been called as a witness, and denied his former marriage, in which respect it differs from the present case, yet having been decided upon the principle that the law does not permit husband and wife to give evidence that may even tend to criminate each other, that decision entirely disposes of the present case.

Lord ELLENBOROUGH, C. J.—With the best attention I have been able to give this case, I cannot discover any incompetence of the first wife to give evidence touching the fact of her marriage. . . . She affirmed that he was her husband. How does this criminate him? Does it contradict anything which he had sworn to before, so as to involve him in the crime of perjury? Not at all. Does it even relate to a matter on which he had given previous evidence? By no means. . . . The objection rests only on the language of the King *v.* Cliviger, that it may "tend to criminate" him; for it is not an immediate tendency, inasmuch as what she stated could not be used in evidence against him. . . . If we were to determine, without regard to the form of proceeding, whether

the husband was implicated in it or not, that the wife is an incompetent witness as to every fact which may possibly have a tendency to criminate her husband, or which connected with other facts may perhaps go to form a link in a complicated chain of evidence against him, such a decision, as I think, would go beyond all bounds.

And there is not any authority to sustain it, unless, indeed, what has been laid down, as it seems to me, somewhat too largely, in Rex *v.* Cliviger, may be supposed to do so. I would observe that by the present decision the Court does not mean to break in on the rule, founded in the policy of the law, that husband and wife shall not be permitted to be witnesses for or against or to criminate each other.

Bayley, J.—There was no objection arising out of the policy of the law because by possibility her evidence might be the means of furnishing information and might lead to inquiry and perhaps to the obtaining of evidence against her husband. It is no objection to the information that it has been furnished by the wife. . . .

I am not sure that the import of the expression "tendency to criminate" was very accurately defined in that case [of R. *v.* Cliviger]. It was probably not understood as meaning that the wife's evidence could be used against her husband, for we know that this could not be so. . . . Nothing which the wife proved on this occasion could be the direct means of founding a prosecution against her husband, although it might afford the means of procuring evidence against him; but such a collateral consequence is not a sufficient objection.

Abbott, J. — I also am of opinion that this witness's testimony was well received, and ought not to have been struck out. . . . It may properly be said of her evidence that it has not any tendency to criminate him, provided that expression be understood with the limitation which I affix to it, that is, to criminate him in the course of some proceeding in which a crime is imputed to him. . . . Order of Sessions confirmed.

586. State *v.* Briggs. (Rhode Island. 1869. 9 R. I. 361.) Durfee, J. — Some of these cases recognize the distinction, suggested in the cases of Rex *v.* All Saints [*ante*, No. 585] and Rex *v.* Bathwick, between testimony which is directly criminative and that which is criminative only when connected with other testimony, — a husband and wife being deemed competent witnesses to give testimony, in collateral cases which relate to the other, when it is of the latter, but not when it is of the former description. But upon principle we find no satisfactory ground for the distinction. The supposed disqualification of husband and wife to give, in collateral cases, testimony directly criminative of each other, is said to rest on the policy of avoiding dissensions between husband and wife; and, if so, the disqualification ought to be complete, for such dissensions, differing only in degrees of virulence, would be likely to result from testimony which tends to criminate, as well as from that which is directly criminative. There are logically only two alternatives, — either to exclude the testimony entirely, or to admit it to any extent in collateral proceedings, provided that no use can afterwards accrue therefrom in any direct proceeding. We think it the better rule, subject to such proviso, to admit the testimony. . . .

[However] if we accord to the witness the privilege of objecting to testify on the ground that the testimony, if given, will criminate, or tend to criminate, a husband or wife, we think that, there is no sound principle of public policy which requires that we should go still further, and put it in the power of a third person, by objecting when the witness does not object, to defeat, it may be, a just claim, or escape a merited punishment.

We concur in the opinion expressed by Mr. Justice Bayley in Rex *v.* All Saints, that a husband or wife, objecting to give such testimony, would be entitled to the protection of the Court.

587. CALDWELL *v.* STUART

Supreme Court of South Carolina. 1832

2 *Bail.* 574

Action of trover for the recovery of certain slaves, which the plaintiff claimed by parol gift from the defendant's testator, who was her stepfather. The only witness to prove the gift was Mrs. Stuart, the widow of the testator, and she was objected to, as incompetent by reason of her relation to the testator. The presiding judge overruled the objection; and the plaintiff obtained a verdict, which the defendant now moved to set aside, on the ground that the testimony of the widow ought to have been excluded.

Johnson, J.—We are very clearly of opinion that Mrs. Stuart was properly admitted as a witness. The rule, which excludes the wife from giving evidence for, or against the husband, is founded, in some degree, upon the legal identity of the husband and wife. . . . Domestic quiet and harmony of families have suggested the propriety of excluding it where it would be volunteered. . . . Neither the rule, nor any of the reasons upon which it proceeds, have any the most remote application here. The husband is no party; he has ceased to have any interest in temporal concerns. The defendant, the executor, represents the interests of the creditors, legatees, or distributees, as the case may be, and not the husband's. There is no danger of matrimonial discord; nor is there any violation of confidence. She has only disclosed what the husband intended should be known. Without it, his intention in making the gift would have been defeated.

O'Neall, J., concurred. Motion refused.

588. STATE *v.* WOODROW

Supreme Court of Appeals of West Virginia. 1905

58 *W. Va.* 527; 52 *S. E.* 545

Error to Circuit Court, Mineral County. William Woodrow was convicted of murder in the second degree, and brings error. Reversed.

Frank C. Reynolds, for plaintiff in error. The Attorney-General, *Frank Lively*, and *O. A. Hood*, for the State.

BRANNON, P.—William Woodrow was indicted in Mineral County for the murder of his child, Ruth Elizabeth Woodrow, and was sentenced to the penitentiary for eight years upon a verdict of murder in the second degree. The deceased was a baby 14 months of age, and was in the arms of its mother, at her breast, when a pistol shot killed it, the ball passing through the baby's head and wounding the mother, according to her evidence. The accused offered a plea in abatement to quash the indictment, on the ground that his wife had been examined before the grand jury; but the plea was ejected. On the trial the wife of the accused gave evidence at the instance of the State against her husband, over his protest. Was the wife a competent witness against him? . . .

Bishop's New Criminal Procedure, vol. 1, § 1153, says that, "if personal violence is inflicted on the wife by the husband, she from necessity may, or, if required, must, testify to it in a criminal proceeding against him for the battery; and he may do the like if she beats him." This ancient rule of the common law is stated in all the books. The sole question in this case is: Does this case come within the exception to the rule; that is, was the prisoner's act of shooting the child a crime against the wife?

It was not violence to her person. It was not a crime against her person corporeally. Such it has to be under this exception. It is true that there has been considerable difference of opinion as to what instances fall within this exception. Some cases hold that bodily violence to the wife is not the only case under the exception. For instance, cases of bigamy, and other cases, have been held to fall within the exception. The books must be resorted to for full discussion. . . . I can safely say that the great bulk of American decision is that, to come within the exception, the case must be one of personal violence to the spouse. Bassett *v.* U. S., 137 U. S. 496; Baxter *v.* State (Tex. Cr. App.) 31 S. W. 394; Crawford *v.* State (Wis.) 74 N. W. 537, 829; Commonwealth *v.* Sapp (Ky.) 14 S. W. 834. And I repeat that those cases, like bigamy and others that do not actually involve violence to the person, which are held within the exception, are cases where the wrong is to the individual particularly and directly injured by the crime for which the husband is prosecuted. . . . An enormous wrong this murder was to the mother in a moral point of view, in an emotional point of view, in a sentimental point of view, in a pathetic point of view, under emotions of the heart which move human beings, owing to the relation of mother and child. We are apt to consider this terrible crime as a greater one against the mother than to any other living human being. Still, in a physical point of view, the homicide did not touch the person of the wife, but was only a crime against her as one member of the community — I mean in the eye of the law. Remember that Woodrow was tried for killing the child, not for shooting his wife. . . . The homicide of the child is

one distinct crime; the shooting of the mother another distinct crime. The close connection of the two in time and circumstances does not blend the results of the ball, and make the killing of the child a personal or corporeal violence to the mother. . . .

Necessity, the want of another witness, is pleaded for the admission of the wife's evidence in this case. That was the parent of the common-law exception. But that exception may often arise and call as loudly as in this case. Suppose the husband should kill a grown child in the privacy of the home, there being no other witness of the fact but the wife; would this necessity admit her evidence? Suppose he would there kill the wife's grown sister or any one else; would she be competent? I say not. If there were other witnesses present, would she be competent? I suppose not, as the necessity would not then exist. Then, the evidence would be competent or incompetent according as there was, or was not, another witness than the wife. . . . Therefore we conclude that the evidence of Woodrow's wife was improperly used against him. . . .

We reverse the judgment, set aside the verdict, and grant a new trial, and remand the case for such new trial.

POFFENBARGER, J. (dissenting).—The judgment is reversed because of the admission of the testimony of the wife of the accused on his trial. On the question of its admissibility I am compelled to differ from the majority of the Court, though I am in perfect accord with all their rulings as to other phases of the case. Therefore I would affirm the judgment.

By the common law, husband and wife were not competent witnesses either for or against each other. This was the general rule. There was an exception to it, first declared in Lord Audley's Case, [*ante*, No. 584]. . . . The existence of this exception to the general rule of the common law is generally admitted by the Courts of this country. People *v.* Green, 1 Denio, 614; . . . Davis *v.* Commonwealth, 99 Va. 838. In the case last cited the rule is stated as follows: "At common law the wife was a competent witness to testify against her husband in relation to offenses alleged to have been committed by him upon her." . . .

For the State, it is insisted that, under this exception to the common-law rule, the evidence of the wife is admissible under the circumstances of this case. . . . Whether the exception is broad enough to make the wife a competent witness against the husband, under the circumstances of this case, involves a consideration of the reason or principle upon which that exception stands. All the authorities say it arises "ex necessitate rei." What sort of necessity is its basis? In Bentley *v.* Cook, 3 Doug. 422, Lord MANSFIELD said

> "that necessity is not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance, the wife would otherwise be exposed without remedy to personal injury."

In Soule's Case, 5 Greenl. 407, MELLEN, C. J., said:

"From the general rule some exceptions have been established, founded on the necessity of the case. For instance, if a wife could not be admitted to testify against the husband as to threatened or executed violence and abuse upon her person, he could play the tyrant and brute at his pleasure, and with perfect security beat, wound, and torture her at times and in places when and where no witnesses could be present nor assistance be obtained."

Wigmore on Evidence, § 2339, says:

"That was commonly placed on the ground of necessity; that is, a necessity to avoid that extreme injustice to the excluded spouse which would ensue upon an undeviating enforcement of the rule." . . .

The nature of the necessity being thus disclosed, is it applicable to the case of a wrong done by either spouse to an infant child? Plainly it appears that this necessity grows out of the privacy and seclusion in which such wrongs may be perpetrated. The husband is master of his home. The law terms it his castle. From it he may exclude all except members of his family. There he has the right to require the presence and continuance of his wife and children. In the secret recesses of his mansion they are bound by duty to stay. Against his will they are not entitled to have others present. He is entitled to the custody and control of his children. He may make them utterly dependent upon him for their support, by denying to strangers the right to give them employment and to receive them within their doors. His right to their custody is admitted to be superior to that of the mother, even when the parents are living separately from each other. Is it possible that the law will not permit the wife to reveal the brutality and inhumanity of the husband to children of such tender years as to make them incompetent as witnesses? If she cannot, what remedy is there in the law for their protection? . . . To say it is not an injury and a wrong to her is to set at defiance the laws of nature. The lowest orders of the animal kingdom will not only protect their young, but will, as a rule, sacrifice life itself for their safety. Men and women who have the true natural instincts, and in whom the parental affection is normal, undepraved, and unrestrained by viciousness, will make any sacrifice, even that of their personal safety and lives, for the protection of their children. No sacrifice can be greater than that of the child. In subjecting Abraham to the final and highest test of his faith, God required him to offer up his son; and the highest ideal of sacrifice is embodied in the scriptural declaration: "God so loved the world that he gave His only begotten Son," etc.

Any interpretation of the common law which ignores natural rights is not to be entertained, for its object is the vindication of such rights. . . . If we say that disqualification goes so far as to prevent the wife from testifying against the husband concerning a wrong done to a helpless child, to whose voice the Courts will not, and cannot, listen, we must say that reasons of public policy shall be paramount to natural right. . . .

The Courts of this country seem to hold that nothing short of per-

sonal violence to the husband or wife will make one a competent witness against the other, under the common-law exception. Brock *v.* State, 44 Tex. Cr. R. 335. . . . In none of these cases, however, did the necessity of admitting the testimony appear. Some were charges of rape, perpetrated on the wife before marriage and when she was not the wife. Others were charges of bigamy, which the Court said were not offenses against the wife, but against the marital relation. One was for incest committed with the daughter of the wife, stepdaughter of the accused. None of these cases, in the facts presented, come up to the exigency of this one. In each of them there was, or ought to have been, some competent witness, without calling the wife. . . .

Having thus considered the circumstances and the principles of law relating to them, I am firmly convinced (1) that the killing or wounding of a child, too young to protect itself by its testimony, is, in law, a wrong to the parent, affecting the person and liberty, and so making the parent a competent witness against the other spouse on his trial for the crime; and (2) that, independently of any wrong to the parent, he or she is a competent witness against his or her wife or husband, as the case may be, on trial for the offense, ex necessitate rei.

SANDERS, J. (dissenting).—I do not agree that the evidence of the wife is incompetent, and therefore concur in the dissenting opinion of Judge POFFENBARGER. I think the case entirely free from error, and would affirm the judgment.

589. RHEA *v.* TERRITORY

COURT OF CRIMINAL APPEALS OF OKLAHOMA. 1909

3 *Okl. Cr.* 230; 105 *Pac.* 314

APPEAL from District Court, Canadian County; C. F. IRWIN, Judge. William H. Rhea was convicted of manslaughter, and he appeals. Affirmed.

At the March term, 1907, of the District Court of Canadian county, the grand jury returned an indictment against Wm. R. Rhea, hereinafter called "defendant," charging him with the murder of Arthur Newall. Said cause was tried at the July term, 1907, of said court, and the defendant was found guilty of manslaughter. A motion for a new trial was presented and overruled, and the punishment of the defendant was fixed by the Court at 30 years' imprisonment in the penitentiary, and sentence was pronounced accordingly. The case is regularly before us on appeal.

J. M. Frame and *R. B. Forrest*, for appellant.

Charles West, Atty. Gen., and *E. G. Spillman*, Asst. Atty. Gen., for the Territory.

FURMAN, P. J. . . .

Third. Counsel in their brief say: "Plaintiff in error next complains

that the Court erred in giving the following instructions: 'The jury are instructed that by the laws of the Territory a wife is not a competent witness against her husband in a criminal case, and that the Territory has no power to compel her to testify, nor will she be allowed voluntarily to do so; but she can be used in behalf of the defendant when called by him, the defendant having that right if he desires to use the same.'" The record shows that the above instruction was given by the Court after the prosecution had closed its opening argument, and while defendant's counsel was making his closing speech to the jury. It was contended, and the appellant now contends, that the giving of the instruction was inopportune and constitutes prejudicial error.

In support of this contention, counsel cite State *v.* Hatcher, 29 Or. 313, 318, from the Supreme Court of Oregon. The Supreme Court said:

"The record discloses that the defendant's counsel, in their argument to the jury, maintained that the deceased was killed while attempting to commit a forcible felony on the defendant's wife. The district attorney, replying thereto, said in substance: 'There were but three persons present at the tragedy — the defendant, his wife, and the deceased. That the voice of the deceased was hushed in death. That the State could not call Mrs. Hatcher as a witness, and it was in the power of the defendant to have produced her. That she could have told all about the affair. That, if present, her testimony would have been adverse to the defendant, otherwise he would have secured her attendance; but failing to do so is proof that her testimony would have been against the defendant.' The defendant's counsel objected to this language, for the reason that the absence of the defendant's wife was no evidence of his guilt; but, the objection having been overruled, an exception was allowed."

In passing upon this question, the Supreme Court said:

"First, the record fails to disclose that the defendant's wife was, at the time of the trial, within the reach of the process of the Court; and, second, it is also silent as to whether she had consented to become a witness for her husband, for without such consent upon her part she could not be compelled to testify. Hill's Ann. Laws Or. 1892, § 1366. In criminal actions the accused shall, at his own request, but not otherwise, be deemed a competent witness, provided his waiver of said right shall not create any presumption against him; but when he offers himself as a witness he becomes subject to the ordinary rules of cross-examination. *Ibid.*, § 1365; State *v.* Abrams, 11 Or. 169, 8 Pac. 327, *supra*. If no presumption of the defendant's guilt can be invoked by reason of his failure to testify in his own behalf, how can such a presumption be created in his failure to produce his wife as a witness, when she cannot be compelled to testify without her consent?"

Upon this ground this decision was correct, because under the statute of Oregon the right of the husband to use his wife as a witness depended upon her consent. We have no such statute. Therefore upon this ground the case cited has no application. Section 5495, Wilson's Rev. & Ann. St. 1903, is as follows: "Except as otherwise provided in chapters 68 and 69, of the statutes of Oklahoma, the rules of evidence in civil cases are applicable also in criminal cases; provided, however, that

neither husband nor wife shall in any case be a witness against the other except in a criminal prosecution for a crime committed one against the other, but they may in all cases be witnesses for each other, and shall be subject to cross-examination as other witnesses, and shall in no event on a criminal trial be permitted to disclose communications made by one to the other except on a trial of an offense committed by one against the other." From this it is seen that no restriction or limitations are placed upon the right of the husband to place his wife upon the stand to testify in his behalf. She has no more right or power to refuse to testify when so placed upon the stand than any other witness would have.

The other ground upon which the decision in Hatcher's Case is based is not supported by reason. The attempted analogy between the failure of the husband to call his wife as a witness in his behalf, and his failure to take the stand as a witness for himself, fails because in the latter instance there is a mandatory, arbitrary statute forbidding that any reference shall be made to such failure or that any inference of guilt shall be drawn therefrom. There is no such provision in the statute making the wife a competent witness for her husband. We decline to be bound by a precedent which is based upon an attempted judicial amendment of a statute. For these reasons we do not recognize the case of Hatcher *v.* State as an authority in point.

The statute of Texas is similar to ours. Under that statute the Texas Court of Appeals, in Mercer *v.* State, 17 Tex. App. 476, said:

"We do not think the remarks of the prosecuting attorney, in his closing argument to the jury, which are complained of by the defendant, were beyond the scope of the legitimate argument. It was disclosed by the evidence that the defendant's wife must have known important facts bearing directly upon the issue in the case, and that she was within easy reach of the process of the Court. She could have explained fully the occurrence testified about by his two daughters when he got his gun and said he would blow his brains out. She could have testified, perhaps, to many other facts which would have shed light upon this horrible transaction. It was not within the power of the prosecution to adduce her testimony, because, being the defendant's wife, she was not permitted under the law to testify against him in this case. He alone could call for her testimony, and compel its production. Her knowledge of the facts, whatever that knowledge might be, was at his command — was within his reach; and without he produced it, or consented to its production, it was a sealed book, which no human tribunal has the power to open against him. Under these circumstances, we think the prosecuting attorney was justified in the remarks complained of, and that the Court did not err in its action in relation thereto."

Counsel in their brief say: "It is true that where a party suppresses testimony, induces the witnesses to leave the jurisdiction of the Court, to swear falsely, or suppress some fact in his knowledge, or commits other acts of bad faith in connection with his cause, the same may be considered as a circumstance in the case; but never can the reliance of the defendant

upon a legal right be impugned as bad faith or be distorted into evidence against him." The instruction given simply informed the jury that the defendant had the legal right to call his wife as a witness in his behalf, if he so desired. We cannot see how this could have injured the defendant. Telling a jury what the rights of a defendant are cannot deprive him of them; but counsel contend that it pointed out a defect in the defendant's case. They say: "Coming from the bench, a solemn declaration of law which they must consider in their deliberations, it was particularly harmful to the defendant, and, while it came in the form of an instruction of the Court, the purpose that it really served was that of an argument to the jury pointing out a defect in defendant's case." In a number of States the husband is denied the right to place his wife on the witness stand in his behalf in a criminal case. This was the law in that part of the State which was known as Indian Territory, prior to statehood. This often caused juries to sympathize with a defendant upon trial, because he was deprived of the testimony of his wife. It was therefore only fair to the Territory that the jury should have been informed that if the wife of the defendant was not placed upon the witness stand, or if no effort to have this done had been made, it was not the fault of the Territory, but was because the defendant did not desire it to be done. If inferences might be drawn, unfavorable to the defendant, from his failure to place his wife upon the witness stand or his failure to make any attempt to secure her testimony, they would be justified by the law. This is the principle upon which the case of Mercer *v.* State, 17 Tex. App. 452, hereinbefore quoted, was affirmed. In fact, the principle is of universal application. In Wigmore on Evidence, vol. 1, § 285, we find the following:

"The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's claim. Even since the case of the chimney sweeper's jewel, this has been a recognized principle (1722, Armory *v.* Delamirie, 1 Strange 505): 'A chimney sweeper's boy, finding a jewel, took it to the defendant, a jeweler, for appraisal; but the defendant would not restore it. In an action of trover, in proving the value, the Chief Justice (Pratt) directed the jury that, unless the defendant did produce the jewel and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages, which they accordingly did.'"

Mr. Wigmore then cites an unanswerable array of authorities to support the principle announced. It would have been improper, under our practice, for the Court to have suggested to the jury what inferences they might draw from the failure of the defendant to place his wife upon the witness stand or to attempt to do so. The duty of the Court ended in stating the law. Argument upon the law and the facts is always for counsel.

Counsel for the defendant make no objection as to the sufficiency

of the testimony. It is therefore not necessary for us to discuss the evidence further than to say that the guilt of the defendant was the only rational conclusion at which an intelligent and honest jury could arrive. In fact, we see no rational escape from the verdict rendered.

The judgment of the lower court is affirmed.

Doyle and Owen, JJ., concur.

590. Statutes. [Printed *ante*, as No. 77]

592. Commissioners of Common Law Procedure. *Second Report, p. 13* (1853). A more difficult question [than that of admitting them in each other's favor] arises when we proceed to consider whether it should be made competent to an adverse party to call a husband or wife as witness against one another. The case would no doubt be of rare occurrence; when it did, it would in the greater number of instances be where husband and wife have separated and are on bad terms with one another. In such cases the mischief apprehended from the interruption of domestic happiness becomes out of the question. But suppose the husband and wife living together on the usual terms; here the identity of interest between them will deter an adverse party from calling one against the other, except under very peculiar and pressing circumstances and when the fact to be proved is certain in its character and clearly within the knowledge of the witness. . . . But if there be such a fact in the knowledge of one of two married persons, so material to the cause of the adverse party as to make it worth his while to run the risk of calling so hostile a witness, it becomes matter of very serious consideration whether justice should be allowed to be defeated by the exclusion of such evidence. It is clear that nothing but an amount of mischief outbalancing the evil of defeated justice can warrant the exclusion of testimony necessary to justice. What, then, is the mischief here to be apprehended? The possibility of resentment of a husband against a wife for testifying to facts prejudicial to his interest. But it is obvious that such resentment could only be felt by persons prepared to commit perjury themselves and to expect it to be committed in their behalf. Such instances, we believe, would be very rare; and we do not think that a regard to the feelings of individuals of this class, or the amount of mischief likely to arise from a disregard of them, is sufficient to compensate for the loss which in many cases may result from the exclusion of the evidence. . . .

The conclusion to which the foregoing observations leads us is that husband and wife should be competent and compellable to give evidence for and against one another on matters of fact as to which either could now be examined as a party in the cause.

Topic 3. Privilege for Self-Criminating Facts

593. History.[1] In the history of this great privilege, two distinct and parallel lines of development must be kept in mind. The first is the history of the opposition to the "ex officio" oath of the ecclesiastical Courts; the second is the history of the opposition to the criminating question in the common-law

[1] [Abridged from the present Compiler's *Treatise on Evidence* (1905), Vol. III, § 2250.]

Courts, *i.e.*, of the present privilege in its modern shape. The first part begins in the 1200s, and lasts well into the 1600s; the second part begins in the early 1600s, and runs on for another century.

I. Under the Anglo-Saxon rule, the bishops had sat as judges and entertained suits in the popular courts. But William the Conqueror, before 1100, had put an end to this. His enactment required the bishops to decide their causes according to the ecclesiastical law; whence sprang up a separate system and a double judicature. By a century later, the papal power and the regal power were in hot conflict over the delimitation of their jurisdictions.

The opposition had nothing to do with any objection to the general process of putting a man on his oath to declare his guilt or innocence; they concerned only the questions (*a*) *who* should have the right to do this, and (*b*) *how* it should be done. Moreover, the former of these things is alone at first concerned; later, the second comes to dominate in importance. Three stages are fairly well marked; namely, (1) to Elizabeth's time, (2) to Charles I's, (3) and afterwards.

1. (*a*) Who should have the rights of jurisdiction? This was in the 1200s and 1300s the great question. The statute "De Articulis Cleri" settled the line of ecclesiastical jurisdiction over laymen by confining it to causes matrimonial and testamentary; and this in substance prevailed till the end of church Courts in England. Under Henry VIII the foreign and papal domination of the church was repudiated. Thenceforward the struggle of jurisdiction is against Elizabeth's own High Commission Court, and not against a foreign and papal power.

(*b*) In the other important respect, namely, how the church Courts should proceed, there is, as yet in the 1200s and 1300s, apparently no hostile feeling based on the oath administered in the church Courts, — known as "jusjurandum de veritate dicenda."

This oath, nevertheless (which we may call the inquisitional oath, as distinguished from the compurgation oath), was then, for the church, an innovation. Hitherto, the trial by compurgation, or formal swearing of the party with oath-helpers, and the trial by ordeal, had been the common methods of ecclesiastical trial and decision. But in the early 1200s, under the organizing influence of Innocent III, one of the first great canonists in the papal chair (1198–1216), new ideas were rapidly germinating in church law. The trial by ordeal was formally abolished by the church in 1215. The trial by compurgation oaths "was already becoming little better than a farce." Anarchy and violence were rampant over Europe. Justice in the old-fashioned mode was inefficient. There was a decided need of improvement in procedure.

One of the marked expedients in this improvement was the inquisitional or interrogatory oath, introduced and developed in the early 1200s, chiefly by the decretals of Innocent III. The time-worn compurgation oath had operated as a formal appeal to a divine and magical test or "Gottesurtheil;" there was no interrogation by the tribunal; the process consisted merely in daring and succeeding to pronounce a formula of innocence, usually in company with oath-helpers. But the new oath pledged the accused to answer truly, and this was followed by a rational process of judicial probing by questions to the specific details of the affair, after the essentially modern manner. The former oath operated of itself as a decision, through the party's own act; the latter merely furnished material for the judge with which to reach a personal conviction and decision. This was an epochal difference of method. Indeed, the radical part played for the progress of English procedure, by the new jury trial in the 1200s and 1300s, was

paralleled, in a near degree, not only for ecclesiastical procedure, but also for the secular criminal procedure of the Continent, by this inquisitional oath of the 1200s.[1]

There *was* a distinction of real consequence (upon which everything came later to turn), regarding the different preliminary conditions upon which a party could be put to this or any other oath. There must be some sort of a presentment, to put any person to answer. But must that come from accusing witnesses or private prosecutors or the like (corresponding to our notion of a "qui tam" or a grand jury)? Or might it be begun by an official complaint (somewhat like our information "ex relatione" by the attorney-general)? Or might the judge "ex officio mero" summon the accused and put him to answer, in hopes of extracting a confession which would suffice? And in the last method, must the charge at least be brought first to the judge's notice "per famam," or "per clamosam insinuationem," "common report" or "violent suspicion"? Such were the questions of procedure which later formed the essential subject of dispute. It is enough here to note that the third method of trial — the "inquisitio," or proceeding "ex officio mero" — became a favorite one for heresy trials; and that its canonical lawfulness in some shape was supported by clear authority. About the year 1600, there came to be in England much pamphleteering anent this; and a formal opinion of nine canonists declared the lawfulness of putting the accused to answer on these conditions: "*Licet nemo tenetur seipsum prodere* [*i.e.*, accuse], *tamen proditus per famam tenetur seipsum ostendere utrum possit suam innocentiam ostendere et seipsum purgare.*" Thus, on the one hand, it was easily arguable that, in ecclesiastical law, the accused could not be put to answer "ex officio mero" without some sort of witnesses or presentment or bad repute; and in this sense an oath "ex officio" (as it came to be called) might be claimed (as it was claimed) to be a distinct thing from the same oath when exacted on proper conditions, and to be therefore canonically unlawful. But, on the other hand, it is plain to see, also, how, in the headlong pursuit of heretics and schismatics under Elizabeth and James, the "ex officio" proceeding, lawful enough on Innocent III's conditions about "clamosa insinuatio" and "fama publica," would degenerate into a merely unlawful process of poking about in the speculation of finding something chargeable. In short, the common abuse, in later days, of the "ex officio" proceeding led to the matter being argued, in English Courts and in popular discussion, as if this oath were either wholly lawful or wholly unlawful; though, in truth, by the theory of the canon law, it *might* be either, according to the circumstances of presentment.

Thus, the emphasis of controversy now shifted. It had in the 1300s concerned jurisdiction; it now concerned methods. The Court of High Commission of course followed ecclesiastical rules; the Court of Star Chamber did likewise, in what concerned the procedure of trial.

2. The Court of Star Chamber seems to have raised no special antagonism during the 1500s, nor until James' time, in the next century. Nor did the Court of High Commission, under the first five commissions. But in 1583, the sixth was issued, with Archbishop Whitgift at the head, — a man of stern Christian zeal, determined to crush heresy wherever its head was raised. He proceeded immediately to examine clergymen and other suspected persons, upon oath, after

[1] A full account of its history is given in Esmein's *History of Continental Criminal Procedure* (1913; Continental Legal History Series, Vol. V; Little, Brown, & Co.).

the extremest "ex officio" style. From this time onwards there is much concerning this oath. The right to examine in this fashion, wherever the case was within its jurisdiction, seems to have been conceded under Henry VIII and Elizabeth, all through the 1500s. But as James' reign went on, and its practices became arrogant and obnoxious, so its use of the "ex officio" oath came to share the burden of criticism and discontent which that procedure in the ecclesiastical Courts excited. The common-law Courts seem to have found no handle against its oath-procedure, even after Coke's accession to the bench. But though there was no explicit judicial condemnation, there was, after a time, more than one formal questioning of it.

3. But its time in the kingdom was now drawing to an end; and the trial which seems to have precipitated the crisis came in 1637. John Lilburn, an obstreperous and forward opponent of the Stuarts (popularly known as "Free-born John"), constituted somewhere between a patriot and a demagogue, had the obstinacy to force the issue. Lilburn was whipped and pilloried for refusing to take the oath. But in 1640 the sentence was vacated, by the House of Commons, and he was later granted £3000 in reparation. Lilburn's case, together with those of Prynne and Leighton (whose grievances were of another sort), were sufficiently notorious to focus the attention of London and the whole country. The Long Parliament (after eleven years of no Parliament) met on November 3, 1640. Lilburn was on the spot that day with his petition for redress. In March, 1641, a bill was introduced to abolish the Court of Star Chamber, as well as (then or shortly after) a bill to abolish the Court of High Commission for Ecclesiastical Causes. These were both passed July 2–5 of the same year; and in the latter statute was inserted a clause which forever forbade, for any ecclesiastical Court, the administration "ex officio" of any oath requiring answer as to matters penal.

II. But what, in the mean time, of the common law, and of jury trial? Thus far the controversy here examined had been purely one of ecclesiastical jurisdiction and ecclesiastical methods of presentment. The common-law Courts had concerned themselves with it simply by virtue of their superior authority to keep the church Courts and other Courts to their proper boundaries. There was no feature of objection to the compulsion, in itself, of answering on oath; the objection was as to *who* shall require it, and *how* it shall be required. Wherever, in other proceedings, it was thought appropriate to have the defendant's oath, there was no hesitation in requiring it. All through the 1500s the statute-book records the sanction of oaths to accused persons. Most notably, every accused felon was required to be examined by the justices of the peace, and his examination to be preserved for the judges at the trial precisely as was done on the Continent at the same period; and, so far as appears, not a murmur was ever heard against this process till the middle of the 1700s; and no statutory measure was taken to caution the accused that his answer was not compellable, until well on in the 1800s. The everyday procedure in the trials of the 1500s and the 1600s, and almost the first step in the trial, was to read to the jury this compulsory examination of the accused. Furthermore, as the trial goes on, the accused, in all this period of 1500–1620, is questioned freely and urged by the judges to answer; he is not allowed to swear, for the reasons already noted, but he is pressed and bullied to answer. A striking example is found in the jury trial of Udall, in 1590, for seditious libel; and the significant circumstance is that Udall, who before the ecclesiastical High Commission Court, a few months previous, had plainly based his refusal on the illegality of making a man accuse himself by

inquisition, has here, before a common-law jury with witnesses charging him, no such claim to make:

> *Udall's Trial.* (1590), 1 How. St. Tr. 1271, 1275, 1289: Udall pleaded not guilty; and after argument made and witnesses testifying, Judge CLARKE: "What say you? Did you make the book, Udall, yes or no? What say you to it, will you be sworn? Will you take your oath that you made it not?" declaring this to be a favor; Udall refused, and the judge finally asked: "Will you but say upon your honesty that you made it not?" Udall again refused; Judge CLARKE: "You of the jury consider this. This argueth that, if he were not guilty, he would clear himself;" then, to Udall: "Do not stand in it; but confess it."

Finally, however, in 1637–41, came Lilburn's notorious agitation; and in 1641, with a rush, the Courts of Star Chamber and of High Commission were abolished, and the "ex officio" oath to answer criminal charges was swept away with them. With all this stir and emotion, a decided effect was produced, and was immediately communicated, naturally enough, to the common-law Courts. Up to the last moment, Lilburn had never claimed the right to refuse absolutely to answer a criminating question; he had merely claimed a proper proceeding of presentment or accusation. But now this once vital distinction came to be ignored. It began to be claimed, flatly, that no man is bound to incriminate himself, on any charge (no matter how properly instituted), or in any Court (not merely in the ecclesiastical or Star Chamber tribunals). Then this claim came to be conceded by the judges. By the end of Charles II's reign, under the Restoration, there was no longer any doubt, in any court;[1] and by this period, the extension of the privilege to include an ordinary witness, and not merely the party charged, was for the first time made. But the privilege, until well on into the time of the English Revolution, remained not much more than a bare rule of law, which the judges would recognize on demand. The spirit of it was wanting in them. The old habit of questioning and urging the accused died hard, — did not disappear, indeed, until the 1700s had begun.[2]

The privilege, too, creeping in thus by indirection, appears by no means to have been regarded as the constitutional landmark that our own later legislation has made it. In all the parliamentary remonstrances and petitions and declarations that preceded the expulsion of the Stuarts, it does not anywhere appear. Even by 1689, when the Courts had for a decade ceased to question it, and at

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[1] 1660, Scroop's Trial, 5 How. St. Tr. 1034, 1039 (L. C. B. Bridgman: "You are not bound to answer me, but if you will not, we must prove it"); 1670, Penn's and Mead's Trial, ib. 951, 957 (on a question being put to Mead, he refused to answer: "It is a maxim in your own law, 'Nemo tenetur accusare seipsum,' which, if it be not true Latin, I am sure it is true English, 'that no man is bound to accuse himself'").

[2] While this was passing in England, the precisely contemporary struggle, across the Channel, is in marked contrast, with its fatally opposite results; for the Council of Louis XIV, then upon the draft of the great criminal Ordonnance of 1670, was fixing, for a century to come, the French rule of compulsory self-crimination. Hitherto this had rested simply on traditional practice; now it was confirmed by statute. The arguments of the opposing councillors in the debate employ language identical with our own privilege: "Nul n'est tenu se condamner soi-même par sa bouche."

the English Revolution the fundamental victories of the past two generations' struggle were ratified by William in the Bill of Rights, this doctrine is totally lacking. Whatever it was worth to the American constitution-makers of 1789, it was not worth mentioning to the English constitution-menders of 1689.[1]

594. STATUTES. *United States.* (Constitution 1787, Amendment V.) No person . . . shall be compelled in any criminal case to be a witness against himself.

California. (Penal Code 1872, § 1323.) [Printed *ante*, No. 77.]
Illinois. (Rev. St. 1874, c. 38, § 426.) [Printed *ante*, No. 77.]
Massachusetts. (Rev. L. 1902, c. 175, § 20.) [Printed *ante*, No. 77.]
New York. (Code Crim. Proc. 1881, § 393.) [Printed *ante*, No. 77.]

595. COUNSELMAN *v.* HITCHCOCK. (1892. Supreme Court. 142 U. S. 547.) BLATCHFORD, J. — It is contended on the part of the appellee that . . . the constitutions of those States [of Virginia, Massachusetts, and New Hampshire] give to the witness a broader privilege and exemption than is granted by the Constitution of the United States, in that their language is that the witness shall not be compelled to "accuse himself," or "furnish evidence against himself," or "give evidence against himself;" and it is contended that the terms of the Constitution of the United States, and of the constitutions of Georgia, California, and New York are more restricted. But we are of opinion that, however this difference may have been commented on in some of the decisions, there is really, in spirit and principle, no distinction arising out of such difference of language.

SUB-TOPIC A. SCOPE OF THE PRIVILEGE

596. PAXTON *v.* DOUGLAS

CHANCERY. 1809

16 *Ves. Jr.* 239, 242; 19 *id.* 225

THE plaintiffs filed the bill as creditors of Peter Douglas, deceased, on behalf of themselves and all the other creditors, &c., an exception was taken to the Master's Certificate, that he had allowed interrogatories for the examination of Charles Christie; claiming as a bond creditor of Douglas. The interrogatories, as allowed by the Master, inquired, 1st, generally as to the consideration for the bond for 2600*l.*; whether money, goods, &c.: 2dly, whether Christie was not before and at the date of the bond entitled to four-sixteenths parts of the ship Belvidere, in the service

[1] The real explanation of the Colonial conventions' insistence on it would seem to be found in the agitation then going on in France against the inquisitional feature of the Ordonnance of 1670. There appears no allusion, in Elliot's Debates on the Constitution, to the contemporary French movement; but the delegates who had been over there must have known of it. The proposals of reform laid before the French Constitutional Assembly from the Provinces, in 1789, show how strong was the popular agitation in France.

of the East India Company; and was not the commander of the said ship; whether Douglas did not contract for the purpose of such shares for 2400*l.*: whether that was a fair price: whether it was paid; as to the circumstances of payment, &c.: 3d, whether Douglas, or his nephew James Peter Fearon, at the same time made some and what proposal or offer to purchase from him the command of the said ship, for any and what sum; and how such sum was to be paid and secured: 4th, whether he treated, or made, or concluded, any and what bargain with Douglas or Fearon, for the sale of the command to Fearon for the sum of 2600*l.* or any other and what sum: 5th, whether, and when he (Christie,) resigned the command: and was not Fearon, and when, and by whose recommendation or procurement, appointed to the command: 6th, whether he had, or not, proved the bond under a Commission of Bankruptcy against Fearon; and if not, why?

Christie objected to answer these interrogatories; on the ground that his answer might criminate himself; and subject him to a forfeiture under the East India Company's Bye-Laws; declaring, that no owner or part-owner of any ship, or any commander, or other person, shall directly or indirectly sell, or take any gratuity or consideration, nor shall any person or persons buy, pay, or give, any gratuity or consideration, for the command of any ship or ships, to be freighted to the Company; and in case any such contract, payment, or gift, shall be made, the commander, or intended commander, concerned therein, shall from henceforth be incapable of being employed, or of serving the Company in any capacity whatsoever. . . .

Mr. *Richards* and Mr. *Rouple*, for the Report, insisted that . . . some of the interrogatories, the first, for instance, going to the consideration, generally, could not be objected to.

Eldon, L. C.— If a series of questions are put, all meant to establish the same criminality, you cannot pick out a particular question and say, if that alone had been put, it might have been answered. . . . He is at liberty to protect himself against answering, not only the direct question whether he did what was illegal, but also every question fairly appearing to be put with a view of drawing from him an answer containing nothing to affect him except as it is one link in a chain of proof that is to affect him. . . .

As these interrogatories are framed, this party can not be compelled to answer.

597. AARON BURR'S TRIAL

United States Circuit Court. 1807

Robertson's Rep. I, 208, 244

[Treason. A cipher letter was placed before the witness, who had been secretary to the defendant, and he was asked by]

Mr. *McRea* (for the prosecution). — Do you understand the contents of that paper?

Mr. *Williams* (for the defendant). — He objects to answer. He says that, though that question may be an innocent one, yet the counsel for the prosecution might go on gradually, from one question to another, until he at last obtained matter enough to criminate him. If a man know of treasonable matter, and do not disclose it, he is guilty of misprision of treason. . . . The knowledge of the treason, again, comprehends two ideas, — that he must have [1] seen and understood [2] the treasonable matter. To one of these points Mr. W. is called upon to depose; if this be established, who knows but the other elements of the crime may be gradually unfolded so as to implicate him?

Marshall, C. J. (sanctioning the witness' refusal). . . . According to their [the prosecution's] statement, a witness can never refuse to answer any question unless that answer, unconnected with other testimony, would be sufficient to convict him of a crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the Court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing; but all other facts without it would be insufficient. While that remains concealed within his bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is attainable, against any individual, the Court can never know. It would seem, then, that the Court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws.

598. WARD *v.* STATE

Supreme Court of Missouri. 1829

2 *Mo.* 120

Error from the Circuit Court of St. Louis County.

The case appeared by the record to be, that at the late term of the Circuit Court for the county of St. Louis, the grand jury for said county caused a subpœna to be issued for said Ward, to appear before them and testify generally, without saying in what particular matter or cause he

was to testify. Ward accordingly appeared, and was sworn to give evidence to the grand jury. He went before the grand jury to testify. The first question asked by the foreman of the grand jury was this: "Do you know of any person or persons having bet at a faro table in this county, within the last twelve months?" To which the witness answered, "I do." The foreman then desired the witness to tell what persons or person have so bet, other than himself, and not naming himself. The witness declined answering, saying that he could not answer without implicating himself. Ward was then directed by the Court to answer the requirements of the grand jury, but not to name himself as a better; which he refused, alleging that to answer thus would implicate himself. Whereupon the Court committed him to prison, till he should consent to give the evidence required, and till the further order of the Court. A writ of error is sued on, a supersedeas asked for. . . .

McGirk, J. (after stating the case as above). Was the witness right in refusing to answer the question on the ground that the answer would implicate himself?

The record shows that the game of faro is played with cards, by one person as banker against any number of persons, each person playing for himself, without any aid from the others, against the banker; and that there is no common interest among those persons playing against the banker. Thus it appears that each player against the bank is separate and independent of all others. The inquiry made by the grand jury is "Tell who bet at the game of faro, not naming yourself." The answer of the witness is (supposing him to be A) that "if I tell that B, C, and D played, it will be either full or partial evidence that I played." This is the whole argument of the case, — an argument which I think is totally untenable in law and reason.

I understand the rule laid down by Chief Justice Marshall, in Burr's Trial, 245 [*ante*, No. 597] to be the true rule of law. It is this, that it is the province of the Court to judge whether any direct answer to the question that may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it, so as to furnish matter for that conviction. . . . The question is, "Who did you see betting at faro except yourself?" It is believed that a direct answer in the negative to this would be, "I saw no one bet at faro." This answer, I think, all will allow, does not accuse him. But suppose his answer must be, that he saw B bet at faro, can it not be true that B bet, yet he, the witness, did not? Does the mere fact that one man saw another commit crime, prove in law or reason that he who saw the crime committed was a participator?. . .

But in this case it is said, if the witness is bound to tell who bet at the game, without naming himself, then those persons who are named will be examined as to the fact, whether he bet; and if the witness is not

compelled to name who did bet, then they will remain unknown to the grand jury, and cannot be examined whether the witness bet. I understand this doctrine to be grounded more on the fear of retaliation than on any sound principle of law. Will the law permit a man to keep offences and offenders a secret, lest the offenders should in their turn give evidence against him?

I have looked into the cases cited at the bar, and I am unable to perceive any principle, in any of them, which ought to vary the foregoing opinion. . . .

The supersedeas is refused in this case; and also in the case of Kembly *v.* The State.

599. STATE *v.* FLYNN

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. 1858

36 *N. H.* 64

THE respondent was indicted for keeping for sale a large quantity — to-wit, ten gallons — of intoxicating liquor, not being an agent for the sale of such liquor, and the liquor not being domestic wine, &c., contrary to the statute, &c. Upon the general issue the State introduced evidence tending to show that A. P. Colby, an assistant marshal of the city of Manchester, acting under a warrant issued by the police court of said city, which was not produced or offered as evidence, went with assistants to the place occupied by the respondent, on Elm street, in Manchester, and there made search for spirituous liquors. The respondent's counsel then objected to the admission of any evidence of the facts ascertained upon such search, upon the ground that the statute for the suppression of intemperance, so far as it purports to authorize a search for spirituous liquors, particularly the fourth section of the statute, is repugnant to the Constitution of the United States and of this State, and any evidence obtained under such unconstitutional enactment is inadmissible, because it is in the nature of admissions made by the respondent under duress, and the respondent is thus compelled to furnish evidence against himself; but the Court admitted the evidence. The jury having found a verdict against the respondent, his counsel move for a new trial, by reason of said decision.

Morrison, *Fitch*, and *Stanley*, for the respondent. . . . II. By the 15th article of the bill of rights of this State it is declared that "no subject shall be compelled to accuse or furnish evidence against himself." The effect of the act of 1855 is to do this. It compels the individual against whom the complaint is made to submit to a search of his premises for the purpose of procuring evidence which is rightfully his, and subject to his sole control, and which he is not to be compelled to furnish or yield to others, to be used against himself, and which he has the right to keep back and withhold, or to resist the sworn officers of the law in the execu-

tion of a precept, and then allows the evidence obtained upon such search to be given against him. . . .

Stevens, Solicitor, for the State. . . . We are at a loss to see in what way the production of the evidence, the facts obtained on the search, can be regarded as an admission or confession on the part of the respondent, or as evidence furnished by him. The discovery or production of the evidence is no more an admission by the accused than it is a denial of the offence charged. . . . There is no restraint upon his person, and no control over his mind. . . . It cannot be seriously contended, that because the accused is prevented from concealing or destroying the instruments or indicia of his offence, because he is so closely pursued that he finds no time or opportuntity to remove the strongest evidence of his guilt, — the weapon with which he struck, the bloody garment, the spoil of his theft or robbery, the tools or instruments of counterfeiting, — or that they are taken from him by force, or discovered by search, and produced in evidence, he is thereby admitting his guilt, or furnishing evidence against himself.

Ball, J.— The objection made in this case does not go so far as to insist that all evidence obtained under a search-warrant is incompetent. . . . Its ground is, rather, that information obtained by means of a search-warrant, in a case not authorized by the Constitution, is not competent to be given in evidence, because it has been obtained by compulsion from the defendant himself, in violation of that clause of the Constitution which provides that no person shall be compelled to furnish evidence against himself. . . . It seems to us an unfounded idea that the discoveries made by the officers and their assistants, in the execution of process, whether legal or illegal, or where they intrude upon a man's privacy without any legal warrant, are of the nature of admissions made under duress, or that it is evidence furnished by the party himself upon compulsion. The information thus acquired is not the admission of a party, nor evidence given by him, in any sense. The party has in his power certain mute witnesses, as they may be called, which he endeavors to keep out of sight, so that they may not disclose the facts which he is desirous to conceal. By force or fraud access is gained to them, and they are examined, to see what evidence they bear. That evidence is theirs, not their owner's. . . . It does not seem to us possible to establish a sound distinction between that case, and the case of the counterfeit bills, the forger's implements, the false keys, or the like, which have been obtained by similar means. The evidence is in no sense his. . . .

The objections being overruled, there must be

Judgment on the verdict.

600. UNITED STATES *v.* CROSS

SUPREME COURT OF THE DISTRICT OF COLUMBIA. 1892

20 *D. C.* 365

MOTION by defendant for a new trial on a case stated and bill of exceptions combined, on indictment for murder. Judgment affirmed. . . .

The defendant was indicted for murdering his wife on the first day of October, 1889. . . . Exception No. 42 was to the admission of the record in the Marshal's office as to the height of the defendant. It seems that he was called into a room in the Marshal's office, and his measurement taken, and that was done after he was convicted at the first trial. . . . It appeared that Mr. Carroll was the clerk, and testified that there is a book kept in the office of the Marshal in which all the measurements of convicted persons are kept, and a description of the convicted persons written down and furnished the Department of Justice. They are required to keep that book and the practice was for somebody to take the measurement and call it out to him, and he reduced it to writing. He identified the book produced as the one used, and then gave the measurement of the defendant. That was objected to on several grounds.

Messrs. *C. Maurice Smith* and *Joseph Shillington*, for defendant. . . . To show the height of the defendant they called William Carroll, a clerk in the Marshal's office. He testified that it was customary in the office to take the measurement of all prisoners after they had been sentenced. He had before him the record in which all measurements thus taken is kept, on one page of which appeared the measurement of the defendant in the witness' own handwriting. He did not make the measurement himself, but it was called out to him by the one who did, and witness took down what was thus called out. The admission of this testimony was doubly objectionable. . . . *Second*, it was compelling the defendant to furnish evidence against himself. . . . The phrase, "be a witness" is broad enough without any unnatural construction to include the testimony of acts and facts as well as of words. The true meaning and intent certainly are that no accused person shall be compelled to say or do anything tending to criminate himself in any criminal prosecution against him. . . .

The United States Attorney, for the District of Columbia, and Mr. *Charles A. Armes*, Assistant Attorney for the United States.

COX, J. (after stating the case as above). . . . There is still a further objection made to it and that is, that it is an effort to compel the defendant to give evidence against himself. It must be remembered that when this measurement was taken, the defendant was *convicted*, and, therefore, it was not taken with the view to a trial or for use upon a trial. There does not seem to be any reason why it could not be used after it had been taken under the circumstances stated. It could not be contended that

the knowledge of the size or height of a man acquired in any other way, for instance by a tailor, could not be used when at the time it was not taken for the purpose of being used as testimony, and it seems to us that a record taken as this was, for a lawful purpose and under the rules of the office, might be made use of afterwards. It does not seem to us that it is compelling the defendant to give evidence against himself, although some cases that have been cited to us go very far in that direction. There was one case holding that it was error for the prosecuting officer to compel the prisoner in court to put his foot into a vessel filled with mud in order to measure it and identify it. That is well enough. It was held in another case that where the officer compelled the defendant to put his foot in certain tracks that were discovered, in order to identify him, that was wrong, as it was compelling him to give evidence against himself, and evidence of that kind so secured, could not be used. We think that is going very far; it is rather too fine. What would be the consequence if such evidence should be entirely excluded? You could not compel a person after his arrest to empty his pockets and disclose a weapon, when the most vital evidence on the part of the Government, in a homicide case, is the possession of the deadly weapon. Could you not compel him to open his pocket-book and exhibit papers that might be conclusive in the case of a forgery, or anything of that sort? We think that officers having a prisoner in custody have a right to acquire information about him, even by force, and that, for example, when his photograph is taken or his measurement taken, it is simply the act of the officers and is not compelling him to give evidence against himself.

Judgment affirmed.

601. Downs *v.* Swann. (Maryland. 1909. 111 Md. 53, 73 Atl. 653.) Schmucker, J. — The right of the police authorities to employ the Bertillon process for the identification of convicted criminals has been recognized in most, if not all, of the jurisdictions in which the subject has received consideration; although several Courts and text writers have either questioned or denied the right to subject to that process persons accused of crimes before their trial or conviction. . . . In Shaffer *v.* United States, 24 App. D. C. 417, . . . Shaffer had been arrested by the police of the district upon a charge of murder, and upon his trial the prosecution offered in evidence his photograph, taken for purposes of identification by the police officer who had him in custody after his arrest. The evidence was objected to on behalf of the prisoner, and, in passing upon the objection on appeal, the Court in their opinion say: . . . "This objection is founded upon the theory that the use of the photograph so obtained is in violation of the principle that a party cannot be required to testify against himself, or to furnish evidence to be so used. But we think there is no foundation for this objection. In taking and using the photographic picture there was no violation of any constitutional right. We know that it is the daily practice of the police officers and detectives of crime to use photographic pictures for the discovery and identification of criminals, and without such means many criminals would escape identification or conviction. It is one of the usual means employed in the public service of the country, and it would be a matter of regret

to have its use unduly restricted upon any fanciful theory of constitutional privilege. . . . It could as well be contended that a prisoner could lawfully refuse to allow himself to be seen while in prison by a witness brought to identify him, or that he could rightfully refuse to uncover himself, or to remove a mark in Court, to enable witnesses to identify him as the party accused, as that he could rightfully refuse to allow an officer, in whose custody he remained, to set an instrument and take his likeness for the purposes of identification." . . .

For the reasons mentioned in this opinion we will affirm the order appealed from; but we must not be understood by so doing to countenance the placing in the "rogues' gallery" of the photograph of any person, not a habitual criminal, who has been arrested but not convicted on a criminal charge, or the publication under those circumstances of his Bertillon record.

602. Holt *v.* United States. (1910. Supreme Court. 218 U. S. 245, 31 Sup. 6.) Holmes, J. . . . Another objection is based upon an extravagant extension of the Fifth Amendment. A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible, and that it should be excluded for the same reason. But the prohibition of compelling a man in a criminal Court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof. Moreover, we need not consider how far a Court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent. Adams *v.* New York, 192 U. S. 585.

603. Ex Parte KNEEDLER

Supreme Court of Missouri. 1912

243 *Mo.* 632; 147 *S. W.* 983

Ex parte petition by Forrest E. Kneedler for a writ of habeas corpus directed to Louis Nolte, Sheriff of the City of St. Louis. Petition denied, and petitioner remanded.

Habeas corpus to discharge petitioner from the custody of the sheriff of the city of St. Louis, who holds petitioner under a capias issued on an information based upon the following statute: . . . "Any person operating a motor vehicle who, knowing that injury has been caused to a person or property, due to the culpability of the said operator, or to accident, leaves the place of said injury or accident, without stopping and giving his name, residence, including street and street number, and operator's license number to the injured party, or to a police officer, or in case no police officer is in the vicinity of place of said injury or accident, then reporting the same to the nearest police station, or judicial officer, shall be guilty of a felony." . . . Laws 1911, p. 328, § 12. The information

charges in the first count that one Ernest Combs was in charge and control of, and operating and managing, an automobile upon a street in the city of St. Louis, and then and there, by accident, struck, run over, and killed one Frank Farrar with such automobile, and that he, knowing that such injury had been caused, did then and there unlawfully and feloniously leave the place of such accident without stopping and giving his name, residence, and license number. . . .

The only question involved is whether or not the Act in question is constitutional. . . .

Kent Koerner and *Glendy B. Arnold,* for petitioner. *Seebert G. Jones* and *Forrest G. Ferris,* for respondent.

FERRISS, J. (after stating the case as above). The statute in question is section 12 of an act of the Legislature, approved March 9, 1911 (Session Acts 1911, p. 322), and comprising in all 16 sections, containing minute regulations and restrictions upon the use of motor vehicles on public streets and highways. . . . The section in controversy was enacted for the purpose, doubtless, of preventing those controlling and operating automobiles from concealing their identity by immediate flight from the scene of accident, and also to secure necessary aid for the injured. Therefore it requires those in charge of the vehicle to remain at the place of accident, or give their names and addresses before leaving.

There can be no question but that this Act, including section 12, is a reasonable exercise of the police power. The petitioner does not contend otherwise. His contention is that, whether reasonable or not as a police measure, it is invalid, because it violates the constitutional provision that "no person shall be compelled to testify against himself in a criminal cause." The argument is that the driver may be charged with the crime of culpable negligence, and that the information exacted by the statute in question may be used as evidence to establish his connection with the injury.

The statute is a simple police regulation. It does not make the accident a crime. If a crime is involved, it arises from some other statute. It does not attempt in terms to authorize the admission of the information as evidence in a criminal proceeding. The mere fact that the driver discloses his identity is no evidence of guilt, but rather of innocence. State *v.* Davis, 108 Mo. 666. On the contrary, flight is regarded as evidence of guilt. In the large majority of cases, such accidents are free from culpability. If this objection to the statute is valid, it may as well be urged against the other provisions, which require the owner and chauffeur to register their names and number, and to display the number of the vehicle in a conspicuous place thereon, thus giving evidence of identity, which is the obvious purpose of the provisions. St. Louis *v.* Williams, 235 Mo. 503.

We have several statutes which require persons to give information which would tend to support possible subsequent criminal charges, if introduced in evidence. Persons in charge are required to report acci-

dents in mines and factories. Physicians must report deaths and their causes, giving their own names and addresses. Druggists must show their prescription lists. Dealers must deliver for inspection foods carried in stock. We held a law valid which required a pawnbroker to exhibit to an officer his book, wherein were registered articles received by him, against his objection based on this same constitutional provision. We held this to be a mere police regulation, not invalid, because there might be a possible criminal prosecution in which it might be attempted to use this evidence to show him to be a receiver of stolen goods. City of St. Joseph *v.* Levin, 128 Mo. 588. If the law which exacts this information is invalid, because such information, although in itself no evidence of guilt, might possibly lead to a charge of crime against the informant, then all regulations which involve identification may be questioned on the same ground. We are not aware of any constitutional provision designed to protect a man's conduct from judicial inquiry, or aid him in fleeing from justice.

But, even if a constitutional right be involved, it is not necessary to invalidate the statute to secure its protection. If, in this particular case, the constitutional privilege justified the refusal to give the information exacted by the statute, that question can be raised in the defense to the pending prosecution. Whether it would avail, we are not called upon to decide in this proceeding.

The petitioner relies upon State ex rel. *v.* Simmons Hardware Co., 109 Mo. 118, wherein we held a statute invalid which required an officer of a corporation to answer, under oath, whether the corporation had violated the statute concerning trusts and combinations, and where the statute further made a violation of such trust statute a crime. The distinction between that case and this is obvious. There the information relates directly to a crime created by the same statute, and is necessarily incriminatory, if the answer is in the affirmative. In re Conrades, 112 Mo. App. loc. cit. 41. This distinction was pointed out, also, in the Levin Case, supra.

Our attention is called to the case of People *v.* Rosenheimer, 70 Misc. Rep. 433, 128 N. Y. Supp. 1093, wherein the Court of General Sessions held a similar act invalid. This decision was affirmed by a divided court, three to two, in the Appellate Division. 146 App. Div. 875, 130 N. Y. Supp. 544. We regard the dissenting opinion by Ingraham, P. J., as sustained by the better reasoning. Similar statutes have been passed in Maine, New Jersey, Michigan, Florida, California, and other States. Our attention is called to no decision upon the question involved here by any Court of last resort. . . .

We cannot hold invalid this statute, imposing a proper restriction, because of its suggested possible relation to a possible criminal prosecution.

It is ordered that the petitioner be remanded.

Brown, P. J., and Kennish, J., concur.

604. HALE *v.* HENKEL

SUPREME COURT OF THE UNITED STATES. 1906

201 *U. S.* 43; 26 *Sup.* 370

THIS was an appeal from a final order of the Circuit Court, made June 18, 1905, dismissing a writ of habeas corpus, and remanding the petitioner, Hale, to the custody of the marshal.

The proceeding originated in a subpœna duces tecum, issued April 28, 1905, commanding Hale to appear before the grand jury at a time and place named, to "testify and give evidence in a certain action now pending . . . in the circuit court of the United States for the southern district of New York, between the United States of America and the American Tobacco Company and MacAndrews & Forbes Company, on the part of the United States, and that you bring with you and produce at the time and place aforesaid:

"1. All understandings, agreements, arrangements, or contracts, whether evidenced by correspondence, memoranda, formal agreements, or other writings, between MacAndrews & Forbes Company and six other firms and corporations named, from the date of the organization of the said MacAndrews & Forbes Company. . . ."

Petitioner appeared before the grand jury in obedience to the subpœna, and, before being sworn, asked to be advised of the nature of the investigation in which he had been summoned. . . . After stating his name, residence, and the fact that he was secretary and treasurer of the MacAndrews & Forbes Company, he declined to answer all other questions in regard to the business of the company, its officers, the location of its office, or its agreement or arrangements with other companies. He was thereupon advised by the assistant district attorney that this was a proceeding under the Sherman Act to protect trade and commerce against unlawful restraint and monopolies. . . . The witness still persisted in his refusal to answer all questions. He also declined to produce the papers and documents called for in the subpœna: . . . Third. Because they might tend to incriminate him.

Whereupon the grand jury reported the matter to the Court, and made a presentment that Hale was in contempt. . . . The circuit judge held him to be in contempt, and committed him to the custody of the marshal until he should answer the questions and produce the papers. A writ of habeas corpus was thereupon sued out. . . .

Mr. *De Lancey Nicoll*, with whom Mr. *Junius Parker* and Mr. *John D. Lindsay* were on the brief for appellant, in this case and in No. 341, argued simultaneously herewith. . . . A corporation is entitled to the same immunities as an individual. It cannot be compelled to incriminate itself. Wigmore on Evidence, § 2259; Logan *v.* Penna. R. R. Co. 132 Pa. St. 403; Santa Clara County *v.* Railroad Company, 118 U. S. 394;

King of Sicilies *v.* Willcox, 7 St. Tr. (N. S.) 1049. By the express provisions of the Sherman Act corporations are deemed to be persons. Section 8. A corporation can only be examined through its officers, directors or agents. In the present case the Government undertook deliberately by that method to compel the corporation to submit to examination, not as a witness, but by forcing one of its officers and directors to produce its books and papers for the sole purpose of ascertaining whether or not the corporation had committed a crime under the Sherman Act. The rule that the protection of the Fourth and Fifth Amendments is the personal privilege of the witness and cannot be claimed for the benefit of another has no possible application to the case of an officer, director or agent of a corporation who seeks to secure to the corporation its constitutional rights and immunities; for these rights can only be asserted through its officers, directors and agents.

In this view the witness is not seeking to invoke the privilege of another, but the corporation itself invokes its own privilege in the only manner and by the only means it can employ for that purpose. . . .

Mr. *Henry W. Taft*, Special Assistant to the Attorney-General, with whom *The Attorney-General* and Mr. *Felix H. Levy*, Special Assistant to The Attorney-General, were on the brief, for the United States. . . .

The protection of the Fourth and Fifth Amendments is based alone upon the personal privilege of the witness. The objections urged by the witness cannot be relied upon for the benefit of the corporation of which he is an officer. . . . While sporadic cases look in a different direction, there have been many decisions, both in this country and in England, in which the courts have refused to permit the privilege to be asserted by an officer or employee in behalf of a corporation of which he is the representative. New York Life Insurance Co. *v.* People, 195 Ill. 430. . . .

Mr. Justice Brown, after making the foregoing statement, delivered the opinion of the Court.[1] . . .

1. Appellant invokes the protection of the 5th Amendment to the Constitution, which declares that no person "shall be compelled in any criminal case to be a witness against himself," and in reply to various questions put to him he declined to answer, on the ground that he would thereby incriminate himself. . . . The interdiction of the 5th Amendment operates only where a witness is asked to incriminate himself, — in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the amendment ceases to apply. The criminality provided against is a present, not a past, criminality, which lingers only as a memory, and involves no present danger of prosecution. To put an extreme case, a man in his boyhood or youth may have committed acts which the law pronounces criminal; but it would never be asserted that he would there-

[1] [Points 2, 3, and 4 are the only ones here involved. Point 1 concerns the topic of No. 623, *post*, — Ed.]

by be made a criminal for life. It is here that the law steps in and says that if the offense be outlawed or pardoned, or its criminality has been removed by statute, the amendment ceases to apply. The extent of this immunity was fully considered by this court in Counselman *v.* Hitchcock, 142 U. S. 547, [*post*, No. 621] in which the immunity offered by Rev. Stat. § 860 (U. S. Comp. Stat. 1901, p. 661) was declared to be insufficient. In consequence of this decision an act was passed applicable to testimony before the Interstate Commerce Commission in almost the exact language of the act of February 25, 1903, above quoted. This act was declared by this Court in Brown *v.* Walker, 161 U. S. 591, [*post*, No. 622] to afford absolute immunity against prosecution for the offense to which the question related, and deprived the witness of his contitutional right to refuse to answer. Indeed, the act was passed apparently to meet the declaration in Counselman *v.* Hitchcock, that "a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

We need not restate the reasons given in Brown *v.* Walker, both in the opinion of the Court, and in the dissenting opinion, wherein all the prior authorities were reviewed, and a conclusion reached by a majority of the court, which fully covers the case under consideration. . . .

The further suggestion that the statute offers no immunity from prosecution in the State courts was also fully considered in Brown *v.* Walker, and held to be no answer. The converse of this was also decided in Jack *v.* Kansas, 199 U. S. 372, *ante*, 73, 26 Sup. Ct. Rep. 74, — namely, that the fact that an immunity granted to a witness under a State statute would not prevent a prosecution of such witness for a violation of a Federal statute did not invalidate such statute under the 14th Amendment. The question has been fully considered in England, and the conclusion reached that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty. Queen *v.* Boyes, 1 Best & S. 311; King of Sicilies *v.* Willcox, 7 St. Tr. N. S. 1049, 1068; State *v.* March, 46 N. C. (1 Jones, L.) 526; State *v.* Thomas, 98 N. C. 599, 2 Am. St. Rep. 351, 4 S. E. 518. The entire question of immunity is also exhaustively treated in Wigmore on Evidence, §§ 2255-2259. . . .

2. It is further insisted that, while the immunity statute may protect individual witnesses, it would not protect the corporation of which appellant was the agent and representative. This is true. But the answer is that it was not designed to do so. The right of a person under the 5th Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation. The question whether a corporation is a "person" within the

meaning of this amendment really does not arise, except, perhaps, where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employees. The amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself;* and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation. As the combination or conspiracies provided against by the Sherman anti-trust act can ordinarily be proved only by the testimony of parties thereto, in the person of their agents or employees, the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the Legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject? Indeed, so strict is the rule that the privilege is a personal one that it has been held in some cases that counsel will not be allowed to make the objection. We hold that the questions should have been answered.

3. The second branch of the case relates to the nonproduction by the witness of the books and papers called for by the subpœna duces tecum. The witness put his refusal on the ground, . . . finally, because they might tend to incriminate him. . . .

Having already held that, by reason of the immunity Act of 1903, the witness could not avail himself of the 5th Amendment, it follows that he cannot set up that amendment as against the production of the books and papers, since, in respect to these, he would also be protected by the immunity Act. We think it quite clear that the search and seizure clause of the 4th Amendment was not intended to interfere with the power of courts to compel, through a subpœna duces tecum, the production, upon a trial in court, of documentary evidence. As remarked in Summers *v.* Moseley, 2 Cromp. & M. 477, it would be "utterly impossible to carry on the administration of justice" without this writ. The following authorities are conclusive upon this question: Amey *v.* Long, 9 East, 473; Bull *v.* Loveland, 10 Pick. 9; United States Exp. Co. *v.* Henderson, 69 Iowa 40, 28 N. W. 426; Greenleaf, Evidence, 469*a*.

If, whenever an officer or employee of a corporation were summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers.

Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State. The individual may stand upon his constitutional rights as a citizen. He

is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the State, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the State, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights. Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the Legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose.

The defense amounts to this: That an officer of a corporation which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges. . . .

4. Although, for the reasons above stated, we are of the opinion that an officer of a corporation which is charged with a violation of a statute of the State of its creation, or of an Act of Congress passed in the exercise of its constitutional powers, cannot refuse to produce the books and papers of such corporation, we do not wish to be understood as holding that a corporation is not entitled to immunity, under the 4th Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the 14th Amendment, against unlawful discrimination. Gulf, C. & S. F. R. Co. *v.* Ellis, 165 U. S. 150, 154, and cases cited. . . . We are also of opinion

that an order for the production of books and papers may constitute an unreasonable search and seizure within the 4th Amendment. . . .

Applying the test of reasonableness to the present case, we think the subpœna duces tecum is far too sweeping in its terms to be regarded as reasonable. . . .

Of course, in view of the power of Congress over interstate commerce, to which we have adverted, we do not wish to be understood as holding that an examination of the books of a corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the 4th Amendment.

But this objection to the subpœna does not go to the validity of the order remanding the petitioner, which is, therefore, affirmed.

Mr. Justice HARLAN, concurring:

I concur entirely in what is said in the opinion of the Court in reference to the powers and functions of the grand jury and as to the scope of the 5th Amendment of the Constitution. I concur also in the affirmance of the judgment; but must withhold my assent to some of the views expressed in the opinion. It seems to me that the witness was not entitled to assert, as a reason for not obeying the order of the Court, that the subpœna duces tecum was an infringement of the 4th Amendment. . . . In my opinion, a corporation — "an artificial being, invisible, intangible, and existing only in contemplation of law" — cannot claim the immunity given by the 4th Amendment; for it is not a part of the "people," within the meaning of that Amendment. Nor is it embraced by the word "persons" in the Amendment. . . .

Mr. Justice MCKENNA, concurring:

I concur in the judgment, but not in all the propositions declared by the Court. . . . There are certainly strong reasons for the contention that, if corporations cannot plead the immunity of the 5th Amendment, they cannot plead the immunity of the 4th Amendment. . . .

Mr. Justice BREWER, dissenting:

. . . The corporation of which the petitioner was an officer was chartered by a State, and over it the general government has no more control than over an individual citizen of that State. Its power to regulate commerce does not carry with it a right to dispense with the 4th and 5th Amendments, to unreasonably search or seize the papers of an individual or corporation engaged in such commerce, or deprive him or it of any immunity or protection secured by either Amendment.

I am authorized to say that the Chief Justice concurs in these views.

605. JOHN H. WIGMORE. *Note on Hale* v. *Henkel.* (1906. I Illinois Law Review, 43.) *The Privilege of a Corporation against Self-Crimination.* — In the Tobacco Trust Cases, Hale *v.* Henkel and McAlister *v.* Henkel, the Federal Supreme Court, speaking through Mr. Justice BROWN, has declared itself for the first time upon two important points in the law of evidence, and has at the same time effectually recanted, upon another, an obiter dictum which has for two decades been disturbing the precedents and leading a few State Courts astray.

The latter point is that the Fourth Amendment to the Constitution, forbidding unreasonable searches and seizures, is distinct in scope from the Fifth Amendment, which grants the privilege against self-criminating testimony — a distinction which was ignored in Boyd *v.* U. S., 116 U. S. 616, where documents obtained by search were declared to be not usable in evidence under the Fifth Amendment; and that therefore when the privilege under the Fifth Amendment has been destroyed by an immunity statute, documents obtained from the accused whether by search-warrant or by subpœna, are not prevented from use in evidence by the Fourth Amendment.

Of the other two points — the novel ones — the first is that the officer of a corporation cannot plead the privilege of the corporation in refusing to produce its documents which are in his custody; this, however, was inevitably the law, and merely receives primal recognition in that Court. But, secondly, it is further declared in the opinion that a corporation cannot set up the privilege against self-crimination in refusing to produce its books, since "there is a clear distinction between an individual and a corporation." It may be questioned whether this was necessary to the decision, and whether the grounds stated are intended to make the proposition an unqualified one. But the language is express; and the ruling seems to be the first one of its kind in any jurisdiction.

What does it teach, as to the practical method for going about to procure this sort of evidence against corporations, in the proceedings now so common? The prosecutor or investigator, it is obvious, has his choice at the outset between two modes. Either he may call upon the corporation directly for its documents, or he may demand them of an officer of the corporation. If he takes the latter course, he must inevitably give immunity to the officers personally, supposing that he is a prosecuting attorney; and he runs a great risk of producing the same effect, if he is an investigating commissioner, under the recent ruling in the Chicago Packers' Case (noticed elsewhere). But if he takes the latter course, demanding from the corporation directly, he avoids these disadvantages; for the corporation has no privilege to refuse (under Hale *v.* Henkel, *supra*), and the officers, not having been personally subjected to the demand, cannot invoke their privilege, and therefore do not benefit by the immunity clause. Thus both the corporation and (most important) the officers remain liable to prosecution. Is not this the practical lesson to be drawn from these decisions?

Yet it remains to ask whether the Court's opinion has not left a vital point still unnoticed. That point is this: The privilege began, continued, and now exists at common law, independently of statute; the Constitution merely guarantees it against legislative alteration; did the Supreme Court, then, mean to say that a corporation was and is not within the privilege at common law? or did they mean to say merely that the Constitutional guarantee of it to all "persons" does not include corporations? If they meant the former, then no immunity needs to be given to, nor can be claimed, by a corporation; and Courts are free to exact everything from a corporation. But if they meant the latter, then the privilege stands, for corporations, until abolished by the Legislature; hence, if the Legislature has not abolished it, the corporation may still claim it; and hence also, if the Legislature in abolishing it has chosen (unnecessarily, to be sure) to grant immunity as an inseparable gift annexed therewith, the corporation will get the immunity when forced to relinquish the privilege. The importance of this distinction in the current attempts to investigate corporate conduct is obvious. But we doubt whether any certain light upon it is to be found in Hale *v.* Henkel.

Sub-topic B. Claim of the Privilege

607. Bembridge's Trial. (1783. 22 How. St. Tr. 143.) Mr. *Bearcroft* (arguing for the defence). It is true he was examined in a mode of inquiry in which it was not improper, perhaps, to examine him; but it cannot be doubted that the persons who did examine him saw that the questions that they put upon that occasion tended to criminate the person under that examination. What does your lordship do in that situation? What does every judge do, even down to the lowest justice of the peace, even to committee-men upon elections, whenever a question of that sort is asked of a witness? "Stop; understand that you are at your own discretion whether you will answer that question or not; you need not accuse yourself." The law of England is that no man is bound to accuse himself; and the man who administers that law best always takes care to give that caution.

608. Mayo *v.* Mayo. (1876. Massachusetts. 119 Mass. 290, 292.) It is within the discretion of the Court, and the usual practice, to advise a witness that he is not bound to criminate himself, where it appears necessary to protect the rights of the witness.

609. CLOYES *v.* THAYER

Supreme Court of New York. 1842

3 *Hill* 564, 566

Action on a promissory note bearing date November 27th, 1835, payable to bearer, made by the defendants and transferred to the plaintiff by Isaac Hovey, the payee. The defendants pleaded the general issue, and gave notice, in general terms, that they would prove the note to have been given to Hovey upon a usurious consideration. . . . The defendants' counsel called Isaac Hovey as a witness, and asked him if he was the original holder of the note. The witness declined answering the question, for fear, as he said, that his reply might form a link in the chain of evidence to convict him of a criminal offence. The circuit judge required the witness to answer the question and to testify in relation to the receipt by him of the alleged usury; giving as the reason for his decision that it was not an offence to take usury when the note in question was executed. The plaintiff's counsel excepted. The jury rendered a verdict in favor of the defendants; and the plaintiff now moved for a new trial on a bill of exceptions.

T. Jenkins, for the plaintiff. *B. D. Noxon*, for the defendants.

Nelson, C. J. — The Court erred in compelling the payee of the note to answer questions tending to criminate himself. It was expressly held in Burns *v.* Kempshall (24 Wend. 360), that the answer in a like case might tend to subject him either to a penalty or to an indictment for a misdemeanor.

But the error is not available to the plaintiff. The privilege belongs exclusively to the witness, who may take advantage of it or not at his pleasure. The party to the suit cannot object. He has no right to insist upon the privilege and require the Court to exclude the evidence on that ground. The witness may waive it and testify, in spite of any objection coming from the party or his counsel. If ordered to testify in a case where he is privileged, it is a matter exclusively between the Court and the witness. The latter may stand out and be committed for contempt, or he may submit; but the party has no right to interfere or complain of the error. It would be otherwise if the Court allowed the privilege in a case where the witness had not brought himself within the rule, as the [cross-examining] party would then be improperly deprived of his testimony.

Upon the other ground, however, viz., that the notice given with the plea was defective under the statute of 1837, a new trial must be granted for the error in compelling the plaintiff to be sworn and give evidence on the question of usury. . . . New trial granted.

610. State *v.* Kent, *alias* Pancoast. (1896. 5 N. D. 516, 67 N. W. 1052.) Bartholomew, J. — With respect to an ordinary witness, counsel in the case have no legal interest in the matter of his protection. It is purely a question between the witness and the Court. Cloyes *v.* Thayer, 3 Hill, 564 [*ante*, No. 609]; Southard *v.* Rexford, 6 Cow. 254. Not only must the witness claim the privilege in person, but he must state under oath that the answer will tend to criminate him. See 1 Roscoe, Criminal Evidence, 232 *et seq.* . . .

This case, however, presents a still further complication, in that the witness was also a party, and a party most vitally interested. Generally speaking, a party to an action in Court speaks through his counsel. It is the right and duty of counsel to protect his client at every point. These considerations led the Court of Appeals in New York, in People *v.* Brown, 72 N. Y. 571, and in the Supreme Court of Iowa, in Clifton *v.* Granger, 86 Iowa 573, to hold that this privilege could be claimed by counsel when the witness was also a party. But there is a practical difficulty in such a holding that was not discussed in either of these cases. The claim of privilege, when made by counsel alone, even when, as in this case, counsel says, "The privilege is claimed by both counsel and the defendant," is not, and cannot be, supported by the oath of the witness. This, as we have seen, is demanded both by authority and reason, and we can conceive of no sufficient ground to support an exception in favor of a party. State *v.* Wentworth, 65 Me. 234. No doubt, counsel have the right, in protecting their clients, to raise the point, and call the attention of the Court to the matter, and demand that the witness be apprised of his rights, and given an opportunity to make the claim under oath, if he so elect. We think this would be the proper method of raising the point in these cases. Of course, the witness might do it without the intervention of counsel.

611. REGINA *v.* GARBETT

CROWN CASES RESERVED. 1847

2 *C. & K.* 474, 492; 2 *Cox Cr.* 448; 1 *Den. Cr. C.* 276

FORGERY. The first count of the indictment charged the prisoner with forging a bill of exchange for £50, with intent to defraud William Booth. . . .

In the course of the trial, *S. Martin*, for the prosecution, proposed to give in evidence the examination of the prisoner on the trial of the civil action of Blagden *v.* Booth, at the Kingston Spring Assizes, 1847. . . . On that trial, the prisoner was called as a witness for the defendant; and, in his examination in chief, he had said: "This is my signature to the bill as drawer. The bill is made payable to my order. The acceptance was on it when I handed it to Mr. Phillips (the second endorser)." His cross-examination was as follows, as was proved by Mr. Corfield, the short-hand writer, by his short-hand notes: —

The stamp was never out of my possession till it was handed to Mr. Phillips.

Had you Mr. Booth's authority to accept it? — I had not.

Where did you get the stamp? — I purchased it at a shop in London, and from that time the stamp has never been out of my possession. I never received a penny for it.

Never mind what you received for it, — when was the "William Booth" put upon it? — Between the Friday and the Sunday.

What Friday and Sunday? — I believe it was between the last Friday and the last Sunday in November.

After the 21st? — Certainly after the 21st.

After the 21st of November, 46? — Certainly.

Did you communicate with Mr. Booth on the subject? — Not in any way.

Have you never done so? — Yes, I believe last Saturday week I saw Mr. Booth.

Lord DENMAN. — Was that the first time? — The first time, my Lord.

Mr. *Chambers*. — Why! did he not write you a letter? — Never, I never heard of his writing me a letter until I came into this Court by accident.

Until you came by accident, — what do you mean? — I came into Court in pursuance of a subpœna served three hours ago.

Who served you three hours ago? — A gentleman.

Where were you three hours ago? — At my office in King William Street, in the City.

Who is the man, — do you know him? — I do not, but I believe he is a clerk to Mr. Stuart.

Where is your office do you say? — My place of business is in King William Street.

What are you? — An attorney and solicitor.

Did you know what you came here to prove? — I did not until I came into the box.

Do you know what you are attempting to prove? — I do.

Do you mean to say it is a forgery? — It is not his handwriting.

Not in his handwriting. Who accepted it then? — I am in the hands of the Court.

Lord DENMAN. — It must be answered.

The Witness. — I state, my Lord, that I filled the bill up at Mr. Phillips's request in his own drawing-room, and handed it to him, and have never received a penny for it.

Mr. *Chambers*. — I ask you who did that? (pointing to the bill.) — Not Mr. Booth.

Did Mr. Phillips? — No.

Who was present when the bill was filled up? — Mr. Phillips alone.

Were there only you two present? — Mr. Booth was not present when "William Booth" was written. William Booth had been written before I filled it up in Mr. Phillips's drawing-room.

Who was present when "William Booth" was written? — I won't say — only myself.

Was any one else? — I cannot say.

I ask you to tell me whether any other person was present when "William Booth" was written besides yourself? — I believe a clerk.

What clerk? — That I decline to say.

Mr. *Chambers*. — My Lord, I press the question.

Lord DENMAN. (To the witness.) — That other person or you must have written it? — Precisely so.

You knew that when you uttered it? — When I handed it to Mr. Phillips I did know it and Mr. Phillips knew it too.

By Mr. *Chambers*. — Who was the other person? I ask the question, and I submit, my Lord, it is a proper question.

Lord DENMAN. — It must be answered.

Montagu Chambers, for the prisoner, objected to those parts of the cross-examination being given in evidence which followed the prisoner's declining to answer, and applying to the Court for protection, and the decision of Lord DENMAN, C. J., that he must answer the question.

Montagu Chambers (for the prisoner). I submit that the prisoner, when he was a witness on the trial of the case in Blagden *v.* Booth, was not bound to answer the question then put, which he demurred to answering, and was illegally compelled to answer.

Willes (for the prosecution). When a witness, in giving this evidence, even inadvertently states a part of a transaction, and it is essential to truth and justice that he should answer the whole, he must do so. Here the witness knew what he came to prove; he does not take advantage of his privilege, but makes certain statements to the advantage of one party, and then wishes to say no more, and insist on his privilege, which he cannot be allowed to do, as the plaintiff has a right to the whole truth.

(ROLFE, B. — If the witness says, on his oath, that he believes the answer will criminate him, can you compel him to give the answer after that? WILDE, C. J. — I have known judges over and over again tell the

witness he must answer. PARKE, B. — It must appear to the judge that the answer really has some tendency to criminate the witness.)

S. Martin. — I submit that the judge has a discretion.

1. The case was afterwards considered by the judges, when a majority of their Lordships held the conviction wrong, being of opinion, that, if a witness claims the protection of the Court on the ground that his answer would tend to criminate himself, and there appears reasonable ground to believe that it would do so, he is not compellable to answer; and if obliged to answer notwithstanding, what he says must be considered to have been obtained by compulsion, and cannot afterwards be given in evidence against him. Their Lordships did not decide (as the case did not call for it) whether the mere declaration of a witness on oath, that he believed that the answer would tend to criminate him, would or would not be sufficient to protect him from answering, where sufficient other circumstances did not appear in the case to induce the judges to believe that the answer would tend to criminate the witness.

2. Their Lordships, also held, that it made no difference in the right of the witness to protection that he had before answered in part; — their Lordships being of opinion that he was entitled to claim the privilege at any stage of the inquiry, and that no answer forced from him by the presiding judge (after such a claim) could be afterwards given in evidence against him.

612. STATE *v.* THADEN

SUPREME COURT OF MINNESOTA. 1890

43 *Minn.* 253, 255; 45 *N. W.* 447

MITCHELL, J. — The defendant was jointly indicted with two others (Partello and Tall) for forgery in the second degree, by putting off as true upon one Christianson a false and forged promissory note purporting to have been executed by one Linstad. He demanded and was granted a separate trial, and the State called, as a witness in its behalf, Linstad, the person whose name was alleged to have been forged.

The first error assigned is the ruling of the trial Court in compelling this witness to answer certain questions, he having previously declined to do so, claiming that the same might tend to criminate himself. While no principle of the common law is more firmly established than that which affords a witness the privilege of refusing to answer any question which will criminate himself, yet its application is attended with practical difficulties. . . . The problem is how to administer the rule so as to afford full protection to the witness and at the same time prevent simulated excuses. All the authorities agree to the general proposition that the statement of the witness that the answer will tend to criminate himself is not necessarily conclusive, but that this is a question which the Court will determine from all the circumstances of the particular case, and the

nature of the evidence which the witness is called upon to give. But the question on which the cases seem to differ is as to what we may call the burden of proof; some holding that the statement of the witness must be accepted as true, unless it affirmatively appears from the circumstances of the particular case that he is mistaken, or acts in bad faith, while other cases hold that, to entitle a witness to the privilege of silence, the Court must be able to see from the circumstances of the case and the nature of the evidence called for, that there is reasonable ground to apprehend danger to the witness, if he is compelled to answer. . . . The difference is theoretical, rather than practical; for it would be difficult to conceive of an instance where the circumstances of the case, and the nature of the evidence called for, would be entirely neutral in their probative force upon the question whether or not there was reasonable ground to apprehend that the answer might tend to criminate the witness. After consideration of the question and an examination of the authorities, our conclusion is that the best practical rule is that laid down in some of the English cases, and adopted and followed by Chief Justice Cockburn, in Reg. *v.* Boyes. . . . To this we would add that, when such reasonable apprehension of danger appears, then, inasmuch as the witness alone knows the nature of the answer he would give, he alone must decide whether it would criminate him. This, we think, is substantially what Chief Justice Marshall meant by his statement of the rule in the Burr trial (Robertson's Rep. I, 243):

> It is alleged that he [the witness] is and from the nature of things must be the sole judge of the effect of his answer; that he is consequently at liberty to refuse to answer any question, if he will say upon his oath that his answer to that question might criminate himself. . . . [But] there is no distinction which takes from the Court the right to consider and decide whether any direct answer to the particular question propounded could be reasonably supposed to affect the witness. There may be questions no direct answer to which could in any degree affect him; and there is no case which goes so far as to say that he is not bound to answer such questions. . . . When two principles come in conflict with each other, the Court must give them both a reasonable construction so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable extent, and according to the true intention of the rule and of the exception to that rule, by observing that course which, it is conceived, Courts have generally observed; it is this: When a question is propounded, it belongs to the Court to consider and decide whether *any* direct answer to it *can* implicate the witness; if this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it *may* criminate himself, then he must be the sole judge what his answer would be; the Court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be, and a disclosure of that fact to the judges would strip him of the privilege which the law allows and which he claims.

Applying this rule to the case at bar, it is very clear that no error was committed in compelling the witness Linstad to answer the questions. The sole object of the evidence sought to be elicited from him was to prove that his signature to the note was forged, and not genuine. For the purpose of proving this, counsel for the state exhibited the note to him, and asked if the name affixed was his signature. This the witness declined to answer, on the ground that it might criminate himself, and the Court held that he need not answer the question. Counsel then, with the evident purpose of proving the same fact indirectly, asked the following questions: "Have you ever seen this note before?" The witness replied, "I refuse to answer that question, because it may criminate myself;" or, as subsequently expressed, "it might have a tendency to criminate myself." The Court having ruled that he must answer, the witness replied, "Yes." Counsel then asked him, "When?" to which the witness interposed a claim of privilege in the same form as before, and, the Court having again ruled that he must answer, he replied, fixing the time he had first seen the note at a date subsequent to the date of the alleged uttering by the defendant.

Whether the rulings of the Court were consistent in sustaining the witness' claim of privilege as to the first question, and overruling it as to the other two, is immaterial. There was not a thing, either in the circumstances of the case as then presented to the Court, or in the nature of the questions, to suggest any reasonable apprehension of danger to the witness from being compelled to answer. The very nature of the offence charged against defendant negatived the idea of the witness being a party to it, and there was nothing in the character of the evidence sought to be elicited from him that would reasonably suggest any real or appreciable danger that it would or could tend to inculpate him in any other offence. The answers themselves, when given, show that they had no such effect. . . . Order affirmed.

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613. PEOPLE *v.* TYLER

SUPREME COURT OF CALIFORNIA. 1869

36 *Cal.* 522, 530

AT the trial the defendant did not avail himself of the right conferred by this Act to offer himself as a witness on his own behalf. During the argument of the case, the District Attorney called the attention of the jury to the fact that the defendant had not testified in his own behalf, and argued and insisted before said jury that the silence of the defendant was a circumstance strongly indicative of defendant's guilt. Defendant's counsel objected to this course of argument, and requested the Court to require the District Attorney to refrain from urging such inference, but the Court declined to interfere, and intimated that the law justified

the counsel in the course pursued. Counsel thereupon continued to urge before the jury that the silence of the defendant was a circumstance tending strongly to prove his guilt, and the counsel for the prisoner excepted. At the close of the argument of the case to the jury, the defendant's counsel asked the Court to give to the jury the following instruction: "The jury should not draw any inference to the prejudice of the defendant from the fact that he did not offer himself as a witness in his own behalf. It is optional with a defendant to do so or not, and the law does not intend that the jury should put any construction upon his silence unfavorable to him." The Court refused to give the instruction, and defendant excepted. The action of the Court in the premises is claimed to be erroneous. . . .

SAWYER, C. J. (after stating the case as above). If, at the trial, when, for all the purposes of the trial, the burden is on the People to prove the offense charged by affirmative evidence, and the defendant is entitled to rest upon his plea of not guilty, an inference of guilt could legally be drawn from his declining to go upon the stand as a witness, and again deny the charge against him in the form of testimony, he would practically, if not theoretically, by his act declining to exercise his privilege, furnish evidence of his guilt that might turn the scale and convict him. In this mode he would indirectly and practically be deprived of the option which the law gives him, and of the benefit of the provision of the law and the Constitution, which say, in substance, that he shall not be compelled to criminate himself. If the inference in question could be legally drawn, the very act of exercising his option as to going upon the stand as a witness, which he is necessarily compelled by the adoption of the statute to exercise one way or the other, would be, at least to the extent of the weight given by the jury to the inference arising from his declining to testify, a crimination of himself.

Whatever the ordinary rule of evidence with reference to inferences to be drawn from the failure of parties to produce testimony that must be in their power to give, we are satisfied that the defendant, with respect to exercising his privilege under the provisions of the Act in question, is entitled to rest in silence and security upon his plea of not guilty, and that no inference of guilt can be properly drawn against him from his declining to avail himself of the privilege conferred upon him to testify on his own behalf; that to permit such an inference would be to violate the principles and the spirit of the Constitution and the statute, and defeat rather than promote the object designed to be accomplished by the innovation in question.

614. COMMONWEALTH *v.* WEBSTER. (1850. Massachusetts. 5 Cush. 295, 316.) SHAW, C. J. — Where probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered, — though not alone entitled to much weight; because the burden of proof lies on the accuser to make out the whole case by substantive

evidence. But when a pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting would tend to sustain the charge. But this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused not accessible to the prosecution.

615. BROCK *v.* STATE

SUPREME COURT OF ALABAMA. 1898

123 *Ala.* 24; 26 *So.* 329

[Printed *ante*, as No. 270.]

616. COMMONWEALTH *v.* RICHMOND

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1911

207 *Mass.* 240; 93 *N. E.* 815

EXCEPTIONS from Superior Court, Middlesex County; JOHN C. CROSBY and WM. F. DANA, Judges.

Elizabeth Richmond was convicted of murder, and excepts. Exceptions overruled.

J. J. Higgins, District Attorney, for the Commonwealth. *R. W. Gloag*, for defendant.

RUGG, J. — The defendant was indicted for murder. . . .

. . . 10. A number of people were in the house of the defendant during the period of time within which the decedent might have met his death. It was claimed that all of these persons had been called as witnesses. Commenting on this in the course of his argument, the district attorney used this language: "Is there anybody in this case whose presence or absence is unaccounted for except the one party charged with the crime? My brother . . . urges upon you the utter futility of our putting these people on the stand and asking them the pregnant question: 'Did you kill Stewart MacTavish?' . . . He utterly failed to apprehend the significance of that question, for every person that was in that house that we could find — and he candidly and frankly says we have brought them all before you — every person but one has told you under oath that they did not kill Stewart MacTavish. This is significant." Objection was made to this argument by counsel for the defendant, and the Court stated: "That will be taken care of in the charge." Thereupon the district attorney proceeded: "You have been told that the defendant is

not to be prejudiced because she did not take the stand. . . . That is the last thing in the world I shall ask of you — to infer anything from the fact that she did not take the stand. And what I have just said has no relation to that except the bare fact that everybody but she has testified under oath that they did not kill MacTavish." Defendant's counsel again addressed the Court, asking that the argument be stopped. The district attorney proceeded: "If she has in her power or control any evidence which will explain where she was on Thursday night, if she has any friends that could come here and tell you where she was and what she was doing, if she has any means whatever of putting before you any evidence showing where she was and she fails to do it, we are entitled to call your attention to that failure, and you are entitled to use it as you see fit. . . . I am not asking you to infer anything from the fact that she did not take the stand. You have no right to do that. . . . But if she has within her possession or control any evidence to show that she is innocent, if she has such evidence that an innocent person would produce I am authorized to call your attention to her failure to do so, and you are entitled to consider it in this case." In the charge, the jury were instructed that although the defendant was permitted to testify in her own behalf, at her own request, she was not obliged to do so, and her failure to do so did not create any presumption against her and should not prejudice her in any way. Accurate instructions were given as to inferences which might be drawn from the defendant's failure to call other witnesses whose evidence might tend to exonerate her. At the close of the charge, the defendant's counsel asked a specific ruling that the district attorney had no right to make the argument above quoted, but the Court refused to give it.

Under the Federal Constitution and that of this Commonwealth, no person can be compelled in a criminal case to be a witness or furnish evidence against himself. Const. U. S. Amend., art. 5; Const. Mass. pt. I, art. 12. Rev. Laws, c. 175, § 20, cl. 3, provides that a defendant in any "criminal proceeding shall, at his own request, but not otherwise, be allowed to testify; but his neglect or refusal to testify shall not create any presumption against him."

The fact that any defendant declines to avail himself of the privilege of testifying conferred by the statute cannot be permitted to create any presumption against him. Courts guard sedulously the constitutional and statutory rights of defendants in this respect. Attempts to infringe upon the privilege of silence thus secured to persons charged with crime are carefully checked. Com. *v.* Harlow, 110 Mass. 411; Com. *v.* Maloney, 113 Mass. 211; Com. *v.* Costley, 118 Mass. 1–27; Com. *v.* Scott, 123 Mass. 238; Com. *v.* Finnerty, 148 Mass. 162; Com. *v.* Smith, 163 Mass. 411–433; Com. *v.* Johnson, 175 Mass. 152. Two different courses of dealing with cases, where there has been any infraction of this rule, appear to be followed by the Courts of the several States. Some hold that any reference to the subject in argument must be presumed to do irreparable

harm to the defendant, and that there must be a new trial granted unless by conduct or consent there has been a waiver of the right. The industry of the counsel for defendant has collected a large number of such cases. . . . It will be found on examination that most of these decisions rest on a statute which in express terms forbids any comment or reference to the fact in argument by either counsel. Some Courts, which have adopted this rule, seem to be breaking away from it and following a less stringent one. Blume *v.* State, 154 Ind. 343–354, and cases cited. Other Courts hold that, where such reference has been made and is either withdrawn or is corrected by the charge of the Court, then it does not constitute reversible error.

It is the general rule in trials of both criminal and civil causes that where an improper argument is addressed to a jury the attention of the Court should be called to it at once. Unless it is a plain breach of propriety, the Court may in his discretion either direct the objectionable argument to end forthwith or permit it to proceed, but in any event the subject must be adequately covered in the charge with such emphasis as will correct any erroneous effect. . . . No sound reason appears why this rule of practice should not apply to unwarranted arguments by a defendant to take the stand in his own behalf. It is a common knowledge that defendants may testify if they desire. Where they do not take advantage of this privilege, frequently counsel for defendants refer to the statute and to the constitutional provisions, in order to explain conduct which might otherwise seem strange to the jurors. While this does not open the door to the district attorney to reply, it shows that the subject itself is one which does not have inherent tendency to harm a defendant. The fact that a defendant has not testified cannot be banished from the observation of the jury, and it is proper that his counsel may suggest the reason for it. It is always the duty of the Court to state the law touching the matter.

It is possible that the argument of the district attorney inferentially called attention to the fact that the defendant had not testified; but it was a pertinent proposition for him to discuss that every person, so far as known, save her, had testified, who had been in such relation to the premises where the remains of the murdered man were found as to have had opportunity to commit the crime. This was germane, not for the purpose of creating a presumption against the defendant by reason of her failure to testify, but to the end that the jury might consider the circumstance that everybody else, who could have done the deed, was accounted for, if the testimony was believed. The immediate disclaimer of the district attorney of intent to urge any inferences from her failure to testify, coupled with the plain instruction of the Court in the charge in accordance with the statute and decisions abundantly protected the rights of the defendant. It must be assumed that the jury understood and acted upon the directions given by the Court. Com. *v.* Cunningham, 104 Mass. 545. Exceptions overruled.

617. Arthur C. Train. "*The Prisoner at the Bar.*" (1908. 2d ed. p. 159.) What naturally interests "O. C." [1] and his fellow jurors most of all is the defendant's own story of how he came to be involved in the transaction out of which the charge against him arises. For the first few days he very probably gives such explanations rather more credit than they deserve, for he is sympathetically inclined to believe that the prisoner is more likely to be the victim of circumstances than guilty of an act of moral turpitude. The eager attitude of some of the complainants likewise gives him an excuse for believing them to be actuated by more than a mere desire to see justice done and to have the truth prevail. He is inclined to look for hidden motives for every prosecution.

This gradually wears off and his attention becomes centred on the defendant himself. Will he put in a defence? Will he testify in his own behalf? What will he say? Little by little "O. C." gets to inventing defences to fit the facts established against the prisoner by the People's case. Meantime he is learning a little law. That "the People must prove the defendant's guilt beyond every reasonable doubt," and "that no unfavorable inference must be drawn as against the defendant from his failure to testify in his own behalf." "O. C." has some difficulty with the "reasonable doubt." . . . But that he shall not permit himself to be prejudiced against a defendant by the latter's refusal to testify is a much more difficult matter. He knows it to be the law, and he tries hard to obey it, but in a majority of cases he cannot escape the subconscious deduction that if the defendant were innocent he would not hesitate to offer an explanation.

As time goes on and he gains in experience, it becomes even harder to follow the instructions of the judge in this respect. He discovers that the district attorney cannot prove the prison record or bad character of the defendant unless the latter subjects himself to cross-examination by taking the witness stand, and hence is likely to suspect that any defendant who does not testify is an ex-convict. Three jurors out of five will convict any man who is unwilling to offer an explanation of the charge against him. How they reconcile this with their oath it would be hard to understand, if they were accustomed to obey it literally in other respects. The writer has heard more than one talesman say, in discussing a verdict, "Of course we couldn't take it against him, but we *knew* he was guilty because he was afraid to testify." . . .

Now to any fair-minded American it must seem almost rudimentary justice that the accused should have a chance to tell his own story. That in itself is a sufficient reason for the rule [permitting him to testify]. Just why, theoretically, if a defendant does *not* see fit to give an explanation and subject himself to cross-examination, the jury should *not* be permitted to draw an unfavorable inference is not so clear.

Experience has demonstrated that an innocent man need have no fear about taking the stand. Jurors sympathize with a defendant who is subjected to a withering fire of questions, and do not expect him to be able to give a lucid account of himself since the day of his birth, or to explain without the minutest contradiction every detail in the evidence against him. But they do want him to deny his guilt, and to give them an opportunity to "size him up." On the other hand, the slightest word of explanation may suffice to change the whole complexion of a case. In the old days, the guiltiest of criminals could, almost with impunity, shield himself behind his lawyer's eloquent assertion that his client had a "perfect defence," but that the law "had sealed his lips." Today in the vast majority of

[1] [Ordinary Citizen. — Ed.]

cases the prisoner who does not take the stand is doomed. Out of three hundred defendants tried by the writer's associate, Mr. C. C. Nott, twenty-three failed to take the stand in cases submitted to the jury; of these twenty-one were convicted, one was acquitted, and as to one the jury disagreed.

Sub-topic C. Waiver of the Privilege

618. East India Co. *v.* Atkins. (1719. Chancery. 1 Stra. 168, 176.) Lord Chancellor Parker (holding valid a covenant to give discovery). It is a negative privilege that is allowed by the law, that a man may, if he please, refuse to discover a matter that will subject him to penalties. It is only a privilege, not a natural right, for then he would shake that natural right whenever he saw fit to make such discovery. If a man will waive such a privilege, surely he may; it is not a thing prohibited by the law. The reason why he is not obliged to discover is a want of right in the other party to oblige him to it; but if he *will* make a discovery, he may, nor is any rule of justice or natural right broken by it. Is it unjust that the whole case should be laid before the Court? If the party has not done anything contrary to his duty, an answer can do him no harm. And why should not this Court carry it so far, when there can be no prejudice unless the party is a knave? And if he be one, shall a Court of equity protect him?

619. REGINA *v.* GARBETT

Crown Cases Reserved. 1847

2 *C. & K.* 474, 492

[Printed *ante*, as No. 611; Point 2 of the opinion.]

620. FITZPATRICK *v.* UNITED STATES

Supreme Court of the United States. 1899

178 *U. S.* 304; 20 *Sup.* 944

This was a writ of error to review the conviction of Fitzpatrick, who was jointly indicted with Henry Brooks and William Corbett for the murder of Samuel Roberts, on March 13, 1898, at Dyea, in the Territory of Alaska. . . . The Court thereupon proceeded to the trial of Fitzpatrick. . . .

A writ of error was sued in forma pauperis.

Mr. *A. B. Brown*, Mr. *Julius Kahn* and Mr. *Alexander Britton*, for plaintiff in error. Mr. *Solicitor General*, for the United States.

Mr. Justice Brown, delivered the opinion of the Court. . . .

The murder took place at Dyea, Alaska, just outside the cabin of Roberts. . . . Defendant himself was the only witness put upon the stand by the defence, who was connected with the transaction; and he

was asked but a single question, and that related to his whereabouts upon the night of the murder. To this he answered: "I was up between Clancy's and Kennedy's. I had been in Clancy's up to about half-past twelve or one o'clock — about one o'clock, I guess. I went up to Kennedy's and had a few drinks with Captain Wallace and Billy Kennedy, and I told them I was getting kind of full and I was going home, and along about quarter past one Wallace brought me down about as far as Clancy's, and then he took me down to the cabin and left me in the cabin, and we wound the alarm clock and set it to go off at six o'clock, and I took off my shoes and lay down on the bunk and woke up at six o'clock in the morning, and went up the street."

On cross-examination the government was permitted, over the objection of defendant's counsel, to ask questions relating to the witness's attire on the night of the shooting, to his acquaintance with Corbett, whether Corbett had shoes of a certain kind, whether witness saw Corbett on the evening of March 12, the night preceding the shooting, whether Corbett roomed with Fitzpatrick in the latter's cabin, and whether witness saw any one else in the cabin besides Brooks and Corbett. The Court permitted this upon the theory that it was competent for the prosecution to show every movement of the prisoner during the night, the character of his dress, the places he had visited and the company he had kept.

Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon these facts. The witness having sworn to an alibi, it was perfectly competent for the government to cross-examine him as to every fact which had a bearing upon his whereabouts upon the night of the murder, and as to what he did and the persons with whom he associated that night.

Indeed, we know of no reason why an accused person, who takes the stand as a witness, should not be subject to cross-examination as other witnesses are. Had another witness been placed upon the stand by the defence, and sworn that he was with the prisoner at Clancy's and Kennedy's that night, it would clearly have been competent to ask what the prisoner wore, and whether the witness saw Corbett the same night or the night before, and whether they were fellow occupants of the same room. While the Court would probably have no power of compelling an answer to any question, a refusal to answer a proper question put upon cross-examination has been held to be a proper subject of comment to the jury, State *v.* Ober, 52 N. H. 459; and it is also held in a large number

of cases that when an accused person takes the stand in his own behalf, he is subject to impeachment like other witnesses.

If the prosecution should go farther and compel the defendant, on cross-examination, to write his own name or that of another person, when he had not testified in reference thereto in his direct examination, the case of State *v.* Lurch, 12 Oregon 99, is authority for saying that this would be error. It would be a clear case of the defendant being compelled to furnish original evidence against himself. State *v.* Saunders, 14 Oregon 300, is also authority for the proposition that he cannot be compelled to answer as to any facts not relevant to his direct examination. . . .

There was no error committed upon the trial prejudicial to the defendant, and the judgment of the District Court is therefore Affirmed.

Sub-topic D. Removal of the Privilege by Grant of Immunity

621. COUNSELMAN *v.* HITCHCOCK

Supreme Court of the United States. 1892

142 *U. S.* 547; 12 *Sup.* 195

On the 21st of November, 1890, while the grand jury in attendance upon the District Court of the United States for the Northern District of Illinois was engaged in investigating and inquiring into certain alleged violations, in that district, of an act of Congress entitled "An Act to regulate commerce," approved February 4, 1887, c. 103, 24 Stat. 379, and the amendments thereto, approved March 2, 1889, c. 382, 25 Stat. 855, by the officers and agents of the Chicago, Rock Island & Pacific Railway Co., and by the officers and agents of the Chicago, St. Paul & Kansas City Railway Co., and by the officers and agents of the Chicago, Burlington & Quincy Railroad Co., and the officers and agents of various other railroad companies having lines of road in that district, one Charles Counselman appeared before the grand jury, in response to a subpœna served upon him, and after having been duly sworn, testified as follows:

"*Q.* — Your name is Charles Counselman?

"*A.* — Yes, sir.

"*Q.* — You are the sole member of Charles Counselman & Co.?

"*A.* — Yes, sir.

"*Q.* — Engaged in the grain and commission business in the city of Chicago?

"*A.* — Yes, sir.

"*Q.* — Have you been a receiver of grain from the West during the past two years?

"*A.* — Yes, sir.

"*Q.* — Over what roads did you ship grain received by you during the present summer of 1890?

"*A.* — The Rock Island and Burlington, principally.

"*Q.* — From what States was most of the grain shipped?

"*A.* — From Kansas and Nebraska, I think. . . .

"*Q.* — Have you during the past year, Mr. Counselman, obtained a rate for the transportation of your grain on any of the railroads coming to Chicago, from points outside of this State, less than the tariff or open rate?

"*A.* — That I decline to answer, Mr. Milchrist, on the ground that it might tend to criminate me.

"*Q.* — During the past year have you received rates upon the Chicago, Rock Island & Pacific from points outside of the State to the city of Chicago, at less than the tariff rates?

"*A.* — That I decline to answer on the same ground.

"*Q.* — I will ask you the same question with reference to the Burlington.

"*A.* — I answer in the same way." . . .

Thereupon, after a hearing, the Court on November 25,1890, adjudged Counselman to be in contempt of court, and made an order fining him $500 and the costs of the proceeding. . . . On December 18, the Circuit Court, held by Judge GRESHAM, delivered an opinion (44 Fed. Rep. 268), and made an order adjudging that the District Court was in the exercise of its rightful authority in doing what it had done, . . . discharging the writ of habeas corpus, and adjudging against Counselman the costs of the proceedings. He excepted to the order and appealed to this Court, and an order was made admitting him to bail pending the appeal. . . .

The statutes upon which the right to compel answers was rested were as follows: U. S. Rev. St. 1878, § 860, re-enacting St. Feb. 25, 1868, c. 13: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture, except for perjury committed in discovering or testifying as aforesaid; St. 1887, Feb. 1, c. 104, § 9, 24 Stat. 379: In any action against a common carrier for damage under this statute, the privilege is not to excuse from testimony; "but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding;" Ib. § 12 (similar, for investigations by the Interstate Commerce Commission); St. 1891, Feb. 10, c. 128, amending St. 1887, Feb. 1, c. 104, § 12: Upon investigations by the Interstate Commerce Commission, where the aid of the Circuit Court is required to obtain testimony, "the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Mr. *John N. Jewett* and Mr. *James C. Carter,* for appellant.

Mr. *Assistant Attorney-General Parker* and Mr. *G. M. Lambertson*, for appellee. . . . Section 860 of the Revised Statutes takes away from the witness the right to refuse to answer on the ground that such answer might tend to criminate him. . . . In several cases in the Federal courts this statute has been construed as holding that the witness is not protected by the Constitution from being compelled to give testimony called for, though it might implicate him in a crime, as he is fully protected by statute against the use of such testimony on his trial. . . .

Mr. Justice BLATCHFORD, after stating the case, delivered the opinion of the Court. . . . It is an ancient principle of the law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties, or forfeitures. . . . It remains to consider whether § 860 of the Revised Statutes removes the protection of the constitutional privilege of Counselman. . . .

Any evidence which might have been obtained from Counselman by means of his examination before the grand jury could not be given in evidence or used against him or his property in any Court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted. The constitutional provision distinctly declares that a person shall not "be compelled in any criminal case to be a witness against himself;" and the protection of § 860 is not coextensive with the constitutional provision. Legislation cannot detract from the privilege afforded by the Constitution. We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates. . . . Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party. . . .

From a consideration of the language of the constitutional provision, and of all the authorities referred to, we are clearly of opinion that the appellant was entitled to refuse, as he did, to answer. The judgment of the Circuit Court must, therefore, be

Reversed, and the case remanded to that Court, with a direction to discharge the appellant from custody, on the writ of habeas corpus.

622. BROWN *v.* WALKER

SUPREME COURT OF THE UNITED STATES. 1896

161 *U. S.* 591; 16 *Sup.* 644

THE petitioner had been subpœnaed as a witness before the grand jury, at a term of the District Court for the Western District of Pennsylvania, to testify in relation to a charge then under investigation by that body against certain officers and agents of the Allegheny Valley Railway Company, for an alleged violation of the Interstate Commerce Act. Brown, the appellant, appeared for examination, in response to the subpœna, and was sworn. After testifying that he was auditor of the railway company, and that it was his duty to audit the accounts of the various officers of the company, as well as the accounts of the freight department of such company during the years 1894 and 1895, he was asked the question: "Do you know whether or not the Allegheny Valley Railway Company transported for the Union Coal Company, during the months of July, August and September, 1894, coal from any point on the Low Grade division of said railroad company to Buffalo at a less rate than the established rates in force between the terminal points at the time of such transportation?" To this question he answered: "That question, with all respect to the grand jury and yourself, I must decline to answer for the reason that my answer would tend to accuse and incriminate myself." The grand jury reported these questions and answers to the Court (BUFFINGTON, District Judge) and prayed for such order as to the Court might seem meet and proper. Upon the presentation of this report, Brown was ordered to appear and show cause why he should not answer the said questions or be adjudged in contempt; and upon the hearing of the rule to show cause, it was found that his excuses were insufficient, and he was directed to appear and answer the questions, which he declined to do. Whereupon he was adjudged to be in contempt and ordered to pay a fine of five dollars, and to be taken into custody until he should have answered the questions.

The following statute had been passed in consequence of the decision in Counselman *v.* Hitchcock [*ante*, No. 621]: St. 1893, Feb. 11, c. 83, 27 Stat. 443: "No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to

the subpœna of the commission, whether such subpœna be signed or issued by one or more commissioners or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled 'an act to regulate commerce,' approved Feb. 4, 1887, or of any amendment thereof, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding: Provided, that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying." . . .

The petitioner appealed from the order. . . .

Mr. *James C. Carter*, for appellant. Mr. *George F. Edmunds*, for appellee.

[The testimony was held to be compellable, and the ruling below affirmed, by a majority of the Court, FULLER, C. J., HARLAN, BREWER, PECKHAM, and BROWN, JJ.; dissenting opinions being filed by FIELD, J., and by SHIRAS, J., for GRAY and WHITE, JJ., also. The following extracts exhibit the various reasonings accepted.]

BROWN, J. . . . If the object of the provision be to secure the witness against a criminal prosecution, which might be aided directly or indirectly by his disclosure, then, if no such prosecution be possible, — in other words, if his testimony operate as a complete pardon for the offense to which it relates, — a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question. . . .

It can only be said, in general, that the clause should be construed, as it was doubtless designed, to effect a practical and beneficent purpose, — not necessarily to protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder, or obstruct the administration of criminal justice. . . . The same answer may be made to the suggestion that the witness is imperfectly protected by reason of the fact that he may still be prosecuted and put to the annoyance and expense of pleading his immunity by way of confession and avoidance. This is a detriment which the law does not recognize. There is a possibility that any citizen, however innocent, may be subjected to a civil or criminal prosecution, and put to the expense of defending himself; but, unless such prosecution be malicious, he is remediless, except so far as a recovery of costs may partially indemnify him. He may even be convicted of a crime, and suffer imprisonment or other punishment before his innocence is discovered; but that gives him no claim to indemnity against the State, or even against the prosecutor, if the action of the latter was taken in good faith, and in a reasonable belief that he was justified in so doing. . . .

[After noting that Congress has power to enact such a statutory amnesty to apply in State courts, and that the statute in question was intended as a general one:] But, even granting that there were still a bare possibility that, by disclosure, he might be subjected to the criminal laws of some other sovereignty, that, as Chief Justice COCKBURN said in Queen *v.* Boyes, 1 B. & S. 311, in reply to the argument that the witness was not protected by his pardon against an impeachment by the House of Commons, is not a real and probable danger, with reference to the ordinary operations of the law in the ordinary courts, but "a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct." Such dangers it was never the object of the provision to obviate. . . .

The fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure. A person who commits a criminal act is bound to contemplate the consequences of exposure to his good name and reputation, and ought not to call upon the courts to protect that which he has himself esteemed to be of such little value. The safety and welfare of an entire community should not be put into the scale against the reputation of a self-confessed criminal, who ought not, either in justice or in good morals, to refuse to disclose that which may be of great public utility, in order that his neighbors may think well of him. The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge. If he secure legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good. If it be once conceded that the fact that his testimony may tend to bring the witness into disrepute, though not to incriminate him, does not entitle him to the privilege of silence, it necessarily follows that, if it also tends to incriminate, but at the same time operates as a pardon for the offense, the fact that the disgrace remains no more entitles him to immunity in this case than in the other. . . .

The danger of extending the principle announced in Counselman *v.* Hitchcock is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege.

While the constitutional provision in question is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity, and we are, therefore, of

opinion that the witness was compellable to answer, and that the judgment of the Court below must be Affirmed.

Shiras, J. (dissenting). . . . All that can be said is that the witness is not protected by the provision in question from being prosecuted, but that he has been furnished with a good plea to the indictment, which will secure his acquittal. But is that true? Not unless the plea is sustained by competent evidence. His condition, then, is that he has been prosecuted, been compelled presumably, to furnish bail, and put to the trouble and expense of employing counsel and furnishing the evidence to make good his plea. . . .

Nor is it a matter of perfect assurance that a person who has compulsorily testified, before the commission, grand jury, or court, will be able, if subsequently indicted for some matter or thing concerning which he testified, to procure the evidence that will be necessary to maintain his plea. No provision is made in the law itself for the preservation of the evidence. Witnesses may die or become insane, and papers and records may be destroyed by accident or design. . . .

Another danger to which the witness is subjected by the withdrawal of the constitutional safeguard is that of a prosecution in the State courts. The same act or transaction which may be a violation of the interstate commerce act may also be an offense against a State law. Thus, in the present case, the inquiry was as to supposed rebates on freight charges. Such payments would have been in disregard of the Federal statute; but a full disclosure of all the attendant facts (and, if he testify at all, he must answer fully) might disclose that the witness had been guilty of embezzling the moneys intrusted to him for that purpose, or it might have been disclosed that he had made false entries in the books of the State corporation in whose employ he was acting. These acts would be crimes against the State, for which he might be indicted and punished, and he may have furnished, by his testimony in the Federal court or before the commission, the very facts, or, at least, clues thereto, which led to his prosecution.

Field, J (dissenting). . . . It is contended, indeed, that it was not the object of the constitutional safeguard to protect the witness against infamy and disgrace. It is urged that its sole purpose was to protect him against incriminating testimony with reference to the offense under prosecution. But we do not agree that such limited protection was all that was secured. As stated by counsel of the appellant, "it is entirely possible, and certainly not impossible, that the framers of the Constitution reasoned that, in bestowing upon witnesses in criminal cases the privilege of silence when in danger of self-incrimination, they would at the same time save him in all such cases from the shame and infamy of confessing disgraceful crimes, and thus preserve to him some measure of self-respect." . . . It is true, as counsel observes, that "both the safeguard of the Constitution and the common-law rule spring alike from that sentiment of personal self-respect, liberty, independence, and dignity

which has inhabited the breasts of English-speaking peoples for centuries, and to save which they have always been ready to sacrifice many governmental facilities and conveniences. In scarcely anything has that sentiment been more manifest than in the abhorrence felt at the legal compulsion upon witnesses to make concessions which must cover the witness with lasting shame, and leave him degraded both in his own eyes and those of others. What can be more abhorrent . . . than to compel a man who has fought his way from obscurity to dignity and honor to reveal crimes of which he had repented, and of which the world was ignorant?" The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to every one, and needs no illustration. . . . The counsel for the appellant justly observes that "the proud sense of personal independence which is the basis of the most valued qualities of a free citizen is sustained and cultivated by the consciousness that there are limits which even the State cannot pass in tearing open the secrets of his bosom."

623. HALE *v.* HENKEL

SUPREME COURT OF THE UNITED STATES. 1906

201 *U. S.* 43; 26 *Sup.* 370

[Printed *ante*, as No. 604; Point 1 of the opinion.]

624. STATE *v.* MURPHY

SUPREME COURT OF WISCONSIN. 1906

128 *Wis.* 202; 107 *N. W.* 470

APPEAL from Circuit Court, Milwaukee County; ORREN T. WILLIAMS, Judge.

William Murphy was convicted of bribery, and the trial Court certified certain questions to the Supreme Court. Questions answered.

On February 1, 1904, an information was filed against the defendant charging that on the 17th day of June, 1899, he then being an alderman of the city of Milwaukee, Wis., solicited and received from Oscar F. Davis $80 for the purpose of inducing accused to vote in favor of a then pending ordinance allowing said Davis's firm to lay a side track across certain streets in said city of Milwaukee. After reversal of the first conviction (124 Wis. 635) the action was again brought to trial, the defendant having interposed both a plea of not guilty and a plea in bar, for that, before a grand jury sitting on the 9th day of January, 1902, charged with the duty of investigating such offenses, defendant attended and gave testimony as to the transactions, matters, and things alleged in the information, by reason whereof the defendant claimed he could not be prosecuted or subjected to any penalty or forfeiture therefor.

The case being reached for trial, defendant's attorney's . . . called the clerk of the grand jury and produced his minutes, showing that defendant was produced as a witness, sworn, and was asked and answered questions; that the minutes of testimony read thus: "Ald. Wm. Murphy, alderman Third Ward, serving second term, sworn: Know Fred Schultz, J. M. Clarke, Mr. Walker. Know of no alderman or public official demanding or receiving money to support any contract, special privilege, or franchise. Never had conversation with Schultz, or any other newspaper man, about special privilege for electric signs." . . . Thereupon defendant testified that he was subpœnaed, sworn, and examined by the district attorney; . . . "I answered these questions under oath. . . . I answered fully all questions asked me while a witness before the grand jury." . . . On cross-examination he stated that . . . he did not volunteer any evidence, only answered what he was asked and gave his testimony because he was subpœnaed to go before them and was asked questions by the prosecuting attorney, but freely and voluntarily. . . .

Thereupon, on motion of the district attorney, the Court directed the jury to find a verdict in favor of the State, which they accordingly did, and to which action defendant duly excepted. Then the trial upon the plea of not guilty proceeded and defendant was convicted of the charge set forth in the information.

Thereupon the Court, deeming that certain questions were doubtful and important, certified the following for answer, viz.: "(1) Was the evidence, all of which is herewith certified sufficient to immune the defendant under the provisions of section 4078, Rev. St. 1898, as amended by chapter 85, p. 106, Laws of 1901? [1] (2) Did the Court err in directing a verdict against the defendant and in favor of the State on the special plea in bar herein, under the evidence? . . ."

L. M. Sturdevant, Attorney General, *A. C. Titus*, Assistant Attorney General (*Francis E. McGovern*, District Attorney, and *Guy D. Goff*, Assistant District Attorney, of counsel), for the State. *J. M. Clarke* and *Hoyt, Umbreit & Olwell*, for defendant.

Dodge, J. (after stating the facts). In presenting the first question

[1] Wisconsin Sec. 4078, Stats. 1898, as amended by ch. 85, Laws of 1901, is as follows: "No witness or party in an action brought upon the bond of a public officer, or in an action by the state or any municipality to recover public money received or deposited with the defendant, or in any action, proceeding or examination, instituted by or in behalf of the state or any municipality, involving the official conduct of any officer thereof, shall be excused from testifying on the ground that his testimony may expose him to prosecution for any crime, misdemeanor or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, in such action, proceeding or examination, except a prosecution for perjury committed in giving such testimony."

certified, counsel have discussed many general considerations bearing upon the purpose and scope of this immunity statute which, in its exact form and words, originated with Congress in Act Feb. 11, 1893, c. 83, 27 Stat. 443, U. S. Comp. St. 1901, p. 3173.

1. The counsel for the State insists that its only purpose is to enable the obtaining of evidence which by the fourth and fifth Amendments to the Constitution of the United States a witness is privileged to withhold but for such a statute, hence that it must be construed as intending to grant immunity only broad enough to accomplish that result; only such as must be granted in order to evade the constitutional privilege of silence as to self-criminatory facts.

But must we assume that the statutory immunity is no broader than the constitutional privilege of a witness to withhold evidence which may be used against him in a criminal case? . . .

In the Packers' Case (U. S. District Court N. D. Ill., March 21, 1906) 142 Fed. 822, the Court expressed its views upon the relative scope of the constitutional privilege and the statutory immunity thus: "Now, in my judgment, the immunity law is broader than the privilege given by the Fifth Amendment, which the act was intended to substitute. The privilege of the Amendment permits a refusal to answer. The act wipes out the offense about which the witnesses might have refused to answer. The privilege permits a refusal only as to incriminating evidence. The act gives immunity for evidence of or concerning the matter covered by the indictment [testimony] and the evidence need not be self-incriminating. The privilege must be personally claimed by the witness at the time. The immunity flows to the witness by action of law and without any claim on his part." . . .

It is upon a presumption in favor of a strictly limited intent in this legislation that counsel for the State bases a contention that *unless a witness resists answering* a question, at least to the extent of asserting that the answer may tend to criminate him and that he claims his constitutional privilege to refuse answer, no immunity from prosecution is earned by him. To this position there are two answers: First, that the statute in terms imposes no such limitation upon the immunity, for it assures it to any person who "may testify," not who may be compelled to testify or who may testify after first refusing or protesting and asserting his constitutional right. Doubtless no criminal can immune himself by volunteering evidence without lawful demand. But a more obvious answer is that the law, giving the prosecuting officers and the investigating tribunal the power and right to demand the answer; the subpœna commanding attendance; the administering the oath, and the putting the question, deprive the witness of any privilege to withhold the information, or to effectively protest, and notify him that the tribunal absolutely demands the testimony. A declaration that he would like to assert that privilege if he had it when by the very proceeding he is warned, that he has it not, would be so

entirely futile as to be puerile. What sense in his asking whether the information is insisted on when all the steps taken constitute most unambiguous insistence? Why assert a privilege when he has none? That he has none is certain, if this statute be given effect according to its terms, for it precludes the possibility of any "criminal case" in which his testimony can be "against" him in the sense forbidden by the Fifth Amendment to the Federal Constitution and, in identical words, by section 8, art. 1, Wis. Const. Walker *v.* Brown, supra; Hale *v.* Henkel (decided March 6, 1906) [*ante*, No. 623]. . . . We are satisfied that the circumstances under which defendant was called on to give his testimony were such as to entitle him to invoke such immunity from prosecution and punishment as the statute confers, and need not discuss the question whether one can by his own initiative and volition, without demand by any authorized person or tribunal, seek shelter under this law.

2. Another position founded on the same premise is that, because the constitutional privilege is to refrain merely from giving evidence against himself, a witness is immune from prosecution only when he gives evidence *which is adverse to him*. The difficulty with this position is, again, that the statute makes no such limitation; it in terms confers immunity when he testifies at all "concerning a transaction, matter or thing for, or on account of, which" prosecution may be attempted. Indeed, if limited as counsel contends, the immunity would not be as broad as the constitutional privilege, for the latter is to refuse to answer a question at all if any answer the witness might give to such question might tend to criminate him. That is by no means satisfied by immunity only when the answer given does tend to charge him with the particular crime to which he pleads it.

3. Another suggestion is made to the effect that, unless the witness *tells the truth*, he cannot be said to testify concerning that of which he speaks. This would involve a highly technical and unusual meaning for the word "testify," which ordinarily means the making of any statement under oath in a judicial proceeding. 8 Words & Phrases, pp. 6932, 6933. The statute itself, however, refutes any such meaning, for it expressly reserves the right to prosecute for perjury "in giving such testimony," thus recognizing that the word "testimony" is used in a sense broad enough to include statements which are false. Whatever general rules of construction should apply to this statute, whenever immunity is claimed under it, the question arises whether defendant did, in any reasonable sense, testify concerning the transaction, matter, or thing for or concerning which he is prosecuted. The strongest evidence is defendant's own testimony that he was asked "if I received any money for my vote on special privileges, bay windows, side tracks, electric light, street railway extensions — I, or any of the aldermen or city officials." This he answered in the negative. The charge in the information is that he did, on June 17, 1899, ask, solicit, demand, and receive from one Davis $80 in money for the purpose of influencing the action of the common

council and of himself to grant, and vote in favor of granting privilege to lay railroad track over and across a certain public street. Did he testify concerning that transaction, matter, or thing? The very statement of the situation seems to suggest a negative answer. . . .

When that answer "No" was given, the progress of investigation to discover from this witness anything concerning the transaction now charged was checked at the very threshold, unless, indeed, the grand jury had some other information of it, so as to enable specific inquiry of the witness. We are persuaded that we should but travesty the statute should we hold that a declaration that he could give no evidence of any transactions within a general class constituted testimony concerning one. . . . For the reasons stated we are satisfied that there was absolutely no evidence that defendant did, before the grand jury, testify or produce any evidence of or concerning any transaction, matter or thing for which he is prosecuted in this case; hence that the evidence was not sufficient to immune him, and the first question certified must be answered in the negative. . . .

We answer the first question: No. We answer the second question: No. . . .

MARSHALL, J. . . . I concur in the answers to the questions certified for decision, but dissent, most emphatically, from the general exposition of the immunity statute which precedes the treatment of the particular points involved.

In view of the fact that in recent years there has been apparently great need for a vigorous prosecution and certain punishment of offenders and a significant awakening of appreciation in that regard, we must assume that the Legislature had no other purpose in passing the immunity statute than to give aid in that respect. In that light, the law, as construed in the opinion by my Brother DODGE, seems to be a most absurd enactment. If the Legislature had devoted the most careful study to the subject of how best to furnish offenders an easy method of escaping the consequences of their wrongdoing: of practically, in great measure, paralyzing the administration of justice in criminal matters, it could hardly have been more successful, if the intent embodied in the immunity law is as suggested in the opinion on file. . . . The purpose of the immunity statute was to take the place of the constitutional privilege against self-incriminatory evidence. It was designed to open the doors in just so far as such privilege would otherwise hold them closed by the right of silence. Its scope, therefore, coincides with such privilege, stopping not short of it, nor going beyond it.

The exposition of the federal statute by Justice Humphrey in the Packers' Cases, quoted from by my Brother DODGE, viewed as applicable to statutes of which ours is a type, I believe, goes altogether too far, and will not stand the test which will be applied to it.

(1) The statute does not wipe out the offense about which the witness might have refused to answer. It creates a bar to a prosecution for the

offense. The offense with its attendant moral turpitude is left just the same, but by force of the statute the public is remediless.

(2) The statute is not broader than the constitutional guaranty for which it was intended to be a "substitute." The very idea of a substitute suggests the limitation of one as that of the other. In other words, that they are equivalents, one being exchanged, by force of the law, for the other.

(3) The statute does not immune because of evidence given other than that of a self-incriminatory character; such as without the statute would be obscured by the constitutional privilege of silence.

(4) For the statute to operate there must be evidence under real compulsion, not mere right of compulsion. That is, there must be coercion to the extent of the witness being called to testify under such circumstances that he would be liable to punishment as standing in defiance of the Court if he refused to do so. In that situation only does the law relieve him from the necessity of expressly claiming his privilege. Until the law then lays its hand on the party so that resistance would be a defiance of the Court, the statute does not intervene. . . .

KERWIN, J. — I concur in the foregoing opinion of Mr. Justice MARSHALL, in so far as it expresses dissent from the view that our own immunity statute is broader than the constitutional privilege of silence as to self-incrimination; and I concur in the view that the statute operates only in cases where evidence is given under real compulsion and concerns, in some respect, an event giving rise to a criminal prosecution, against the witness.

WINSLOW, J. (concurring). I agree fully with the conclusions reached, but not with some of the reasoning. . . .

In my judgment the immunity statute is as broad as the privilege which it was passed to obviate, and no broader. In order to gain the immunity the witness must, in my opinion, be compelled to testify. He could waive his constitutional privilege by testifying voluntarily, he can likewise waive his statutory immunity by doing the same thing. I do not think that compelling a person to appear by subpœna can properly be considered as compelling him to testify. It was not so considered with regard to the constitutional guaranty. A person might be compelled by subpœna to attend, but might testify voluntarily when so in attendance, and thus waive his privilege. In like manner I think he may waive his immunity. Otherwise the statute becomes a snare to the prosecution and a means of avoiding the just consequences of crime. I do not mean by this that it is necessary for the witness to refuse to answer, but simply that he should make known the fact that he does not testify voluntarily but only in obedience to the command of the law and the Court. When this has been done he gains immunity from prosecution on account of the transaction or matter concerning which he testifies, and not before.

In this case, therefore, I think there was no immunity on two grounds:

First, because the defendant testified voluntarily before the grand jury. He was not compelled to testify. Second, because he did not give any testimony concerning the transaction or thing for which he is now being prosecuted.

625. HEIKE *v.* UNITED STATES. (1912. Supreme Court. 227 U. S., — 33 Sup. 226.) HOLMES, J. . . . In favor of the broadest construction of the immunity act, it is argued that when it was passed there was an imperious popular demand that the inside working of the trusts should be investigated, and that the people and Congress cared so much to secure the necessary evidence that they were willing that some guilty persons should escape, as that reward was necessary to the end. The Government on the other hand maintains that the statute should be limited as nearly as may be by the boundaries of the constitutional privilege of which it takes the place.

Of course there is a clear distinction between an amnesty and the constitutional protection of a party from being compelled in a criminal case to be a witness against himself. Amendment V. But the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned. We believe its policy to be the same as that of the earlier act of February 11, 1893, c. 83, 27 Stat. 443, which read: "No person shall be excused from attending and testifying," etc. "But no person shall be prosecuted," etc., as now, thus showing the correlation between constitutional right and immunity by the form. That statute was passed because an earlier one, in the language of a late case, "was not coextensive with the constitutional privilege." American Lithographic Co. *v.* Werckmeister, 221 U. S. 603, 611. Compare Act of February 19, 1903, c. 708, § 3, 32 Stat. 848. To illustrate, we think it plain that merely testifying to his own name, although the fact is relevant to the present indictment as well as to the previous investigation, was not enough to give the petitioner the benefit of the act. See 3 Wigmore, Evidence, § 2261.

SUB-TOPIC E. POLICY OF THE PRIVILEGE

627. MARQUIS OF NAYVE'S TRIAL. (Bourges, 1895. *Albert Batailles.* "Causes Criminelles et Mondaines de 1895," p. 8.) [Murder of the accused's child. The accused was a man of the best family and breeding, living at Grenoble. He was born before his parents' marriage. In 1875 he had made a rich marriage with Mlle. de Baudreuille. This lady had already in 1871 an illegitimate child, the fruit of a rape; the sum of 60,000 francs had been settled on this boy — named Menaldo — by his grandfather. By the marriage there were two sons. The wife's boy was brought up alone and privately, at Orleans. As time went on, he learned (apparently) of his parentage, grew discontented, and wished to rejoin his mother. In September, 1883, the boy was placed in a private school at Chambéry, near Grenoble; but he was still discontented and kept running away. On October, 1885, the Marquis went to Chambéry and took the boy away. About November 1, he started with him on a hurried journey into Italy, but without revealing to any one his destination. On November 9, he took the boy

from Naples to Castellamare (along the coast of the bay), and they started to walk that evening from Castellamare to Sorrento, along the cliff road.

The boy was never again seen alive. The next day his mangled body was discovered at the foot of the rocks, by some fishermen. A few days later the Marquis notified his wife, from Marseilles, that the boy had strayed over the cliff and been drowned. An inquest had been held on the body, by the Naples authorities; but no clue to its identity was found, and the Marquis had left Italy without notifying the police.

For some ten years nothing further transpired. But in 1895, domestic dissensions broke out. The wife of the Marquis wrote to a magistrate, requesting his protection against her husband's violence, and charging that he had in 1885 killed her boy at Naples. The present trial then ensued, in October, 1895.

The accused was first put on the stand. Presiding Judge LAUVERJAT conducted the examination. The following passage deals with the Marquis' story of the supposed accident.]

J. — The road from Castellamare to Sorrento abuts on the sea, passing Torella, Serodio, Vico Equense, and Meta, and then strikes Sorrento, $17\frac{1}{2}$ kilometers distant. You met several hackmen on the way?

N. — Oh, I must have met 3000 or 4000 persons. There is not a road more frequented by excursionists.

J. — Why did you go on foot?

N. — Because that is some of the most wonderful scenery in Italy. . . . We walked slowly, stopping now and then to admire the views.

J. — Especially the view near Fusarella? Don't deny it, for two policemen saw you. (Sensation.)

N. — Oh, that was a spot 400 meters from the precipice.

J. — Excuse me, it was exactly above the precipice. (Sensation.)

N. — At 1.30 P.M. we arrived at Sorrento, where we lunched and visited the harbor. Then we went 3 kilometers further, to get a view of the island of Capri. Then, about 4 P.M. we took a carriage for Sorrento, and went on back to Meta.

J. — That is entirely controverted by the witnesses. You were on foot when you passed Meta. On the way back you were offered a carriage there, and you refused it.

N. — It was not till we got to Meta that we started to walk again. After resting, we started about 4.30 P.M. towards the Scutari headland. There we admired the view. It was growing dark, but we could still see our way.

J. — Some hackmen, who passed you, were surprised to see you on foot at such an hour with a child, who looked tired. Why did you refuse the carriage offered you? It would have cost only 2 or 3 francs.

N. — I wanted to enjoy the view.

J. — What view? It was dark.

N. — Excuse me. Vesuvius was in full eruption. The sight was one of incomparable beauty. . . .

J. — From Meta to Vico Equense is about 8 kilometers?

N. — At Vico Equense we had coffee. It was not quite dark; Zarilli, the man at the café, had not yet lit up.

J. — This café-keeper also observed that the boy was very tired. And no wonder; since morning you had dragged the poor fellow along with you. Zarilli was astonished to hear you refuse the carriage. What time was it when you reached the Fusarella precipice?

N. — About 6.30 P.M.

J. — The precipice is a frightful one. The road runs at the top more than 60 meters from the bottom.

N. — Oh, the whole road from Castellamare to Sorrento is like that. You can see the path very plainly.

J. — What time did you reach Vico Equense?

N. — About 5.30 or 6 P.M.

J. — Then how was it that the witness Periaro, who was walking on that road with Romano, met you and the boy about 8? They say that Menaldo [the boy] was two or three paces behind you, and seemed exhausted. . . . A third hackman, Savarese, met you and the boy, about 8; also a fourth, Balsamo, a hundred meters from the precipice; he offered to drive you to Castellamare. Why did you refuse?

N. — I did not want to ride; I wanted to see the view. . . .

J. — What happened then? Did you put the boy up on a ridge of rocks to have him admire the view, and then let him fall over? Or did you just give him a push? Whichever way you did it, it would sustain a charge of murder.

N. (quietly). — I will tell you just how it happened. . . . I stepped off the road for a few moments, and then came back. The boy was no longer there. My first thought was that he had run away. I called out, I ran after him for about 2 kilometers. I met a workman, and asked him if he had seen a little boy. He said he had not. In my running I had nearly got to Castellamare. My heart was beating fit to break. I went back over the road to where I had missed the child, but I could hear nothing, except the sound of the waves and the distant calls of the fishermen.

I spent an hour and a half thus, searching in vain. Then I resumed my route to Castellamare, with a sad heart. What could I do? Inform the magistrate? I thought of that. But the publicity would disgrace my wife before our boys. Every father will understand my feelings. There was nothing for me to do but to flee. . . . So I returned to Castellamare, and went directly on to Naples and Marseilles. I had at least saved my wife's honor. . . . And so here I am in the dock, simply because I left Italy without telling of the affair.

J. — What was your first thought about the boy?

N. — That he must have fallen over the cliff.

J. — But in your examination before the magistrate, you added: "I looked over, and could see nothing below." Are you sure that you saw nothing? Wasn't it true that you *did* see something? (Sensation.) The child had *not* fallen into the sea, as you hoped; his corpse was down there on the rocks. You hadn't known about the rocks. That was the terrible proof of your crime, and when you saw it, that was why you ran away! (Sensation.)

N. — I fled to save the honor of my wife.

J. — There were boats down in the water at the foot. You heard the voices of the fishermen, you yourself said. Why did you not call out to them?

N. — It was too far for them to hear me.

J. — You claim to have looked for the child along the road for some two hours. Well, the boy fell over about 8 P.M., and about 8.30 a hackman, Vollano, met you alone, hurrying towards Castellamare, and evading the lights of his carriage. . . . You took the first train for France. You were well rid of a child who was a burden to you, and the 60,000 francs in trust for him reverted to your wife and thus became your community property, to go afterwards to your children. Now, there was a French vice-consul at Castellamare; why did you not seek his help?

N. — I should have had to reveal my wife's disgrace.

J. — But it is not necessarily a shameful thing to have a natural child, — certainly not a life-long shame. Besides, you are a natural child yourself, and you haven't ever shown any shame over it! (Sensation.)

N. — My case was not the same at all; I had been legitimized by my parents' subsequent marriage. . . .

[This examination of the accused on the stand continued for three days.

On the third day, the bailiff produced and exhibited to the jurors the articles found on the dead boy's person — a little black hat, white stockings, black breeches, shoes, a bloody shirt in tatters. The Marquis sat reading documents, after making the following statement.]

N. — I do not know what inferences you are going to make from my behavior here. If I show indifference, you will say that I am hard-hearted. If I weep, you will say that I am acting a part. I do not know what to do.

J. — Do just as you wish, only be sincere about it.

[The assistant judge then read the Naples report of the expert testimony about the rocks at the foot of the precipice. The testimony showed that they could not be seen, and that a person leaning over the heavy parapet would believe that there was a direct drop into the sea from the edge.]

J. — Now, if the child had fallen or thrown himself over the edge, he could not have been killed instantly. Yet you abandoned him to possible death, without trying to rescue him. That is the sort of heart you have! It was abominable!

N. — Yes, in any other circumstances, it would have been abominable to act thus. But at that time I had only a single thought, — to escape and keep silence, for the honor of my children. . . .

J. — Why did you wait till reaching Marseilles to telegraph to your wife? Why did you not telegraph to her the very night of the boy's disappearance?

N. — Well, he wasn't *my* child! (Sensation and much excitement.)

J. — He was Madame de Nayve's child!

N. — She had never asked me to keep her advised of what was happening to him. (Extreme excitement in Court.)

J. — So I suppose that you expected her to write to you before you would condescend to let her know that her child had disappeared, — run away in the uttermost part of Italy, with a few coppers in his pocket, when he found that you were going to take him back to France. Disappeared, you call it. Why should he run away?

N. — Twice already he had run away from the academy.

J. — But he was then in France, where the people spoke his language and he could manage to get along. . . . Did you not later admit to your wife that, to get rid of little Menaldo, you had pushed him over the cliff and then escaped?

N.— No. And she never invented that lie either. It was the priest, Abbé Rosselot, who invented it.

J. — Well, your wife is no fool, is she?

N. — No, but she is under that priest's influence.

[At this moment, the defendant was overcome by emotion, and sank to his seat, sobbing aloud, clasping his hands to his head, and weeping copiously.]

Albert Danet (counsel for defence). The defendant is quite at the end of his endurance. For the last three days he has been grilled here, and his most tender sentiments have been wrung at every moment by your examination.

J. — But I consider that I have not exceeded the limits of propriety. . . .

[On November 5th the jury retired, and after a few minutes of deliberation returned with a verdict of Not Guilty.]

628. *Sir* James Fitzjames Stephen. *History of the Criminal Law.* (1883. I, 342, 441, 535, 542, 565.) In the old ecclesiastical Courts and in the Star Chamber [the "ex officio" oath] was understood to be and was used as an oath to speak the truth on the matters objected against the defendant — an oath, in short, to accuse oneself. It was vehemently contended by those who found themselves pressed by this oath that it was against the law of God, and the law of nature, and that the maxim "nemo tenetur prodere seipsum" was agreeable to the law of God, and part of the law of nature. In this, I think, as in most other discussions of the kind, the real truth was that those who disliked the oath had usually done the things of which they were accused, and which they regarded as meritorious actions, though their judges regarded them as crimes. People always protest with passionate eagerness against being deprived of technical defences against what they regard as bad law, and such complaints often give a spurious value to technicalities when the cruelty of the laws against which they have offered protection has come to be commonly admitted. . . .

Our privilege against self-crimination is one of the most characteristic features of English criminal procedure, and it presents a marked contrast to that which is common to, I believe, all continental countries. It is, I think, highly advantageous to the guilty. It contributes greatly to the dignity and apparent humanity of a criminal trial. It effectually avoids the appearance of harshness, not to say cruelty, which often shocks an English spectator in a French court of justice; and I think that the fact that the prisoner cannot be questioned stimulates the search for independent evidence. During the discussions which took place on the Indian Code of Criminal Procedure in 1872, some observations were made on the reasons which occasionally lead native police officers to apply torture to prisoners. An experienced civil officer observed, "There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence." This was a new view to me, but I have no doubt of its truth. The evidence in an English trial is, I think, usually much fuller and more satisfactory than the evidence in such French trials as I have been able to study. . . .

The following account of the French practice is given by M. Hélie: "The magistrate who puts questions to the accused and asks explanations from him has the right to interrogate him for the purpose of extracting his excuse or his confession of guilt. He should, without harassing or confusing him, but at the same time while requiring a disclosure, encourage his freedom of utterance. He should, in short, with the most complete impartiality, seek solely to get at the truth. The interrogatory must be neither an argument nor a combat; that is by means of the issue. The main object is to ascertain the theory of the defence, and thus to determine the details of the issue and the points therein which are to be established." He adds, that though the interrogatory is not essential, yet the President can interrogate the accused either before or after the witnesses are heard, the former being the common course. . . .

Whatever may be the law on the subject, the fact unquestionably is that the interrogation of the accused by the President is not only the first, but is also the most prominent, conspicuous, and important part of the whole trial. Moreover, all the reports of French trials which I have seen, and I have read very many,

suggest that the views taken by M. Hélie as to the proper object of the interrogatory, and the proper method of carrying it on, are not shared by the great majority of French Presidents of Cours d'Assises. The accused is cross-examined with the utmost severity, and with continual rebuke, sarcasms, and exhortations, which no counsel in an English court would be permitted by any judge who knew and did his duty to address to any witness. This appears to me to be the weakest and most objectionable part of the whole system of French criminal procedure (except parts of the law as to the functions of the jury). It cannot but make the judge a party — and what is more, a party adverse to the prisoner; and it appears to me, apart from this, to place him in a position essentially undignified and inconsistent with his other functions. . . .

This comparison of French and English criminal procedure naturally suggests the question, Which of the two is the best? To a person accustomed to the English system and to English ways of thinking and feeling there can be no comparison at all between them. However well fitted it may be for France, the French system would be utterly intolerable in England. . . . The whole temper and spirit of the French and the English differs so widely, that it would be rash for an Englishman to speak of trials in France as they actually are. We can think of the system only as it would work if transplanted into England. It may well be that it not only looks, but is, a very different thing in France. . . . The best way of comparing the working of the two systems is by comparing trials which have taken place under them. For this purpose I have given at the end of this work detailed accounts of seven celebrated trials, four English and three French, which afford strong illustrations of the results of the two systems. It seems to me that a comparison between them shows a superiority of the English system even more remarkably than any general observations which may be made on the subject. In every one of the English cases, the evidence is fuller, clearer, and infinitely more cogent than it is in any one of the French cases, — notwithstanding which, far less time was occupied by the English trials than by the French ones, and not a word was said or a step taken which any one can represent as cruel or undignified.

629. Wisconsin Branch, American Institute of Criminal Law and Criminology. *Report of the Committee on Trial Procedure.* 1910. A majority of our committee believe that the provision in § 8, Art. I of our Constitution that "No person shall be compelled in any criminal case to be a witness against himself" has outlived its usefulness, and should be abolished, and that thereby one hiding-place of crime would be destroyed. We have obtained the views of many active lawyers and judges on this question; and a large majority of those consulted have expressed the opinion that no innocent person would suffer and that more guilty ones would be detected and convicted if this provision could be repealed. . . .

The Constitutional provision does not so much stand in the way of the detection and punishment of crime of the lower orders (for the lower criminals no doubt would cunningly add perjury to their other crimes), as it prevents the obtaining of evidence to convict those guilty of offences such as bribery, grafting, rebating, violation of laws against combinations and similar offences, that threaten even more than the grosser crimes the foundations of good government and good order; nor so much even as it interferes at times with the obtaining of evidence in civil cases necessary to the redress of civil wrongs which may also involve some of the participants in liability to criminal prosecution. To over-

come such interferences, we are fast acquiring immunity statutes, such as § 4078 granting immunity to witnesses testifying in actions brought on bonds of public officers or by the State or municipality to recover public money or property or involving official conduct, and § 4078b relating to witnesses in actions by the State to recover fees, taxes, penalties, forfeitures, etc., from the railroads, and § 4078d relating to miscarriages, etc., and other similar statutes. Cases in which such immunity is claimed have become somewhat frequent in this State. A case of national importance involving the same claim was the Packers' Case, U. S. *v.* Armour, 142 Fed. 808. The term "immunity bath" has become something of a reproach to our criminal procedure.

We recommend that this Institute urge upon the Legislature an amendment of the Constitution striking out the provision that "No person shall be compelled in any criminal case to be a witness against himself;" and at the same time urge the enactment of legislation such as is suggested by "Exhibit F" hereto annexed.

We believe that a resolution to so amend the Constitution would fare better when submitted to a vote of the people if it also provided for legislation for protection of the accused about as follows: "Resolved that § 8, Art. I of the Constitution of Wisconsin be amended by striking out the words 'nor shall be compelled in any criminal case to be a witness against himself' and inserting in lieu thereof the words 'Nor shall any person be compelled in any criminal case to be a witness against himself until he shall first have the benefit of legal counsel to be provided as the Legislature may enact.'"

Exhibit F. A bill to amend section 4786, Wisconsin Statutes. "Section I. Section 4786, Wisconsin Statutes, is hereby amended to read: Section 4786. The magistrate before whom any person is brought upon a charge of having committed an offence shall, as soon as may be, examine the complainant and the witnesses to support the prosecution, on oath, in the presence of the party charged, in relation to any matters connected with such charge which may be deemed pertinent. He may also examine the accused and any one suspected of complicity in the offence charged; but in such case and in case any witness shall claim that his testimony may tend to incriminate himself, the accused and any witness so claiming shall have opportunity to procure counsel in attendance before giving testimony, and if destitute of means to do so, the magistrate shall appoint and secure the attendance of counsel at the expense of the county before proceeding with the testimony."

630. Arthur C. Train. *Courts, Criminals, and the Camorra.* (1912. p. 19.) One of the most sacred rights guaranteed to those of us who can afford to pay for it under the law is that of not being compelled to give evidence against ourselves or to testify to anything which might degrade or incriminate us. . . . Now, this is all very fine for the chap who has his lawyer at his elbow or has had some similar previous experience. He may wisely shut up like a clam and set at defiance the tortures of the third degree. But how about the poor fellow arrested on suspicion of having committed a murder, who has never heard of the legal provision in question, or, if he has, is cajoled or threatened into "answering one or two questions"? Few police officers take the trouble to warn those whom they arrest that what they say may be used against them. What is the use? . . . As his oath, that such a statement was voluntary, makes it *ipso facto* admissible as evidence, the statutes providing that a defendant cannot be compelled to give evidence against himself are practically nullified. . . .

The struggle to keep the peace and put down crime is a hard one anywhere. It requires a strong arm that cannot show too punctilious a regard for theoretical rights when prompt decisions have to be made and equally prompt action taken. . . . From the time a man is arrested until arraignment he is quizzed and interrogated, with a view to inducing him to admit his offence or give some evidence that may help convict him. Logically, why *should* not a person charged with a crime be obliged to give what explanation he can of the affair? Why *should* he have the privilege of silence? Doesn't he owe a duty to the public the same as any other witness? If he is innocent he has nothing to fear; if he is guilty — away with him! The French have no false ideas about such things, and at the same time they have a high regard for liberty. They merely recognize the fact that there is a point at which the interest of the public and its liberty is bound to conflict with the interest of the individual and *his* freedom to do as he likes. And we instinctively recognize this, too, just as everybody does. We merely cheat ourselves into thinking that *our* liberty is something different from French liberty because we have a lot of laws upon our statute books that are there only to be disregarded and would have to be repealed instantly if enforced.

Take, for instance, the celebrated provision of the penal laws that the failure of an accused to testify in his own behalf shall not be taken against him. Such a doctrine flies in the face of human nature. If a man sits silent when witnesses under oath accuse him of a crime, it is an inevitable inference that he has nothing to say — that no explanation of his would explain. The records show that the vast majority of accused persons who do not avail themselves of the opportunity to testify are *convicted*. Thus, the law which *permits* a defendant to testify in reality *compels* him to testify, and a much invoked doctrine of liberty turns out to be a privilege in name only. In France or America alike a man accused of crime sooner or later has to tell what he knows — or take his medicine. It makes little difference whether he does so under the legalized examination of a "juge d'instruction" in Paris or under the quasi-voluntary interrogations of an assistant district attorney or police inspector in New York.

631. John H. Wigmore. *A Treatise on the System of Evidence in Trials at Common Law.* (1905. Vol. III, § 2251.) Is the fundamental policy of the privilege against self-crimination a sound one? It has been over-worshipped and too liberally applied by the Courts. But, assuming these excesses to be corrected, is its fundamental policy correct? It represents one of two opposing systems which divide the world's practice; and its claims cannot be disposed of by superficial views or by experiences temporarily unfavorable. . . .

(1) For the *preliminary inquisition of one not yet charged* with an offence, the claims of the privilege seem valid. This aspect of it seems to have been ignored by Bentham. Yet it was historically this situation which gave rise to the privilege. The system of "inquisition," properly so called, signifies an examination on mere suspicion, without prior presentment, indictment, or other formal accusation; and the contest for one hundred years centred solely on the abuse of such a system. In the hands of petty bureaucrats, whether under James the First, or under Philip the Second, or in the twentieth century under an American republic, such a system is always certain to be abused.[1] The whole

[1] That these abuses are the creature of no one country or time may be seen from the extent to which the moral instincts of certain American officers were sapped by the insidious example, set before them in the Philippine Islands, of

principle of the grand jury presupposes a formal and deliberate accusation, based on probable cause, before any person is called to answer for a crime. No doubt a guilty person may justly be called upon at any time, for guilt deserves no immunity. But it is the innocent that need protection. Under any system which permits John Doe to be forced to answer on the mere suspicion of an officer of the law, or on public rumor, or on secret betrayal, two abuses have always prevailed and inevitably will prevail; first, the petty judicial officer becomes a local tyrant and misuses his discretion for political or mercenary or malicious ends; secondly, a blackmail is practiced by those unscrupulous members of the community who through threats of inspiring a prosecution are able to prey upon the fears of the weak or the timid. The modern system of formal indictment needs no defence. In this aspect the privilege against self-crimination is, in history and in policy, its just complement, in so far as it exempts all persons from being compelled to disclose their supposed offences before formal process of charge is had.

(2) When we come to the case of an *accused duly charged* by indictment and *now placed on trial*, we reach a somewhat different set of considerations. Here the question is merely whether he shall be required to disclose all that he knows of the crime already charged against him. None of the considerations applicable to the foregoing situations have here any bearing. What is there to exempt the accused from simple and straightforward answers of denial, confession, or explanation? There are, to be sure, what the great jurist so plainly and truly stigmatized as the "old woman's reason" and the "fox-hunter's reason;" and there are also the false shibboleths of torture and the like, but these can only succeed in affecting us through the old rhetorical device of calling a thing by epithets which do not belong to it. So far as Bentham's argument goes, *i.e.*, for the individual case, it is irrefutable. Assuming *this* man to be guilty, there is no good reason to exempt him.

There is no escape from this fundamental truth, so long as we confine ourselves to the assumption on which it rests. That assumption is that the person charged is guilty. But assume him innocent, and a different problem is presented, — a problem to which Bentham's arguments did not do justice. The truth is that the privilege exists for the sake of the innocent, — or at least for reasons irrespective of the guilt of the accused. The real objection is that *any system which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby.* The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. "It is far pleasanter," said the officer in India to Sir J. Stephen (quoted above) "to sit comfortably in the shade, rubbing red pepper into a poor devil's eyes, than to go about in the sun hunting up evidence." The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer, — that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent

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the so-called "water-cure" for extracting information. Of deplorable degeneracies, the most remarkable instance is that sons of the American Commonwealth should have attempted publicly to defend this cowardly practice, which made martyrs of its victims and degraded its practitioners to the brutal level of Alva and his cohorts.

are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized.

The insidious effects of the practice in this respect may be seen in the history of the Holy Inquisition. Although the rules of the ordinary penal law of the church, even in "ex officio" inquisitions, declared a confession insufficient per se for condemnation, and hedged it about with rules, yet as soon as these rules were relaxed in the special procedure of the Holy Inquisition, the whole effort degenerated into the procurement of a confession.[1] "A confession dispensed with all other investigation and all further proceedings either by the party-accuser (when the cause was begun by complaint) or by the judge (when it was "ex officio"). One can thus understand with what zeal it was sought for in inquisitional proceedings." [2]

It may be conceded that the Continental practice is efficacious in detecting guilt. But it must also be conceded that it leads to or is found united with a spirit of petty judicial license and browbeating, dangerous to innocence, and capable of great abuses in our own community, if it once obtained a sanction. For the sake, then, not of the guilty, but of the innocent accused, and of conservative and healthy principles of judicial conduct, the privilege should be preserved.

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[1] Esmein, *History of Continental Criminal Procedure*, passim (1913, transl. Simpson; Continental Legal History Series, Vol. V, Little, Brown, & Co.).

[2] Tanon, *Histoire des tribunaux de l'inquisition en France*, p. 358.

SUB-TITLE III. PRIVILEGED RELATIONS

633. Introductory. In general 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 today. No pledge of privacy, nor oath of secrecy, can avail against demand for the truth in a court of justice. Accordingly, a confidential communication to a *clerk*, to a *trustee*, to a *commercial agency*, to a *banker*, to a *journalist*, or to any other person not holding one of the specific relations hereafter considered, is not privileged from disclosure.

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 dominated by that standard) were often put forward as a sufficient ground for maintaining silence. By the middle of the 1700s it seemed as though this notion would prevail, at any rate in certain worthy cases. 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. But a stricter view of justice finally dominated, and in the notorious Duchess of Kingston's Case [1] the older point of view was definitely abandoned and the new one thoroughly promulgated.

Since any privilege is an exception to the general liability of every person to give testimony to all facts inquired of in a court of justice, and since preponderance of extrinsic policy alone can justify the recognition of any such exception, 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.

These four conditions being present, a privilege may 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 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

[1] 1776; 20 How. St. Tr. 586.

in the incorrect assumption that the second condition is generally present. In the privilege (doubted at common law) for communications between Priest and Penitent, the objection to its recognition has probably lain in a tacit denial (in England) 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.

Topic 1. Attorney and Client

635. GREENOUGH *v.* GASKELL. (1833. Chancery. 1 Myl. & K. 98, 103.) BROUGHAM, L. C. — 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. . . .

636. ANDERSON *v.* BANK. (1876. Chancery. L. R. 2 Ch. D. 644, 649.) JESSEL, M. R. — 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 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.

637. STATUTES. *California* (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.

Ibid., § 1882 [added by amendment 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.

638. CRAIG *dem.* ANNESLEY *v.* ANGLESEA

EXCHEQUER, IRELAND. 1743

17 Howell's State Trials, 1139, 1225, 1229

[THE preliminary facts of this case are stated *ante*, No. 267. It was proposed to show that the defendant, Marquis of Anglesea, by supporting the criminal prosecution for murder against the plaintiff, James Annesley, 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.]

Mr. *Harward* (of counsel for the plaintiff). My lord, the conversation Mr. Giffard had with lord Anglesea was to this purpose; Mr. Giffard is an attorney of reputation in England, and as such has been twenty years or thereabouts employed by this noble earl in his business, as he had occasion for him. When my unfortunate client was to be tried at the Old Bailey, that was the time lord Anglesea had greatest occasion for this Mr. Giffard; and it will appear to your lordship that lord Anglesea disclosed his intentions to him in this manner: "I am advised that it is not prudent for me to appear publicly in the prosecution, but I would give 10,000*l.* to have him hanged. Mr. Jans my agent shall always attend you. I am in great distress; I am worried by my wife in Ireland; Mr. Charles Annesley is at law with me for part of my estate, and," says he, "If I cannot hang James Annesley, it is better for

me to quit this kingdom and go to France, and let Jemmy have his right, if he will remit me into France 3,000*l.* a year; I will learn French before I go."

Mr. *Daly* (of counsel for the defendant) objects to Mr. Giffard's being examined, since as an attorney he was to keep the secrets of his client, and if he is a gentleman of character, he will not, and as an attorney he ought not to disclose them.

Mr. *Recorder* (for the defendant). 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, 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 has 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.

Mr. Prime Sergeant *Malone* (for the defendant): The mutual confidence between client and attorney require 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.

Mr. Serjeant *Tisdall* (for the plaintiff). 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* (for the plaintiff). 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.

Bowes, L. C. B. . . . 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 Court may judge, from the particulars of the conversation. Nor do I see any propriety 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. — Mr. Recorder hath very properly mentioned the foundation [of the privileges] . . . 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.

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. . . .

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 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 an 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.

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. . . .

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 pos-

session 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 had done anything further, he has trusted him, not as an attorney, but as an acquaintance.

Evidence admitted.

639. HATTON *v.* ROBINSON

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1833.

14 *Pick.* 416

TRESPASS for taking two mares, a chaise and chaise harness. The defendant pleaded the general issue, and filed a brief statement alleging that he attached them as the property of David Winch. At the trial, before WILDE, J., it appeared, that the plaintiff claimed the property under a bill of sale from Winch. The defendant to prove the bill of sale fraudulent, offered in evidence the deposition of Samuel Ames, Esq., a counsellor at law in Providence. The plaintiff objected to the admission of the deposition, on the ground that Mr. Ames was employed in the transaction testified to by him, as the attorney of Winch and the plaintiff, and that all he knew in relation to it, was communicated to him in that capacity. The only evidence that Mr. Ames was so employed, was the deposition in question. Mr. Ames, in his deposition, testified that on April 6, 1831, Winch desired him to draw a conveyance of certain property attached to the Fenner tavern stand in Providence, to the plaintiff, to whom he had contracted to sell it; that he accordingly drew the conveyance; that his impression was, that a small portion of the consideration was to be paid very soon, but that the residue, amounting to the sum of $400 or $500, was secured to Winch by the plaintiff's negotiable note indorsed by one Wesson, which note also the deponent drew. The deponent further testified, that on April 30, 1831, Winch again called upon him, and informed him, that he was about to leave Providence with the purpose of residing in the State of New York; that he owed old debts in Massachusetts to a much larger amount than the value of his property; that he also owed a considerable sum in Providence, for which he was recently indebted; that his intention was, to convert what salable property he had, particularly a pair of horses and a carriage or carriages, into money, as soon as he could obtain a fair price for them, and with the proceeds to pay his Providence creditors; and that in the meantime his Massachusetts creditors pressed him, and as soon as he left Rhode Island for New York, would undoubtedly attach and sacrifice his horses and carriage or carriages. The deponent further testified, that he understood Winch, that he had left them with the plaintiff for sale, with the intention from

the proceeds from the sale, to give preference to, and pay his Providence creditors, and that he wished to cover them, as far as possible, from attachment by his Massachusetts creditors; that, on the whole, as Winch had come from Massachusetts poor, and the credits he had obtained in Providence had been the means of his acquiring what little property he had, the deponent thought his preference of his Providence creditors would not be unfair, and accordingly informed him, that he was willing to draw a mortgage deed from him of the horses, carriage or carriages, to any person he might select; that Winch said, that he had perfect confidence in the plaintiff, and that the deponent accordingly drew such a mortgage deed. . . .

The objection to the admission of this deposition was overruled, and the plaintiff thereupon became nonsuit. If this ruling was wrong, the nonsuit was to be taken off, and a new trial granted; otherwise, judgment was to be rendered on the nonsuit.

The cause was argued in writing.

Merrick and *Bottom* for the plaintiff. . . . Where counsel are consulted as to what will the be legal effect and consequences of any particular instrument of conveyance, they are as much guarding the rights of their clients and protecting their property, as when litigation is actually in progress; and communications made by clients, in both cases, are entitled to the same privileges. The current of the decisions, and all the elementary treatises, put the rule strictly on the ground of professional consultation. They do not limit it to consultations on questions in actual or immediately contemplated litigation. It is the character of the communication which is to be considered. . . .

Newton, Lincoln and *Child* for the defendants. . . . It is a forced construction of this deposition to infer from it, that any application was made by Winch for legal advice in the defence of any suit. None was then pending, and it was only among the events which were possible, that any suits would be instituted. Winch certainly could not have asked legal advice, whether his creditors could commence suits. It was not his purpose to defend, if they were commenced. The conveyance of property would not affect, in any manner, the right of any creditor to recover judgment for his debt, although it might defeat the collection of it. It does not appear, that Winch asked legal advice of Mr. Ames, on any subject, or that the latter gave any legal advice; and the burden of proof is on the plaintiff, to show that Mr. Ames acted in a professional capacity. The business could have been done as well by any other person as by an attorney at law. . . .

Shaw, C. J. — The only question for the Court in the present case, is, whether the deposition of Mr. Ames was properly admitted in evidence; and this depends upon the further question, whether the matters testified to by him were to be considered as within the rule of privileged communications. . . . 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.

The whole deposition therefore was rightly admitted, and conformably to the case agreed, the nonsuit must stand.

640. BARNES *v.* HARRIS

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1851

7 *Cush.* 576

ACTION of assumpsit on an account annexed to the writ.

At the trial in the court of common pleas, before HOAR, J., the defendant called Stephen Holman, as a witness, and proposed to inquire of him as to a conversation between him and the plaintiff, which took place in the office of Milton Whitney, Esq., an attorney of this court, before the commencement of the suit. The witness having stated that at the time of the conversation, he was a student at law in Whitney's office; that the plaintiff called there for professional advice; that he did not know but the plaintiff supposed him to be Mr. Whitney; and that the conversation was relative to the plaintiff's claims against the defendant, as to which the plaintiff consulted the witness; the judge ruled, that it was not competent for the witness to testify as to any statements then made to him by the plaintiff, for the purpose of obtaining professional advice.

Whitney was not present at the conversation; he was not the attorney for the plaintiff in this suit; and it did not appear that the plaintiff had ever before consulted him. The jury found a verdict for the plaintiff, and the defendant alleged exceptions. . . .

METCALF, J. — The testimony of the witness was excluded, probably, either on the ground that he was a student in an attorney's office, and therefore the communication made to him by the plaintiff was privileged, as if made to the attorney himself, or on the ground that the plaintiff supposed that the witness was an attorney at law. But, in our judgment, the testimony ought not to have been excluded on any ground. . . . Lord BROUGHAM says, (1 Mylne & Keen 103,) "the rule is established 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." Such being the reason of the rule which protects communications made to attorneys and counsel, the Court should apply the rule to those cases only which fall within that reason. And it is truly said, in Harrison on Evidence, 36, that as the rule operates to the exclusion of evidence, the Courts have always felt inclined to construe it strictly and narrow its effect. We believe the rule is correctly stated in Foster *v.* Hall, 12 Pick. 93; viz. that it "is confined strictly to communications to members of the legal profession, as barristers and counsellors, attorneys and solicitors, and those whose intervention is necessary to secure and facilitate the communication between attorney and client; as interpreters, agents, and attorneys' clerks."

The witness, in this case, was not of the legal profession, and though he was a student in an attorney's office, yet it does not appear that he was either the attorney's agent or clerk for any purpose. Many students at law are never either the one or the other. Some of the members of this Court never were. If the plaintiff's communication was made to the witness in his capacity as a student in Mr. Whitney's office, it is not privileged; Andrews *v.* Solomon (Peters C. C. 356); nor if it was made on the supposition that the witness was Mr. Whitney or some other attorney at law (Fountain *v.* Young, 6 Esp. R. 113).

641. MITCHELL'S CASE

COMMON PLEAS, NEW YORK. 1861

12 *Abb. Pr.* 249

APPEAL from an order of commitment for contempt. Mr. Mitchell was an attorney and counsellor-at-law, and was, as such, retained by,

and acting for, one McKechnie, who was the defendant in an action brought by J. H. McCunn and J. Moncrief, in the Court of Common Pleas for the city and county of New York, to recover from McKechnie the possession of a certain lot of land in that city.

Upon the trial of that action before his honor, Judge BRADY, one Bettz was examined as a witness for the defendant, and upon examination testified that he, Bettz, claimed the title to the land, that the defendant, McKechnie was his tenant, and that he, Bettz, was defending the action as landlord of the defendant; and being asked whether he had in his possession any old deeds, leases, or assignments relating to the land, he answered that he had received from his grantors a certain old lease and other papers, which he had kept in his possession until a few days before the trial, when he had delivered them to John W. Mitchell, his attorney, and the attorney of the defendant in the action; and being asked to produce the said old lease and other papers, he answered that he was unable to do so, because they were in Mr. Mitchell's possession. Mr. Mitchell was then in court, acting as the attorney and counsel of the defendant on the trial. He was thereupon called as a witness by the plaintiffs, and on his examination, being asked: "Have you in your possession any old leases or deeds relating to this property, placed there by Mr. Bettz?" replied, that he had some papers of Mr. Bettz's, but that he did not know what they were; and on being requested by the Court to examine the papers and see, he declined to do so, objecting on the grounds that he was privileged from testifying as to such matters, they having come to his knowledge from his client, that he had not been subpœnaed, and that he had had no notice to produce the papers. During a brief suspension of the proceedings pending this examination, Mr. Mitchell delivered the bundle of papers to Mr. Bettz, with a suggestion that he carry them to the office of his counsel. After the proceedings were resumed, this fact appearing upon the continued examination of Mr. Mitchell, the plaintiffs applied for an attachment for contempt against him; but it was finally arranged that the application should be suspended, and the case adjourned, upon a stipulation that Mr. Mitchell should appear on the adjourned day with the papers in the same. On the same day Mr. Mitchell was served by the plaintiffs with subpœna duces tecum, requiring him to produce the papers on the adjourned day. After the adjournment, the parties appeared on the 27th of May, and Mr. Mitchell, being called to the stand and asked if he had brought with him the bundle of papers in question, replied that he had. Being requested to look at them, and inform the Court whether they had related to the lands in suit, he refused to do so. The Court thereupon ordered the witness to be committed for ten days to the county jail, for contempt of court. From this order the present appeal was taken. . . .

DALY, F. J. — Before the important change in the law requiring a party to an action to be examined as a witness at the instance of the adverse party, the general principle was recognized, that no one in a

court of law could be compelled to give evidence against himself. . . . The principle of exemption was applied in its broadest extent to parties to actions at law, who could not be compelled to give evidence; and in respect to the production of documentary testimony, as a party to an action was not bound to give evidence, he could not be required to produce papers to be used against him as evidence; and if a paper had been deposited by him with his attorney, the attorney's possession was deemed the possession of the party, and the attorney could not be required to produce it, nor even any other person having the temporary possession of it in right of the party. If a document was in the possession of the party to an action at law, or in the possession of his attorney, all that could be done was to give him notice to produce it; and if he failed to do so, the other party was at liberty to give secondary evidence of its contents; or if the production of the document itself was essential, and he would not produce it, the Court would, if he was a defendant, strike out his answer, or if a plaintiff, nonsuit him — a practice introduced into courts of law from the Court of Chancery. But the attorney might be called, and was bound to answer whether or not he had the paper in his possession, that the other party might be enabled to give secondary evidence of its contents, which he could not do until he had first shown that he was unable to produce it; and though the attorney could not be required to disclose the contents of the paper, his examination might be carried at least so far as to show, with reasonable certainty, that the document in his possession was the one respecting which the other party proposed to give evidence. . . . The rule was also well established, that neither a party nor his legal adviser would be compelled in a court of justice to disclose the confidential communication which had passed between them in respect to the matter upon which the party had sought professional advice. The principle which appears to have been recognized as far back as the days of Elizabeth (Cary's R., 127, 88, 89), was not confined to courts of law, but was equally acted upon by the Court of Chancery, where the aid of that court was sought to compel a discovery of evidence. On an application for a discovery, a Court of equity would neither compel nor permit a solicitor to disclose what his client had communicated to him in professional confidence, nor compel the production of letters which had passed between them, or through intermediate agents upon the business, containing or asking legal advice or opinions, nor cases prepared at the instance of the client for the opinion of the counsel. . . .

Such was the state of the law before the enactment of the provision compelling parties to action to be examined as witnesses at the instance of an adverse party. The provision has brought about a very material change.

1. But before proceeding to inquire into the effect of the enactment upon the question of privilege, it is very plain, that by the law, as it stood before this change was made, the conduct of Mr. Mitchell amounted

to a contempt. His refusing to produce papers acknowledged to be in his possession, for the reason that it would be a breach of his privilege as attorney for the defendant, was assuming the right of determining for himself the question of privilege, which was not his province, but that of the Court; and his disobedience of the order of the judge to produce them, was a very plain case of contempt, upon the authority of the cases that have been cited. It was a contempt to wilfully deprive the Court of the means of determining whether the principle of protection extended to the papers in his possession or not, and it would not be the less a case of contempt, even assuming that, upon what was stated to the Court, a case of privilege was shown; for though a judge should decide erroneously upon the question of privilege, the order he makes is nevertheless to be obeyed. If it were otherwise, it would always be in the power of a witness to withhold evidence whenever he thought fit to consider himself privileged.

2. But Mr. Mitchell was mistaken, since the enactment above referred to, in supposing that he had any privilege at all. The exemption of the attorney was never regarded as his personal privilege, but as existing purely for the protection of his client. . . . He was, in this respect, in the language of Chief Baron Gilbert, "considered as one and the same person with his client" (Gilbert on Evidence, 138); and if, by a change in the law, a party to an action has no longer any privilege, it follows as a matter of course, that his attorney can have none. The provision in question declares, that "a party to an action may be examined as a witness, at the instance of the adverse party, and for that purpose may be *compelled to testify in the same manner*, and subject to the same rules of examination, as any other witness." This sweeps away the rule of the common law, that parties to actions should not be compelled to give evidence against themselves; and every privilege, either of the party of or his attorney, that was founded upon it, is gone. I suppose that the protection that was extended to the confidential communications between attorney and client remains unaffected, as the reason upon which that rule was founded is as applicable now as it was before; but with this exception, a party to an action, or his attorney, are no longer privileged to withhold testimony. A party to an action may be compelled, by a subpœna duces tecum, to produce papers and documents, upon the trial, to be read in evidence. . . . When the Code, therefore, declares that a party to an action may be compelled to testify in the same manner, and subject to the same rules of examination, as other witnesses, it is obvious that the meaning is, that whatever may be required of other witnesses may be required of him. If they must produce books and papers, so must he; and if he has placed them in the possession of his attorney, agent, or any other person, the one who has them in actual custody may be compelled to bring them before the court, to be used as evidence. . . . The general rule of courts of equity that wherever the client may be called upon to produce papers, the

attorney, if they are in his possession, may be required to produce them, is the proper rule, now that parties to actions are made witnesses.

There may possibly be cases in which the deposit of a document with an attorney for advice and counsel, may bring it within the rule of protection; though I can conceive of none, if the client would himself be bound, if he had it in his possession, to produce it as a witness. In this case, however, there could be no pretence that the papers in question were left by the witness Bettz with Mitchell for professional advice and counsel, as Mitchell declared that he could not tell what they were without examining them; nor, when first interrogated respecting them, whether he had them in his possession or not, without looking into a bundle of papers which he had with him in court. He was, therefore, either ignorant of their nature and contents, or else he stated what was untrue. We are bound to presume the former; and if he did not therefore know what they were, the fact that they were left with him in professional confidence would not protect them. . . . Mr. Mitchell did not declare that the papers had been left with him by Bettz for professional advice or assistance, but he put his objection on the ground that to produce them would be a breach of his privilege as attorney for the defendant. They were not placed in his hands by the defendant, but by the witness Bettz; and if any privilege could exist, it must have been as the attorney of Bettz, who, as the owner of the land, was defending the suit against his tenant; but he had no privilege either as the legal adviser of Bettz, or as the attorney of the defendant. Either of them could have been examined as witnesses, and required, if they had the papers in their possession, to produce them; and he could have no privilege where they had none.

Upon both grounds, therefore, it was a case of contempt: first, because it was right of the judge to determine whether there was any privilege or not, and the duty of the witness to be governed by his decision; and secondly, because he had no privilege entitling him to withhold the papers in his possession from being given in evidence.

642. SKINNER *v.* GREAT NORTHERN R. CO.

EXCHEQUER. 1874

L. R. 9 *Exch.* 298

RULE to vary an order for inspection, made at Chambers by KEATING, J., in an action brought to recover damages for personal injuries alleged to have been sustained by the plaintiff through the defendants' negligence, whilst he was traveling as a passenger on their line. The document of which inspection was ordered comprised, amongst others, two reports, dated respectively the 15th of December, 1873, and the 4th of February, 1874, made to the defendants by Mr. Jackson, their

medical officer, after examining the plaintiff. The examinations to which the reports referred were held, and the reports were made, before any action had been commenced or any communication made by the plaintiff's attorney, but after a claim for compensation had been made by the plaintiff and in consequence of that claim. The rule was to vary the order by excluding these reports.

Pritchard shewed cause. The decisions in the Courts of Queen's Bench and the Common Pleas, with respect to this class of documents, are not altogether consistent; in this Court there is no reported decision.

(Bramwell, B. — The distinction is this; where an accident happens, and the officials of the company in the course of their ordinary duty, whether before or after action brought, make a report to the company that report is subject to inspection; but where a claim has been made, and the company seek to inform themselves by a medical examination as to the condition of the person making the claim, inspection of that report is not granted; that practice has been constantly followed in this Court.)

Pritchard. — In Fenner *v.* London & South Eastern Ry. Co. (*post*), which was a considered judgment, and is the latest case on the subject, a wider rule was adopted, and it was laid down that a document of this nature is not privileged unless it is in the nature of instructions for the brief, which the judge will ascertain by examination of the document itself. That rule was acted upon in the present case by Keating, J., who perused the reports before he made the order for their inspection. That rule is not inconsistent with Woolley *v.* North London Ry. Co., Law Rep. 4 C. P. 602. It must be admitted that the rule acted on in the later case of Cossey *v.* London, Brighton & South Coast Ry. Co., Law Rep. 5. C. P. 146, would exclude these reports; but Fenner *v.* London & South Eastern Ry. Co., Law Rep. 7. Q. B. 767, is later than both of these cases, and was decided after a full consideration and review of them and of numerous other authorities.

F. M. White was not called on to support the rule.

Bramwell, B. — We have to choose between the decision of the Queen's Bench and that of the Common Pleas, and we follow the latter, which is in conformity with the practice of this Court. The rule must be made absolute.

Pigott, B. — The case of Cossey *v.* London, Brighton & South Coast Ry. Co. lays down a clear, broad, and intelligible principle, which there is no difficulty in acting upon; but if that is departed from, and the matter is made to turn upon the discretion of the judge, there can be no certainty in the practice.

Cleasby and Amphlett, BB., concurred.

Rule absolute.

Note. — (1). *Fenner v. London and South Eastern R. Co.* Blackburn, J. — This was a rule obtained by Mr. Willis, to vary an order

made by me at chambers, for the inspection of certain documents, scheduled by the officer of the defendants. Before me at chambers, the only affidavit used was that of Mr. Noden, the goods manager of the defendants. The material part of this affidavit was as follows: —

"That the company have in their possession, or under their control, the following letters or documents, relating to the matters interrogated to, or the matters in dispute in the action: A way-book kept at Battle station; telegram from Fenner to Breach, dated the 21st of October: letter from Neek and Donaldson (Neek and Donaldson were the plaintiff's attorneys) to defendant's general manager; 25th, letter from E. B. Noden, defendants' goods manager, to Breach, station-master. . . . With the exception of the letters received from the plaintiff or his attorney, the way-bill, guard's report, and the telegrams from the plaintiff, I object to procedure, or allow inspection of, any of the foregoing documents, writings, or letters, on the ground that they were not written or made in the ordinary course of the duty of the person or persons writing or making them, but were made confidentially for the purpose of, or with a view to, litigation, and resisting the plaintiff's claim." . . .

The view which I took of the matter at chambers was that the general rule is, that a litigant is entitled to a discovery of all the documents in his adversary's possession which are relevant to his case, subject to some exceptions. . . . I am still of the opinion which I formed at chambers, that the inspection should be granted. . . . The principle, however, I think, to be derived from all the cases is that, where it appears that the documents are substantially rough notes for the case, to be laid before the legal adviser, or to supply the proof to be inserted in the brief, the discretion of the Court should, as a general rule, be to refuse the inspection. Where the documents fall short of that, it should, as a general rule, be granted.

Woolley *v.* North London Ry. Co. (L. R. 4 C. P. 602) is an authority that a report sent by the subordinate to his superior, in consequence of a general order to report, is not privileged, whether it was made before or after the litigation began; and I cannot think that such a report would be the more privileged because it was specially asked for. . . .

Hannen, J. — I agree in the principles explained by my Brother Blackburn, and by which he intended to be guided in the exercise of his discretion. And it does not follow that his discretion should be overruled because I, in the exercise of my discretion, should have acted differently. I should have drawn the inference that the great bulk of the letters written by the servants of the company, after the inquiry, must be privileged. . . . Rule discharged.

643. Ex Parte SCHOEPF

Supreme Court of Ohio. 1906

74 *Oh.* 1; 77 *N. E.* 276

[Printed *ante*, as No. 500; Point 3 of the opinion.]

644. SHEEHAN *v.* ALLEN

Supreme Court of Kansas. 1903

67 *Kan.* 712; 74 *Pac.* 245

Error from District Court, Miami County; Jno. T. Burris, Judge.

Action by Bridget Allen and Mary Cunningham against John Sheehan and others. Judgment for plaintiffs, and defendant Sheehan brings error. Reversed.

The defendants in error, Bridget Allen and Mary Cunningham, commenced an action against John Sheehan, the plaintiff in error, and their codefendants in error, to partition real estate which had been the property of Richard Collins, then deceased. It was alleged that all the parties to the suit were tenants in common of the land by virtue of being heirs of the former owner. John Sheehan answered, claiming sole ownership and possession of one tract described in the petition, under a deed from Richard Collins, executed and delivered in consideration of board and washing to be furnished, and stated sums of money to be paid to him, during the remainder of his lifetime. The plaintiffs replied that the deed mentioned was invalid because at the time of its execution the grantor was of unsound mind, and charged John Sheehan with fraud and undue influence in procuring it. After a trial, judgment was rendered for the plaintiffs, the court holding the deed to John Sheehan being null and void. . . . This proceeding in error was commenced to reverse the judgment of the District Court. . . .

Frank M. Sheridan, for plaintiff in error. *N. W. Wells* and *E. J. Sheldon*, for defendants in error.

Burch, J. — On the trial a number of nonexpert witnesses were permitted to express opinions concerning the mental capacity of Richard Collins to execute the Sheehan deed. Two of these were attorneys at law, and, upon examination as to the basis of their opinions, disclosed fully the details of transactions and conversations in which Richard Collins had consulted them as attorneys. One of these attorneys justified his disclosure as follows:

"*Q.* — He consulted you as an attorney, did he not? That is your business? *A.* — Yes, sir; that was my business. *Q.* — And he employed you to ascertain about the patents on his lands, did he not? *A.* — Yes, sir; he did. *Q.* — And

you consulted with him about his plan of having Sheriff Butts take charge of his land? *A.* — Well, I didn't consult with him nor advise with him about that. He simply came and talked to me about it, and told me about it. The fact is that, after I discovered the condition he was in, I never accepted any fee from him for what I had done in getting the patent or the writing of letters, or the investigation in regard to the lands he claimed from his wife; and I did not consider that the relation of attorney and client existed at all, for I didn't consider that he was capable or competent to make that sort of a contract. *Q.* — Well, if he had been, and had these talks with you, you would have considered the relation of attorney and client to have subsisted, wouldn't you? *A.* — Possibly.

The other attorney, who had at one time conducted some litigation for Richard Collins, and who, about the time of some of the transactions revealed, was in the receipt of fees from him for legal services, made the following explanation:

"*Q.* — He came to your law office, did he? *A.* — Yes, sir. Oh, I would occasionally meet him here. I remember of meeting him twice on the road, but generally at my law office. *Q.* — And he came there to consult you as an attorney? *A.* — No, sir; he never paid me any attorney fee, nor I never asked him for any, and never intended to charge him any. *Q.* — He came there, I presume, with the idea that he was counselling with you? *A.* — I think so; yes, sir; I think that was his idea. *Q.* — And you had these talks and conversations throughout that time about these matters? *A.* — Yes."

The statute relating to the competency of witnesses in cases of this character is as follows: "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." Gen. St. 1901, § 4771. Under this statute the relation of attorney and client must exist, to make the communication privileged.

But the payment of a fee is not the test of that relation. In the case of State *v.* Herbert, 63 Kan. 516, 519, it is said:

"While the payment of a retainer or fee is the best evidence that the relation of attorney and client exists, such payment is not absolutely essential. If an attorney is consulted in his professional capacity, and he allows the consultation to proceed, and act as adviser, the fact that no compensation was paid, or that the consultation was ended and the relation broken, would not remove the seal of secrecy from the communications made." . . .

In this case Richard Collins twice sought out an attorney for the purpose of obtaining legal advice and assistance upon matters he deemed of importance. In each case the attorney consulted accepted his confidences as an attorney at law engaged in the practice of his profession, and obtained from him information imparted upon the faith of that relation. One of these attorneys conceded that Richard Collins acted upon a belief in the existence of such relation. The other conceded that he himself at the time acted in good faith upon such a belief to the extent of procuring a patent, writing letters, and investigating a title. There-

fore neither one will be allowed to profane the relation after his client's death. . . .

If the witnesses had founded their opinions upon observations made in common with others in a nonprofessional capacity, or upon facts which did not come to their peculiar knowledge because their professional opinions and guidance had been sought, they might have shown themselves to be competent to testify. . . . In State *v.* Fitzgerald, 68 Vt. 125, 34 Atl. 429, it was determined that under certain circumstances a lawyer could testify regarding his client's intoxication. The following is from the opinion: "Counsel on both sides, in their briefs, have treated the knowledge that the attorney obtained in respect to the respondent's condition as privileged. We think, however, it cannot be so held. It does not appear that Mr. Cushman learned, or had an opportunity to learn, any fact in respect to the respondent's condition that was not observable by Buckley and by all other persons who saw him during the time of his alleged intoxication. No fact came peculiarly within his knowledge on account of his relation to the respondent as his counsel. This being the case, he was not privileged from testifying to what he observed of the respondent's condition." In this case, however, it is quite clear the witnesses would not have learned the major portion of the facts which they disclosed, or held the most important conversations which they repeated on the witness stand, had they not undertaken to consult with and act for Richard Collins as his attorneys. This being true, they were incompetent to testify as to such facts and conversations. . . .

The judgment of the District Court is reversed, and the cause remanded for a new trial. All the Justices concurring.

645. CHAMPION *v.* McCARTHY

SUPREME COURT OF ILLINOIS. 1907

228 *Ill.* 87; 81 *N. E.* 808

APPEAL from Circuit Court, Ogle County; O. E. HEARD, Judge. Suit by Henry McCarthy against Edgar D. Champion and others. From a decree for complainant, defendants appeal. Affirmed.

This suit was begun by appellee, Henry McCarthy, filing a bill for the partition of certain lands of John Earl, deceased. The bill alleged that Earl was the owner of certain lands therein described. That he died November 13, 1905, leaving no children nor descendants of a child or children, no widow, and no father nor mother surviving him. . . . The bill alleges that John Earl and Lydia Cheshire, and the deceased brother and the deceased sister of John Earl, and the complainant, were all sons and daughters of Susan Champion, who died March 3, 1893, leaving no other heirs than her sons and daughters and the children of a deceased son and daughter. Complainant claimed in his bill that

by the death of John Earl he became seised of an undivided one-fourth of his lands, Lydia Cheshire of an undivided one-fourth, the children of the deceased brother one-fourth, and the children of the deceased sister one-fourth, and prayed for partition. The children of the deceased brother and sister of John Earl answered the bill, denying that complainant was the son of Susan Champion and a brother of John Earl, and denying that he had any interest in the lands described in the bill. . . . A decree was entered for partition in accordance with the master's report and the prayer of the original bill. To reverse that decree this appeal is prosecuted.

The controversy is as to whether the complainant, Henry McCarthy, is an heir of John Earl, deceased, and entitled to an interest in the lands of which he died seised. . . . Susan Champion died in 1893, leaving a will, in and by which she devised to John Earl the real estate in controversy. Complainant claimed to be an illegitimate son of said Susan Champion, born to her in Canada in 1826, before her marriage to Elias Champion. This would make him a half-brother to John Earl, and as such, an heir entitled to a one-fourth interest in the real estate of which John Earl died seised. . . .

Delos W. Baxter testified he was a practicing lawyer and had practiced about twenty-five years. He had held the office of State's Attorney and State Senator. He had known Susan Champion from his boyhood, and also members of her family, including John Earl. He had been employed by Susan Champion in a lawsuit in the early part of his professional career. He testified that in 1886 Susan Champion came to his office with William Stocking, who was the conservator of John Earl, to get him to draw her will; that in transacting the business she talked of her family, and said Henry McCarthy, John Earl, Lydia Cheshire, and Daniel Champion were her children, and also mentioned a child or children of a deceased daughter. Some time after this talk, the witness drew the will, and went with Mr. Stocking to the home of Mrs. Champion to have it executed. On this occasion the witness said Mrs. Champion again told him Henry McCarthy was her son, but that it was not generally known in the neighborhood, and for that reason she did not want his name mentioned in the will. . . .

Sears & Smith and *J. C. Seyster*, for appellants.

S. W. Crowell and *W. J. Emerson*, for appellee.

FARMER, J. (after stating the case as above).

It is insisted that the statements Baxter testified Susan Champion made to him in connection with the preparation and execution of her will were privileged communications, and that he should not have been permitted, over the objection of counsel for the grandchildren of Susan Champion, to testify to them. It does not appear from his testimony that the information given by Susan Champion as to who her children were was necessary to be communicated to Baxter to enable him to prepare the will in accordance with her desires. According to his testi-

mony, she knew how she wanted to dispose of her property, and how she wanted her will made. Her statements appear to have been more in the nature of an explanation of her reasons for giving practically the whole of her estate to one of her children. The fact, also, that the communication was made in the presence of another party, would seem to indicate that it was not intended as a confidential communication to her attorney.

In order to render a communication between attorney and client privileged, it must relate to some matter about which the client is seeking advice, or be made in order to put the attorney in possession of information supposed to be necessary to enable him to properly and intelligently serve his client. Where the transaction between the attorney and client is the preparation of a deed or a contract in accordance with the directions of a client, and no legal advice is asked or required, the reasons or motives moving the client to make the deed or contract, if stated to the attorney, are not privileged. De Wolf *v.* Strader, 26 Ill. 225, 79 Am. Dec. 371; Smith *v.* Long, 106 Ill. 486; Hatton *v.* Robinson, 14 Pick. (Mass.) 416, [*ante.* No. 639].

In Wigmore on Evidence (Volume 4, § 2314) will be found a discussion of the subject of privileged communications relating to the preparations of wills, and the author there announces the rule to be that the fact of the execution of a will, and its contents, are within the rule during the life of the testator, but the rule ceases at his death, and the attorney may then disclose all that affects the execution and tenor of the will. The only exception to this rule, it is said, is the disclosure of facts that would tend to invalidate the will. A large number of cases are cited in the notes to the text in support of the rule announced. . . .

The decree of the Circuit Court is affirmed. Decree affirmed.

646. In Re CUNNION'S WILL

Court of Appeals of New York. 1911

201 *N. Y.* 123; 94 *N. E.* 648

Appeal from Supreme Court, Appellate Division, Second Department.

Proceedings for the probate of the will of John Cunnion, deceased, contested by a daughter of testator. From a decree of the Appellate Division (135 App. Div. 864, 120 N. Y. Supp. 266), affirming a decree admitting the will to probate, the party aggrieved appeals. Affirmed.

See, also, 138 App. Div. 922, 123 N. Y. Supp. 1113.

John Cunnion, on September 9, 1907, executed a will. On June 6, 1908, he executed another will. He died on the 16th day of August, 1908. After his death the will of September 9, 1907, was found, but the will of June 6, 1908, could not be found. This proceeding was com-

menced by a legatee under the will of September 9, 1907, to have the same probated. The probate was contested by a daughter of the testator, and it appeared that the will of September 9, 1907, was duly signed and executed, and that the will of June 6, 1908, was also duly signed and executed, but the contestant was unable to prove the contents of the will of June 6, 1908. Both of the wills were drawn by Francis L. Maher, the attorney of John Cunnion, and he was present when each of them was executed. When the will of June 6, 1908, was executed, it was signed in the presence of the subscribing witnesses and Maher read to such witnesses in the presence of the testator an attestation clause in the usual form, and such attestation clause which followed the signature of the testator was then signed by the witnesses in the presence of the testator. The subscribing witnesses did not know the contents of the will. Maher as a witness in this proceeding was asked: "Q. I ask you to state the contents, all that you can remember." The attorney for the proponent then objected to the witness answering the question on the grounds that it is not "the best evidence of the contents of a written paper; the paper should be produced; and also, as privileged under section 835 of the Code." . . .

John J. Curtin, for appellant. *Michael F. McGoldrick*, for respondent.

Chase, J. (after stating the facts as above). There was no effort in this proceeding to prove the will of June 6, 1908, as a lost will. It is not even claimed before us that the will was inadvertently lost or mislaid, but the contestant seeks to show the contents of that will that she may claim therefrom an express revocation of all former wills or provisions so antagonistic and inconsistent with the former will as to amount to a revocation. . . . The contents of the will of June 6, 1908, were not shown, and the surrogate was right upon the evidence before him in admitting the will of September 9, 1907, to probate.

The only question now remaining for our consideration is whether the surrogate erred in refusing to allow the testimony of Maher as to the contents of the will of June 6, 1908, because of the prohibition contained in section 835 of the Code of Civil Procedure.

1. Prof. Wigmore, in his work on Evidence, gives an extended statement of the rules relating to privileged communications. He states the rule of the common law excluding communications between attorney and client when legal advice of any kind is sought and given, and in connection therewith discusses the history and policy of such rule, and in referring to wills and testamentary dispositions he says:

"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. That it appropriately explains the client's 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. 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. . . . 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 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." 4 Wigmore on Evidence, § 2314.

The reasoning is quite satisfactory, and the rule as stated relating to testamentary dispositions has been substantially adopted in many states as the common-law rule. Doherty *v.* O'Callaghan, 157 Mass. 90; Graham *v.* O'Fallon, 4 Mo. 338; Scott *v.* Harris, 113 Ill. 447; . . . Blackburn *v.* Crawfords, 70 U. S. 175; Glover *v.* Patten, 165 U. S. 394; Stewart *v.* Walker, 6 Ont. L. 594.

2. In reading the decisions of the Courts of this State, it is necessary to remember that prior to September 1, 1877, the common law relating to disclosures of communications and transactions between attorneys and clients prevailed in this State, but from and after that date we have had not only a statute (section 835, Code of Remedial Justice, now Code of Civil Procedure) relating to such disclosures, but also a statute (section 836 of said Code) defining when the statute relating to such disclosures shall apply. The latter statute has been frequently amended so as to extend from time to time the application of the prohibition and to make more clear when and how its provisions can be expressly waived. We are not without authority in this State, in accordance with the rule stated by Wigmore, but the decisions constituting such authority were made in cases where the evidence was offered before the enactment of said sections 835 and 836, or at least before the more recent amendments to said section 836. . . . It is provided by said section 835 as follows: "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, 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." . . . Section 836 as then enacted read as follows: "The last three sections apply to every examination of a person as a witness unless the . . . provisions thereof are expressly waived by the person confessing, the patient, or the client." . . . By chapter 514 of the Laws of 1892, passed May 12, 1892, . . . there was also added thereto the clause relating to an attorney as follows: "But nothing herein contained shall be construed to disqualify an attorney on the probate of a will heretofore

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." In 1899 by chapter 53 there was added to the section the words: "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." Other amendments not important on this appeal were passed in 1893 and 1904. It is still open to the Courts, when not otherwise provided, to determine what is a communication made by a client to an attorney or counselor or advice given by such attorney or counselor in the course of his professional employment; but, when it is determined that certain testimony is within the provisions of the statute, its application to an examination of a person as a witness is stated in section 836, and a waiver must be made in accordance with the terms of that section, otherwise it cannot be considered by the Courts. It has been held that the prohibition under the common-law rule and also as defined by statute does not apply to a case where two or more persons consult an attorney for their mutual benefit in any litigation which may hereafter arise between them, but that it does apply?

Prior to the amendment of section 836 in 1892, relating to an attorney, this Court in Loder *v.* Whelpley, 111 N. Y. 239, 248, . . . and in Matter of Coleman, 111 N. Y. 220, 226, 73, referring to the evidence of witnesses who were employed by the testator in their professional capacity to draw a will for him, and to conversations had with them for the purpose of enabling them to execute the instructions of the testator, said: "That these interviews were had in pursuance of and under the sanction of a professional employment, and that communications made by a client under such circumstances to his attorneys were clearly within the protection of the statute, we have no doubt." It was there also held that "the act of the testator in requesting his attorneys to become witnesses to his will leaves no doubt as to his intention thereby to exempt them from the operation of the statute, and leave them free to perform the duties of the office assigned them, unrestrained by any objection which he had power to remove."

This Court has never modified or changed the letter or spirit of the two last decisions from which we have quoted. A short time after such decisions were reported, the amendment to said section 836 in 1892 was passed. . . . It cannot reasonably be doubted that this amendment to section 836 was passed to conform to the decisions from which we have quoted, and to make it clear beyond controversy that when an attorney or counselor becomes a subscribing witness to a will the prohibition of section 835 does not apply to him, and that in case he does not become a subscribing witness to a will the provisions of section 835 are applicable, and that the common-law rule as stated by Wigmore relating to

testamentary dispositions is overcome and made of no effect by our statutes. . . . It was held in the federal Circuit Court in Fayerweather *v.* Rich, 90 Fed. 13, that sections 835 and 836 of our Code do not prevent an attorney who drew the testator's will and a codicil thereto from giving testimony as to the contents of the codicil, and this decision is called to our attention by the appellants. But that decision was expressly overruled and reversed by the Circuit Court of Appeals, reported as Butler *v.* Fayerweather, 91 Fed. 458, 33 C. C. A. 625, in which Wallace, J., says: . . . "As the statute now reads, no act of the client except a waiver upon the trial can be treated as a waiver of the prohibition of disclosure; and, except he is an attesting witness to a will, in no case is an attorney permitted to make disclosure in respect to the contents of any documents or other information communicated to him in the course of his professional employment by his client."

If it is the intention of the Legislature that section 835 shall not apply to testimony relating to testamentary dispositions after the death of the testator, it should be so stated in an amendment to such section or to section 836.

The testimony of Maher was properly rejected and the judgment should be affirmed, with costs.

Cullen, C. J., and Werner, Willard Bartlett, and Hiscock, JJ., concur. Vann and Collin, JJ., dissent. Judgment affirmed.

Topic 2. Husband and Wife

648. Introductory. 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; 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. 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. But among the various reasons advanced for its support was the policy of protecting domestic confidence by prohibiting their mutual disclosures. 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. 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. 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.

649. MERCER *v.* STATE

SUPREME COURT OF FLORIDA. 1898

40 *Fla.* 216; 24 *So.* 144

WRIT of error to the Circuit Court for Jackson county.

The plaintiffs in error were on the 10th day of June, 1897, indicted, jointly with one Westley Bush, in the circuit court of Jackson county, for willfully driving an ox upon a railroad track. . . . Upon the cross-examination of J. E. Brock, one of the State's witnesses, a letter written by him to his wife was exhibited to him by the attorneys for the defendants; and he was asked if he had written such letter, to which he replied, in substance, that he had written the letter, but the following words, "that I never saw the boys that night that the ox was put upon the road," then contained in it, were not put into the letter by him, and were not in it when he sent it to his wife. . . . With this identification of the letter, and by consent of the State attorney as to the time and order of its introduction, it was offered in evidence on behalf of the defendants in rebuttal of the evidence of the witness who wrote the letter; but its admission in evidence was objected to, both by the State and by the witness whose letter it purported to be, upon the ground that, being a letter from the witness to his wife, it was a confidential communication, as between husband and wife, and therefore privileged. This objection was sustained, and the exclusion of the letter is assigned as the ninth error.

John M. Calhoun, for plaintiffs in error.

The Attorney-General and *John H. Carter*, for defendant in error.

TAYLOR, C. J. (after stating the case as above). Chapter 4029 laws, approved June 4th, 1891, . . . provides: "That in the trial of civil actions in this State neither the husband nor the wife shall be excluded as witnesses" . . . against each other in all cases, civil or criminal, where either of them is an interested party. In neither of these cases decided here, nor in any other State having similar enabling statutes, have we been able to find any declaration that the removal from husband and wife of their incompetency as witnesses because of interest in the cause has the effect of empowering either of them, when they become witnesses, to give illegal or incompetent testimony, by

detailing or exposing those transactions or communications that have passed between them in the sacred confidence and trust that should exist between husband and wife, or that the removal of the incompetency of husband and wife as witnesses on the ground of interest removes the inhibition of the law against the exposure in evidence of confidential communications between them.

Such confidential communications between husband and wife have always been regarded as privileged. As Mr. Greenleaf puts it:

"The great object of the rule is to secure domestic happiness by placing the protecting seal of the law upon all confidential communications between husband and wife; and whatever has come to the knowledge of either by means of the hallowed confidence which that relation inspires cannot be afterwards divulged in testimony, even though the other party be no longer living." 1 Greenleaf on Evidence (15th ed.), §§ 337, 334; 254.

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 placed 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 and wife were 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 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.

The matter that the law prohibits either the husband or wife from testifying to as witnesses includes any information obtained by either during the marriage, and by reason of its existence. It should not be confined to mere statements by one to the other, but embraces all knowledge upon the part of either obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known. And the same rule prevails in full force after the marital relation has been dissolved by death or divorce. Where the incompetency as witnesses of husband and wife on the ground of interest has

been removed by statute, as is the case here, either of them may testify, for or against the other, to any fact, the knowledge of which was acquired by them independently of their marriage relation, in any manner not involving the confidence growing out of the marriage relation. To this effect, see 1 Greenleaf on Evidence, § 254a and the cases there cited; also the cases cited in the notes to Commonwealth *v.* Sapp, 29 Am. St. Rep. 415 et seq.

The letter from the husband to the wife here excluded, however, was not sought to be introduced directly through the wife as a witness to whom it had been written, but, in some manner not disclosed by the record, had found its way to the possession of the attorneys for the defendants, and its offer in evidence was from their immediate custody. There is a considerable array of authorities to the effect that when confidential communications between husband and wife, or between attorney and client, get out of the possession and control of the parties to the confidence, and that of their agents and attorneys, and find their way into the possession and control of third persons, regardless of the manner in which the possession thereof may be obtained by such third persons, then such communications lose the protected privilege of the law, and become competent and admissible evidence. We cannot agree to the correctness of this rule thus broadly laid down by these and other authorities, but think the policy of the law, that forms the foundation of the general rule, is far more strongly upheld and subserved by those authorities that recognize and declare certain classes of communications to be privileged from the inherent character of the communication itself, and that in such cases the privilege attaches to the communication itself, and protects it from exposure in evidence, wheresoever or in whosesoever hands it may be. . . . We think the letter offered in evidence here from the witness Brock to his wife was inherently a confidential communication, and that it was privileged from exposure in evidence, in and of itself, regardless of the custody from which it was produced at the trial, and that its admission in evidence was properly refused. . . .

But, for the error found in the admission of proof as to the character for *honesty* of the State's witnesses, the judgment of the Court below is reversed and a new trial ordered.

650. SEXTON *v.* SEXTON

Supreme Court of Iowa. 1905

129 *Ia.* 487; 105 *N. W.* 314

Appeal from District Court, Ida County; Z. A. Church, Judge. — Action at law by plaintiff to recover damages from defendant, her father-in-law, for alienating the affections of her husband. There was

a verdict and judgment in favor of plaintiff, and defendant appeals. Affirmed.

Plaintiff and James Sexton, Jr., were married in November, 1899, and for some time thereafter continued to live together. One child was born to them, at the time of the commencement of this action three years old. Before the action said James, Jr., had abandoned plaintiff and their child, and was making his home with the defendant, his father. During the trial plaintiff was called as a witness on her own behalf, and to prove that her husband regarded her with affection at and for some time after the marriage, and, further, to prove the subsequent loss or withdrawal of such affection by him, she was allowed to testify to acts, statements, and declarations on his part, addressed to her. To the same end, several letters, written to plaintiff by her husband while absent from home, and produced by her in court, were also allowed to be introduced and read to the jury. To all such evidence the defendant made timely objection, basing the same upon the statute (Code, § 4607), which reads as follows: "Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married," etc. The objections were overruled, and upon such rulings is predicted the only contention for error as presented in argument by counsel for appellant. . . .

F. E. Gill and *W. E. Johnston*, for appellant. *P. W. Harding*, for appellee.

Bishop, J. (after stating the case as above). The literal reading of the statute would seem to be quite conclusive against the right to call either the husband or wife to speak from the witness stand respecting communications had between them, no matter what the character thereof or the occasion or purpose. But we are not always restricted to the precise words employed, in getting at the meaning of a statute. And it is the real purpose and intent of the Legislature, as meant to be expressed, to which we are to give force of operation. . . . The privilege of communications between husband and wife, was secured at common law. The rule was not designed to suppress truth, but had its origin in the fact, made clear by experience, that greater mischiefs resulted from the admission of such evidence than were likely to arise from its exclusion. In common, therefore, with other privileges, analogous in character, it was grounded on public policy. . . . That the common-law Courts were not all agreed as to the measure or extent of the privilege must be confessed, and that such lack of uniformity in decision has continued, notwithstanding the principle involved has generally found its way into the statute law of the land, is equally true. Without doubt, however, the latter fact is due in some measure to the difference in phrasing to be found in the enactments as adopted in the various states; some providing for the exclusion of so-called confidential communications only, and others, as in this State, providing in terms that any communication is within the privilege. . . .

We come, then, to the question, what is meant by the expression "any *communication*" as used in the statute? As we have seen, the privilege is bottomed upon considerations of public policy. Accordingly it would seem that, whatever the form of expression adopted, no more is required than that the confidences inherent in the marital relation, or incident thereto, should be fully protected. Says Mr. Wigmore, in his recent work on Evidence (§ 2336): "The essence of the privilege is to protect confidences only." And this must be true, because there can be no reason arising out of public policy, or otherwise, requiring that every word spoken between husband and wife shall be privileged, irrespective of the presence in which spoken or the subject or occasion thereof. And, within our observation, no Court has ever gone so far as to so hold. The spirit of the rule as enforced at common law, and, within our understanding, the meaning to be gathered from the statute, is that the privilege shall be construed to embrace only the knowledge which the husband or wife obtains from the other, which, but for the marriage relation and the confidence growing out of it, would not have been communicated, or which is of such nature or character as that, to repeat the same, would tend to unduly embarrass or disturb the parties in their marital relations. It is the marital communication, then, that is sought to be protected. . . . Thus it cannot be that words spoken by husband to wife, or vice versa, in the presence and hearing of one or more third persons, and hence in the very nature of things not to be construed as in any marital sense private or confidential, must be held within the protection of the privilege, although clearly within the letter of the statute. . . .

So, too, it cannot be that the rule of privilege must be held to extend so far as to exclude all communications between husband and wife having reference to business relations existing either as between them directly, or as between them — one or both — and others. Certainly as to business relations existing between husband and wife directly, there can be no adverse consideration of public policy Quite to the contrary, public policy, as reflected by statute and by our decisions, permits of such relations to the fullest extent. And it would be shocking to say that a contract thus made, or rights or liabilities thus accruing, could not be enforced because, forsooth, a communication between the parties having relation thereto, and essential to proof, was privileged. The cases are almost unanimously against such a conclusion. Wigmore, § 2336.

To the general proposition thus advanced it is no answer to say that by Code, § 460, husband and wife are made competent witnesses for and against each other in all such cases. That statute goes no farther than to authorize the husband and wife to testify to facts within his or her knowledge, and material or relevant to the issue. It has no relation to the subject of communications made by the one to the other.

"At common law neither husband nor wife could testify in favor of or against the other. General enabling statutes have been passed in many jurisdictions, but these statutes do not affect the rule as to the so-called privileged communications between husband and wife." Elliott on Evidence, § 628. . . .

The distinction between the competency of the husband or wife, when called as witnesses, and the privilege incident to such relation, and the privilege of either against the other's disclosure of communications, is said by Mr. Wigmore to be plain enough:

"And, when the legislators in the various jurisdictions took the first steps . . . by abolishing or restricting the disqualification [as witnesses], they invariably preserved by express enactment the present privilege for communications." Wigmore on Evidence, §§ 2333, 2334.

And again, in § 2228, the same author says:

"So, too, the privilege for confidential communications is not only quite different in scope [from the qualification of husband and wife as witnesses], but stands upon its own sufficient grounds."

Moreover, and for kindred reasons, a literal interpretation of the statute would in many cases forbid an inquiry into the personal wrongs committed by one spouse against the other, and especially where such consisted of a verbal act, or where the statements or declarations accompanying a physical act were necessary to establish the true character of such act. To hold for exclusion in such cases would not only be subversive of the principle of public policy under which the rule of the statute came into existence — that is, the promotion of the interests of the marital relation — but it would be to hold for the equal effectiveness of the privilege as an engine for the suppression of the evidence of wrong, possibly crime. . . .

What has been said foregoing will be sufficient to make clear the reasons for our conclusion that the statute was intended to protect only marital communications. . . . It may be confessed that what are marital communications cannot be answered according to any fixed rule. The varying circumstances of married life are such that the question must be made to depend for its answer upon the peculiar circumstances of the case out of which it arises. Perhaps no better guide for general observance can be found than to say that impliedly all communications between husband and wife are confidential in character, and hence privileged, and that the party asserting the contrary in any given instance must satisfy the Court by the circumstances of the case that grounds for exclusion do not exist.

It being made clear that the rule of privilege is not a rigid one admitting of no exceptions, we have, then, to consider whether, in view of the issue here presented, the testimony of plaintiff, in character as hereinbefore stated, may fairly be said to have been within the rule of exclusion because of marital communications. Looking first to the issue, it is clear that the burden was upon plaintiff to establish, among other things,

first, that at the beginning of their married life she possessed the affection of her husband; second, that such affection had been lost to or withdrawn from her. . . . Now, marital affection, or the want of it, is manifested alone by acts, either physical or verbal, and it can be fully proven in no other way than by presenting to the court or jury the relevant doings and sayings of the spouse in question. That physical acts do not come within the rule of exclusion is the declaration of many of the cases. See those collected by Mr. Wigmore in note to § 2337. But this should be accepted with qualification. Knowledge may be as effectively communicated in many cases by physical acts as by words spoken, and, if the knowledge imparted is such in character as to come within the spirit of the rule, no good reason appears for withholding the privilege because of the means of communication adopted. Whatever may be said in respect of this, it is doubtful, to say the least, if testimony of the character in question, whether of physical or verbal acts, and limited to such, should be regarded as communications in any sense employed in the statute. The words spoken or the acts committed have no testimonial value in and of themselves. They are important only as the expression of countenance, the caress, the term of endearment, the word of hope for the marital future — or, on the other hand, the withholding of society, the blow, the curse — may serve to make evident the material fact, from the standpoint of testimonial value, of affection or the want thereof. . . .

But aside from this, and speaking first of testimony intended to establish affection, there can be nothing in the rule of privilege to justify the exclusion of testimony by a spouse bearing upon the existence of such fact; and this, whether the evidence offered be of physical acts or verbal acts. Affection between husband and wife is the rule, and, as we have seen, the law presumes it. Indeed, it is published to the world with the fact of marriage. Accordingly in no sense can it be a matter of marital confidence, and as such subject to be violated by the one testifying to the acts, physical or verbal, commonly understood to be declaratory thereof, in proof of the fact. . . . As applied to a case such as we have before us, it has become a question simply whether there shall be vindicated another principle of public policy by so ordering that that which has been lost may be compensated for. Surely it does not lie in the mouth of one who has entered a family circle to despoil it to plead the privilege of the statute to the sole end that he may escape the consequence of his own unlawful act. It was not intended for his benefit, and every consideration of public policy that enters into it forbids him from making of it a cloak to shield him from being penalized for the mischief he has wrought. . . .

There was no error in admitting the testimony complained of, and the judgment is affirmed.

Topic 3. Jurors

652. Earl of Shaftesbury's Trial. (1681. 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,[4] which was given them, and they withdrew. On 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. . . .

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 no 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 favor 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.

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[4] The form of oath administered to grand jurors was as follows:

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."

653. PHILLIPS *v.* MARBLEHEAD

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1889

148 *Mass.* 326; 19 *N. E.* 547

PETITION to the Superior Court for a jury to assess the damages caused by the taking by the respondent of land of the petitioners, in July, 1886, for the laying out of Atlantic Avenue in Marblehead. The respondent called as a witness one Martin, a member of the board of selectmen of Marblehead in 1886, who testified as an expert to the value of the petitioners' land. Upon cross-examination he testified that the petitioners had in his judgment sustained damage to the amount of three hundred dollars, and no more. The petitioners then offered in evidence, solely for the purpose of contradicting the witness Martin, the record of the board of selectmen of Marblehead made July 27, 1886, showing the laying out of Atlantic Avenue, and the amount of damage therefor, signed by Martin together with the other members of the board. The record contained the statement that the petitioners had sustained damage by the taking of their land to the amount of five hundred and fifty-three dollars, and that that sum was awarded the petitioners. The judge ruled that the record was not admissible in evidence for the purpose named, and the petitioners excepted

FIELD, J. . . . While the deliberations of legislative bodies are usually public, the deliberations of judicial or quasi judicial bodies are private, and there are reasons of public policy why they should not be made public, particularly when the purpose to be served is comparatively unimportant. Grand and petit jurors are not permitted to testify to opinions concerning the case expressed in their consultations with one another, and arbitrators are not permitted to testify to the grounds on which they reached the conclusions declared in the award. For the purpose of contradicting a witness, we think that evidence ought not to be received of the deliberations of selectmen acting in a quasi judicial capacity, and that the certificate of the doings of the board of selectmen was rightly excluded.

654. STATE *v.* CAMPBELL

SUPREME COURT OF KANSAS. 1906

73 *Kan.* 688; 85 *Pac.* 784

APPEAL from District Court, Wyandotte County; J. MCCABE MOORE, Judge.

Frank M. Campbell was convicted of bribery, and appeals. Affirmed.

At the June Term of the District Court of Wyandotte County, appel-

lant was convicted of the crime of accepting a bribe to influence his official action as a member of the board of education of Kansas City. He was sentenced to confinement in the State penitentiary for a period of not less than one or more than seven years. From the judgment he appeals. . . .

Hale & Maher, for appellant.

C. C. Coleman, Attorney-General, for the State.

PORTER, J. (after stating the facts). The appellant contends . . . 2. that the Court erred in allowing members of the grand jury which indicted appellant to testify to statements made by him while a witness before the grand jury; . . . that members of a grand jury are prohibited by statute from testifying as to what a witness before that body has sworn to, except for the purpose of impeaching his statements made in court or in a case where a witness is being prosecuted for perjury.

In its testimony in chief, the State introduced four members of the grand jury which returned the indictment, and proved by them certain statements made by appellant while a witness before the grand jury. . . . When this evidence was offered, counsel for appellant objected, and the following took place: "Q. What did Mr. Campbell say in his examination before the grand jury as to who had employed Mr. Gilhaus? By Mr. Wooley: I object to that as incompetent. Testimony taken before the grand jury cannot be reiterated by the grand jury. . . . Mr. Coleman: It is competent as an admission, if it amounts to one. The Court: It may have been voluntarily made, and competent, if shown they are not made under compulsion. He may answer." . . .

The second ground upon which it is contended that this testimony was incompetent is that the statutory as well as the common-law rules prohibit a grand juror from disclosing the testimony of a witness before that body, except for two purposes: (1) To prove whether the testimony of such witness before the grand jury is consistent with or different from his testimony before the court; (2) upon a complaint against such person for perjury, or upon his trial for that offense. Section 91, Code Cr. Proc. (Gen. St. 1901, § 5533), read as follows:

"Members of the grand jury may be required by any Court to testify whether the testimony of a witness examined before such grand jury is consistent with or different from the evidence given by such witness before such Court; and they may also be required to disclose the testimony given before them by any person upon a complaint against such person for perjury, or upon his trial for such offence."

Section 93, Code Cr. Proc. (Gen. St. 1901, § 5535), is as follows:

"No grand juror shall disclose any evidence given before the grand jury, nor the name of any witness who appeared before them, except when lawfully required to testify as a witness in relation thereto; nor shall he disclose the fact of any indictment having been found against any person for felony, not in actual confinement, until the defendant shall have been arrested thereon. Any juror violating the provisions of this section shall be deemed guilty of a misdemeanor."

These sections first appear in our statutes in the laws of 1855, and have been subsequently re-enacted without change. It is historical that the territorial Legislature of 1855, often referred to as the "bogus Legislature," adopted the entire statutes of Missouri, substituting the word "Territory" for "State," and making some other slight changes where it was found necessary.

These sections had been construed by the Supreme Court of Missouri in the case of Tindle *v.* Nichols, 20 Mo. 326, decided in January, 1855, and it is now contended that we are bound by the judicial construction placed thereon. In the Tindle Case, supra, which was an action for slander, defendant justified and answered that plaintiff had sworn falsely in a certain matter before the grand jury. On the trial defendant sought to prove by members of the grand jury what the witness had testified. The Court held that, inasmuch as section 91 specified two classes of cases in which a grand juror may be required to disclose such testimony, it followed that all other cases not enumerated were excluded, and that the words of section 93 "when lawfully required to testify as a witness in relation thereto" had reference only to those two exceptions. We recognize the force of the rule that, where one state adopts a statute from another State, it adopts the construction placed thereon by the Courts of that State. But this is a general rule to which there are numerous exceptions. . . .

The question before us, however, is not whether this statute was in fact adopted from Missouri, about which there can be no dispute, but whether we should be bound by it absolutely. . . . In many of the States the subject is controlled by statute, and provisions almost identical with our statutes are in force. The various statutory provisions of the several States are set forth in a note to § 2360 in Wigmore on Evidence, Vol. 4, p. 3316. From the time the grand jury was first established, the law has surrounded its deliberations and all that transpired before it with secrecy. By the common law, a grand jury was not permitted to disclose how any witness testified before that body or how any member voted. 12 Viner's Abr. 20, tit. Evidence, H, I. The grand juror's oath required him to keep "the State's counsel, his own and his fellows' secret." The purpose of this requirement has been, manifestly: First, to protect the interests of the State, by preventing information reaching the accused which might enable him to escape or induce him to suborn witnesses to prove the contrary of the charges; second, to protect the members of the grand jury, and leave them free to act without fear of consequences to themselves; and, third, to protect witnesses in the same way. Gradually, exceptions to these rules have been allowed; and the first naturally to suggest themselves were those permitting a grand juror to testify what a witness swore to before the grand jury in a prosecution of the witness for perjury, and, again, for the purpose of impeaching the testimony of the witness on a trial of an indictment or in another action. The tendency of modern authorities has been to hold that, when the

reasons for secrecy no longer exist, the ancient rules with reference thereto do not apply, and, in all cases where justice or the rights of the public require it, the facts should be disclosed. . . . In Commonwealth *v.* Mead, 12 Gray 167, it was said: "But, when these purposes are accomplished, the necessity and expediency of retaining the seal of secrecy are at an end." Mr. Wigmore, in his work on Evidence (§ 2362) says: "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 person accused." In a note to the same section, in referring to Tindle *v.* Nichols, supra, the author characterizes the decision as "clearly unsound and unjust." The Florida Supreme Court, in a well-considered case (Jenkins *v.* State, 35 Fla. 737), decided in 1895, construed a statute which is in the same language as ours so far as section 93 is concerned. . . . They say: "But, independent of statutory regulation, it has long been established that it is discretionary with the trial court to permit a grand juror to be examined as to what a witness testified to before the grand jury, when competent and the ends of justice require it, and we do not see that our statutes have changed this rule." . . .

Mr. Wigmore, after referring to and criticising the Missouri and Connecticut cases, says:

"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 today. 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." Vol. 4, § 2362.

The same author disposes of the motion that the two exceptions contained in many statutes should be held to exclude all others. He says:

"It is now universally conceded that a witness may be impeached, in any subsequent trial civil or criminal, by self-contradictory testimony given by him before the grand jury. In the same way, a party to the cause, not taking the stand as a witness, may be impeached by his admissions made in testifying before the grand jury. 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 unskillfulness of the legislature which attempted in any respect to make a declaratory statute." Vol. 4, § 2363.

Appellant, in addition to the Missouri cases, relies upon the old case of State *v.* Fasset, 16 Conn. 457, which is a leading authority in support of the rule excluding such testimony. This case was decided in 1884, and has been to some extent discredited by that Court in the case of

State *v.* Coffee, supra, decided in 1888. In the latter case the Court use this language:

"Some of the reasons given for keeping the testimony secret are temporary in their nature, and some do not exist, under our practice, where the prisoner is before the grand jury. Nevertheless the oath and the policy of the law have ever regarded the testimony as among the secrets of the grand jury room, not, however, inflexibly so. In State *v.* Fasset, 16 Conn. 457, the Court notices two exceptions —in prosecutions for perjury, and in case witnesses testify differently on the trial. Perhaps it would be proper to say that the oath has this implied qualification: that the testimony is to be kept secret unless a disclosure is required in some legal proceeding. It does not seem that the policy of the law should require it to be kept secret at the expense of justice. And so the weight of authority outside of this State seems to be that, where public justice or the rights of parties require it, the testimony before the grand jury may be shown. . . . We make these quotations, not for the purpose of showing what the law is in this State, but for the purpose of showing the principles which prevail in other jurisdictions. The case of State *v.* Fasset, *supra*, may be regarded as somewhat inconsistent with the broad principles elsewhere enunciated. It is doubtful whether the Court intended to go further than the two exceptions there noticed." . . .

It appears beyond question, we think, that the doctrine of the Tindle Case is opposed to the weight of modern authority, and as its reasoning does not accord with our views, we must decline to be bound by it. The oath provided for grand jurors by our State imposes none of the common-law restrictions of secrecy, required by the statutes of many of the States. While the obligations of the oath are by many of the Courts considered indicative of the policy of the law in those States, the absence of any such requirements in the oath provided by our statute is perhaps of little importance in view of the other obligations as to secrecy imposed by the sections which we are considering. In principle we see no good reason why the statements, admissions or declarations made by a witness before a grand jury should not be disclosed by a member of the grand jury whenever lawfully required to do so, and that a member of the grand jury may be lawfully required to testify "in relation thereto," when after the purpose of secrecy has been effected, it becomes necessary in furtherance of justice or for the protection of public or individual rights. . . .

The judgment will be affirmed. All the justices concurring.

Topic 4. Official Secrets

655. HARDY'S TRIAL

King's Bench. 1794

24 *How. St. Tr.* 199

[Treason. The witness had reported the existence and doings of secret political societies].

Witness. — 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 say 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. . . .

[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.

656. Michael *v.* Matson. (*Supreme Court of Kansas.* 1909. 105 Pac. 537.) Mason, J. — The county attorney was called as a witness by the plaintiff, and was permitted to relate a conversation between Matson and himself relating to the liquor prosecution, before it was dismissed. The defendant objected to this on the ground that his statements to the county attorney, under the circumstances, were privileged. We think the objection should have been sustained, not on the theory that the relation of attorney and client existed, thus rendering the communication incompetent under the statute (Gen. St. 1901, § 4771, subd. 4), but for the reason that the evidence was inadmissible on the grounds of public policy. . . . The interest of the public in protecting the privacy of a communication seems, indeed, greater when it is made to a prosecuting officer in that capacity than when it is made by a client to his attorney. Persons having knowledge regarding the commission of a crime ought to be encouraged to reveal to the prosecuting attorney fully, freely, and unreservedly the source and extent of their information. The possibility that what they say, under such circumstances, will be used against them, tends to impose a natural restraint upon their conduct and to deprive the officer of the benefit of their services. It is said that the privilege based upon this principle applies only to the identity of the informant (4 Wigmore on Evidence, § 2374, p. 3333), and such appears to be the English rule; but in this country it has been treated as covering the communication itself.

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657. AARON BURR'S TRIAL

United States Circuit Court. 1807

Robertson's Rep., I, 121, 127, 136, 181, 255; II, 536

[Treason. The accused moved 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.]

Mr. *Botts* (arguing for the accused). 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. . . .

Marshall, C. J. (granting the motion). . . . 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 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 counsel — 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. . . .

[As to the argument that reasons of State might forbid the disclosure], 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.

[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 would not, then, intend that it should be withdrawn from its station by any co-ordinate authority. . . .

[The President though 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.

658. MISSISSIPPI *v.* JOHNSON. (1866. Federal Supreme Court. 4 Wall. 475, 483.) Attorney-General *Stanbery* (arguing). If the Court [in Burr's Trial] in saying that the President was amenable to subpœna, was right, the Court was bound, at the instance of the defendant, to follow it up by process of attachment to compel obedience to its lawful order. At that point, however, the Court hesitated, and not a step further was taken towards enforcing the doctrine laid down by the Chief Justice. It then became quite too apparent that a very great

error had been committed. I say a very great error, with the greatest submission to the great Chief Justice, who, on circuit, at Nisi Prius, suddenly, on a motion of this kind, had held that the President of the United States was liable to the subpœna of any Court as President.

659. BEATSON *v.* SKENE

EXCHEQUER. 1860

5 *H. & N.* 838, 853

[LIBEL. 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, 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 military court's minutes of the defendant's testimony, and of the plaintiff's own letters to the Secretary of War. This production was refused. On a rule nisi granting production,]

Bovill and *Garth* showed cause. First, the learned Judge was correct in refusing to compel the production of the letters and minutes of the Court of Inquiry, the Secretary of State for War having objected to produce them, on the ground that their production would be prejudicial to the public service. It is clear that evidence may be excluded, where the disclosure would be prejudicial to public interests. . . .

Edwin James and *Gray*, in support of the rule. First, the learned Judge ought to have compelled the production of the letters and minutes of the Court of Inquiry, which the Secretary for War was subpœnaed to produce. The letters were not confidential communications, but were written by the plaintiff in explanation of his conduct, and for the purpose of showing the motives by which he was actuated. There is no authority that under such circumstances the Secretary for War was entitled to withhold them. The case is totally different from that of a confidential report made by a military officer to the Secretary for War, which it is conceded would be privileged.

POLLOCK, C. B. — 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 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; and the question then arises, how is this to be determined?

It is manifest it must be determined either by the presiding Judge or by the responsible servant of the Crown in whose custody the paper is. The Judge would be unable to determine it without ascertaining what the document was, and why the publication of it would be injurious to the public service — an inquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against. It appears to us therefore, that the question, whether the production of the documents would be injurious to the public service, must be determined, not by the Judge but by the head of the department having the custody of the paper; and if he is in attendance and states that in his opinion the production of the document would be injurious to the public service, we think the Judge ought not to compel the production of it. The administration of justice is only a part of the general conduct of the affairs of any State or Nation, and we think is (with respect to the production or non-production of a State paper in a Court of justice) subordinate to the general welfare of the community.

Rule discharged.

660. HENNESSY *v.* WRIGHT. (1888. Queen's Bench Division. L. R. 21 Q. B. D. 509, 512.) FIELD, J. — 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 coelum," 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.

Topic 5. Physician and Patient

662. Duchess of Kingston's Trial. (1776. House of Lords, 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.

Mansfield, L. C. J. — 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.

663. Commissioners on the Revision of the Statutes of New York. (1836. 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 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.

664. GARTSIDE *v.* CONNECTICUT MUTUAL LIFE INS. CO.

Supreme Court of Missouri. 1882

76 *Mo.* 446

Appeal from St. Louis Court of Appeals. Affirmed.

This suit was instituted in the circuit court of the city of St. Louis, on a policy of insurance to recover a death loss. On the trial judgment was rendered for defendant, which, on plaintiff's appeal to the St. Louis court of appeals, was reversed, and from the judgment of reversal defendant prosecutes an appeal to this Court.

The only question presented on said appeal for determination is, whether a physician, who is called to visit a patient, when introduced as a witness, can be required or allowed to disclose any information acquired by him from such patient either orally, by signs or by observation

of the patient after he has submitted himself for examination, which information was necessary to enable him to prescribe for such patient. An affirmative answer reverses, and a negative answer affirms the judgment, and the solution of the question is dependent upon a construction of the fifth subdivision of section 4017, Revised Statutes, which declares that the following persons shall be incompetent to testify, viz: . . . "A physician or surgeon, concerning any information which he may have acquired from any patient 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."

B. D. Lee, for appellant. The Court of Appeals gave too broad a construction to the statute of Missouri relating to the competency of witnesses. It should have been strictly construed. . . . The New York and Michigan authorities cited by plaintiff have no application here. . . .

Jacob Klein, for respondents. The information which a physician is forbidden to disclose consists not merely of the communications made to him by his patient, but of facts which otherwise come to his knowledge by virtue of his professional employment. . . . It might as well be said that information can be gained only through the sense of hearing, as that the information intended to be protected by the statute is only that which the medical person gains through the oral statements of the patient. . . . But the context of the clause puts the matter beyond doubt; there is a studied discrimination in the language applied to the three professions: As to the Attorney, it is the "communication" that is to be withheld. As to the Priest, it is the "confession." As to the Physician, it is the "information," a word more comprehensive than both of the others. . . . All the knowledge that comes to a physician, in regard to his patient, is information.

Again, it is obvious that the purpose of the law was to create entire confidence in the mind of the patient, that his maladies could not be disclosed by the physician. Take the case of a patient who has an ulcer produced by venereal disease. As soon as the eye of the physician rests upon it, he knows what it is, and its origin. It matters not what his patient may say. He may deny its origin, through delicacy; and yet it is by looking at the ulcer that the physician gets his "information." It is the policy of the law to encourage the patient to receive medical aid, and for his friends to assist him; and anything that would prevent so merciful a rule is against public policy. Take, for instance, cases of delirium tremens. It is for the interest of society, and certainly in harmony with every humane principle, that the patient should receive medical attention. But we will say that the physician who is called to attend upon him may be called into court to testify that he had delirium tremens. The fear that such would be the case might deter the friends of the patient from calling a physician, and thus the law would become an engine of inhumanity and cruelty, for in cases of delirium tremens the physician would get "information" in regard to the disease without any

"communication" from the patient, unless his incoherent ravings may be considered as communications.

NAPTON, J. (after stating the case as above). It is contended upon the one hand that the above statute was only designed and intended to forbid the disclosure of such information as a physician while attending a patient acquires orally from the patient. It is contended, on the other hand, that the statute forbids, not only information acquired through the ear by oral communication, but also all information acquired through the eye by observation or examination of the patient after he has submitted himself to the care of the physician for examination and treatment. In settling this contention, and in determining the proper construction to be placed on said section 4017, we feel authorized to look at the adjudications in other States having similar statutes. . . .

A kindred statute has been in existence in New York since 1828. . . . This statute has been repeatedly before the Courts of that State for construction, and in a long line of decisions, beginning in 1834, it has been held that the object of the statute was to impress secrecy upon the knowledge acquired by a physician in the sick chamber, whether acquired by conversations had with the patient, or as the result of observation or examination of such patient, and which information was necessary to enable him to prescribe for the patient. . . . In Michigan the statute upon this subject is in the exact words of the New York statute, and the same construction has been put upon it by the Courts of that State, Judge COOLEY delivering the opinion in the case of Briggs *v.* Briggs, 20 Mich. 34. . . .

It is plausibly argued by counsel that, inasmuch as our statute differs from the New York and Michigan statutes in this, that the words "from the patient" inserted in our statute after the word "acquired," are not to be found in the New York statute, therefore the decisions above referred to are not authoritative. While it is true that the phraseology of our statute is different in the above respect from the New York statute, it is also true that the object intended to be accomplished by both is the same, and the meaning of both is the same when construed with reference to the object intended to be brought about, viz: casting "the veil of privilege" or secrecy over information acquired by a physician while professionally engaged in the sick chamber, and necessary to enable him to prescribe. Information acquired by a physician from inspection, examination or observation of the person of the patient, after he has submitted himself to such examination, may as appropriately be said to be acquired from the patient as if the same information had been orally communicated by the patient. The construction contended for by defendant's counsel, that by the statute a physician is forbidden to disclose only such information as may have been communicated to him orally by his patient, would, in our opinion, nullify the law. To hold that, while under the statute a physician would be forbidden from disclosing a statement made to him by his patient that he was suffering

from syphilis; and to allow him to state as the result of his observation and examination of the patient that he was diseased with syphilis would be to make the statute inconsistent with itself. It is doubtless true that a physician learns more of the condition of a patient from his own diagnosis of the case than from what is communicated by the words of the patient; and to say that while the mouth of the physician is sealed as to the information acquired orally from his patient, it is opened wide as to information acquired from a source upon which he must rely, viz: his own diagnosis of the case, would be to restrict the operation of the statute to narrower limits than was ever intended by the Legislature and virtually to overthrow it.

It follows from what has been said that the Circuit Court erred in permitting Drs. Gregory and Bauduy, two physicians, to give in evidence the information acquired by them while attending Gartside, their patient, professionally, although such information was acquired not from what the patient said but from observation and examination.

The judgment of the St. Louis Court of Appeals reversing the judgment of the Circuit Court and remanding the cause, is affirmed, with the concurrence of all the judges.

665. McRAE *v.* ERICKSON

COURT OF APPEAL OF CALIFORNIA. 1905

1 *Cal. App.* 326; 82 *Pac.* 209

APPEAL from Superior Court, Los Angeles County; M. T. ALLEN, Judge. Action by Alexander McRae against Charles Erickson and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Bicknell, Gibson & Trask, for appellants. *Edwin A. Meserve* and *Fred E. Burlew*, for respondents.

SMITH, J. — Appeal from a judgment for the plaintiff, and from an order denying the defendants' motion for a new trial. The suit is for damages for injuries received by plaintiff while working for defendants in the construction of a tunnel for the Southern Pacific Railroad Company on the line between Los Angeles and Ventura counties. . . .

The remaining point urged is that the Court erred in excluding the testimony of Dr. Hitt as to a statement made to him by the plaintiff at the defendants' hospital, where he had been taken for treatment; and this is objected to on the two grounds: That there is nothing in the record to indicate that the witness was acting professionally, or with a view to treating plaintiff, or that the information was obtained with a view to treatment, and that the information was, in fact, not "necessary to enable him to prescribe or act for the patient."

1. But the former point, we think, is obviously untenable. The

witness was a physician and surgeon, and as such was in charge of the defendants' hospital, and his services were remunerated by assessments upon the wages of the men, so that he was, in effect, employed by the plaintiff. He examined the plaintiff as a physician, and the plaintiff knew that he was examining him as such, and the information sought was obtained from the plaintiff at the time he was examining him, or sometime during the day. The Court below, we think, was right in holding that the communication was made to the witness in the course of professional employment.

2. As to the remaining objection: The question asked the witness was: "If Mr. McRae made any statement to you, explaining how the rock fell, and how it hit him," to which he answered: "He did." The witness was then asked: "Now, state whether he told you how the rock came down and from whence it came," and, the question being objected to, the witness testified that the statement referred to "had nothing to do with his (the plaintiff's) treatment, nor with the examination of him for the purpose of determining his physical injuries"; that "it had no relation whatever to his treatment"; that "it was customary in the hospital to get a record from the patients as to how these things occurred." . . . The objection to the question was thereupon sustained, and the appellants excepted. The Court was not informed as to the effect of the statement sought, otherwise than by the questions above quoted; and from these it cannot be very clearly determined what the statement would have been. If it was as indicated by the first question, the information sought was apparently of a character necessary to the proper treatment of the patient; but information as to the direction or point whence the rock came would seem to have been unnecessary for such purpose, and to this extent, if we have regard to the most obvious sense of the provision of the statute under consideration, the objection of the respondent would seem to have been well taken.

But to give to the statute this narrow construction would equally exclude from its application many, if not most, of the answers to questions usually put, and properly and necessarily put, by competent physicians to patients in cases of this kind, in order to enable them to act for their patients. This, we think, would be to defeat the obvious purpose of the act, which, it is said, "is to facilitate and make safe, full, and confidential disclosure by patient to physician of all facts, circumstances, and symptoms, untrammeled by apprehension of their subsequent and enforced disclosure and publication on the witness stand, to the end that the physician may form a correct opinion, and be enabled safely and efficaciously to treat his patient." Will of Bruendl, 102 Wis. 47, 78 N. W. 169. . . . Though the precise question has not been determined by the Supreme Court of this State, the same view seems to have been commonly taken. . . .

We are therefore of the opinion that the view of the Court below in this case was correct, and that the intention of the statute is to exclude

all statements made by a patient to his physician while attending him in that capacity for the purpose of determining his condition. Nor does this construction do violence to the language of the act liberally construed, which we think is to be understood as forbidding a physician to be examined "as to any information acquired in attending the patient, the acquisition of which was necessary (or which it was necessary for him to acquire) in order to enable him to prescribe or act for the patient." Of this necessity, from the nature of the case, the physician must commonly be regarded as the sole judge; for it would be obviously unreasonable to require of the patient the exercise of any judgment with reference to the propriety of the questions asked by his physician, except, possibly, in cases where the materiality of the question is obviously apparent.

We are of the opinion that the judgment and order appealed from should be affirmed, and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

BOOK II. HOW AND WHEN EVIDENCE IS TO BE PRESENTED (PROCEDURE OF ADMISSIBILITY)

TITLE I. THEORY OF ADMISSIBILITY

Topic 1. Multiple Admissibility

667. People *v.* Doyle. (1870. Michigan. 21 Mich. 221, 227.) Graves, J. Whenever a question is made upon the admission of evidence, it is indispensable to consider the object for which it is produced, and the point intended to be established by it. . . . It frequently happens that an item of proof is plainly relevant and proper for one purpose, while wholly inadmissible for another which it would naturally tend to establish. And when this occurs, the evidence when offered for the legal purpose can no more be excluded on the ground of its aptitude to show the unauthorized fact than its admission to prove such unauthorized fact can be justified on the ground of its aptness to prove another fact legally provable under the issue.

668. GOODHAND *v.* BENTON

Court of Appeals of Maryland. 1834

6 *G. & J.* 481

Appeal from Queen Anne's county court. This was an action of Replevin, commenced by the appellee against the appellant, on the 17th day of October, 1831, for negro boy named Bill. Issues were joined upon the pleas of non cepit, and property in defendant.

At the trial the plaintiff read to the jury a bill of sale from Charles M. Stevenson to Mary Ann Burgess, daughter of George B. and Isabella Burgess, dated February 20, 1817, of a negro woman named Rhoda, and a boy Bill, the subject of the present action.

The cause was argued before Stephen, Archer, and Dorsey, JJ.

Spencer, for the appellant. *Wm. Carmichael* for the appellee. . . .

Dorsey, J., delivered the opinion of the Court. . . . It has been contended by the appellant's counsel, that whether the subject matter of a cross-examination has any relevancy or bearing upon the issues made up in the cause, or has any immediate connection with, or pertinence to, any material testimony offered in relation to such issues, is wholly immaterial; that in a cross-examination for the purpose of impeaching the testimony of a witness, or involving him in contradictions, or showing his

ignorance, or the inaccuracy of his memory, he may be interrogated as to any thing and every thing, without reference to its relevancy to the issues which by the pleadings in the cause have been submitted to the jury.

To such an unreasonable, pernicious, and latitudinarian principle, this Court can never yield its sanction. . . .

Having disposed of the question, as far as regards the abstract power of the appellant, in the cross-examination of the witness, let us now apply the principles of our decision to test the accuracy of the Court's opinion in the first bill of exceptions. The witness, Thomas Thomas, in his examination in chief, had testified that he knew Rhoda, the mother of Bill, in 1817, when she lived with George B. Burgess; that his father at the time of his death lived on the farm of Mary Burgess, who was a lunatic, and for whom George B. Burgess was trustee; that the witness, in December, 1817, went to the house of George B. Burgess, who then resided in Church Hill, to settle with Burgess for the rent of the farm, and that while there, he was carried by Burgess into the kitchen, where he saw Rhoda's child, then an infant, of but a few weeks old; that he took out letters of administration on the estate of his father, James Thomas, in June, 1817, and that he did not go to settle with Burgess until after he had taken out letters. And the witness, on being cross-examined, stated that he did not apply to Burgess to know the state of his father's accounts before the date of his letters; that he knew the state of his accounts; that his father was indebted to Burgess for a store account, and for the hire of a negro, and for a store; besides a balance of the rent. That the rent was not settled between him and Burgess; they having differed, the subject was referred, and was before arbitrators two years or more; and that he had never charged his father's estate for the rent, in any account passed by him with the Orphan's court. The plaintiff then produced the letters of administration, dated June 1, 1817.

All this testimony, with the other proof set forth in the bill of exceptions, being before the jury, without objection by either party, the defendant offered to read in evidence the account passed by the witness, and the co-administratrix of his father, before the Orphan's court in June, 1818, containing among other credits the following: "for cash due from said deceased to George B. Burgess, trustee of Mary Burgess, and paid by these accountants, as per account proved, and receipt allowed $226.74:" declaring the object of the testimony then offered, to be, to contradict Thomas Thomas, and impeach the accuracy of his recollection in regard to the passing an account for rent and as to the time expended in investigating the claim before arbitrators; but the Court refused to permit the said accounts being laid before the jury for the purpose for which the same was offered.

As to the correctness of this refusal, we fully concur in opinion with the County Court. The testimony which had been offered on the cross-examination, unless subsequently made competent by the production

of the account for a legitimate purpose, was wholly irrelevant and immaterial to the issues in the cause. If the purpose for which the account was offered, was effectuated — if the facts which it was designed to prove were established or admitted — the evidence given on the cross-examination was still left wholly irrelevant, impertinent to the issues, and every material fact proved in relation to them; and being so, no testimony contradictory thereof was admissible to impeach the credit of the witness or show the inaccuracy of his memory. For the purpose, then, for which the account was offered in evidence, we think it clearly inadmissible, and approve of its rejection as made by the County Court. . . .

In the Court's rejection of the account, they do not declare it admissible evidence for no purpose, but simply that it was inadmissible for the purpose for which it was offered. It was still open to the appellant to offer it as evidence for any other purpose, for which it was legally competent. Had the defendant offered the account in evidence generally, without specifying his object, or had stated it to be to contradict or discredit the testimony of the witness given on his examination in chief, in relation to his statement of having seen Rhoda's child, a few weeks old in December, 1817, upon the principles settled by this Court in Davis et al. *v.* Barney, 2 Gill and Johns. 382, . . . there could not have been a doubt as to its legal admissibility. Connecting it with the proof offered on the cross-examination, it was testimony legally sufficient to have been submitted to the consideration of the jury. . . . The witness, on his examination in chief, had proved that in December, 1817, (after the granting of his letters of administration in the June preceding) he had called on George B. Burgess to settle the rent, and saw there Rhoda's child, Bill (the negro in controversy), then but a few weeks old; and on his cross-examination he deposed, that the rent was not settled between him and Burgess; but that having differed as to the rent, it was referred to arbitrators, and remained before them *two years or more*. The account passed by the Orphan's court is evidence, that the witness paid the rent anterior to June 18, 1818. All the statements of the witness, therefore, cannot possibly be true. A part of the testimony elicited by the cross-examination was in direct collision with that given on the examination in chief: both could not stand together. It could not be true, that the controversy about the rent was two or more years before the arbitrators, if the reference had been made as stated by the witness. Which statement was true, the jury only was competent to decide. Should they have believed that the subject of the rent was before the arbitrators two or more years, it was within the scope of their powers to conclude that the reference, though continued afterwards, commenced in the lifetime of James Thomas; and that the witness was mistaken in dating his visit to George B. Burgess' house in December, 1817; that in truth it occurred in December, 1816. . . .

Concurring in opinion with the County Court, on both bills of exception, we affirm the judgment. Judgment affirmed.

669. PEGG *v.* WARFORD

COURT OF APPEALS OF MARYLAND. 1855

7 *Md.* 582, 607

APPEAL from the Circuit Court for Baltimore county.

This was a case of issues from the Orphan's court, to try the validity of two wills executed by Rachel Colvin, deceased, the one on the 30th of October, 1845, and the other on the 6th of April, 1848. . . . These issues were. . . . Whether the paper of the 6th of April, 1848, was . . . executed by her under the influence of suggestions and importunities of some person or persons, when her mind, from its diseased or enfeebled state, was unable to resist the same? . . .

The caveatee, upon the cross-examination of St. George W. Teackle, a witness produced by the caveators, proved that he (witness) endeavored to get the testatrix, Rachel Colvin, to insert in the will of 1845 the name of Mrs. Mary Ann Ellicott, as a devisee, but the said testatrix refused, upon the ground that Mrs. Ellicott was the only child of a rich father. . . . The caveators then proved by Mrs. Ellicott, a competent witness, that in the year 1847, and in the fall of that year, the defendant, Colvin Warford, called upon her, and in the course of conversation during his visit, asked her if she knew how much her father was worth? to which she replied, "I do not." That Colvin Warford then said he had been to New Jersey, and would tell her how much he was worth, and that he was worth $100,000. . . . The caveatee then offered to examine Mr. Shrope as a witness, and having called him to the stand, he was objected to by the caveator's counsel, and the counsel for the caveatee being asked what they offered to prove by said witness, said, that they offered said witness for the purpose of contradicting Mrs. Ellicott, or impeaching her, by showing that she was mistaken as to the time of said conversation, if any was had, or that the statement of said Warford in said conversation, if it was had, was true. The caveatee then proved by said Shrope that he was one of the assessors of one of the townships of Hunterdon county, New Jersey, where Elisha Warford, the father of Mrs. Ellicott, resided. . . . That in 1852, Colvin Warford called upon him to ascertain what was the amount and value of Elisha Warford's estate, that Elisha Warford was going security upon a bond in Maryland; that witness showed to Colvin Warford the assessment of Elisha Warford's estate, which was $10,000 worth of real estate, and that he owned lands in other places. . . .

To the admissibility of all which testimony of said Shrope, for the purpose for which it was offered, the counsel for the caveators objected, but the Court overruled their objection, and permitted the evidence to go to the jury. To this ruling the caveators excepted. . . .

The verdict was in favor of the caveatee upon all the issues, and the caveators appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and MASON, JJ.

Henry Winter Davis, Grafton L. Dulany, and *John Johnson,* for the appellants. . . . The second exception relates to the admissibility of the testimony of Shrope for the purposes for which it was offered. When Shrope was called as a witness and was objected to, and the counsel for the caveatee were requested to state for what purpose they offered him, they said that they offered him for the purpose of contradicting Mrs. Ellicott, or impeaching her by showing that she was mistaken as to the time of said conversation if any was had, or that the statement of Warford in said conversation, if it was had, *was true.* Now these *purposes* being legitimate we could make no further objection until the testimony was in. When the testimony was given, we then objected that it did not come up to the purposes for which it was offered, and insisted that it was the duty of the Court below to have it ruled out. Now we say:

1st. That this testimony was inadmissible and utterly incompetent to sustain *any one* of the purposes for which it was offered. . . .

2d. But conceding the evidence of Shrope was admissible for one or two of the three purposes for which it was offered and admitted by the Court, we still ask for a reversal of the judgment, if for the *remaining purpose* for which it was offered and let in the proof was not admissible. The purposes were stated in the alternative, and therefore unless the appellee was entitled to the benefit of the proof in support of each and every alternative, he has by the judgment of the Court below obtained an advantage to which he is not entitled. We say that unless it was admissible to establish *each one and all of the purposes* for which it was offered, the testimony should have been excluded.

William Schley and *Reverdy Johnson,* for the appellee. . . . The only issue to which the evidence of Mrs. Ellicott had any application, was the *second,* and the object was to show by it that Miss Colvin was so influenced by the suggestion of the appellee that Elisha Warford was worth $100,000, that no legacy was given to Mrs. Ellicott, the only child of Elisha Warford. It was therefore important that the appellee should contradict this testimony, so far as was in his power. . . . The evidence was properly admitted for what it was worth for the consideration of the jury. . . .

Now what is the meaning of the objection? It is said, that if this testimony was not admissible for *any one* of the purposes for which it was offered, it was improper to admit it. But this is an entire misapprehension of the law. . . . The objection was a *general one,* that the testimony was not admissible for the purposes for which it was offered. . . . If admissible for any of the purposes offered, it was properly admitted. . . . The exception was to *all* the testimony of Shrope, for the purpose

for which it was offered. If *any part* was admissible, the exception pro tanto was too broad. . . .

Our positions therefore, upon this exception, are:

1st. That the evidence of Shrope was admissible for the purpose of showing (should it avail with the other evidence in the case,) that Mrs. Ellicott was mistaken as *to the time* of the alleged conversation with the appellee.

2d. That it was admissible for the purpose of showing that the representation, if made by the appellee, as to the pecuniary condition of Elisha Warford, *was true*, and was not a *misrepresentation*. . . .

3rd. That proof of the *fact* that the appellee never applied but once, and in 1852, to Shrope for information as to the pecuniary condition of Elisha Warford, was a circumstance which . . . the caveatee was entitled to have submitted to the jury as part of his *rebutting* evidence. . . .

4th. That it was admissible for *all the purposes* specified respectively in the preceding points.

5th. That if admissible *for any* of these purposes, this second exception is not well taken.

6th. That if any *part* of this evidence was admissible for any one of the purposes indicated, the *exception* being taken to the *whole*, cannot be sustained. . . .

Mason, J., delivered the opinion of the Court. . . . The second exception relates to the testimony of the witness Shrope. When the caveatee proposed to examine this witness, he was objected to by the other side, but the record does not disclose upon what ground the objection then rested. Such an objection, at such a time, must go to the competency of the witness, and not to the admissibility of his testimony, for until the evidence is offered, no question of admissibility could arise. The legal presumption being in favor of the competency of every witness produced on the stand, no objection to the competency of such witness should be entertained, unless the party making it discloses at the time the ground upon which the objection is based. A mere general, indefinite objection will not avail. Hence the objection in this case, to Shrope, was improperly made, and the caveatee was not bound to state any special purpose for which he was offered, or to show, until the contrary was at least prima facie established, that the party was a competent and legal witness. The facts to be disclosed by this witness, if admissible for any purpose, might have been offered *generally*, as all legal and pertinent evidence for the most part may be offered. Goodhand *v.* Benton, 6 Gill & John., 488 [*ante*, No. 668].

But the caveatee did not avail himself of his legal rights in this particular, but proceeded to assign three several objects in the alternative, for which the evidence was offered, each of which, in the then aspect of the case, was a legitimate subject of proof. By the case of Goodhand *v.* Benton, [*ante*, No. 668], it may be regarded as settled, that if evidence offered for a particular purpose, be inadmissible for that purpose, though

admissible generally, or for some other object, it may be properly rejected. Acknowledging this principle to be sound, it would follow, that if the evidence of Shrope had been admissible *for all* the special objects for which it was tendered, though perchance it might be legal evidence for some other purpose, it should have been rejected; and the appellants contend that the principle should be carried to the extent of determining that unless admissible for *each and all* the several purposes for which it was offered, it should not have been received, and this is the main point involved in this exception.

The testimony of Shrope, if applicable at all to the issues in the case, might have been offered *generally*, as we have already shown. If it were competent testimony for any purpose, it must be presumed to have been for one or the other of the subjects for which it was alleged to be offered; at least no attempt was made to use it for any other. If it could have been offered for *no other purpose*, does it not follow that the offer was virtually a *general offer*, even though, in point of fact, the testimony may not have been legally applicable to all of the points to which it was declared to relate? If there be any reason why the omission to mention *all the purposes* for which the testimony might be applicable, when you have attempted to name some, would be fatal to its admissibility for the purposes not mentioned, it must be because the opposite party might be thereby misled, and prevented from fortifying himself with rebutting testimony upon the point, in reference to which he may have been led to believe the testimony was not to be used. While the omission to mention all the purposes to which this testimony might relate, might have such an effect, it is difficult to imagine why such a result, or why any other inconvenience could follow from enumerating among the proper purposes for which testimony was offered, others for which it was not. The question resolves itself then into this, was the testimony admissible for *any* of the purposes for which it was offered?

An attempt had been made on the part of the caveators to show, by Mrs. Ellicott, that Miss Colvin, the testatrix, had been deceived by false representations made by Colvin Warford, as to the pecuniary condition of Elisha Warford, the father of Mrs. Ellicott, by which the latter lost a legacy which she supposes she would otherwise have received. It is said he represented Elisha Warford to Miss Colvin as being worth $100,000. If this were a fact, or if he honestly believed it to be a fact, there was no impropriety in Warford's having mentioned it to Miss Colvin, let his motive for doing so be what it may. The caveatee offered Shrope, at this juncture of the case, as he stated, "for the purpose of contradicting Mrs. Ellicott, or impeaching her, by showing that she was mistaken as to the time of said conversation, if any was had, or that the statement of said Warford, in said conversation, if it was had, was true." . . .

One of the purposes, then, assigned for offering this testimony, was to show that this statement of Warford was made in good faith. The

issue thus collaterally arising was simply, Was or was not the statement true, that Elisha Warford was worth $100,000? . . . Shrope surely proved a material part of that sum, and his testimony was therefore clearly admissible. . . .

But it has been said, that as this evidence was received for all or either of the three purposes for which it was offered, unless it was legally applicable to each, the jury might have been misled, and applied it to one of the purposes to which it did not relate. To avoid such a result, it was the duty of the counsel objecting to have pointed out specifically the purpose to which the testimony had no legal application, and to ask its exclusion for such purpose. A general objection to testimony which is per se applicable to the case for any purpose will not be sustained, though inapplicable for other purposes; and such general objection would leave the testimony to go to the jury as if no objection had been made at all; in other words, it would be virtually an offer *generally* of competent testimony. Under such circumstances, suppose, in argument before the jury in this case, the counsel for the appellee had endeavored to show that besides the testimony's tending to establish that the statement of Warford was true, it also contradicted the previous statements of Mrs. Ellicott, when, in fact, if it had been offered solely for the latter purpose, it would have been rejected as illegal evidence, what would have been the effect? Could the judgment have been reversed upon the assumption that the jury made an improper, instead of a proper application of the evidence? Surely not! We must assume, where evidence has been offered generally, that it will be applied by the jury to the purposes to which it is legally applicable; and if counsel wish to guard against the contingency of a misapplication of the evidence by the jury, they should ask the Court, as has been already said, to point out the branch of the case to which the evidence is not to be applied. . . .

As to the sufficiency of this evidence to establish the fact, we say nothing; it was for the jury alone, upon a properly framed prayer, to say whether the issue was proved or not. . . .

Judgment affirmed.

ECCLESTON, J., dissented.

670. BALL *v.* UNITED STATES. (United States Circuit Court of Appeals. 1906. 147 Fed. 32, 38.) GILBERT, J.: . . . The trial Court, over the objection of the plaintiff in error, admitted the record of the District Court of the United States for the Northern District of California of the conviction of the plaintiff in error of said offence. . . .

It is contended that the failure of the trial Court to instruct the jury that the evidence of the prior conviction of the plaintiff in error was to be considered only as tending to affect the credibility of his testimony was error. There was no request for such an instruction, nor was any objection made to the omission of the Court so to instruct, nor is the failure of the Court so to instruct assigned as error. In Kentucky, Tennessee, and Missouri it is held, contrary to the general rule, that in criminal cases the omission of the Court to charge the jury

fully as to any branch of the law of the case, though not requested, is ground for reversal, unless it is clear that no injury could have resulted therefrom. . . . But we think it may be said to be the general rule that the mere omission of the Court, in the absence of a specific request, to limit the effect of evidence admitted only for a certain purpose, is not error.

Topic 2. Curative Admissibility

671. MOWRY *v.* SMITH

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1864

9 *All.* 67

TORT to recover damages for an assault and battery.

At the trial in the Superior Court, before AMES, J., the committing of an assault and battery was admitted; and the defendant, for the purpose of showing provocation, introduced evidence to show that the plaintiff had charged him with attempting to pass counterfeit $500 bills at Brighton market, to which the defendant was in the habit of going. The plaintiff denied that he had made this charge, but testified that he said to the defendant, "People do say that you show bad money;" and he was allowed to testify, under objection, that he had seen the defendant frequently show his money at Brighton; that the defendant would take it out in papers, and show it, several thousand dollars at a time.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

F. H. Dewey, (*A. Dadmun* with him,) for the defendant. *G. F. Hoar*, for the plaintiff.

BIGELOW, C. J.—We are at a loss to understand on what ground evidence was introduced at the trial of this case to show that the plaintiff had charged the defendant with passing counterfeit money. Unless this charge was made at the time the alleged assault was committed, and so formed part of the res gestæ, which does not appear by the exceptions, the evidence was clearly incompetent, even in mitigation of damages. Provocation cannot be shown unless it was so recent and immediate as to lead to the inference that the violence was committed under the direct influence of the passion wrongfully excited by the plaintiff, and before there was time for opportunity for it to cool and subside. Avery *v.* Ray, 1 Mass. 12. Lee *v.* Woolsey, 19 Johns. 319.

But the introduction of this evidence was not objected to by the plaintiff at the trial. The question then arises, how far the admission of incompetent and irrelevant evidence offered by one party, to which no objection is taken, renders it competent for the opposite party to introduce evidence of a similar character.

There certainly must be some limit beyond which parties cannot be permitted to go, in extending issues of fact and bringing into a case

matters which have no essential bearing on its real merits. Without indicating a general rule applicable to all cases of this nature, we think it may be safely said that a party should not be allowed to go farther than to prove facts which have a direct tendency to contradict and control the irrelevant or incompetent evidence which his adversary has introduced into the case. To this extent, it may be properly held that the latter has waived the strict rule of law applicable to such evidence, and is estopped from objecting to the proof of facts, by the opposite party, which can be properly deemed to be contradictory or in rebuttal of those offered by himself. It seems to us that the plaintiff was allowed to transcend this limit at the trial, in the introduction of evidence to which the defendant objected. He was not confined to disproof of the fact that he had charged the defendant with passing counterfeit money, which was the only ground of provocation which the latter had attempted to establish. The plaintiff was allowed to go much further, and to show the distinct and independent fact that the defendant had large sums of money in his possession, which he would take out in papers and show to persons about him, to the amount of several thousand dollars at a time. This was an irrelevant and immaterial fact, which not only had no bearing on the true issue between the parties, but did not tend to contradict or control the evidence which the defendant had introduced in mitigation of damages.

The plaintiff's counsel suggests that the evidence to which objection was taken could have no tendency to injure the defendant, and that not being prejudiced by its admission he has no valid ground of exception. But we cannot regard the evidence in such a light. In connection with the alleged provocation and the testimony of the plaintiff that he had stated that people said that the defendant showed bad money, the evidence offered by the plaintiff was calculated to lead to the inference that the defendant was the possessor of counterfeit money, and thus to disparage his character, and create in the minds of the jury a prejudice against him. Exceptions sustained.

672. PHELPS *v.* HUNT. (1875. Connecticut. 43 Conn. 194, 199.) LOOMIS, J. — On the cross-examination the plaintiff asked the defendant what he told Goodman about a sale of his goods to one Foskett. . . . This question, being objected to by the defendant, was ruled out by the auditor. It is obvious that this whole subject matter, both of the direct and cross-examination, was wholly irrelevant, and ought not to have been entertained at all. . . .

The plaintiff seems to assume that if the cross-examination was pertinent to the examination in chief it necessarily makes the ruling erroneous. This proposition we do not accept. Where the plaintiff stands on matters "strictí juris," it must appear that the particular ruling complained of was erroneous in law. We cannot hold that it was error in law to rule out, objection being made, what it would have been error to admit, merely because the Court had received without objection matter just as irrelevant before. The maxim, "Similia similibus curantur," has been applied to some extent in the science of medicine, but the principle has never been recognized as applied to the cure of errors in law.

673. Sisler *v.* Shaffer. (1897. West Virginia. 43 W. Va. 769; 28 S. E. 721.) Dent, J.—To discredit the defendant's testimony, the Court allowed the plaintiff, over the objection of the defendant, to introduce the witnesses Lynch and Wright, who testified that about the same time the defendant had purchased separate bills of lumber of them, and that they had or were about to sue him therefor. This was not a matter material to the issue, about which the defendant ordinarily could be contradicted. His own evidence on the point was irrelevant, but, having introduced it in support of his evidence, the plaintiff had the right to contradict it. "A party who draws from his own witness irrelevant testimony, which is prejudicial to the opposing party, ought not to be heard to object to its contradiction on the ground of its irrelevancy." 29 Am. & Eng. Enc. Law, 793; State *v.* Sergent, 32 Me. 429. Strange cattle having wandered through a gap made by himself, he cannot complain.

674. State *v.* Slack. (1897. Vermont. 69 Vt. 486; 38 Atl. 311.) [Printed *ante*, as No. 234; Point 2 of the opinion.]

Topic 3. Conditional Admissibility

675. ROGERS *v.* BRENT

Supreme Court of Illinois. 1849

10 *Ill.* 573

This was an action of ejectment, and upon the trial in the circuit court the plaintiff below introduced a patent from the United States, for the premises in question, to Jesse Bowman as assignee of Samuel M. Bowman, dated on the first of May, 1843, which was followed by a deed from Jesse Bowman to Brent, dated December 1st, 1846. The plaintiff then proved the possession of the defendant, and closed his case.

The defendant then offered to prove by the register's certificate, that the land in controversy was entered at the land office by Samuel M. Bowman on the 19th of May, 1840, and that he assigned his certificate of purchase to Jesse Bowman on the 5th of April, 1843. He also offered the record of a judgment in the Lee circuit court, against Samuel M. Bowman, which was entered on the 12th day of September, 1842, upon which an execution was issued on the 28th of the same month, by virtue of which the sheriff levied on the premises in question, and advertised and sold them according to law to Southwick, who obtained a sheriff's deed on the 17th of December, 1844. As each portion of this evidence was offered it was objected to, and ruled out by the Court, and an exception taken. A verdict and judgment were entered for the plaintiff. . . .

The plaintiff in error assigned for errors the several decisions of the Circuit Court in excluding the evidence recited above.

J. O. Glover and *B. C. Cook*, for the plaintiff in error. . . .

The certificate of the Register was evidence of title in Samuel M. Bowman at the time of the sale of the land on the judgment. . . .

E. S. Leland, for the defendants in error. The certificate of the Commissioner of the General Land Office is not sufficient to prove when the certificate of entry was assigned. The certificate supposed to be assigned, or a certified copy thereof, should have been produced, in order that the Court might see whether the assignment of said certificate is valid. . . . The defendant below was not injured by the exclusion of his offered evidence, because there is no evidence in this case, nor was any offered, to connect him with Southwick's title. . . .

The opinion of the Court was delivered by

CATON, J. . . . It is first necessary to inquire what rights were acquired under the judgment and sheriff's sale and conveyance, as against the patentee and his grantee, and then whether these rights could be asserted and vindicated in this action of ejectment. . . .

Having shown in what way it was competent for Rogers to prove that he did not, in the language of the issue, "unlawfully withhold the possession," it only remains to be seen whether the evidence which he offered, and which was excluded by the Court, tended to prove such a case.

All of the interest which Samuel M. Bowman ever had in the land, whether legal or equitable, passed to Southwick by the sale under the execution and the sheriff's deed, as completely as if the transfer had been by voluntary conveyance and Southwick was as much entitled to a patent in the one case as he would have been in the other. . . . At the time of the assignment by Samuel M. Bowman, he had no interest in the premises except the right of redemption of which the assignee never availed himself, and the sheriff's deed must relate back to the time of the judgment, which was notice to all the world of everything which was legally done under it. The rights acquired by the sheriff's deed stand upon as high ground as if the Patent had been issued to Jesse Bowman without any assignment at all; for as to those rights the assignment was utterly void. The assignor had no interest which he could assign except the right of redemption, and the assignee was bound to know this. A Patent issued under a void assignment could convey no more right than one issued upon a second sale when the first was valid, and in such a case the Supreme Court of the United States has said that the Patent conveys no title.

. . . The question is, not whether the debt's offer of evidence was sufficent *of itself* to make out the defence, but would it *aid* to make out the case? Would it *tend* to prove the defence? Most cases have to be proved by a succession of distinct facts, neither of which standing alone would amount to anything, while all taken together form a connected chain and establish the issue; and from necessity a party must be allowed to present his case in such detached parts as the nature of his evidence requires. It would be no less absurd than inconvenient, when proof is offered in its proper order, of one necessary fact, to require the party to go on and offer to prove at the same time all the other necessary facts to make out the case. Such a practice would embarrass the administration of justice

and prove detrimental to the rights of parties. It may be that Rogers was bound to connect himself with Southwick's title before he could insist that the patent was void because obtained in fraud of such title; but he must first prove such title to exist before he could connect himself with it; and this he was not allowed to do. If he was bound to connect himself with Bowman's creditors, to avail himself of the fraud practiced upon them, he must first show that there were such creditors; and the judgment which proved this was ruled out by the Court. It is the right of the party, when he offers evidence in its proper order which proves or tends to prove any necessary fact in the case, to have it go to the jury; for the reasonable presumption is that it will be followed by such other proof as is necessary for its proper connection, and if it is not, it then becomes irrelevant, and as such, if desired, may be withdrawn from the jury. If there is anything to induce the suspicion that the time of the Court is being trifled with, it may be proper to call upon counsel to state the connection which they expect to give the proposed evidence; but this should ordinarily be avoided, as it is often embarrassing for counsel to anticipate their case in the presence of the opposite party.

It may sometimes happen that evidence is offered so out of its proper place as to authorize the Court to exclude it for want of a proper foundation; as, in this case, had the sheriff's deed been offered without the previous proceedings, it might have been properly excluded till the proper foundation for it was shown. No such objection, however, existed in this case. The party commenced at the foundation of his case, and offered to establish the first necessary fact; and, when that was ruled out, he still persisted in offering to prove subsequent parts of his case dependent upon those previously offered and rejected, till his repeated offers had almost the appearance of wrestling with the opinion of the Court. He proceeded as far as duty or propriety required; for it was apparent then, as it is now, that the evidence was ruled out because it was the opinion of the Court that it was not competent to defeat the Patent, by the case which the evidence tended to show, and not because the party did not propose evidence enough. Nor has it been insisted here that the evidence was ruled out because Rogers did not offer to connect himself with Southwick's title, but the whole effort has been to sustain the decision upon the other ground.

We are of opinion that the Court erred in rejecting the evidence offered, and for that reason the judgment is reversed with costs, and the cause remanded. Judgment reversed.

676. Campau *v.* Dewey. (1861. Michigan. 9 Mich. 381, 422.) Christiancy, J. — On the direct examination, it is true, if the relevancy of a proposed inquiry does not appear, the Court have a right to call on the counsel to state the object of the proposed testimony and the manner in which it is to be made relevant; and the Court may in the exercise of its discretion require a particular statement of the substance of the evidence in connection with which the proposed inquiry is to be rendered pertinent, and, if refused, may reject the evidence. . . .

But on a *cross-examination* the rule as to relevancy is not so strict; and it would be a very unsafe rule which should allow the Court to reject evidence, which may in any manner be rendered material, because the party proposing it has not volunteered to precede it with a statement of its precise object and of the other facts in connection with which it is to be rendered material. The Court may doubtless, in its discretion, when a question is asked on cross-examination which he thinks cannot be rendered pertinent, require an intimation of its object, and reject the evidence if not given. But this is a discretion which should be very sparingly exercised, and nothing further than a bare intimation should generally be required; for, in many cases, to state the precise object of a cross-examination would be to defeat it.

677. PARNELL COMMISSION'S PROCEEDINGS. (1888. London. 33d day, Times' Rep. pt. 9, p. 104.) [The Irish Land League and its leaders being charged with complicity in crime, the doings and admissions of various known criminals were offered, with the purpose of connecting with them the League leaders. Sir *Richard Webster*, Attorney-General, having asked a witness what one Carey said about Egan, one of the leaders, Sir Charles Russell objected.]

Sir *R. Webster*. — I think, if your lordships trust me for a moment, you will see that it is in the interests of justice that this man should make his statement. I will undertake to connect it with Egan.

Sir *C. Russell*. — I do not think that is a reason.

President HANNEN. — Well, if the Attorney-General does not fulfil his pledge, I shall strike out what is said.

Sir *C. Russell*. — We have had so many of these pledges which have been broken.

Sir *R. Webster*. — I beg your pardon; no pledges that I have given have been broken.

Sir *C. Russell*. — Well, left unfulfilled.

Sir *R. Webster*. — Or left unfulfilled.

President HANNEN. — Counsel can only say what they anticipate will be the case; if this is not made evidence, I will strike it out.

678. ELLIS *v.* THAYER

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1903

183 *Mass.* 309; 67 *N. E.* 325

TORT by a card stripper for injuries in the defendant's mill at East Dedham, from being struck by a loose pulley alleged to have come off a shaft owing to a screw not being tightened properly. Writ dated March 16, 1901. In the Superior Court the case was tried before MASON, C. J. The jury returned a verdict for the plaintiff in the sum of $1,200; and the defendant alleged exceptions.

The plaintiff while employed as a card stripper in the defendant's factory, was injured by a loose pulley which came off from a shaft and struck him. The pulley, when in use, is held in its place near the end of the shaft by an iron collar which surrounds the shaft at the end, and is fastened there by a screw which passes through the collar and engages

the shaft. There is, or should be, a small slot in the shaft to receive the screw. The evidence tended to show that this screw was not turned up to its place, and that the collar and pulley came off from the shaft because at the time there was nothing to hold them on.

The first exception relates to the admission of testimony. A witness was called to testify that once previously, about four years before this accident, the collar and pulley came off. The judge ruled, subject to the defendant's exception, that the question might be answered on the condition that, unless further evidence should be offered that the machines remained the same, the judge would order it stricken out if called to his attention, and the counsel for the defendant thereupon said, "I will call your honor's attention to it." At the close of the plaintiff's case the attention of the judge was called to the fact that the evidence had not disclosed that the machine remained unchanged, and the judge thereupon ordered the evidence stricken out. This order was made in the absence of the jury, but the judge's attention was not called to the jury's absence, and neither the counsel nor the judge referred to this evidence again until several days after the end of the trial.

S. R. Spring, (*H. R. Bygrave* with him,) for the defendant. *E. Greenhood*, for the plaintiff.

Knowlton, C. J. (after stating the case as above). The ruling excepted to was within the discretion of the judge. The meaning and effect of it was, that, for reasons satisfactory to the judge, the testimony might be heard then, with an understanding that it would not be considered as evidence unless afterwards supported by other testimony which would make it competent. Of course, testimony should not be received in this way if it is of a kind which will be likely to prejudice the jury notwithstanding that it is subsequently stricken from the case and an instruction given that they are not to consider it. But sometimes it is convenient and not harmful to receive testimony in this way, and ordinarily the decision of the presiding justice on a question of this kind should be treated as final. The ruling excepted to contemplated striking the evidence from the record in a way which would leave the case as if it never had been presented. This would involve an instruction to the jury to disregard it, unless they already understood the ruling under which it was received; and the defendant's counsel, who undertook to bring the matter to the Court's attention, must have known this. The evidence was subsequently stricken from the record at the defendant's request, and the manner of doing it probably was satisfactory to the counsel at the time. . . . Moreover, if the jury were attentive to the ruling when the testimony was received, they must have known that in the absence of additional proof, it was not to be regarded. We are of opinion that under these circumstances he should not be permitted to have the benefit of an exception founded upon the failure of the judge to instruct the jury about it, when the only exception that he took was to a matter within the discretion of the Court. . . . Exceptions overruled.

679. PUTNAM *v.* HARRIS

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1906

193 *Mass.* 58; 78 *N. E.* 747

TORT for alleged negligence in causing the burning over of a woodlot of the plaintiff in Templeton. Writ dated August 8, 1905. In the Superior Court the case was tried before PIERCE, J. . . .

The testimony was conflicting as to whether the fire which started on the defendants' land spread to the plaintiff's land and caused the damage alleged. The defendants had in their employ one McNaughton, who died about a month before the bringing of this action. . . . The plaintiff offered the testimony of Frank L. Putnam, the plaintiff's son, to a conversation between him and McNaughton on the evening of the fire, which was objected to by the defendants and was admitted by the judge against the exception of the defendants. . . . The jury returned a verdict for the plaintiff in the sum of $577.54; and the defendants alleged exceptions.

G. R. Warfield, for the defendants. *J. P. Carney*, for the plaintiff.

LORING, J. — The testimony was admitted under Rev. Laws, c. 175, § 66, and was competent against the defendants if it was shown that McNaughton had authority from them to give the directions in question. Whether evidence of the directions given should be admitted first and the authority shown later, or the evidence of the directions given should be excluded until McNaughton's authority was shown, was a matter to be decided by the presiding judge in his discretion.

It heretofore has been generally laid down that in such a case the exception will not be sustained unless it appears from the bill of exceptions that the evidence was not properly connected. Whitcher *v.* McLaughlin, 115 Mass. 167; Costello *v.* Crowell, 133 Mass. 352, where the earlier cases are collected. It is more correct to say that the exception will not be sustained unless the fact that the evidence admitted de bene had not been properly connected afterwards was brought to the attention of the Court and a further ruling on that ground asked for. The rule was so laid down in Brady *v.* Finn, 162 Mass. 260. See, also, Williams *v.* Clark, 182 Mass. 316.

But whichever is the true statement of the rule, the exception in question must be overruled. The matter was not subsequently brought to the attention of the Court either by a request to strike out the evidence admitted de bene, or by a request for a ruling that there was no evidence for the jury on this point.

TITLE II. MODE OF INTRODUCING EVIDENCE

Topic 1. The Offer

682. GOODHAND *v.* BENTON

COURT OF APPEALS OF MARYLAND. 1834

6 *G. & J.* 481

[Printed *ante*, as No. 668]

683. FARLEIGH *v.* KELLEY

SUPREME COURT OF MONTANA. 1903

28 *Mont.* 421; 72 *Pac.* 756

APPEAL from District Court, Jefferson County; HENRY C. SMITH, Judge. Petition by Caroline V. Kelley for the probate of an instrument purporting to be the last will of John D. Allport, deceased, to which Lillie Sue Farleigh and others filed objections as contestants. From a judgment for contestants, petitioner appeals. Affirmed. . . . The cause came on for trial before the Court and a jury, and, . . . the jury found against the petitioner, and declared that the instrument offered was not the will of John D. Allport. From an order overruling petitioner's motion for a new trial, this appeal is taken.

T. J. Walsh, B. H. Giles, and *Geo. F. Cowan*, for appellant. *Walsh & Newman, Robert B. Smith*, and *Chas. R. Leonard*, for respondents.

HOLLOWAY, J. . . . 5. Upon the trial the petitioner sought to prove by the witness Nichols that in May, 1899, the subscribing witness Geigerich had come to his office and handed to him the will in controversy, at the same time explaining the circumstances under which he had held possession of the document from the time of its alleged execution. The substance of Geigerich's statement to Nichols was that in October, 1895, Allport had executed the will, and gone with Geigerich to the office of the Butte Hardware Company to leave the instrument with one Kirby; that Kirby was not in, and Allport then handed it to Geigerich and asked him to deliver it to Kirby; that he (Geigerich) put the will away, and forgot about it until May, 1899, when he went to get a paper from a box in which he kept valuable papers, and discovered the will and brought it to Nichols. The offer to prove these declarations by the witness Nichols was excluded.

As we have heretofore seen, Geigerich was, to all intents and purposes, a witness in court, testifying under oath that the facts recited in the attestation clause actually occurred as therein set forth, and the reason

for the rule which now excludes these declarations made by him to Nichols is that his declarations not made under oath cannot strengthen the testimony which he has given under oath. . . . The declarations of Geigerich were hearsay, and notably so are his declarations of declarations made to him by Allport.

But it is contended that they should have been received as a part of the res gestæ. They were made nearly four years after the alleged will purports to have been executed, and cannot, therefore, be said to characterize or explain the principal fact, viz., the execution of the will. As to that, they are narrations of a past transaction, and, as such, inadmissible.

But it is contended that they characterize and tend to explain the possession of the will, and for that purpose, at least, were admissible. The evidence was offered en masse — the offer was an entirety; and along with the declarations of Geigerich, explaining his possession, were the declarations made to him by Allport, and these, as offered, were incompetent under any phase of the case. So long, then, as the offer included evidence incompetent, coupled with that which may have been competent, the Court committed no error in excluding the offer in its entirety. It was not the duty of the Court to separate the competent from the incompetent matter, and admit the one and exclude the other. It properly passed upon the order as made, and was not required to do for counsel that which he should have done for himself. Yoder *v.* Reynolds, 28 Mont. 183, 72 Pac. 417; Clark *v.* Ryan, 95 Ala. 406, 11 South. 22; Bank *v.* North, 2 S. D. 480, 51 N. W. 96; Thompson on Trials, 678. . . .

The order overruling petitioner's motion for a new trial is affirmed.

Affirmed.

MILBURN, J. — I concur, although I do not agree with Mr. Justice HOLLOWAY in all that is said in sections 5 and 6 of the opinion.

BRANTLY, C. J., concurs.

684. INDIANAPOLIS & MARTINSVILLE RAPID TRANSIT CO. *v.* HALL. (1905. Indiana. 165 Ind. 557; 76 N. E. 242.) GILLETT, C. J.: This was an action by appellee to recover for an injury to his person. . . . The record shows that appellee's counsel objected "to Dr. Hylton testifying as a witness in this case as to anything he learned, either by observation or examination, or from the statements of the plaintiff, while he was treating him as a physician." Then follows an offer to prove upon the part of appellant. The offer, as set out in the record, involves various subjects. . . . The record then shows that the Court sustained the objection of appellant, and refused to allow the witness to testify, to which ruling appellant excepted. . . .

The course pursued by appellant's counsel was objectionable in another particular, and that is that the offer to prove what was said was part of a general offer that involved an offer to introduce incompetent testimony. It is the duty of a party to select the competent from the incompetent in offering testimony, and he cannot impose this duty upon the trial Court. . . . The later decisions of this Court uphold the view that a ruling that a witness is incompetent will not excuse the making of a sufficient offer to prove. State ex rel. *v.* Cox, 155 Ind.

593, 58 N. E. 849; Toner *v.* Wagner, 158 Ind. 447, 63 N. E. 859. The rules of practice above indicated are not merely arbitrary, but they are rules which experience has demonstrated to be essential to the administration of justice. It is too much to expect that a Court, without even the aid of an apposite question, shall sift out of a long offer to prove, consisting largely of that which is incompetent, an item of proposed testimony which would only be admissible because of certain testimony which had been previously offered by the other side. The sustaining of an objection to the question in such circumstances is not error, and even the [erroneous] indicating by the Court that the witness is incompetent will not dispense with the necessity of an appropriate question and a proper offer to prove. It is only by the method of saving questions above indicated that misapprehensions can be avoided during the course of a trial, and that the Court on appeal can be advised that the ruling was made with a precise understanding of its import.

685. MARSHALL *v.* MARSHALL

SUPREME COURT OF KANSAS. 1905

71 *Kan.* 312; 80 *Pac.* 629

ERROR from Reno District Court; MATTHEW P. SIMPSON, Judge. Opinion filed April 8, 1905. Affirmed.

Isaac E. Marshall executed a deed purporting to convey a tract of land to two of his sons and the wife of a third son, but reserving a life-interest in the grantor. About two years later he began a suit to set aside the deed, alleging that his signature had been procured by the fraudulent representation, believed and relied upon by him, that the instrument contained a provision making it revocable at his pleasure. Issues were joined and tried, the testimony being largely oral. The Court found generally for the defendants and rendered judgment accordingly, which the plaintiff now seeks to have reversed. . . .

The fraudulent representations relied upon were alleged to have been made by Elmer Marshall, the husband of one of the grantees. The plaintiff testified that after the deed was made he had a conversation with Elmer about deeding back the land, but that he did not, however, talk to him anything about leaving out the condition authorizing a revocation. The question was then put: "What did you ask him?" Thereupon the defendants objected "to any conversation with Elmer after the deed was executed, as incompetent, irrelevant, and immaterial — not binding on these defendants." The objection was sustained, and the ruling was excepted to, and is now assigned as error. No further questions were asked, however, and no offer was made to explain the purpose of the inquiry already made or to show any specific fact by the witness.

Carr W. Taylor, and *J. U. Brown*, for plaintiff in error. *George A. Vandeveer*, and *F. L. Martin*, for defendants in error.

The opinion of the Court was delivered by

MASON, J. (after stating the case as above). . . . In this condition of the record the action of the Court must be regarded merely as a rejection of the very question asked. The question did not point to any matter of obvious relevancy and materiality, and in the absence of further information the trial Court could not have known that the answer sought to be elicited would be admissible. The ruling cannot be said to have been prejudicially erroneous merely because it may be possible to imagine a conversation between the witness and his son that might properly have been received in evidence.

In volume 2 of the Cyclopedia of Law and Procedure, at page 697, it is said:

"To reserve any question on the ruling of the trial Court in excluding testimony, there must be a pertinent question propounded, and, upon objection being made, a statement to the Court of the testimony which it is expected will be elicited by the question, and an exception taken to the ruling thereon."

The proposition is there somewhat too broadly stated, since the question itself may be, and often is, of such a character that in connection with the other proceedings it clearly indicates the materiality of the answer sought and renders superfluous any statement as to what it is expected to be.

On the other hand, a too narrow enunciation of the principle is made in volume 8 of the Encyclopedia of Pleading and Practice, at page 76, where it is said:

"The Court may require counsel to explain the materiality of the answer sought from a witness; and, if this be not done, the exclusion of the evidence is not available on appeal."

This language seems to imply that no statement or explanation need be made unless in response to a demand by the Court. In a doubtful case the Court may well inquire of counsel, as an aid to an intelligent ruling, the purpose of a particular line of inquiry; but it is incumbent upon the attorney conducting an examination to show affirmatively upon his own motion that the testimony he offers is material, assuming himself the risk that if he fail to do so a reviewing court can grant him no relief. As was said in Mitchell *v.* Harcourt et al., 62 Iowa, 349, 17 N. W. 581:

"The true rule, we think, is that, when it is apparent on the face of the question asked the witness what the evidence sought to be introduced is, and that it is material, this is sufficient; but when this is not apparent, then the party seeking to introduce the evidence is required to state what he expects to prove, and thus make its materiality appear." . . .

The judgment is affirmed. All the justices concurring.

Topic 2. The Objection

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

688. MARSH *v.* HAND

COURT OF APPEALS OF MARYLAND. 1871

35 *Md.* 123

APPEAL from the Superior Court of Baltimore City.

The case is sufficiently stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BRENT, ALVEY and ROBINSON, J.

Patrick M'Laughlin and *Wm. Pinkney Whyte*, for the appellants. *William A. Fisher*, for the appellee.

BARTOL, C. J., delivered the opinion of the Court. . . .

The single question presented by the first bill of exceptions, (the only one properly before us,) is whether the Court below erred in permitting to be read to the jury, as evidence on the part of the defendant, a press copy of a letter from him to the plaintiffs, dated the 25th of January 1862.

The bill of exceptions states that no notice had been given to produce the original; there was no admission or proof that the original had ever been received by the plaintiffs. It is very clear that the copy was not legal or admissible evidence.

The bill of exceptions, however, states that it was offered, and a part of it read to the jury, when the plaintiffs' counsel made their objection. The Court decided that the objection came too late; "that having allowed the first part of the letter to be read, the plaintiffs could not object to the reading of the balance, and that it was too late to object to the admission of the letter, in whole or in part." . . .

The rule is well settled, "that it is the duty of counsel, if aware of the objections to its admissibility, to object to the testimony at the time it is offered to be given," and it has been embodied among the rules of the Superior Court, as follows: Rule 34. "Every objection to the admissibility of evidence shall be made at the time such evidence is offered, or as soon thereafter as the objection to its admissibility shall have become

apparent; otherwise, the objection shall be treated as waived." This rule does not appear to us to have been infringed in this case by the appellants. It must have a reasonable interpretation. Its object is to prevent a party from knowingly withholding his objection, until he discovers the effect of the testimony, and then if it turns out to be unfavorable to interpose his objection. Such a course could not be allowed. It is very obvious from reading the bill of exceptions in this case, that such a purpose could not be justly ascribed to the plaintiffs' attorneys. There is nothing to show that they waived their objection or consented to the copy of the letter being read. It was not submitted to their inspection before it was offered, as is the usual and proper course. But it appears that in the hurry of the trial, probably from a momentary inadvertence on their part, a portion of the letter had been read to the jury, when the objection was interposed in good faith and with reasonable diligence. In our judgment it would be too strict and narrow a construction of the rule, to deny them under such circumstances, the right to make their objection.

In our opinion there was error in this ruling; the objection was made in due time, and the evidence ought to have been excluded. . . . And inasmuch as the evidence was not legally admissible and ought to have been excluded, the judgment will be reversed and a new trial ordered.

689. BURDEN OF OBJECTION AS TO TESTIMONIAL QUALIFICATIONS.[1] Experience has led to an arrangement by which the existence of the proper qualifications may in some classes of cases be assumed, until the opposing party proves or the witness betrays their absence; while in certain other classes of cases the qualifications are not assumed to exist, but must first be proved to exist by the party offering the witness. Under the former head fall, in general, the elements affecting Organic and Emotional Capacity; under the latter head, those affecting Experiential Capacity, as well as the qualification of Observation (or Knowledge); for the elements of Recollection and Narration, there is no uniform doctrine. For example, the lack of capacity by insanity or idiocy must be shown as a disqualification by the opposing party; lack of capacity by infancy must in theory also be shown by him, though the witness' age and appearance usually serve to change the burden; interest and relationship must be shown, as disqualifications, by the opposing party; while the witness' experience and perception (or, means of knowledge) must be shown, as qualifications, by the offering party.

Mode of Proof of Qualifications. Four ways are distinguishable for ascertaining the qualifications or lack of qualifications of a witness.

(1) The *behavior* of a witness, in Court during trial, or after being called to the stand but before being sworn or formally questioned, may reveal his incapacity. This, however, would in practice be an available source for the cases only of idiocy, insanity, intoxication, or extreme infancy.

(2) Before the witness is sworn as such, but after he is called and presented, a *preliminary questioning* of himself may be had, in order to ascertain by his own answers his condition as to qualifications. This questioning (known as "voir

[1] Adapted from the present Compiler's *Treatise on Evidence* (1905, Vol. I, §§ 484, 485).

dire," when applied to ascertain disqualification by interest) formed originally a distinct stage of the proceeding; and it was perhaps properly so, because the answers of a (supposedly) unqualified person could not form testimony, and because it is convenient to mark definitely the time when the stage of testimony proper begins. But in modern practice (especially under the deplorable custom of administering the oath beforehand to the witnesses in mass) the separation of the two stages is usually ignored. Moreover, in proving the qualifications of experience and knowledge, it was never practiced.

(3) Before the witness is sworn as such, but after he is called and presented, *other witnesses* may be used to evidence the facts of his incapacity. This is now unusual, since the abolition of interest is a disqualification.

(4) After the witness has been sworn, the *progress of his direct examination* or *cross-examination* may disclose his incapacity, and then he may be stopped and his preceding testimony ordered expunged; or, if merely grounds of doubt are disclosed, a questioning on voir dire, or other persons' testimony, may be resorted to.

Time of Objecting to Qualifications. Wherever a plain separation is preserved between the voir dire and the testimony proper, the rule can be strictly enforced that capacity is not to be questioned after the person is once *sworn* as a witness, except where the opposing party had *no prior notice* of the disqualifying fact, or where, having notice, he has made due objection but has been unable to prove the fact. But in a Court where the witnesses are customarily sworn as such before any opportunity for questioning is given, this rule cannot be applied. Yet its principle may be carried out by requiring the opponent to make objection and offer proof before the testimony of the witness is begun, — so far at least as the opponent then is aware of any specific ground of objection.

When the testimony is offered in the form of a *deposition*, the same general principle is applied, *i.e.*, the objection, if the facts were known, must have been made at the time of the taking of the deposition, if it could then have been of any avail. Nevertheless, since the officer taking it has no authority to exclude testimony, in some classes of evidence the objection would be at that time without practical consequences, and hence there is no harm in permitting certain questions to be raised at the trial for the first time, provided the party offering the deposition has not been put in an inconvenient position for lack of the prior objection.

690. ALBERS COMMISSION CO. *v.* SESSEL

SUPREME COURT OF ILLINOIS. 1901

193 *Ill.* 153; 61 *N. E.* 1057

APPEAL from the Appellate Court for the Third District; — heard in that court on appeal from the Circuit Court of Macoupin county; the Hon. ROBERT B. SHIRLEY, Judge, presiding.

This litigation arose in the county court of Macoupin county on a claim filed by appellant against the appellee, as executor of Peter J. Hendgen, deceased. The claim was in the form of an account for moneys advanced and commissions earned in the purchase and sale of grain by plaintiff. . . . The only evidence offered in support of the claim in the Circuit Court was in depositions. C. H. Albers, president of the claimant

company, a corporation organized under the laws of the State of Missouri, and a stockholder in that company, testified. . . . The book-keeper of the claimant company, also a stockholder in the company, in his deposition testified to substantially the same facts and to conversations or statements made by the deceased during his lifetime; also the deposition of a salesman of the corporation, William P. Hazard, likewise a stockholder in the company.

These depositions were taken in the city of St. Louis some time prior to the hearing upon the claim in the County Court, counsel for the executor being then present but making no objection to the competency of the testimony. Upon the trial in the Circuit Court, upon the offer of the claimant to introduce those depositions, appellee objected upon the ground that each of said witnesses was incompetent to testify in the cause because each was a stockholder of the claimant corporation and defendant was executor of the last will of the deceased, Hendgen. But the Court overruled the objection and permitted the depositions to be read to the jury.

Joseph S. Laurie, for appellant. *E. W. Hayes*, and *Bell & Burton*, for appellee.

Mr. Chief Justice WILKIN (after stating the case as above) delivered the opinion of the Court. . . .

It is conceded by the parties that neither of the above named witnesses was competent to testify in this case, and that the admission of their testimony would have been reversible error, but for the fact, as is claimed, that the objection was waived by a failure to urge it upon the taking of the depositions, and in support of this contention Moshier *v.* Knox College, 32 Ill. 155, Frink *v.* McClung, 4 Gilm. 569, Kelsey *v.* Snyder, 118 Ill. 544, Cassing *v.* Mortimer, 80 id. 602, and Cooke *v.* Orne, 37 id. 186, are relied upon.

It will be found, however, upon an examination of these cases, that the last two are not in point, and that in the first two the question arose between living parties as to a common law incompetency of the witnesses, which could have been removed by other evidence, or by the act of the witness releasing his interest. Kelsey *v.* Snyder was a bill against the administrator of an estate and the heirs of the intestate to declare and enforce a resulting trust in the deceased, and it was there held that the complainant was not competent to testify in her own behalf as to transactions and conversations with the deceased in his lifetime. We there said (p. 549): . . .

"Counsel contends that the objection should have been taken at the time of the taking of the depositions and that it was too late to urge it for the first time on the trial in the Circuit Court, and in support of this he cites Frink *v.* McClung, 4 Gilm. 569, Goodrich *v.* Hanson, 33 Ill. 498, and Warren *v.* Warren, 105 *ibid.* 568. The objection to a witness on account of interest might at common law be obviated upon the trial by the execution of an instrument having the effect to release that interest, and hence it was required, as held in the cases cited, that

an objection on account of interest should be made at the earliest opportunity, so that the party calling the witness might have time, if possible, to obviate the objection by release or otherwise. In Warren *v.* Warren no objection was taken on the hearing; but this rule did not apply as to objections that were incurable, as, for instance, that the evidence was irrelevant. (Lockwood *v.* Mills, 39 Ill. 602.) And the philosophy of the rule is stated in Clauser *v.* Stone, 29 Ill. 114." . . .

These witnesses were absolutely disqualified to testify to the facts sworn to by them, and the objection to their depositions was in apt time at the trial of the case. . . . No hardship would have resulted to the claimant if the objection had been sustained, — first, because the incompetency of the witness was absolute and could not have been removed; and second, if it could be said to have been taken by surprise in not having an opportunity to procure other competent evidence of its claim, it could have asked, and upon a proper showing obtained, a continuance of the case to enable it to produce, upon the final hearing, other competent testimony.

The trial Court erred in holding that the objection came too late. . . .

The judgment of the Appellate Court will accordingly be affirmed.

Judgment affirmed.

Mr. Justice CARTWRIGHT, dissenting.

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691. RUSH *v.* FRENCH. (1874. Arizona. 1 Ariz. 99, 123; 25 Pac. 816.) DUNNE, C. J. — A party wishing the benefit of the remedy must, at the time he complains, show how he is hurt; in the language of the old authorities, he must lay his finger upon the point of objection. . . . He must not merely complain in a general way, and say that to let certain evidence in will hurt his case, and that under the law it ought to be excluded, and leave the judge and opposite side in the dark as to what principle of law he relies on, and compel them to decide haphazard, or else stop the trial of the cause, with a jury waiting, while the counsel examine the whole body of the law, from the earliest judicial expositions down to the latest act of the legislature, to see if they can discover any valid objection, to the testimony. The opposing counsel can make no reply to a general objection, except to throw the whole responsibility upon the judge at once, or else begin systematically and argue that under any possible objection the testimony should come in. Many trials under such a system would practically never end. The effect of it would be to compel one party to fight in the dark, not knowing when his opponent intended to strike, while the other would be free to choose his weapons, and the time and place to use them. Such things may do in love or war, when all things are said to be fair; but life is too short to transact business on such a system in Courts of justice. . . . An objection that the testimony is "irrelevant" without specifying wherein or how or why it is irrelevant will not be considered in the Supreme Court as raising any issue, if the testimony could, under any possible circumstances, have been relevant. An objection that the testimony is "inadmissible" may be disregarded; it amounts to no more than the assertion that the evidence is illegal; the objection should fully and specifically point out how it is inadmissible. When an objection is that the evidence offered

is "incompetent and illegal," it is the duty of the Court to overrule it if the evidence was admissible for any purpose. An objection that evidence is "incompetent" does not raise any issue as to whether the question is leading or not. The only way to raise such an issue is to object specifically that the question is leading. . . .

The object of requiring the grounds of objection to be stated, which may seem to be a technicality, is really to avoid technicalities and prevent delay in the administration of justice. When evidence is offered to which there is some objection, substantial justice requires that the objection be specified, so that the party offering the evidence can remove it, if possible, and let the case be tried on its merits. If it is objected that the question is leading, the form may be changed; if that the evidence is irrelevant, the relevancy may be shown; if that it is incompetent, the incompetency may be removed; if that it is immaterial, its materiality may be established; if to the order of introduction, it may be withdrawn and offered at another time, — and thus appeals could often be saved, delays avoided, and substantial justice administered.

692. RINDSKOFF *v.* MALONE

SUPREME COURT OF IOWA. 1859

9 *Ia.* 541

APPEAL from Lucas District Court. Tuesday, November 1.

Defendants are the makers and endorsers of a negotiable promissory note. To charge the endorsers, plaintiffs offered in evidence the note and the protest of the notary, showing demand and notice as required by law. "Which (in the language of the bill of exceptions) was the only evidence offered by either party, and the defendant objected to the introduction of said note and protest, which was overruled; the same was received by the Court as evidence, and at the same time defendant (Malone) objected to judgment being rendered against him, and thereupon the Court rendered judgment against all of said defendants." Malone is the payee and endorser of the note, and appeals.

T. B. Perry, for the appellant, cited Code of 1851, §§ 82, 83, 24, 14. . . .

C. C. Cole, with *Baker & Edwards*, for the appellee, contended that where objection is made to the introduction of evidence in the District Court, it is necessary that the party objecting should state the ground of his objection, so as to afford the opposite party an opportunity to remedy the defect, or this Court will not reverse on any ground not thus taken or assigned. . . .

WRIGHT, C. J. — The only question in this case is, whether the protest of the notary was, under the circumstances, disclosed by the record, properly received in evidence. The objection made to it now is, that it had no seal. That this was requisite we entertain no doubt. (Code, §§ 244, 82, 83.)

But is appellant in a position in this Court to make this objection? It will be observed that the record simply shows that he "objected to the

introduction of said note and protest." But why, or upon what ground, is not stated and nowhere appears. Neither was there any motion for a new trial, or any other step taken to call the attention of the Court to this or any other defect in the protest, or variance in the note. In our opinion under these circumstances, the objection cannot avail.

The degree of particularity required in pointing out objections to the testimony, when offered, must depend very much upon the kind of testimony, and the circumstances and attitude of the case. Thus, if it was proposed to prove by parol, a contract which was not performed within one year from the making of the same, it might be sufficient for the record to show that the complaining party objected *generally* to the competency of such proof, for in such a case the mind of the opposite party and the Court would be directed unerringly to the very point raised. So if the wife should be offered as a witness for the husband in a civil case, or a party to the action should offer himself, the opposite party need show no more than that he objected to the introduction of said witnesses and their testimony. But when the testimony offered is apparently of a *kind* that is admissible to prove a particular fact or thing, then a general objection should be held to raise the question only of its competency as a *kind*, and not the technical sufficiency or competency of the particular instrument relied upon. And especially is this true where no such motion for a new trial is made, or objection urged to the sufficiency of the testimony to sustain the judgment.

Now in this case it is claimed, and is true, that the notary had omitted to affix his seal to the protest. In every other respect it is complete and formal. If this objection had been made, it must have availed to exclude the testimony. But if made, the defect might possibly have been cured at once, and in this fact consists the strong reason for requiring the objections in such cases to be specific. The notary would have had the right at the time to affix his seal, and thus every difficulty would have been obviated.

We would not hold parties to a rule too strict in this respect, but we do think some degree of particularity is required. Thus if it had been objected that the protest was not properly authenticated, that it was not properly signed and sealed, we say if the bill of exceptions showed anything of this nature, we should be inclined to give appellant the benefit of any defect in the instrument which would fairly range itself under such objections. Not so, however, when the objection is so general and pointless as in this instance. Thompson *v.* Blanchard, 2 Iowa 44; Danforth, Davis & Co. *v.* Carter & May, 1 Ib. 552; Patterson *v.* Stiles, 6 Ib. 54; State *v.* Wilson, 8 Ib. 407. Judgment affirmed.

693. TOOLEY *v.* BACON

COURT OF APPEALS OF NEW YORK. 1877

70 *N. Y.* 34

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of defendant, entered upon the report of a referee. This was an action for money alleged to have been paid and received by Charles C. Bacon, plaintiff's intestate. The answer alleged in substance that all moneys or property which came into the hands of said intestate, belonging to plaintiff, were transferred by the latter with intent to hinder, delay and defraud his creditors. . . .

It was alleged in the answer that the plaintiff placed the funds and property in controversy in the hands of the intestate for the purpose of delaying and defrauding his creditors. After the defendant had given some evidence tending to sustain this defence, the plaintiff, as a witness in his own behalf, was asked if he had put the property in the hands of the intestate for the purpose and with the intent to delay or defraud his creditors. Counsel for plaintiff objected to the question, and the referee sustained the objection. No ground of objection was specified, but the course of the examination was such that it must have been understood that the objection was to the competency of the plaintiff to answer the question under § 399 of the Code, Bacon being dead.

Z. M. Knowles, for the appellant. The evidence offered upon the question of the intent, with which the transfer was made, was competent, and erroneously excluded. . . .

E. H. Lamb, for the respondent. . . .

EARL, J. (after stating the case as above). . . . That no ground was specified is immaterial now. When evidence is *excluded* upon a mere *general* objection, the ruling will be upheld, if *any* ground in fact existed for the exclusion. It will be assumed, in the absence of any request by the opposing party or the Court to make the objection definite, that it was understood, and that the ruling was placed upon the right ground. If in such a case a ground of objection be specified, the ruling must be sustained upon that ground, unless the evidence excluded was in no aspect of the case competent, or could not be made so. But where there is a *general* objection to evidence and it is *overruled*, and the evidence is received, the ruling will not be held erroneous unless there be some ground which could not have been obviated if it had been specified, or unless the evidence in its essential nature be incompetent. (Levin *v.* Russell, 42 N. Y. 251; Williams *v.* Sargeant, 46 N. Y. 481.)

We are of opinion that the ruling was right. The plaintiff could not be examined as a witness "in regard to any personal transaction or communication" between him and Bacon. The placing of property in

the hands of Bacon was a personal transaction with him, and the intent with which it was done accompanied and characterized the transaction and was an element thereof. . . . When death has sealed the lips of one party the law should seal the lips of the other. . . .

The question, "Did you say to your counsel that you never gave any mortgage to Bacon?" put to plaintiff upon his cross-examination, was not objected to on the ground that it called for a privileged communication, and no material evidence was elicited in answer thereto. . . .

All concur, except CHURCH, Ch. J., and ANDREWS, J., who dissent, on the ground of the exclusion of evidence of plaintiff's intent in the transfer, holding that the question should have been answered.

RAPALLO, J., absent. Judgment affirmed.

694. WOLVERTON *v.* COMMONWEALTH

SUPREME COURT OF PENNSYLVANIA. 1821

7 *S. & R.* 273

ERROR to the Court of Common Pleas of Erie county.

This was a scire facias on a recognisance in the sum of $5000, . . . conditioned that Wolverton would perform the office of sheriff for the county of Erie, for the next three years. The scire facias was for the use of Eli Hart and John Lay, trading under the firm of Hart & Co., and was returnable to December Term, 1817; it alleged, generally, a breach of the condition, . . . setting out a particular breach, that on the first of May, 1817, a certain Edwin Forbes was committed to the jail of the county, and in the custody of the said sheriff, by virtue of an execution issued by George Moore, a justice of the peace, at the suit of Hart & Co., for $117.77, on a judgment obtained by confession, pursuant to the Act of Assembly, and that the sheriff suffered Forbes to escape and go at large. . . .

The plaintiff also offered parol evidence of the existence of an execution against Forbes, "having first given notice to the defendants to produce the said execution; the admission of which said testimony was then and there objected to by the counsel of the defendants, on the ground that a record could not be proved by parol evidence." This objection was overruled by the Court, and the testimony admitted, and an exception taken by the defendants. . . .

The jury found a verdict for the plaintiffs for the amount due to them by Forbes, for which judgment was entered.

This case was argued at the former term, and again at this term, by *Foster*, for the plaintiffs in error, and *Baldwin*, for the defendants in error.

GIBSON, J., delivered the opinion of the Court on all the points but one. TILGHMAN, C. J., having been absent at the argument, and a

difference of opinion having arisen between GIBSON, J., and DUNCAN, J., on that point, it was re-argued at this term, before all the judges.

GIBSON, J. . . . The plaintiffs further offered parol evidence of the contents of the execution, on which Forbes (for whose escape the suit was brought) was committed; "having first given notice to the defendants to produce the said execution; the admission of which testimony was then and there objected to by the counsel of the defendants, on the ground that a record could not be proved by parol evidence." The objection in this Court is, that parol evidence was inadmissible, before the execution was shown to have come to the defendants' possession, or to be lost or destroyed.

And I at once admit that if it had been put on that ground at the trial, it ought to have prevailed. But I apprehend there has been a total change of position, since the cause came here. The argument that, to avoid the operation of the rule which excludes parol evidence of the contents of a paper, it was incumbent on the plaintiffs to bring the case within one of the exceptions to it, and that until they did so the objection on general grounds was unremoved, is ingenious, but easily shown to be unsound. . . .

I take it to be an inflexible rule, and one of the utmost value, both in pleading and evidence, that whatever is not denied or made special ground of objection is conceded. Thus, if a party being called on for that purpose opens the particular view with which he offers any part of his evidence, or states the object to be attained by it, he precludes himself from insisting on its operation in any other direction, or for any other object; and the reason is, that the opposite party is prevented from objecting to its competency in any view different from the one proposed. In like manner, a party may be called on to state the particular ground on which he rests an objection to competency, and if it fails him, it is not error to receive the evidence, although it be incompetent on other grounds. Where, therefore, there is a special objection, or, what is the same in effect, a general objection resting, not on collateral circumstances, but on the supposed existence of an abstract principle admitting of no exception, as was the case here, every ground of exception which is not particularly occupied, is to be considered as abandoned. For instance, a deposition is offered, and it is resisted exclusively on the ground, that the witness is interested, or that the evidence is irrelevant; would it not be palpably unjust in a court of error, to listen to an objection, that it did not appear there had been proof of notice, or that the deposition had in all respects been regularly taken? If the defect were pointed out in time, it might be supplied by further proof; or if that were impossible, the party would, at least, be apprised of the danger to ultimate success, which is necessarily incurred by pressing the admission of incompetent testimony. Here, if instead of urging the abstract operation of the rule, the defendants had objected that the case did not fall within the particular exception to it, now relied on, the plaintiffs might have been prepared

to show that the execution actually came to the hands of the sheriff, or that it was lost or destroyed; but, as to that, the silence of their antagonists at the trial, had a direct tendency to lead them into a surprise.

For reasons like these, I regret a practice, too frequent in the Common Pleas, of stating the exception generally, without specifying the ground on which it is urged. In such a case, as we cannot judicially know the precise point the Court was called on to decide, we are obliged to let in any objection that can be raised on the face of the record; and hence I have frequently been obliged to consent to reverse, on points that, I had every reason to believe, were never made below. . . .

As, in the case at bar, the objection was made on a supposed abtract inadmissibility of the evidence, independently of collateral considerations, I am of opinion, that the proof of all preliminary facts, which would otherwise have been indispensable, ought to be considered as having been waived. . . .

On all the points, therefore, I am of opinion, that the judgment be affirmed.

Tilghman, C. J. . . . I understand from this record, that the only ground on which the evidence was objected to, was, that a record could not be proved by parol evidence. But the plaintiffs in error now contend, that the evidence was inadmissible, for want of previous proof that the writ had come to the sheriff's hands. I do not think that objection now open; it should have been made below, or the plaintiff may be taken here by surprise. . . .

Duncan, J. (dissenting).—The fact in issue was, whether Edwin Forbes had been committed to the custody of the sheriff, on the execution of Hart & Co., and had escaped from such custody. To prove the execution, the plaintiff below, having proved a notice to the sheriff to produce the execution on the trial, offered a witness to prove its existence and contents. This was objected to, on the ground that parol evidence could not be admitted of a record. . . . The plaintiffs offered the parol evidence, with the proof of notice; to this evidence, thus offered in connection, the defendants objected, on the ground that parol evidence of the execution could not be received. . . .

It was not proved that the paper was lost; it was neither admitted nor proved that it ever came to the hands of the sheriff. What is it then, more or less, than this? That the Court received parol evidence of the execution, without proof of its loss. . . . The objection was to the medium of proof. Parol evidence cannot be admitted of this thing; as a general rule of evidence, this cannot be questioned. If it was admissible, it must be because the case fell within some of the exceptions — its loss, or that it was in the hands of the opponent. He who alleges that his case is excepted out of the general rule, must make it out, that it falls within some of the exceptions of the cardinal rule of evidence. . . .

The plaintiffs in error did not make one objection to the evidence below, and a different one here; that could not be endured. But they

object here, as they did in the Common Pleas, that parol evidence ought not to be received of the execution. . . . Here the plaintiffs in error resisted *all* parol evidence of the execution. . . .

I agree that the plaintiffs in error have failed in all the other exceptions made by them, but this I think they have fully supported.

695. SPENCER *v.* POTTER'S ESTATE

SUPREME COURT OF VERMONT. 1911

85 *Vt.*; 80 *Atl.* 821

APPEAL from Rutland County Court; FRED M. BUTLER, Judge.

Proceedings by Kate Spencer against Jarvis T. Potter's estate. From a commissioner's decision disallowing a claim, petitioner appeals. Reversed and remanded.

This is an appeal from the decision of commissioners on Jarvis T. Potter's estate, disallowing the plaintiff's claim based on a written instrument dated February 17, 1905, purporting to be signed by the testator, and of the tenor following: "I have given this day to my niece, Kate Spencer, the sum of fifteen hundred dollars ($1500), to be paid by the administrator of my estate at my decease. The above is given in consideration of her kind care and attention during my sickness in her home. Her Uncle Jarvis T. Potter." In the court below the plaintiff declared in special assumpsit on said instrument, and the defendant pleaded the general issue, and gave notice thereunder that it should deny the execution of the instrument by the testator.

The testator had lived many years in Burlington and Essex, in this State, and was a tin peddler and later a farmer. His wife died in 1903, and in the summer of 1904 he went to Clarendon, where he lived ever after, and where he had a half-brother, John Spencer, and numerous other relatives, among whom were Sarah R. Spencer Hoag, the executrix, and Albert H. Spencer, children of John Spencer. The plaintiff is the wife of Albert H. Spencer. . . . The testator was accustomed to visit frequently at the homes of his relatives. He was 84 years old when he died in January, 1909. . . .

The testator made a will after the date of the instrument in suit, by which he distributed his estate, amounting to between $5,000 and $6,000, among his relatives into twenty-four parts, leaving one cent to the plaintiff's husband. The defendant claimed that it was never expected nor understood that the care during the testator's sickness at the plaintiff's house should be paid for, and that such services as were rendered were out of personal regard and because of relationship, and while the testator was there on a visit.

There was considerable testimony on both sides on the question of the genuineness of the signature to said instrument, a number of the

plaintiff's witnesses testifying their opinion that it was genuine, and a number of the defendant's that it was not genuine. The instrument was admitted "under objection and exception by the defendant." The defendant claimed, and its testimony tended to show, that on October 26, 1904, the testator made a gift to the plaintiff of $100, for which she executed a receipt, which is referred to. The plaintiff's husband testified that the signature to said instrument is the genuine signature of the testator. On cross-examination he testified that a few days after October 6, 1906, he delivered a package to the testator and got his signature to a receipt therefor, and that later the testator demanded to know what the paper was that he signed, and wanted to see it, but that the husband did not show it to him. The defendant then produced the receipt and put it into the case, and in that connection claimed that the signature thereto was procured by Spencer and used by him or some one else as a model from which to copy the testator's signature onto the instrument in suit. On Spencer's redirect examination the plaintiff introduced a letter dated June 2, 1906, with documents pinned to it, for the purpose of showing that the defendant's claim was not correct, and to show that in June, 1906, the instrument in suit was in existence, and had been submitted to an attorney in Cornell University for his opinion, and the letter and the documents pinned to it were limited to that purpose. Said letter purported to come from the law office of Henry L. Allen, Hornorsville, N.Y., and was addressed to "George Alvord, City." In it Mr. Allen, the writer, said he had examined the instrument left with him by Alvord the other day, and had examined some of the authorities on that subject, some of which he indorsed on a separate sheet, together with the instrument and his opinion thereon. Pinned to the letter were two separate sheets containing a copy of the instrument, citation, and discussion of legal authorities, and an opinion that the instrument is valid and enforceable. Spencer had testified that the plaintiff had a relative in the state of New York named George Alvord, to whom said instrument was sent, and that Alvord had submitted it to Henry Allen, an attorney, for an opinion, and that Alvord sent said letter and sheets in a letter of his. To their admission the defendant objected and excepted. . . .

Argued before Rowell, C. J., and Munson, Watson, Haselton, and Powers, JJ.

T. W. Moloney and *J. A. Merrill*, for appellant. *M. C. Webber*, for appellee.

Rowell, C.J. . . . It is contended that the Court erred in admitting the letter of June 2, 1906, from Allen to Alvord, and the documents pinned thereto, because not admissible for the purpose offered, as the defendant had not opened up its admission. It is conceded that, in view of the defendant's claim that the receipt for the package was procured for the purpose of using the testator's signature thereto as a model, the plaintiff could show by proper evidence that the instrument was already in existence. But it is contended that she could not import said

letter into the case, as it had no probative force in itself, and was between persons not parties here; that the purpose was to show the date of the letter, but that there is no proof of the authenticity of the letter nor that it was ever written by Allen and received by Alvord, nor that the date was correct; that the most the testimony showed was that plaintiff's husband said he received the letter in one from Alvord; that it is, in effect, the testimony of Allen as to the validity of the instrument; and that it was not necessary to resort to the letter and the accompanying documents in order to get evidence before the jury that the instrument was in existence before October 6, 1906, for plaintiff's husband had already testified that he saw the instrument from two to six months after February 17, 1905.

It is to be noticed that no ground of objection was stated to the admission of this letter and the accompanying documents, the exceptions showing only that "to their admission the defendant objected and excepted." This Court has had frequent occasion of late to state and enforce the rule in respect of such exceptions. The last time was in Townshend *v.* Townshend, 84 Vt. 319, where it is held to be the general rule that objections to the admission of testimony must be such as to indicate the precise point that the Court is asked to rule upon; but that this rule has its exceptions, one of which is, when the offered evidence cannot be material nor relevant in any state of the case, and that is apparent on the face of the question asked or the offer made, a general objection is sufficient. Mr. Wigmore says that "the cardinal principle, no sooner repeated by courts than forgotten by counsel, is that a general objection, if overruled, cannot avail," and "that the only modification of this broad rule is that, if on the face of the evidence in its relation to the rest of the case there appears no purpose whatever for which it could have been admissible, then a general objection, though overruled, will be deemed to have been sufficient." And he sustains his statement of the rule and its modification by reference to many cases. 1 Wigmore Evidence §§ 18, p. 57 et seq. Applying this rule to this exception, it is manifest that it cannot prevail. . . .

[But the judgment on other grounds must be]

Reserved and remanded.

Topic 3. The Ruling

697. HAMBLETT *v.* HAMBLETT

SUPREME COURT OF JUDICATURE OF NEW HAMPSHIRE. 1833

6 *N. H.* 333

APPEAL from the decree of the judge of probate approving and allowing a certain instrument as the last will of David Hamblett, deceased. The defence being that the testator was not of sound and disposing

mind, an issue, formed for the purpose of trying that question, came before the jury, August term, 1832. . . .

The appellee also offered in evidence the deposition of Mary Palmer, in which she testified, among other things, that on the day of the execution of the will she was at the house of the testator, and that "his discourse was satisfactory to her." To this part of the testimony the appellant objected. The evidence was admitted, but the Court in their instructions to the jury directed them not to rely upon any evidence of opinion as to the sanity or insanity of the testator, except what was derived from the testimony of the subscribing witnesses to the will. . . .

The jury returned a verdict that the testator was sane, and the appellant moved for a new trial. . . .

Porter, for the appellant. *C. H. Atherton*, for the appellee.

Parker, J. . . . On the supposition that this testimony of Mary Palmer, to matter of opinion, or rather to matter from which her opinion of sanity is to be inferred, was incompetent — which is not conceded, if sufficiently connected with facts — the question arises whether this furnishes any ground for a new trial, the Court having thus directed the jury.

Upon this subject it did not seem to us, at first, that there could be two opinions. But in Penfield *v.* Carpenter, 13 Johns. 350, in error, on certiorari to a justice's court, it appeared, that at the trial a witness was called, on the part of the defendant, to testify to the defendant's declarations made to the witness, and the testimony being objected to, the justice decided that the witness might go through with his testimony, and he would then inform the jury what part was admissible, and what not — and the justice informed the jury that this testimony was inadmissible, and that they ought not to take any notice of it as testimony. Another witness was permitted to swear to hearsay, and the justice told the jury that what the witness had sworn was not evidence. The Court reversed the judgment, saying, "the admission of such testimony was illegal and dangerous, and no subsequent caution or advice, by the justice, that the jury ought to disregard what the witnesses had sworn, can cure the irregularity. The law forbids such testimony, because it *may have* an influence upon honest jurors, who are unconscious of the impressions which they retain, notwithstanding the effort of the Court to obliterate them." . . .

However irregular the proceedings in those cases may have been, and however proper the decisions may be in New York, as applied to their courts of justices of the peace, we cannot adopt the broad principle there laid down, as sound law, applicable to all cases. The reason that the testimony so given in presence of the jury *might have* an influence, though they are directed to disregard it, would apply with equal force in all cases where anything irrelevant may have crept in during the course of the trial, and would entitle parties to a succession of new trials, until no sentence should have been uttered which by any possibility

might have an undue influence, though the jurors were unconscious of any influence. It is apparent that the principle cannot be carried to this extent, and other authorities show it must fall far short of it, even if it can be supported in any degree.

The rule respecting the testimony of interested witnesses, as laid down by Starkie and Phillipps, is that where it is discovered incidentally in the course of a cause that the witness is interested, his evidence will be struck out, although no objection has been made to him on the voir dire. . . . So where evidence which is competent in one view, and yet from its nature or connection proves something else, which would not be competent, and which might possibly have an effect upon the jury, the evidence is admitted, and the jury directed not to regard it as evidence, except for the purpose for which it is admissible. So where the confession of a prisoner implicates others, charged in the same indictment, the whole evidence is introduced, and the jury directed to disregard it as to the others. . . . Cases are of daily occurrence, also, where evidence is admitted, which, from a failure to connect it with other evidence, with which it had a necessary connection in order to be relevant, eventually turns out to be incompetent. The utmost caution cannot always prevent the introduction of evidence, which in the course of the trial is discovered to be clearly inadmissible, and if, in such cases, its introduction was to be regarded as ground for a new trial, on the application of the party objecting, the practice should be to stop the case, and begin *de novo* to another jury, for however strongly the jury were directed to disregard the testimony, it could not be shown that it had not had an influence upon the verdict, of which the jurors were not conscious — and yet it is not believed, that a practice of stopping a trial upon such account, ever prevailed in any court. . . .

This rule respecting the introduction of incompetent testimony may admit of exceptions. If the testimony be of a nature to excite popular prejudice, and if there is good reason from the verdict to suppose that it must have influenced the jury improperly, notwithstanding the direction of the judge that it was to be disregarded, such case might furnish an exception, and the granting of a new trial be a proper exercise of the discretion of the Court. But in this case, the judge who tried the cause states that there is no ground for supposing that this testimony of Mary Palmer affected the verdict either way, and it was of a nature to have the least possible weight, if no direction had been given in relation to it. . . .

Decree of Judge of Probate affirmed.

698. STATE *v.* MORAN. (1906. Iowa. 131 Ia. 645; 109 N. W. 187.) WEAVER, J.: Defendant was charged with the larceny of certain horses alleged to have been committed on May 16, 1901. . . . It is true that in some exceptional cases the effect of the admission of improper evidence is regarded as so clearly and seriously prejudicial that its subsequent withdrawal from the jury will not be

regarded sufficient to cure the error; but the general rule is otherwise. It is not possible for even the most watchful and careful trial Court to keep from the jury at all times all testimony of an immaterial or incompetent character, and if, upon attention being called thereto, such matter is stricken out, we must under all ordinary circumstances assume that the jury has done its duty, and given it no weight or influence in reaching the verdict.

699. GULLIFORD *v.* McQUILLEN

SUPREME COURT OF KANSAS. 1907

75 *Kan.* 454; 89 *Pac.* 927

ERROR from District Court, Chase County; F. A. MECKEL, Judge. Action by E. F. McQuillen against William Gulliford. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

W. H. Carpenter, for plaintiff in error. *Madden & Doolittle*, for defendant in error.

SMITH, J. — Gulliford became the owner of a mill, and, not being himself a miller, employed McQuillen to operate it. . . . An exchange was finally effected with one McClintock of the mill and $2000 for a drug store and dwelling properties, in which the mill was accepted at the value of $18,000. McQuillen thereafter demanded of Gulliford $360 as his commission on the deal, which being refused, he brought suit and recovered judgment for the amount claimed, and Gulliford brings the case here. . . .

The plaintiff below offered evidence tending to impeach the defendant's reputation for truth and veracity, and thereupon the defendant asked a postponement of the trial to enable him to secure the attendance of witnesses in rebuttal thereof, which request the Court granted, and immediately the plaintiff withdrew all the impeaching evidence and the Court instructed the jury to disregard that evidence, and proceeded with the trial. There is no showing that plaintiff's attorney made any reference to this evidence in his argument. Neither was there any reference to that evidence in the instructions complained of. These instructions were general, and were such as are usually given in relation to the weight of the evidence and the credibility of witnesses. No request for an instruction in writing on this subject was made. . . . The judgment is affirmed.

JOHNSTON, C. J., and GREENE, BURCH, MASON, and GRAVES, JJ., concur.

PORTER, J. (dissenting). The whole case turned upon the credibility of the testimony of plaintiff and defendant. Plaintiff had the burden and testified one way. Defendant contradicted him. Plaintiff produced a number of witnesses who testified that defendant's reputation for truthfulness in the neighborhood where he lived was bad. In order to

rebut this, defendant required time to procure the attendance of witnesses from his neighborhood, and the Court, recognizing the reasonableness of his request, granted a postponement until next morning. Plaintiff then offered to withdraw the impeaching testimony, which the Court, over the objections of defendant, permitted, and proceeded with the trial. It is true the jury were instructed to disregard the impeaching testimony, but the fact remained that several witnesses had sworn that defendant's reputation was such that he was not entitled to credit, and it is not likely that the jury could or did entirely disregard it.

If the practice indulged in here is proper, I am unable to see why a party may not in any case offer impeaching testimony and withdraw it before the party impeached has offered his rebuttal, and thus prevent rebuttal testimony. It may be said that it can be left to the discretion of the trial Court; but, in view of the situation presented by the record here, and the particular circumstances of this case, I think the action of the Court was an abuse of discretion which prevented defendant from having a fair trial, and that the judgment should be reversed and a new trial ordered.

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700. JUDICIAL DISCRETION.[1] The term "discretion," as applied to a trial Court's powers, may be used in several senses, which have not been, in our law, as often discriminated or as fully developed as they ought to be.

It may mean (1) that the trial judge is controlled by *no fixed rules*, but may in each case decide according to good sense and justice without regard to precedents, either by himself or by a higher Court. In this meaning nothing is involved as to the finality of the decision; it may or may not be appealable.

(2) It may mean, on the contrary, that the trial judge decides according to some rule, but that in one or another respect his *decision is final;* and here it may be final (a) as to the law, *i.e.* the tenor of the rule, (b) as to the applicability of the rule to the facts, or (c) as to the existence of the facts. The first of these meanings (1) is Discretion in the ordinary sense; the second (2) may be termed Finality of Ruling.

701. NORRIS *v.* CLINKSCALES

SUPREME COURT OF SOUTH CAROLINA. 1896

47 *S. C.* 488; 25 *S. E.* 797

BEFORE EARLE, J., Abbeville, January, 1896. Reversed.

Action in claim and delivery by E. B. Morris, as executor of J. Estelle Clinkscales, against A. J. and T. L. Clinkscales, Jr. Judgment for plaintiff. Defendants appeal.

This action for claim and delivery was brought by Jane Estelle Clinkscales to recover from the defendants certain personal property covered by a mortgage, of which she was the assignee. . . . The third exception charges error in the Circuit Judge, "In refusing to allow secondary evidence

[1] From the present Compiler's *Treatise on Evidence* (1905, Vol. I, § 16).

as to the contents of the receipt signed by Estelle Clinkscales, in which she elected to take under the will of her husband, J. P. Clinkscales, and to give up all claim to the property covered by the mortgages in question, when there was sufficient proof going to show that said receipt had been lost or destroyed by fire." . . .

Mr. *Frank B. Gary*, for appellants. . . .

Messrs. *Parker & McGowan*, also for appellants. . . .

Messrs. *Graydon & Graydon*, contra. . . .

Oct. 26, 1896. The opinion of the Court was delivered by

Judge BENET, acting Associate Justice, in place of Associate Justice GARY.

This exception raises two questions: *First.* Is the exercise of judicial discretion, in regard to the admission or exclusion of secondary evidence, appealable matter to be reviewed by this Court? And *second.* If appealable and reviewable, did the Circuit Judge, in the case at bar, commit error of law in excluding the secondary evidence offered?

1. Arguing on the first question, counsel for the respondent contend that the admission or exclusion of secondary evidence is a matter solely in the discretion of the Judge, and not appealable; and as authority they cite Congdon *v.* Morgan, 14 S. C. 588. We do not think that case will bear such a construction. Delivering the opinion of the Court, Mr. Chief Justice MCIVER referred to Floyd *v.* Mintsey, 5 Rich. 372, and to Berry *v.* Jordon, 11 Rich. 75, to show that no uniform rule could be established as to the exact amount of evidence necessary to prove the loss of the instrument before secondary evidence of its contents could be admitted. And he added:

"Neither shall we undertake, on this occasion, to lay down an absolute rule upon the subject, for, as it is said in 1 Greenleaf on Evidence, § 558, 'it should be recollected that the object of the proof is merely to establish a reasonable presumption as to the loss of the instrument, and that this is a preliminary inquiry addressed to the discretion of the judge.' Hence, where the case, as presented to us, does not show that the judge has violated any of the established rules of evidence in the conduct and determination of this preliminary inquiry, we cannot say that there was any error on his part in admitting the secondary evidence. In this case we are unable to perceive any such violation of the rules of evidence. . . . (After summarizing the facts), we do not see that there was any error on the part of the circuit judge in holding that the proof of loss was sufficient to let in secondary evidence. . . . The preliminary evidence offered here was certainly much stronger than that which was held to be sufficient in Edwards *v.* Edwards, 11 Rich. 537."

This is a plain recognition of the fact, that while the preliminary inquiry as to the proof of loss of the instrument is addressed to the discretion of the Judge, the exercise of that discretion will be, in a proper case, reviewed by this Court.

This Court has always, and very properly, been averse to disturbing the exercise of this discretion in the Court below, having always felt

assured that the Judges presiding there would seldom, if ever, overstep the limits of their power and act capriciously and arbitrarily. . . . In the recent case of Hobbs *v.* Beard, 43 S. C. 370, it was held that "the loss of a paper is always a preliminary question addressed to the discretion of the presiding Judge, and his ruling is not ordinarily the subject of review by this Court." (GARY, A. J.) These views accord with the opinions of the Courts both of England and of our sister States, and they arise out of the very nature of the case.

The term "discretion" implies the absence of a hard and fast rule. The establishment of a clearly-defined rule would be the end of discretion. And yet "discretion" should not be a word for arbitrary will or unstable caprice. Nor should judicial discretion be, as Lord COKE pronounced it, "a crooked cord," but rather, as Lord MANSFIELD defined it, the "exercising the best of their judgment upon the occasion that calls for it," adding that "if this discretion be wilfully abused, . . . it ought to be under the control of this Court." The Courts and text writers all concur that by "judicial discretion" is meant sound discretion guided by fixed legal principles. It must not be arbitrary nor capricious, but must be regulated upon legal grounds, — grounds that will make it judicial. It must be compelled by conscience, and not by humor. So that when a judge properly exercises his judicial discretion he will decide and act according to the rules of equity, and so as to advance the ends of justice.

There are two different kinds of discretion that may be exercised by the presiding judge, one of which is appealable, the other not. In the exercise of his exclusive right to decide a matter of fact, or to control the orderly conduct of trials, the discretion of the circuit judge will not be reviewed by this Court. For example, in granting or refusing a new trial on the evidence, or in granting or refusing additional time for argument of counsel, or in deciding whether an admission or confession was made freely and voluntarily, so as to determine its admissibility as evidence, or in permitting a witness to be recalled, or in granting or refusing a motion for a continuance, or the like. In such matters no error of law can be committed, and no appeal can be taken.

But to the appealable class in this State belong all instances of the exercise of discretion which may disclose the commission of error of law. And, without going into detail, it is enough for the purpose of this case to say that in deciding the preliminary question whether or not there has been sufficient proof of the loss of the written instrument to justify the admission of secondary evidence of its contents, it is possible that a Circuit Judge may commit error of law in the violation or misapplication of the rules of evidence; and, therefore, his exercise of discretion may be appealed from. And the appeal will lie, not because of any so-called "abuse of discretion" — a phrase unhappily framed, because implying a bad motive or wrong purpose — but because his ruling may appear to have been made on grounds and for reasons clearly untenable. This principle is recognized in Trumbo *v.* Finley, 18 S. C. 315, where Mr.

Justice McGowan says that the exercise of a Judge's discretion, "as a rule, will not be disturbed, unless it deprives a party of a substantial right which he can show he is entitled to under the law."

2. In excluding the secondary evidence offered in this case, the Circuit Judge assigned his reasons for his ruling as follows: "The person who had the paper in his possession should have been examined as to the lost paper. Unless it be shown by competent evidence that the paper is lost and cannot be found, then the contents of that paper cannot be gone into. We can introduce secondary evidence only when it is shown that the primary evidence cannot be produced. It may be possible that Mr. Gary found that receipt after he and the witness made the search." In excluding the secondary evidence upon the foregoing grounds, did the Circuit Judge commit error of law? . . . Under the circumstances, we think the Circuit Judge committed error of law in excluding the secondary evidence. . . . As was well summed up by Mr. Justice Whitner, in Berry *v.* Jourdon, 11 Rich. 76: "The party is expected to show that he has in good faith exhausted, in a *reasonable* degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him." As we understand the ruling of the Circuit Judge in the case before us, he exacted a larger measure of proof and applied a stricter rule of evidence. He held that "the person who had the paper in his possession should have been examined as to the lost paper. . . . It may be possible that Mr. Gary found the receipt after he and this witness made the search." We do not think that the rules of evidence sustain Judge Earle in holding, as a sine qua non, that "the person who had that paper in his possession should have been examined." . . .

We think it proper to add that, measured by the quantum of proof adjudged to be sufficient in numerous cases in our reports, as well as elsewhere, the case before us came fully up to the standard established by the Courts. . . . Our opinion, however, is not based upon the quantum of proof — for that is the Circuit Judge's peculiar province — but on the ruling that "the person who had the paper in his possession should have been examined as to the lost paper," when this rule can only apply where the presumption is that he is in possession of the lost paper. And here that presumption was removed by the same testimony that created it. . . .

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702. DE CAMP *v.* ARCHIBALD

Supreme Court of Ohio. 1893

50 *Oh. St.* 618; 35 *N. E.* 1056

Error to the Circuit Court of Hamilton county.

The object of this proceeding was to reverse an order of the Court of Common Pleas of Hamilton county, affirmed by the Circuit Court,

remanding the plaintiff in error to custody of the sheriff of the county in a proceeding in habeas corpus, the return of the sheriff showing that the party had been committed to the jail of the county by a notary public for refusing to answer certain questions propounded to him; his deposition being taken at the time before the notary to be used as evidence in an action then pending in the superior court of Cincinnati; the suit being that of Charles A. Costello *v.* The Post Publishing Company, for an alleged libel published in the paper of the defendant, called "The Cincinnati Post."

The plaintiff in error, Joseph M. De Camp, having been called as a witness by the defendant, was asked, among other questions, the following: "You have stated that you prepared the substance of the article published in the Miami Valley News, and employed somebody else, or got somebody else, to assist you in putting it into shape. I will ask you who that person was." After an exception to the question by the plaintiff as incompetent and irrelevant, the witness answered: "Well, it was not Mr. Costello," — to which the counsel for the defendant said: "That does not answer the question. I did not ask you who it was not, but who it was." To this the witness answered: "Well, I have stated several times that Mr. Costello had nothing to do with that article." He was then asked if he refused to answer the question, and he answered that he did. Thereupon counsel for defendant said: . . . "We expect to show that the person who prepared the article, or assisted Mr. Costello in preparing it, was Otto Reich; that Otto Reich did prepare it, caused it to be typewritten and put in shape for publication, with the knowledge and in consultation with Mr. Costello; that the article itself was scurrilous, indecent, and scandalous, and was the provocation for writing and publishing the article which is complained of in the plaintiff's petition; and therefore we desire the evidence for the purpose of proving, or aiding in the proof of, the above fact." He was then ordered by the notary to answer the question, but refused to do so. . . . At the conclusion of the examination, the notary adjudged the witness guilty of contempt in refusing to answer the above questions, and committed him to the jail of the county, there to remain until he should testify as ordered.

It is claimed that the Court erred in remanding the party on these grounds: (1) That no power is conferred on a notary by the Statutes of Ohio, in taking a deposition, to commit a witness to jail for refusing to answer a question; or, if this be not so, then (2) such power, being judicial in character, cannot be conferred on a notary; and (3) the questions propounded the witness were incompetent and irrelevant, and furnished no ground for a commitment.

Harmon, Colston, Goldsmith & Hoadly, and *Follett & Kelley,* for plaintiff in error. . . . A notary public, as appears from the sections creating the office and authorizing the appointment of notaries (§§ 110 to 123 inclusive, Revised Statutes), is a ministerial officer, appointed by the governor and removed by the governor in the manner provided in § 110.

That the Legislature could not constitutionally vest such an officer with judicial power, is plain from § 10, art. IV, of the Constitution, and it only remains to be determined whether the power here attempted to be exercised is a judicial power. . . .

Bateman & Harper, for defendant in error. . . . It is claimed that §§ 5252–4, as applied and intended to grant to notaries the power to punish, are in violation of art. IV, § 1, of the Constitution. This assumes that the term "judicial power" embraces all discretionary and judicial functions, or functions in aid of the exercise of judicial power by the courts. This cannot be the meaning intended by this provision of the Constitution. It must be construed in view of the whole practice, and recognized constitutional order of our civil society, previous to the time of the adoption of the Constitution and continued since under it. . . .

It is said that the notary is not an officer of the court. Technically, he is not; but the law authorizes his use in its service, and, when performing such service, he is a subordinate of the court in the exercise of the powers in question, subject to its supervision. . . .

MINSHALL, J. (after stating the case as above).

1. As to the first question, is such power conferred on a notary public by the statutes of the State? . . . The mode of taking testimony by depositions is provided for in the part of our Revised Statutes relating to civil procedure. § 5269 designates the officers before whom evidence in this form may be taken, and includes "a notary public"; § 5252 provides, among other things, that "a refusal to answer as a witness, when lawfully ordered, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required;" and § 5254 provides that "the punishment for the contempt mentioned in § 5252 shall be as follows: When the witness fails to attend in obedience to the subpœna, the court or officer may fine him in a sum not exceeding fifty dollars; in other cases the court or officer may fine the witness in a sum not exceeding fifty nor less than five dollars, or may imprison him in the county jail, there to remain until he submits to be sworn, testifies, or gives his deposition." It is plain that by these sections a notary, as any other officer, empowered to take depositions, may imprison a witness in the jail of the county for a refusal to testify before him when required to do so, and the imprisonment may be until he consents to do so; and this is not inconsistent with the power conferred on him by § 118, Rev. St. This section does not purport to limit the powers of a notary public to those of a justice of the peace in matters of contempt, and is entirely consistent with a statute that confers on him other and greater powers in such matters, as is done by the section above referred to. The fact that this construction seems to render the provision as to notaries, contained in § 119, unnecessary, is of no consequence, when we consider how the statutes of the State have been built up by the annual labors of the Legislature, through a long series of years, and, so long as consistency

is preserved by the Legislature in making amendments to the laws, redundancy is a matter of no great moment.

2. It is next maintained that the imprisonment of a witness for refusing to answer a question cannot be conferred on a notary, to be exercised in taking a deposition, because such power is judicial in character, and is conferred by the Constitution upon the Courts of the State. Article 4, § 1. . . . The term "judicial power," as used in the Constitution, is not capable of a precise definition. It is included in the power to hear and determine, but does not exhaust the power. That it embraces the hearing and determination of all suits and actions, whether public or private, there can be no doubt. But we think that it is equally clear that it does not necessarily include the power to hear and determine a matter that is not in the nature of a suit or action between parties. Power to hear and determine matters more or less directly affecting public and private rights is conferred upon, and exercised by, administrative and executive officers. But this has not been held to affect the validity of statutes by which such powers are conferred. State *v.* Hawkins, 44 Ohio St. 98–109. The term "judicial power" has never been taken with such latitude of construction in the usages and customs of our American commonwealths, and to so extend the jurisdiction of the courts would lead to the most embarrassing results, with little or no compensation whatever. The taking of depositions is not only a very ancient, but, in many instances, necessary, method of obtaining evidence to be used in the trial of a cause. Without such means of obtaining evidence, justice could not in many cases be done, as the attendance of the witness at the trial could not be secured; and, if the witness cannot be compelled by the officer taking the deposition to answer a proper question, the rights of a party might be sacrificed to the perversity of the witness. In States where, as in our own, the power is conferred by statute, it has frequently been exercised by notaries, and sustained by the courts. Dogge *v.* State, 21 Neb. 273, 278; In re Abeles, 12 Kan. 451; Ex parte McKee, 18 Mo. 599; Proffatt, Notaries, § 98; Giauque, Notaries, § 146. . . .

This seems the first time the question has been presented to this Court, though the statute conferring the power is of long standing. Any abuse is carefully guarded against by the power given any judge, by § 5255, Rev. St., on application of the witness, to discharge him if he find the imprisonment to be illegal.

3. Finally, it is claimed that the questions put to the plaintiff in error as a witness were incompetent, and therefore the commitment was illegal. It might be a sufficient answer to this to say that neither of the questions involved any question of privilege on the part of the witness, and no such privilege was claimed as an excuse for not answering; and it seems well settled that whether the questions are in other respects competent is a matter for the determination of the Court on the trial of the action in which the depositions are being taken. Ex parte McKee,

18 Mo. 599; People *v.* Sheriff of New York, 7 Abb. Pr. 96; People *v.* Cassels, 5 Hill 164; Bradley *v.* Veazie, 47 Me. 85; Rapalje, Contempts, §§ 66, 69, 70; Proffatt, Notaries, 202. Here, however, the evidence sought by the questions seems to have been entirely competent. The action being for a libel, the defendant had the right, in mitigation of damages, to show provocation. He had the right to show a prior publication by the plaintiff of a provoking character, or that the plaintiff had been instrumental in the distribution of such a publication. . . . The defendant had, therefore, the right to know who assisted the witness in the publication and distribution of the article in the Miami Valley News, as such information might have enabled him to connect the plaintiff with the publication and distribution of the article in that paper. Hence, both questions were competent, and should have been answered.

Judgment affirmed.

703. Ex Parte Jennings. (1899. Ohio. 60 Oh. St. 319.) The petitioner, Malcom Jennings, by his petition in habeas corpus seeks to be discharged from a commitment made by a notary public before whom his deposition was being taken in an action in quo warranto pending in this Court. . . . The petitioner had testified that he is the proprietor of "The Jennings News Bureau and Advertising Agency," started about December 1, 1898; that the agency had contracts with newspapers in Ohio. . . . The witness was then asked to furnish a list of the papers circulating in Ohio with which he had such contracts. This the witness refused to do upon the ground that the information sought was not pertinent to the issues in the case in which the deposition was being taken and that the disclosure would be detrimental to the business of the witness. . . . The witness persisting in his refusal to answer, the notary issued his writ to a constable of the township commanding him to arrest the petitioner and commit him to the jail of the county and there to remain until he shall submit to testify. . . .

Shauck, J.: Authority to punish, as for a contempt, a witness who refuses to answer "when lawfully ordered" is conferred upon notaries public by sections 5252 and 5254 of the Revised Statutes. De Camp *v.* Archibald, 50 Ohio St. 618 [*ante*, No. 702]. The denial here is not of the *power* of the officer, but of the *lawfulness of the occasion* for its exercise. . . . The settled law upon the subject is as stated in Church on Habeas Corpus, section 319: "The law has not invested such officers (notaries public) with arbitrary and omnipotent power to compel a witness to answer all questions however incompetent, irrelevant, immaterial, or inadmissible. A refusal to answer such questions is not necessarily a contempt. To have power to commit for contempt, the notary must exercise his functions substantially in the manner and under the circumstances prescribed and contemplated by law. . . ." [The subject here covered by the question was irrelevant and incompetent.] In De Camp *v.* Archibald, so confidently relied upon to justify this imprisonment, it was clearly pointed out in the opinion that the question which the witness refused to answer was competent. . . .

Petitioner discharged.

Minshall, J., dissents from the proposition of the syllabus, but not from the discharge of the relator.

704. Ex Parte SCHOEPF

Supreme Court of Ohio. 1906

74 *Oh.* 1; 77 *N. E.* 276

[Printed *ante* as No. 500; Point 1 of the opinion]

705. Dowagiac Manufacturing Co. *v.* Lochren. (1906. United States Circuit Court of Appeals. 143 Fed. 211.) Sanborn, J.: . . . The examination in this case was proceeding before a special master, to whom the case had been referred, to take the evidence and to report the facts. . . . In Blease *v.* Garlington, 92 U. S. 1, 7, the Supreme Court ruled that in suits in equity all the evidence sought by either party, whether it was received or rejected by the trial Court, should be elicited, and in case of an appeal, presented to the Supreme Court, to the end that, if that Court were of the opinion that the evidence rejected below should have been received, it might consider it and render a final decree without remanding the suit to procure the rejected evidence. . . .

It is a necessary corollary of this rule of practice, established by the decision in Blease *v.* Garlington, that it is the duty of an auxiliary Court to elicit and cause to be transmitted to the primary Court not only such evidence as it deems competent and material, but also that which it deems incompetent or immaterial, unless the witness or the evidence is privileged or it clearly and affirmatively appears that the evidence cannot possibly be material or relevant. In no other way can the general rule of practice be made effectual; for, if the auxiliary Court refuses to compel the production of the testimony because it deems it immaterial or incompetent, and the appellate Court should be of a different opinion, the latter Court cannot consider the rejected evidence and render a final decree without remanding for further proof, because the rejected evidence has not been elicited and cannot be presented to it. Moreover, this practice is more logical, rational, and convenient than that which requires the auxiliary judge or Court to determine the admissibility of the evidence which either party seeks to secure; because the Court in which the suit is pending and in which all the pleadings and evidence must be gathered together is far more competent to decide questions of this nature than a distant judge or Court that has but a fragment of the case, and, more than all, because the law imposes upon the primary Court the absolute duty to consider and decide all these questions of the admissibility of evidence and to determine the final result in the suit, — a duty that the Court of original jurisdiction is no more able than the Supreme Court to fairly and wisely discharge, unless all the evidence deemed competent or material by any of the parties to the suit has been produced and presented for its consideration.

These considerations have led us to this conclusion: It is not the duty of an auxiliary Court or judge, within whose jurisdiction testimony is being taken in a suit pending in the Court of another district, to consider or determine the competency, materiality, or relevancy of the evidence which one of the parties seeks to elicit. It is the duty of such a Court or judge to compel the production of the evidence, although the judge deems it incompetent or immaterial, unless the witness or the evidence is privileged, or it clearly and affirmatively appears that the evidence cannot possibly be competent, material, or relevant, and that it

would be an abuse of the process of the Court to compel its production. Fayerweather *v.* Ritch (C. C.) 89 Fed. 529. . . . Strong *v.* Randall, 177 N. Y. 400, 69 N. E. 721.

Topic 4. The Exception

707. WRIGHT *v.* SHARP

King's Bench. 1709

1 *Salk.* 288

A CORPORATION-BOOK was offered in evidence at the assizes to prove a member of the corporation not in possession, and refused. No bill of exceptions was then tendered, nor were the exceptions reduced to writing; so the trial proceeded, and a verdict was given for the plaintiff.

Next term the Court was moved for a bill of exceptions, and it was stirred and debated in Court. It was urged, that the law requires "quod proponat exceptionem suam," and no time is appointed for the reducing it into writing, and the party is not grieved till a verdict be given against him; and the same memory that serves the judges for a new trial will serve for bills of exceptions.

On the other side, it was said, that this practice would prove a great difficulty to judges, and delay of justice; that the precedents and entries suppose the exception to be written down upon its being disallowed, and the statute [1] ought to be construed so as to prevent inconvenience; besides the words of the Act are in the present tense, and so is the writ formed on the Act.

HOLT, C. J. — If this practice should prevail, the judge would be in a strange condition: He forgets the exception, and refuses to sign the bill, so an action must be brought. You should have insisted on your exception at the trial. You waive it if you acquiesce, and shall not resort back to your exception after a verdict against you, when perhaps, if you had stood upon your exception, the party had other evidence, and need not have put the cause on this point. The statute indeed appoints no time, but the nature and reason of the thing requires the exception should

[1] [1285, St. 13 Edw. I, Westminster Second, c. 31: "When one that is impleaded before any of the justices doth alledge an exception, praying that the justices will allow it, which if they will not allow, if he that alledged the exception do write the same exception and require that the justices will put to their seals for a testimony, the justices shall do so; and if one will not, another of the company shall; and if the king, upon complaint made of the justices, cause the record to come before him, and the same exception be not found in the roll, and the plaintiff shew the exception written, with the seal of the justice put to," then if the justice admit his seal genuine, the exception shall be adjudged upon.

The history of the statute is noticed in the following works: 1895, Pollock & Maitland, History of the English Law, II, 663–669; 1838, Chitty, General Practice, IV, c. 1, § 1.]

be reduced to writing when taken and disallowed, like a special verdict, or a demurrer to evidence; not that they need be drawn up in form; but the substance must be reduced to writing while the thing is transacting, because it is to become a record.

708. HUNNICUTT *v.* PEYTON. (1880. Federal Supreme Court. 102 U. S. 333, 353.) STRONG, J. — It is no doubt necessary that exceptions should be taken and, at least, noted before the rendition of the verdict; but the reduction of the bills to form, and the signature of the judge to the bills, required for their attestation, or, as said in the Statute of Westminster, "*for a testimony*," may be afterwards, during the term. In practice it is not usual to reduce bills of exception to form and to obtain the signature of the judge during the progress of the trial. Nor is it necessary. The Statute of Westminster did not require it. It would greatly and uselessly retard the business of Courts were it required that every time an exception is taken the progress of the trial should be stayed until the bill could be reduced to form and signed by the judge. For this reason it has always been held that it need only be noted at the time it is made, and may be reduced to form within a reasonable time after the trial is over.

709. RUSH *v.* FRENCH

SUPREME COURT OF ARIZONA. 1874

1 *Ariz.* 99, 121; 25 *Pac.* 816

DUNNE, C. J. . . . The cases where we are called on to review rulings on the admission of evidence may be reduced to two classes: 1. When the party objecting was overruled and he appeals. 2. When the party objecting was sustained and the other side appeals.

1. In the first case, where the party objecting was *overruled* and he appeals, he must show by the record: (1) What the question was, and what answer was given to it, or what the evidence was which was introduced against his objection. This is important because the evidence admitted may not injure him. The answer may have been in his favor. It is not necessary that he should show clearly that he was injured, because that would often be impossible, but he must show that the evidence was admitted against his valid objection, which, it may be, has injured him; for the object of granting a review by this Court is not to determine the abstract questions as to whether the judge below ruled correctly or not, but to give relief in case a party may have been injured by an erroneous ruling. (2) He must set out enough of the evidence to illustrate the point of his objection, and to raise the presumption that he may have been injured; but where error is shown, injury will be presumed, unless the contrary clearly appears. (3) He must show what kind of an objection was made, and to avail him here he must show that the objection as made was good. Then it is for the other party to see that the statement made contains a showing sufficient to sustain the admission of the

evidence as against the objection made. The amount of showing the latter party must make depends upon the nature of the objection. If the party objecting interpose merely a general objection, all that is necessary is to show enough to obviate the general objection. If the objection is specific, all that is necessary is to show enough to obviate the specific objection as made. Beyond this, we cannot in reason require him to go. He should defend himself against the particular attack made, but we cannot ask him to fortify himself against all possible attacks which might have been made.

2. In the second case, where the party objecting was *sustained*, and the other side appeals and asks to have the ruling declared erroneous, the party appealing must see that the record shows: (1) What question he asked or what evidence he sought to introduce; (2) Sufficient of the other evidence to illustrate the admissibility of that offered; (3) That the evidence so offered was excluded; (4) That there is reasonable ground to presume that he may have been injured by such exclusion. The other party must see that the record shows good grounds of exclusion.

710. GRIFFIN *v.* HENDERSON

SUPREME COURT OF GEORGIA. 1903

117 *Ga.* 382; 43 *S. E.* 712

PROBATE of will; appeal. Before Judge CANDLER. Newton Superior Court. April 12, 1902. Henderson, as executor, offered a paper for probate as the will of Mrs. A. C. Brown. A caveat was filed by her daughter, Mrs. Lula D. Griffin. On the trial there was a verdict in favor of the propounder. The caveatrix, among other grounds, objected to the probate of her mother's will, for the reason that the testatrix had made the will under a mistake of fact as to the conduct of the daughter, who was her sole heir at law. Civil Code, § 3262. No demurrer or exception was filed to this ground of the caveat. One of the grounds of alleged error was that the Court refused to permit the caveatrix to testify as a witness to any communications made to her by her mother, or conversations between them. "The Court so ruling, no questions were propounded to the witness (caveatrix); who would have testified that Mrs. A. C. Brown treated her entirely different after her marriage to her husband, Mr. C. M. Griffin, than she had done prior to her marriage," and to other facts which relate to the question of a mistake of fact. . . . A motion by Mrs. Griffin for a new trial was overruled, and she excepted.

Brown & Randolph, *L. L. Middlebrook*, and *J. F. Rogers*, for plaintiff in error. *J. M. Pace* and *Foster & Butler*, contra.

LAMAR, J. . . . It is expressly stated that no questions were propounded to the witness; and while the motion says what she would have testified, it does not appear that the Court was informed thereof

at the time he excluded her; and therefore we are not permitted to consider this assignment of error. No matter how competent a witness might be, a Court will not grant a new trial merely because he was not allowed to testify. It must appear that the excluded testimony was material; and the almost universal rule of practice is that what that material testimony was must be expressly called to the attention of the trial Court at the time of its exclusion. Bigby *v.* Warnock, 115 Ga. 386 (4); Southern Mutual Insurance Co. *v.* Hudson, 113 Ga. 438; Freeman *v.* Menecken, 115 Ga. 1018.

In a few instances there may be one exception, particularly in cross-examinations, where the examining counsel may not know what the answer would be, or is exercising a right to test the witness. But ordinarily the exclusion of oral testimony can be made available as error only by asking some pertinent question, and, if an objection is sustained, informing the Court at the time what the answer would be, so that he can then determine whether the fact is or is not material. It will not do to state thereafter what the witness would have answered. . . . If a new trial should be granted because the answer was excluded, it might happen that on the second trial the question would be again propounded, allowed, and the witness give hearsay, inadmissible, or irrelevant testimony, or the answer might be harmful instead of helpful or the witness may reply, "I do not know," with the result that the time and money of the parties and the country has been wasted for so inconsequent a conclusion. That this is not unlikely to occur is shown by the experience of all practising lawyers, who have often seen a long and heated argument as to the right to ask a question, followed by the laughter of all bystanders when the Court held it competent, and the witness replied that he knew nothing about the matter. Parties can often agree in the presence of the Court as to what the witness would testify, or, if not, the witness or examining attorney can state what the answer would be; and, where the subject-matter is important, the judge may, in his discretion, retire the jury until its admissibility has been settled. We are well aware that the rule may be perverted into a means of getting inadmissible evidence before the jury, or, by forcing their constant withdrawal, retard the trial. The Courts must rely upon the good faith of counsel not to bring about such a result. But it would never do to grant a new trial until it appeared not only that the question was proper, but that the answer was material, and would have been of benefit to the complaining party.

While the rule as to assigning error on the exclusion of testimony is not without its exceptions, the practice in other jurisdictions is substantially that in this State. Railroad *v.* Stonecipher, 95 Tenn. 311; Omaha Ins. Co. *v.* Berg, 44 Neb. 522 (3). . . .

The judgment of the lower court refusing a new trial is affirmed.

By four Justices. CANDLER, J., disqualified.

Topic 5. New Trial for Erroneous Ruling

711. JOHN H. WIGMORE. *A Treatise on Evidence.* (1905. Vol. I, § 21.) An erroneous ruling having been made and excepted to, and the excepting party having received an adverse verdict on the law and the evidence, the great question on appeal then becomes, *Shall a new trial be granted because of the erroneous admission or exclusion of the particular piece of evidence?* It is a great question, because, although it does not directly involve the tenor of the rules of evidence, yet the whole status of the law of evidence, as well as the efficiency of our methods of doing justice, is dependent upon the answer. Whether that law of evidence shall be a mere means to an end, — the end being a just settlement of particular controversies, — or whether it shall be an end in itself — an end so independent of justice, and so superior thereto, that it must be attained even at the cost of justice, — this depends practically upon whether it can be conceded that an erroneous ruling of evidence is *ipso facto* a ground for a new trial.

The original and orthodox English rule was plain. An erroneous admission or rejection of a piece of evidence was not a sufficient ground for setting aside the verdict and ordering a new trial, unless upon all the evidence it appeared to the judges that the truth had thereby not been reached:

R. *v.* BALL, R. & R. 133 (1807). "Whether the judges on a case reserved would hold a conviction wrong on the ground that some evidence had been improperly received, when other evidence had been properly admitted that was of itself sufficient to support the conviction, the judges seemed to think must depend on the nature of the case and the weight of the evidence. If the case were clearly made out by proper evidence, in such a way as to have no doubt of the guilt of the prisoner in the mind of any reasonable man, they thought that as there could not be a new trial in felony, such a conviction ought not to be set aside because some other evidence had been given which ought not to have been received. But if the case without such improper evidence were not clearly made out, and the improper evidence might be supposed to have had an effect on the minds of the jury, it would be otherwise."

Such was the rule in the King's Bench, in criminal as well as in civil cases. Such was the rule in the Common Pleas, plainly stated in Doe *v.* Tyler (1830, 6 Bing. 561). Such was equally the practice in Chancery,[1]

[1] 1805, L. C. Eldon, in Pemberton *v.* Pemberton, 11 Ves. 50, 52: "If upon the whole [record] he is satisfied that justice has been done, though he may think that some evidence was improperly rejected at law, he is at liberty to refuse a new trial."

So too, in the Federal Supreme Court, for new trials as distinguished from writs of error; 1828, Story, J., in M'Lanahan *v.* Ins. Co., 1 Pet. 170, 183: "In such cases, the whole evidence is examined with minute care, and the inferences which a jury might properly draw from it are adopted by the Court itself; if therefore upon the whole case justice has been done between the parties, and the

when issues had been sent to a jury in a common law court. All this lasted down to the decade of 1830.

In that decade the Court of Exchequer, in Crease *v.* Barrett (1835, 1 C. M. & R. 919, 932) announced a rule which in spirit and in later interpretation signified that an error of ruling created per se for the excepting and defeated party a right to a new trial. The new Exchequer rule was speedily accepted in the other courts,[1] and for something more than a generation it remained the law of England, until it was reformed away, for civil causes, in 1875.[2]

The Exchequer rule duly obtained recognition in the United States in a majority of jurisdictions. In its most extreme form, and in language exhibiting in the most radical manner the theory that the rules of evidence form an end in themselves, the new doctrine — which had indeed given sporadic signs of independent growth — was now rapidly promulgated.[3] During the last generation, the Exchequer heresy has clearly gained the ascendance.

There are, to be sure, Courts that still cling to the old-fashioned notion, resting on the orthodoxy of Doe *v.* Tyler, and refusing to bow the knee to the Baal-worship of the rules of evidence.

712. STATE *v.* CRAWFORD

SUPREME COURT OF MINNESOTA. 1905

96 *Minn.* 95; 104 *N. W.* 822

APPEAL from District Court, Sherburne County; A. E. GIDDINGS, Judge.

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verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed at the trial"

[1] 1887, Coleridge, C. J., in R. *v.* Gibson, L. R. 18 Q. B. D. 537, 540: "Until the passing of the Judicature Acts, the rule was that if any bit of evidence not legally admissible, which might have affected the verdict, had gone to the jury, the party against whom it was given was entitled to a new trial."

[2] 1875, Judicature Act, 1883, Rules of the Supreme Court, Order 39, rule 6: "A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence . . . unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned on the trial."

[3] 1886, Cobb, J., in Masters *v.* Marsh, 19 Nebr. 467, 27 N. W. 438, excluding certain books of account: "While I do not think that the books would have proved any fact of the least value in the case had they been properly admitted, yet the party presenting them would scarcely be permitted to escape the consequence of an erroneous ruling on that ground."

1874, Cole, J., in Schaser *v.* State, 36 Wis. 434: "It may be shown by the most irrefragable proof that the defendant is guilty of the offence charged against him; but this does not justify the violation of well settled rules of evidence in order to secure his conviction."

C. D. Crawford and George R. Palmer were convicted of murder, and Crawford appeals. Affirmed.

Ernest S. Cary and *Charles S. Wheaton*, for appellant. *E. T. Young*, Attorney General, *C. S. Jelley*, and *F. T. White*, County Attorney, for the State.

JAGGARD, J. — The accused, C. D. Crawford jointly indicted with one George R. Palmer for murder in the first degree, was convicted on separate trial and was sentenced to be hanged. On application of his counsel, a stay of execution was granted. The case comes before this Court upon an appeal from the judgment of the trial court. . . . Crawford and his codefendant, Palmer, knew each other before the night of the murder. Crawford had been in the army and was familiar with the handling of firearms. He and Palmer, together with five other young men, Lundin, Freeman, Bjorquist, Conradson, and Kenner, were riding together on a freight train, in a combination mail and baggage car, with the consent of a brakeman. Crawford, testifying on his own behalf, confirms the narrative of the other eyewitnesses in almost all essential particulars. In substantially his own language, the tragedy occurred as follows: He had said to Palmer, while they were on the car: "Let's hold them up." Palmer replied; "All right; I've a flash light." . . . Both Crawford and Palmer cried out: "Throw up your hands!" Although no one offered any resistance, Crawford fired one shot in the air just to "scare" the prospective victims. At the rear end of the car was a sorting table, about five feet long and four feet wide. Lundin and Bjorquist had lain down on it and had gone to sleep, each lying on his right side, each with his face to the front end of the car. . . . After the first shot was fired, Lundin, lying with one hand in his overcoat pocket, did not get up; but, when Palmer tried to waken him, it seemed to Crawford "as if he kind of raised up a little." Palmer then stepped away and, according to Crawford, said to Crawford, "Wake him up;" according to all other eyewitnesses, "Shoot the son of a bitch." Crawford, then only a few feet away from Lundin, passed the light backward and forward and followed the light with the revolver. He "shot the revolver immediately after Palmer said 'Wake him up.'" . . .

Toward the close of the case of the State there occurred the only matter which is now properly before us upon assignment of error. The record reads: "By One of the Jurors: *Q.* — I would like the witness a question to ask. The Court: You may ask it. *Q.* — Mr. Conradson, you say that after he the first shot did fire, and before he did the second shot fire, he did to one side step? *Q.* — Yes, sir. *A.* — Now I would like to ask you if your best judgment is if he, after he the first shot did fire, and before he did the second shot fire, he did to one side step that he might the better aim take? *A.* — Yes, sir; so that he could see Lundin's face better and get out of our line and get a better view of Lundin. *Q.* — And you say that he careful aim did take? *A.* — Yes, sir. *Q.* — And then did you hear the report? *A.* — Yes, sir. *Q.* — Now, then,

after you the report did hear, did you right away know that Lundin was hit? *A.* — No, sir. *Q.* — How long after you the report did hear before you knew that the man on the table sleeping was hit? *A.* — I didn't know that he was hit. I knew that he didn't get up, and I thought he must be shot. That is all I knew about it."

Counsel for the accused insists that it is the duty of the Court in its sound discretion to allow the juror to ask any proper and competent question: but that it was likewise the duty of the Court in its sound discretion, with regard to the rights of the defendant, to determine whether or not the questions were proper and competent questions before allowing the same to be submitted to the witness, and not to allow incompetent questions to be asked, and that failure to object to this question involving the opinion of this witness was error. In support of this he cites typical authorities to the effect that it is a well-established principle that the rejection of competent and material evidence, or the reception of incompetent and improper evidence, which is harmful to the defendant and excepted to, present an error requiring reversal. Such a ruling affects the substantial rights of the defendant, even though the appellate Court would, with the rejected evidence before it, or with the improper evidence excluded, still come to the same conclusion reached by the jury. The defendant has the right to insist that material and legal evidence offered by him shall be received and submitted to the jury, and to have illegal and improper evidence, which may be harmful, excluded, and have the opinion of the jury upon proper evidence admitted in the case, and upon such evidence only. People *v.* Wood, 126 N. Y. 249; People *v.* Greenwall, 108 N. Y. 296. As was said by Earl, J., in the latter case: "A person on trial for his life is entitled to all the advantages which the law gives him, and among them is the right to have his case submitted to an impartial jury upon competent evidence. Stokes *v.* People, 53 N. Y. 164." People *v.* Corey, 148 N. Y. 476, 42 N. E. 1066.

We are satisfied that as a matter of strict technical construction there is no error in this record entitling the accused to a new trial as a matter of right. . . . Accordingly, assuming that the questions and testimony have all the legal faults counsel for the accused contends for, and that the decision of this case is to be rested upon technical rules, the appeal must fail. . . . There are cases in which it would be the more orderly practice for the trial court, in its discretion, to ask the juryman to indicate the point of his inquiry and then to see that the question is properly formulated, as by directing counsel to put it, so as to afford the usual opportunity for objection and exception. Indeed, there is ordinarily no occasion for a juryman to interrogate a witness. In the instant case, however, no abuse of discretion on the part of the trial Court and no reversible error appears in this matter.

The decision in this case, however, is not based upon compliance or noncompliance with technical rules of practice or evidence. Such rules

are primarily different from the constitutional guaranties, without the strict observance of which punishment even by a properly constituted court is little better than the punishment by a mob. Matters of mere procedure, however, have no such sanctity. When a court exercises its traditional power to regulate a trial, to pass on the competency, materiality, or sufficiency of evidence, or the propriety of the form of a question, and to revise the action of a jury, it violates no constitutional right; nor does it when it confirms the verdict of a jury. Rules of practice and evidence are primarily designed to secure the orderly administration of the laws of the land. They serve their purpose so far as, and only so far as, they conduce to a fair trial. But, instead of serving as a means of securing justice, they have been made to usurp dominion as if their observation were the end to be attained.

Decisions of many Courts have determined controversies concerning them as if they were the constitutional requirements, as if the object of the law was their evolution into a perfect system, and as if the function of even the highest judicial tribunals was to secure their consistent enforcement. Under the guise of protecting the "rights of the accused," this perversion in the use of these rules has been and must be the source of wrong, alike to the accused and to the public. For, on the one hand, cases involving human lives may arise in which an appellate Court would properly feel that there was imposed on it the duty of setting aside a verdict of conviction and of granting a new trial for errors committed by the trial Court resulting in an unfair trial of the defendant, although no objection or exception was made or taken to the improper admission or exclusion of evidence, or to the improper conduct or ruling of a trial court, because of the mistake or misconduct, neglect, or incompetency of his counsel. The strict application of practice rules would then make a new and fair trial impossible. On the other hand, the exaggeration of the value of such technicalities has opened the doors for the escape of unnumbered and undoubted criminals. "Some of the instances of enforcement would seem incredible, even in the justice of a tribe of African fetish worshipers." 1 Wigmore on Evidence, p. 73.

There is a current impression on part of the profession of law, and of the community in general, that all Courts are hopelessly committed to this apotheosis of an artificial system, as repugnant to common sense as it is subversive of common justice. In point of fact, this is far from being true. The original English rule was that erroneous admission or exclusion of evidence, duly objected to, would not be a basis for new trial if the rest of the testimony be sufficient to warrant the conclusion to which the jury have come. Later, and about 1835, a different rule came to be generally accepted, viz., "that an error or ruling created per se for the defeated party a right to a new trial. It remained the law of England until it was reformed away for civil cases in 1875." In the United States this rule is the law in the majority of jurisdictions, but it is not sustained by the better opinion or reason (1 Wigmore on Evidence, p. 71, § 21), and

is distinctly not the law in this State. In State *v.* Nelson, 91 Minn. 143, 144, 145, Brown, J., says:

"New trials in criminal prosecutions have for many years been granted by the Courts with too much liberality (3 Columbia Law Rev. 433), and to such an extent have the technical rights of accused persons been magnified and upheld, and that, too, in cases where guilt has been overwhelmingly shown, as to result in much public discontent, and to bring the administration of the criminal laws into disrespect. Errors of no vital consequence, at least not affecting materially the substantial rights of the accused, either in the admission or exclusion of evidence, in the instructions of the trial Court to the jury, or alleged misconduct of the prosecuting attorney, have opened prison doors and liberated many criminals. This condition has caused peaceful and law-abiding citizens to become lawless, and to join in the barbarous method of punishing crime by a resort to the Court of Judge Lynch. All such outrages of the law have been attributed in the main to the lax administration of the laws in the criminal Courts, the gravity and tenacity with which they respect the alleged legal rights of the criminal, and the unnecessarily strict adherence to ancient forms and procedure. Remedies have been suggested, among others, that the right of appeal be taken away in such cases; but it is believed that the only appropriate way to quiet the public mind in this respect and restore confidence in the ability of the Courts to administer justice, not only to the criminal, but to society and the State as well, and to overcome the tendency to resort to lynch law, is a prompt and speedy trial, conviction, and certain and unrelenting punishment of the guilty, unaccompanied by the long delays usually incident to the administration of criminal laws, and unaccompanied, too, by too much respect for refined and subtle technicalities. New trials should be granted only where the substantial rights of the accused have been so violated as to make it reasonably clear that a fair trial was not had."

The present case, however, presents neither error nor unfair trial. The substantial rights of the accused have not been violated. . . . The prosecuting attorney without error proved every step in the perpetration of the double felony from its beginning to its end, by testimony the most direct, complete, and conclusive, amounting to a substantial demonstration of the guilt, and of the degree of guilt, of the accused. Not only did four full-grown men, who in the possession of all their faculties had seen in the light held by the prisoner himself, in his presence and in the presence of each other, every act of the tragedy, testify without attack, impeachment, or inconsistency, to every brutal detail; not only were the revolver which shot the bullet and the bullet which was taken from the brain of the dead man produced, identified, and connected with the deceased; but he himself voluntarily took the stand and admitted the robbery and the shooting.

There is accordingly no doubt that the judgment of the trial Court should be, and it is hereby, affirmed; and it is hereby directed, in accordance with the statute (Gen. St. 1894, § 7391), that the sentence pronounced by the trial court be executed. Judgment affirmed.

TITLE III. ORDER OF INTRODUCING EVIDENCE

Topic 1. In General

714. Lord Lovat's Trial. (1746. House of Lords. 18 How. St. Tr. 658.) Hardwicke, L. C. — My lords, the rule for the examination of witnesses in this Court, in either House of Parliament, and everywhere else, is that . . . all questions that are asked, whether touching the matter of fact to be tried or the credibility of the witness, are to be asked at the proper time. The party who produces a witness has a right to go through the examination first, and then the other side cross-examines him; and after that is over, the judge asks him such questions as he thinks proper; unless, as I said before, there be any objections to the questions, or any doubtful matter arises that wants immediately to be cleared up. The same method is to be observed here; and the reason of it, my lords, is that unless your lordships observe this method, you will be in perpetual confusion.

715. Hathaway *v.* Hemingway. (1850. Connecticut. 20 Conn. 191, 195.) Waite, J. — The rule upon this subject is a familiar one. When, by the pleadings, the burden of proof of any matter in issue is thrown upon the plaintiff, he must in the first instance introduce all the evidence upon which he relies to establish his case. He cannot (as said by Lord Ellenborough) go into half his case and reserve the remainder. The same rule applies to the defence. After the plaintiff has closed his testimony, the defendant must then bring forward all the evidence upon which he relies to meet the claim on the part of the plaintiff. He cannot introduce a part and reserve the residue for some future occasion. After he has rested, neither party can as a matter of right introduce any farther testimony which may properly be considered testimony in chief. . . .

But this rule is not in all cases an inflexible one. There is and of necessity must be a discretionary power, vested in the Court before which a trial is had, to relax the operation of the rule, when great injustice will be done by a strict adherence to it.

716. Rucker *v.* Eddings. (1841. Missouri. 7 Mo. 115, 118.) Scott, J.: The law has entrusted Courts with a discretion in allowing the parties to a cause to obviate the effects of inadvertence by the introduction of testimony out of its order. This discretion is to be exercised in furtherance of justice, and in a manner so as not to encourage the tampering with witnesses to induce them to prop up a cause whose weakness has been exposed. Where mere formal proof has been omitted, Courts have allowed witnesses to be called or documents to be produced at any time before the jury retire, in order to supply it. So, material testimony ought not to be rejected because offered after the evidence is closed on both sides, unless it has been kept back by trick and the opposite party would be deceived or injuriously affected by it. So, after a witness has been examined and cross-examined, the Court may at its discretion permit either party to examine him again, even as to new matter, at any time during the trial. So, where by an accidental omission plaintiff's attorney does not call and examine a witness who was present in Court, and a non-suit is moved for after he has rested his case, the Court will permit the witness to be examined in furtherance of justice.

This Court is sensible of the disadvantages under which it labors in revising

the discretion of the Circuit Courts in matters of this kind, and a strong case must be presented for its interference before it can be induced to disturb the judgment of inferior Courts by revising the exercise of the discretion with which they are entrusted in regard to the relaxation of the rules of evidence. It must be manifest to any one conversant with the trial of causes that the Court before which a trial is had, from having an opportunity of seeing the conduct of parties, of witnessing the difference in the experience of the opposite counsel, and many incidents which cannot be set out in a bill of exceptions and which influence the exercise of its discretion (and properly too), has superior means for a wise and judicious exercise of this power than is possessed by this Court, which is confined entirely to the facts spread upon the record.

717. MUELLER *v.* REBHAN

SUPREME COURT OF ILLINOIS. 1879

94 *Ill.* 142

APPEAL from the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

This was a bill filed May 8, 1875, by Catherine Rebhan, the appellee, against Solomon Mueller and others, to set aside the will of George Christian Mueller (executed on the 14th of March, 1870), who died a few days after the execution of the will. The will was afterwards duly probated. . . .

The ground upon which it was sought to set aside the will were two: 1. It was charged that George Christian Mueller at the time of the making of the will, was mentally incapable, and that he was of weak intellect, not possessed of capacity sufficient to make a valid will. . . . An issue was formed as to the validity of the will, that was submitted to a jury for trial at the January Term, 1877, and resulted in a verdict that the will in question was not the will of the deceased. A motion for a new trial was made by the defendants and overruled by the court, and a final decree entered setting the will aside, and Solomon Mueller appeals to this court.

Mr. *W. Winkelman*, for the appellant. *Mr. James M. Dill*, and Mr. *W. C. Kueffner*, for the appellee.

Mr. Justice DICKEY delivered the opinion of the Court. . . . It is insisted that the Court erred in refusing to permit appellant, after the complainant had closed her testimony as to the sanity of George Christian Mueller at the time of the making of the will, to introduce testimony tending to prove that he was sane and mentally competent. . . .

As a matter of practice the rulings of Courts are not uniform upon this question. In some Courts it is held that neither party is called upon to produce all his testimony in support of any allegation in issue until it has been developed on the trial that an issue on the evidence is made upon that question; the view of such Courts being that where the burden

of proof of a given allegation rests upon a party, it is sufficient for that party, in the first instance, to produce proof enough to make a prima facie case, and that he is not required to accumulate other testimony until evidence has been introduced tending to contradict his prima facie case. That rule has not prevailed in the Courts of this State; but the more usual rule is, that the party upon whom the burden of proof rests must, in the first instance, produce *all* the proof he proposes to offer in support of his allegation; and after his adversary has closed his proof, he may only be heard in adducing proof directly rebutting the proofs given by his adversay. This question of practice must, to a greater or less degree, be left to the discretion of the Court trying the case. This discretion should be exercised in such a manner that neither party shall be taken by surprise and deprived, without notice, of an opportunity of producing any material proof.

In this case, when the appellant closed his proof and rested his case upon the production of the will, the affidavit of the subscribing witnesses and the order of the Court admitting it to probate, appellant was notified (the record shows) that if he desired to produce any additional proof of the sanity of the testator it might be then produced, otherwise the introduction of it would not be permitted after the defendant had closed his case. Appellant, having rested his case upon this prima facie proof, under these circumstances can not be allowed to complain that he was not permitted to cumulate proof upon this subject. An examination of the proof, however, shows that the Court did allow appellant to introduce and prove any and all facts having a tendency to rebut the proof offered by appellee, except in so far as he proposed to interrogate witnesses as to their opinions as to whether the testator was sane. We are led to believe that appellant suffered no injury from this ruling of the Court. . . . The decree of the Circuit Court must be affirmed. Decree affirmed.

718. ANKERSMIT *v.* TUCK

COURT OF APPEALS OF NEW YORK. 1889

114 *N. Y.* 51; 20 *N. E.* 819

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 28, 1888, which affirmed a judgment in favor of defendant, entered on a verdict and an order denying a new trial.

This action was brought to recover the possession of eight bales of Sumatra tobacco purchased by the defendant's assignor, as is alleged, by means of false and fraudulent representations as to his solvency, and with the intent not to pay therefor. Upon the trial the plaintiffs gave evidence tending to show that, before making the sale of the goods in question, the defendant's assignor represented and stated that he was

solvent and worth $20,000; that his wife had $10,000, which was in the stock at the risk of the business. After the plaintiffs had rested, the defendant's assignor was sworn as a witness for the defendant, and denied that he had made any such representations. Upon the cross-examination he was asked if he had not purchased goods at about that time of various individuals, among whom were Schroeder & Bon, and he testified that he had, but at the time of such purchase in August or September, 1885, Bon did not make any inquiry of him as to his financial condition, and that he did not say to Bon that he was solvent and worth $20,000, and did not state to him that he had $10,000 in his business from his wife, which was at the risk of the business. After he had rested, the plaintiffs called Bon as a witness, who testified that he sold the goods to the defendant's assignor in August or September, 1885, and that, at the time he made a statement as to his condition. The witness was then asked "Did he state to you that he was solvent; and that he was worth $12,000, and that the $10,000 which he got from his wife was at the risk of the business?" This was objected to as immaterial, incompetent and not in rebuttal. The evidence was excluded and an exception taken by the plaintiffs.

Frederick P. Forster, for appellants. Evidence impeaching Moeller's credibility was erroneously excluded. . . . For the purpose of impeaching Moeller the evidence was not competent in chief; it could only be offered at the time it was. . . .

Alfred P. W. Seaman and *E. E. West*, for respondent. A party is bound to exhaust all his testimony in support of his issue, and to introduce all his evidence before he closes. . . . The evidence was admissible on plaintiff's case, as a matter of right, but its admission in rebuttal was in the "discretion of the court, from the exercise of which discretion no appeal lies." . . . Plaintiffs neglected to produce evidence of contemporaneous representations before they rested, when competent, and when they attempted to prove them on cross-examination of defendant's witness they made the witness their own for that purpose, and being disappointed in the result, they should not be permitted to impeach the testimony they themselves brought out. . . .

HAIGHT, J. (after stating the case as above). The Court at General Term, held that the statement made to Bon and others was competent as evidence in chief, and that the plaintiffs, having rested without introducing it, left its subsequent admission discretionary with the trial Court, and, consequently, that the exception to its exclusion was not well taken. It is doubtless true that the evidence was competent and could have been introduced by the plaintiffs as a part of their affirmative case for the purpose of showing an intent to cheat and defraud, and that their neglect to introduce it at that time deprives them of the right to make use of it as affirmative evidence. But a party has the right to impeach or discredit the testimony of an opponent, and such evidence is always competent. He may contradict the testimony of a witness as to any

matters upon which he has been called to give evidence in chief, provided it is not collateral to the issue; if it has reference to statements made to others, his attention should first be called to the time, place and person to whom the statement is claimed to have been made, and if denied, such person may then be called to contradict him, thus discrediting his testimony as a witness. This is what the plaintiffs attempted to do, and we do not understand that it was discretionary with the trial Court to exclude it. . . . The judgment should be reversed and a new trial ordered, costs to abide the event.

All concur. Judgment reversed.

Topic 2. Putting in One's Own Case on Cross-Examination

719. MOODY *v.* ROWELL

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1835

17 *Pick.* 490

ASSUMPSIT on a promissory note for the sum of $2,750, dated November 1, 1828, payable to John Blaisdell, junior, since deceased, or his order, in five years, with interest, and purporting to be signed by the defendant and indorsed by the payee. The defence rested on the ground, that the signatures of the defendant and of the payee were forged. Henry H. Brown, who was called as a witness for the defendant, was examined as to the handwriting of the payee. On his cross-examination, the plaintiff examined him as to the handwriting of the defendant. The judge did not permit the plaintiff to cross-examine the witness as to the defendant's signature, he not having been questioned on that subject by the defendant. . . .

The verdict was for the defendant; and the plaintiff moved for a new trial.

Saltonstall and *Choate*, for the plaintiff. . . .

Cushing, for the defendant, to the point, that the party cross-examining a witness, is not authorized to put leading questions as to a matter not inquired of on the direct examination. . . .

SHAW, C. J., delivered the opinion of the Court. . . . Upon the question, whether, as a general rule, the cross-examining party is prohibited from putting a leading question to a matter not inquired of by the party calling him, on his examination in chief, there is a diversity of opinion. It was held by Mr. Justice WASHINGTON, that such question could not be put. Harrison *v.* Rowan, 3 Wash. C. C. R. 580. . . . The same view seems to have been taken by the Supreme Court of Pennsylvania. Ellmaker *v.* Buckley, 16 Serg. & Rawle 77. But we think the general practice has been otherwise both in England and in this State, and is so laid down by the compilers. 1 Starkie on Evidence (4th Am. ed.) 131;

1 Phillipps on Evidence (6th ed.) 260. . . . So in several recent cases, it has been held that where a witness is called to a particular fact, he is a witness to all purposes, and may be fully cross-examined to the whole case, and no distinction is suggested as to the mode of cross-examination. Morgan *v.* Brydges, 2 Stark. R. 314; Rex *v.* Brooke, ibid. 472. . . .

It is most desirable that rules of general practice, of so much importance and of such frequent recurrence, should be as few, simple and practical as possible, and that distinctions should not be multiplied without good cause. It would be often difficult, in a long and complicated examination, to decide whether a question applies wholly to new matter, or to matter already examined to in chief. The general rule admitted on all hands is, that on a cross-examination, leading questions may be put, and the Court are of opinion, that it would be useful to engraft upon it a distinction not in general necessary to attain the purposes of justice, in the investigation of the truth of facts, that it would be often difficult of application, and that all the practical good expected from it may be as effectually attained by the exercise of the discretionary power of the court, where the circumstances are such as to require its interposition. As this was laid down as the general rule of law, the Court are of opinion, that upon this ground the plaintiff, if he shall be so advised, is entitled to have a new trial.

720. PHILADELPHIA & TRENTON R. CO. *v.* STIMPSON. (1846. Federal Supreme Court. 14 Pet. 448, 461.) STORY, J. (ruling on testimony to an admission, given by the defendant's witness on cross-examination). Upon his cross-examination Winans stated: "I understood there were arrangements made with the Baltimore Company. I heard the company paid five thousand dollars." Now, certainly, these statements, if objected to by the defendants, would have been inadmissible on two distinct grounds. 1. First, as mere hearsay; 2. And, secondly . . . upon the broader principle (now well established, although sometimes lost sight of in our loose practice at trials) that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him as to other matters, he must do so by making the witness his own, and calling him as such in the subsequent progress of the cause.

721. STAFFORD *v.* FARGO. (1864. Illinois. 35 Ill. 481, 486.) WALKER, C. J.: [The opponent] has only the right to cross-examine upon the facts to which he [the witness] testified in chief. If he can give evidence beneficial to the other party, he should call him at the proper time and make him his own witness and examine him in chief, thereby giving the other party the benefit of a cross-examination on such evidence in chief. Otherwise the party calling the witness would be deprived of a cross-examination as to evidence called out by the other side, and the party against whom the witness was first called would obtain the advantage of getting evidence under the latitude allowed in cross-examination.

722. NEW YORK IRON MINE *v.* NEGAUNEE BANK

SUPREME COURT OF MICHIGAN. 1878

39 *Mich.* 644

ERROR to Marquette. Submitted October 18 and 22. Decided November 21. Assumpsit. Defendant brings error.

W. P. Healy and *G. V. N. Lothrop*, for plaintiff in error. . . . Wide latitude should be allowed in cross-examining a party charged with fraud in the transaction at issue. . . .

Ball & Owen and *Ashley Pond*, for defendant in error. . . . Cross-examination must be confined to matters bearing on the direct testimony of the witness. . . .

COOLEY, J. — The plaintiff in error is sued as a maker of three promissory notes and endorser of a fourth, all of which are copied in the margin.[1] By reference to these notes it will be seen that the name of plaintiff in error is subscribed or endorsed by W. L. Wetmore, and the contest has been made over his authority to make use of the name of plaintiff in error as he has done. The New York Mine is a corporation, having its place of operations at Ishpeming in this State. It was organized some fourteen years ago, with Samuel J. Tilden and William L. Wetmore as corporators. Mr. Tilden has had the principal interest from the first, and has always acted as president and treasurer, keeping his office in New York city. Mr. Wetmore has always until this controversy arose acted as general agent with his office at Ishpeming. The board of direction has been made up of these gentlemen with some nominal holders of stock in New York city as associates. . . . The firm of Wetmore & Bro. named in the three notes purporting to be made by the New York Mine, was composed of William L. and F. P. Wetmore, and there was evidence that the New York Mine had had business transactions with that firm to the amount in all of $125,000. . . . It was not claimed on the trial that there had ever been any corporate action expressly empowering Wetmore as general agent to make promissory notes, nor did it appear that he had ever executed any in its name except a few. . . . It was not disputed by the defense that the corporation as such had power to make the notes in suit. The question was whether it had in any manner delegated that power to Wetmore. . . .

Some of the proceedings on the trial require attention, and especially the rule of cross-examination laid down by the circuit judge when Wetmore was on the stand as a witness for the plaintiff. Wetmore was manifestly a willing witness, and made such showing as was in his power in support of the authority which as general agent he had assumed to

[1] These notes were signed or endorsed "New York Iron Mine, by W. L. Wetmore."

exercise. But although he was the first witness called, and the case involved nothing but paper made or indorsed by himself, he was not asked respecting his signatures, and the notes were not offered in evidence while he was upon the stand. The reason for this was apparent as soon as the cross-examination commenced, for when the witness was asked any questions concerning the notes, the purpose of which was to show that he had signed or indorsed them without authority and in fraud of defendant, and that he had admitted that such was the fact, objection was at once interposed on behalf of the plaintiff, and the circuit judge, remarking that the witness had given no testimony in reference to the notes, nor had any testimony been introduced by any other party in reference to them, nor had the notes been put in evidence, sustained the objection.

The question of the proper range of cross-examination has been discussed in this State until it would seem that further discussion must be entirely needless. . . . People *v.* Horton, 4 Mich. 67, and Campau *v.* Dewey, 9 Mich. 381, would support the ruling of the circuit judge. But those cases have been repeatedly overruled. In Chandler *v.* Allison, 10 Mich. 460, 473, Mr. Justice CAMPBELL undertook to lay down the proper rule. The object of cross-examination, he there explained,

"is to elicit the whole truth concerning transactions which may be supposed to have been only partially explained, and where the whole truth would represent them in a different light. Whenever an entire transaction is in issue, evidence which conceals a part of it is defective, and does not comply with the primary obligation of the oath, which is designed to elicit the whole truth. If the witness were (as he always may be) requested to state what he knows about it, he would not do his duty by designedly stopping short of it. Any question which fills up his omissions, whether designed or accidental, is legitimate and proper on cross-examination. . . . A party cannot glean out certain parts, which alone would make out a false account, and save his own witness from the sifting process by which only those omissions can be detected. There could be no such thing as cross-examination if such a course were allowed. . . . No one can be compelled to make his adversary's witness his own to explain or fill up a transaction he has partially explained already.

One might suppose, after reading this language, that it was written in anticipation of the proceedings in this very case. . . . Here the matter in issue was confined to the single point of Wetmore's authority to make and endorse the paper sued upon. . . . The questions on behalf of the plaintiff had been carefully restricted to that part of the facts which it was supposed would tend in its favor and in respect to which a cross-examination could not be damaging, and were intended, instead of eliciting the whole truth, to conceal whatever would favor the defense. The witness, instead of being required, according to the obligation of his oath, to tell the whole truth, had been carefully limited to something less than the whole; and when questions were asked calculated to supply his omissions, they were ruled out because they did not relate to the precise circumstances which the plaintiff had thought it for his

interest to call out. It would be difficult to present a more striking illustration of the error in the rule in People *v.* Horton than is afforded by this case. For here was the principal actor in the transaction under investigation brought forward as a witness to support his own acts, but carefully examined in such a manner as to avoid having him utter a single word regarding the main fact — though it was peculiarly within his own knowledge — and even his handwriting was left to be proved by another. In that manner he was made to conceal not merely a part of the transaction but a principal part, and made to tell, not the whole truth according to the obligation of his oath, but a small fraction only, — a fraction, too, that was important only as it bore upon the main fact which was so carefully kept out of sight while this witness was giving his evidence. It is true, the defense was at liberty to call the witness subsequently; but this is no answer; the defense was not compellable to give credit to the plaintiff's witness as its own for the purposes of an explanation of facts constituting the plaintiff's case and a part of which the plaintiff had put before the jury when examining him. One of the mischiefs of the rule in People *v.* Horton was that it encouraged a practice not favorable to justice, whereby a party was compelled to make an unfriendly witness his own, after the party calling him had managed to present a one-sided and essentially false account of the facts, by artfully aiding the witness to give such glimpses of the truth only as would favor his own side of the issue. What has been said on this point has in substance been said many times before. The necessity of repeating it is a singular illustration of the difficulty with which a mischievous but plausible precedent is sometimes got rid of.

The question put to Wetmore on cross-examination, whether he had not admitted his fraud in the issue of this and similar paper, should have been allowed, as bearing directly upon the trustworthiness of his evidence. . . . The judgment must be reversed with costs, and a new trial ordered.

The other Justices concurred.

723. Rush *v.* French. (1874. Arizona. 1 Ariz. 99; 25 Pac. 816.) Dunne, C. J.: . . . Judge Garber, of Nevada, in Ferguson *v.* Rutherford, 7 Nev. 390, . . . evolves a clear, definite rule, which everybody can understand, and which any one thoroughly versed in the effect of pleadings can apply, viz., that the one invariable test to determine whether the cross-examination can be permitted is, Does it concern *new matter of defence* or not? As we understand the purport of this decision, it means that whatever is in mere denial of plaintiff's case may be brought out on cross-examination, whether the witness directly testified concerning it or not; that any such matter is, for this purpose, a fact or circumstance, legitimately connected with the matter testified to; if the witness has testified to *any* material fact in behalf of plaintiff's case, he may be compelled to disclose on cross-examination all he knows about the plaintiff's case, *and everything that will go towards denying and destroying the case set up by plaintiff;* that so far as defendant has a right to cross-examine on such matter, he shall have the full benefit of cross-examination, viz., the right to make such examination leading,

thorough, and exhaustive, and the fact that the evidence thus educed, while pertinent to the pending matter, will also help defendant's case is no ground for its exclusion. . . .

We have only one objection to the rule as stated by Judge GARBER, and that is the difficulty of applying it with certainty in the hurry of nisi prius trials. The test as to whether matter is or is not new matter of defence is, Can it be given in evidence under a general denial, and very often it is not easy to say, at a moment's notice, whether the matter is new or not, in this sense. The rule would hardly forward business on the trial; there would be the same objection by counsel as to admissibility, the same consumption of time in argument, and the same hesitation on the part of the Court to decide. But there is this advantage, after the trial is over, all parties know just what is necessary to determine whether an appeal will lie or not; they know where the line is drawn; they can look for it, and when they find it, they know that they have struck "wall rock," and that it is useless to go further. This is a great deal better than trusting to some other man's idea of the general equities of the case. Still, it is a very poor substitute for the plain, simple English rule, which avoids all possibility of dispute, saves all contention at the trial, dispatches the business at once, and yet, according to the testimony of our oldest and busiest States, hurts nobody. Nevertheless, the Supreme Court of the United States has discarded the English rule, and has furnished some suggestions for a new rule, which different States have accepted as a basis on which to build up what is called, by way of distinction, the American rule, though it has hardly received an adoption sufficiently general to warrant such a title. These suggestions have been adopted in California and Nevada. . . . We shall adopt the following rules, believing them to be clearly in accordance with the doctrine held in Nevada, and substantially in accordance with the practice in California:

1. When an adverse witness has testified to any point material to the party calling him, he may then and there be fully cross-examined and led by the *adverse party upon all matters pertinent to the case of the party calling him*, except exclusively new matter; and nothing shall be deemed new matter except it be such as could not be given *under a general denial.*

2. The fact that evidence called forth by a legitimate cross-examination happens also to sustain a cross-action or counter-claim affords no reason why it should be excluded.

3. The party entitled to cross-examine may waive his rights to do so at the time, and recall the witness and cross-examine him after he opens his case.

724. AYERS *v.* WABASH R. CO.

SUPREME COURT OF MISSOURI. 1905

190 *Mo.* 228; 88 *S. W.* 608

APPEAL from Circuit Court, Carroll County; JNO. P. BUTLER, Judge.

Action by Montie B. Ayers against the Wabash Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Plaintiff was struck by a locomotive on defendants' railroad, and suffered personal injuries. He brings this suit for damages. The negligence

ascribed to the defendant in the petition is failure to sound the bell or whistle on approaching the point where plaintiff was, and failure of the engineer to use the appliances at hand to stop the train in time to avoid striking the plaintiff after seeing him in a position of peril, or after the engineer, by ordinary care, might have seen him. The petition states that defendant's track was, and had been for many years, a well-recognized public path for pedestrians, with the knowledge and consent of defendant, and that plaintiff was on the track when he was struck, but it omits to say what he was doing, or in what position he was. The answer was a general denial and contributory negligence. . . .

The plaintiff called as a witness the engineer who was operating the locomotive at the time of the accident, and interrogated him on two subjects; that is, asked him how the engine was equipped, and what kind of a day it was. Then the witness was turned over to attorney for defendant for cross-examination, and was examined in regard to the accident, in which examination he stated: That when at his post on a level, straight track he could see from a half to three-quarters of a mile ahead. That this track was level and straight for about a quarter of a mile south of Gates' Crossing. That on this occasion he was at his post on the east side of the cab, looking north. He was running a little over 40 miles an hour. At that speed the train could not be stopped shorter than within 600 or 700 feet. That he did not see the plaintiff until he was within 150 feet of him. The plaintiff was then lying on the west side of the west rail, his body showing about 5 or 6 inches above the rail. As soon as he saw him, he used every effort and means at hand to stop, but it was too late. It was then impossible to stop in time to prevent striking him. The position of the plaintiff on the track was such that the witness could not have discerned him sooner than he did. At the close of the plaintiff's evidence the Court, at the request of defendant, gave an instruction to the jury to find for the defendant. The jury rendered a verdict accordingly, and the judgment for defendant followed. The plaintiff appealed.

John T. Barker and *Conkling & Rea*, for appellant. *Geo. S. Grover*, for respondent.

VALLIANT, J. (after stating the case as above). . . . The only question for decision is, was the plaintiff entitled to have his case submitted to the jury under instructions authorizing a verdict in his favor under any view of the evidence? The plaintiff insists that the testimony of the engineer to the effect that he was at his post and looking, yet did not see him until it was too late, and that as soon as he discovered him he did everything possible to avert the injury, is not the plaintiff's evidence, and did not justify the court in giving the peremptory instruction. The proposition is that the engineer was the plaintiff's witness only in reference to the subjects on which he was examined by plaintiff, and as to the rest he was defendant's witness. The question of latitude allowed in cross-examination of an adversary's witness has led to the adoption of one rule

in some jurisdictions and a different one in others. A distinguished text-writer on this subject calls one the "orthodox rule," and the other the "Federal rule" (3 Wigmore on Evidence, § 1885 et seq.), and quotes for the orthodox rule Fulton Bank *v.* Stafford, 2 Wend. 483–485:

"When a witness has been sworn in chief, the opposite party may not only cross-examine him in relation to the point which he was called to prove, but he may examine him as to any matter embraced in the issue. He may establish his defence by him without calling any other witness. If he is a competent witness to the jury for any purpose, he is so for all purposes."

For the Federal rule the same text-writer quotes from Judge Story in Philadelphia & T. R. Co. *v.* Stimpson, 14 Pet. 448, 461 [*ante*, No. 720];

"[The answers in controversy were inadmissible] upon the broader principle (now well established, although sometimes lost sight of in our loose practice at trials) that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine as to other matters, he must do so by making the witness his own, and calling him as such in the subsequent progress of the case."

What is there called the "orthodox rule" has always been the rule in this State. Page *v.* Kankey, 6 Mo. 433; Railroad *v.* Silver, 56 Mo. 265; State *v.* Jones, 64 Mo. 391; State *v.* Soper, 148 Mo. 234. The learned author above named, after an exhaustive discussion of the subject, says, in § 1895: "The rule under consideration is concerned solely with the order of presenting evidential material. The assumption is that the fact may be proved on direct examination at a later stage, and the only question is whether it may be elicited during the earlier stage." That is really the only essential difference in effect between the two rules. Under what is called the Federal rule, the defendant may cross-examine the plaintiff's witness on the subject of his examination in chief, and afterwards, when defendant comes to introducing his evidence, he may recall the witness, and examine him on other subjects, making him as to those matters his own witness. Under our rule the defendant need not wait until the time for introducing his evidence has come, but may examine the witness before he leaves the stand on other subjects; yet as to these other matters he is the defendant's witness. The testimony is the defendant's, and not the plaintiff's. Hume *v.* Hopkins, 140 Mo. 65; State ex rel. *v.* Branch, 151 Mo. 622, loc. cit. 641; Anderson *v.* Railroad, 161 Mo. 411. In such case, if the plaintiff had by other evidence made out a prima facie case, the Court could not take it from the jury on account of testimony brought out by defendant in the examination of the plaintiff's witness touching matters that had not been referred to in the direct examination. Such testimony would be the same, in effect, as if the witness had, as in conformity with the Federal rule, come down from the stand, and been recalled by the defendant after the plaintiff had closed his case. The only difference, as the text-writer above quoted says, is in the order in which the testimony is introduced. Involved in

this subject is the question of the right of plaintiff to cross-examine the same witness on the new subject on which the defendant has examined him, and the right of the plaintiff, after having closed his case in chief, to bring out testimony not strictly in rebuttal by examining defendant's witnesses on subjects upon which defendant had not examined them. Those questions, however, are not in this case, but they are scientifically discussed by the text-writer above quoted, citing and reviewing numerous decisions on the subject.

It is not clear, however, from the record in the case at bar, that the plaintiff did not make this engineer his witness on the disputed point. He asked him if his engine was equipped with modern appliances, and if it was not a bright day. The only significance of the modern appliances was the facility for stopping the engine, and the only point to be attained in proving that the day was clear was to show that the engineer must have seen the man on the track, if he was at his post and doing his duty. We have thus discussed the subject of the examination of an adversary's witness not because it is a vital question in this case, but because the counsel on both sides have discussed it in their briefs; for, even if all that the plaintiff claims on that point be conceded, and if we disregard entirely the evidence the engineer gave on cross-examination, the plaintiff made out no case for the jury.

There is no statute requiring the defendant to give a signal by bell or whistle on approaching a private crossing. Its duty to do so depends on the circumstances of the case. There was therefore no negligence per se in failing to sound the bell or whistle. . . . The learned trial judge had the right view of the subject.

The judgment is affirmed.

Brace, C. J., concurs. Marshall and Lamm, JJ., concur in the result, but are of the opinion that the engineer put on the stand by plaintiff was plaintiff's witness throughout, and all his testimony in chief, as well as on cross-examination, was to be taken as part of plaintiff's case.

TITLE IV. JURISDICTION; RULES OF EVIDENCE IN FEDERAL COURTS

727. John H. Wigmore. *A Treatise on Evidence.* (1905. Vol. I, § 6.) By the principle of Conflict of Laws, the law of the forum determines the rules of evidence. In the Federal Courts, their own rules of evidence would therefore ordinarily have prevailed, for the Federal jurisdiction rests upon a sovereignty separate from that of the respective States. Nevertheless, their situation is peculiar, for (apart from the District of Columbia and the Territories) there is not a separate physical territory within which their jurisdiction is exclusive, and, in consequence, the litigation before their trial sessions is commonly in the hands of a body of practitioners which primarily is a State bar and represents local habits and traditions. It would be therefore natural and highly convenient to follow so far as practicable the local rules of evidence. Such was the view of the founders of the Federal Government, who in 1789 directed the Federal Courts to follow local rules except when otherwise directed by Federal legislation: U. S. R. S. 1878, § 721 (repeating St. 1789, c. 20, s. 34): "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply."

This policy was continued in later enactments, which enlarged the scope of the rule, though they added numerous instances to the exceptions. U. S. R. S. 1878, § 858 (combining statutes of 1862, 1864, and 1865; after enacting certain provisions as to qualifications of witnesses, it continues): "In all other respects the laws of the State in which the trial is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty." [1]

The effect of this legislation may be considered under three heads:

(*a*) In *chancery* proceedings, since the statute of 1862, the local State rules are applicable to the "competency of witnesses." But this provision seems to be ignored or narrowly construed in the Federal decisions.

(*b*) In *admiralty* proceedings, the Federal Courts originally had their own rules of evidence; but since 1862 the statute directs the adoption of the local State rules.

(*c*) *Common law* trials, being expressly named in the statute of 1789, have from the beginning been subject to the rule. Thus in the Federal courts a Federal statute prevails over the State rule upon the same subject,

[1] Amended by St. 1906, June 29, § 3608, Stat. L. Vol. 34, p. 618, so as to read: The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the court is held."

but in the absence of a Federal statute the State rule is followed. The State rules thus made applicable include statutory rules, and they include all the rules of admissibility, even under the words "competency of witnesses" in U. S. R. S. § 858. But by a singular and indefensible construction, *criminal cases* have been held not to be included under the term "trials at common law" either in U. S. R. S. § 721 or in U. S. R. S. § 858; in consequence of which the Federal rules for criminal trials are determinable by an artificial and unpractical test, which merely creates useless obscurity and complication and ought to be reformed by legislation.

728. WILSON *v.* NEW ENGLAND NAVIGATION CO.

United States District Court Eastern District, New York. 1912

197 *Fed.* 88

At Law. Action by James Wilson against the New England Navigation Company. On motion by defendant for a bill of particulars and by plaintiff for an examination and inspection of an object in defendant's possession. Both motions granted.

A. Delos Kneeland, for plaintiff. *Charles M. Sheafe, Jr.*, for defendant.

Chatfield, District Judge. — The plaintiff has alleged injury while at duty on a steam tug belonging to the defendant by scalding from steam escaping out of a throttle valve or pipe, which he alleges was "unsafe, defective, imperfect and improperly constructed and applied." He alleges that the defendant had notice of the "defects, lack of safety and disrepair," and that a part of the machinery which the plaintiff was using was, without negligence on the plaintiff's part, blown out in the harbor of New York through the negligence stated. The defendant has made a motion for a bill of particulars as to the respects in which the valve and piping were unsafe, defective, imperfect, improperly constructed or improperly applied, in what way any of the other machinery was defective or out of repair, and what part of the machinery was blown into the harbor. It now appears that the plaintiff has no evidence that any of the machinery was blown into the harbor, but intended to allege that an explosion occurred while the boat was in New York Harbor. Nor does the plaintiff charge that any of the machinery was out of repair or unsafe, other than the throttle valve and the piping attached thereto. Plaintiff has demanded, by a motion brought on at the same time, examination and inspection of this throttle valve, which he alleges is in the possession of the defendant, before being required to specify any defects or lack of care beyond such as he may attempt to point out from the happening of the accident itself and the conditions under which it occurred.

I. It will be necessary to take up his motion for inspection of this particular article first.

1. It may be assumed that as at common law no power vests in a Court of law to preliminarily examine a witness, or documents, or to require a party to allow the inspection of physical objects, including that of the person of a party, in advance of trial. Iasagi *v.* Brown, 1 Curt. 401, Fed. Cas. No. 6,993; Carpenter *v.* Winn, 221 U. S. 545.

2. Nor have the United States Courts any such power unless by statute.

In Ex parte Fisk, 113 U. S. 713, it was held that § 914 of the Revised Statutes [1] (U. S. Comp. St. 1901, p. 684), by which the practice and procedure in cases in the United States Courts are ordered to conform, as near as may be, in civil causes, to the practice and procedure in the State courts, and § 721 of the Revised Statutes [2] (U. S. Comp. St. 1901, p. 581), by which the laws of the several States, except where the Constitution or statutes of the United States otherwise provide, are to be regarded as rules of decision in trials at common law, in courts of the United States, did not allow the examination of a party before a master, according to the laws of the State in which the action was being tried. The Court held this as a conclusion from the language of § 861 of the Revised Statutes (U. S. Comp. St. 1901, p. 661), which directs that "the mode of proof in trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except" in the cases named by § 863 and §§ 866 to 870 (U. S. Comp. St. 1901, pp. 661 and 663–665), inclusive.

The reason for taking the deposition in question was not within the specified situations of either § 863 or § 866, R. S., and the Court therefore said that the provisions of § 861 must be held conclusive, not only as to the method of presenting the testimony of witnesses at the trial, but also as to the power of the Court to procure written testimony for use at the trial in any other way than under the sections above specified.

In Union Pacific Railway Co. *v.* Botsford, 141 U. S. 250, personal examination of a plaintiff in order that a surgeon might prepare to testify at the trial of an action for personal injuries was held beyond the power of the United States Courts, without reference to the law of the State in which the case arose. And, although no testimony was to be given until the trial, the court said, as in Ex parte Fisk, supra, that actions in a court of law of the United States must be governed by the rules and exceptions of the United States Courts, as the United States statutes provide.

[1] § 914. *Practice and proceedings in other than equity and admiralty causes.* The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.

[2] [Quoted *ante*, in No. 727.]

Hence § 721, prescribing the rules for trial, was held not controlling over the conduct of the case prior to trial, while § 914 was held inapplicable to enlarge the power of the United States Courts, so as to grant an examination of the sort asked, as neither §§ 866 et seq. nor § 724 provided for such method of preparation for trial as was asked in that case.

In Camden & Suburban Railway Co. *v.* Stetson, 177 U. S. 172, however, the decision in the Botsford Case was stated to have been upon the ground that no statute of the State in which the court was held existed allowing such examination, and an examination of the person of the plaintiff, under a statute of the state of New Jersey providing for such examination, in order to enable the witnesses to prepare for oral testimony on the trial, was upheld as within the power of the United States Court. It was intimated that the doctrine of Lyon *v.* Manhattan Railway Co., 142 N. Y. 298, which upheld, under the New York law, the physical examination of a party called as a witness before trial, could not, under the decision of the Fisk Case, be upheld in a Federal court. But a statute providing for inspection only was in conflict with nothing in the United States statutes, and therefore could be invoked in a case removed into the United States courts.

In the case of Hanks Dental Association *v.* International Tooth Crown Co., 194 U. S. 303, taken up from the Southern District of New York, the Supreme Court held that the provisions of § 873 of the New York Code (which allow a physical examination of the plaintiff before trial, as a part of the examination of that party for the purpose of perpetuating his testimony under § 870) were contrary to the statutes of the United States. But the Court expressly says that the principle of Camden & Suburban Railway Co. *v.* Stetson, supra, is correct, and also intimates that the ruling of Ex parte Fisk, supra, is unaffected in any substantial particular.

In Carpenter *v.* Winn, 221 U. S. 533, the Supreme Court has held that the production of books, papers, memoranda, etc., which under § 724 of the Revised Statutes can be produced by order of Court "in the trial of an action at law," can only be obtained by subpœna or on notice at the trial, and that the provisions of this section leave the right to a bill of discovery unaffected. Hence the Court holds that in an action at law the production before trial of books and papers cannot be ordered upon motion, but that the right to a bill of discovery is not affected, and intimates that every remedy, except a bill of discovery, is prevented by the argument of exclusion, based upon § 861, as in Ex parte Fisk, supra. . . .

3. The application of § 724, R. S., therefore, having been limited to a production of books or writings at the trial, we are necessarily (under the express holding of the Supreme Court in that case that the right of a party to a bill of discovery is not affected by the provisions of § 724) brought to consider whether § 724 does exclude the New York Statutes,

§ 803,[1] providing for examination of papers and property before trial. We must, therefore, look to the other sections of the Revised Statutes, and in the present case we must consider whether any of these sections prevent the examination of the valve which the plaintiff now seeks to inspect.

As has been said, Ex parte Fisk, supra, and Hanks Dental Association *v.* International Tooth Crown Co., supra, have held definitely that the examination of parties and witnesses and the taking of testimony, except at the trial, is contrary to the provisions of § 861 and § 863, R. S. In Carpenter *v.* Winn, supra, the production and examination of books and papers before trial was held impossible because to hold otherwise would be inconsistent with the court's conclusion that § 724 was limited to an order to produce at the trial, and that a bill of discovery could still be filed. But none of these cases except that of Camden & Suburban Railway Co. *v.* Stetson, supra, seem to have considered a statute with provisions such as § 803, and providing for an examination of the object apart from the examination of a witness.

It will be noted that § 803 of the New York Code applies to "any court of record," and is entirely general in its provisions, and the examination is of itself called a production and discovery. §§ 870 and 873 of the New York Code, on the other hand, have to do with the depositions of a party or person who expects to be a party, and the order for physical examination provides that, "in granting an order for the examination of the plaintiff before trial," the judge may direct him to submit to a physical examination as well. The purpose of the discovery and of these various statutes is to confer power upon the Court to accomplish what seems to be recognized by the Legislatures and by Congress, in so far as the laws have been passed, as desirable to simplify litigation and aid litigants. . . .

The defendant suggests that inspection of an exhibit should not be allowed if the physical examination of the plaintiff is held illegal under the rulings of the Supreme Court. But why should the matter be made one of retribution and not of law? The decision in Ex parte Fisk was followed by an amendment by Congress to § 866, providing that "it shall be lawful to take the deposition or testimony of witnesses in the mode prescribed by the laws of the State." But in Hanks Dental Association *v.* International Tooth Crown Co., supra, the Supreme Court again held that the language of § 861, viz., "The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided," was not affected thereby. In Carpenter *v.* Winn, supra, the words, "in the trial," are now held to mean only "at the trial," and the words, "except as hereinafter provided," are held, in Hanks Dental Association *v.* Inter-

[1] *New York*, Code of Civil Procedure, § 803: A court of record, other than a justice's court in a city, has power to compel a party to an action ending therein, to produce and discover, or to give to the other party, an inspection and copy, or permission to take a copy, of a book, document, or other paper, in his possession or under his control, relating to the merits of the action, or of the defence therein.

national Tooth Crown Co., supra, to mean only in cases where the United States statutes provide for a deposition. In other words, the language of § 861, which says, "mode of proof at the trial," includes the prohibition of any other form of preparation for trial; while in § 866, as amended, "mode prescribed" means the "way of taking down testimony," and cannot be construed as forming any rule as to when the testimony shall be taken. It is difficult to see why the Hanks Dental Association Case should be broadened after the limitation put upon § 861 by the decision in Carpenter *v.* Winn. To hold, after this last decision, that § 861 prohibits any way of preparing or preserving testimony, except "at the trial," or by certain kind of depositions, would prohibit a witness from going to inspect an object or locality for the purpose of testifying, or, in other words, would compel the production at the trial of everything to be considered by witnesses, and might even shut out testifying from recollection.

4. The present case seems to be of the sort where the plaintiff feels that he has a cause of action, but is in some doubt as to the exact ground for the charge of negligence, because the evidence from which he will attempt to make out his case is in the hands of the defendant. This evidence is not necessarily something which they are retaining for their defense, but is rather evidence which they do not desire the plaintiff to have, even if it be necessary to him for the proving of his case. Under these circumstances, it would seem to be hardship to allow the defendant to prevent the plaintiff from ascertaining what evidence is in existence and will be available to the plaintiff in proving the case which he will be bound to prove; while at the same time the defendant can insist upon the plaintiff's not being allowed to prove his case, unless he states just how he is going to try to charge liability. To deny the motion for inspection might enable the defendant not only to prevent the plaintiff's proving his case, if he has one, but would put him in a position where he might never find out or satisfy the court that he has any case to prove.

II. It also appears that the application for a bill of particulars, while sanctioned by usage and based upon § 531 of the New York Code, is in reality an application to have the plaintiff state his theory of negligence, or state more definitely just what negligent act of the defendant is charged and how he intends to make it out. This is, when properly asked, allowable under the form of a so-called bill of particulars, and the defendant's motion, therefore, should be granted, to the extent of directing the plaintiff to specify the cause of action upon which he intends to recover, in so far as to make certain whether the negligence was in the management and handling of the machinery in question, or whether it was in the previous installation and failure to provide or maintain suitable machinery.

But the plaintiff's motion for inspection should also be granted, and the order will provide that the plaintiff shall serve and file his bill of particulars within 10 days after the inspection is allowed and a proper identification of the valve made. . . .

BOOK III. TO WHOM EVIDENCE IS TO BE PRESENTED

(LAW AND FACT; JUDGE AND JURY)

730. James Bradley Thayer. *A Preliminary Treatise on Evidence.* (1898. p. 185.) 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, ascertaining whether disputed things be true. In other words, there is not, and never was, any such things in jury trials as an allotting of *all* questions of fact to the jury. The jury simply decides some questions of fact. The maxim, "ad quaestionem facti non respondent judices, ad quaestionem juris non respondent juratores," was never true, if taken absolutely. It was a favorite saying of Coke, in discussing special verdicts; and in Isaack *v.* Clark (Rolle, I, p. 132; s.c. Bulst. p. 314; 1613–14) he attributes it to Bracton; but that appears to be an error; a careful search for it in Bracton has failed to discover it. It seems likely that this formula took shape in England in the sixteenth century. But the maxim was never meant to be taken absolutely.

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731. Edward Bushell's Trial. (1670. King's Bench. 6 Howell's State Trials, 1000, 1014.) *Note by Mr. Howell.* "The most usual trial of matters of fact," says Lord Coke (First Inst. 155b), "is by twelve such men ('liberi et legales homines') for 'ad quaestionem facti non respondent judices;' and matters in law the judges ought to decide and discuss, for 'ad quaestionem juris non respondent juratores.'" Upon which passage his learned commentator, Mr. Hargrave, has given the following Note:

"This 'decantatum' (as Lord Chief Justice Vaughan calls it on account of its frequency in the books) about the respective provinces of judge and jury, hath, since Lord Coke's time, become the subject of very heated controversy, especially in prosecutions for State libels; some aiming to render juries wholly dependent on the judge for matters of law, and others contending for nearly a complete and unqualified independence. On the trial of John Lilburne for treason in 1649, high words passed between the Court and him, in consequence of his stating to the jury that they were judges both of law and fact, and citing passages in the Coke upon Littleton to prove it. 2 State Tr. 4th ed. 69 and post. 228, a. In the case of Penn and Meade, who in 1670 were indicted for unlawfully assembling the people and preaching to them, the jury gave a verdict against the directions of the Court in point of law, and for this were committed to prison. But the commitment was questioned; and on Habeas Corpus brought in the Court of Common Pleas, it was declared illegal; Lord Chief Justice Vaughan distinguishing himself on the occasion by a most profound argument in favor of

the rights of a jury. Bushell's Case, 1 Freem. 1, and Vaughan 135. However, the contest did not cease, as appears by Sir John Hawles's famous Dialogue between a Barrister and a Juryman, which was published in 1680, to assert the claims of the latter against the then current doctrine decrying their authority. Since the Revolution also many cases have occurred, in which there has been much debate on the like topic. See King *v.* Poole, in Cas. B. R. temp. Hardwicke 23. Franklin's case, in the St. Tr. Peter Zenger's, *ibid.* Owen's case, in the St. Tr., and Woodfall's case, 5 Burr. 261."

By attending to the cases before referred to, it will be easy to trace the progress of this controversy on the limits of the jury's province.

732. COMMONWEALTH *v.* PORTER

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1846

10 *Metc.* 263

INDICTMENT against the defendant on the Rev. Sts. c. 47, secs. 1, 2, . . . for "selling intoxicating liquors, to be used in and about his house in Cambridge," . . . without being first duly licensed.

At the trial in the Court of Common Pleas, before MERRICK, J., the prosecuting officer introduced record evidence that the defendant had been licensed according to St. 1837, c. 242, sec. 2, "to keep an inn, without authority to sell any intoxicating liquor." He also introduced evidence that the defendant had sold intoxicating liquors. The defendant's counsel contended that the license which was given in evidence was an authority to the defendant to do the acts and make the sales alleged and charged in the indictment, and was a sufficient and legal justification, on his part, for making those sales and doing those acts.

The counsel was proceeding to argue to the jury that such was the true construction of the statute, and the legal effect of said license, when he was stopped by the Court. The Court afterwards ruled, on argument, that the proposition stated by the defendant's counsel was purely a question of law, and as such was to be decided by the Court, and not by the jury; and the Court thereupon rules that the said license did not authorize the defendant to make the sales and to do the acts charged in the indictment, and was no justification to him therefor. . . .

The defendant's counsel contended, and was proceeding to argue to the jury, that sec. 1, of c. 47 of the Rev. Sts. was, by necessary implication, revealed by St. 1837, c. 242; the provisions of the latter statute being incompatible with those of the former. He was again stopped by the Court; and the Court ruled (as before) that this was a question of law, etc., and after argument, further ruled that said section was not so repealed, but remained in full force. And the Court further ruled that the several questions, having been ruled and decided by the Court, as aforesaid, were not open questions to the jury; that no appeal could be allowed from the Court to the jury, upon these several rulings and

decisions of the Court; and that therefore the defendant could not be permitted, by himself or his counsel, to argue these questions to the jury, for the purpose of inducing them to overrule or reverse these several rulings and decisions of the Court. . . .

The judge instructed the jury (among other things) that it was their duty to adopt and follow the said several rulings and decisions of the Court, for the purposes of the trial. But he stated to them that they occupied an independent position, and, being required to return only a general verdict, they possessed the power of rendering a verdict in opposition to the said rulings and decisions, whereby they would be in fact overruled and reversed; and that, if the jury should do so, in violation of what the Court had thus prescribed as the rule of their duty, they would in no way be amenable to punishment by the law, or responsible, in any form, to any legal accusation or animadversion, for such proceeding. . . .

This case was argued at the last October Term.

Hallett & Nelson, for the defendant. . . . "It is the right of juries, in criminal cases, to give a general verdict of acquittal, which cannot be set aside on account of its being contrary to law; and hence results the power of juries to decide on the law, as well as on the facts in all criminal cases." Per CHASE, J., 1 Chase's Trial 34; State *v.* Snow, 6 Shepley 346. . . .

Huntington (District Attorney), for the Commonwealth. . . . In U. S. *v.* Battiste, 2 Sumner 243, STORY, J., says: "The jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case tried upon the general issue. In each they have the physical power to disregard the law as laid down to them by the court. But I deny that in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure. It is the duty of the jury to follow the law, as it is laid down by the court. . . ."

Hallett, in reply. It is admitted on all hands, that the jury have the *power* to determine the law as well as the fact of the case. "And if the law gives them the power it gives them the right also; power and right are convertible terms when the law authorizes the doing of an act which shall be final, and for the doing of which the agent is not responsible." Such was Mr. Hamilton's argument in the People *v.* Croswell, 3 Johns. Cas. 345, and such was the opinion of BLACKFORD, J., in Townsend *v.* The State, 2 Blackf. 163. . . . The anomalous cases of libel, under Lord MANSFIELD, were decided after the adoption of our constitution, and were made a state question between the government and the liberty of the press. 3 T. R. 428, note. . . . In all cases but these, the doctrine that, in a criminal trial, the jury, on the plea of not guilty, may determine the law and the fact of the case, has been supported, or not denied, by every English judge, except Chief Justice JEFFRIES, in the trial of Sidney, 3 Hargrave's State Trials, 805. . . .

SHAW, C. J.—This case comes before the court upon a bill of excep-

tions. And the question is, whether, in a criminal prosecution against the defendant for an alleged violation of the license laws, his counsel have a right to address the jury upon the questions of law embraced in the issue. The effect of the argument for the defendant, when analyzed, appears to be this; that in criminal prosecutions, it is within the legitimate right and proper duty of juries, to adjudicate and decide on questions of law as well as questions of fact; and that although the judge may instruct and direct them upon a question of law, and they fully comprehend and understand those directions, in their application to the facts of the case, yet that they are invested by law with a legitimate power and authority, if their judgments do not coincide with that of the judge, to disregard it, and decide in conformity with their own views of the law. If this were a correct view of the law, it would undoubtedly follow, as a necessary consequence, that in such appeal from the Court to the jury, the counsel on both sides would have a right to argue the questions of law to the jury. But if this proposition is not correct, it does not follow, we think, as a necessary consequence, that the counsel cannot address the jury upon the law, under the direction of the court. They are, in our view, separate and distinct questions, to be separately considered.

We consider it a well-settled principle and rule, lying at the foundation of jury trial, admitted and recognized ever since jury trial has been adopted as an established and settled mode of proceeding in courts of justice, that it is the proper province and duty of judges to consider and decide all questions of law which arise, and that the responsibility of a correct decision is placed finally on them; that it is the proper province and duty of the jury to weigh and consider evidence, and decide all questions of fact, and that the responsibility of a correct decision is placed upon them. And the safety, efficacy, and purity of jury trial depend upon the steady maintenance and practical application of this principle. It would be alike a usurpation of authority and violation of duty, for a court, on a jury trial, to decide authoritatively on the questions of fact, and for the jury to decide ultimately and authoritatively upon the questions of law. And the obligations of each are of a like nature, being that of a high legal and moral obligation to the performance of an important duty, enforced and sanctioned by an oath. . . .

The whole doctrine of bills of exception, now in such general and familiar use, both in civil and criminal proceedings, is founded upon the same great and leading idea. It presupposes that it is within the authority, and that it is the duty of the judge to instruct and direct the jury authoritatively, upon such questions of law as may seem to him to be material for the jury to understand and apply, in the issue to be tried; and he may also be required so to instruct upon any pertinent question of law within the issue, upon which either party may request him to instruct. The doctrine also assumes that the jury understand and follow such instruction in matter of law. This results from the consideration, that if such instruction be either given or refused, it is the

duty of the judge to state it in a bill of exceptions, so that it may be placed on the record; and if the verdict is against the party who took the exception, and it appears, upon a revision of the point of law, that the decision is incorrect, either in giving or refusing such instruction, the verdict is set aside, as a matter of course. To this conclusion the law could come, only on the assumption that it was the right and duty of the court to instruct the jury in matter of law, that the jury understood it, and, as a matter of duty, were bound to follow it; so that, if the instruction was wrong, the law assumes, as a necessary legal consequence, that the verdict was wrong, and sets it aside. The law could only assume this, upon the strength of the well known and reasonable presumption, that all persons, in the absence of proof to the contrary, do that which it is their duty to do. It is presumed that the jury followed the instruction of the Court in matter of law, because it was their duty so to do, and therefore, if the instruction was wrong, the verdict is wrong. But if the jury could rightly exercise their own judgment, and decide contrary to the direction of the Court, as they unquestionably may do, in regard to questions of fact, no such presumption would follow; it would be left entirely in doubt, whether the jury had been misled or influenced by the incorrect direction in matter of law, and therefore this would alone be no sufficient ground for setting aside the verdict. But entirely otherwise it is in regard to a matter of fact, in respect to which it is within the proper authority, and is the duty of the jury to exercise their judgment authoritatively and definitely. And should a judge express or intimate any opinion upon a question of fact, however incorrect it might be afterwards found to be, upon a revision by a higher Court, it would not necessarily afford a ground for a new trial; for, it not being the duty of the jury to follow it, there would be no presumption that they had followed it, and therefore it would not, of itself, show conclusively that the verdict was wrong. . . .

[Furthermore, looking at the essential purposes of a Constitution, and the fundamental rights and principles there guaranteed in solid permanence,] it appears to us that the principle contended for would be adverse to all these objects. If a jury has a legitimate authority to decide upon all questions of law arising in the cases before them, and that contrary to the instruction of the judge, in cases where such direction of the judge may be supposed adverse to the views of the law relied on by the accused or his counsel, they would have the same power to decide any question of law, against the opinion and instruction of the judge, when such opinion is in favor of the accused, and find him guilty, where the judge should direct the jury that those facts which the evidence conduces to prove, if proved to their satisfaction, would not warrant a conviction. A case may be supposed, at least for the purpose of illustration, where a high popular excitement should arise and become general in which large bodies of persons might come to be actuated by feelings of honest but mistaken indignation against some supposed wrong, and

earnest in the pursuit of the supposed interests of philanthropy; or perhaps numbers may be influenced by more base, interested, and vindictive passions. Under these circumstances, a grand jury, having, as the case supposes, a legitimate and rightful authority to decide on questions of law, contrary to the instructions and charge of the judge, might return an indictment; a traverse jury, in their turn, might convict upon it, though the court before whom it is tried should give them such directions, in point of law, that if they understood and followed them they must acquit the accused. But the case supposes that the law may be rightfully interpreted by a jury which may shift at every trial. What then becomes of the security which every citizen is entitled to, by a steady and uniform, as well as impartial interpretation of the laws and administration of justice, by judges as free, impartial and independent as the lot of humanity will admit? . . .

Whether, therefore, we consider the rules of the common law, or the constitution and law of this Commonwealth, we are of opinion that it is the proper province and duty of the court to expound and declare the law, and that it is the proper province and duty of the jury to inquire into the facts by such competent evidence as may be laid before them, according to the rules of the law for the investigation of truth, which may be declared to them by the court, and find, and ultimately decide, on the facts. . . .

But in thus conducting a jury trial in a criminal case, with a view to the return of a general verdict, it is obvious that the whole matter of law as well as of fact must be stated and explained to the jury, so that they may fully understand and apply it to the facts; because, as we have seen, in the form of the general verdict, they do declare the law as well as the fact. For this purpose, it seems to be necessary, and in our State it is the usual practice, for the parties respectively, by their counsel, to state the law to the jury, in the presence, and subject to the ultimate direction of the judge; because, unless the jury understand the rule of law, with its exceptions, limits and qualifications, they cannot know how to apply the evidence, and determine the truth of the material facts necessary to bring the case of the accused within it. . . . We are of opinion that *a party may by his counsel address the jury* upon questions of law, subject to the superintending and controlling power of the Court to decide questions of law, by directions to the jury, which it is their duty to follow.

On the whole subject, the views of the Court may be summarily expressed in the following propositions: —

That in all criminal cases, it is competent for the jury, if they see fit, to decide upon all questions of fact embraced in the issue, and to refer the law arising thereon to the Court, in the form of a special verdict.

But it is optional with the jury thus to return a special verdict or not, and it is within their legitimate province and power to return a general verdict, if they see fit.

In thus rendering a general verdict, the jury must necessarily pass upon the whole issue, compounded of the law and of the fact, and they may thus incidentally pass on questions of law.

In forming and returning such general verdict, it is within the legitimate authority and power of the jury to decide definitely upon all questions of fact involved in the issue, according to their judgment, upon the force and effect of the competent evidence laid before them; and if in the progress of the trial, or in the summing up and charge to the jury, the Court should express or intimate any opinion upon any such question of fact, it is within the legitimate province of the jury to revise, reconsider, and decide contrary to such opinion, if, in their judgment, it is not correct and warranted by the evidence.

But it is the duty of the Court to instruct the jury on all questions of law which appear to arise in the cause, and also upon all questions, pertinent to the issue, upon which either party may request the direction of the Court, upon matters of law. And it is the duty of the jury to receive the law from the Court, and to conform their judgment and decision to such instructions, as far as they understand them, in applying the law to the facts to be found by them; and it is not within the legitimate province of the jury to revise, reconsider, or decide contrary to such opinion or direction of the Court in matter of law. To this duty jurors are bound by a strong social and moral obligation, enforced by the sanction of an oath, to the same extent, and in the same manner, as they are conscientiously bound to decide all questions of fact according to the evidence.

It is within the legitimate power, and is the duty of the Court, to superintend the course of the trial; to decide upon the admission and rejection of evidence; to decide upon the use of any books, papers, documents, cases or works of supposed authority, which may be offered upon either side; to decide upon all collateral and incidental proceedings; and to confine parties and counsel to the matters within the issue. . . .

As it appears by the bill of exceptions, that the defendant's counsel were prohibited from addressing the jury upon questions of law embraced in the issue, the Court are of opinion that the verdict ought to be set aside; and the same is set aside, and a new trial granted, to be had at the bar of the Court of Common Pleas.

733. STATE *v.* GANNON. (1902. Connecticut. 75 Conn. 206, 223; 52 Atl. 727.) HAMERSLEY, J. — Whether such facility for disregarding both law and facts, when some impulse of lawlessness or patriotism assails the integrity of the jury, is a beneficial result of the right to render a general verdict, is a question of politics. How far a juror can justify himself in yielding to such impulse is a question of conscience. But whether it is an essential feature of jury trial as settled by common law, that the Court shall instruct the jury as to what is that law which they must consider with the facts as found by them in reaching a verdict, and that the jury shall accept the law so determined, as the law for the

case, in accordance to which they are bound by their oaths to return their verdict, is a question of law. On this question we entertain no doubt. . . .

In 1895, this question was, for the first time, formally passed upon by the Supreme Court of the United States. The case was decided upon great deliberation. The opinions of Mr. Justice HARLAN, speaking for the majority, and of Mr. Justice GRAY, speaking for the minority, cover the whole range of the controversy. The Court said: "We must hold firmly to the doctrine that in the Courts of the United States it is the duty of juries in criminal cases to take the law from the Court and apply that law to the facts as they find them to be from the evidence." In this conclusion seven of the nine judges concurred. Sparf *v.* United States, 156 U. S. 51, 102.

It is true that during the formative period of jury trial, and not infrequently in later times, judges in charging juries have used language of doubtful meaning and sometimes of questionable accuracy; that during times of high political excitement some public men of repute have advocated the right of juries to disregard the law; and that a few jurists of eminence have been led, by the practical result in former times of a general verdict in finally concluding the law in criminal cases, into confounding the physical power to disregard the law by the rendition of a general verdict with the duty imposed upon them by law. But we are satisfied that such expressions and views are repugnant to a most essential feature of jury trial and cannot bear the test of thorough examination. They are uniformly rejected by the Courts of the United States, and by the Courts of last resort in nearly all the States, where the question has been discussed.

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734. TITUS OATES' TRIAL. (1685. King's Bench. 10 Howell's State Trials, 1079, 1141.) [The notorious Oates, having been the chief informer testifying in the Popish Plot Trials (Whitebread, Fenwick, et al.) is now on trial himself for perjury in those former trials. Part of his defence is that judge and jury at those trials gave him full credit. He now offers to prove the charge given to the jury by the present Chief Justice SCROGGS, when presiding at the former trial.]

Oates [to the reporter]. — Pray will you look into what my lord chief justice Scroggs said when he discharged the jury of Whitebread and Fenwick. . . .

Blayney. — I have found the place, what is it you would ask me about it?

Oates. — Whether my lord chief justice Scroggs did not use these words to the jury? "I do acknowledge that Mr. Oates has given a very full and ample testimony, accompanied with all the circumstances of time and place, against them all;" . . .

Blayney. — There is something to that purpose, my lord. . . .

Oates. — Then will your lordship be pleased to give me leave to mention what was said by your lordship at that time, when you were Recorder of London, about your satisfaction with the evidence.

L. C. J. — Ay, with all my heart. . . . Ay, do so.

Oates. — Says Mr. Recorder of London, . . . when he gave judgment of death upon these five Jesuits and Langhorn (for I now speak of your lordship in the third person,) "Your several crimes have been proved against you; you have been fully heard, and stand convicted of those crimes you have been indicted for."

L. C. J. — I believe I might say something to the same purpose as you have

read now . . . but what counsel says at the bar, or what judges say in the Court of their opinion, is no evidence of a fact, of which the jury are judges only.

Oates. — My lord, every judge is upon his oath, and delivers his judgment according to his oath.

L. C. J. — Not as to the fact, but only in points of law, so as to tell the jury what the law is, if the fact be so and so.

Oates. — My lord, it goes a great way with the jury to have the judge's opinion.

L. C. J. — Mr. Oates, deceive not yourself. All this you have insisted on hitherto, has not been to the purpose, nor is any sort of evidence in this case; and therefore do not run away with an opinion of this as evidence. A judge's opinion is of value in points of law that arise upon facts found by juries, but are no evidence of the fact: for judges only do presume the fact to be true as it is found by the jury; and therefore say they, out of that fact so found, the point of law arising is thus or thus. . . . And by the same reason as this, a jury of honest gentlemen here, when I tell them, Here is a plain fact either to convict you, or to acquit you upon this indictment, are not bound to go by what I say in point of fact, but they are to go according to their own oaths, and according to the evidence and testimony of the witnesses. It is not my opinion that is to weigh at all with them, whether you are guilty of this perjury, or are innocent, but the evidence that is given here in Court. Therefore, what my Lord Chief Justice Scroggs said at any of those trials, or what I said, or any other person, that either was of counsel, or a judge on the bench, said as our opinions is but our opinions on the fact as it occurred to our present apprehensions, but is no evidence nor binding to this jury.

735. STATE *v.* MOSES

SUPREME COURT OF NORTH CAROLINA. 1830

2 *Dev.* 452

INDICTMENT for murder by shooting. The counsel for the prisoner placed his defence upon the total want of credibility in the witnesses for the prosecution. It was argued, first, that the testimony of the principal witness was not credible from its absurdity, for how could a man in a dark night, at the distance of ten steps, see another pull the trigger of a gun. . . . His honor, in his charge to the jury, informed them that the credit they would give to the testimony was a matter exclusively with them, and proceeded to suggest such circumstances as, in his opinion, might be considered by them as tending to shake or support the credit of the witness for the State, and leaving it also to them to give such weight to any other circumstances, which they might remember and the Judge should omit, as they thought proper. In speaking of the first objection, the Judge said, that a man might see by the flash of a gun, even in the night and probably the darker the night the more distinctly; and if they believed from the testimony, that was the case in the present instance, and that seeing a man in the attitude of shooting, with his hand

upon the trigger, and even by the flash of the gun, was substantially seeing him pull the trigger; and that if this was the fact in the particular case, then the contradiction relied upon in the testimony of the witness did not exist. . . . The jury returned a verdict of guilty, upon which, the counsel for the prisoner obtained a rule for a new trial, for misdirection. . . .

RUFFIN, J.—The Act of 1796 (Rev. c. 452,) "to direct the conduct of Judges in charges to the petit jury," restrains the judge from giving an opinion whether a fact is fully or sufficiently proved. At the same time, it imposes another duty; which is, to state, in a full and explicit manner, the facts given in evidence, and declare and explain the law arising thereon. . . . An unfair and partial exhibition of the testimony can alone be complained of; and the apprehension of that seems to have induced the passage of the law under consideration. It is not for us to say, whether that apprehension was well or ill founded; or whether the administration of the law would not be more certain, its tribunals more revered, and the suitors better satisfied, if the Judge were required to submit his view upon the whole case, and after the able and ingenious, but interested and partial arguments of Counsel, to follow with his own calm, discreet, sensible and impartial summary of the case, including both law and fact. Such elucidations from an upright, learned and discreet magistrate, habituated to the investigation of complicated masses of testimony, often contradictory, and often apparently so but really reconcilable, would be of infinite utility to a conscientious jury in arriving at just conclusions — not by force of the Judge's opinion, but of the reasons on which it was founded, and on which the jury would still have to pass. If this duty were imposed on the Judge, it is not to be questioned, that success would, oftener than it does, depend on the justice of the case, rather than the ability or adroitness of the advocate.

But such is certainly neither the duty nor within the competency of our Judges. I have already mentioned that it would be difficult for a Judge, surrounded by all the circumstances, to determine exactly what is his duty in this respect, in law and his own conscience. With still less certainty can a revising court lay down any rules *a priori*, or even apply them, after they are prescribed to cases as they arise. So much of the meaning of words depends upon their context, and of words spoken, upon the tone, emphasis, temper, and manner of the speaker, that it is utterly impossible that the whole can be transferred to paper, so as to enable an appellate tribunal to pass in general upon cases, without imminent hazard of doing injustice to the parties, and casting unmerited reproach upon the intentions of the Judge, and the understanding of the jury. If I were to lay down a rule as growing out of this Act of Assembly, I would say, that it was in general this: That the weight of the evidence is for the jury; they hold the scales for that. But the nature, relevancy and tendency of the evidence, it is competent for the Judge and his duty to explain. He is not only to recapitulate the testimony, but to show

what it tends to prove, and he may recapitulate it in such order and connexion, as to give it the effect of proving the fact sought for, if in itself it be sufficient for that purpose. Whether it be sufficient, it is the province of the jury to determine, and by this statute it is their exclusive province; and the Judge cannot give his opinion in aid of theirs, that it is, or is not sufficient. . . .

To apply these observations to the case before us: It is objected here, that the Court below assumed the power of expressing an opinion upon the facts, or expressed such forced inferences from the testimony, as might bias the minds of the jury. The facts to which those parts of the charge apply, were the credit due to several witnesses. The main fact in dispute, on which the issue was joined, was the guilt or innocence of the prisoner. This depended upon the subordinate facts of the veracity or falsehood of the tales of the witnesses. Now this last fact — of credibility, or the want of it — rested again upon other facts which tended to sap or sustain it. . . . In charging the jury, the judge is not obliged to confine himself to delivering the abstract rule, that a witness does impair his credit by refusing to give full evidence; but may, and ought also to call the attention of the jury to the specific misbehavior before their own eyes, a fact in evidence to him and them. Again, if the credit of one witness is assailed upon the ground that he is contradicted by two others, is the Court barely to inform the jury, that if such contradiction exist, it may impair the credit of the first witness, but that they have the right in law to reconcile the testimony, and then act on it? Or may he not mention to them the circumstances, and show how they are contradictory, or how reconcilable, leaving it to the jury, to say, whether in truth, the two tales do, or do not stand together, according to the parts of the transaction to which they relate, or to the meaning of the witnesses? Such a course as this last, seems to me to be right, useful and lawful. . . .

In like manner, the other exceptions are readily disposed of, without my going through them in detail. The whole are regarded as mere suggestions by the Judge to the jury, of the construction of which the words of the witnesses are susceptible, or the inferences which could be deduced from admitted or hypothetical facts; in each case leaving it to the jury to say, what was the true construction, or the true inference. I think this is the legitimate province of a Judge, within the statute under consideration. If I err, the charge of the Judge is an empty pageant, and ceremonial mockery, which may serve for the amusement of the crowd, but instead of aiding the jury, by rescuing the case from the false glosses of powerful advocates, and the misconception of the evidence, as applicable to the legal controversy, will but confound the jury, and still further obscure the truth.

It is to be recollected, that the objection here is not that the charge of the Judge as a whole, was partial or unfair, and therefore that he did not give "a full and explicit statement of the facts in evidence." . . .

There is no such complaint here; the objection on the contrary, is, that *any* suggestion, however reasonable, and though (without relating to the sufficiency of the proof) it form a part of the most explicit charge, going fully and impartially into the case on both sides, is forbidden to the Judge. That, I think, for the reason I have given, is not so. Consequently, the motion for a new trial was, in my opinion, properly overruled. . . .

Per Curiam. — Let the judgment of the Court below be affirmed.

736. James Bradley Thayer. *A Preliminary Treatise on Evidence.* (1898. p. 188.) In Massachusetts this change was introduced in 1860 (Gen. St. c. 115, s. 5), in the form that "The Courts shall not charge juries with respect to matters of fact, but may state the testimony and the law."

It is not too much to say of any period, in all English history, that it is impossible to conceive of trial by jury as existing there in a form which would withhold from the jury the assistance of the Court in dealing with the facts. Trial by jury, in such a form as that, is not trial by jury in any historic sense of the words. It is not the venerated institution which attracted the praise of Blackstone and of our ancestors, but something novel, modern, and much less to be respected.

In the Federal Courts the common-law doctrine on this subject has always held. "In the Courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment on the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts. . . . The power of the Courts of the United States in this respect is not controlled by the statutes of the State forbidding judges to express any opinion upon the facts." Gray, J., for the Court, in Vicksburg, etc., R. R. Co. *v.* Putnam, 118 U. S. 545, 553 (1886).

737. Arthur C. Train. *The Prisoner at the Bar.* (1908. 2d ed. p. 179.) Let us consider first the conduct of the judge during the trial itself. Theoretically it is his duty, at least in most States of the Union, simply to declare the law governing the case and to rule impartially upon the questions of evidence presented. He is supposed to give no hint of his own opinion as to whether or not the defendant should be convicted, and to refrain from any marshalling of the facts claimed to have been proven by either side in such a way as to influence the verdict of the jury. In England he may and generally does "sum up" the case; in America such a course would usually be a ground for reversal, — his function being limited to an abstract discussion of the law involved, with little reference to the facts save in so far as it may be necessary for purposes of illustrating the way in which the jury shall apply it. . . .

This may be all very well in theory, — but it is very far from what is either followed in practice or, to speak frankly, desirable. What the people want in our criminal courts is, of course, a fair "trial;" but they want a "fair trial" that results in the acquittal of the innocent and the conviction of the guilty, — so long as he is convicted by what they deem fair means. . . . A judge who has sat for ten or fifteen years on the criminal bench is usually keener to detect a liar or see through a "faked" defence than any twelve men drawn indiscriminately from different walks of business activity. A timely question from him may

demolish a perjured explanation which, but for his interference, would have acquitted a guilty criminal. Theoretically, it is none of his business. Practically, it is. An inexperienced prosecutor may be so inadequate to the task of coping with some old war-horse of a lawyer that save for the assistance of the Court a rascal would be turned loose upon the community; or, turn about, a stupid lawyer may convict his own client if not prevented by a considerate presiding justice. Theoretically, the judge must let the parties fight it out by themselves. In point of fact, it is his business to even things up. . . .

Under our prevailing doctrines the Court has no right to influence the jury on the facts in the slightest degree, and indeed most judges expressly direct the jury to disregard absolutely any idea they may have obtained of what the Court's opinion may be. This, in the face of the balance of the charge, must often seem paradoxical to the talesman, for few judges entirely succeed in concealing their own views of the case, however hard they may honestly try to do so.

It is quite as foreign to the spirit of our institutions for a judge to interfere with the jury on questions of fact as for a jury to arrogate to itself the decision of points of law. The system is designed to do "justice" by means of its several parts working harmoniously together, but neither part "working justice" by itself. If the judge arrogate the jury's function, the jury becomes superfluous. This is not the intent of the Constitution. There is no real trial by jury when the judge decides the whole matter, and it would be far more dangerous for a single man to act as arbiter of the defendant's fate than for twelve. Yet more or less consciously there is often a tendency upon the part of the criminal bench to lend itself to the success of one party or the other, however positively it may declare and direct to the contrary. . . .

A distinguished member of the bench, now long since deceased, was accustomed to deliver charges so drastic that a defendant charged with a serious offence rarely, if ever, escaped. Upon appeal absolutely no exception could be taken to his remarks, yet nothing more unfair could be conceived of. The record would show that the judge had charged: "If you believe the defendant's testimony you will of course acquit him. He is presumed to be innocent until the contrary is proved. If you have any reasonable doubt as to his guilt you must give him the benefit of it. On the other hand, if you accept the testimony offered by the people you may and will convict him." Now, nothing on its face would seem to be fairer. What the jury actually heard was: "If [scornfully] you *believe* the defendant's testimony you will of course acquit him. He is *presumed* [with a shrug of the shoulders] to be innocent until the contrary is proved. If you have [another shrug] any *reasonable* doubt as to his guilt, you must give him the benefit of it. *On the other hand*, if you accept the testimony offered in behalf *of the People*, you may *and* WILL *convict him!*" (The last few words in tones of thunder.)

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738. BARTLETT *v.* SMITH

EXCHEQUER. 1843

11 *M. & W.* 483

ASSUMPSIT by the endorsee against the drawer of a bill of exchange. The declaration stated, that the defendants, on, &c., made their certain bill of exchange in writing, and directed the same to Mr. John E. Butcher,

Dublin, and thereby required the said J. E. Butcher to pay to the order of the defendants, in London, the sum of £17. It then alleged the endorsement of the bill to the plaintiffs. The defendant, by his pleas, denied the drawing and endorsement. At the trial before the Undersheriff of Middlesex, the bill, when produced, appeared to be drawn in Dublin, payable in London, and was stamped as a foreign bill.

On the plaintiff's counsel proposing to read it in evidence, the defendant's counsel objected, on the ground that, although the bill purported to be drawn in Dublin, it was in fact drawn in London, and being therefore an inland bill, required a higher stamp; and proposed to give evidence of that fact. The Undersheriff however said, that as the bill was not objectionable on the face of it, he should allow the case to proceed; on which the defendant's counsel addressed the jury, and afterwards adduced evidence to show that at the time the bill bore date, the drawer was in London: whereupon the Undersheriff left it to the jury to say whether the bill was drawn in London or Dublin, but reserved leave to the defendants to move to enter a nonsuit if this Court should think he ought to have received the evidence in the first instance, and to have decided upon it. . . .

The jury having found a verdict for the plaintiff,

R. V. Richards, on a former day in this Term, obtained a rule for a non-suit accordingly.

Crowder and *Hughes*, showed cause. — The evidence tendered was insufficient. . . . In Bire *v.* Moreau, 2 C. & P. 376, . . . the question was left to the jury. (Alderson, B. — That is leaving to the jury the question whether the document is or is not admissible in evidence. Parke, B. — The under-sheriff surely must decide for himself whether the evidence is or is not admissible.)

R. V. Richards and *Meteyard*, contra. — The under-sheriff ought to have received the evidence for the purpose of satisfying his own mind as to when the bill was drawn, and deciding upon its admissibility, and not to have left the case to the jury.

Lord Abinger, C. B. — I am of opinion that this rule must be made absolute for a new trial, but not to enter a nonsuit. All questions respecting the admissibility of evidence are to be determined by the judge, who ought to receive that evidence, and decide upon it without any reference to the jury. In all cases where an objection is made to the competency of witnesses, any evidence to show their incompetency must be received by the judge, and adjudicated on by him alone. So, in the present case, evidence offered to impeach the admissibility of the bill, on the ground that it was improperly stamped, should have been received by the judge, and determined by him before the bill was allowed to be read to the jury. When the objection was made that the bill bore a wrong stamp, the Undersheriff ought to have received the evidence to impeach it, before he allowed the bill to be read; and it was for him to say whether the evidence adduced for the purpose was such as to satisfy him or not.

The evidence tendered was for the purpose of showing that the bill ought not to be read at all; and if the Undersheriff rejected it in the first instance, he ought not to have received it afterwards and submitted it to the jury. There ought, therefore, to be a new trial.

PARKE, B. — I am of the same opinion. All preliminary matters of this kind are to be determined by the judge, not by the jury. I well recollect the case of Major Campbell, who was indicted for murder in Ireland; and on a dying declaration being tendered in evidence, the judge left it to the jury to say whether the deceased knew, when he made it, that he was at the point of death. The question as to the propriety of the course adopted in that case was sent over for the opinion of the English judges, who returned for answer that the course taken was not the right one, and that the judge ought to have decided the question himself. New trial.

739. HUTCHISON *v.* BOWKER

EXCHEQUER. 1839

5 *M. & W.* 535, 541

ASSUMPSIT for the non-delivery of barley. Plea, non assumpsit. At the trial before Lord ABINGER, C. B., it appeared that the action was brought by the plaintiffs, who were corn merchants and factors at Kirkaldy, in Fifeshire, to recover from the defendants, who were corn merchants at Lynn, damages for the non-performance of a contract to supply 400 quarters of barley. To prove the contract, the following letters were given in evidence:

"LYNN, 21st Nov., 1838.

"Messrs. Rt. HUTCHISON & Co., KIRKALDY.

"GENTLEMEN:

"In reply to your favor of 17th inst., we beg to offer you a cargo of about 400 qrs. of good barley, weighing 52lbs. per bl., at 34*s.* per qr. on board. . . . Your most obedient servants,

"A. & J. BOWKER."

To this letter the plaintiffs returned the following answer:

"KIRKALDY, 14th Nov., 1838.

"Messrs. A. & J. BOWKER, LYNN.

"GENTLEMEN:

"We have your favor of 21st current, offering 400qrs. good barley, 52lbs. per bl., at 34*s.* per qr. f. o. b., payment in full by banker's bill at two months, on receipt of bill of lading and invoice: of such offer we accept, expecting you will give us fine barley and full weight. . . .

"We remain, gentlemen,

"Your most obedient servants,

"ROBT. HUTCHISON & Co."

The defendant declined to ship "fine barley." Evidence was given at the trial to show that the phrases "good" barley and "fine" barley were terms well known in the trade, and that fine barley was the heavier. The jury at first found a verdict for the plaintiffs generally, stating their opinion to be, that "the difference was in weight, and that barley would be fine and good at 52lbs. per bushel." The learned Judge asked them to reconsider the verdict, and answer this question, whether there was a distinction in the corn trade between "good" and "fine"? And they then found that there was a difference between good and fine, but that the parties did not understand each other; and they returned a verdict for the plaintiffs, damages 30*l*. Cresswell having on a former day obtained a rule to show cause why this verdict should not be set aside, and a non-suit entered,

Sir *F. Pollock* (*W. H. Watson* with him) now showed cause. . . . The words have either a general or a technical meaning. It was found that the word "fine" had a technical meaning, and the obscurity is removed by the verdict. The jury thought that on this contract there could be no misunderstanding amongst merchants. It was a question to be left to the jury, what was the meaning of the word "fine" in the contract. (PARKE, B. — You may ask the jury the meaning of the word "fine" in a mercantile sense, but you cannot go further. The Court is to say what is the meaning of the contract, and whether there has been an acceptance of it.) . . . It is admitted that when the words of a contract are clear and unambiguous, it is for the Court to put a construction upon it; but where the words are either unintelligible, or have both a popular and a technical meaning, it is for the jury to say whether the words were used in a technical or ordinary sense.

Lord ABINGER, C. B. . . . It appears to me that the question as to the interpretation of this contract is a question entirely for the Court, and not for the jury. That they should ever be the judges on such a matter was founded on this, that there might be technical words used in a contract, which the jury might understand, and the Court might not; but it would be contrary to all practice to say, after the terms are explained to the satisfaction of the Court, that the jury are to have the interpretation of the contract, and not the Court. . . . In this case, if they had said they were satisfied that there was no difference in the words, I should then have directed them to find for the plaintiffs; but they told me they were of opinion that there was a difference in the words, but they did not think the contract should be interpreted with reference to that distinction, as the parties did not understand each other. I think that they had no right to assume that. . . .

The meaning, therefore, being left ambiguous, I am of opinion that this rule ought to be made absolute.

PARKE, B. — I am of the same opinion. . . . 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 particu-

lar 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. It was right, therefore, to leave it to the jury to say whether there was a peculiar meaning attached to the word "fine," in the corn market; and the jury having found what it was, the question, whether there was a complete acceptance by the written documents is a question for the judge.

740. HOOPER *v.* MOORE

SUPREME COURT OF NORTH CAROLNA. 1857

5 *Jones L.* 130

THIS was an action of Detinue, tried before MANLY, J., at the last Fall Term of Caswell Superior Court. . . .

The plaintiff declared for the detention of the slaves Fanny and her children, and alleged title, as administrator with the will annexed of Alexander Moore, under the provisions of that will. The testator lived and died in Halifax county, in the State of Virginia. . . . The defendant claimed the slaves as the administrator of Alexander Moore, Jun'r., and offered evidence to show that . . . the said testator placed in the possession of his grand-daughter and her husband, Alexander Moore, Jun'r., the slave Fanny in question, who is the mother of the other slaves sued for; that Alexander Moore, Jun'r., held the slaves in question for ten years, during which time, he lived in the State of Virginia, and brought them thence to the county of Caswell, where he remained in possession of them until his death in 1852. In order to show the law of Virginia controlling this transaction, the deposition of Woodson Hughes, Esquire, a gentleman of the legal profession in that State, was produced, who deposed that according to the law of Virginia, no inference of a gift could be drawn from the possession of the slaves, under the circumstances of this case. The defendant's counsel insisted: . . . That no statute of Virginia had been offered in evidence, altering the common law; that by the common law a gift was presumed, and that it was the duty of the Court to expound the statute and give the defendant the benefit of the presumption, notwithstanding the deposition of Mr. Hughes, and prayed the Court so to instruct the jury. The Court . . . declined giving the instructions prayed for, but gave in charge the law of Virginia as proved by the deposition of Mr. Hughes, and left it to the jury to decide the question, whether it was a gift or a loan, free from any presumption either way. Defendant again excepted. . . .

Under these instructions, the jury returned a verdict for the plaintiff; a judgment was rendered thereon, and the defendant appealed to this court.

Norwood, for the plaintiff. *Morehead*, for the defendant.

PEARSON, J. . . . What is the law of another State, or of a foreign country, is as much a "question of law," as what is the law of our own State. There is this difference, however: the Court is presumed to know judicially the public laws of our State, while in respect to private laws, and the laws of other States and foreign countries, this knowledge is not presumed; it follows that the existence of the latter must be alleged and proved *as facts;* for otherwise, the Court cannot know or take notice of them. This is familiar learning. In order to give effect to this presumption of a knowledge, on the part of the Court, of the public laws of our State, it is provided that the persons who are entrusted with the administration of justice as a Court, shall be men learned in the law. . . . When an issue of fact involves a question of law, the jury are not entrusted to decide it; but it is the duty of the Court to give to the jury instruction in regard to the law, and it is the duty of the jury to be governed by such instructions. In this way, as much accuracy, and as great a degree of fixedness, in respect to questions of law, is secured, as the nature of the subject admits of.

Such being the case in respect to questions arising about our own laws, it would seem as a matter of course to be likewise so in respect to questions arising about the laws of other States, or of foreign countries, whenever, in the administration of justice, our Courts are called upon to deal with them. The assertion of a contrary opinion is met at once by these considerations, which, as it seems to us, cannot be answered: i.e., if juries are incompetent to decide questions in regard to our own laws, and the Court is required to give them instructions in respect thereto, are they any more competent to decide questions in regard to the laws of other States, or foreign countries? and do not they stand equally in need of instructions in respect to them? If such questions are to be decided by the juries, their decisions cannot be reviewed by the Supreme Court, and where is the security either for accuracy or fixedness? A jury is not a permanent tribunal, and no memorial is kept of its action, except the general conclusion — a *verdict;* which is binding only between the parties to the particular case.

But it is said our Courts are not presumed to know the laws of other States, or of foreign countries. Admit it; still can it be questioned that the Court is more competent to ascertain and understand such laws, than the jury? or that the jury stand as much in need of instruction in respect thereto, as in respect to our own laws?

Again, it is said the existence of such laws must be alleged and proved as *facts.* Admit it. But how are they to be proved? To the court, or to the jury? Surely to the court, because they are "questions of law." We are aware that an impression prevails to some extent, that the proof is to be made to the jury. This originated from the expression "to be proved as facts," and many loose dicta are to be met with, scattered through the books, in which these words have been inadvertently added to, so as to make the expression "to be proven as facts to *the jury.*" . . .

If the law be written, and its existence is properly authenticated, the Court, availing itself of the aid of the judicial decisions of the country, puts a construction on it, and explains its meaning and legal effect, and the jury have nothing to do with it, save to follow the instructions of the Court, as if it was our own law. If the law is unwritten, and its existence is presumed or admitted, then the jury have nothing to do with it. For example, if it be presumed, or admitted, that the common law prevails in the State of Virginia, and has not been altered by statute in respect to the particular question, our Court decides what the common law is. . . .

But if the existence of an unwritten law of another State, or foreign country, is not presumed or admitted, then its existence must be proved by competent witnesses, and the jury must then pass on the *credibility of the witnesses*, and it is the province of the Court to inform the jury as to the construction, meaning, and legal effect of the law, supposing its existence to be proven; and to this end, the Court should avail itself of the judicial decisions of the State or country. . . .

In our case, the Judge below erred in refusing to decide that, according to the common law, a gift was presumed, as is settled by repeated decisions, and in leaving it an open question of fact for the jury upon the deposition of Mr. Hughes.

PER CURIAM. Judgment reversed, and a venire de novo.

741. STATE *v.* MONICH

COURT OF ERRORS AND APPEALS OF NEW JERSEY. 1906

74 *N. J. L.* 522; 64 *Atl.* 1016

ERROR to Court of Oyer and Terminer, Morris County. Sam Monich was convicted of murder in the first degree, and brings error. Affirmed. The defendant below, having been convicted of murder in the first degree, and thereupon sentenced to death, brings the record of that conviction to this court for review. . . .

The circumstances disclosed in evidence were briefly as follows: The deceased was an able-bodied woman of middle age named Hattie Decker. She was widowed, and lived upon a farm with her parents, Mr. and Mrs. Wilbur Kayhart. Between 6 and half-past 6 in the evening of January 16, 1906, after having taken supper with her parents, she took a lighted lantern with the avowed purpose of going from the house to the barn to fasten up her dog. Shortly afterwards, as Mr. Kayhart testified, he heard the firing of two or three shots, went quickly to the door, and found his daughter standing there with the still lighted lantern in her hand endeavoring to enter the house, but unable to do so for want of strength. To him she said: "Oh, Pa, I am shot with a bullet. I am dying." He asked her: "For God's sake, who shot you?" and she answered: "Sam shot me" (meaning the defendant). . . . From this

wound she died within a few hours. Kayhart's testimony that she declared the defendant had shot her was admitted over objection, and an exception was thereupon sealed. . . .

Charlton A. Reed, for plaintiff in error. *Charles A. Rathbun*, for defendant in error.

PITNEY, J. (after stating the case as above). . . . 1. With regard to the function of a Court of review in the premises, Chief Justice GREEN made it plain (26 N. J. L. p. 501), that the question here is not a question of the weight of testimony, but whether there was evidence before the trial Court which warranted it in admitting the evidence. . . . It is entirely manifest that in the case at hand there was abundant evidence to legally justify the determination of the trial Court that the declarations of the deceased that were admitted in evidence were made under the apprehension of impending death. . . .

2. The only other matter requiring discussion is the refusal of the trial Court to charge the jury that

"before the jury can consider declaration made by the deceased as to the person who inflicted the mortal injury in the absence of such person, they must be convinced that the person making the declaration had an absolute conviction that death as an absolute certainty is immediately at hand. If there is the least hope, no matter how faint, the requisite certainty of belief does not exist."

The effect of this instruction would have been to permit the jury to revise the finding of the trial Court upon the question of fact whether the declaration was made under a sense of impending death, and to disregard the declaration if they disagreed with the conclusion of the judge upon this point. Defendant's contention upon this head received some countenance from a dictum of Justice DEPUE (afterwards Chief Justice), in Roesel *v.* State, 62 N. J. L. 216, 238, where, in discussing the admissibility in evidence of a confession made by the prisoner, he said:

"If there be a conflict of evidence as to whether the confession was or was not voluntary, if the Court decides that it is admissible, the question may be left to the jury, with the direction that they should reject it if upon the whole evidence they were satisfied that it was not the voluntary act of the defendant."

This dictum was based in part upon the charge of Mr. Justice DRAKE to the jury in State *v.* Guild, and the qualified approval of his instruction contained in the opinion of the Supreme Court in the same case (10 N. J. L. 163, 181, 182). It will be noticed that the language of Justice DEPUE just quoted indicates a permissible practice, not one that the defendant is entitled to have observed. In Bullock *v.* State, 65 N. J. L. 557, at page 567, the same learned jurist did, however, declare obiter that in cases of doubt the question should be left to the jury with the instruction that they should reject the confession if upon the whole evidence they are satisfied that it was not the defendant's voluntary act.

In other jurisdictions, where the practice is recognized of permitting the jury to review the finding of the trial Court upon a preliminary question of fact on which depends the admission of a declaration or the

like, the practice is commonly treated as discretionary with the trial Court. In Massachusetts, for instance, it seems to have been adopted as a matter of grace to the defendant. Commonwealth *v.* Cuffee, 108 Mass. 285, 288; Commonwealth *v.* Smith, 119 Mass. 305, 311; Commonwealth *v.* Nott, 135 Mass. 269, 271; Commonwealth *v.* Preece, 140 Mass. 276, 277. The opinion of Chief Justice FULLER in Wilson *v.* United States, 162 U. S. 613, 624, likewise indicates his view that the practice is discretionary. . . .

The question is fairly raised in the present case by the refusal of the trial judge to accede to the request to charge above mentioned; and in our opinion it admits of but one answer. The determination of the question whether a declaration that is offered as a dying declaration was in truth made under a sense of impending death, like the determination of the cognate question whether a defendant's confession was made voluntarily, is for the trial Court, and not for the jury. The question relates to the admissibility of evidence, and like all similar questions is not reviewable by the jury. Whether the deceased spoke the truth when she declared that the defendant had shot her was for the jury's determination. Whether the witnesses who testified that she made such a declaration testified truthfully was likewise for the jury to decide. But, in our opinion, it was not their province to lay aside the evidence of her declarations upon coming to a conclusion that she was not impressed with a sense of impending death when she made them. . . .

The judgment under review should be affirmed.

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742. BRIDGES *v.* NORTH LONDON RAILWAY COMPANY

HOUSE OF LORDS. 1874

L. R. 7 *H. L.* (*E. & I. App.*) 213

ACTION for damages for negligence in causing the death of the plaintiff's husband. Plea, not guilty. The cause was heard before Mr. Justice BLACKBURN at the Middlesex Sittings after Michaelmas Term, 1869. . . . B. was in the last carriage of a railway train. Before reaching the station at which he was to alight the train had to pass through a tunnel. In that tunnel there was, first, a heap of hard rubbish lying by the side of the rails, irregular in form and height, then a short sloping piece of ground, then a piece of flat platform, like the main platform, but narrower, and within the tunnel. Beyond these was the main platform itself. The train only partially went up to the main platform, leaving the last two carriages within the tunnel, which had no light within it, and on the occasion in question was filled with steam. The last carriage but one came opposite the narrow platform; the last carriage was opposite the hard rubbish. A passenger in the last carriage but one (was who called as a witness at the trial) heard the name of the station

called out in the usual way and got out upon the narrow platform. He then heard a groaning, and proceeding farther back into the tunnel found B. lying on the rubbish with his legs between the wheels of the last carriage, but neither of them had touched him. B.'s leg was broken, and he had received other injuries, from the effects of all which he died. The witness heard the warning, "Keep your seats," and shortly afterwards the train moved on. . . .

Mr. Justice BLACKBURN was of opinion that there was no evidence of negligence on the part of the defendants, and directed a nonsuit; but the jury expressing a strong opinion to the contrary, a verdict was taken for the plaintiff, the jury assessing the damages at £1200. The nonsuit was then entered, but leave was reserved to move to enter the verdict for the plaintiff for the damages thus contingently assessed.

A rule was accordingly moved for, and, after argument in the Court of Queen's Bench, was refused. On appeal to the Exchequer Chamber the facts were stated in a case, power being reserved to the judges to draw inferences of fact. The case was heard, and the judgment of the Court below was affirmed by four judges to three.[1] This appeal was then brought.

The Judges were summoned, and Lord Chief Baron KELLY, Mr. Baron MARTIN,[2] Mr. Justice KEATING, Mr. Justice BRETT, Mr. Justice DENMAN, and Mr. Baron POLLOCK attended.

Mr. *Henry James*, Q. C., and Mr. *Kemp* (Mr. *Snagge* was with them), for the plaintiff in error. The question here is, whether there was evidence of negligence on the part of the defendants, which ought to have been left to the jury. . . .

Sir J. *Karslake*, Q. C., and Mr. *Aspinall*, Q. C. (Mr. *A. G. Shiell* was with them), for the defendants in error. The judgment here must be affirmed unless it clearly appears that the deceased man was killed by the negligence of the company's servants. . . . There being no evidence on which the jury could reasonably find, in point of fact, that there had been negligence, there was no necessity for leaving the case to the jury, but the Judge rightly took on himself to say that no case had been made out for the plaintiff and that there must be a nonsuit. . . .

Lord CAIRNS, who presided in the absence of the Lord Chancellor, proposed that the following question should be put to the Judges: Whether in the facts stated in the special case, and having regard to the liberty thereby given to the Court to draw any inference or find any facts from the facts therein stated, there was evidence of negligence on the part of the respondents which ought to have been left to the jury? . . .

Mr. Justice BRETT. — My Lords, before determining whether there

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[1] L. R. 6 Q. B. 377.

[2] Mr. Baron MARTIN heard the argument, but retired from the Bench before the Judges' opinions were delivered.

is or is not evidence fit to be left to a jury in support of questions, one must know what the questions are which are to be so left. It seems impossible to answer satisfactorily the question whether there was or was not evidence of negligence which ought to have been left to the jury, without first determining the form in which the question of negligence, if left, should be judicially stated to a jury. It is farther necessary, as it seems to me, to consider the formula which should be applied to the facts in evidence, in order to see whether they ought or ought not to be left to the jury. And farther, how much of the dealing with facts is within the province of the Judge, and how much is exclusively within the province of the jury. . . .

What is the direction in point of law which ought to be given to the jury at the trial? . . . The proposition which the plaintiff undertakes to substantiate is that he has suffered injury by reason of the negligence of the defendants or their servants. . . . This direction, however, is not yet sufficient. It requires to be amplified by a legal definition of what amounts to negligence. That definition is, that negligence consists in the doing of some act which a person of ordinary care and skill would not do under the circumstances, or in the omitting to do some act which a person of ordinary care and skill would do under the circumstances. The final and full and strict direction to a jury therefore in such cases is contained in the following questions: Have the defendants or their servants done anything in the conveyance of the plaintiff to his destination which persons of ordinary care and skill under the circumstances would not have done, or have they or their servants omitted to do anything which persons of ordinary care and skill under the circumstances would have done? . . .

Such is the direction to the jury. But before giving this direction it is the duty of the Judge to determine whether there is evidence fit to be left to the jury on each of the propositions which it is necessary that the plaintiff should establish. This being a duty cast exclusively on the Judge, is a question to be decided according to some proposition or rule of law. What is that proposition or rule of law which the Judge is bound to apply to the evidence in order to determine this question of law? It 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? It may be said that this is so indefinite as to amount to no rule, that it leaves the Judge after all to say whether in his individual opinion the facts in evidence would prove the proposition; but I cannot think so. It is surely possible to admit that reasonable and fair men might come to a conclusion which oneself would not arrive at. And Judges may be able reasonably to say frequently, that although they would not upon the facts have come to the same conclusion to which the jury has come, yet they or he cannot say but that reasonable and fair men might agree with the conclusion

of the jury; or, in other words, that, although they would not have arrived at the same conclusion, it is not contrary to reason to have arrived at it.

The Judge must, therefore, before directing the jury in the terms above set forth, first determine the following questions: Are there facts in evidence upon which, if unanswered, men of ordinary reason and fairness *might* fairly say that the plaintiff had been injured by some act of commission or omission by the defendants or their servants? . . . If the Judge, not deciding the final issues according to his own individual view, but determining according to the propositions last laid down, holds that there is no evidence fit to be left to the jury on some one of the cardinal questions before stated, he must direct the jury *as matter of law* that there is no case in favour of the plaintiff, or he must nonsuit the plaintiff. . . . If he holds there is evidence on each of the cardinal questions, he must leave the case to the jury according to the direction in point of law before laid down in this opinion. When the Judge has so directed the jury as to the law, he has finished all which it is legal for him exclusively to determine. . . . A judge may be of opinion that the calling out of the name of the station ought not in any way to actuate the passenger; [yet] jury after jury may decide that according to the ordinary understanding both of railway officials and passengers it is an indication upon which a passenger may fairly rely [so] that, directly the train stops, he may, unless he receives some other warning, safely alight. . . . If such decisions may be overruled on the mere ground that the Courts or judges do not agree with them, juries are bound to matters of fact by the view of the judges as to facts. This cannot be. . . .

My Lords, the paramount importance which I attach to the enunciation of a rule of conduct or of decision by your Lordships is, that it will prevent the decisions in these cases from being governed by the many different views taken by different judges of facts of every day occurrence in life, and which no one can say are questions of law. The kind of discussion which may be found in this case in the Courts below, and the differing grounds of decision to be found in so many cases, would not be repeated.

Applying to the question proposed by your Lordships the rule I have submitted to be the right one, I cannot entertain any doubt that there was in this case evidence fit to be left to the jury, and I therefore answer your Lordships' question in the affirmative. . . .

Mr. Baron POLLOCK. — My answer to your Lordships' question is in the affirmative. [After having stated the facts of the case,] . . . The general rule which prescribes the duty of the judge presiding at Nisi Prius, when the question is raised whether, at the close of the plaintiff's case, there is evidence which ought to be left to a jury, is laid down, in the judgment of the Court of Exchequer Chamber in Ryder *v.* Wombwell, Law Rep. 4 Ex. 32, 38, where the question being whether articles supplied

by the plaintiff to the defendant, who was an infant, were "necessaries," the Court said:

"The first question is, whether there was any evidence to go to the jury that either of the above articles was of that description? Such a question is one of mixed law and fact; in so far as it is a question of fact it must be determined by a jury, subject no doubt to the control of the Court, who may set aside the verdict and submit the question to the decision of another jury; but there is in every case, not merely in those arising on a plea of infancy, a preliminary question which is one of law, namely, whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury and direct a nonsuit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant."

This is a clear exposition of the rule, and it has been generally acquiesced in and acted upon, and it follows from it that although the question of negligence or no negligence is usually one of pure fact, and therefore for the jury, it is the duty of the judge to keep in view a distinct legal definition of negligence as applicable to the particular case; and if the facts proved by the plaintiff do not, whatever view can be reasonably taken of them, or inference drawn from them by the jurors, present an hypothesis which comes within that legal definition, then to withdraw them from their consideration.

I commence, therefore, by considering what was the duty of the defendants towards their passengers upon the occasion in question, the non-observance of which would constitute negligence. . . . [Here the learned judge examined the facts and the possible inferences in detail, and continued:]

The plaintiff no doubt is bound to make out her case, and cannot by a bare suggestion challenge its rebuttal, and if what I have stated was all mere speculation, it ought not to have gone to the jury. But if it was an inference which could be fairly drawn from the facts proved in the same manner as things unseen or unproved — which in the eye of the law are the same — are constantly inferred and found as facts by a jury, then the evidence should have been submitted to the jury, together with any which the defendants chose to adduce, and which might have exculpated or further inculpated them according as their witnesses knew more of the occurrence, and confirmed or displaced the evidence for the plaintiff.

Judgment of the Court of Exchequer Chamber reversed, and the verdict to be entered for the plaintiff for the sum of £1200.

743. JAMES BRADLEY THAYER. *A Preliminary Treatise on Evidence.* (1898. p. 208.) This [judicial] function comes into play in supervising and regulating the exercise of the jury's office. Herein lies one of the most searching and far-reaching occasions for judicial control — that of keeping the jury within the bounds of reason. This duty, as well as that of preserving discipline and order, belongs to the judge in his mere capacity of presiding officer in the exercise of

judicature. Reason is not so much a part of the law, as it is the element wherein it lives and works; those who have to administer the law can neither see, nor move, nor breathe without it. Therefore, not merely must the jury's verdict be conformable to legal rules, but it must be defensible in point of sense; it must not be absurd or whimsical.

This, of course, is a different thing from imposing upon the jury the judge's own private standard of what is reasonable. For example, when the original question for the jury is one of reasonable conduct, and a Court is called on to revise the verdict, the judges do not undertake to set aside the verdict because their own opinion of the conduct in question differs from the jury's. They are not an appellate jury. The question for the Court is not whether the conduct ultimately in question, *e.g.*, that of a party injured in a railway accident, was reasonable, but whether the jury's conduct is reasonable in holding it to be so; and the test is whether a reasonable person could, upon the evidence, entertain the jury's opinion. Can the conduct which the jury are judging, reasonably be thought reasonable?

This matter has been accurately and neatly handled by Lord HALSBURY, in the House of Lords. A few years before, in Solomon *v.* Bitton, 8 Q. B. D. 176 (1881), . . . the Court (JESSEL, M. R., and BRETT and COTTON, L. JJ.) had said that the rule in such cases ought not to depend on whether the judge who tried the case was dissatisfied with the verdict or would have come to the same conclusion, "but whether the verdict was such as reasonable men ought to come to." In 1886, in the Metropolitan Railway Company *v.* Wright, 11 App. Cas. 152 (1886), in a case involving the question of negligence, Lord HALSBURY, in a short and excellent statement, put the matter with precision: "My lords, the facts of this case may, of course, be differently viewed by different minds. . . . Now I think that the principle laid down in Solomon *v.* Bitton is erroneous, as reported, in the use of the word 'ought.' If a Court — not a Court of Appeal in which the facts are open for original judgment, but a Court which is not a Court to review facts at all — can grant a new trial whenever it thinks that reasonable men *ought* to have found another verdict, it seems to me that they must form and act upon their own view of what the evidence in their judgment proved. This, I think, is not the law. . . . If the word 'might' were substituted for 'ought to' in Solomon *v.* Bitton, I think the principle would be accurately stated."

BOOK IV. BY WHOM EVIDENCE IS TO BE PRESENTED

(BURDENS OF PROOF; PRESUMPTIONS)

745. Introductory.[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, and the usage of various terms employed. The difficulties exist, 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 our law has so long suffered.

I. *Logical and Legal Process.* (1) *Burden of Proof; First Meaning: 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, with whom the money is now invested, is opposed to having M change the investment to A. M will invest in A's property if he can learn that it is a more 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 affect 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 main 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. The removal of the burden is not in itself a matter of logical necessity. It is the desire to have action taken that

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[1] Abridged from the present Compiler's *Treatise on Evidence* (1905, Vol. IV, §§ 2485-2490).

is important.[1] 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.

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 constitute rights and duties, and, secondly, more 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; 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 the burden of

[1] "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.)

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; 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 into more vogue under the loose modes of pleading current in modern times in many jurisdictions.

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. By what considerations, then, is this apportionment determined? Is there any single principle or rule which will afford a general test for ascertaining the incidence of this risk? By no means.

It is merely a question of policy and fairness based on experience in the different situations. Thus, in most actions of tort there are many possible justifying circumstances, — self-defence, leave and license, and the like; but it would be both contrary to experience and unfair 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. 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.

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 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.

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(2) *Burden of Proof; Second Meaning: Duty of Producing Evidence to the Judge.* 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.

At the outset, let us note, then: *The opportunity to decide finally upon the evidential material offered does not go to the jury as a matter of course.* Each party must first with his evidence pass the gauntlet of the judge. Thus, 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. The present "burden of proof" is therefore a *duty towards the judge exclusively*, who rules upon it as matter of law.

It operates somewhat as follows:

(*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, 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, requires that the mass of evidence put in be at least enough to be worth considering by the jury.

(*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 his risk of non-persuasion. There is now *no duty on either party towards 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 other 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, then, 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 pro-

ponent'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 matter of law. The matter is thus *in the hands of the judge again*, as having the supervisory control of the proof; and now he, as matter of law, *requires the opponent to produce some 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 of enforcing a presumption, as shortly to be explained; but the better authority gives ample recognition to this process.

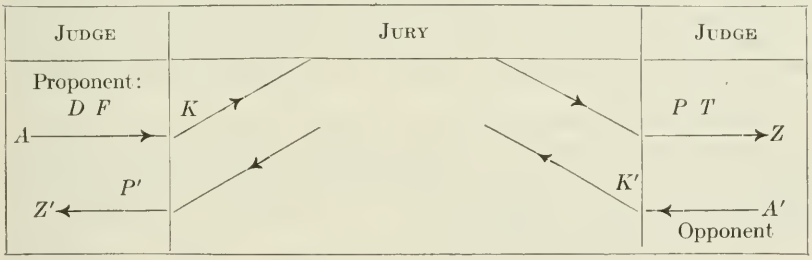
(*c''*) Another mode under which this process is carried out employs the aid of a fixed rule of law, *i.e.*, a *presumption*, applicable to *inferences from specific evidence to specific acts forming part of the issue* (rather than to the general mass of evidence bearing on the proposition in issue). 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. This particular form of the process, however (*c''*), happens to have become known as a "presumption."

(*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 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.[1]

(*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 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 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 by 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.

The various possible stages in the foregoing process may be illustrated by a diagram; 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;

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[1] The following passage from Professor Austin Abbott's article, in the University Law Review, II, 59, 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 playery 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 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."

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 his 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.

The important practical distinction, then, between these two senses of "burden of proof" is this: The *risk of non-persuasion* operates only 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.

Tests for Ascertaining this Duty to Satisfy the Judge. There is 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 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 restating 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.

(3) *Measure of Persuasion for Jury.* Besides the foregoing two things, which affect the parties, there is a third thing, which affects the jury only. What should be the measure of their persuasion, which they must reach in order to be able to say that the burden of proving to them has been fulfilled? The definition of this measure of persuasion is usually considered as a part of the present subject.

II. *Meaning of Terms.* (1) *Presumption* is used (besides the above meaning) in several other senses. (*a*) *Presumption,* in the old sense, is merely a logical inference, — usually from circumstantial evidence.[1]

(2) *Presumption* is sometimes said to be *conclusive; i.e.,* after a period of time of adverse possession, a grant of title is "conclusively presumed." Such a rule is one of substantive law, and has nothing to do with rules of evidence. In effect, it says that a certain fact is immaterial in law.

(3) *Prima facie* is used in two senses. In one sense, it signifies that the proponent has sustained his duty of satisfying the judge (*i.e.,* has reached point *K* in the diagram). In the other sense, it signifies that he has by his mass of evidence created for the opponent a duty of satisfying the judge (*i.e.,* has reached point *P* in the diagram). The context alone can show which sense is used by the judge.

(4) *Shifting the Burden of Proof.* 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 acts will be a part of his case, so far as concerns the ultimate risk of non-persuasion. 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 a 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 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.

In taking up the cases, it will be convenient to use the following order of topics:

I. Measure of Jury's Persuasion.
II. Party's Risk of Non-persuasion of the Jury.
III. Party's Duty of Satisfying the Judge.

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[1] This is one of the earlier uses of "presumption." 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."

TITLE I. MEASURE OF JURY'S PERSUASION

746. COMMONWEALTH *v.* WEBSTER

1850. Massachusetts. 5 *Cush.* 295, 320

Shaw, C. J. (charging the jury). . . . Another rule is, that the circumstances taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty, that the accused, and no one else, committed the offence charged. . . . The evidence . . . in case of homicide, must not only prove a death by violence, but must, to a reasonable extent, exclude the hypothesis of suicide, and a death by the act of any other person. This is to be proved beyond reasonable doubt.

Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It 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 burden of proof is upon the prosecutor; all the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but 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, of those who are bound to act conscientiously upon it.

This we take to be proof beyond reasonable doubt.

747. ELLIS *v.* BUZZELL

Supreme Court of Maine. 1872

60 *Me.* 209

On exceptions. Case for slander, charging that the defendant accused the plaintiff with the crime of adultery. Plea, general issue, with justification.

The defendant testified that he saw the plaintiff in the act of adultery with a certain woman. This the plaintiff denied by his own testimony,

and introduced the deposition of the "particeps criminis," which also denied the charge. The plaintiff requested the presiding judge to instruct the jury that the truth of the statements of the defendant concerning the plaintiff's alleged act of adultery must be made out beyond a reasonable doubt, the same as in the trial of an indictment for adultery in order to constitute a defense. This the Court refused to do; but did instruct the jury that if the defendant made out by a preponderance of testimony, as in ordinary civil suits, that the words spoken by the defendant, concerning the alleged act of adultery by plaintiff, were true, that they should find for defendant, and that the truth of the statements of the defendant concerning the alleged act of adultery by the plaintiff being proved, would be a complete justification of the defendant for uttering the same.

The verdict was for the defendant, and the plaintiff alleged exceptions.

Lebroke & Pratt, for the plaintiff. In civil cases, where a criminal act is so set out in the pleadings as to raise that distinct issue before the jury, the crime charged must be proved beyond a reasonable doubt before the plaintiff is entitled to a verdict; but where no such issue is raised by the pleadings, the jury may decide upon the preponderance of evidence. . . .

J. A. Peters & F. A. Wilson, for the defendant.

Barrows, J.—The plaintiff claims to recover damages of the defendant, because, he says, the defendant falsely charged him with the commission of the crime of adultery. The defendant says the plaintiff ought not to recover damages, because the accusation was not false, but true, and he testified that he saw the plaintiff in the act of adultery with a certain woman. The plaintiff denies this in his testimony, and produces the deposition of the woman, who denies it also. Hereupon he requests the judge to instruct the jury that the defendant in order to maintain the defense must prove the act of adultery upon him beyond a reasonable doubt, the same as if he was on trial for the commission of a crime. The judge refused so to instruct, and, on the contrary, instructed the jury that if the defendant had made out the truth of the charge against the plaintiff by a preponderance of testimony, it was sufficient to entitle him to a verdict; and that proof of the truth of the statements made by the defendant would be a complete justification for uttering them. . . .

Unless the charge made by the defendant against the plaintiff was false, as well as malicious, the plaintiff has no right to recover damages from him. The falsehood of the charge is a necessary element in the plaintiff's case. He cannot complain of any one for speaking of him nothing but the truth. The burden, however, of proving that what he has said is true, rests rightfully enough upon the defendant, not only because he holds the affirmative according to the pleadings, but because of the presumption of innocence. This presumption, as well as whatever testimony the plaintiff may offer to repel the charge, the defendant must be prepared to overcome by evidence. But when he has done this by

that measure and quantity of evidence which is ordinarily held sufficient to entitle a party upon whom the burden of proof rests, to a verdict in his favor in a civil case, shall he be required to go further, and in order to save himself from being muleted in damages for the benefit of the plaintiff, free the minds of the jury from every reasonable doubt of the plaintiff's guilt, as the State must in the trial of a criminal prosecution?

We see no good reason for thus confounding the distinction which is made by the best text-writers on evidence, between civil and criminal cases with regard to the degree of assurance which must be given to the jury as the basis of a verdict. In England there was a reason for carrying the distinction thus made between civil and criminal cases, into suits of this description, — which never existed here, — because there, as Lord KENYON remarked in Cook *v.* Field, 3 Esp. 133, "where a defendant justifies words which amount to a charge of felony, and proves his justification, the plaintiff may be put upon his trial by that verdict without the intervention of a grand jury;" and so penal consequences might in some sort be said to follow the verdict in a civil cause. . . . But we think it time to limit the application of a rule which was originally adopted "in favorem vitae" in the days of a sanguinary penal code, to cases arising on the criminal docket, and no longer to suffer it to obstruct or encumber the action of juries in civil suits sounding only in damages. . . .

It is true, that this distinction has heretofore been carried into civil cases and applied to suits in which it incidentally became necessary to determine, in order to settle the issue which the parties were litigating, whether one of the parties had committed an offense against the criminal law. Hence have arisen in these actions for defamation among others, a series of decisions which, if juries had acted according to their tenor, would have been productive not unfrequently of very unjust results. Practically we do not consider the form of expression used in the instructions to juries in cases of this description as very likely to change the result. We do not believe, if the jury in the present case found themselves inclined to believe upon the whole evidence that the plaintiff was verily guilty, as the defendant had said, that they would have proceeded to assess damages in his favor, because he might have started a reasonable doubt in their minds whether he ought to be convicted of the crime and sent to the State prison, upon that evidence, even had they been so instructed. The practical effect of such an instruction would probably have been to eliminate the doubt from the minds of the jury, not to change the result at which they arrived. But we think it best to recognize what has been justly said to be "well understood, that a jury will not require so strong proof to maintain a civil action as to convict of a crime;" and to draw the line between the cases where full proof beyond a reasonable doubt shall be required and those where a less degree of assurance may serve as the basis of a verdict, where the juror instinctively places it, — making it to depend rather upon the results which are to follow the decision, than upon a philosophical analysis of the character

of the issue. . . . A greater degree of caution in coming to a conclusion should be practiced to guard life or liberty against the consequences of a mistake always painful, and possibly irreparable, than is necessary in civil cases, where, as above remarked, the issue must be settled in accordance with one view or the other, and the verdict is followed with positive results to one party or the other, but not of so serious a nature.

Exceptions overruled.

APPLETON, C. J., CUTTING, KENT, and WALTON, JJ., concurred.

748. BUEL *v.* STATE

SUPREME COURT OF WISCONSIN. 1899

104 *Wis.* 132; 80 *N. W.* 78

ERROR to review a judgment of the Circuit Court for Sawyer county; JOHN K. PARISH, Circuit Judge. Reversed.

[The accused was charged with the murder of one Nelson, a companion who possessed a sum of money. The facts are given fully in No. 518, *ante*.]

For the plaintiff in error there was a brief by *J. B. Alexander*, attorney, and *V. W. James*, of counsel, and oral argument by Mr. *Alexander*.

For the defendant in error there was a brief by the *Attorney-General*, and oral argument by C. E. Buell, first assistant attorney-general.

MARSHALL, J. . . . Evidence was produced to explain or discredit much of the evidence of the circumstantial evidentiary facts mentioned, and to impair the probative force of circumstances established, pointing to the guilt of Buel. The jury found him guilty of murder in the first degree, and judgment was entered accordingly.

The motion to acquit the plaintiff in error and the motion to set aside the verdict for want of sufficient evidence to warrant a conviction were properly denied. Upon each vital question in the case there was credible evidence tending to establish the fact involved, contradicted or explained in many instances, it is true, by other evidence; but it was for the jury to weigh all the evidence and determine where the truth lay. Such determination is conclusive, unless we can say it was not warranted in any reasonable view of the evidence, and we clearly cannot say that. . . .

The Court was specially requested to instruct the jury that before finding the defendant guilty of any crime they should require equally as strong and conclusive evidence of his guilt as would be required by them "*as careful and prudent men to enter upon the greatest and most important acts of their lives.*" The request embodied, substantially, a correct rule of law, which the accused was entitled to have given to the jury, and unless the general charge sufficiently covered it the refusal to grant the request was reversible error. . . .

The use of such expressions as, "the jury before convicting an accused

person must be convinced of his guilt with that degree of certainty requisite to lead men to act in the most important affairs of life," or, "in considering the evidence and coming to a conclusion, the jury should exercise all the care, caution, and judgment that men exercise in the most important affairs of life," or the jury "should be convinced only by the same proof as that which would convince men and upon which they would act in the management of the gravest and most important matters, and in arranging the most serious affairs and concerns of life," or the jury "should not convict unless from the whole evidence in the case they have an abiding conviction to a moral certainty that the accused is guilty," are each and all mere explanatory expressions to convey to the minds of jurors the exact meaning of the term "beyond a reasonable doubt" and the degree of certainty which such term calls for. They are generally given as the equivalent of the general expression that, "in order to convict, the jury should be *convinced* of the guilt of the accused *beyond a reasonable doubt*." The latter expression contains all there is of the rule, and it was given to the jury in this case with commendable fullness. This may be said without expressing an approval of the charge on the subject as a model for clearness.

The general instructions on such subject, found in the different portions of the charge, are as follows: . . . "You will not convict the defendant unless you are satisfied from the whole evidence that the defendant, Eugene Buel, wilfully, feloniously, and with malice aforethought, or with premeditated design to effect the death of Peter F. Nelson, killed and murdered him at the time and place alleged in the information. *If each and all of you are satisfied that each and every material thing* set out in the information is true and has been proved by the evidence *beyond every reasonable doubt*, you will convict; if you are not so satisfied you will acquit." . . . "If a reasonable doubt exists in your minds of defendant's guilt of any material allegation set out in the information, your verdict will be not guilty. A reasonable doubt, or doubt to be of avail to this defendant, is a doubt founded upon reason." . . . In view of such full instructions, the question is, Was it error for the Court to refuse to give the explanatory instruction requested?

To say that a failure to explain the meaning of the phrase "beyond a reasonable doubt" is reversible error, is a doctrine that has but very little support in the books. Much discussion is found in the adjudged cases as to whether any attempt to explain it does not tend to confuse. . . .

It is considered that, in this case, the better practice would have been to have given to the jury the explanatory instruction requested; but inasmuch as the subject was covered by clear language in the general charge, the refusal was not reversible error.

749. William Trickett. *Preponderance of Evidence, and Reasonable Doubt.* (1906. The Forum, Dickinson School of Law, vol. X, p. 76.) Different standards of weight of evidence are imaginable. If the evidence is testimonial the number of witnesses for or against can be counted. Two witnesses swearing

to the same fact are stronger than one of them alone. If the evidence is circumstantial, six circumstances equally persuasive of the "factum probandum" are stronger than three of them. The number of the media of persuasion is a measure of their persuasiveness. In the Anglo-American system of jurisprudence, the law seldom prescribes any particular number of pieces of evidence. . . .

But, besides difference in respect to the number of the media of proof, there is a difference in respect to the intrinsic persuasiveness of the same number of media. There are two witnesses. A is mature, observant, careful, free from proneness to exaggeration, truthful. B is young, immature, and untruthful. The statement of A wins a larger credit than that of B. If the evidence is circumstantial, one circumstance may, more cogently than another, persuade of the primary fact. . . .

But let us suppose that the party having the burden has furnished evidence that is enough, in the opinion of the judge, to warrant a jury's belief of the fact. The opposite party then furnishes evidence of a contrary tenor. The two bodies of evidence have been addressed to the same minds, and must be considered and compared by them. If they leave these minds in a state of equilibrium, if these minds are unable to say which of the bodies of evidence is the more persuasive; or if they are able to say that they are equally persuasive, the decision must be against the party who has the so-called burden of proof.

Suppose, however, the evidence is appreciably stronger on one side than on the other. Either, alone, might convince, but neither, contradicted by the other, may be sufficient to convince. Two apparently credible persons testify affirmatively. One, somewhat more credible, testifies negatively. The testimony of the two, or of the one, would have been believed, had it not been contradicted by that of the one or of the two. It is clear that the evidence may leave the jury unconvinced, as to which of the assertions, the affirmative or the negative, is true, although it is conscious that the testimony of the two is somewhat stronger than that of the one, or *vice versa*. Opposing pieces of evidence may leave doubt, although one piece is stronger than the other, and doubt is not belief. Doubt "means," says Sully,[1] "a pulling of the mind in two directions, that is, a state of discord or conflict due to the action of two incompatible and antagonistic thought tendencies (forces of association). In this case, it is evident, judgment is altogether arrested, or suspended. It is this state of doubt or uncertainty, and not that of disbelief, which is the proper psychological opposite of belief. In belief the mind is at rest, the impulse to inquire is satisfied, and the volitional activity involved in thought is quieted. In doubt, on the other hand, we are in a state of unrest, conflict, or baffled activity."

The text-books and authorities usually inform us that, in civil cases, the decision must be according to the "preponderance of evidence." The persuasion necessary, in such cases, says Wigmore,[2] 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." . . . "In civil issues," says Wharton,[3] "when there are conflicting

[1] The Human Mind, Vol. 1, p. 457. Whately's Rhetoric, p. 103.

[2] Evidence, 3545.

[3] Evidence, 30. By proof, the author means evidence, presumptions of law or fact and citations of law; *Id.*, p. 2. Best says that the "mere preponderance of probability is decisive in civil cases." Evidence, p. 85. But not everything for which *some* evidence can be adduced, is *probable; nor* everything for which the affirmative evidence is *appreciably* stronger than the negative evidence.

hypotheses, the judgment must be for that for which there is a preponderance of proof."

A corollary from this rule would be that the juror or the judge must in many cases decide in favor of A or B, the parties to the suit, that a fact did or did not occur, although he does not believe that it occurred or did not occur. A sues B on a note, whose execution B denies. Six witnesses affirm that the signature is in B's handwriting. Five affirm that it is not. No difference in competence, or trustworthiness, between these witnesses appears. Six, however, are more than five. The ordinary man, juror or judge, would say that the evidence "preponderated" in favor of A's proposition. But would the ordinary discreet man believe that proposition? Instead of six let us suppose twenty witnesses, and instead of five let us suppose nineteen. Still there is a preponderance towards A's contention. But would a sensible man necessarily believe that B signed the note, when nineteen men, each equally credible with each of the twenty, said that he did not sign it? In such a state of the evidence, the prudent and careful man would remain in a state of doubt. He would say, "There is one-nineteenth more evidence in favor of B's having signed, than in favor of his not having signed, but I am not convinced that he signed it; I neither believe nor disbelieve that he signed it."

If the rule quoted is to be adopted, it follows that a verdict in a civil case need not, and therefore does not, express the belief, opinion, or conviction of the jury as to the existence or non-existence of the facts which form the issue, but simply as to the existence of the preponderance of the evidence, a totally different matter. There can be evidence that fact X occurred, when it did not occur, and evidence that fact X did not occur, when it did occur, and, for the same reason, there can be more evidence that it occurred than that it did not occur, although it in fact did not occur, and to believe that there is this greater degree of evidence of occurrence than of non-occurrence, is not to believe the occurrence rather than the non-occurrence.

The rule indicated results in palpable absurdity. The object of the law is, or ought to be, to secure the sequence of certain results upon certain objective facts. If B signed the note he ought to be compelled to pay it. It would be, of course, inadmissible to hold that the absolute certainty of the jury that he signed it, should be the preliminary to this compulsion. But would it be too much to hold that the jury should believe, at least in some low degree, that he signed it? Is not the principle abhorrent that B may be coerced into paying a sum of money to A, when the jury does not believe, even in a faint degree, that he promised to pay it, simply because it believes that, of the plaintiff's and defendant's respective pieces of evidence, that of the former is heavier than that of the latter?

What those who have laid down the principle that "preponderance" of evidence will justify and require a decision conformable with it, have failed to realize, is that perception of the preponderance of evidence is quite consistent with want of belief. Of two pieces of very weak evidence, one may preponderate. It might be barely enough to convince, had it not encountered the contradictory evidence. Opposed by the latter, it may be insufficient to generate even the lowest degree of belief. To detect a preponderance of evidence that B signed a note, is neither to believe that he signed it, nor to be logically required to believe that he signed it. It would be fatuous to affirm that a man ought to believe, even faintly, everything the evidence for which is, in his opinion, stronger than the evidence against it.

Sometimes, by some authorities, a distinction is taken between different sorts

of civil cases; in some, the rule of preponderance of evidence being laid down, and in others that of belief. Thus Starkie [1] says: . . . "One who seeks to charge another with a debt, must do so by full and satisfactory proof;" and one who alleges payment of debt must furnish "full proof."

In a considerable number of cases the Courts of this State require not a preponderance of evidence, but a satisfaction, a convincing of the judge or jury, not that evidence of a fact preponderates over evidence against it, but that the fact exists. An equitable title to land resting in parol can prevail against the legal title, only when the evidence of it is "clear, satisfactory in character and *convincing*." The evidence to reform a writing on account of mistake or to set it aside for fraud must be satisfactory. When the allegations in a bill in equity are denied by the answer, the proof must be "clear, precise, and indubitable." These cases hold that a preponderance of evidence, however great, is insufficient to sustain the burden of proof. The evidence must not only preponderate, but it must convince. . . .

There is no measure of the weight of evidence (unless the witnesses or the evidential facts are counted), other than the feeling of probability which it generates. If X hearing A aver a certain fact, and B deny it, believes the fact, or disbelieves it, he, in so doing, appraises the evidence of A as heavier or lighter than that of B. For him, for it to be heavier is for it to produce faith in him. The rule in all civil cases ought to be that the jury should find against the party who has the burden, unless it is persuaded, believes, is convinced, that the facts which he has averred have occurred. . . .

In criminal cases as in the special civil cases adverted to, the Courts formed the habit of advising jurors not simply to be conscious of a preponderance of evidence of guilt, not to believe the guilt, but to have a "clear impression" of it, to be "satisfied" of it, before returning a verdict of guilty.[2] At length, the admonition was given that they should have no "rational doubt;" they should be convinced beyond a "reasonable doubt." . . .

Two important psychological elements appear in these statements: they are belief and doubt. Doubt, as we have seen, is the negation of belief. The question for A is, Did X strike Y? He neither believes nor disbelieves; he is in doubt. To advise A to believe beyond a doubt, is to advise him simply to believe and possibly to believe *hard*. So long as he believes, he does not doubt. . . . If the admonition to the jury means that the belief of guilt should be strong and not weak, tenacious and pertinacious, despite repeated reflection on and analysis of the evidence, and despite the realization of the gravity of a verdict of guilty, it is intelligible. But the phraseology employed is scarcely to be commended for perspicuousness. What is a "reasonable doubt"? The advice is directed to the juror. He must have the doubt and he must be the critic of it. He is to say whether it is reasonable. But what man ever entertained a doubt, which at the time he believed to be unreasonable? To be convinced that, a doubt of a fact is unreasonable, is to believe the fact. To tell a man that, if he believes beyond a reasonable doubt, he must do so and so, is to tell him that if he believes beyond reasonably not believing, he is to do so and so, — a valuable instruction surely! . . .

A statement of Chief Justice SHAW of Massachusetts has been not infrequently quoted by judges.[3] The jury is to render a verdict of guilty, if it believes

[1] Evidence, p. 817. [2] Wigmore, Evidence, 3542.

[3] It is quoted in Com. *v.* Devine, 18 Superior, 431.

the defendant guilty beyond a reasonable doubt. And this is the explanation of a reasonable doubt. It is "that state of the case which, after the entire comparison and consideration of all the evidence, leaves the mind 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, — certainty that convinces and directs the understanding and satisfies the reason and judgment. . . . This we take to be proof beyond a reasonable doubt!"

The doubt is a "state of the case"! I had imagined that it was a state of the mind. The state of the case, viz., the state of the evidence in the case, leaves the jurors' minds in a condition. What condition? This, viz., that they cannot say, that they have a conviction. I suppose that, if they cannot say that they have a conviction, it is because they have not the conviction. What conviction? It is an abiding conviction. But, what is that? One that has abode, for a considerable time, or one that is going to abide? How long before rendering the verdict must the conviction expressed by it have been formed? A week, a day, an hour, five minutes? If the abidingness is future, by what faculty does the juror know that it is going to abide? By what quality of the conviction does he recognize its longevity? By its strength? By its defiance of past argument in the jury room? Who knows?

But, it is a conviction to a "moral certainty." Is the certainty a different state of mind from the conviction, or is the phrase used to mean, a conviction which is a certainty, that is, a very strong conviction? It would be hypocritical to challenge the usage which speaks of a moral certainty, but it is impossible to see how an ordinary juror is to be aided by being told that if he is morally certain of the prisoner's guilt, he is to convict him. . . .

In order to convict, we are further told, the evidence must produce a "moral certainty of the guilt." But this certainty has some very peculiar powers. It "convinces, and it directs the understanding," it "satisfies the reason and judgment." Certainty is the state of being convinced, but, in Shaw's philosophy, it is the cause of, and therefore different from, the conviction. A moment ago, there was "an abiding conviction *to* a moral certainty," but now it is a certainty generating a conviction! This certainty (which is not a state, but an actor, a cause) has seemingly, three subjects on which to operate. There is an understanding; there are a reason and a judgment! Or are these three names only for one thing? But, that cannot be, for the operations are different. The certainty convinces and directs the understanding. It does no such thing for the reason or the judgment. Its function is, respecting these, humbler, shall we say, or more exalted? It "satisfies" the reason and judgment! A certainty satisfies! The certainty that one has fallen heir to a million dollars "satisfies," but it does not satisfy the reason; only the cupidity, the desire for happiness. The certainty that X the defendant killed Y satisfies the reason! What is this strange, elusive thing called satisfaction of the reason? And what singular thing is reason, that it should be satisfied by a certainty that the defendant has committed an atrocious crime? Perhaps what is satisfied is the desire to find out who committed it, that is, the official curiosity of the jurors; for which "reason and judgment" are odd names.

Doing the best possible with Chief Justice SHAW'S phrases, all that can be got out of them is this: Before convicting of a crime a juror should be morally certain that he committed it, and this conviction should be the result of a serious consideration of all the evidence.

Professor Wigmore well says, in his noble work on Evidence,[1] "When anything more than a 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 mere confusion, or, at least, a continued incomprehension."

TITLE II. PARTY'S RISK OF NON-PERSUASION OF THE JURY

751. KENDALL *v.* BROWNSON

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. 1866

47 *N. H.* 186

ASSUMPSIT on a note dated March 28, 1860, signed by the defendant and payable to the plaintiff or order. The defence was payment made by the defendant to the plantiff about a month after the date of the note. The execution of the note was admitted under the rule and not denied on trial; and the only question of fact in the cause was whether the note was so paid. . . .

The plaintiff requested the Court to instruct the jury that on the question of payment of the note the burden of proof was on the defendant. The Court refused so to instruct the jury; but did instruct the jury that upon the whole case the burden of proof was on the plaintiff; that if the defendant had introduced no evidence, the burden of proof would have been supported by the introduction of the note, the signature being proved, or admitted expressly, or under the rule; and that in such case the plaintiff would have had the verdict; but that the defendant having introduced evidence tending to show payment, it was for the jury to determine whether, the note and all other evidence on both sides being considered, the evidence preponderated in favor of the plaintiff; that if it preponderated in his favor never so little, he was entitled to the verdict; that if it preponderated in favor of the defendant, or if it was in equilibrium and did not preponderate either way, the verdict should be for the defendant; that the defendant was entitled to the verdict unless upon the whole case it was more probable than otherwise that the plaintiff was entitled to it.

A verdict was returned for the defendant, which the plaintiff moves to set aside for error in the foregoing rulings and instructions.

H. & G. A. Bingham, for the plaintiff. . . . The defence to the note was payment. In such case the burden of proof is on the defendant. . . .

H. Hibbard, for the defendant. . . . The declaration in assumpsit contains an averment that the claim is not paid. The question of payment may be tried under the general issue. This averment is put in issue by that plea, and it follows as a necessary corollary that the burden

[1] Vol. 4, p. 3543.

of proof as well as the right to open and close is with the plaintiff. Much of the inconsistency in the dicta of the judges in certain Massachusetts cases on this subject, seems to have arisen from inattention to the distinction between two very different things, that is, making a prima facie case and shifting the burden of proof.

PERLEY, C. J. . . . When the plaintiff had produced the note described in his declaration, the execution of it being admitted by the rule, his case was made out, and he was entitled to a verdict, unless his prima facie case was overthrown by evidence coming from the defendant. The defendant did not deny that the note was made on a sufficient consideration, and was originally a valid security; but he undertook to prove that he had paid it, and that was his sole defence. He did not rely on a negative of the plaintiff's prima facie case, but set up in answer to it the affirmative fact of payment. It is true, he said, I gave you this note, and it was a valid contract, which I was bound to perform, and I will prove that I have performed it by payment; and the only fact tried in the cause was whether after the note was made the defendant paid it. Besides other conflicting evidence on this point there was the contradictory testimony of the parties. On this question of fact, had the plaintiff or the defendant the burden of proof? . . .

An examination of the cases bearing on this question, shows clearly, as I think, that in this State it has all along been regarded as a settled general rule of practice in civil actions, that, whenever a party in any stage of the cause, under any form of pleading, sets up an affirmative proposition in answer to his adversary's case, he has the burden of proof to maintain the affirmative fact on which he relies. This general recognition of the rule in practice, and the direct authority of Buzzell *v.* Snell, 25 N. H. 474, I consider to be decisive of the present question. . . . So far, however, as I have been able to learn, the practice elsewhere is, in substantial agreement with what I suppose to have been our own; and on this particular point all the authorities that I have seen, are unanimous that where a defendant relies on payment, whether under the general issue or a special plea, the burden of proof is on him. . . .

Even if we were at liberty to go beyond the authorities, which to my mind are decisive, and look to the general reason of the thing, I can see no ground for any change in what I understand to be the present rule of the law on this point. The defendant has his election to plead his defence or give it under the general issue. If he sets up an affirmative fact to defeat the plaintiff's case, he ought in reason to assume the burden of proving the fact, whether he elects to show it by special plea, or finds it more for his interest to prove it under a general denial of the plaintiff's case. It is not reasonable that he should be permitted to use the indulgence which the law allows him, of showing an affirmative defence under the general issue, to shift the burden of proving it from himself and throw it on the plaintiff. . . .

My opinion is that the jury should have been instructed that the

burden of proof on the question of payment was on the defendant; that the instructions given on that point were not correct; and that consequently the verdict must be set aside.

Doe, J., dissenting. . . . The general issue traverses and denies the truth of every material allegation in the declaration, and, under that issue, the plaintiff must prove every such allegation. . . . In actions on notes, as well as in other actions in assumpsit, the plaintiff must show a breach of contract by the defendant. 2 Greenleaf, Evidence, sec. 174; Chitty on Bills, 573. The breach, being a material fact, the only cause of complaint, and the very gist of the action, alleged by this plaintiff, and being denied by the general issue, must be shown by the plaintiff — that is, if he introduced no evidence tending to show it, he would be nonsuited. He has the burden of proof as to a breach, and there can be no other breach than non-payment. The obligation of proving any fact lies upon the party who substantially asserts the affirmative. . . . The burden of proof is necessarily assigned upon and by the pleadings in the first instance. If there is no proof and no legal presumption upon an issue or a vital branch of an issue, there must be some means of determining which party shall prevail. That party has the burden of proof on an issue, who will fail if there is no evidence on that issue. Judge of Probate *v.* Stone, 44 N. H. 593; Starkie, Evidence, 534, 8th Am. Ed. The strict meaning of the term, "onus probandi," is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. Barry *v.* Butlin, 1 Curtis 637. The rule as to the burden of proof determines which party shall prevail when an issue is not maintained by proof or legal presumption. . . .

At the trial of this case, upon the general issue, when the signature was admitted or proved, the note was evidence tending to show a consideration, . . . and a promise to pay on demand; the record was evidence of a demand made by suit, and that demand was evidence of a breach, because the contract could not be performed after that demand. The note, with the aid of the technical rules of law, was proof tending to sustain every material allegation of the declaration. Such proof made a prima facie case for the plaintiff; but it did not throw upon the defendant the burden of introducing evidence of greater weight than that introduced by the plaintiff, and of showing that upon all the evidence on both sides it was more probable than otherwise that he had not broken his contract. If he introduced so much evidence that, upon the question whether he paid the note upon or before demand, all the evidence in the case was in equilibrium, he was entitled to the verdict, because the plaintiff failed to sustain his burden of proving a breach. An equilibrium of evidence is the same as no evidence, and if there was no evidence of a breach, the plaintiff could not recover damages for a breach. . . .

If the defence in this case had been payment made *after* breach, it would have been in confession and avoidance, admitting a breach and setting up the new, distinct, affirmative fact of subsequent payment in

discharge of a cause of action which once existed; the burden of proof would have been on the defendant, and his evidence would have been received under the general issue only by a relaxation of the strict rule of pleading. 3 Blackstone, Commentaries, 305, 306; 1 Chitty, Pleading, 477. But payment before suit, and before, or upon, actual demand, would be a performance of the contract before breach, rendering a breach impossible. The defence was a negative of the plaintiff's case — a denial of the alleged breach — and not in confession and avoidance or discharge; the burden of proof was on the plaintiff, and the defendant's evidence was admissible under the general issue, — not by a relaxation of any rule, but by the strict common law principle in which the general issue had its origin. . . .

"Payment," as well as "discharge," is used in two senses; first, performance of a contract to pay money according to its stipulations; second, extinguishment of a cause of action arising from breach of a contract. "Payment," as generally used in the books, has the latter meaning, and "the defense of payment" is usually of the same import, denoting a new, affirmative, and independent fact set up by the defendant in confession and avoidance, and not a denial of the breach. . . . The difference between the two significations of payment is the difference between the performance of a contract and compensation accepted in satisfaction of a breach of contract; and the distinction is not obliterated by any general and indiscriminate use of language by Courts or authors when their attention is not called to the distinction. The general statement that payment is a defence in confession and avoidance of a cause of action, is shown to be erroneous by a single illustration. If the note in this case was payable within a year from its date, payment before the expiration of the year would not be in discharge of the plaintiff's cause of action, for the plaintiff would never have a cause of action, — there would be no breach, — and the defence of such a payment would be a mere negative of the breach which, upon the general issue, the plaintiff must prove. . . .

It is of some practical importance, as a matter of justice, that promisors should not be deprived of their property by judgment and execution in assumpsit upon the accusation, denied by the general issue, that they have broken their contracts, when, in the equilibrium of evidence, it is as probable that they have not, as that they have, broken them.

752. LISBON *v.* LYMAN

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. 1870

49 *N. H.* 553

ASSUMPSIT, for the support of the pauper wife and children of one Volney C——. Verdict for the plaintiff. Motion of the defendant for a new trial.

The question was, whether Volney had a settlement in Lyman, by derivation from his father Isaac. . . . There was evidence tending to show that, for four years between 1833 and 1851, Isaac had real estate in Lyman, of the value of $150. There was no evidence that any taxes were assessed in Lyman during this time, nor that Isaac paid any taxes. The jury were instructed that taxation would not be presumed; and that it was unnecessary to consider whether he paid taxes, until it was proved that there were taxes to be paid; to which instructions the defendant excepted.

Carpenter, for the defendant. . . . *C. W.* and *E. D. Rand*, for the plaintiff.

Doe, J. . . . I. In actions for malicious prosecution, on the point of no probable cause (2 Saunders, Pleading & Evidence, 332; Eastman *v.* Keazor, 44 N. H. 520), and in actions for not having or not using, knowledge, skill, or care, (Leighton *v.* Sargent, 27 N. H. 460, 475; S. C. 31 N. H. 119, 136), the plaintiff *affirms a literal negative*, which, on the general issue, he must prove. Such cases, countless in number, and infinite in form, covering extensive departments of the law of contract and tort, are illustrations not of presumptions or exceptions or peculiar rules, but of the elementary principle which lays the burden of proof on the party having the affirmative of the issue, or, in other words, requires a party to prove his own side of the case.

And there is a great mass of cases, in which, upon the general issue, the plaintiff has the burden of proving that he was careful, and that the defendant was not careful (1 Hilliard on Torts, ch. 4, § 2): as in actions against towns for defective highways. . . . It is to be observed, however, that this burden of proof, in theory, often appears to be more formidable than it is in practice. The ordinary evidence of the plaintiff's damage generally has some tendency to show that it was caused by the faults of the defendant (Leighton *v.* Sargent, 31 N. H. 136); and evidence going to show that, generally tends to show that it was not caused by the fault of the plaintiff. Hill *v.* New Haven, 37 Vt. 508.) In an action for driving against the plaintiff on the highway, a sleigh (Lane *v.* Crombie, 12 Pick. 177), or a car (Gahagan *v.* R. R. 1 Allen 190; Robinson *v.* R. R. 7 Gray 92), the plaintiff must prove that he was careful and that the defendant was not careful. Cases involving this double aspect, are among the most common. In such cases, the plaintiff has the affirmative of the proposition that he used reasonable care; and he has the affirmative of the proposition that the defendant did not use reasonable care; for the simple reason that the plaintiff is the party who does affirm, and must affirm, each of the propositions although they are diametrically opposed to each other in form of language. A so-called negative affirmation is an affirmation and not a negation.

In assigning the burden of proof to one party rather than to the other, the law acts upon a better reason than a verbal distinction. The burden is imposed according to a plain principle of natural justice. The party

who affirms as part of his case, a fact denied by the other party, has the affirmative, however much literal negation there may be in his affirmation; and it is just that he should be required to prove the essential facts of his case, whether he states them in the form of a negative affirmation or in any other form. Great confusion has arisen among the authorities, from the frequent application of a verbal, instead of the legal, test, of the affirmative of an issue.

"In every issue the affirmative is to be proved. . . . But to this rule there is an exception of such cases where the law presumes the affirmative contained in the issue. Therefore, in an information against Lord Halifax for refusing to deliver up the rolls of the auditor of the exchequer, the Court of Exchequer put the plaintiff upon proving the negative, viz., that he did not deliver them; for a person shall be presumed duly to execute his office till the contrary appear." Bull. N. P. 298. This report of Lord Halifax's case, indicates that the information contained an affirmation that he did not deliver the rolls, and that this alleged non-delivery was the gist of the information, and was traversed in pleading. If such was the case, the prosecutor, affirming non-delivery, had the burden of the proof which the law attaches to the affirmative. But the court attached the burden to the literal, and not to the legal, affirmative, and then shifted the burden by a legal presumption. The literal affirmative was mistaken for the legal affirmative; this mistake placed the burden of proof on the wrong party; that error was corrected by constructing or impressing a legal presumption to transport the burden from the defendant to the prosecutor; and this case of mistaken affirmative, unnecessary circuity, and superfluous presumption, has become a leading authority, and has done much to entangle and obscure a very simple principle of law. . . . By confounding the affirmative of the issue with the literal affirmative, the legal negative is constantly mistaken for the legal affirmative, and undesirable results are reached from which there is no escape except by complex processes and a liberal use of so-called legal presumptions and exceptions to general rules.

To ascertain which party has the affirmative of a proposition, we do not inquire, whether it is expressed in affirmative or negative terms, but we inquire which party affirms the proposition in order to make out his case, and whether it is traversed by the other party. 1 Phillipps, Evidence, 812 (4th Am. Ed.) The rule is elementary. When a plaintiff grounds his right of action upon a negative allegation, he has the burden of proof. 1 Greenleaf, Evidence, § 78. But Greenleaf erroneously says that this is an exception to the general rule. It is merely an application of the general rule. . . .

In the present case, the jury were instructed that taxation would not be presumed; and that it was unnecessary to consider whether Isaac paid taxes until it was proved that there were taxes to be paid. There was no legal presumption that taxes were, or were not, assessed. But the effect of the ruling that it was unnecessary to consider whether

Isaac paid taxes until it was proved that there were taxes to be paid, was, to entirely relieve the plaintiff from the burden of proof as to the payment of all taxes assessed, unless the defendant proved that taxes were assessed; and to put upon the defendant the burden of proving assessment of taxes.

This result was at variance with the rule which attaches the burden of proof to the legal, not to the verbal, affirmative. . . . The paupers who had been supported by the plaintiff, and whose settlement was in controversy, were the wife and children of Volney. The plaintiff's claim was based on the allegation that the paupers had their settlement in Lyman. . . . The plaintiff claimed that Isaac had gained a settlement in Lyman, in the fourth method of Rev. Stats. ch. 65, § 1, by "having real estate of the value of $150, . . . in the town where he" dwelt and had "his home, and paying all taxes duly assessed on him and his estate for four years in succession," while he was "of the age of twenty-one years." The issue on this subject, was, in effect, whether Isaac, for four years in succession, had the four following qualifications: 1, age of 21 years; 2, a home in Lyman; 3, real estate in Lyman worth $150; 4, payment of all taxes duly assessed on him and his estate. If these four requisites existed for four successive years, he had gained a settlement in Lyman; if either of these requisites was wanting, he had not gained such settlement. The plaintiff alleged that Isaac had complied with these four requirements for four years in succession; and this allegation of the plaintiff was denied by the defendant. . . .

The allegation that Isaac paid all taxes duly assessed four years in succession, is not an assertion that he paid taxes; nor is it an assertion that taxes were not assessed; but it is an assertion that he paid taxes four years in succession; or that taxes were not assessed in the years in which he did not pay taxes. The circumstance that the averment is an alternative proposition, does not relieve the plaintiff from the burden of proving either the one or the other of the alternatives. If the averment is put in this form: Isaac paid taxes if any were assessed: it is still an alternative proposition in contemplation of law; its legal effect is not changed by a variation of phraseology. . . . Unless one or the other part of the proposition is proved, the proposition as an entirety is not maintained. It is maintained by proof of either of its parts, but not by proof of neither of them. . . .

II. Was the burden of proof taken from the plaintiff and placed upon the defendant by an exception to the rule, on the ground that the subject-matter was *peculiarly within the knowledge* of the defendant?

When in the nature of things, or the circumstances of the case, it would be more difficult for one party to prove an allegation essential to his side of the cause, if it were true, than it would be for the other party to disprove it, if it were not true, the omission of the latter to produce certain proofs (the omission of the defendant, in a criminal case, to testify, being excepted, laws 1869, ch. 23, § 2) may be evidence against him and in

favor of the former; the absence of proof on one side, may be equivalent to express proof on the other. Ela *v.* Kimball, 30 N. H. 126, 135. . . . The greater the difficulty on one side, and the less the difficulty on the other, the stronger is the inference against the latter and in favor of the former. Rex *v.* Burdett, 4 B. Ald. 122, 123, 140, 161. It is a matter of degrees, and a matter of fact. . . . But, however that may be, it would seem that nothing less than obvious impracticability on one side, contrasted with obvious feasibility on the other, can authorize the invention of an exception to release a litigant from his duty of proving the essential facts of his case. . . .

For the attempt to establish an exception changing the burden of proof on the ground of the difficulty and facility of furnishing proof, we seem to be largely if not wholly indebted to a rigorous enforcement of the English game laws, and the undue influence of a small governing class asserting their superior rights under peculiar institutions not brought to this country and hostile to our system of society. The authorities supporting the exception, rest upon game-law precedent. . . . When, in a prosecution on the game laws, it was charged that the defendant had killed a partridge, the defendant then and there not having the necessary aristocratic qualification, the burden was put upon him to prove that he did not belong to the inferior class of men disabled by law to kill game. King *v.* Turner, 5 M. & S. 206; Bac. Abr. title Game; Com. Dig. title Justices of the Peace (B. 43). But when a penalty was claimed of a sailor on the charge that he had left his ship, not having the necessary qualification by license in writing, the burden was not put on him to prove he had a license, but on the other party to prove no license. Frontine *v.* Frost, 3 B. & P. 302. . . . The value of such authorities must be chiefly historical. If there could be one rule for game killers, and another for sailors, and another for clergymen, the application of these clashing regulations to other classes of men, would be perplexing. . . .

The game-law exception, having been established, was extended to a few other cases; but as it stands in the books, it has no consistent or satisfactory foundation in principle or authority. It has been extended to the liquor laws of this State. State *v.* Foster, 23 N. H. 348, 352; State *v.* McGlynn, 34 N. H. 422, 426; State *v.* Shaw, 35 N. H. 217. In State *v.* Foster, it was held that if the defendant had been licensed he could readily have produced the license; while to prove the negative the government would have been compelled to summon the town clerk to appear with the records of the town. . . . The introduction of the game-law exception in prosecutions upon the liquor laws of this State, brought to them an unnecessary odium. Its application to them was vastly more arbitrary than its original invention. It relieved the State from proving an essential averment of the indictment, when it not only did not appear to be impracticable for the State to prove it, but when it did appear to be at least as easy for the State to summon the town clerk, as for the defend-

ant to summon witnesses (of whom the town clerk would naturally be one) to prove the signatures and authority of the selectmen. Even if it were a little more difficult for the State to furnish the proof than for the defendant to furnish it, it is not by a trifling difference between two inconsiderable difficulties of proof, that the general rule of the burden of proof can be set aside, and an exception established. Cheadle *v.* State, 4 Ohio State, 477, 480.

Upon an indictment for hunting deer, or catching fish, or cutting trees, or concealing a slave, without the consent of the owner, the burden is on the government to prove that the defendant was not licensed by the owner. Rex *v.* Rogers, 2 Camp. 654; Rex *v.* Allen, 1 Moo. C. C. 154; Rex *v.* Corden, 4 Burr. 2279; Rex *v.* Hazy, 2 C. & P. 458; State *v.* Woodly, 2 Jones, N. C. 276. And in other cases, the State is constantly required to prove a formal negative when the difficulty of proving it, is very great, and the difficulty of disproving it, would be very slight. . . .

The game-law exception has been applied in but very few classes of cases; the number in which it could as well be applied as in those few, is very great. 1 Ben. & H. Lead. C. C. 308–317. It ought to be extended or extinguished. Its present position cannot be sustained. In its partial operation, it is a mere exercise of arbitrary power, destructive of the congruity and unity of the law. . . .

The instruction which relieved the plaintiff of the burden of proving payment of all taxes assessed, and put upon the defendant the burden of proving assessment of taxes, was erroneous, and for this cause there must be a new trial.

753. GULF, COLORADO & SANTE FE R. CO. *v.* SHIEDER

Supreme Court of Texas. 1895

88 *Tex.* 152; 30 *S. W.* 902

Error to Court of Civil Appeals for Third District, in an appeal from Concho County. The suit was transferred to Concho from Runnels County.

This suit was brought by T. D. Shieder against the Gulf, Colorado & Santa Fe Railway Company to recover damages for injuries inflicted upon the plaintiff's wife in a collision between one of the trains of defendant and the buggy in which Mrs. Shieder was riding at the intersection of a public street with the railroad in the town of Ballinger on the 17th day of April, 1892. . . . The Court below charged the jury that the burden of proof was upon defendant railroad to establish contributory negligence on the part of Mrs. Shieder. This charge is assigned as error. . . .

J. W. Terry and *Chas. K. Lee*, for plaintiff in error. . . . Where the plaintiff's own case raises a suspicion of contributory negligence, the

burden is on the plaintiff not only to show negligence on the part of the defendant, but to show that he was not guilty of contributory negligence. . . . In a carefully considered article on the burden of proof, in volume 4 of the Harvard Law Review, pages 48, 49, speaking of the term "Burden of Proof," it is said: "In legal discussion, this phrase is used in two ways; (1) to indicate the duty of bringing forward argument or evidence in support of a proposition, whether at the beginning or later; (2) to mark that of establishing a proposition as against all counter argument or evidence; (3) it should be added, that there is a third indiscriminate usage, far more common than either of the others, in which the term may mean both or either of the first two. . . ." Bearing this distinction in mind, we believe that we can demonstrate both by reason and the great weight, if not substantially all, of the decisions of this State, the following propositions:

First. That the burden of proof on contributory negligence, in the sense of the burden of establishing such issue by a preponderance of evidence, where there is evidence in the case of contributory negligence, whether first offered by plaintiff or defendant, on the whole case has never been held by the decisions of this State to be on the defendant. . . . "Second. . . . That without dissent or dispute, the rule has been qualified to this extent, that where the plaintiff's own case discloses any evidence of contributory negligence, the burden is on him on the whole case. . . .

Guion & Truly, for defendant in error. . . .

DENMAN, Associate Justice (after stating the facts as above). . . . There is much conflict of authority upon the question as whether the burden of proof, upon the issue of contributory negligence, rests upon plaintiff or defendant. The confusion resulting is intensified by the fact that few, if any, jurisdictions can be found in which the decisions of the courts of last resort can be entirely reconciled upon this important question. A careful examination of the cases leads us to the conclusion that much of the apparent conflict in the decisions of any particular State is due to the fact that the Courts, in deciding individual causes, have sometimes relied upon the authority of decisions of Courts holding a different view of the law as to burden of proof; such differences not appearing on the face of the opinions, but lurking in the principle upon which they are based. The two classes of decisions, and the reasons by which they are respectively supported, are essentially antagonistic. They start from different premises, and logically arrive at different results, and therefore the citation of one to support the other generally leads to confusion. Mr. Beach, who undertakes to defend the rule imposing the burden on the plaintiff, asserts that it is supported by "the decided weight of authority," and declares it to be the doctrine in Massachusetts, Maine, Mississippi, Louisiana, North Carolina, Michigan, Oregon, Illinois, Connecticut, Iowa, Indiana, and probably New York, but candidly admits that the contrary is the settled rule in England, the

supreme court of the United States, Alabama, California, Georgia, Kentucky, Kansas, Maryland, Minnesota, Missouri, New Hampshire, New Jersey, Nebraska, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Wisconsin, West Virginia, Vermont, and Colorado, and is the opinion of the text writers. . . .

The rule seems to be well settled that it is not necessary for the plaintiff in his petition to negative, either by facts stated or by express averment, the existence of contributory negligence on his part. . . . We have been able to find no case where such pleading has been required, except in a few of those states where the burden of proof is upon plaintiff to show that he was not guilty of contributory negligence. Since these States have changed the well-established and logical rule of evidence at common law, consistency would seem to require a corresponding change in the rule of pleading; but it seems that only a few of them have so ruled. . . . We are of the opinion that the great weight of authority, as well as the reason of the law, is in favor of the rule which imposes the burden of proof upon defendant to establish plaintiff's contributory negligence, and it may be considered the settled law in this State. . . . It is not necessary for us to determine here in what class of cases a special plea of contributory negligence is required, but it seems generally to be admissible in many jurisdictions under the general denial, even where the burden of proof is on defendant.

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.

Let us apply these principles to the case at bar. Plaintiff's wife was traveling in a buggy along a public street, when injured. She evidently knew the track was there, for she lived in view of and near the crossing. There is no proof as to whether she saw or heard the engine coming until she crossed the side track, though there was some disputed evidence as to whether the whistle was blown some distance back, and as to whether the bell was ringing as the engine approached the crossing. The testimony showed, that her view of the approaching engine was partially if not entirely obstructed until she crossed the side track, when she appears to have discovered the train and tried to turn her horse, which, becoming frightened by the approaching engine, jumped onto the track.

We have seen that the law raises no presumption of negligence from the fact of injury. Are there any other facts from which a legal presumption of negligence on the part of Mrs. Shieder arises? We think not. . . . No fact or group of facts can be gathered from the plaintiff's pleading or the undisputed evidence, from which the law can be said to raise a prima facie presumption of negligence on the part of Mrs. Shieder, and therefore the case does not come within either of the two exceptions above noticed to the general rule imposing upon the defendant the burden of proof upon the issue of contributory negligence. . . .

We are of the opinion, therefore, that the trial Court correctly charge the jury, that the burden of proof was upon defendant to establish contributory negligence on part of plaintiff's wife. . . .

There are many other assignments of error, none of which we consider well taken. The judgment is affirmed. Affirmed.

754. STATE *v.* QUIGLEY

SUPREME COURT OF RHODE ISLAND. 1904

26 *R. I.* 263; 58 *Atl.* 905

INDICTMENT for murder. Heard on petition of defendant for new trial, and denied.

The defendant, on January 30, 1903, was found guilty of the murder of Abraham A. Camac, October 4, 1902. He now prays for a new trial, alleging . . . that the presiding justice erred in his instructions to the jury. . . . The accused, through his counsel, sets up the defence of insanity of a temporary character, to wit, delirium tremens; alleging that this incapacity existed at the time of the homicide, but had passed away soon after. . . .

To support this defence several witnesses appeared who had known

the accused from one to twelve years, and their testimony was to the effect that the accused was accustomed to drink to excess, and on some occasions had shown symptoms which to them indicated delirium tremens. One medical expert, Dr. Ford, made examinations of the accused at various times, at the request of his counsel, and declared it to be his opinion that the accused had delirium tremens or alcoholic insanity on October 4th in an aborted form. . . . The State, in rebuttal, called amongst other witnesses, Dr. Keene, who is in charge of the State Insane Asylum. . . .

The Court charged that upon the issue of insanity the burden of proof is upon the accused, and that the rule of evidence upon this issue is that it shall be proven by a fair preponderance of evidence.

Douglas, J. (after stating the case as above). The first, third, and fourth requests, which were refused, were based upon the proposition that upon the question of sanity or insanity of the accused the burden is upon the State to prove sanity beyond a reasonable doubt.

The question was settled in England in 1843 by the answer of the Judges to questions propounded by the House of Lords, suggested by the case of Daniel M'Naghten, reported in 10 Cl. & Fin. 200. In that case the law was said to be: That if the accused was conscious that the act was one which he ought not to do; and if the act was at the same time contrary to law, he is punishable; in all cases of this kind the jurors ought to be told that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crime until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing or as not to know that what he was doing was wrong. . . .

The question has arisen in almost every State of the Union, and in the courts of the United States, and between the decisions of these courts there is a hopeless conflict.

The decisions up to 1882 were collected in an article by Henry Wade Rogers in the Central Law Journal, vol. 14, p. 2. The writer cites, as supporting the view that the burden is upon the accused, the courts of Alabama, Arkansas, California, Connecticut, Delaware, Georgia, Iowa, Kentucky, Maine, Massachusetts, Minnesota, Missouri, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, and Virginia. To the contrary are cited Illinois, Indiana, Kansas, Michigan, Mississippi, and New Hampshire, while New York is called uncertain. From the report of the trial of Henry K. Goodwin, published in 1887, by the attorney-general of Massachusetts, by authority of law, it appears that the Courts of that State have abandoned the English rule. . . . Georgia has also changed its view, Ryder *v.* State, 100 Ga. 528, Maryland, Spencer *v.* State, 69 Md. 28, and New Mexico, Faulkner *v.* Ter., 6 N. M. 465, where the question has come up for the first time, have adopted the same

rule. To the supporters of the English rule named above may be added Nevada, State *v.* Lewis, 20 Nev. 333; South Dakota, State *v.* Yokum, 11 So. Da. 544; and Utah, People *v.* Dillon, 8 U. 92. . . . Perhaps the most weighty authority to the contrary is Davis *v.* United States, 160 U. S. 469. . . . In that case, the Court hold that the burden is upon the prosecution to establish sanity as an ingredient of the crime; and hence, when the presumption of sanity becomes silent on the introduction of evidence against it, proof of sanity beyond a reasonable doubt must be made before the jury can convict.

It would be a fruitless task to review in detail the cases where the question has been considered, for they are divided into two classes, which follow substantially the same two divergent lines of reasoning.

The English rule implies that the question of guilt and the question of insanity raise two distinct issues, and that while both may be involved in the final verdict, the burden of proof upon each issue lies upon different parties. The most complete and forcible statement of the argument in support of this rule which we have found is contained in the opinion of Judge DANFORTH in State *v.* Lawrence, 57 Me. 574, 581.

The American rule, so-called, holds that in a criminal case there is but one issue and that the burden throughout is upon the prosecution to prove, not only the criminal act, but the capacity of the accused to commit it beyond a reasonable doubt.

We think the first of these positions is the more logical. Sanity is not an ingredient of crime. It is a condition precedent of all intelligent action, as well benevolent as nefarious. It is a quality of the actor, not an element of the act. It is incumbent upon the prosecution to show the commission of the act, and from this showing and its circumstances to sustain the inferences of malice and such emotions as the particular crime may include. But sanity is not one of these inferences. It is a pre-existing fact which may be taken for granted as implied by law and general experience. . . .

It is argued that criminal intent, malice, and premeditation are facts to be proven by the prosecutor; that these can not exist in any insane mind; hence sanity must be proved by the prosecutor. But these are facts of mental condition and action, and they can only be proved by inference from material facts, circumstances, and acts. It is incumbent, therefore, upon the prosecution to prove such material facts, circumstances, and acts as would compel the inference of guilt in a sane person; and this is the limit of his burden. In murder the prosecution must establish the act, and either by inference or additional evidence, malice, and premeditation. If these ingredients of the crime can not exist without sanity, sanity is presumed. All the ingredients of the crime must be proved, and as to these we agree the burden never shifts. But as to sanity it never attaches to the prosecutor. The plea of not guilty by itself does not put the sanity of the accused in issue. He must raise the question otherwise, as all agree, if not by special plea, at least by

introducing evidence, and this is confession and avoidance. Confession and avoidance are an admission that the accused performed the act charged and a denial that the act was criminal. They are not, as the argument of several Courts assume, an admission that a crime was committed and the tender of an excuse for committing it. The defence of insanity admits the act but not the crime, just as the pleas of self-defence or of a license do. Upon both these defences we have held the burden to be upon the accused. State *v.* Ballou, 20 R. I. 607; State *v.* Beswick, 13 R. I. 211. . . .

We can not doubt that this is the view of the issue which is implied by our statute law, Gen. Laws cap. 82, § 22, which provides: "Whenever, upon the trial of any person upon an indictment, the accused shall set up in defence thereto his insanity, the jury, if they acquit such person upon such ground, shall state that they have so acquitted him," etc. This statute requires the defence of insanity to be set up by the accused, and requires the jury to find specially upon that issue. Under this provision the rules of evidence are as essentially fixed as if a special plea of insanity were required. . . .

The petition for new trial is denied, and the case will be remanded to the Common Pleas Division for sentence.

Charles F. Stearns, Attorney-general, for State. *Cooney & Cahill*, for defendant.

755. GINN *v.* DOLAN

SUPREME COURT OF OHIO. 1909

81 *Oh.* 121; 90 *N. E.* 141

ERROR to the Circuit Court of Cuyahoga County. . . .

The defendant in error sued to recover on four promissory notes. One of the defenses thereto was want of consideration. On the trial and before argument to the jury, the defendant below, plaintiff in error here, asked the Court to charge the jury that the burden of proof was upon the plaintiff to satisfy the jury by a preponderance of the evidence, that the notes were given for a valuable consideration; that such burden does not shift to or upon the defendant at any stage of the case; and that, although the presumption is that the notes were given upon a sufficient consideration, yet when other evidence on that subject is offered by the defendant, the burden is on the plaintiff to satisfy the jury upon all of the evidence that there was a consideration for the notes. The Court refused to so instruct the jury and, after the argument, instructed the jury as follows: "The law presumes the existence of a consideration for a promissory note, and this presumption continues until it is shown that there was none. . . . The defendant in this action, in addition to the denial of the execution and delivery of the notes in question, charges that said notes are wholly without consideration. Upon the issues of the absence or

want of consideration, the burden of showing this is on the defendant. He must show by a preponderance of the evidence that the notes in question were without consideration." The verdict and judgment were for the plaintiff, and the judgment in the Court of Common Pleas was affirmed by the Circuit Court.

Blandin, Rice & Ginn, for plaintiff in error. Our contention is that while the introduction of the notes in evidence made a prima facie case for consideration, it did not shift the burden of proof upon all the evidence relating to that issue to the defendant and require him to establish by a preponderance of the evidence that the notes were without consideration.

It has been a very common error for the Courts of this and other states in their statements of the law to fail to discriminate closely between the burden of proof upon the whole case, and the state of proof at a particular time in the progress of the trial. This error very frequently takes the form of stating that upon certain proofs being introduced, the burden shifts from one side to the other, which is upon all hands conceded to be an inaccurate statement of the law; what does in fact happen is that upon the introduction of certain proofs which are sufficient to make a prima facie case, the burden of producing countervailing proof is cast upon the other party; but the burden upon the whole case and all the evidence still remains upon the party having the affirmative.

This misuse of language has not been confined by the Courts to the statement of the law with reference to the burden of proof upon the question of consideration for a promissory note; but similar statements have been made with reference to every other kind of case which involves a presumption sufficient to make a prima facie case; as, for instance, the presumption of negligence arising from the occurrence of an accident of a particular character or occurring in a particular way; the Courts have said repeatedly as to such cases that upon proof being made by the plaintiff of the occurrence of an accident of that character or of its occurrence in that particular way, the presumption made a prima facie case in favor of the plaintiff, and that the burden of proof at such point in the progress of the case shifted to the defendant, and he was required to prove by a preponderance of the evidence that he exercised due care and was not guilty of negligence. Railroad Co. *v.* Mowery, 36 Ohio St. 418.

But the general rule would seem to be well established in negligence cases by an almost unbroken line of authority, that to rebut and destroy a mere prima facie case, the party upon whom rests the burden of repelling its effect need only produce such amount or degree of proof as will countervail the presumption arising therefrom. In other words, it is sufficient if the evidence offered for that purpose counterbalance the evidence by which the prima facie case is made out or established; it need not overbalance or outweigh it. . . .

We do not understand that any Court has ever given the presumption, attaching to a promissory note, that it was upon a sufficient consideration,

when introduced in evidence, any other effect than to make a mere prima facie case. All that the defendant here was required to do was to rebut and destroy a mere prima facie case, and only produce such amount or degree of proof as would countervail the presumption arising therefrom. In other words, it was sufficient if the evidence, offered for that purpose, counterbalanced the evidence by which the prima facie case was made out and established; it did not need to overbalance or outweigh it. . . .

Kerruish & Kerruish, for defendant in error. We submit that in a suit on a promissory note where the defendant sets up in his answer want of consideration, the burden is on him to establish this defense by a preponderance of the evidence. . . . We do not contend that the burden shifts from the plaintiff to the defendant, but we submit that the burden was on the defendant from the beginning to the end of the trial to show want of consideration. . . .

DAVIS, J. (after stating the facts as above). . . . It appears to us that these facts disclose an error of sufficient gravity to require the reversal of the judgment below.

The weight of the evidence, or as it is otherwise expressed, the preponderance of the evidence, may vary from side to side as a trial progresses; but the burden, which rests upon the plaintiff to establish the material averments of his cause of action by the preponderance of all the evidence, never shifts. The party who maintains the affirmative of an issue carries the burden of proof through the whole case, although he may be aided by such a rebuttal presumption of law, or such facts, as would prima facie support his contention. His opponent need not do more than counterbalance the presumption, or prima facie case. It is not necessary that the petition should in terms contain the averment that the note was based on a valuable consideration, because that is presumed. But when consideration is denied in the answer, there is an issue made upon that point, on which the plaintiff has the affirmative, and, the presumption being prima facie only, and not conclusive, the burden of proof necessarily rests upon the plaintiff to show a consideration, by a preponderance of the whole evidence given on the trial of the issue.

The reason of the rule, and some of the authorities which support it, are fully shown in Klunk *v.* Railway, 74 Ohio St. 125. It would be easy to amplify the citation of authorities (for example, see cases cited 4 Am. & Eng. Ency. Law (2 ed.), 200, n. 2; Hurley *v.* Ry. Co., 180 Mass. 370; Bank *v.* Adams, 70 Vt. 132; Kenny *v.* Walker, 29 Ore. 41; Owens *v.* Snell, 29 Ore. 483; 16 Cyc. 932–934), but it would not clarify the proposition to any extent. Indeed, it is not believed that the Courts below would have fallen into this error, but for a misconstruction of Dalrymple, Admr. *v.* Wyker, Admr., 60 Ohio St. 108. There were only two questions considered in that case. The first one was, whether the defense of want of consideration, as it was there pleaded, was good

against a demurrer. This Court held that it was not. But the case having been heard on evidence, the Court proceeded to the second question, namely, whether the evidence adduced by the defendant was sufficient to overcome the presumption of a valuable consideration; and this was the conclusion of the Court: "The evidence then does not overcome the presumption of a consideration arising from the giving of the note. In other words, to say the least, the evidence leaves the case in as much uncertainty as to whether there was, as to whether there was not, a consideration sufficient in law to support the note, and, consequently, the note with the presumption in its favor must prevail." It must be obvious, therefore, that the question involved in the case at bar was not raised by the record in Dalrymple, Admr. *v.* Wyker, Admr., and was not considered by the Court; and the syllabus of that case cannot be construed as being any broader than the facts of the case would warrant.

It is proper to say further, replying to a suggestion by counsel in argument, that a plea of failure of consideration, or of payment, presents a case very different from this. These defenses, as it were, confess and avoid. They are affirmative defenses, and upon such the burden is upon the defendant from the beginning to the end, just as it is upon the plaintiff here.

The judgment of the Circuit Court and that of the Court of Common Pleas are reversed.

CREW, C. J., SUMMERS, SPEAR and SHAUCK, JJ., concur.

TITLE III. PARTY'S DUTY OF SATISFYING THE JUDGE

Topic 1. Sufficiency of a Mass of Evidence

757. Rex *v.* Almon. (1771. King's Bench. 5 Burr. 2868.) [Criminal libel. To charge the defendant as the publisher, evidence was offered of a purchase of the libel, imprinted with the defendant's name and bought in his shop.] L. C. J. 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.

758. Regina *v.* O'Doherty. (1848. Ireland. 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 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 phase 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.

759. GRAY *v.* JACKSON

Supreme Judicial Court of New Hampshire. 1871

51 *N. H.* 9

Assumpsit, by Calvin Gray against the defendants as common carriers. It was alleged in the declaration that the defendants received of the plaintiff, at Portsmouth, N. H., the sum of $41, to be carried from Portsmouth to Reading, Mass., and there delivered to Nancy Thrasher. By agreement of parties the case was tried by the Court, who found the following facts:

The defendants are expressmen running from Portsmouth to Boston.

They receive, at Portsmouth, besides packages for Boston, packages for all parts of the country, and at the end of their route deliver them to other expressmen to be forwarded. There is no evidence that the defendants have any business connection or arrangement with other expressmen. July 11, 1865, the plaintiff delivered to the defendants, at Portsmouth, a package containing $41, directed to "Miss Nancy Thrasher, Reading, Mass.," a place not upon the defendants' route; and the plaintiff paid the defendants fifty cents as the entire expressage from Portsmouth to Reading. The defendants gave the plaintiff the following writing: "Jackson & Co. Portsmouth and Boston Express. Portsmouth, July 11th, 1865. $41.00. Received of Calvin Gray, package said to contain forty-one dollars, directed to Miss Nancy Thrasher, Reading, Mass., per Jackson & Co. Marden." The plaintiff knew that the defendants carried packages from Portsmouth to Boston, but did not know whether their line extended elsewhere or not. No notice was given him on this point by the defendants, except so far as such notice may have been given by the above writing and the other facts herein mentioned. When the package was delivered by the plaintiff to the defendants, the plaintiff understood that the defendants undertook to carry it to Reading and there deliver it to Miss Thrasher. The defendants understood that they undertook to do nothing more than they afterwards did. There was no conversation on this matter at the time, but the Court finds the understanding of each party to have been as above stated.

The defendants carried the package to Boston, gave it to the agent of the expressman whose route was from Boston to Reading, paid him twenty-five cents, and took his receipt. The Reading expressman appropriated the money to his own use, and has since left this part of the country. The defendants had no business connection with the express from Boston to Reading. About four weeks after July 11th, an agent of Miss Thrasher, to whom the Reading expressman had admitted the receipt of the money but refused to pay it over (virtually acknowledging that he had spent it), went with Miss Thrasher to the Boston office of the defendants, notified the defendants of the non-receipt, and demanded the money. About two weeks later, the plaintiff notified the defendants, at their Portsmouth office, that the money had not been received.

The Court found a verdict for the defendants, and the plaintiff moved for a new trial.

Minot, Tappan & Mugridge, for the plaintiff. *C. P. Sanborn*, for the defendants.

Doe, J. . . . The defendants have taken upon themselves the public office, trust, and duty of common carriers between Portsmouth and Boston, but not between Boston and Reading. They were under an obligation as common carriers to receive the plaintiff's parcel and carry it to Boston. That was their official duty. Assuming the office, they promise to perform its duties. This is common law. But it was no part

of their official duty to carry the parcel to Reading, or to receive it coupled with a contract to carry it to Reading. And when the plaintiff accuses them of violating a contract to carry it to Reading, the plaintiff must prove the contract on which it relies. It is not proved by the official duty of their public employment, because that does not extend beyond Boston. A contract to carry the parcel to Reading must be a mutual understanding of the parties. It may be proved expressly or by implication, by direct or circumstantial evidence, by writing or parol, by words or conduct or usage. . . . There is no law peculiar to this branch of the contract of a common carrier. There is no law in it, except the elementary and general principles applicable to all contracts, that a contract is a mutual understanding, and that a party may be estopped to deny that his understanding was such as he induced the other to believe it to be. All the rest of the question whether by an implied contract a carrier undertook to carry goods beyond his route, is a question of fact to be determined upon the evidence by the tribunal authorized to try the questions of fact involved in the issue.

How can so plain a question of fact be changed into a question of law? In Muschamp *v.* L. & P. J. R. Co., 8 M. & W. 421 (decided in 1841, and everywhere accepted as the leading case on this subject), it was held to be a question of fact. A parcel directed to a place beyond the defendants' route, and carried by them through their route and forwarded, was afterwards lost. Baron ROLFE "stated to the jury, in summing up, that where a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, *that is prima facie evidence of an undertaking on his part* to carry the parcel to the place to which it is directed: and that the same rule applied, although that place were beyond the limits within which he in general professed to carry on his trade of a carrier." The jury found a verdict for the plaintiff, and the defendants moved "for a new trial, on the ground of misdirection." In the Exchequer,

"Lord ABINGER, C. B. — The simple question in this case is, whether the learned judge misdirected the jury in telling them that if the case were stripped of all other circumstances beyond the mere fact of knowledge by the party that the defendants were carriers only from Lancaster to Preston, and if, under such circumstances, they accepted a parcel to be carried on to a more distant place, they were liable for the loss of it, this being evidence whence the jury might infer that they undertook to carry it in safety to that place. I think that in this proposition there was no misdirection. . . . The question is, Why should the jury infer one of these contracts rather than the other? Which of the two is the most natural, the most usual, the most probable? . . . The whole matter is therefore a question for the jury, to determine what the contract was on the evidence before them. . . .

GURNEY, B. — I think there was no misdirection in this case, and that the jury might fairly infer the contract was such as was stated by the learned judge."

In this explicit manner the undertaking of the carrier to be responsible for the delivery of the parcel beyond his own route was held to be a

pure question of fact, to be determined by the jury on the evidence. There was such an undertaking, if both parties so understood it. Whether there was such an understanding, was plainly a question of fact, and no attempt was made to change it into a question of law. It was submitted to the jury by Baron ROLFE, and the only point decided by the Court was, that it was a question of fact which must be submitted to the jury.

When Baron ROLFE told the jury that the evidence in the case was prima facie evidence of such an undertaking, by these words he held the undertaking to be a matter of fact to be proved by evidence. In saying that the evidence was prima facie evidence of the fact, he merely expressed his opinion of the weight of the evidence, in accordance with the general custom of English judges. State *v.* Hodge, 50 N. H. 519, 522, 525. In their practice, such opinions are given in various forms. Where we should say, "There is *some evidence* to be submitted to the jury," English judges often say, "The evidence *proves*," or "The *weight* of the evidence *is*," or "From the evidence the inference is," or "The presumption is," or "*This is prima facie evidence*," or "This evidence shifts the burden of proof," or "This evidence is sufficient to prove the fact unless it is rebutted by the other party." And when exception is taken to such statements, the point intended to be raised by counsel and decided by the Court is, not whether the judge *may rightfully give* the jury his opinion of the evidence in such forms (that is taken for granted), but whether there *is any* evidence for him to give his opinion of, and for the jury to give their verdict upon. . . . The opinions of English judges on the weight of the evidence being constantly given in such expressions as "From this evidence the inference (or presumption) is," or "This is prima facie evidence," or other equivalent phrases, these expressions, having been used for ages in the trial of cases by jury, became the common judicial language used in delivering judgment on motions for new trials as well as in summing up to the jury. Muschamp *v.* L. & P. J. R. Co. is an instance of this practice. On the motion for a new trial, in Muschamp *v.* L. & P. J. R. Co., Lord ABINGER, delivering judgment, said the undertaking alleged by the plaintiff "is the most likely contract under the circumstances." In saying this he no more undertook to state a rule of law than Mr. Justice BAYLEY did when he told the jury, in King *v.* Diggles (50 N. H. 520), that "it was not very likely" that an old man would sell his spectacles. . . . "The whole matter," says he, "is therefore a question for the jury, to determine what the contract was on the evidence before them."

But the decision in that case has often been misunderstood. It has been erroneously supposed that the opinions of ROLFE and ABINGER, on the prima facie weight of the evidence, were laid down as law. Through that error, the decision has been taken as the establishment of a peculiar legal principle fixing the liability of common carriers beyond their own routes, although it was held, with remarkable clearness and emphasis, that the whole matter was a question of fact for the jury.

By such a mistake, and others of a similar kind, a plain question of fact may inadvertently be changed into a question of law. The mistake in regard to the doctrine of Muschamp's case, on the point of prima facie evidence, was promoted, and another mistake was disseminated, by the reporters who made the head note of the case, by adding to a summary of the evidence this unfortunate statement: "HELD, that the Lancaster and Preston Railway Company *were liable* for the loss." If they had said "HELD, by the *jury*, that the company were *liable*. HELD, by the *Court*, that there *was evidence competent to be submitted* to the jury," they would have made a correct and useful statement of the case. In Angell on Carriers, § 95, it is said that in Muschamp's case "it was held that the company were liable for the loss," from which the reader would understand that it was so held by the Court.

It has been by no means an unusual thing for fact to be turned into law by the English practice of the judge giving the jury his opinion of the evidence. State *v.* Pike, 49 N. H. 438; Lisbon *v.* Lyman, 49 N. H. 572; State *v.* Hodge, 50 N. H. 521. . . .

The simple solution of all the difficulties that have arisen on this subject is, *not* to hold fact to be law, and *not* to mistake the opinions of judges on the weight of evidence for opinions on principles of law.

The perplexity of some American authorities, growing out of a misapprehension of Muschamp's case, makes it necessary, in examining all the authorities, English and American, to observe critically how the question arose in each particular case, — whether it was submitted to the jury or any other tribunal as a question of fact, whether the real doctrine of Muschamp's case was understood, whether the attention of the Court was called to the distinction between law and fact . . . [examining them].

These are the principal English cases usually cited on the question of a carrier's liability beyond his own route. They show that, in England, when there is no paper to be construed by the Court as a contract in writing, — when the undertaking of the carrier to carry beyond his own route is to be inferred or implied from circumstantial evidence, — the question is one of fact. They also show that, upon the evidence usually introduced on that question of fact, the jury and the Court habitually arrive at the same conclusion. . . . And with a tendency to allow settled fact to grow into law, and in the absence of a universal habit of critically and inflexibly preserving the distinction between law and fact, it is not unlikely that the finding of the jury, recorded as the head note in Muschamp's case, will eventually be regarded as the statement of a principle of English law. . . .

These [enumerating and stating them] are some of the principal American cases usually cited on the question of the liability of a carrier beyond his own route, in the absence of an express written contract. Some of them are not in point. Many contain nothing but dicta on the subject. Some turn on writings held to be, or treated as, express con-

tracts, the construction of which by the Court shows the understanding of the parties, without the finding of a jury on parol or circumstantial evidence. Some are based on the mistake of supposing that in Muschamp's case the defendants were held liable by the Court as a matter of law. Some are controlled or influenced by the mistake of supposing that in Muschamp's case the opinions of the judges on the prima facie weight of the evidence were opinions on the law. It would seem that in no one of them has the question been held to be, or been treated as, a question of law, where it was claimed to be a question of fact, or where the attention of the Court was called to the distinction between law and fact, — a distinction which has been clouded by misapprehensions of Muschamp's case. In nearly all of them, when there is no decisive contract in writing, it is held to be, or practically treated as, a question of fact. There is much in the American authorities going strongly to show that Lord ABINGER was right, and there is nothing in them having any considerable tendency to show that he was wrong, when he said, in Muschamp's case, "The whole matter is therefore a question for the jury to determine what the contract was, on the evidence before them." . . .

Upon the question of the understanding of the parties in this case, it may be doubtful whether the mere reception by the defendants of the parcel, directed to a place beyond their route, is evidence of an undertaking to carry the parcel to that place, or to be responsible for its carriage beyond Boston. . . . No such mutual understanding, binding the defendants to carry the plaintiff's parcel beyond Boston, was found by the judge who tried the facts in this case. . . .

The judge who tried the case found a general verdict for the defendants, and there must be Judgment on the verdict.

760. BRIDGES *v.* NORTH LONDON R. CO.

HOUSE OF LORDS. 1874

L. R. 7 *H. L.* (*E. & I. App.*) 213

[Printed *ante*, as No. 742)

761. HEHIR *v.* RHODE ISLAND CO.

SUPREME COURT OF RHODE ISLAND. 1904

26 *R. I.* 30; 58 *Atl.* 246

TRESPASS on the Case for negligence. Heard on petition of defendant for re-argument, after denial of its petition for new trial. Petition dismissed.

TILLINGHAST, J. — This case was very fully and carefully considered by the Court before rendering the decision now complained of by defend-

ant's counsel, and, after reading his brief in support of his motion for a re-argument, we fail to see that he has pointed out any error committed by the Court in said decision.

Counsel criticises the rule adopted by the Court that "where the evidence is conflicting, the case is one which is peculiarly within the province of the jury to decide;" contending that under such a broad rule the Appellate Division could in no case consider a petition for new trial, based upon the ground of the verdict being against the evidence, because every case has two sides, and there must of necessity be conflicting testimony in every case. He argues, further, that the law does not contemplate such a rigid rule, and that it is only in cases where the testimony is sufficiently conflicting to make it doubtful where the preponderance may be that the Court would refuse to interfere with the verdict.

The rule which the Court adopted — or rather followed — is, and always has been, the rule which controls in petitions for new trials, not only in this State, but wherever the common law is in force. Questions of fact are for the jury to try and determine. And where the evidence as to the existence of those facts which are put in issue is conflicting, and of such a character that fair-minded men might honestly differ as to the result thereof, the verdict of the jury is final and conclusive. . . .

And this is so, even though the Court or another jury might come to a different conclusion upon the same state of facts. The cases, both reported and unreported, in this State are numerous and uniform in support of this doctrine. See, by way of illustration, Watson *v.* Tripp, 11 R. I. 98; Boss *v.* R. R. Co., 15 R. I. 149; East Greenwich Inst. for Savings *v.* Kenyon, 20 R. I. 110.

The language of the former rescript criticised by counsel, does not mean that where there is merely a technical or nominal conflict in the testimony the Court may not reverse the finding of the jury; for no Court of last resort ever adopts such a rule. A mere scintilla is never sufficient to sustain a verdict, or, according to the modern rule, even to warrant the trial Court in submitting the case to the jury; Commissioners *v.* Clarke, 94 U. S. p. 284; Bouv. Law Dict. vol. 2, 959–60. Nor is a slight amount of direct and positive evidence on one side sufficient to sustain a verdict based thereon, where the evidence opposed to it is strong and convincing and *very clearly* of greater weight. All that the Court meant by the use of the language criticised, and all that any Court means thereby — for it is a most common expression in opinions upon petitions for new trials — was that the testimony, the positive and substantial testimony introduced by the respective parties to the case, at the trial thereof, was so conflicting that the Court could not say that the verdict was clearly and palpably wrong. And under the decision of this Court in Johnson *v.* Blanchard, 5 R. I. 24, which has been repeatedly reaffirmed, a verdict cannot be set aside unless the evidence "*very strongly preponderates*" against it.

In the opinion of a majority of the Court the evidence in this case did not so preponderate, but on the other hand was sufficient to sustain the verdict. The defendant's motion for re-argument is therefore denied and dismissed.

A. A. McCaughin, for plaintiff. *Henry W. Hayes, Frank T. Easton, Lefferts S. Hoffman*, for defendant.

762. STATE *v.* FORBES

SUPREME COURT OF NEW HAMPSHIRE. 1909

75 *N. H.* 306; 73 *Atl.* 929

EXCEPTIONS from Superior Court, Coos County; PIKE, Judge.

Fred Forbes was convicted of forgery, and he brings exceptions. Overruled.

Indictment, charging that the defendant, on December 4, 1908, "did falsely make and counterfeit a certain American Express money order for the payment of money, purporting to be made and signed by one W. A. Davids, assistant agent, for the sum of $50, . . . with intent that some person should be defrauded." Trial by jury and verdict of guilty. The defendant moved for his discharge upon the ground that there was no evidence upon which it could be found that he falsely made and counterfeited the order in Coos County. The motion was denied, and he excepted. After verdict the Court imposed sentence, but stayed execution pending the determination of the question of law reserved. The State's evidence tended to prove that on Wednesday or Thursday in the week ending August 15, 1908, the defendant was seen in company with one Wilhelm at the Windham Junction station of the Boston & Maine Railroad. The railroad agent at that station does business for the American Express Company, "issuing orders, filling out freight," etc. Wilhelm bought of the agent an express order for $1. On August 15th, after Forbes and Wilhelm had disappeared, the station agent discovered that a book containing twenty blank money orders had been stolen from the office. There was evidence that the theft was committed by Forbes and Wilhelm. All orders of the American Express Company are issued in blank books of twenty or more, each bearing a serial number which has no duplicate. One of the blank orders in the stolen book bore the serial number 8–3265268. After the disappearance of Forbes from Windham Junction, he was next seen at Lancaster, on September 4th. How long he had been there did not appear. While in Lancaster he went into a store and bargained for some clothing, for which he agreed to pay $28, and offered in payment therefor an American Express money order for $50, like the one set forth in the indictment, bearing the serial number 8–3265268, with the addition that it bore upon its back the indorsement "Paul N. Mertha, Jr." . . .

J. Howard Wight, Sol., and *Drew, Jordan, Shurtleff & Morris*, for the State. *Sullivan & Daley* and *Burritt H. Hinman*, for defendant.

Bingham, J. — To sustain a conviction of the crime of forgery, as in other crimes, it should appear that it was committed in the county where the offence is laid; and according to the weight of authority proof of that fact is sufficiently made out to entitle the State to go to the jury, if nothing further appears than that the person charged with the offence is shown to have uttered the forged instrument in the county where the indictment is found. Spencer *v.* Commonwealth, 2 Leigh (Va.) 751; State *v.* Poindexter, 23 W. Va. 805; State *v.* Morgan, 19 N. C. 348; Johnson *v.* State, 35 Ala. 370; Bland *v.* People, 3 Scam. (Ill.) 364; State *v.* Blanchard, 74 Iowa 628; United States *v.* Britton, 2 Mason 464, 469, 470, Fed. Cas. No. 14,650; Rex *v.* Parkes, 2 East, Pleas of the Crown, 992; s. c., 2 Russell, Crimes (2d ed.) 371; 2 Leach, Crown Law, 898, 909. In other words, proof that the forged instrument was uttered by the forger in the county where the indictment was found, if unanswered, is sufficient to sustain the verdict of a jury that the crime was there committed.

If this is the law (and we see no reason for thinking that it is not), it would seem that the situation would not cease to present a question of fact for the jury, and become a question of law for the Court, if other evidence should be introduced upon which a contrary finding might be predicated, and that the cases above cited, to the extent that they present a contrary view, are not to be followed. It is said in those cases "that the place where an instrument is found or offered in a forged state affords prima facie evidence, or a presumption, that the instrument was forged there, unless that presumption is repelled by some other fact in the case;" and in Commonwealth *v.* Costley, 118 Mass. 1, 26, it is said that this is all that was decided in Commonwealth *v.* Parmenter, 5 Pick. (Mass.) 279, the case relied upon by the defendant. If the terms "prima facie evidence or presumption," as there employed, mean, as we understand they do, that such evidence answers the legal requirements of proof authorizing a submission of the question to the jury (King *v.* Hopkins, 57 N. H. 334, 359), then it does not follow that, in case countervailing proof is put in evidence, the Court would be warranted in withdrawing the question from the jury; for the weight to be given the evidence is for them to pass upon, and presents no question of law, and if a verdict is rendered which is against the weight of the evidence, the injured party's remedy is to seasonably apply to the trial Court to have the verdict set aside. The true rule, as stated by Wigmore, is: 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? If there are, he has passed the judge, and may properly claim that the jury be allowed to consider his case. 4 Wigmore, Evidence, §§ 2494, 2513.

As it is conceded that the defendant forged the order and uttered

it at Lancaster, in the County of Coos, there was sufficient evidence from which it could be found that the crime of forgery was there committed; and this, irrespective of the fact whether there was or was not other evidence tending to disprove such a conclusion.

Exception overruled. All concurred.

763. JOLIET, AURORA & NORTHERN R. CO. *v.* VELIE

SUPREME COURT OF ILLINOIS. 1892

140 *Ill.* 59; 29 *N. E.* 706

APPEAL from the Appellate Court for the Second District; — heard in that Court on appeal from the Circuit Court of Kane County; the Hon. ISAAC G. WILSON, Judge, presiding.

This is an action on the case begun on April 23, 1888, by the appellee against the appellant company in the Circuit Court of Kane County to recover damages for a personal injury, which resulted in the amputation of one of the appellee's legs and the mangling of the other, in tearing his ribs from the breast bone, in inflicting internal injuries and in completly shattering his nervous system. The plea was not guilty. The first trial resulted in a verdict in favor of the plaintiff for $15,000.00. A new trial was granted. The second trial has resulted in verdict and judgment in favor of the plaintiff for $14,000.00. This judgment has been affirmed by the Appellate Court, and the judgment of the latter Court is brought here for review by appeal. . . . After the plaintiff below had introduced his evidence and rested, the defendant — the appellant here — moved to exclude the plaintiff's evidence. This motion was overruled, and exception was taken. The action of the trial Court in thus overruling the motion of the defendant to exclude all of the plaintiff's evidence, so made at the close of the plaintiff's evidence, and not afterwards, is the only error now insisted upon by appellant's counsel; except the claim that the damages are excessive.

Williams, Holt & Wheeler, for the appellant. The Circuit Court should have allowed defendant's motion to take the case from the jury, on the ground that by plaintiff's own showing he knew the hazard, and so was not entitled to recover. . . .

A. J. Hopkins, F. H. Thatcher, and *N. J. Aldrich,* for the appellee. The motion to exclude the plaintiff's evidence is in the nature of a demurrer to the evidence, and subject to the same rules and requirements. . . .

Mr. Chief Justice MAGRUDER (after stating the case as above) delivered the opinion of the Court. . . .

A motion to exclude the evidence operates as a demurrer to the evidence. Where the defendant demurs to the plaintiff's evidence, he must be held to admit not only all that the plaintiff's testimony proves,

but all that it tends to prove. The demurrer not only admits the truth of the testimony demurred to, but all the conclusions of fact which a jury may fairly draw therefrom. The testimony is to be taken most strongly against the party demurring, and whatever inferences a jury would be entitled to draw the Court ought to draw. The object of the demurrer is to refer to the Court the law arising from facts. . . . Hence, if there is evidence tending to prove the issues in favor of the plaintiff, the judgment must be in his favor, or, what amounts to the same thing under the more recent practice, the motion to exclude must be overruled. If, therefore, the record in this case was in such shape as to present for our consideration the question of law whether the evidence, that had been introduced by the plaintiff below when he rested his case, was or was not sufficient to justify a recovery, or establish a cause of action, we would be obliged to examine such evidence in order to determine the question thus presented.

But we do not think that the appellant is in a position to urge before this Court, that the trial Court erred in refusing to sustain its motion to exclude the evidence of the plaintiff below. When the motion was overruled the defendant below did not stand by the motion; on the contrary, it proceeded to introduce testimony to contradict the proofs of the plaintiff; and, after the introduction of its own testimony, it did not renew its motion to exclude, nor did it ask the Court to instruct the jury to find for the defendant, but allowed the case to go to the jury under instructions framed upon the theory that there was such a conflict in the evidence as to justify the jury in passing upon it. Where a defendant, whose motion to exclude plaintiff's evidence, made as soon as plaintiff rests, is overruled, fails to stand by such motion, or to renew it when all the testimony is in, or to request that the jury be instructed to find for the defendant, but introduces testimony of his own to contradict the case made by the plaintiff, and requests that the jury be instructed to pass upon the issues involved and to determine them according to the preponderance of the evidence, he thereby waives his right to object to the action of the Court in overruling his motion, and is estopped from assigning such action as error in a Court of review.

This conclusion necessarily follows from the observations already made upon the nature of such a motion, which operates as a demurrer to the evidence. When a defendant demurs to a declaration and his demurrer is overruled, he has two courses before him. He can either stand by his demurrer and suffer judgment to go against him, trusting to the upper Court to sustain his position, or he can plead to the declaration and go to trial. If he does the latter, he loses any rights which he might have had under his demurrer if he had stood by it. We see no reason why the same rule should not apply in the case of a motion by the defendant to exclude the plaintiff's evidence, when such motion is made as soon as the plaintiff rests his case. A motion of this kind is a substitute for the old practice of filing a demurrer to the evidence, which set out

all the facts admitted, and was expressed in the formal language of the ordinary demurrer. The plaintiff then joined in the demurrer, or refused to join therein, according to the ruling of the Court. Inasmuch as the demurrer admits all the facts stated in it to be true, and admits also all the inferences which can be properly drawn from the facts, and merely claims that the testimony is not sufficient in law to enable the plaintiff to maintain his action, the defendant necessarily withdraws his admissions when he neglects to stand by his demurrer after it is overruled, and proceeds to introduce witnesses to contradict the very evidence which he has just admitted to be true. The action of the Court in ruling upon the demurrer to the evidence is based upon defendant's admission that the facts established by the evidence are true. When the defendant no longer admits such facts to be true but tries to prove that they are false, he ought to be held to have waived any error based upon the admissions thus withdrawn. . . . When the testimony of the defendant is introduced the case made by the plaintiff may have been strengthened, and its defects, if any existed, may have been cured. Very often the cross-examination of the defendant's witnesses brings out facts favorable to the plaintiff's cause of action which the latter could not otherwise obtain. When all the evidence is in on both sides, an entirely different case may be presented from that which existed when the plaintiff rested. Even though a motion to exclude plaintiff's evidence made at the close of his case may have been improperly overruled, yet the evidence on both sides when considered all together may show so clearly, that the cause depends upon the effect or weight of testimony, as not only to justify but to require the jury to pass upon it. Would it be right for this Court to reverse a judgment for error in overruling such a motion, if it could plainly see that the case was one for the jury in view of all the testimony presented by both sides, and that it was properly submitted to the jury under instructions applicable to a controverted state of facts? We think not.

If the defendant in this case felt confidence in the position, that the evidence introduced by the plaintiff established no cause of action, it should have stood by its motion. . . . What matters it that it would have been wrong to submit the case to the jury upon the plaintiff's evidence alone, if it was right to submit it upon the plaintiff's evidence and the defendant's evidence together? . . . They [defendant's counsel] nowhere claim, or ask us to hold, that the case was not properly submitted to the jury upon all the evidence presented on both sides. Their sole contention is, that the plaintiff *when he rested* had not made a case, and that the trial Court erred in not sustaining the motion *then* made to exclude plaintiff's evidence without reference to the bearing, or effect on the issues, of the evidence subsequently introduced; and that, for this alleged error alone, we must reverse the cause irrespective of anything that occurred after such motion was overruled, and no matter upon what theory or upon what kind of instructions the case was finally submitted. We are unable to concur in this view.

It is claimed that the doctrine herein announced is opposed to the weight of authority. After a careful examination of all the cases decided by this Court, to which we have been referred, we see nothing in them inconsistent with the views here expressed.[1] . . . Under our practice, the trial Court cannot order a peremptory non-suit against the will of the plaintiff, though the motion of the defendant to exclude plaintiff's evidence on the ground of its insufficiency to support a verdict will, when granted, have the same effect as an enforced non-suit and may be almost said to be equivalent thereto. (Poleman *v.* Johnson, 84 Ill. 269.) Under the English practice, however, the defendant may, at the close of the plaintiff's evidence, apply for a non-suit against the plaintiff, if it is claimed that there is not evidence upon which the jury can reasonably and properly find a verdict; and it has been held in several English cases, that the judge may use the evidence introduced by the defendant, in order to determine whether he will grant a non-suit or not, or in order to change his ruling already made upon an application for a non-suit. (Davis *v.* Hardy, 6 Barn. & Cress. 225; Giblin *v.* McMullin, Law Rep. 2 Privy Council Appeals, 317.) If, under these authorities, the evidence of the defendant may be considered in connection with that of the plaintiff in order to decide whether or not the plaintiff has made such a case as should be submitted to a jury, then when a record shows that testimony was introduced by both plaintiff and defendant, it should be made to appear to this Court, by proper rulings obtained from the trial Court, that the plaintiff was not entitled to go to the jury upon *all* the evidence, before we will reverse upon the alleged ground that the case ought to have been taken from the jury. . . .

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

Topic 2. Specific Presumptions

765. Cogdell *v.* R. Co. (1903. North Carolina. 132 N. C. 852; 44 S. E. 618.) Walker, J. — 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 case of a mere inference, there is no technical force attached to it. The jury,

[1] [Gray, J., in Columbia & C. R. R. Co. *v.* Hawthorne, 144 U. S. 202, 12 Sup. 591 (1892): The question of the sufficiency of the evidence for the plaintiff to support his action cannot be considered by this Court. It has repeatedly been decided that a request for a ruling that upon the evidence introduced the plaintiff is not entitled to recover cannot be made by the defendant, *as a matter of right*, unless at the close of the *whole* evidence; and that if the defendant, at the close of the *plaintiff's evidence*, and without resting his own case, requests and is refused such a ruling, the refusal cannot be assigned for error. — Ed.]

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.

766. STATE *v.* HODGE

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. 1869

50 *N. H.* 510

INDICTMENT, for breaking and entering the dwelling-house of one James Call, in the night-time, and stealing a gold watch and chain. Verdict, guilty; and motion of the defendant for a new trial.

The evidence tended to prove the following facts: The house had been broken and entered in the night. The next morning, when the watch and chain were missed, the house occupied by the defendant was searched, and the watch and chain were found (with two bits, a chisel, and a spirit-level, which belonged to Call, and which he had kept in his shop in front of his house) in a straw bed owned by one Howe, the father of Mrs. Call, in a back chamber adjoining the room in which the defendant slept. There was no access to the back chamber, except through a door which led into the defendant's sleeping-room. The back chamber was not hired or occupied by the defendant; but Howe and Call kept sundry things there, and they and others had access to it occasionally. It was not under lock and key. To enter it, it would be necessary to go through the lower kitchen, occupied by the defendant, then through an entry, and up a pair of stairs, and through his sleeping-room. In his bed in his sleeping-room, under the pillows and under the sheets, was found a small piece of upper leather which Call claimed, and which the defendant admitted he had stolen. The defendant also admitted he had stolen some sole leather from Call, which he had used in tapping his boots, saying he had taken the leather to get even with Call. The defendant had worked for Call, and had had some difficulty with him about his labor.

The defendant excepted to the refusal of the Court to instruct the jury that the evidence was not sufficient to authorize a verdict against him.

Burke, for the respondent. In this case, the State relies on the *possession*, by the respondent, of the articles alleged to be stolen, for conviction on the charge of breaking, entering, and stealing, set forth in the indictment. Possession of stolen goods, which will justify conviction, must be *recent* and *exclusive*. . . .

Colby, solicitor for the State.

DOE, J. — The defendant's counsel claims that "the State relies on

the possession by the respondent of the articles alleged to be stolen;" that "possession of stolen goods, which will justify conviction, must be recent and exclusive;" that "the State has not actually proved either possession by the respondent of the articles alleged to be stolen, or occupancy of the room in which they were found, much less exclusive possession;" and that the Court erred in refusing to instruct the jury, as requested, that the evidence was not sufficient to authorize a verdict against him.

It has been generally understood, that the prisoner's exclusive and unexplained possession of stolen property recently after the theft, raises the presumption that he is the thief, and that this presumption takes the burden of proof from the prosecutor and lays it upon the prisoner. 2 East, Pleas of the Crown, 656; Roscoe, Criminal Evidence, 18; J. F. Stephen, Criminal Law, 303, 304; 1 Bennett and Heard, Leading Cases, 360–372, 1st ed.; and cases cited in 2 Bishop, Criminal Procedure, § 701. When the defendant's possession of stolen property has been the only evidence relied upon to convict him, judges have directed an acquittal because they held the possession was not recent, or was not exclusive, or was explained. Trials have proceeded upon the ground that it was for the Court to determine whether the possession proved was recent enough, or exclusive enough, or explained enough, to shift the burden of proof, and that, if the burden of proof was not thus shifted by the Court, the defendant was entitled to an acquittal. The Court has decided, not whether there was any evidence, however slight, to be submitted to the jury, but whether there was a presumption which shifted the burden of proof. This practice was formerly so common, that it came to be regarded as the application of a rule of law, and is so laid down in many books of high authority.

In this case, the defendant claims that the evidence does not bring him within the supposed rule in relation to possession of stolen property, and that the Court should have ordered his acquittal. It becomes necessary, therefore, to inquire whether there is any such rule of law as has been supposed, and what the rule is, if there is one, and whether this case comes within it.

It is obvious, at the outset, that if there is such a rule, the presumption which it draws from the evidence must be a presumption of law declared by the Court, as distinguished from a presumption of fact found by the jury. The first practical difficulty in the way of making it a presumption of law is the impossibility of inventing a rule by which to determine whether the possession *is* recent or not. Cockin's Case, 2 Lewin C. C. 235, was an indictment for stealing two sacks, found in the defendant's possession about twenty days after they were missed; COLERIDGE, J., said to the jury:

"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."

In a valuable note to this case, the reporter says:

"The question, however, of distance of time and recent possession must be at all times one of fact under the circumstances, and a jury under the judge's direction must decide." . . .

"What shall be considered a *recent* possession, cannot be absolutely determined by any rule, but must depend not only upon the mere lapse of time, but upon the nature of the articles stolen, and the considerations whether they are of a description likely to pass rapidly from hand to hand, or such as the party might, from his situation in life, or the nature of his vocation, become innocently possessed of." Burrill, Circumstantial Evidence, 448; Best on Presumptions, § 305; Best on Evidence, § 211; 3 Greenleaf Evidence, § 32; 2 Bishop Criminal Procedure, § 701; Bennett & Hurd, Leading Cases, 366, 1st ed. . . .

Is it the duty of the Court, or the duty of the jury, to determine whether, in view of the nature of the property, the possession is recent enough to raise the presumption? This duty has frequently been performed by the Court. Courts governed by precedent can easily find precedent enough to put that duty upon them. But whenever a judge, in the discharge of that duty, undertakes to charge a jury, he practically demonstrates, and virtually admits, that there is no rule of law on the subject. He does not say to the jury, "There is a general rule of law, or a legal presumption, applicable to all kinds of property;" but he must say, in substance, "There is a general rule of law which finds guilt from the recent possession of stolen property; but whether the possession is recent or not, depends upon the nature of the property. There is no general rule of law which divides the infinite varieties of property into three hundred and sixty-five or any other number of kinds, and requires you or me to draw the presumption, from the possession of one kind one day after the theft, from the possession of another kind two days after, and so on to the end of the list; that allotment of time and variety is left to my judgment; and, in my judgment, the time and variety, in this case, are sufficient to raise the presumption; this presumption, found by me, is binding upon you." It is useless to call such a presumption a presumption of law. Call it what we may, it is a presumption of fact. . . .

These [precedents cited] are mere instances and illustrations of the general practice of the judge giving to the jury his opinion on the facts; and this general practice, probably, is the chief origin of the supposed legal presumption drawn from the possession of stolen property. When judges, following the common practice of giving the jury their opinions of the facts and the weight of the evidence, had charged juries year after year, for a great length of time, that possession of stolen property was presumptive evidence of guilt, or raised a presumption of guilt, this form of judicial instruction finally came to be considered as the law of the land. Whether it was matter of fact or matter of law was practically immaterial,

the influence of the Court upon the jury being then generally overwhelming in cases that touched no political prejudice or sympathy. Being constantly repeated by the Court, it naturally acquired the position and strength of an established dogma. . . .

To whatever extent matter of fact involved in the issue is held to be matter of law, to that extent the constitutional system of trial by jury is destroyed; and when part is destroyed, the remainder is put in jeopardy. One precedent is held to justify another. Every matter of fact turned into law, opens the way for a further annexation of the province of the jury to the province of the Court, and a gradual absorption. None the less dangerous is the process because it has been going on for a long time. . . .

The English doctrine of presuming malice or criminal intent as a matter of law in certain cases may have grown out of the judicial practice of advising the jury on the weight of the evidence — a practice continued so long that the true character of the presumption as an inference of fact passed into oblivion. Lisbon *v.* Lyman, 49 N. H. 576. . . . An immense mass of authorities (Burrill, Circumstantial Evidence, 48, 49; 1 Bennett and Heard, Leading Cases, 347–360; 2 *ibid.* 504–538; 1 *ibid.* 295–362, 2d ed.) was overthrown by the decision in State *v.* Bartlett, 43 N. H. 232, 233, 234, where the presumption of malice in homicide was held to be a presumption of fact, and a long step was taken towards the rectification of the doctrine of presumptions, and its establishment upon ground consistent with the constitutional trial by jury. . . . The decision in State *v.* Bartlett struck out of our books a vast number of ancient and modern authorities, and submitted to the jury, as a question of fact, a subject which had long been studied as a question of law. If, by virtue of that precedent, the law should be still more simplified and sound constitutional principle still further advanced, the profession would be relieved and justice promoted.

Whether the defendant, in this case, had any possession of the watch and chain, at any time, either when they were found or before; whether his possession, if any he had, was recent enough, or exclusive enough, or unexplained enough, to raise a presumption of guilt, — were questions of fact for the jury. There was *some* evidence to be submitted to the jury on those questions. If the jury found the defendant had the property in his possession after it was stolen, that fact was evidence against him. If they found an absence of explanatory evidence on his side, under circumstances which tended to show he could furnish such evidence, that fact was additional evidence against him. Rex *v.* Burdett, 4 B. & Ald. 161, 162; 1 Phillipps, Evidence, 598, 599, 4th Am. ed.; J. F. Stephen, Criminal Law, 303. But if those facts were found, there was no presumption of law, nor was the burden of proof shifted. The State, in the indictment, made an affirmation of the defendant's guilt which the defendant traversed in his plea. The State had the affirmative, and the burden of proof which belongs to the affirmative. The question, from

the beginning to the end of the trial, was, whether the affirmative allegation of guilt was proved by the testimony introduced on both sides, and by the evidence which consists of the non-production of testimony, *not* including the refusal of the defendant to testify, if there was such a refusal. The Court rightly refused to instruct the jury as requested.

Judgment on the verdict.

767. ROSS *v.* COTTON MILLS

SUPREME COURT OF NORTH CAROLINA. 1905

140 *N. C.* 115; 52 *S. E.* 121

ACTION by M. C. Ross against the Double Shoals Cotton Mills, for personal injury sustained by plaintiff while operating a lapper in defendant company's mill; . . . heard by Judge M. H. JUSTICE and a jury, at the Spring Term, 1905, of the Superior Court of Cleveland. From a judgment of nonsuit, the plaintiff appealed.

Webb & Mull and *D. F. Morrow*, for the plaintiff. *O. F. Mason* and *Ryburn & Hoey*, for the defendant.

CONNOR, J. . . . The plaintiff, in the employment of the defendant, was on the day of the injury operating a lapper in defendant's cotton mill. The motive power was applied by a belt running over a pulley on the machine attached to another pulley overhead working upon shafting connected with the power. When it was desired to stop the machine for any purpose, the belt was removed or shifted from the tight to the loose pulley by means of the belt shifter. If the machine became choked with the cotton passing through the beater, and it became necessary to clean it, or remove the cotton, it is stopped by throwing the belt from the tight to the loose pulley, this being done by a shifter. If in proper condition it will remain motionless until the belt is thrown back on to the tight pulley. While machine is in motion, there are parts in which the hand of the operator may be put without injury; there are other parts in which the beater shaft revolves very rapidly. Plaintiff's witness, Gilliam, says that two years ago when he left the mill the lapper was all right and in good condition. The plaintiff says that on the 11th day of July, 1904, he was operating the lapper, that it became choked and "the belt ran off the big pulley," that he carded the belt off and put belt grease on it to prevent belt from running off. In five or ten minutes it choked again, that he stopped the machine with the belt shifter and carried some cotton back to the hopper. Champion went to the opposite side, raised the cap from the beater, and the plaintiff put his hand into the beater bars to get the cotton out. The machine, by some unknown means, started and tore his arm off. . . .

With the light afforded us, but one of three possible explanations of the unexpected starting of the machine occurs to our minds; either

Champion accidentally struck the shifter and threw the belt on to the tight pulley, or the plaintiff, in moving about the machine, did so; or there was some defect in the belt or shifter.

It is elementary learning that the defendant is not liable for the movement of the belt, unless, either by the negligent conduct of some employee not a fellow servant or by some defect in the condition of the shifter, it worked back and threw the belt on to the tight pulley. In this condition of the case, what shall be done? The defendant has charge of the machinery and its operation except in so far as the plaintiff, in the discharge of his duty, had such charge. The plaintiff is suddenly and unexpectedly caught in the machine, struck dumb, his arm torn off, paralyzed. Conceding that there is no direct evidence of a defect in the machine or any of its parts, is the plaintiff driven to a nonsuit? Or may he, upon the doctrine of "res ipsa loquitur," have his case submitted to the jury to say whether there be actionable negligence which is the proximate cause of his injury? . . .

While the rule has not been, in express terms, often applied in this State, it is by no means new or of unusual application. Professor Wigmore says that, for a generation at least, in England it has been conceded to exist "for some classes of cases at least." In 1865, ERLE, C. J., in Scott *v.* London Dock Co., 3 H. & C. (Com. L. R. U. S. 134) said:

"There must be some evidence of negligence, but when the thing is shown to be under the management of the defendant or his servants and the accident is such that, as in the ordinary course of things, does not happen if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

The limitations governing the application of the rule are thus stated by Wigmore (§ 2509):

"(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."

The underlying reason for the rule is that usually the chief evidence of the true cause of procedure is practically accessible to the defendant, but inaccessible to the person injured. It is for this reason that in some cases the Legislature has made the fact of injury "*presumptive* evidence" and in others a "*prima facie*" case. . . .

To prevent any misconstruction of the circumstances under which or the manner in which this principle applies in the trial of causes, we wish to restate: . . . It does not in any degree affect or modify the elementary principle that the burden of the *issue* is on the plaintiff. WALKER, J., in Stewart *v.* Carpet Co., 138 N. C. 60, clearly states the law in this respect:

"The doctrine does not dispense with the requirement that the party who alleges negligence must prove the fact, but relates only to the mode of proving it. The fact of the accident furnishes merely some evidence to go to the jury which requires the defendant 'to go forward with his proof.' The rule of 'res ipsa loquitur' does not relieve the plaintiff of the burden of showing negligence, nor does it raise any presumption in his favor."

The suggestion has been made in argument of cases at this term that, when the rule applies, it is the duty of the Court to instruct the jury that proof which calls the rule into action constitutes a "prima facie" case, or raises a presumption of negligence. This is a misapprehension both of the principle upon which the rule is founded and its application. It must be conceded that expressions are used in cases . . . which give color to the suggestion. . . . So learned and accurate a jurist as Judge GASTON, in Ellis *v.* Railroad, 24 N. C. 138 (being the first time that we find the rule declared in this Court), refers to it as making out, when applicable, a "prima facie" case. SMITH, C. J., in Aycock *v.* Railroad, 89 N. C. 323, quotes with the approval the language used in Ellis' case, supra. . . . When a breach of duty is shown which is the proximate cause of the injury, a verdict follows for the plaintiff, unless exculpatory circumstances are shown. It is only, as here, when there is no direct evidence of a defect in the machine, and the physical conditions surrounding the transaction do not ordinarily produce injury, that the occurrence speaks for itself.

Such conditions are shown to exist in this case. . . . The law says that the plaintiff is entitled to have a jury pass upon the physical facts and condition, and to say whether in their opinion he has made good his allegation of actionable negligence. The defendant may, or may not, introduce evidence as it is advised. By failing to do so, it admits nothing, but simply takes the risk of *non-persuasion*. This is what is meant by "going foreward" with testimony. He, by this course, says that he is willing to go to the jury upon the plaintiff's evidence. . . .

The judgment of nonsuit must be set aside and a new trial had.

New trial.

768. CONTINENTAL INSURANCE CO. *v.* CHICAGO & NORTHWESTERN R. CO.

SUPREME COURT OF MINNESOTA. 1906

97 *Minn.* 467; 107 *N. W.* 548

APPEAL by plaintiff from an order of the District Court for Winona County, SNOW, J., denying a motion for a new trial, after a trial and directed verdict in favor of defendant. Reversed.

John Moonan, for appellant. *Brown, Abbott & Somsen*, for respondent.

JAGGARD, J. — This was an action to recover damages caused by a

fire set by the engine of defendant and respondent. The plaintiff and appellant, an insurance company, paid the loss on property insured by it and was subrogated to the rights of the insured against the defendant. At the close of the testimony, the Court directed a verdict for defendant. From a motion denying a new trial, this appeal was taken.

The statute of this State (G. S. 1894, § 2700) provides that the owner of property burned by fire thrown from an engine can recover damages from the railroad company without being required to show defects in the engine or negligence on the part of employees. The fact of fire is "prima facie" evidence of negligence. The cases construing this section in this State, and similar statutes in other States, are not harmonious. Many of them hold that it is necessarily for the jury to weigh the statutory presumption of negligence in the balance against the evidence of defendant in rebuttal. Greenfield *v.* Chicago, 83 Iowa 270, 49 N. W. 95. . . . Hagan *v.* Chicago, 86 Mich. 615, 49 N. W. 509; 2 Thompson, Negligence, 840. Railway companies argue against this rule that it amounts to judicial legislation, inasmuch as it converts a presumption, rebuttable under the statute, into an unrebuttable one in effect, and that it deprives them in every instance of the right to try the force of the rebuttable evidence against the presumption before the Court, and enables incendiaries in practical result to sell them their crops and improvements at a price fixed by hostile juries.

According to other authorities, rebuttal by proof that the engine was properly constructed, equipped, inspected, maintained, and operated is as broad as the presumption of negligence, and justifies the trial Court in directing a verdict for defendant. Daly *v.* Chicago, M. & St. P. Ry. Co., 43 Minn. 319. . . . 2 Thompson, Negligence, 796, note 30.

In language more picturesque than temperate, Judge THOMPSON has insisted that the rule last stated involves a complete obfuscation of the line which separates the province of the Court and the province of the jury, and that here is a case where evidence of a cogent nature is opposed to the testimony of the agents and employees of a railroad company, who, as experience will show, will, in almost every case swear up to the necessary mark and to whom nothing is more common than to lie on the witness stand:

"In nearly every such case the railway company will come forward with its creatures and prove that the engine was a good one, that it was suitably equipped with appliances to prevent scattering fire; and many Courts have held such evidence to constitute a defence, and, assuming its truthfulness, . . . " 2 Thompson, Negl. 840, 844, 796.

The contrast of the two views was well illustrated and judicially stated in a leading recent case, Great Northern Ry. Co. *v.* Coats, 115 Fed. 452, 53 C. C. A. 382. THAYER, J., for the majority of the Court, held that where the company produced testimony not directly contradicted, tending to show that the locomotive was properly constructed,

equipped, inspected, and operated, it was the province of the jury to determine whether the statutory presumption of negligence was overcome:

"We cannot well understand," he said, "upon what theory the statement of persons who were in charge of a locomotive when it occasioned a disastrous fire, that it was properly and prudently managed, etc., must be accepted by a Court as conclusive, and as overturning, as a matter of law, the presumption of negligence raised by other testimony. It would seem, rather, that the triors of the fact ought, in such a case, to consider how far the interest of such witnesses — their natural desire to absolve themselves from all blame — may have colored their evidence, and how far their statements are consistent with other facts and circumstances which have been proven. If a Court undertakes to weigh such evidence, and say that the witnesses are credible, and also to decide as to the effect of the proof, it plainly assumes the functions of the jury or at least a function which is discharged by the jury in other cases."

On the other hand, SANBORN, J., dissenting, after a reference to a number of cases supporting his views, and a consideration of the nature of rebuttable presumptions, held that:

"The result is that it was in the first instance a question of law for the Court below in this case whether or not the presumption of negligence in the operation of the defendant's locomotive, which arose from the scattering of the sparks or coals and the setting of the fire, was overcome by the testimony for the defendant; and if the testimony of its proper employees that there was no negligence in the operation of the engine was uncontradicted, and was as broad as the presumption, then that presumption was overcome, as a matter of law, and it was the duty of the trial Court to withdraw this charge of negligence from the consideration of the jury on the motion of the defendant."

The opinion of the majority of that Court was followed and approved in all respects in the recent and well-considered case of Atchison *v.* Geiser, 68 Kan. 281, 75 Pac. 68. . . .

Under the decisions of this State, the rule is that the statute throws the burden of proof upon the defendant to rebut the presumption of actionable negligence on its part, upon proof by the plaintiff that a fire was kindled upon his lands adjoining a railway track by sparks from defendant's locomotive; that the defendant may rebut this presumption by sufficient proof of its non-connection as cause or of such construction, equipment, maintenance, and operation of the engine as was required in the exercise of care commensurate with all the circumstances of the particular case. Such rebuttal proof must conform, as to character and extent, to the standard, by which in ordinary cases is measured the propriety of a holding by a trial Court that a defendant, against whom a prima facie case of negligence has been made, is free from fault, as a matter of law. The adequacy of such proof by a defendant must also be determined in view of any other facts appearing in the testimony in addition to those sufficient to give rise to the statutory presumption, which tend to show negligence. Unless the rebutting evidence as to

both the facts and the inferences reasonably to be drawn from them is conclusive, the question is for the jury. Burud *v.* Great Northern Ry. Co., 62 Minn. 243, 64 N. W. 562. . . .

In this case, plaintiffs established the facts sufficient to give rise to the statutory presumption. To rebut this presumption, the defence was: First, that the engine was equipped with the best approved modern appliances for the arrest of sparks and to prevent the escape of cinders, all of which were in the best condition; second, that the engine was operated not only by men of unquestioned skill, but in such manner, at the time in question, as to reduce the discharge of sparks to a minimum; third, that no locomotive can be so constructed and practically operated as to prevent the escape of fire as is claimed to have occurred in this case. We are of opinion that this rebuttal testimony was not sufficient to have justified the trial Court in taking the case from the jury; because, first, the plaintiff introduced affirmative circumstantial evidence of negligence in addition to proof of the facts essential to raise the statutory presumption of defendant's negligence; second, the rebuttal testimony depended in part on evidence of witnesses whose credibility was for the jury; third, it consisted largely (1) of expert testimony, to the effect that no engine could be practically so operated as not to start fires at the distance here involved, which was inconclusive and not entirely consistent, and (2) of expert testimony that the engine was operated in a careful manner, which was based upon too narrow an hypothesis. . . .

The order of the Court is reversed, and a new trial granted.

769. FOSS *v.* McRAE

SUPREME JUDICIAL COURT OF MAINE. 1909

105 *Me.* 140; 73 *Atl.* 827

EXCEPTIONS from Supreme Judicial Court, Washington County. Action by Mary E. Foss against Maurice E. McRae and others, executors of the will of Asa T. McRae, deceased. Verdict for defendants, and plaintiff excepts. Exceptions overruled.

Action on an alleged guaranty by the defendants' testator of the payment of some fifty overdue promissory notes transferred by him to the plaintiff. The notes were given by the various promisors to Walter H. Foss, the husband of the plaintiff, and had been by him transferred to the defendants' testator, and later transferred by him to the plaintiff in settlement of matters between them. The record does not disclose the plea nor for whom was the verdict; but presumably the plea was the general issue and that the verdict was for the defendants. To sustain her allegations the plaintiff offered in evidence a typewritten instrument bearing the signature of the defendants' testator of the following tenor:

"Machias, M., April 11, 1907.

"This is to certify that I have this day, in a settlement of business transacted with Mary E. Foss, conveyed and sold to her a lot of notes for which I have received payment in full. And will guarantee them.

(Signed) Asa T. McRae.

Witness: M. E. McRae."

The defendants had seasonably given written notice to the plaintiff of their denial of the execution of this instrument, and at the trial the subscribing witness, who was one of the defendants' executors, testified that at the time of the execution and delivery of the instrument it did not contain the last four words, "and will guarantee them." There was also evidence upon both sides of this issue.

The plaintiff contended that upon this issue the burden of proof was upon the defendants; but the presiding justice instructed the jury as follows:

"So the question is narrowed right down to this: Were those words, the final four words in this paper, written on there when Mr. Asa T. McRae signed that paper? And the burden is upon the plaintiff, Mrs. Foss, or her agents, who conduct the suit, to convince you by the evidence that in fact and in truth those words were upon that paper when signed by Asa T. McRae; and has she done so? She claims that she has, and she first relies upon the circumstances that the words are found to be on the paper now. That is prima facie evidence that they were there when it was signed, but only prima facie. By 'prima facie' we mean that, if nothing more appeared, if that was all there was, just the paper itself, with no contradictions, it would be taken as sufficient evidence that they were there when signed; but, it appearing that it is disputed that they were there, and there being some evidence to the contrary, the burden is still upon the plaintiff throughout to convince you by evidence that, upon the whole, you believe the words were there when signed."

Argued before Whitehouse, Savage, Spear, King, and Bird, JJ.

R. J. McGarrigle, for plaintiff. *John F. Lynch* and *H. H. Gray*, for defendants.

Spear, J. (after stating the case as above). . . .

The instructions were correct. The plaintiff, under the notice and rule, was required to prove the execution of the instrument upon which she sought to recover. To accomplish this the subscribing witness was put upon the stand. His evidence clearly developed the real issue in the case. When he had testified to the execution of the paper, as we presume he did under the notice, the plaintiff had established a prima facie case, as the words in dispute appeared upon the face of the paper whose execution had been proven. Had the case stopped here, the plaintiff would have been entitled to recover. This is precisely what the presiding justice instructed the jury at this stage of the proceedings. But the case did not stop here. The very witness the plaintiff relied upon to prove execution testified that the disputed words—the substance

of the plaintiff's case — were not upon the instrument when he witnessed the defendant's signature. Again, it is apparent, if the case had stopped at this point, the defendant would have been entitled to the verdict, as the testimony of the witness, showing a material alteration, is undisputed, and must therefore prevail. Hence it follows that it was incumbent upon the plaintiff, to entitle her to recover, to proceed further and introduce evidence tending to overcome the testimony of the attesting witness. The issue of alteration now having been raised, it became her duty to assume the burden upon all the evidence of persuading the jury that the words of guaranty were upon the paper when it was executed.

Now, while the burden of evidence may be said to have shifted from the plaintiff to the defendant, when she had made out a prima facie case, and from the defendants to the plaintiff, again, when their evidence had overcome the prima facie case, the burden of proof had not changed at all. It was incumbent upon the plaintiff, in the end, upon all the evidence, however it may have shifted from one side to the other, to establish the truth of the allegation upon which she sought to recover, that the instrument contained the disputed words.

"Burden of proof" and "burden of evidence" are often confused. The phrase "burden of proof" is, in fact, more philosophical than practical. It means generally that a plaintiff, however often the evidence shifts, must, upon the whole, persuade the jury, by legal evidence, that his contention is right. The risk of nonpersuasion is all the time upon him. If he fails to persuade, he loses his case. The risk of nonpersuasion is the burden which he must assume. Exceptions overruled.

770. CARVER *v.* CARVER

Supreme Court of Indiana. 1884

97 *Ind.* 497

[Printed *post*, as No. 779]

BOOK V. OF WHAT FACTS NO EVIDENCE NEED BE PRESENTED

TITLE I. JUDICIAL ADMISSIONS

773. Chief Baron Gilbert. *Evidence.* (1726. p. 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.

774. Paige *v.* Willet. (1868. New York. 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 suffered to deny its existence or to prove any state of facts inconsistent with that admission.

775. New York, L. E. & W. R. Co.'s Petition. (1885. New York. 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.

776. PRESTWOOD *v.* WATSON

Supreme Court of Alabama. 1896

111 *Ala.* 604; 20 *So.* 600

Ejectment by E. Watson, as administrator of the estate of R. E. Jordan, deceased, against J. E. Prestwood and A. J. Fletcher, to recover certain lands, specifically described in the complaint. There was a judgment for plaintiff, and defendants appeal. Reversed. . . .

On the trial of the cause it was admitted and agreed by and between the attorneys for the plaintiff and the defendants that this case was tried in the same Court, at a former term of the Court, upon an agreed written statement of facts; that said written agreed statement of facts upon which the case was formerly tried, and the bill of exceptions upon which the case was appealed, were lost or mislaid. . . . The plaintiff offered to introduce in evidence a copy of the agreed statement of facts used on the former trial, which was taken from the report of the case

as found in 79 Ala. 417. It was shown by the testimony of John Gamble that the foregoing agreement was not signed by the parties or their attorneys, and was made only for that trial, and that several years ago (four or five years) the counsel of defendants notified plaintiff and his counsel that defendants would not abide said agreement in any subsequent trial. The defendants objected to the introduction of said statement of facts upon the following grounds: (1) Said agreed statement of facts was never signed by the parties, or by their attorneys. (2) Said agreed statement of facts was not shown to be made in open Court, or indorsed or entered on the minutes or record of the Court. (3) Said agreed statement of facts was not admissible, nor could the same be alleged or suggested by the plaintiff, against the defendants in this cause, because the same was not signed by the party to be bound thereby. The Court overruled each of the foregoing grounds of objections, allowed said agreed statement of facts to be introduced as evidence, and to this ruling the defendants duly excepted. . . .

There were verdict and judgment for the plaintiff. The defendant appeals, and assigns as error the several rulings of the trial Court to which exceptions were reserved.

John Gamble and *M. E. Milligan*, for appellant. . . . The agreed statement of facts on which the former trial of the cause was had is not admissible on a subsequent trial, nor was it conclusive upon the parties. . . .

J. D. Gardner and *P. N. Hickman*, contra.

Brickell, C. J. A former trial of this case was had in the Court below, on a statement of facts reduced to writing, and by the parties admitted to be true, in open Court.

1. The primary question to be considered is whether, on a subsequent trial, this statement of facts was admissible, and its operation and effect as evidence; for, if it was admissible, and binding and conclusive on the parties, a consideration of many of the exceptions reserved is unnecessary. 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. . . . 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.

2. 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 case, — 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.

3. 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. 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.

There was no application by either party for relief from the agreement, and neither party should have been bound to give evidence in controversy of the facts therein stated. The loss of the writing rendered admissible secondary evidence of its contents. The best evidence would have been a certified copy of the transcript in this Court on the former trial. Unless by consent, the statement found in the published report of the case was not admissible.

The several instructions given the jury in reference to the recovery of damages for the destruction and removal of timber were erroneous; compensation for use and occupation is the full measure of recovery to which the plaintiff was entitled. Reversed and remanded.

777. STATE *v.* MARX. (1905. Connecticut. 78 Conn. 18; 60 Atl. 690.) HAMERSLEY, J.: . . . It is true that in the trial of capital offences the Court will and should exercise care and discretion in respect to admissions made by the accused or by his counsel in open Court, and that every conviction should be supported by some evidence produced in Court, and so even a plea of guilty will not ordinarily be accepted. But it is not true that an accused cannot, either by himself or his counsel, in his own interest, admit some facts which, though necessary for the State to establish, may be consistent with his innocence and the defence he maintains. Subject to the reasonable discretion of the Court in the protection of the accused against improvidence or mistake, admissions during the trial by the accused or his counsel as to the genuineness of a document; admissions as to the testimony a witness not produced would give if present, or the fact his testimony would establish, voluntarily made for the purpose of preventing a postponement of the trial; and admissions in the interest of the accused limiting the issue to the material facts upon which alone his successful defence depends, have long been permitted under our practice, and we think their lawfulness and propriety rest upon sound reason. Oscanyan *v.* Arms Co., 103 U. S. 261, 263; Commonwealth *v.* Desmond, 5 Gray (Mass.) 80; State *v.* Mortensen, 26 Utah 312, 323; State *v.* Fooks, 65 Iowa 452; Rosenbaum *v.* State, 33 Ala. 354, 362; Commonwealth *v.* McMurray, 198 Pa. St. 51, 59.

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778. STATUTES. *England.* Rules of Practice, Hilary Term, 4 Wm. IV (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].

Illinois. Revised Statutes, 1874, c. 110, § 34, Rev. St. 1845, p. 415, § 14. No person shall be permitted to deny, on trial, the execution or assignment of an 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 defence 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.

New York. 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.

779. CARVER *v.* CARVER

SUPREME COURT OF INDIANA. 1884

97 *Ind.* 497

FROM the Madison Circuit Court.

M. S. Robinson and *J. W. Lovett*, for appellants. *H. D. Thompson*, *T. B. Orr*, and *W. March*, for appellee.

ZOLLARS, J.— Action by appellee in relation to real estate; verdict in her favor, and over a motion for a new trial and other motions, judgment upon the verdict that she is the owner, and entitled to the possession, of the undivided one-third of the real estate, and for $125 against appellant William Carver for the detention thereof. . . . This brings us to the question of the sufficiency of the paragraphs of the complainant, as against any of the defendants. . . . The second paragraph is quite lengthy, tedious, and uncertain in detail. The substance of it is as follows: In 1853, appellee's father gave to her lands in Rush County, subject to a small encumbrance, and conveyed it to a trustee, to be held by him until her husband should pay off the encumbrance, when the trustee should convey it to her. In 1854, the trustee, with her consent, sold the land for enough to pay off the encumbrance and $2,500 additional. In the same year, her husband, Ira Carver, and appellant William Carver, purchased land in Henry County, and paid for the same with appellee's $2,500. With her consent, the money was thus applied as an investment for her. The land in Henry County having been sold, appellee's husband, acting as her agent, for her use and benefit, purchased the land in controversy, and paid for the same with the proceeds of the Henry County land. By mistake, the deed for this land was not made to appellee, but to her husband. In 1857, her husband was of weak mind and financially embarrassed. Appellant William Carver, with knowledge of the husband's condition, mentally and financially, and that appellee's money paid for the land, and with the intent to cheat and defraud her out of the land, confederated with the husband, and a justice of the peace, to get her to sign a deed to him, William Carver. To accomplish this, they and each of them, and especially William Carver, represented to her that her husband was overwhelmingly in debt, and that his creditors were about to arrest and imprison him; that he, William Carver, was security for her husband for a large amount; that if she would execute

to him a mortgage upon the land to secure him, he would save her husband from arrest and imprisonment, and save the land for her and her children, and that in no other way could this be done. Believing and relying upon these representations, all of which were false, and known to the parties to be false, she signed what they told her was a mortgage. She never made any deed to William Carver, and the deed under which he claims to hold the land is as to her a forgery. During all this time she was the wife of Ira Carver, and continued to be and to live with him as such until 1875, when he died. She had no knowledge of the deed until 1870. . . .

It is conceded by appellants in argument, that Ira Carver, husband of appellee, was the owner of the land described in the second paragraph of the complaint and in the judgment, prior to the 20th day of November, 1857, at which time he made a deed for the same to appellant William Carver. Their whole claim rests upon the deed from him. It is really conceded, too, and shown by the evidence, that appellee, as the widow of Ira Carver, who died in 1875, if she did not join in that deed, is the owner of and entitled to the possession of the undivided one-third of the said real estate, except, perhaps, what may have been sold by Carver. It is contended, however, that she did join in that deed. Whether she did or not, is the main question of fact in the cause.

Prior to the trial, appellants served a notice on appellee, that upon the trial they would introduce in evidence the said deed, which bears the names of appellee and her husband as grantors. Upon the service of this notice, appellee filed her affidavit denying the execution of the deed. Proof of execution having been made, which, to the trial Court, was sufficient to entitle the deed to be read in evidence, it was so read. The third instruction to the jury was as follows: "The defendants have read in evidence a deed purporting to be executed by Ira Carver and plaintiff, Esther J. Carver, conveying said real estate to the defendant William Carver. The burden of proving that the plaintiff . . . executed said deed is upon the defendants, and if the defendants have not proved by a preponderance of all the evidence in the cause that said plaintiff did sign her name to said deed, the plaintiff is entitled to a verdict in her favor, no matter how innocent the defendants may have been in their purchase. If, however, you find that Esther J. Carver did sign her name to said deed, then your verdict must be for the defendants, whether the deed bears the true date of its execution or not; and this must be your verdict, though the plaintiff, when she signed said deed, believed it to be a mortgage. You will then see that an important point in controversy is as to whether the plaintiff signed said deed, and this you will determine, as well as all other facts submitted to you, from a careful consideration of all the testimony and circumstances in evidence, for you are the exclusive judges of the evidence and the credibility of the witnesses, and determine from the evidence what it proves and what it does not prove."

Several objections are urged against this instruction. As related to the deed the argument is, first, that after appellants had made such a

case as entitled the deed to be read in evidence, the burden of proof was shifted to appellee to prove the non-execution of the deed; second, that as the execution of the deed seems to have been acknowledged before an officer authorized to take acknowledgments, appellee cannot, in this action, dispute the execution. These two objections are so related that we consider them together.

1.[1] The rule is well settled that in the absence of statutes upon the subject, the grantee, offering a deed in evidence, must prove its execution, whether it has been acknowledged and recorded or not; especially is this so if its execution is put in issue by a plea of "non est factum." The statutes of this State, like those of many of the other States, have made material innovations upon this rule. The code of 1852, in force when this cause was tried, provided that where a writing, purporting to have been executed by one of the parties, is the foundation of, or is referred to in any pleading, it may be read in evidence on the trial of the cause against such party without proving its execution, unless its execution be denied by affidavit before the commencement of the trial, or unless denied by a pleading under oath. . . . Section 304, 2 R. S. 1876, p. 158, provided as follows: "If either party at any time before trial allow the other an inspection of any writing, material to the action, whether mentioned in the pleadings or not, and deliver to him a copy thereof, with notice that he intends to read the same in evidence on the trial of the cause, it may be so read, without proof of its genuineness, or execution, unless denied by affidavit before the commencement of the trial." A failure to deny the execution by a pleading under oath has been held to be so far an admission of the genuineness of the instrument as to preclude its being controverted by proof. This rule would, perhaps, apply to a case like this where the denial is by affidavit. The reason of this ruling, as stated in the earliest decision upon the subject under these statutes, is that the party relying upon the instrument has a right to be forewarned of any contemplated attack upon it. . . . These statutes clearly include deeds, and recognize the rule as we have stated it to be, in the absence of statutes. Their purpose is not to shift the burden of proof, but simply to relieve the party relying upon a written instrument of the burden of making proof of its execution, unless the execution be denied under oath. . . . The affidavit, or plea of "non est factum," throws back upon the other party the burden of proving the execution of the instrument, and thus the parties occupy the position they would have occupied were there no statutes upon the subject.

After making a prima facie case in favor of the execution of the writing, it may be read in evidence. The party making such proof may rely upon it, and in the absence of countervailing evidence, it will be sufficient to make his case. This, however, does not shift the burden of the issue

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[1] [The part of the opinion in this case dealing with the *burden of proof* is to be considered in connection with Nos. 765–770 *ante*. — Ed.]

to the party denying the execution. In the case of Fay *v.* Burditt, 81 Ind. 433 (42 Am. R. 142), it was questioned, whether in any case, it is proper to say that the burden of an affirmative issue shifts in the course of a trial from one party to the other. We think, upon further consideration, that there is no hazard in saying that it does not as to any single proposition, such as to whether or not a written instrument was in fact executed by the party denying the execution. When the execution of an instrument is thus denied, the question is, Did the party thus denying in fact execute it? The party relying upon it has the affirmative of that issue. The burden is upon him to establish that affirmative, and that burden will remain upon him until he establishes it to the satisfaction of the jury, not by a prima facie case alone, but by such proof as will withstand and overthrow all of the evidence to the contrary. There must be more than an equipoise of the testimony; there must be a preponderance in favor of the execution. If, upon the making of a prima facie case, the burden shifts to the other side, then it would follow that when the prima facie case is overthrown by weightier testimony, the burden shifts back again. To say that the burden thus shifts, is to say that it is constantly shifting from the stronger to the weaker side, as the testimony may make one side or the other stronger. Of course, when a prima facie case is made out in a case like this, the burden is upon the other side to meet it, or suffer defeat. . . . This imposition of the burden to meet a prima facie case, or to show matter in avoidance, is not the shifting of the burden of proof as to the fact in issue. Appellants made their defence under the general denial, as they had a right to do under the statute. By introducing in evidence the deed from William to Ira Carver, appellee's husband, and the deed which purports to have been executed by appellee and her husband, they made their defence, as against appellee's claim, dependent upon the validity of the latter deed. The defence thus took the shape of an affirmative defence, a defence of confession and avoidance; a confession of title in appellee as the widow of Ira Carver, and of avoidance, by the deed from her and husband to appellant William Carver. By the notice and affidavit in relation to this latter deed, the burden of proving its execution was clearly thrown upon appellants, and was not shifted from them by their making out a prima facie case.

2. The deed purporting to have been executed by appellee and her husband, apparently, was properly acknowledged and recorded. We cannot hold, however, that the certificate of acknowledgment is conclusive upon appellee. . . . We think, however, that under our statutes since 1852, a certificate of acknowledgment in proper form makes a prima facie case in favor of the execution of the instrument, not only as to innocent third parties, but as to the parties to the instrument also. The statutes require that deeds shall be acknowledged. To entitle a deed to be recorded it must be acknowledged. . . . A record of a deed without such acknowledgment is not competent evidence against any one. An acknowledgment is not essential to the validity of a deed, as between the

parties to it, but it is apparent upon an examination of the statutes that, as to all parties, it is a very important matter. It is essential to the record of a deed, and thus becomes the basis of notice by record. The deed may be recorded; the record becomes notice to the world, and may be used as evidence, without the production of the deed or proof of its execution, because the acknowledgment is evidence of the execution. . . . It is provided, however, that neither the certificate of acknowledgment of a deed, nor the record, nor the transcript of the record thereof, shall be conclusive, but may be rebutted, and the force and effect thereof, contested by any one affected thereby. 1 R. S. 1876, p. 368, § 32; § 2954, R. S. 1881. The reasonable construction of these several sections of the statute is, we think, that the certificate of acknowledgment is prima facie evidence of the execution of the deed, and that in all cases where the record is competent evidence, the deed is also competent, without further proof of its execution.

This, however, does not throw the burden of proof upon the party denying the execution. In this case appellants produced the deed, asserting its genuineness. That was denied by appellee. Appellants had the affirmative of the issue, and were bound to establish it by a preponderance of testimony or suffer defeat. The certificate of acknowledgment operated as evidence in support of the genuineness of the deed, and made a prima facie case for appellants, very much as the presumption of sanity operates as evidence in behalf of the State in criminal prosecutions. The burden was upon appellee to meet and overthrow the prima facie case, but the burden was not upon her to prove the non-execution of the deed. The Court below did not err, therefore, in charging the jury that the burden was upon appellants to prove by a preponderance of the testimony that appellee executed the deed.

TITLE II. JUDICIAL NOTICE

782. Introductory. 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," or propositions in a party's case, as to which he will not be required to offer evidence; these will be taken for true, provisionally, 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 due, for the most part, to the consideration that though they are neither actually notorious nor 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.

Anomalous Meanings of the Term Judicial Notice. The term Judicial Notice has many applications, distinct from those peculiar to the present purpose.

(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*.

(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, or falsely alleged in the pleading, 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 the Executive's recognition is the determining element.

(4) Certain *rules of evidence*, usually *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; but a Court occasionally makes this exception by saying that the almanac is to be judicially noticed.

(5) Other loose applications of the term, sometimes dealing with matters of substantive law, sometimes with matters of procedure, will occasionally be found. It is unfortunate that the phrase should be so often loosely employed.

783. James Bradley Thayer. *A Preliminary Treatise on Evidence.* (1898. p. 277.) The maxim that what is known need not be proved, "manifesta" (or, "notoria") "non indigent probatione," may be traced far back in the civil and the canon law; indeed, it is probably coeval with legal procedure itself. We find it as a maxim in our own books,[1] and it is applied in every part of our law. It is qualified by another principle, also very old, and often overtopping the former

[1] Bracton's Note Book, supra 13 n.; 7 Co. 39 a–39 *b;* 11 Co. 25; State *v.* Intoxicating Liquors, 73 Maine 278.

in its importance, — "non refert quid notum sit judici, si notum non sit in forma judicii." [1] These two maxims seem to intimate the whole doctrine of judicial notice. It has two aspects, one regarding the liberty which the judicial functionary has in taking things for granted, and the other the restraints that limit him.

784. LUMLEY *v.* GYE. (1853. 2 El. & Bl. 266.) COLERIDGE, J.: Judges are not necessarily to be ignorant in Court of what everybody else, and they themselves out of Court, are familiar with; nor was that unreal ignorance considered to be an attribute of the Bench in early and strict times. We find in the Year Books the judges reasoning about the ability of knights, esquires, and gentlemen to maintain themselves without wages; distinguishing between private chaplains and parochial chaplains from the nature of their employments; and in later days we have ventured to take judicial cognizance of the moral qualities of Robinson Crusoe's "man Friday" (1 Dow, P. C. 672) and Aesop's "frozen snake" (12 Q. B. 624).

785. FOX *v.* STATE

SUPREME COURT OF GEORGIA. 1851

9 *Ga.* 373

AT the July Term, 1850, of Bibb Superior Court, John Fox was placed on his trial for larceny from the house. The defendant moved for a continuance for the absence of a witness, William Robards, who resided in Decatur County. On the showing for a continuance, it appeared that the witness had been recognized at the last term of the Court to appear and testify in the cause for the defendant. The defendant stated that he expected to prove by the witness, Robards, that he (witness) heard one Simpson, upon whose testimony the defendant understood the State would mainly rely for conviction, say "that if hard swearing would send the defendant to the penitentiary, that he should go." . . . Robards was confined in jail at the time of the conversation, charged with stealing a horse and buggy. . . . The motion to continue was overruled by the Court, and the trial ordered to progress. The Jury returned a verdict of guilty. Whereupon, counsel for defendant moved the Court for a new trial, on the ground that the Court erred in refusing to grant the continuance.

The Court overruled the motion for a new trial, and remarked "that in overruling the defendant's showing for a continuance, he did not place much confidence in the truth of the defendant's statements — knowing, as he had, for many years, the witness, Simpson, whose testimony was sought to be assailed, and having no special reason to confide in the integrity of Fox, he thought if a witness intended to act out the corruption ascribed to Simpson, he would not be likely to declare his

[1] COKE, C. J., in an action of slander, Crawford *v.* Blisse, 2 Bul. 150 (1613) quotes this from Bracton, to support the overstrained doctrine of his own day about taking the words charged "in mitiori sensu."

intentions in advance in the presence of others, and the facts disclosed on the trial left his preconceived opinions of the integrity of Fox unchanged." Counsel for the defendant excepted.

Nisbet, J. — The new trial ought to have been granted, because there was error in not allowing the continuance. . . . All proper diligence was used to have the witness at the trial. It is clear that the showing for a continuance was complete.

Why, then, was it not granted? It appears from the record before me, that the presiding Judge gave as reasons for refusing the new trial, that he did not place much confidence in the truth of the defendant's statements. . . . They are not only not sufficient, but develop a ground of action in such cases not warranted by the law. . . . There was, as we have seen, no legal objection to the showing for a continuance. Can the Court, when the showing is sufficient, refuse it on account of his personal knowledge of the character of the party making it, and of the witness whose testimony that party is seeking to assail — a knowledge not drawn from evidence before the Court, but from his private sources of information? He, beyond all controversy, cannot. He has no discretion to act upon such knowledge. The discretion allowed in applications for a continuance must be within the law, and must spring out of, and be bounded by what transpires in the case. It cannot be justified upon what the Court, as a man, may or may not know. Justice is administered according to general rules; rules which, if applicable in a single case, must be applicable in all like cases, no matter who are the parties, or what their character. If the Court may dispense with them because of this personal knowledge of the character of the parties before him in one case, he may in all cases. And this would be equivalent to dispensing with them altogether.

786. KILPATRICK *v.* COMMONWEALTH

Supreme Court of Pennsylvania. 1858

31 *Pa.* 198

Error to the Oyer and Terminer of Philadelphia.

The plaintiff in error, John Kilpatrick, was indicted in the Court below, for the murder of John McCracken, on October 20, 1857. The prisoner was tried on March 10, 1858, at a Court of Oyer and Terminer, held by the Hon. James R. Ludlow and the Hon. Joseph Allison, the two associate law judges of the Common Pleas of Philadelphia, under the provisions of the Act of February 3, 1843; Judge Ludlow having been duly appointed to hold the Court, for the trial of all issues pending therein. On March 13, 1858, the jury found the prisoner guilty of murder in the first degree; and on May 1st, a motion for a new trial having been overruled, sentence of death was passed upon the defendant. . . .

David Paul Brown, Goforth, and *Palethorp,* for the plaintiff in error. —The Act of 1843, under which the Court was held by the two associate judges, is in conflict with the constitution, Art. 5, § 4, which provides "that the judges of the Courts of Common Pleas shall be justices of oyer and terminer and general jail delivery, for the trial of capital and other offenders therein; any two of the said judges, *the president being one,* shall be a quorum." . . .

Loughead and *Mann,* District Attorneys, for the Commonwealth. . . .

The opinion of the Court was delivered by

STRONG, J.—This record presents several questions of the gravest importance. . . . The principal questions relate to the constitution of the Court in which the indictment was tried, and to the instruction which was given the jury. . . . The record exhibits that, at the Court of Oyer and Terminer for the city and county of Philadelphia, John Kilpatrick, the defendant, was indicted, tried, convicted of murder in the first degree, and sentenced. The first assignment of error is that "it appears by the record that the case was tried by the Hon. James R. Ludlow and Joseph Allison, neither of whom was the President of the Court of Common Pleas; and therefore the said judges had no constitutional right to hold said Court and try the said case; and that the entire proceedings are void and 'coram non judice.'"

We come therefore directly to the inquiry whether two associate judges of the Court of Common Pleas of Philadelphia — commissioned as such, though learned in the law, can hold a Court of Oyer and Terminer within that county. . . .

1. In Commonwealth *v.* Zephon, 8 W. & S. 382, the enactment was ruled to be constitutional, and it was held, that in the city and county of Philadelphia, a Court of Oyer and Terminer may be properly holden by two associate judges of the Court of Common Pleas. . . .

2. Upon the argument in this Court a doubt was suggested, whether this question is raised by the record. The doubt was not without reason. Personally we know that Judges Ludlow and Allison are associate justices of the Court of Common Pleas, learned in the law, and that neither of them is the president of that Court. Yet can we judicially take notice of the fact, that neither of them is the president of that Court, when the defendant did not deny it by plea, and when the record does not show it; but, on the contrary, avers that the trial took place at a Court of Oyer and Terminer? Doubtless, there are many things of public interest, things which ought generally to be known, of which Courts will take notice without proof. But whether a Superior Court is bound to know who are the judges of subordinate Courts, and what is the nature of their commissions, is by no means clearly settled. In the English Courts it has been held, that such facts a Court cannot be presumed to know. . . . In the American Courts the question is still an open one, though it has not often arisen. . . . Notwithstanding the doubts, however, which have elsewhere entertained in similar cases, we are disposed to take judicial

notice of the facts that, at the time of the trial in the Court below, Judge Thompson was President Judge of the Court of Common Pleas of Philadelphia county, and that Judges Ludlow and Allison, though justices learned in the law, were only associates. The rule is, that Courts will take notice of what ought to be generally known within the limits of their jurisdiction. There seems to us, to be as much reason for our having knowledge of who are in fact the judges of our constitutional Courts, as for our having judicial knowledge of the heads of departments, sheriffs, etc.; knowledge of whom is always presumed.

We discover no error in this record. The judgment is affirmed.

THOMPSON, J., dissented.

787. STATE *v.* MAIN

SUPREME COURT OF ERRORS OF CONNECTICUT. 1897

69 *Conn.* 123; *37 Atl.* 80

INFORMATION for a violation of the statute relating to "peach yellows," brought to the Supreme Court in New London County and tried to the jury before SHUMWAY, J. Verdict and judgment of guilty, and appeal by the defendant for alleged errors in the rulings and charge of the Court. No error. . . .

Donald G. Perkins, for the appellant (defendant). The statute in question is unconstitutional. . . . If the defendant is right, the constitutionality of the law in this particular depended upon a question of fact whether diseased trees on a man's land caused a substantial injury to his neighbor of such a nature that a law condemning such trees was a reasonable exercise of the police power. The Court erred in its rulings on evidence. . . .

Solomon Lucas, State's Attorney, for the appellee (the State). . . . The legislation on this subject in other States shows the common belief in the dangerous nature of the disease known as "peach yellows." Bulletin No. 11, Dept. of Agriculture, June, 1896. . . .

BALDWIN, J. . . . The Superior Court was also right in refusing to instruct the jury, as requested, that if they should "find that the 'Yellows' is not a contagious disease and the existence of the disease in one tree does not cause it to spread from that tree to other trees, and thus endanger other trees, the property of others, and that a tree so diseased is not a public nuisance, then this statute . . . is unconstitutional and void."

Whether the "yellows" was such a disease as to justify the General Assembly in enacting the statute under which the prosecution was brought, depended on the existence and nature of the disease, and also on the apprehension of danger from it commonly entertained by the public at large. That such a disease existed, and was one of a serious

character, ordinarily resulting in the premature death of the tree affected, is a matter of common knowledge, of which the Court had a right to take judicial notice. Century Dict., Peach-yellows, and Yellows; Webster's Internat. Dict., Yellows. Such a disease it was proper for the General Assembly, in the exercise of its police power, to endeavor to suppress, even by the destruction of the trees attacked by it, if there was a reasonable apprehension of substantial danger from allowing them to live, to those who might eat their fruit, or to other peach orchards. . . . The description of this disease given in standard works and government publications, and the legislation in regard to it to be found in the statute books of Delaware, Maryland, Michigan, New York, Pennsylvania, Virginia, and the Province of Ontario, are amply sufficient to establish as a matter of judicial notice the possibility, if not the probability, that it is a contagious disease. Grimes *v.* Eddy, 126 Mo. 168, 28 Southwestern Rep. 756. . . .

Judicial notice takes the place of proof, and is of equal force. As a means of establishing facts it is therefore superior to evidence. In its appropriate field it displaces evidence, since, as it stands for proof, it fulfills the object which evidence is designed to fulfill, and makes evidence unnecessary. Brown *v.* Piper, 91 U. S. 37, 43; Commonwealth *v.* Marzynski, 149 Mass. 68.

"The true conception of what is judicially known as that of something which is not, or rather need not, unless the tribunal wishes it, be the subject of either evidence or argument, — something which is already in the Court's possession, or at any rate is so accessible that there is no occasion to use any means to make the Court aware of it." Thayer's Cases on Evidence, 20.

If, in regard to any subject of judicial notice, the Court should permit documents to be referred to or testimony introduced, it would not be, in any proper sense, the admission of evidence, but simply a resort to a convenient means of refreshing the memory, or making the trier aware of that which everybody ought to be aware. State *v.* Morris, 47 Conn. 179, 180.

The defendant, therefore, had no right to have the jury pass upon the danger of contagion from trees affected by the yellows, as a means of determining the constitutionality of the statute, by such verdict as they might render under the instructions of the Court. It was for the Court to take notice that it was a disease which might be contagious. Norwalk Gaslight Co. *v.* Norwalk, 63 Conn. 495, 525, 527. This being established, the validity of the statute became a matter of pure law. . . .

There is no error in the judgment appealed from.

788. WINN *v.* COGGINS

SUPREME COURT OF FLORIDA. 1907

53 *Fla.* 337; 42 *So.* 897

IN BANC. Error to Circuit Court, Wakulla County; JOHN W. MALONE, Judge. Action by James W. Coggins and others against A. B. Winn and J. D. Cay, partners as A. B. Winn & Co. Verdict for plaintiffs. From an order granting a new trial, defendants bring error. Reversed and remanded.

The defendants in error brought an action of ejectment on August 17, 1905, in the Circuit Court for Wakulla county, against the plaintiffs in error, to recover the possession of lots 47 and 48 of Hartfield's survey, and lots 97 and 98 of Hopkins' survey, containing 1,440 acres, more or less, in Wakulla county, Fla., and for mesne profits. A plea of not guilty was entered. At the trial the jury rendered a verdict for the defendants. The Court granted a motion for a new trial, the defendants excepted thereto, and by writ of error bring the order granting a new trial here for review. . . .

The plaintiffs then offered in evidence a certified copy of the record of a deed without warranty from John Beard, receiver of the Apalachicola Land Company, purporting to convey the lands in controversy to James Coggins, bearing date January 28, 1858, "pursuant to a decree made at Tallahassee on the eleventh day of April, A.D. 1856, by the Honorable J. W. Baker, Judge of the Circuit Court of the Middle Circuit of Florida, in chancery sitting." . . .

The defendants then objected to the introduction of the deed on the further grounds: . . . (4) that the plaintiffs have not shown, as a predicate to the admission of the deed, the authority which John Beard, receiver, had to execute said deed; (5) that plaintiffs have not shown a valid decree of court authorizing Beard, as receiver, to execute said deed. . . . The Court overrruled all these grounds of objection to the certified copy of the record of the deed except the fourth and fifth. . . .

George B. Perkins, George P. Raney, and *Joseph A. Edmondson,* for plaintiffs in error.

Nat. R. Walker and *W. C. Hodges,* for defendants in error.

WHITFIELD, J. (after stating the case as above):

If a deed purports to have been executed by an officer of Court under a decree, and it is sought to use the deed in evidence, the power or authority to make the deed must be shown, unless waived. Simmons *v.* Spratt, 20 Fla. 495; McGehee *v.* Wilkins, 31 Fla. 83, 12 South. 228. . . . The introduction in evidence of the certified copy of the record of the deed of conveyance purporting to have been executed under a decree of Court by John Beard, receiver, to James Coggins, was objected to on the ground that the authority to make the deed as receiver was not shown; and, as

no evidence of such authority was offered, the certified copy of the record was very properly not admitted in evidence as title to the lands. In the trial of this cause the Court could not take judicial knowledge of a decree rendered by the Court of another county in another cause. See McNish *v.* State, 47 Fla. 69, 36 South. 176; 4 Wigmore on Evidence, § 2579. . . .

The order granting the new trial is reversed. . . .

TAYLOR, COCKRELL, HOCKER, and PARKHILL, JJ., concur.

789. REA *v.* STATE

CRIMINAL COURT OF APPEALS OF OKLAHOMA. 1909

3 *Okl. Cr.* 281; 105 *Pac.* 387

Appeal from Pontotoc County Court; JOEL TERRELL, Judge.

W. C. Rea was convicted of unlawfully selling intoxicating liquor, and he appeals. Affirmed.

The plaintiff in error, hereinafter designated as defendant, was convicted in the County Court of Pontotoc county, on an information charging that, in Pontotoc county, Okla., on July 15, 1908, the said defendant did unlawfully sell, barter, give away, and furnish one Wes Hattox intoxicating liquor, to-wit, alcohol. The cause came on for trial on the 4th day of February, 1909, which resulted in a verdict of guilty. . . . The defendant appeals to this Court, . . . first because the State did not prove the alleged sale to have been made within the period of the statute of limitations. . . .

Bullock & Kerr and *Galbraith & McKeown*, for appellant.

FURMAN, P. J. (after stating the facts as above).

Even if the burden of proof was on the State to establish the commission of the offense within the statute of limitations beyond a reasonable doubt, we think that it was done in this case. The evidence is as follows: "*Q.* — Your name is Wes Hattox? *A.* — Yes, sir. *Q.* — Where do you live? *A.* — At Fitzhugh. *Q.* — You know Will Rea? *A.* — Yes, sir. *Q.* — What business is he in? *A.* — Drug business. *Q.* — Where? *A.* — Roff. *Q.* — Were you in his drug store in July? *A.* — Yes, sir. *Q.* — Did you purchase anything? *A.* — Yes, sir. *Q.* — What was it? *A.* — Alcohol. *Q.* — Is alcohol intoxicating? *A.* — Yes sir; I suppose it is. *Q.* — That was in Pontotoc county, Okl.? *A.* — Yes, sir." From this it is proven that the sale took place in Pontotoc county, Okla. The Court takes judicial notice of the fact that, prior to the incoming of Statehood, on November 16, 1907, such county as Pontotoc county, Okla., was not in existence. Therefore the sale was proven to have been made subsequent to that date. Wigmore on Evidence, vol. 4, § 2575, says: "Domestic Political Organization — Boundaries, Capitals, etc. — So far as the facts of political organiza-

tion and operation of the State are determined in the law, they are judicially noticed as a part of the law."

Therefore the contention of the defendant, that the case should be reversed because it was not proven that the sale was made within the period of the statute of limitations, is not supported by the law or the evidence. . . . We are therefore compelled to affirm the conviction.

Affirmed.

Doyle and Owen, JJ., concur.

790. PEROVICH *v.* PERRY

United States Circuit Court of Appeals. 1909

167 *Fed.* 789

Appeal from the District Court of the United States for the Third Division of the District of Alaska.

John F. Dillon, T. C. West, and *Leroy Tozier*, for appellant.

Robert T. Devlin, U. S. Attorney, and *Benjamin L. McKinley*, Assistant U. S. Attorney, for appellee.

Before Gilbert, Ross, and Morrow, Circuit Judges.

Morrow, Circuit Judge. — This is an appeal from a judgment of the United States District Court for the Territory of Alaska, rendered on the 30th day of January, 1908, remanding the appellant to the custody of the appellee as United States marshal, to be dealt with according to law, and dismissing a writ of habeas corpus. . . .

In the assignment of errors there are recitals from which it appears that there was a sentence of death pronounced against the appellant on May 29, 1907; that application was made to the President of the United States for commutation of sentence, and that, pending the determination of the application by the President, application was made to the Governor of Alaska, for a reprieve, which was granted, and the execution of the sentence was stayed to February 1, 1908, between the hours of 6 o'clock a.m. and 6 o'clock p.m.; and that prior to that date the President denied the petition for a commutation of sentence, and the defendant in error was about to execute the sentence of the Court when a petition was presented to the Court for a writ of habeas corpus. . . . It appears that the decision of the President denying the application of commutation of sentence was made known by a telegram signed "Bonaparte." The appellant seeks to raise the question whether this notice of the decision of the President was sufficient in law. The telegram is not in the record, and, as there is no bill of exceptions, this Court would be justified in declining to consider this question; but in view of the serious character of the case, the law upon the subject will be stated: . . .

Facts which are so generally known that every well-informed person

knows them, or ought to know them, need not be proven and will be judicially recognized without proof. Taylor on Evidence, § 21, American Notes, 36.

These rules of evidence are founded upon very ancient legal maxims: "Lex non requirit verificari quod apparet curiae." The law does not require that to be verified (or proved) which is apparent to the Court. Baten's Case, 9 Coke 54b. . . . "Quod constat curiae opere testium non indiget." That which appears to the Court needs not the aid of witnesses. 2 Inst. (Coke) 662; Best on Evidence, § 252.

The incumbencies of the more important and notorious offices are judicially noticed. Wigmore on Evidence, § 2576. In the case of Jean Peltier, 28 Howell's State Trials, p. 530, the defendant was indicted for a libel on Napoleon Bonaparte, First Consul of the French Republic, and was tried in the Court of King's Bench in 1803, before Lord ELLENBOROUGH and a jury. In charging the jury, Lord ELLENBOROUGH said:

"That Napoleon Bonaparte was the Chief Magistrate and First Consul of France is admitted; and that the relations of peace and friendship subsist between us and the French Republic, and did so at the time of these publications, is also admitted; and, indeed, they were capable of easy proof, if they had not been admitted. Their notoriety seems to render all actual proof very unnecessary." . . .

The President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. . . . It is generally known that Charles J. Bonaparte was the Attorney-General of the United States and the head of the Department of Justice at the time the decision of the President was made known in this case, and that through that department the decision of the President in a pardon case would, in the regular course of business, be promulgated.

In the absence of the telegram from the record, it will be presumed that it contained all the usual evidences of authenticity, and that it contained sufficient information to enable the Court to ascertain therefrom that the President had denied the application of the plaintiff in error for a commutation of sentence.

The judgment of the Court below is affirmed.

791. PEOPLE *v.* SCHMITZ

SUPREME COURT OF CALIFORNIA. 1908

153 *Cal.* xviii; 94 *Pac.* 419

IN BANK. Appeal from Superior Court, City and County of San Francisco; FRANK H. DUNNE, Judge. Eugene E. Schmitz having been convicted of extortion, and the conviction having been reversed by

the District Court of Appeals on his appeal, the People apply to the Supreme Court for a hearing and determination of the appeal. Application denied.

Campbell, Metson & Drew, Charles H. Fairall, and *John J. Barrett,* for appellant.

U. S. Webb, Attorney-General, and *W. H. Langdon,* District Attorney, (*Henry & Cobb* and *J. J. Dwyer* of counsel), for the People.

Per Curiam. This is an application by respondent for a hearing and determination of this appeal by this Court, after decision and judgment by the District Court of Appeal for the First District. . . .

The Court is unanimous in the opinion that the District Court of Appeal was correct in its conclusion that the indictment was insufficient, in that it did not show that the specific injury to the property of the restaurant keepers threatened by the defendant was an "unlawful injury." . . . § 520 of the Penal Code provides that the threat must be such as is mentioned in the preceding section, and the preceding section, in subdivision 1 (the only subdivision here applicable), says that the threat must be one "to do an *unlawful injury* to the person or property of the individual threatened, or to any relative of his, or member of his family." . . . What is meant by the term "unlawful injury"? Giving to such term the broadest meaning possible under the authorities, it can include no injury that is not of such a character that, if it had been committed as threatened, it would have constituted an actionable wrong. . . .

Applying this to the case at bar:

It was within the lawful power of the police commissioners of San Francisco to withhold from the restaurant keepers a license to sell liquors at retail in their restaurant, no matter how great the pecuniary loss thereby caused to the business. It was also lawful for any person, by legitimate persuasion or argument, to endeavor to prevail upon the commissioners to refuse the license, although such person was actuated by a malicious intent to injure the restaurant keepers and cause them pecuniary loss. The conjunction of the lawful persuasion, inducing the lawful refusal of the license, with the malicious motive instigating the persuasion, would not convert the lawful act of refusing the license into an unlawful one, nor make the resulting injury unlawful or actionable. . . .

In this case the indictment charges that the defendant threatened the restaurant keepers that, if money was not paid him, he would prevent them from obtaining or receiving a retail liquor license and thereby destroy or render unprofitable their restaurant business, of which the sale of liquors at retail formed the remunerative part. It is not stated how the defendant proposed to do this, or how it was understood by the parties that he would accomplish it, whether by fair persuasion and lawful influence over the commissioners, or by duress, menace, fraud, or undue influence exercised upon them. This is not a case where it is

sufficient to charge an offense in the language of the statute defining it. The Court cannot assume, in the absence of any averment to that effect, that Schmitz was mayor of the city and as such in a position to exercise power and undue influence over the members of the board of police commissioners; or that Ruef, his co-defendant, was a person in practical control of the city government because of his political activity and influence, or otherwise able to exert an undue influence over the board; nor can it be inferred, or presumed, when it is not so charged, that the defendant threatened to prevent the issuance of the license by unlawful means, and not solely by lawful and innocent persuasion and argument. . . .

The attorneys for the respondent . . . introduce their application with the statement that they are convinced that upon a full discussion of the case "it will be found and decided by this Court that levying blackmail upon licensed businesses by the mayor and the political boss of a metropolitan community is a crime under the law of California, and should not go unwhipped of justice." This is a gross misstatement of the case and of the question to be decided, as presented by the indictment. We again emphasize the fact that the indictment *does not aver* that Schmitz *was* mayor, or that Ruef *was* a political boss, or that either of them had any power, or influence, or control over the police commissioners, or that they threatened to use such power, influence, or control in preventing the issuance of a license. . . .

The application for a hearing and determination of this appeal by this Court, after decision and judgment by the District Court of Appeal of the First District, is denied.

792. Letters on the Case of PEOPLE *v.* SCHMITZ

(1) Chief Justice Beatty. *Letter in the Sacramento Bee* (April 29, 1908). . . . Though the facts that Schmitz was Mayor and Ruef the political boss of the city may have been as notorious in San Francisco as the fire or the earthquake, no lawyer would contend for a moment that they were facts of which a Court could take judicial notice, in passing upon the sufficiency of the indictment.

If these facts [that Schmitz was mayor and Ruef the political boss] had been alleged in the indictment, then indeed the Court could have considered in that connection the provisions of the charter of San Francisco which empowered the mayor to appoint and remove at will the members of the board of police commissioners, and which invest that board with discretion to issue or refuse licenses to sell liquors at retail. And if by means of these allegations or otherwise it had been made to appear that the defendants had caused the applicants to believe that they could and would influence the police commissioners to reject their application regardless of its merits, I have never doubted that the

indictment would have been sufficient. For this would have been a threat to do an unlawful injury — an injury which by reason of the corrupt abuse of official power employed to accomplish it would have been actionable.

But the Court, being obliged, as I have shown, to look exclusively to the force of the indictment in determining its validity, and seeing only a charge against two private persons, could see nothing unlawful in the threatened injury. For it could not be assumed that such private persons could prevent the issuance of the license otherwise than by adducing good reasons why, in the exercise of their discretion, the Police Commissioners should refuse it, — as, for instance, that the applicants were unfit persons, or their house an improper place. To oppose and prevent the issuance of a license on such grounds would be perfectly lawful, in the absence of a corrupt or malicious motive. And therefore the question finally resolved itself into this: Did the purpose of the threat (the extortion of money) convert into an unlawful injury that which in the absence of such motive would not have been criminal or actionable?

Why, it has been asked, could not the Court have taken into consideration the notorious facts that Schmitz was Mayor of the city and Ruef the political boss of the party in possession of the city government? The answer to this question is that . . . the Legislature of California, by a constitutional law, has enumerated the facts of which Courts may take judicial notice in the absence of proof, and by necessary implication has excluded all others, including the fact that any particular person is Mayor or political boss of any particular city. Necessarily, facts which must be proved, where they are matters of proof, must be alleged where they are matter of allegation, as in an indictment.

(2) Francis J. Heney (Assistant District Attorney of San Francisco). *Letter in the San Francisco Bulletin* (October 31, 1908). In the opinion of Chief Justice Beatty in People *v.* Schmitz, and his subsequent letter, . . . it is thus, in fact, conceded by the learned Chief Justice that if the indictment had alleged that Schmitz was mayor, it would have been sufficient, because the Court could then have taken judicial notice in that connection of the influence which the mayor possesses officially over the board of police commissioners, and that, therefore, when Schmitz threatened the French restaurant-keeper that he could and would prevent him from securing a license, the intended victim was justified, as a reasonable man, in believing that Schmitz possessed the power, through his official position, to influence the police commissioners, whom Schmitz had appointed and over whom he possessed the power of removal, to reject the French restaurant-keeper's application for a license, regardless of the merits of the application.

Yet the Court's refusal to take notice in this case ignores the plain language of the Code of Civil Procedure, § 1875, subdiv. 5, enumerating

the kinds of facts of which judicial notice may be taken: "The accession to office and the official signatures and seals of office of the *principal officers of government* in the legislative, *executive* and judicial departments of the State and the United States." The Political Code, § 343, provides, "The number and designation of the civil executive officers are as follows: A governor; . . . such other *officers* as fill offices created by or under the authority of *general laws for the government of* counties, *cities* and towns, or of the *charters* and special laws affecting the same." Surely the Mayor of the City and County of San Francisco, the largest in the State, is a "principal officer" of the executive department of this State, as thus defined. Moreover, in a decision of this Supreme Court rendered in 1896, the broad principle is stated that "the judicial notice which Courts take of matters of fact embraces those facts which are within common knowledge of all, or are of such general notoriety as to need no evidence in their support." . . .

Furthermore, the opinion of the Court indicates that the justices did look into the record of the case to some extent and consequently the Court must have known that the defendant Schmitz was fully apprised, at the time of the trial, of the fact that he was charged with having used the prestige of his official position, together with the prestige of Abe Ruef as political boss, to extort money from the French restaurant keepers under a threat to prevent them from securing the liquor licenses. The case was tried on behalf of the defendant by able and learned attorneys upon this very theory. It cannot be possible, therefore, that any substantial injustice was done the defendant by not alleging these evidentiary facts in the indictment. Surely no substantial injustice was done to the defendant by failing to inform him in the indictment that he was the mayor of this city and county at the time he is alleged to have made the threat and to have extorted the money. He could not have been taken by surprise by our failure to allege that fact, for he is presumed to be sane and to be gifted with at least ordinary senses of sight and hearing and at least an ordinary memory.

(3) JOHN H. WIGMORE. *Letter in the Liberator* (Vol. I, No. 8, San Francisco, Jan. 30, 1909). I have read the letter of Mr. Heney, and the letter of the Chief Justice, and have re-read the opinion of the Court in People *v.* Schmitz. The Chief Justice's letter and Mr. Heney's reply turn largely on the legal rule of judicial notice. The learned Chief Justice finds himself iron-bound by the rules of that subject. But the whole spirit of the rules is misconceived by him. Their essential and sole purpose is to relieve the party from proof, — that is, from proof of facts which are so notorious as not to need proof. When a party has not averred or evidenced a fact which later turns out, in the Supreme Court's opinion, to be vital, the rule of judicial notice helps out the judge by permitting him to take the fact as true, where it is one so notorious that evidence of it would have been superfluous. Now these helping rules

are not intended to bind him, but the contrary, *i.e.*, to make him free to take the fact as proved where he knows the proof was not needed. Moreover, it follows, since these rules cannot foresee every case new times and new conditions will create, that they can always receive new applications. The precedents of former judges, in noticing specific facts, do not restrict present judges from noticing new facts, provided only that the new fact is notorious to all the community. For example, the unquestioned election of William H. Taft as President of the United States is notorious; but no man named William H. Taft has ever been elected President, and no judicial precedent has noticed the fact. Yet no Court would hesitate to notice this new notorious fact.

The principle is stated in masterly form by Professor James Bradley Thayer, in his "Preliminary Treatise on Evidence" (1898, p. 300): "Practical convenience and good sense demand an increase rather than a lessening of the number of instances in which Courts shorten trials, by making prima facie assumptions, not likely, on the one hand, to be successfully denied, and, on the other, if they be denied, admitting readily of certification or disproof. . . . There is a wide principle, covering some things already mentioned, that Courts may and should notice without proof, and assume as known by others, whatever, as the phrase is, everybody knows. The application of such a principle must, as I have said, leave a great range of discretion to the Courts; only in a large and general way can any one say in advance what are and what are not matters of common knowledge. . . .

Courts may judicially notice much which they cannot be required to notice. That is well worth emphasizing, for it points to a great possible usefulness in this doctrine, in helping to shorten and simplify trials; it 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. This function is, indeed, a delicate one; if it is too loosely or ignorantly exercised it may annul the principles of evidence and even of substantive law. But the failure to exercise it tends daily to smother trials with technicality and monstrously lengthens them out."

If, then, a man named Schmitz was notoriously Mayor of San Francisco, and a man named Ruef was notoriously its political boss, at the time in question, that is all that any Court needs; and the doctrine of judicial notice gives it all the liberty it needs. It is conceivable that a trial judge might sometimes hesitate in applying this doctrine of notoriety, because the trial Court might fear that the Supreme Court would not perceive the notoriety. But there never need be any such hesitation in a Supreme Court, if that Court does see the notoriety.

And this is just where the learned Chief Justice is to be criticised.

He does not for a moment ask or answer the question, "Did we actually, as men and officers, believe these facts to be notoriously so?" but refers to certain mechanical rules, external to his mind. What that

Supreme Court should have done was to decide whether they under the circumstances did actually believe the facts about the status of Schmitz and Ruef to be notorious. In not so doing, they erred against the whole spirit and principle of judicial notice.

And Mr. Heney's demonstration that there is nothing in the codes to forbid them is complete; for, of course, the Code of Procedure, in telling them (Section 1875) that "the Courts take judicial notice of the following facts," simply gave them a liberty of belief as to those specified facts, and did not take away their liberty as to other unspecified facts.

But there is a deeper error than this in the learned Chief Justice's letter, and in the Court's opinion. The letter says: "If by means of these allegations or otherwise it had been made to appear that the defendants had caused the applicants to believe that they could and would influence the Police Commissioners to reject their application regardless of its merits, I have never doubted that the indictment would have been sufficient." He stakes his decision on this point. The point is that, in determining the fear caused by the threat, which constituted extortion, the belief of the restaurant-keeper as to Schmitz's and Ruef's power, and not their actual power, was the essential thing. If that is so, then of what consequence was it whether one or the other was Mayor or boss? And of what consequence was it whether those facts were averred or judicially noticed? None at all. The indictment alleged that the threats were made to use influence or power over the Commissioners, and that their purpose was to obtain money by means of (*i.e.*, through fear of) such threats. Obviously, then, the actual power or influence was immaterial; and the belief of the restaurant-keeper, the only material fact, was a question of the evidence on the trial, and not of the legal sufficiency of the indictment. All the lucubrations about judicial notice were therefore beside the point.

The inconsistency of the learned Chief Justice, in thus taking as essential the actual status of Schmitz and Ruef, is further seen in his next paragraph. There he declares "it could not be assumed that such private persons could prevent the issuance of the license otherwise than by adducing good reasons." But why does he assume that, on the contrary, a threat by a Mayor or a boss could prevent the issuance of the license otherwise than by adducing good reasons? He says that if it had appeared that the threats were made by a Mayor and a boss, then this would have sufficed, because, in his own words, their influence to reject the application would have been used "regardless of its merit." See what this means. Suppose that two persons, a Mayor and a private citizen, tell a restaurant-keeper that they will do all they can to induce a Commissioner to revoke the license unless money is paid; for one of these persons the learned Chief Justice immediately assumes that he can and will do this "regardless of its merits"; for the other he says "it cannot be assumed." Why not for one as much or as little as the other? He does not say that the private person could not possibly

succeed in influencing the Commissioner corruptly — he merely says that "it cannot be assumed." On the other hand, why assume it for the Mayor? Surely a Mayor might fail in trying to influence an honest Commissioner by a corrupt threat to remove him. In short, either assume that on the facts of the trial a private person might have power to influence corruptly the license; in which case an allegation of his Mayoralty would be superfluous. Or else refuse to assume that a Mayor, merely as such, could and would inevitably influence a Commissioner corruptly; in which case the mere allegation of his being Mayor would not be enough, and judicial notice would not cure. But the Chief Justice says it would be enough! He is plainly inconsistent.

The truth is that the learned Chief Justice, in endeavoring to support his decision, weaves a logical web, and then entangles himself in it. We do not doubt that there are dozens of other Supreme Justices who would decide, and are to-day deciding, in obscure cases, just such points in just the same way as the California case. And we do not doubt that there are hundreds of lawyers whose professional habit of mind would make them decide just that way if they were elevated to the bench to-morrow in place of those other jurists who are now there. The moral is that our profession must be educated out of such vicious habits of thought. One way to do this is to let the newer ideas be dinned into their professional consciousness by public criticism and private conversation.

Such disputations were the life of scholarship and of the law three hundred years ago. They are out of place to-day. There are enough rules of law to sustain them, if the Court wants to do so. And there are enough rules of law to brush them away, if the Court wants to do that.

ALL THE RULES IN THE WORLD WILL NOT GET US SUBSTANTIAL JUSTICE IF THE JUDGES HAVE NOT THE CORRECT LIVING MORAL ATTITUDE TOWARD SUBSTANTIAL JUSTICE.

BOOK VI. THE SO-CALLED PAROL EVIDENCE RULES

795. Introductory.[1] 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. But this prohibition of proving it is merely the dramatic aspect of the process of applying the rule of substantive law.

(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. 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 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.

(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.

(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 also have something to say about writings, — the chief of which are the rule about Producing Documentary Originals and the rule about Authenticating Documents.

(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*

[1] Abridged from the present Compiler's *Treatise on Evidence* (1905, Vol. IV, §§ 2400, 2401).

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 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 so 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.

In short, then, (1) the parol-evidence rule is not a rule of evidence; (2) nor is it a rule for things parol; (3) nor is it a single rule; (4) nor is is 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.

II. 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 conduct which is allowed to have such effect is a *legal act.*[1]

For the purpose of specific varieties of legal acts — 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 the varieties of legal acts, and must therefore be analyzed and discussed in union. 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;

[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).

(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*.

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.

C. The Solemnization of the act concerns the forms which are required by law to attend it in order to give it legal effect. 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.

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 lot of land or a barrel of sugar or John Doe the legatee.

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.

TITLE I. ENACTION OF A LEGAL ACT

796. History.[1] The two chief problems have been that of the finality of the utterance, and that of the correspondence between intent and expression, *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. It must be kept in mind, for appreciating the traditions against which the modern law has had to struggle.

In earlier times, outward technical form reigned supreme.

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, "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 draft deed (an "escrow," or mere scroll), placed in the hands of a second person for subsequent handing to the grantee, is not yet effective. 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. It has been reserved for very modern times to repudiate this last relic of primitive formalism.

Passing to the problem of intent as competing with expression, it is equally plain that the primitive legal conception was strictly formalistic.

"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."[2] 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. 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 read while

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[1] Abridged from the present Compiler's *Treatise on Evidence* (1905, Vol. IV, § 2405).

[2] Professor *Andreas Heusler*, Institutions of Germanic Private Law, I, 60.

void as to the part falsely read. For literate persons, there seems never to have been any doubt that a mistake of intent could not avail to avoid the document; and the doctrines of mutual mistake and the like are the product of equity and modern rationalism.

SUB-TITLE I. ACT VOID FOR INCOMPLETENESS

798. THOROUGHGOOD'S CASE (1601. 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 will make the express delivery to the party upon the matter no delivery. . . . And therewith agrees the report of 19 H. 8. 8. *a.* and takes the difference when it is so delivered to the party himself, and when to a stranger, as it was there agreed.

799. PYM *v.* CAMPBELL

QUEEN'S BENCH. 1856

6 *E. & B.* 370

ACTION on a contract to purchase shares in an invention. The contract was dated Jan. 17, 1854, named the respective shares and prices, and was signed by Campbell, Pym, Mackenzie, and Pritchard.

The defendants gave evidence that, in the course of the negotiations with the plaintiff, they had got so far as to agree on the price at which the invention should be purchased if bought at all, and had appointed a meeting at which the plaintiff was to explain his invention to two engineers appointed by the defendants, when, if they approved, the machine should be bought. At the appointed time the defendants and two engineers of the names of Fergusson and Abernethie attended; but the plaintiff did not come; and the engineers went away. Shortly after they were gone the plaintiff arrived. Fergusson was found, and expressed a favorable opinion; but Abernethie could not then be found. It was then proposed that, as the parties were all present, and might find it troublesome to meet again, an agreement should be then drawn up and signed, which, if Abernethie approved of the invention, should be the agreement, but, if Abernethie did not approve, should not be one. Abernethie did not approve of the invention when he saw it; and the defendants contended that there was no bargain. The Lord Chief Justice told the jury that, if they were satisfied that, before the paper was signed, it was agreed amongst them all that it should not operate as an agreement until Abernethie approved of the invention, they should

find for defendant on the pleas denying the agreement. Verdict for the defendants.

Thomas, Serjt., in the ensuing term, obtained a rule nisi for a new trial on the ground of misdirection.

Watson and *Manisty*, now showed cause. — The direction was correct. . . . If the defendants had signed this as an agreement, they could not have shown that the agreement was subject to a condition. But they may show that the writing was signed on the terms that it should be merely void till a condition was fulfilled; for that shows there never was a contract. . . .

Thomas, Serjt., and *J. H. Hodgson*, *contra.* — The very object of reducing a contract to writing and signing it is to prevent all disputes as to the terms of the contract. Here the attempt is to show by parol that the agreement to take this invention was subject to a condition that Abernethie approved; while the writing is silent as to that.

Erle, J. — I think that this rule ought to be discharged. The point made is that this is a written agreement, absolute on the face of it, and that evidence was admitted to show it was conditional; and if that had been so it would have been wrong. But I am of opinion that the evidence showed that in fact there was never any agreement at all. The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement; and, if in fact he did sign the paper *animo contrahendi*, the terms contained in it are conclusive, and cannot be varied by parol evidence. But in the present case the defence begins one step earlier; the parties met and expressly stated to each other that, though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until Abernethie was consulted. I grant the risk that such a defence may be set up without ground; and I agree that a jury should therefore always look on such a defence with suspicion; but, 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 so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible.

Crompton, J. — I also think that the point in this case was properly left to the jury. If the parties had come to an agreement, though subject to a condition not shown in the agreement, they could not show the condition, because the agreement on the face of the writing would have been absolute, and could not be varied. But the finding of the jury is that this paper was signed on the terms that it was to be an agreement if Abernethie approved of the invention, not otherwise. I know of no rule of law to estop parties from showing that a paper, purporting to be a signed agreement, was in fact signed by mistake, or that it was signed on the terms that it should not be an agreement till money was paid, or

something else done. When the instrument is under seal it cannot be a deed until there is a delivery; and when there is a delivery that estops the parties to the deed, that is a technical reason why a deed cannot be delivered as an escrow to the other party. But parol contracts, whether by word of mouth or in writing, do not estop. There is no distinction between them, except that where there is a writing it is the record of the contract. The decision in Davis *v.* Jones, 17 Com. B. 625, is, I think, sound law, and proceeds on a just distinction; the parties may not vary a written agreement; but they may show that they never came to an agreement at all, and that the signed paper was never intended to be the record of the terms of the agreement; for they never had agreeing minds. Evidence to show that does not vary an agreement, and is admissible.

800. BURKE *v.* DULANEY

SUPREME COURT OF THE UNITED STATES. 1894

153 *U. S.* 228; 14 *Sup.* 816

THIS action was brought by the testator of the appellees, upon a writing purporting to be the promissory note of the appellant for forty-three hundred and eight dollars and eighty cents, dated Salt Lake City, Utah, August 10, 1883, and payable one year after date, for value received, at the bank of Wells, Fargo & Co. in that city, with interest at the rate of six per cent per annum from date until paid.

The defendant, Burke, denied his liability upon the note, and at the trial below was sworn as a witness on his own behalf. In support of his defence, as set forth in the answer filed by him, he stated the circumstances under which the note was given. He said: "Mr. Dulaney bought this group of mines — the Live Yankee and the Mary Ellen. He came to the Walker House in Salt Lake, and wanted me to run them for him. I said I would not do it unless I got a show to get some interest in the property. He says, I will carry an interest for you, and you can take it if you want it, and if not, you can give it back to me after you see the property." To this testimony the plaintiff objected, and the defendant admitting that the agreement referred to by him was oral, the objection was sustained. To this ruling he excepted. Being asked what he did after giving the note in suit, he answered: "I gave the note. I worked on the property, which was done some time in September; worked the property until March; settled up all of its debts, paid them, notified Dulaney I wanted nothing more to do with the property; that I was going to Idaho Territory, to Cœur d' Alêne mines, and as I was ready to give him a deed at any time he would send me my note. That is all." Objection being made by the plaintiffs to this testimony, the defendant offered to prove "that at the time of the giving of the note and prior thereto, Dulaney, the payee of the note, agreed with Mr.

Burke, the maker of the note, that the note should be given to represent the price of the interest that Mr. Burke was to have, conditioned upon his demanding it after an inspection of the mining property mentioned." He offered also to prove that after inspecting the property and testing it, the defendant notified testator that he did not want the interest; that he was prepared to make a deed for the interest to the latter, and demanded the delivery of his note.

All this evidence was excluded by the Court upon motion of the plaintiffs, to which ruling the defendant excepted. The defendant having stated that the conversation with the testator above referred to, and which was executed by the Court, took place prior to the execution of the note, he offered to prove that at the time the note was made, the same agreement was made orally between him and the testator. This testimony was also excluded, and he excepted. . . .

Mr. *W. B. Heyburn*, for appellant, submitted on his brief.

Mr. *Lehigh Robinson*, for appellee. It is not easy to conceive of a more complete contradiction and variation of a promissory note to pay a certain sum, to a certain party, than the contradiction and variation and transformation which would be accomplished by the admission of proof to turn a precise and distinct negotiable note into an option to purchase real estate. . . . "It is a firmly settled principle, that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or endorsing of a bill, cannot be permitted to vary, qualify, or contradict, or add to or subtract from the absolute terms of the written contract," Forsythe *v.* Kimball, 91 U. S. 291, 294. . . . In a suit at law, by the payee against the maker, "evidence is inadmissible to show that the note was not intended to be a promissory note, but was given as a memorandum not to be enforced against the maker." Burnes *v.* Scott, 117 U. S. 582.

HARLAN, J. — The general rule that a written contract cannot be contradicted or varied by evidence of an oral agreement between the parties before or at the time of such contract, has been often recognized and applied by this Court, especially in cases in which it was sought to deprive bona fide holders of or parties to negotiable securities of the rights to which they were entitled according to the legal import of the terms of such instruments. . . . The authorities cited do not determine the present case. The issue here is between the original parties to the note. And the evidence offered by the appellant, and excluded by the Court, did not in any sense contradict the terms of the writing in suit, nor vary their legal import, but tended to show that the written instrument was never, in fact, delivered as a present contract, unconditionally binding upon the obligor according to its terms from the time of such delivery, but was left in the hands of Dulaney, 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. In other words, according to the evidence offered and excluded

the written instrument, upon which this suit is based, was not — except in a named contingency — to become a contract, or a promissory note which the payee could at any time rightfully transfer. Evidence of such an oral agreement would show that the contingency never happened, and would not be in contradiction of the writing. It would prove that there never was any concluded, binding contract entitling the party who claimed the benefit of it to enforce its stipulations. The exclusion of parol evidence of such an agreement could be justified only upon the ground that the mere possession of a written instrument, in form a promissory note, by the person named in it as payee, is conclusive of his right to hold it as the absolute obligation of the maker. While such possession is, undoubtedly, prima facie, indeed, should be deemed strong evidence that the instrument came to the hands of the payee as an obligation of the maker, enforcible according to its legal import, it is open to the latter to prove the circumstances under which possession was acquired, and to show that there never was any complete, final delivery of the writing *as the promissory note of the maker*, payable at all events and according to its terms. The rule that excludes parol evidence in contradiction of a written agreement presupposes the existence in fact of such agreement at the time suit is brought. But the rule has no application if the writing was not delivered as a present contract. . . .

For the reasons stated, and without considering the case in other aspects, we are of opinion that it was error to exclude the evidence offered by the defendant tending to show that the writing sued on was not delivered to or received by Dulaney as the promissory note of the defendant, binding upon him as a present obligation, enforcible according to its terms, but was delivered to become an obligation of that character when, but not before, the defendant examined and, by working them, tested the mining properties purchased by the plaintiff, and elected to take the stipulated interest in them.

801. STANLEY *v.* WHITE

SUPREME COURT OF ILLINOIS. 1896

160 *Ill.* 605; 43 *N. E.* 729

APPEAL from the Circuit Court of Iroquois county; the Hon. CHARLES R. STARR, Judge, presiding.

This was a bill for partition, filed by Stanley R. White, against John Stanley and others, in the circuit court of Iroquois county. The cause was heard upon the original and amended bills of Stanley R. White, the answers thereto, and the cross-bills of Jane S. Talliaferro, Mark A. Stanley and Dicie A. Warren, and the answers and replications thereto. The testimony was taken before the master in chancery, and upon the filing of his report the Court found all the allegations in complainant's

bills and in the cross-bills to be true, and that partition and division ought to be made as prayed in complainant's bills, and rendered a decree accordingly. From that decree defendant, John Stanley, prosecutes this appeal. He objects to that part of the decree awarding partition of the north-east quarter of the southwest quarter of section 33, township 27, north, range 12, west of the second principal meridian. His contention is, that Jane Talliaferro, Mark Stanley and Dicie Warren have no rights in said land, and are not entitled to the one-sixth interest each therein ordered by said decree to be set off to them. He claims that their interests therein they had conveyed to him by a good and sufficient deed prior to the institution of this suit, and he asks that the decree, as to that part of it awarding to said Jane Talliaferro, Mark Stanley and Dicie Warren a one-sixth interest each in said land, be reversed.

The evidence shows that appellant and Jane Talliaferro, Dicie Warren, Mark Stanley and Joseph Stanley, children, and Stanley R. White, grandchild, of Micajah Stanley, who died intestate, are his sole surviving heirs. Among other lands of which he died seized was the land above described. After his father's decease, appellant desired to obtain a conveyance to himself of the interests of the heirs in said land. To that end he had prepared for him the deed here in controversy which bears the date of March 15, 1889, and was signed by Mark A. Stanley and Jennie E., his wife, Jane S. Talliaferro, widow, and Dicie A. Warren and George E., her husband, all of whom admit that they signed the deed with a full knowledge of its contents. Mark A. and Jennie E. Stanley and Jane S. Talliaferro duly acknowledged the deed on July 25, 1889, and it was acknowledged by Dicie A. and George E. Warren on November 1, 1892. The evidence shows that all of the grantors did not sign the deed at the same time, but that some signed at one time and others at other times, and that after the several signings the deed was each time returned either to appellant or to his mother, who was acting for him. The deed has remained under his control ever since the day it bears date. The grantors do not contend there was any fraud, duress or undue influence used to induce them to sign the deed. Their only claim is, that it was the understanding between them and appellant, at the time the deed was executed, that it was not to be operative unless signed by all the heirs of Micajah Stanley.

Morris & Hooper, and *Robert Doyle*, for appellant: Parties lose control of the deed by leaving it with the grantee. . . . A party is not allowed to show by oral evidence that the delivery was conditional, because this would be to permit him to change the terms of a written instrument by parol. . . .

Kay & Kay, for appellees: John Stanley was a mere agent of the grantors to procure the signatures to the deed, and not in possession of it as a grantee. It never came into his possession for any other purpose on the part of the grantors. . . .

Mr. Justice BAKER (after stating the case as above) delivered the opinion of the Court — The question to be decided is, was there, or was there not, a delivery of this deed by the grantors to appellant? The answer depends upon the answer to the further question, what was the intention of the parties at the time the transaction took place? If the parties intended that a present title should pass, then plainly there was a delivery. If, after appellees had signed and acknowledged the deed, they had merely handed it to appellant for the purpose, solely, of having him get the signatures of the other heirs thereto, that would not have constituted a delivery, but would have been a mere manual transfer of possession, and would not have passed the title. If, however, the deed being ready for delivery, they had given it to him intending at the time to pass a present title, but with the mutual verbal understanding that the deed should subsequently become inoperative and void if the other heirs should refuse to sign it when requested so to do, then there would have been a delivery and the title would have passed, and the grantors could not thereafter set up the non-performance of the condition in order to defeat the deed, but would be concluded by its terms. (Stevenson *v.* Crapnell, 114 Ill. 19; McCann *v.* Atherton, 106 id. 31; Weber *v.* Christen, 121 id. 91.) The latter hypothesis presents the facts shown by the record in this case. The deed, absolute on its face, was properly signed and acknowledged. The grantors were acquainted with its contents, and they deposited it with the grantee, and under his control it has remained ever since. The weight of the evidence shows that when the grantors gave him the deed they thought they were divesting themselves of the title, and intended so to do. Their only concern seems to have been that all the other heirs should do as they were doing, hence the condition was added that if the other heirs refused to sign the deed it should become void. That was the condition, and not that the deed was *not to take effect* unless signed by the other heirs. . . .

Appellees rely upon Roundtree *v.* Smith, 152 Ill. 493, . . . as sustaining their contention that there was here no delivery. The Roundtree case differs from the case at bar in this: that there the deeds were given by the grantor to the grantee with the mutual understanding that they were *not to take effect* until the return by the grantee of certain securities to the grantor, and that the deeds were to remain subject to the latter's control until the securities should be offered and accepted. The securities, however, were not given. We said there, as here, that the intention must govern, and held that there was no delivery because the deeds were not given to the grantee with the intention of then passing the title; that the grantor had never parted with the control over them, and she consequently had a right to demand them back at any time before the transaction was completed. . . .

We are of the opinion that appellant is entitled to the estate in the land in controversy which the deed here in question purports to convey to him.

802. Smith *v.* Dotterweich. (1911. New York. 200 N. Y. 299; 93 N. E. 985.) Werner, J. . . . There is no subtlety or ambiguity in the law of the subject; but there is difficulty in applying it to some cases in which there may be uncertainty as to the effect of oral testimony upon contracts which are wholly or partly reduced to writing. When the oral testimony goes directly to the question whether there is a written contract or not, it is always competent; but when the effect of the oral testimony is to establish the existence of a written contract, which it is designed to contradict or change by parol, then the spoken word must yield to the written compact. In Benton *v.* Martin, 52 N. Y. 570, 574, this Court very clearly enunciated the rule, which has always obtained in this State: "Instruments not under seal may be delivered to the one to whom upon their face they are made payable, or who by their terms is entitled to some interest or benefit under them, upon conditions the observance of which is essential to their validity. And the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between the parties to it, or others having notice. It needs a delivery to make the obligation operative at all; and the effect of the delivery and the extent of the operation of the instrument may be limited by the conditions with which delivery is made. And so also, as between the original parties and others having notice, the want of consideration may be shown." This quotation sums up the whole of the law applicable to the case at bar in its present state, and outlines comprehensively the rule which has been followed in Bookstaver *v.* Jayne, 60 N. Y. 146; Grierson *v.* Mason, 60 N. Y. 394; Reynolds *v.* Robinson, 110 N. Y. 654; Schmittler *v.* Simon, 114 N. Y. 176, and other cases, under a variety of circumstances.

The case of Jamestown Business College Assn. *v.* Allen, 172 N. Y. 291, is a salient illustration of the converse of this rule. There the promissory note was rendered effective and complete by an unconditional delivery. The payee agreed to release the maker, and to cancel the note, upon a future contingency which might or might not arise. That was clearly a condition subsequent which brought the case within the general rule that a contract reduced to writing and complete in its terms, cannot be varied and contradicted by oral testimony. Eighmie *v.* Taylor, 98 N. Y. 288; Thomas *v.* Scutt, 127 N. Y. 133; Stowell *v.* Greenwich Ins. Co., 163 N. Y. 298; Mead *v.* Dunlevie, 174 N. Y. 108. Thus, to state the difference most concretely, the case at bar is one in which the oral testimony tends to show that the writing purporting to be a contract is in fact no contract at all, while in the case of the Jamestown Business College, the oral testimony was in direct contradiction of the written contract as to the existence and validity of which there was no controversy.

SUB-TITLE II. ACT VOID FOR LACK OF INTENT

804. Thomas Erskine Holland. *Jurisprudence.* (1886. 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 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 analyze the free act itself into 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 analyzing them, the terms "velle," "concensus," "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 favorable to the interests of commerce. . . . In other words: 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.

805. FOSTER *v.* MACKINNON

COMMON PLEAS. 1869

L. R. 4 *C. P.* 704

ACTION by indorsee against indorser on a bill of exchange for 3000*l.* drawn on the 6th of November, 1867, by one Cooper upon and accepted by one Callow, payable six months after date, and indorsed successively by Cooper, the defendant, J. P. Parker, T. A. Pooley & Co., and A. G. Pooley, to the plaintiff, who became the holder for value (having taken it in part-payment of a debt due to him from A. G. Pooley) before it became due, and without notice of any fraud. The pleas traversed the several indorsements, and alleged that the defendant's indorsement was obtained from him by fraud.

The cause was tried before Bovill, C. J., at the last spring assizes at Guildford. The defendant, who was a gentleman far advanced in years, swore that the indorsement was not in his handwriting, and that he had never accepted nor indorsed a bill of exchange; but there was evidence that the signature was his; and Callow, who was called as a witness for the plaintiff, stated that he saw the defendant write the indorsement under the following circumstances: — Callow had been secretary to a company engaged in the formation of a railway at Sandgate, in Kent, in which the defendant (who had property in the neighborhood) was interested; and the defendant had some time previously, at Callow's request, signed a guarantee for 3000*l.*, in order to enable the company to obtain an advance of money from their bankers. Callow took the bill in question (which was drawn and indorsed by Cooper) to the defendant, and asked him to put his name on it, telling him it was a guarantee; whereupon the defendant, in the belief that he was signing a guarantee similar to that which he had before given (and out of which no liability had resulted to him), put his signature on the back of the bill immediately after that of Cooper. Callow only shewed the defendant the back of the paper; it was, however, in the ordinary shape of a bill of exchange, and bore a stamp, the impress of which was visible through the paper.

The Lord Chief Justice told the jury that, if the indorsement was not the signature of the defendant, or if, being his signature, it was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if the defendant was not guilty of any negligence in so signing the paper, he was entitled to the verdict. The jury returned a verdict for the defendant.

Sir *J. D. Coleridge*, S. G., in Eastern Term last, obtained a rule nisi for a new trial, on the grounds of misdirection and that the verdict was against evidence.

Ballantine, Serjt., *Brown*, Q. C., and *Archibald*, showed cause. Two questions arise here, — 1. Whether there was any negligence on the part of the defendant in signing the document as he did. 2. Whether, assuming Callow's evidence to be true, the defendant can be responsible upon an indorsement so fraudulently obtained. In considering the first of these questions, regard must be had to the age and condition of the party. What would be negligence in a merchant or a banker would not necessarily be negligence on the part of a gentleman of great age and impaired physical powers. Negligence must in all cases be a relative term: Lynch *v.* Nurdin (1 Q. B. 29). Then, as to the second question. It is essential to every contract that there be volition. A man cannot be said to contract when he signs a paper upon a representation and under a belief that he is signing something different from that which it turns out to be; to make a valid and binding contract, the mind must go with the act. . . .

Sir *J. D. Coleridge*, S. G. Sir *G. Honyman*, Q. C., and *Talfourd Salter*, in support of the rule. The fact that the defendant's indorsement on the bill was obtained by a fraudulent representation that he was signing something else, is no answer to the claims of a bona fide holder for value without notice of the fraud. No doubt, as a general rule, fraud vitiates all contracts. But . . . no matter how a bill or note may be tainted with fraud, or even if it has been obtained by duress or by felony, that is no answer to an action at the suit of a bona fide holder for value. . . .

(Byles, J. — If that be right, it can only be with reference to the case of a complete instrument; it can hardly be applicable to the case where a man's signature has been obtained by a fraudulent representation to a document which he never intended to sign.)

Then, the verdict was clearly against the weight of evidence upon the question of negligence. . . .

July 5. The judgment of the Court (Bovill, C. J., Byles, Keating, and Montague Smith, JJ.) was delivered by

Byles, J. — This was an action by the plaintiff as indorsee of a bill of exchange for 3000*l.*, against the defendant, as indorser. The defendant by one of his pleas traversed the indorsement, and by another alleged that the defendant's indorsement was obtained from him by fraud. The plaintiff was a holder for value before maturity, and without notice of any fraud. . . . A rule nisi was obtained for a new trial, first, on the ground of misdirection in the latter part of the summing-up, and secondly, on the ground that the verdict was against the evidence.

As to the first branch of the rule, it seems to us that the question arises on the traverse of the indorsement. The case presented by the defendant is, that he never made the contract declared on; that he never saw the face of the bill; that the purport of the contract was fraudulently misdescribed to him; that, when he signed one thing, he was told and believed that he was signing another and an entirely different thing; and that his mind never went with his act. It seems plain,

on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which the name is appended.

The authorities appear to us to support this view of the law. In Thoroughgood's Case (2 Co. Rep. 9*b*), it was held that, if an illiterate man have a deed falsely read over to him, and he then seals and delivers the parchment, that parchment is nevertheless not his deed. In a note to Thoroughgood's Case, in Fraser's edition of Coke's Reports, it is suggested that the doctrine is not confined to the condition of an illiterate grantor. . . . The position that, if a grantor or covenantor be deceived or misled as to the *actual contents* of the deed, the deed does not bind him, is supported by many authorities. . . . Accordingly, it has recently been decided in the Exchequer Chamber, that, if a deed be delivered, and a blank left therein be afterwards improperly filled up (at least if that be done without the grantor's negligence), it is not the deed of the grantor: Swan *v.* North British Australasian Land Company (2 H. & C. 175). These cases apply to deeds; but the principle is equally applicable to other written contracts.

Nevertheless, this principle, when applied to negotiable instruments, must be and is limited in its application. These instruments are not only assignable, but they form part of the currency of the country. A qualification of the general rule is necessary to protect innocent transferrees for value. If, therefore, a man write his name across the back of a blank bill-stamp, and part with it, and the paper is afterwards improperly filled up, he is liable as indorser. If he write it across the face of the bill, he is liable as acceptor, when the instrument has once passed into the hand of an innocent indorsee for value before maturity, and liable to the extent of any sum which the stamp will cover. In these cases, however, the party signing knows what he is doing; the indorser intended to indorse, and the acceptor intended to accept, a bill of exchange to be thereafter filled up, leaving the amount, the date, the maturity, and the other parties to the bill undetermined. But, in the case now under consideration, the defendant, according to the evidence, if believed, and the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. 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, or on an order for admission to the Temple Church, or on the fly-leaf of a book, and there had already been, without his knowledge, a bill of exchange or a promissory note payable to order inscribed on the other side of the paper. . . . The defendant never intended to sign that contract, or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the *actual contents* of the instrument. . . .

For these reasons, we think the direction of the Lord Chief Justice was right.

With respect, however, to the second branch of the rule, we are of opinion that the case should undergo further investigation. We abstain from giving our reasons for this part of our decision only lest they should prejudice either party on a second inquiry.

The rule, therefore, will be made absolute for a new trial.

806. McNAMARA *v.* BOSTON ELEVATED RAILWAY COMPANY

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1908

197 *Mass.* 383; 83 *N. E.* 878

TORT for personal injuries alleged to have been received by the plaintiff while a passenger on an electric street car of the defendant. Writ in the Superior Court for the county of Suffolk dated August 17, 1905. The answer of the defendant alleged that the plaintiff's cause of action had been released by her "by an instrument in writing over her hand and seal."

At the trial, which was before DANA, J., the plaintiff's evidence tended to show that a fuse burned out upon the car upon which she was near the corner of Washington and Cobden streets in the Roxbury district of Boston and that, in the rush of the passengers to get out of the car, she was injured; that she left the car and reached the sidewalk "in a very weak, hurt condition" and walked to a nearby post, by which she was supported until she took another car to the Dudley Street transfer station, transferred there to the elevated train to Dover street, again transferred there to a South Boston car, that her friends accompanied her to C street, South Boston, but that she went the rest of the way to her home at 702 East Fifth street alone. Her testimony as to what occurred after she arrived at her home and until the defendant's agent came is stated in the opinion.

As to her interview with the agent of the defendant, she testified: "Well, I opened the door and the gentleman walked in and he said to me, 'Are you Mrs. McNamara,' and I said, 'Yes, sir,' and he said, 'You were on the car the accident happened,' and I said, 'Yes, sir,' and I

can't remember what he was saying; all I remember of his saying was, 'Have you got any bones or limbs broken,' and I said, 'No,' and he said, 'Well,' he said, 'Are you going to sue the road when you have no bones or limbs broken?' and I said, 'Well, I can't tell what I will do until I see the doctor,' I said, 'I can't explain my, — the way I feel to you.' And he said he had been to the other houses and they all signed the paper, and handed me over the paper, and he said, 'You sign your name there,' and he said, 'Let me see,' he said, 'Has that paper got Margaret Riley signed in it?' and I returned him the paper, and he handed it back again, and I said, 'Well, now, you see my condition, I can't sign my name,' and he said, taking the paper from me, and putting it on a stiff envelope, 'Let me support it for you.' 'Well,' I said, 'It is impossible,' I said, 'I feel so sick,' and I remember of writing my name the best I could. . . . He asked me what doctor I was going to have and I told him my family physician. He put his hand in his pocket and took out a $5 bill and gave it to me, and I said, 'What is this for?' he said, 'That will pay the doctor.' " The testimony then proceeded: "*Q.* — Now, did he say anything about that paper; did he say anything about that paper being a release of all your claims against the Boston Elevated Railroad? *A.* — I can't remember of him saying anything. *Q.* — Now, did you read that paper? *A.* — No; I don't remember of reading it. *Q.* — Did he read it to you? *A.* — I don't remember. *Q.* — Did he give you any explanation about it at all? *A.* — I don't remember."

At the close of the evidence a verdict was directed for the defendant on the ground that the release which was in evidence barred the action; and the plaintiff excepted. Other facts are stated in the opinion.

William J. Sullivan and *Jas. A. McGeough*, for plaintiff. *Robert G. Dodge* and *Alexander Kendall*, for defendant.

Loring, J. — We are of opinion that the presiding judge was right in ruling that there was no evidence warranting a finding that the release given by the plaintiff was not binding on her.

It is settled on the one hand that it is no defense to a release that the person signing it neither read it nor understood its contents. Leddy *v.* Barney, 139 Mass. 394, 396; Rosenberg *v.* Doe, 146 Mass, 191, 193. This is but an application of the broad principle applied in a similar connection in Grace *v.* Adams, 100 Mass, 505. On the other hand it is also settled that a release can be avoided if there was a fraudulent misrepresentation as to its contents, and if the party signing it without reading it did so, relying on that misrepresentation. Bliss *v.* N. Y. C. & H. R. R. R., 160 Mass 447; Peaslee *v.* Peaslee, 147 Mass. 171. Further, there can be no question of his right to avoid it if he signed it when he did not have "legal competency to act," as it was put by Parker, C. J., in Farnam *v.* Brooks, 9 Pick. 212, 220.

The plaintiff's evidence here did not go far enough to warrant the jury in finding that the release signed by her was obtained by fraud,

or that it was signed by her when she was in such a condition that she did not understand what she was doing; or, as Chief Justice Parker put it, when she did not have "legal competency to act." A fraudulent concealment of the contents of a release is not per se enough to avoid it. . . . The true rule is laid down in Freedley *v.* French, 154 Mass. 339, namely, that where the person to whom the release is given undertakes to state the contents of it and conceals a part of them, a fraudulent misrepresentation is made out.

1. So far as the representation goes that the defendant's agent had been to the other houses and all the ladies had signed the paper, or that he went to all the houses and they signed (it was put both ways in the testimony), there was no evidence that this was not the fact. Four of the plaintiff's fellow passengers who were put on the witness stand by her testified that they had signed a release. So far as appears, therefore, this statement was true. The statement did not mean that all the other women signed the identical piece of paper signed by the plaintiff. If all of them had signed a release the truth of this statement was made out.

2. The plaintiff did not testify that the defendant undertook to state the contents of the release. She did not testify that the $5 given her was paid to her to pay her doctor and so bring the case within Bliss *v.* New York Central & Hudson River Railroad, 160 Mass. 447. What the plaintiff testified to was that the defendant's agent said that the $5 given her "will pay for the doctor," not that the $5 was given her to pay the doctor.

3. Lastly, the evidence did not warrant a finding that when she signed the release the plaintiff did not know what she was about, or, as Chief Justice PARKER put it, that she did not have "legal competency to act." . . .

The only testimony which it could be argued went far enough is that of the plaintiff's husband that when he came home "somewhere around 5 o'clock" his wife "was hysterical and not able to give a clear story of the accident." What was in issue was whether she understood what she was doing when she took $5 and gave a release at about 4:15. On the stand she gave an intelligent account of that transaction; her husband testified that between 5 and 6 she "told the doctor how she got hurt, describing how the thing happened." She did not testify that she did not understand the transaction; the farthest that her testimony went was that after the agent left she was "in a very weak condition."

As we have said, the evidence did not, in our opinion, go far enough to warrant a finding that she did not have "legal competency to act" when she signed the release. Exceptions overruled.

807. GRAY *v.* JAMES

Supreme Court of North Carolina. 1909.

151 *N. C.* 80; 65 *S. E.* 644

Appeal from Cook, J., April Term, 1909, of Pitt. This action was originally tried before Lyon, J., at the November Term, 1907. The action was instituted by plaintiff, a subsequent purchaser of the land now in controversy, against J. R. Jenkins, mortgagee of this and other lands, and J. I. James, mortgagor and owner, and his wife, Lucy, et al., to enforce a sale of the mortgaged land in a certain order, as required by the rights and equities of plaintiff as subsequent purchaser. The mortgagee answered, setting up his indebtedness and the mortgage given to secure the same on all the land in controversy and other lands not embraced in plaintiff's deed. The mortgagor answered, and, among other things, alleged that the plaintiff's deed included more land than the agreement and contract between them authorized, and that the excess, to-wit, all that portion lying outside of the town of Oakley, was inserted in the instrument by reason of deceit and fraudulent representations on the part of plaintiff.

Among other things, the defendant (the plaintiff in the issue) testified that he had bargained with the plaintiff Gray concerning the land, and had agreed to sell and convey to him all that portion of the tract of land which lay within the boundaries of the town of Oakley for $600, and a store account amounting to about $20; and that some time after that, when the defendant and his wife were at the house of one Williams, some time between sundown and dark, plaintiff came to them with a deed already prepared, and a justice of the peace with him, and in conversation defendant told him he was only selling the land in town, and plaintiff replied the deed only covered the land in town; "said it was only a plain deed, like we had agreed upon. There was no reading done. Gray [the plaintiff] handed me the deed; I read the deed to where it mentioned E. R. Mizell's corner, and I said to Gray, 'you have the initials wrong,' and he said, 'it makes no difference; it is nothing but a plain deed; I am in a hurry to get back to the store; there is no one there but Mr. Rogers.' I handed the deed to Mr. Whichard. I had confidence in him. I thought he would tell me the truth, or I would not have signed it. Whichard was looking over the deed, and the plaintiff said the same thing to him — that he was in a hurry." No one read the deed to witness. He further testified that he did not know the deed embraced any land outside of the town, or he would not have signed the deed.

Mrs. James, wife of defendant, gave similar testimony as to what took place about reading the deed at the house, of the execution, and further that he had agreed to sign a deed for the land within the town,

and said so at the time, and she would not have agreed to the execution otherwise. Mrs. Williams, sister of the defendant, testified that plaintiff Gray said it was not worth while to read the deed; that it was just a plain deed, containing what he bought.

Plaintiff further testified that, some time after executing the deed, he discovered that it was not restricted to the land within the town, but conveyed the entire tract to plaintiff, and same was worth $1,000 to $1,200.

On issues submitted, the jury rendered the following verdict:

1. "Did defendants agree to sell and convey to plaintiff only that portion of their land which is located within the boundary lines of the town of Oakley?" Answer: "Yes."

2. "Were defendants induced to execute the deed of November 16, 1905, containing that portion of their land lying outside the boundary lines of the town of Oakley, by the deceit and false and fraudulent misrepresentations of the plaintiff?" Answer: "Yes."

3. "Is the plaintiff the owner and entitled to the possession of the land described in the complaint?" Answer: "All that part in the town of Oakley."

4. "Does the defendant, J. I. James, unlawfully withhold the possession of said land from the plaintiff?" Answer: "Yes."

5. "What is the annual rental value of said land?" Answer: "Thirty-six dollars."

On such verdict judgment was rendered reforming plaintiff's deed according to the facts established, and directing a sale in a given order, and from that judgment plaintiff appealed. . . .

Jarvis & Blow and *Moore & Long*, for plaintiff. *Moore & Dunn* and *Skinner & Whedbee*, for defendant.

HOKE, J. (after stating the case). The objection chiefly urged for error is the refusal of the Court below to charge the jury "That the evidence in the case does not tend to prove facts sufficient to constitute fraud and deceit, and the jury is instructed, upon the whole evidence, if they believe it, to find the first and second issues 'No.'" But the objection, in our opinion, cannot be sustained. . . . We think it clear that the prayer of plaintiff, above noted, was properly refused by the judge below.

It is true that in an action of this character, the false statements must be such that they are reasonably relied upon by the complaining party. It is also true that when an adult of sound mind and memory, and who can read and write, signs or accepts a formal written contract, he is ordinarily bound by its terms. Floars *v.* Ins. Co., 144 N. C. 232. In such case it is very generally held that a man should not be allowed to close his mind to facts readily observable and invoke the aid of Courts to upset solemn instruments and disturb and disarrange adjustments so evidenced, when the injury complained of is largely attributable to his own negligent inattention.

Older cases have gone very far in upholding defences resting upon this general principle, and, as pointed out in May *v.* Loomis, 140 N. C. 357–358, some of them have been since disapproved and are no longer regarded as authoritative; and the more recent decisions, on the facts presented here, are to the effect that the mere signing or acceptance of a deed by one who can read and write shall not necessarily conclude as to its execution or its contents, when there is evidence tending to show positive fraud, and that the injured party was deceived and thrown off his guard by false statements designedly made at the time and reasonably replied upon by him. Some of these decisions, here and elsewhere, directly hold that false assurances and statements of the other party may of themselves be sufficient to carry the issue to the jury when there has been nothing to arrest attention or arouse suspicion concerning them. Walsh *v.* Hall, 66 N. C. 233; Hill *v.* Brower, 76 N. C. 124; May *v.* Loomis, 140 N. C. 350; Griffin *v.* Lumber Co., 140 N. C. 514. . . .

In Griffin *v.* Lumber Co., *supra*, the Court held as follows:

"3. Before signing a deed, the grantor should read it, or, if unable to do so, should require it to be read to him, and his failure to do so, in the absence of any fraud or false representation as to its contents, is negligence, for the result of which the law affords no redress; but when fraud or any devise is resorted to by the grantee which prevents the reading or having read the deed, the rule is different."

And like decision was made in May *v.* Loomis, *supra.*

Under these authorities, the judge below correctly ruled that the questions at issue should be submitted to the jury, the evidence bringing the case clearly within the principle stated. . . . There was testimony on the part of plaintiff in denial of defendant's claim; but, for the purpose of the exception, the evidence of defendant must be taken as true, and, as stated, presents a case for the consideration of the jury.

The exceptions to the ruling of the Court in questions of evidence are without merit, and the judgment for defendant is affirmed.

No error.

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808. ESSEX *v.* DAY

SUPREME COURT OF ERRORS OF CONNECTICUT. 1885

52 *Conn.* 483

SUIT for the correction of certain bonds issued by the plaintiffs, which were in terms payable at the end of twenty years from their date, but which were intended to be issued with a provision that the town might at its option pay them in ten years from date; brought to the Superior Court in Middlesex County. The following facts were found by a committee: On the 25th day of September, 1869, the town of Essex subscribed for four hundred and eighty shares of the capital stock

of the Connecticut Valley Railroad Company, and on the 27th day of April, 1870, directed the issue of town bonds to the amount of $48,000 to pay for the stock. . . .

At a special meeting held on the 27th day of April, 1870, a committee had made the following report: "That the town issue coupon bonds of the denomination of one thousand dollars each, numbered from one to forty-eight consecutively, to be payable at the option of the town in ten years from date, and due in twenty, denominated ten-twenty bonds, bearing interest six per cent per annum; the interest payable semi-annually; . . ." The town passed the resolution recommended and the selectmen at once entered upon their duties under it. They did not intend to have the bonds printed as they were printed, as below stated, but did intend that they should be printed so as to be payable at the option of the town in ten years from their date.

The printing of the bonds was procured by James C. Walkley, the president of the railroad company, who attended to that duty for Essex and other towns. He did it for Essex at the request of C. O. Spencer, agent of the town, who gave him a written memorandum which Mr. Walkley gave to the Kellogg & Bulkeley Printing Company, and which called for ten-twenty bonds only. The printing company consulted with Mr. Walkley as to the general form of the bonds, and showed him blank forms of bonds; but the bonds were printed twenty-year bonds by mistake in the printing. The bonds as printed were returned to the agents of the town, and "competent authority" appointed by the selectmen signed them and they were then left with the town treasurer to be sold. There were in all forty-eight bonds of $1,000 each. Of these bonds the four in question in this case were sold about January 1, 1870, to F. A. Tiffany, then a citizen of the town of Essex. Each bond had attached interest coupons payable every six months through the twenty years from date. . . . At the time the town treasurer signed the bonds he signed them supposing they were payable at the option of the town in ten years from their date. He signed them all without reading any of them. The bonds were left with the town treasurer for delivery to purchasers. . . .

At the time Tiffany bought the bonds the then town treasurer, Edward W. Redfield, told him that the bonds were ten-twenty bonds, and at the option of the town could be called in and paid at the expiration of ten years from their date, and that such was the vote of the town in authorizing the issue of the bonds. But Tiffany did not care whether the bonds were redeemable in five, ten, or twenty years, and would have bought them as readily in the one case as in either of the others. Tiffany sold these bonds in the autumn of 1878 to Daniel S. Swan. Before Swan bought them he called upon the then town treasurer in relation to the bonds, and to know what the action of the town would be, and the treasurer told him what the vote of the town was in authorizing the issue of the bonds, and that the town would call them in at the expiration

of ten years from their date, and pay them up; and that the town had already called them in, but by mistake they had been called a year too soon. Swan sold these bonds to the defendant April 20, 1880, at a premium of not over two per cent. The defendant at the time of his purchase had full knowledge of the vote of the town in relation to the issue of the bonds, and that the town had called them for payment. . . . On the 25th of February, 1880, the town gave notice by publication in various newspapers that the bonds would be paid at the office of the treasurer on the 1st of April, 1880, and that interest upon them would cease at that time. None of the agents of the town appear to have had any knowledge that there had been a mistake in the issue of the bonds until the town was informed, after February 25, 1880, by the Chelsea Savings Bank, a holder of some of them, that the bonds on their face were twenty year bonds and not redeemable before. . . . Upon these facts the Court (Sanford, J.) rendered judgment for the plaintiffs and for a correction of the bonds by inserting in them an option on the part of the plaintiffs to pay them at the expiration of ten years from their date. The defendant appealed.

G. G. Sill, for the appellant. 1. The mistake arose from the gross negligence of the plaintiffs, and equity will not assist a person whose condition is attributable only to the want of that diligence which may fairly be expected from a reasonable person. . . . 2. If the defendant had the information that could be obtained from inspecting the records of the town, yet he had a right to rely on the recitals and words of the bond. . . .

J. Phelps and *M. E. Culver*, for the appellees.

Loomis, J. — It is not necessary for us to consider in this case whether the bonds issued by the town are to be regarded as negotiable and therefore protected in the hands of a bona fide holder against the correction which the plaintiffs seek to procure. We may assume for the purposes of this case, that, in the absence of notice on the part of the defendant of the error claimed by the plaintiffs to have intervened in the printing of the bonds, the correction could not be made.

Starting with this assumption, the questions which present themselves for consideration are the following: 1. Have the plaintiffs, through their agents, been guilty of such negligence, either in the original execution and issuing of the bonds, or in the seeking of a correction of the error when discovered, as precludes them from the equitable relief which they seek? 2. Did the first purchaser of the bonds, and afterwards the purchaser from him, and finally the defendant at the time of his purchase, have such knowledge of the error in the bonds, either actual or to be imputed, as gives the plaintiffs a right, as against them, to the equitable relief which they seek? 3. Was the error one of such a character that it can be corrected by a Court of equity? . . .

1. And first — have the plaintiffs been guilty of a fatal negligence? . . . We think therefore that the negligence of the plaintiffs, in the

execution and issuing of the bonds, was not of such a character as to preclude all equitable relief against the present defendant. . . .

2. Did the first purchaser of the bonds in question, and afterwards the purchaser from him, and finally the defendant at the time of his purchase, have such knowledge of the mistake, either actual or to be imputed, as gives the plaintiffs a right, as against them, to the equitable relief which they seek? . . . We think the only reasonable view of the matter is, that the defendant knew, or had such information that the law would impute to him knowledge, that the bonds were by mistake issued as twenty year bonds instead of ten-twenty ones.

3. Was the mistake one of such a character that it can be corrected by a Court of equity? It is claimed by the counsel for the defendant that the mistake, in such a case, must be mutual, and the cause of the agreement, and numerous authorities are cited in support of the proposition. This rule, within the limits of its proper application, is founded in reason. If a contract is corrected by a Court of chancery to make it conform to the intention of one of the parties, it is of course forcing a contract upon the other party which he never intended to make, unless his own intent concurred with that of the other party.

But this case is not that of that character nor governed by that rule. A grantor by mistake embraces in his deed a parcel of land that neither party intended to have conveyed. The grantee sees his mistake, but does not call the attention of the grantor to it, and afterwards claims the parcel thus accidentally conveyed. Or a person offers a reward of $100 for the detection and arrest of a burglar, but by mistake and without his notice it is printed $1,000. A man who knows of the mistake arrests the burglar and claims the $1,000. In each of these cases the error is not mutual, but wholly on the one side. What is there on the other? Not mistake, but fraud. That fraud can never stand for a moment in a Court of equity. But suppose the case to be one where, instead of actual fraud, there is merely such knowledge, actual or imputed by the law, as makes it inequitable for the purchaser to retain his advantage. The Court will deal as summarily with that inequitable position of the party, as in the other case with his fraud. . . .

It is however claimed, on the part of the defendant, that the mistake must have been one that induced the contract on the part of the purchaser; that is to say, that the purchaser must have taken the bonds for the very reason that they were twenty year bonds and not ten-twenty ones. But it is obvious that the hardship attending the correction of a contract is all the greater where the other party accepted the contract for the reason that he supposed himself to be acquiring what the correction of it deprives him of. But supposing the purchasers of the bonds in question had taken them in entire indifference as to whether they were twenty year or ten-twenty bonds, and that the defendant was now endeavoring to assert rights under them to which he had before been indifferent, would there be no remedy in equity? Can it be claimed

for a moment that equity, which deals with substance and not mere form, which applies reason and not mere arbitrary rules, would see no substantial difference between the case of a party who, when he accepted the contract, was indifferent with regard to a known mistake and so remained, and one who, at first indifferent, was now trying to take an unjust advantage of the mistake?

We conclude, therefore, that there was nothing in the nature of the mistake, or in the relation of the parties to it, that should lead a Court of equity to refuse the relief sought.

There is no error in the judgment.

In this opinion GRANGER and BEARDSLEY, JJ., concurred.

CARPENTER, J. (dissenting). . . . It will be observed that the negotiations related to existing bonds, and not to bonds to be subsequently prepared pursuant to any agreement they might make. There was no contract that the bonds should be of a certain description. Tiffany made no agreement whatever in relation to that matter. As to that he was totally indifferent. The town simply represented that an article which it had to sell was of a certain description. Tiffany neither assented to it nor denied it, as it was of no consequence to him. It was simply a sale of the bonds as they were, without warranty or other agreement. . . . But the plaintiff must not only show that there was such a contract, but also that Swan, a subsequent owner of the bonds, and the defendant, had notice of it when they purchased. In respect to Swan. . . . Here is no verbal agreement between Swan and the town, and there is not the slightest intimation that Swan had any knowledge whatever of any agreement with Tiffany. How is it with the defendant? In respect to him the finding is as follows: "Swan sold these bonds to the defendant April 20, 1880, at a premium of not over two per cent. The defendant at the time of his purchase had full knowledge of the vote of the town in relation to the issue of the bonds, and that the town had called them for payment." What is the effect of such knowledge? It gave the defendant no notice of any contract with Tiffany, and there is no other evidence that he had such notice. . . . The only evidence of such circumstances or implied agreement is the extract from the finding just quoted. If found there it is because the defendant then knew of certain facts. Now it is true that mere knowledge will often subject a man to pre-existing equities; but how it can be regarded as sufficient evidence of a contract, or, in law, as the equivalent of a contract, is beyond my comprehension. . . . These bonds had been in existence ten years; he found them in the market; he knew the claims of the town in respect to them; but he knew at the same time that they were not in fact as the town claimed them to be. Under these circumstances he had a perfectly legal, equitable, and moral right to purchase them, relying upon the liability of the town as therein expressed. A judicial decree changing them to his prejudice is arbitrary and unwarranted, and a decree for which I am sure no precedent can be found.

But suppose that I am wrong as to the facts, and in my conclusions therefrom; even then I say the law will not justify such a decree. . . . "Mistake in matter of law or matter of fact, to be a ground for equitable relief, must be of a material nature, and must be the determining ground of the transaction. . . ." It cannot be said that the mistake concerned the substance of the transaction; it concerned a mere incident, and that an unimportant one. . . .

But I go further, and insist that the probability is that the agents of the town did know of the omission before the bonds were sold, and that they sold them knowingly — in short, that *there was no mistake*. There is no direct explicit finding that there was a mistake. It is found that a mistake occurred in printing the bond, but the essential thing is, and that is not found, that the mistake was unknown when the bonds were sold and the money received. . . . But did it appear in evidence that they did not? That is the important inquiry; and the report gives us no answer, except by its silence. And such an answer must be regarded as a negative one. . . .

But suppose that I am wrong in this, and that the fact was clearly proved and expressly found, then another question arises. In 1 Story's Equity Jurisprudence, § 146, this rule is laid down: "It is not, however, sufficient in all cases to give the party relief that the fact is material; but it must be such as he could not by reasonable diligence get knowledge of, when he was put upon inquiry. . . ." The slightest diligence would have disclosed the fact. It was only necessary to read the bond to discover the omission. A want of slight diligence in such matters is culpable negligence.

The plaintiff then is in this dilemma, — if its agents read the bond they had knowledge of the mistake and issued the bonds understandingly, and that is fatal to the case; if they did not, they were guilty of culpable negligence, and that is equally fatal.

Fark, C. J. (dissenting). I cannot concur in the result to which the majority of the Court have come upon the question whether the plaintiff town exercised its optional right to make the bonds payable at the end of ten years. . . .

I think there is error in the judgment appealed from.

809. MEDLEY *v.* GERMAN ALLIANCE INSURANCE CO.

Court of Appeals of West Virginia. 1904

55 *W. Va.* 342; 47 *S. E.* 101

Error to Circuit Court, Kanawha County; F. A. Guthrie, Judge.

Action by Lucy A. Medley against the German Alliance Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

Watts & Ashby and *Chilton, MacCorkle & Chilton*, for plaintiff in error. *A. W. McDonald, Brown, Jackson & Knight, Linn, Byrne & Cato*, and *A. B. Littlepage*, for defendant in error.

POFFENBARGER, P. The German Alliance Insurance Company complains of a judgment of the Circuit Court of Kanawha County rendered against it, and in favor of Lucy A. Medley, for the sum of $1,732, in an action of assumpsit upon a policy of insurance upon a dwelling house, and personal property therein, for the sum of $1,500; alleging that the Court erred in overruling its motion to exclude the plaintiff's evidence, made at the conclusion thereof, and its motion to exclude all the evidence and direct a verdict, made after all the evidence had been introduced; in giving to the jury five several instructions, and each of them; in refusing to set aside the verdict; and in entering judgment thereon.

One of the principal defences to the action, raised by a proper plea, and which forms the subject-matter of instructions given and refused, is the alleged breach of a condition of the policy which reads as follows: "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto shall be void . . . if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground *not owned by the insured in fee simple*." No such provision was indorsed on the policy. Mrs. Medley's title to the land on which the building stood is evidenced by a deed by which the Kanawha Valley Bank, a corporation, "doth grant and convey unto" her the lot (describing it,) and which contains, in the habendum clause thereof, the following: "And it is fully understood and agreed between all of the parties herein interested that the said lot of land is hereby conveyed by the parties of the first part to the party of the second part for and during her lifetime and at and after her death the title to the said lot is to pass unto and vest in her children born and unborn."

No written application for the policy was made. The contract of insurance was effected by Thomas Popp, on behalf of the company, as its agent, and G. W. Medley, the husband of the plaintiff, as her agent. The insurance was solicited by the company through Popp, who inquired of Medley, before issuing the policy, as to the person in whose name the deed was, in response to which Medley said: "The deed is deeded to my wife and her heirs, born and unborn." George Medley, a son of the insured, says his father told Popp the property was deeded to his mother and her heirs, and also that there was a lien upon it by deed of trust for $300 in favor of Ben Baer. Both father and son say the agent inquired, not as to the estate or interest of Mrs. Medley in the property, but as to the name of the person to whom it was deeded. Popp's testimony was not taken.

The policy contained the following additional clause, limiting the authority of the agent: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon or

added hereto, and no officer, agent, or other representative of these companies shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

1. In Wolpert *v.* Northern Assur. Co., 44 W. Va. 734, this Court held that "if an insurance company elects to issue its policy of insurance against a loss by fire without any regular application, or without any representation in regard to the title to the property to be insured, it cannot complain, after a loss has occurred, that the interest of the insured was not correctly stated in the policy, or that an existing incumbrance was not disclosed." . . . The agent of an insurance company, in preparing, or directing the preparation of, an application for insurance, acts for his company, and not for the applicant. He is the agent of the company, and not the agent of the applicant, and, in what he does, binds the company, and not the applicant, if he acts improperly.

"Though the weight of the modern authorities, as well as reason, in my judgment, leads to the conclusion that where an application for a policy, which is filled up by an agent of an insurance company, and signed by the insured on the faith that it has been properly filled up, who has not read the application, though he had an opportunity to do so, if none of the false answers were given by him, but were inserted by the agent of the insurance company either fraudulently or by mistake, where the mistake was not the result of anything said or done by the insured, the insured or assured is not bound by such false answers inserted in the application, but these answers should be regarded as the act of the insurance company, by its agent, and not as the act of the insured. It is true, this position is still controverted by respectable authorities. . . . But outside of Massachusetts the weight of authority now seems to be in favor of the position that, under circumstances above stated, false answers in the application for an insurance will not forfeit the policy, and I concur in this view." Green, J., in Schwarzbach *v.* Insurance Co., 25 W. Va. 622, 663.

This view is embodied in point 12 of the syllabus of said case. The same doctrine is reiterated in Deitz *v.* Insurance Co., 31 W. Va. 851. . . .

2. It is denied, however, that this law is applicable to the case in hand, for the reason that the policy contains a clause limiting the power of the company's agent to waive conditions of the policy. As the policy was delivered into the hands of the insured with this clause plainly printed in it, it is said that she had notice of it, and was bound to know, whether she read the policy or not, that the agent had no power to issue a policy upon any other conditions than those stated in it.

It is difficult to see any solid ground for this distinction. . . .

The decisions [supporting it] are founded largely upon that of the

Supreme Court of the United States in the case of Insurance Co. *v.* Wilkinson, 13 Wall. 222, in which Mr. Justice MILLER, delivering the opinion, said:

"If, however, we suppose the party making the insurance to have been an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations, and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it, and yet, knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement would be an act of bad faith, and of the grossest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract, and that it was made by the defendant, who procured the plaintiff's signature thereto. . . . The powers of the agent are prima facie coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals."

But this is said not to be applicable to the case in hand, for the reason that notice of the agent's want of authority to waive conditions was not brought home to the applicant in that case. It is also said that a limitation in the policy is notice. . . . It is further said that subsequent decisions of the Supreme Court of the United States, as well as some prior to that of Insurance Co. *v.* Wilkinson, are authority for the position that the limitation clause in the policy is notice. . . . Another one is Assurance Co. *v.* Building Ass'n, 183 U. S. 308, relied upon by this Court as authority for the decision in Maupin *v.* Insurance Co. 45 S. E. 1003, and it does actually decide as follows: "Where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power. Where such limitation is expressed in the policy, the assured is presumed to be aware of such limitation." This much of the decision is based upon the prior decisions of that Court hereinbefore referred to and explained, all of which are cases showing either that there was notice in the application prior to the issuance of the policy, or that the principle had only been applied to conditions in the policy, the violation of which subsequent to its issuance rendered it invalid and noneffective. Hence it is clear that the doctrine has been extended in this last case to limits beyond those theretofore defining its application. . . . Moreover, at best, it is only presumptive, not conclusive or actual, notice. In the case last cited, the Court says the assured is presumed to be aware of such limitation. . . .

A large number of the States hold, for one reason or another, that the limitation, expressed in the policy, of the authority of the agent, or prohibition of his authority to waive conditions, has no application to those

conditions which relate to the making or inception of the contract, but only to conditions inserted in the contract as actually made, and to be thereafter observed. . . . For this position, decisions by the Courts of Georgia, Kentucky, Michigan, Missouri, New York, Pennsylvania, South Carolina, Texas, Wisconsin, and West Virginia are cited, and there are others. . . . So, in Dewees *v.* Manhattan Ins. Co., 35 N. J. Law 366, . . . it appears that the only trouble in New Jersey as to this power of waiver is the selection of the proper forum in which to assert it. You cannot have it in a Court of law, but you may have it in a Court of equity. In this State no such difficulty exists. This Court has not been turning the assured round to a suit in equity to have reformation of this contract. . . .

3. The only ground upon which this right of reformation can be denied is laches. How is the person into whose hands the policy of insurance is placed to know whether it has been drawn according to the verbal understanding of the parties, until after he has read it? Is he to reject it upon suspicion? Has he not the right to assume for the time being that it has been properly drawn? As a matter of fact, is it not common knowledge that agents are relied upon to properly prepare the policies, and that they are scarcely ever critically examined before acceptance? There can be no notice until after the reading, and, after the acceptance of the policy, there can be nothing more than a sort of implied notice; and a Court of equity will not hold the party guilty of laches for mere negligence to actually read the policy, any more than it will in the case of a deed. . . .

4. The only new element in this case which could possibly distinguish it from the decisions made by this Court, to which reference has been made (as holding that where the agent of the company issues a policy without having taken any written application therefor, or, having taken one, has incorrectly stated therein the information given to him by the applicant, the company is estopped from relying upon facts, existing at the time the contract was made, differing from those incorrectly stated in the application for the policy) is the alleged notice of want of authority in the agent, conveyed by incorporating the limitation clause in the policy. If this is not notice, there is nothing else in the case which forms the basis of even a pretence that it is to be distinguished from the other cases. Nothing more need be said to show that it is not conclusive, actual notice, irrevocably and unalterably binding the insured. To say so would be to take a position inconsistent with the law relating not only to insurance contracts, but all other kinds of contracts. . . .

In this case the agent of the insured, when solicited to take insurance upon the property, did not say that the title of the insured was the fee-simple estate in the property. He said either "the deed is deeded to my wife and her heirs born and unborn," or that "the property was deeded to Mrs. Medley and her heirs." To any one but a person learned

in the law, this would hardly be taken to mean the fee-simple title. To the layman it imports an estate in the heirs. Under the rule in Shelley's Case, the word "heirs" in such deed is a word of limitation, and not of purchase; and the rule involves intricate and fine distinctions, incomprehensible to any person except those who have studied the law. Upon this information, the agent assumed to write in the policy that Mrs. Medley owned the fee-simple title to the lot on which the building stood. Had he put upon that policy the words actually used by the agent of the insured, the company would, no doubt, have made inquiries which would have disclosed the actual state of the title. If the company has been prejudiced, the fault rests with its own agent. Upon the principles hereinbefore referred to, it is clear that no advantage of it can be taken by the company. . . .

Hence the Court did not err in refusing to give defendant's instructions Nos. 3, 4, and 9, which read as follows:

"(3) The jury are instructed that if they believe from the evidence that the agent, Thos. Popp, who solicited said insurance, inquired of the agent and husband of the plaintiff as to who owned the property to be insured, and said agent stated to said Popp, in answer to said inquiry, that the deed to said real property was to his wife and her heirs, born and unborn, or to her and her heirs, then the plaintiff is not entitled to a verdict in this case. . . .

For the other error above noted, as well as for insufficiency of evidence to support the verdict, the judgment will be reversed, the verdict set aside, a new trial granted, and the case will be remanded.

Reversed.

Note by BRANNON, J.— I agree to the judgment.

1. I do not agree to the opinion excusing one from reading a policy before he accepts it, and excusing him from its conditions because he did not read or understand it. I think that when a man accepts a deed he is bound by its terms. If it departs from the agreement, and he accepts it, he waives the points of departure. The agreement is merged. The deed is a contract; so is a policy of insurance. Weidert *v.* State Ins. Co., 20 Am. St. R. 809. I do not agree to take from the company the condition that the policy should be void, if the insured owned less than a fee. A company would be willing to take a risk, if the insured owned a fee, but not if he owned only a life estate. . . . The insured is bound to know the meaning of the policy, and cannot plead ignorance of law.

2. I do not agree to allow oral evidence preliminary to the contract to change its terms. The authorities given in Maupin *v.* Scottish Union, 45 S. E. 1003 (53 W. Va. 557), will sustain this view. That oral evidence is that the agent was told that the deed was to Mrs. Medley and heirs. That in law meant a fee simple, just as the policy says. So, the agent did not write the policy different from the statement, in the eye of the law.

3. I do not agree that the disability of the agent to waive vital con-

ditions extends only to things occurring subsequently to the issue of the policy. It is agreed that an agent may not, after the policy issues, waive conditions; but it is said before it issues, he may waive the duty of the insured to conform thereafter to its requirements, and may waive the presence or existence of essential facts at the date of issue, for instance, that the party has a fee simple. That is, though the company is willing to risk only on the basis of a certain state of things, yet the agent in every place can waive them, and accept another basis, and this in the face of the policy which says that it is issued on the faith of a certain specified basis, and further that no agent can dispense with that basis. This seems to deny right of contract and to be hard and unjust to insurance companies, which are valuable institutions to the country. . . . I have always understood that a purchaser of and is bound to know, whether in fact he does or not, clauses, conditions and limitations, not only in the last instrument in the chain of title, the deed to him, but also away back in any deed in the chain; but here it is proposed to release a party from a condition set before his eyes in the very deed to him. Waldron *v.* Harvey, 46 S. E. 603, 54 W. Va. 608. An insurance company deals with persons far off, and has to do so by agents. If bound by their waivers, by agreements between the insured and the agents, it would be ruined. It would be subject to oral evidence, sometimes true, oftener false. It is absolutely necessary that it put its terms and conditions in its policy, and if you nullify these, it has no protection. You impair, destroy its contracts. . . .

4. As to the argument that the agent was told one thing as to the title, and wrote another in the policy, and therefore the policy can be reformed, so as to conform to the statement. That makes it conform to what the one side agreed to, but what the other side never agreed to. That forces on the company a contract it never made. Equity never reforms a deed except to correct *mutual* mistake. Where both sides do agree to the same particular thing, and agree to have an instrument drawn to do that thing, and the scrivener fails to make the document accomplish what both parties intended it to do, equity will reform; but not where both sides never agreed to do that same thing. In the one case you carry out the intention of both sides; in the others, you carry out the intention of *one* side, but defeat the intention of the *other*, and make for him a new agreement. In such case equity will rescind, but not reform. Ferrel *v.* Ferrel, 53 W. Va. 515.

Some of our decisions may seem in contrast with the view above expressed, and if it were not for the recent labored consideration of the whole question by the Supreme Court of the United States in Northern Co. *v.* Grand View, 183 U. S. 308, I should not be so insistent upon the matters above discussed. . . .

Judge MILLER concurs in this note.

810. BAXENDALE *v.* BENNETT

Queen's Bench Division. 1878

L. R. 3 *Q. B. D.* 525

Action commenced on the 10th July, 1876, on a bill of exchange, dated the 11th of March, 1872, for 50*l.* drawn by W. Cartwright and accepted by the defendant, and of which the plaintiff was the holder, and her interest. At the trial before Lopes, J., without a jury, at the Hilary Sittings in Middlesex, the following facts were proved: The bill dated the 11th of March, 1872, on which the action was brought, purported to be drawn by one W. Cartwright on the defendant, payable to order at three months' date. It was indorsed in blank by Cartwright, and also by one H. T. Cameron. The plaintiff received the bill from Cameron on the 3rd of June, 1872, and was the bona fide holder of it, without notice of fraud, and for a valuable consideration. One J. F. Holmes had asked the defendant for his acceptance to an accommodation bill, and the defendant had written his name across a paper which had an impressed bill stamp on it, and had given it to Holmes to fill in his name, and then to use it for the purpose of raising money on it. Afterwards Holmes, not requiring accommodation, returned the paper to the defendant in the same state in which he had received it from him. The defendant then put it into a drawer, which was not locked, of his writing table at his chambers, to which his clerk, laundress, and other persons coming there had access. He had never authorized Cartwright or any person to fill up the paper with a drawer's name, and he believed that it must have been stolen from his chambers.

On these facts the learned judge found that the bill was stolen from the defendant's chambers, and the name of the drawer afterwards added without the defendant's authority; but that the defendant had so negligently dealt with the acceptance as to have facilitated the theft; he therefore ruled upon the authority of Young *v.* Grote (4 Bing. 253), and Ingham *v.* Primrose (7 C. B. (N. S.) 82), that the defendant was liable, and directed judgment to be entered for the plaintiff for 50*l.* and costs. . . .

May 4. *Bittleston* (*Rolland*, with him), for the defendant. The question is, whether a blank acceptance, lost by the alleged acceptor, before its delivery to any one, and subsequently filled up by a stranger and put into circulation, can be sued on by a bona fide holder for value. No action can be brought on such an instrument, for it is merely an inchoate bill; and there can be no implied authority to any one to make the bill complete, for it was never intended that it should be issued. . . . Young *v.* Grote, 4 Bing. 253, and Ingham *v.* Primrose, 7 C. B. (N. S.) 82; 28 L. J. (C. P.) 294, will be relied on by the plaintiff, but in those cases the documents were complete. Awde *v.* Dixon, 6 Ex. 869, is in

point for the defendant. There is no evidence of negligence on the part of the defendant to make him liable to the plaintiff. . . . Leaving the blank acceptance in an unlocked drawer in his chambers is not that species of negligence which disentitles the defendant from insisting that the bill is invalid. . . .

Jeune, for the plaintiff. The defendant having been guilty of negligence, the plaintiff, being a holder for value, is entitled to recover. . . . In Byles on Bills, 11th ed. at p. 187, the author seems to be of opinion that the writer of a blank acceptance not delivered, but lost or stolen without any negligence on his part, would not be liable; in the present case the defendant has been guilty of such negligence as, according to Ingham *v.* Primrose, 7 C. B. (N. S.) 82; 28 L. J. (C. P.) 294, would make him liable. In that case the defendant gave the bill to M. to get it discounted, and M., failing to do so, returned it. The plaintiff then tore it in half and threw it into the street. M. picked it up, joined the pieces together, and negotiated it. The jury found that the defendant intended to cancel the bill; he was, however, held liable on the authority of Young *v.* Grote, 4 Bing. 253, on the ground that he had led to the plaintiff becoming the holder of it for value.

Bramwell, L. J. — I am of opinion that this judgment cannot be supported. The defendant is sued on a bill alleged to have been drawn by W. Cartwright on and accepted by him. In very truth he never accepted such a bill; and if he is to be held liable, it can only be on the ground that he is estopped to deny that he did so accept such a bill. Estoppels are odious, and the doctrine should never be applied without a necessity for it. It never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he had said or done, or failed to say or do. Is that the case here? Let us examine the facts. The defendant drew a bill (or what would be a bill had it had the drawer's name) without a drawer's name, addressed to himself, and then wrote what was in terms an acceptance across it. In this condition, it, not being a bill, was stolen from him, filled up with a drawer's name, and transferred to the plaintiff, a bona fide holder for value. It may be that no crime was committed in the filling in of the drawer's name, for the thief may have taken it to a person telling him it was given by the defendant to the thief with authority to get it filled in with a drawer's name by any person he, the thief, pleased. This may have been believed and the drawer's name bona fide put by such person. I do not say such person could have recovered on the bill; I am of opinion he could not; but what I wish to point out is that the bill might be made a complete instrument without the commission of any crime in the completion. But a crime was committed in this case by the stealing of the document, and without that crime the bill could not have been complete, and no one could have been defrauded. Why is not the

defendant at liberty to show this? Why is he estopped? What has he said or done contrary to the truth, or which should cause any one to believe the truth to be other than it is? Is it not a rule that every one has a right to suppose that a crime will not be committed, and to act on that belief? Where is the limit if the defendant is estopped here? Suppose he had signed a blank cheque, with no payee, or date, or amount, and it was stolen, would he be liable or accountable, not merely to his banker the drawee, but to a holder? If so, suppose there was no stamp law, and a man simply wrote his name, and the paper was stolen from him, and somebody put a form of a cheque or bill to the signature, would the signer be liable? I cannot think so.

But what about the authorities? It must be admitted that the cases of Young *v.* Grote and Ingham *v.* Primrose go a long way to justify this judgment; but in all those cases, and in all the others where the alleged maker or acceptor has been held liable, he has voluntarily parted with the instrument; it has not been got from him by the commission of a crime. This, undoubtedly, is a distinction, and a real distinction. The defendant here has not voluntarily put into any one's hands the means, or part of the means, for committing a crime. But it is said that he has done so through negligence. I confess I think he has been negligent; that is to say, I think if he had had this paper from a third person, as a bailee bound to keep it with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion. . . .

Brett, L. J. — In this case I agree with the conclusion at which my Brother Bramwell has arrived, but not with his reasons. . . . It seems to me that the defendant never authorized the bill to be filled in with a drawer's name, and he cannot be sued on it. . . . In this case it is true that the defendant after writing his name across the stamped paper sent it to another person to be used. When he sent it to that person, if he had filled it in to any amount that the stamp would cover, the defendant would be liable, because he sent it with the intention that it should be acted upon; but it was sent back to the defendant, and he was then in the same condition as if he had never issued the acceptance. The case is this: the defendant accepts a bill and puts it into his drawer, it is as if he had never issued it with the intention that it should be filled up; it is as if after having accepted the bill he had left it in his room for a moment and a thief came in and stole it. He has never intended that the bill should be filled up by anybody and no person was his agent to fill it up. Then it has been said that the defendant is liable because he has been negligent; but was the defendant negligent? . . . He put the bill into a drawer in his own room; to say that was a want of due care is impossible; 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. . . . In the present case I think there was no estoppel, no

ratification, and no negligence, and that the defendant is entitled to our judgment.

BAGGALLAY, L. J., concurred, that the judgment ought to be entered for the defendant.

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811. HUBBARD *v.* GREELEY

SUPREME JUDICIAL COURT OF MAINE. 1892

84 *Me.* 340; 24 *Atl.* 799

ON Report. This was a real action for the recovery of a tract of land on Mt. Desert Island, containing over forty-six acres, and called the Smallidge Lot. Writ dated February 28, 1888. The defendants claimed title by a regular chain of deeds, all seasonably recorded. Among other deeds they introduced one from Seavy and Clark to T. and R. W. Boyd, dated January 26, 1878, and recorded July 15, 1878, which the plaintiff claimed had been placed in escrow and was improperly delivered.

The plaintiff claimed title from deed of the Boyds, dated May 27, 1876, recorded September 24, 1887; deed of Seavy to Crowell dated September 15, 1874, but not recorded; deed of Clark and Crowell to himself, dated October 1, 1878, recorded August 25, 1879; and deed from Seavy to himself dated September 6, 1887, recorded September 9, 1887.

It was admitted that premises in 1872 belonged to one Swazey, under whom both parties claimed title. By *mesne* conveyances the title stood February 12, 1874, in Seavy, Clark and Boyds, one-third each. The principal issue between the parties turned on the question whether the plaintiff could properly show that the deed of Clark and Seavy, dated January 26, 1878, had been placed in escrow and was improperly delivered. The defendants, claiming that they were bona fide purchasers for value and without notice, objected to the admission of the evidence offered by the plaintiff on this point. The facts are found in the opinion.

A question of construction of this deed also arose, which is stated in the head note, relating to the quantity of interest in the land conveyed. It was conceded that if the Court decided against the plaintiff on the first question and in favor of the plaintiff upon the second question (one half of the "Smallidge" lot conveyed by that deed, making five-sixths in the Boyds), the plaintiff would be entitled by reason of his conveyances to the remaining one-sixth. . . .

Wiswell, *King*, and *Peters*, for plaintiff. A deed delivered without the consent of the grantor is absolutely void; it is like a forged or a stolen deed and passes no title to the grantor which he can part with. The principle, that where one of two innocent parties must suffer, he whose act has caused the loss must bear it, does not apply, because, principally, the depositary is not the agent of the grantor any more than of

the grantee; he is simply a person agreed upon by both parties to hold the escrow until the happening of a particular event. Even if he was the agent of the grantor, as has often been insisted upon in argument, but not sustained by the authorities, he would be an agent only with limited authority, which authority is particularly understood by the grantee. There is no negligence upon the part of a person in placing a deed as an escrow in the hands of a responsible person agreed upon by the parties. There is no more equity in favor of the innocent purchaser than there is in favor of the person whose deed has been delivered without his knowledge and against his consent. The case is similar to that of a person who makes a deed, executes it, and keeps it in his possession ready for delivery when certain conditions have been complied with. If such a deed should be stolen for or by the grantor, it could not for a moment be claimed that it would pass any title to the grantee which he could convey to an innocent purchaser.

We think the whole distinction lies in the difference between a voidable deed and a void deed. If a deed is delivered with the consent of the grantor, even if that consent is obtained by fraud or even perhaps by duress, and under such circumstances that the grantor could reinvest himself with the title, yet until the deed is avoided, the title passes and the grantee can transfer that title to a purchaser for value, without notice, who can hold against the person who has been defrauded of his property; this is not true as to a forged deed, a stolen deed, or a deed delivered without the consent of the grantor. . . .

Hale and *Hamlin*, for defendants.

Walton, J. Whether the grantee named in a deed delivered as an escrow, who has wrongfully obtained it and put it on record, can convey a good title to a bona fide purchaser, is a question in relation to which the authorities are in conflict. In Blight *v.* Schenck, 10 Pa. St. 285, the Court held, in a full and well-reasoned opinion, that the title of a bona fide purchaser could not be defeated by proof that one of the deeds through which he claimed title was a wrongfully obtained and a wrongfully recorded escrow. The Court rested its decision on the fact that the custodian of an escrow is the agent of the grantor as well as the grantee, and, if one of two innocent persons must suffer by the wrongful act of the agent, he who employs an unfaithful agent, and puts it in his power to do the act, must bear the loss; that the agent has the power to deliver the deed, and, if he delivers it contrary to his instructions, he will be answerable to his principal; and it is therefore reasonable that the latter, and not the innocent purchaser, should bear the loss. In Everts *v.* Agnes, 4 Wis. 343, the contrary was held. But in the latter case the Court appears to have acted in ignorance of the decision in the former case, and in ignorance of the equitable doctrine upon which it rests, although the former decision was made six years before the latter. This, as it seems to us, was an unfortunate oversight; for the former decision is supported by reasoning so strong, and, as it seems to us, so satisfactory,

we cannot resist the conviction that if the attention of the Court had been called to it, and the principles on which it rests, a different conclusion would have been reached; and the subsequent decisions, which have followed the lead of that, would have no existence.

But be this as it may, the authorities all agree that a deed cannot be delivered directly to the grantee himself, or to his agent or attorney, to be held as an escrow; that, if such a delivery is made, the law will give effect to the deed immediately, and according to its terms, divested of all oral conditions. The reason is obvious. An escrow is a deed delivered to a stranger, to be delivered by him to the grantee upon the performance of some condition, or the happening of some contingency, and the deed takes effect only upon the second delivery. Till then, the title remains in the grantor. And if the delivery is in the first instance directly to the grantee, and he retains the possession of it, there can be no second delivery, and the deed must take effect on account of the first delivery, or it can never take effect at all. And if it takes effect at all, it must be according to its written terms. Oral conditions cannot be annexed to it. It will therefore be seen that a delivery to the grantee himself is utterly inconsistent with the idea of an escrow. And it is perfectly well settled, by all the authorities, ancient and modern, that an attempt to thus deliver a deed as an escrow cannot be successful; that in all cases where such deliveries are made the deeds take effect immediately and according to their terms, divested of all oral conditions. And it is equally well settled that, if the delivery is to one who is acting at the time as an agent or attorney of the grantee, the effect is the same. . . .

The principal contention in the present case is whether one of the deeds through which the defendants have derived their title was legally delivered. The deed is from George E. Seavy and Nathaniel H. Clark to Thomas Boyd and Robert W. Boyd. It is dated January 26, 1878, was acknowledged the same day, and recorded July 15, 1878. The plaintiff claims that this deed was delivered as an escrow, and, although acknowledged and recorded, never became operative. Upon the proofs in the case, we do not think such an attack upon the defendants' title is permissible. The proof is that the deed was made and accepted in part payment of a debt owing from the grantors to the grantees, and that it was in fact delivered to one G. C. Bartlette, an attorney at law, who had been employed by the grantees to collect the debt; that Bartlette afterwards sent the deed by mail to the grantees, and that they caused it to be recorded; and that, at the time of the defendant's purchase, the deed had been on record for more than eight years, its validity apparently uncontested and unchallenged. And it is admitted that the defendants are innocent purchasers for value, and, at the time of their purchase, had no notice of the condition of the title other than that disclosed by the record. Under these circumstances, and for the reasons already given, we think the plaintiff is estopped to deny that

the deed was legally delivered. We rest our decision upon the ground that the deed was, in fact, delivered to the grantees' attorney as such, and that such a delivery is equivalent to a delivery to the grantee himself; and that, when such a delivery is made, it is not competent for the grantor, or those claiming under him by a subsequent conveyance, to show by oral evidence that a condition was annexed to the delivery, for the nonperformance of which the deed never became operative.

It seems to us that to hold otherwise would render all deeds of little value as evidence of title. 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 clothe the grantees with apparent titles which are not real titles. Such deeds are capable of being used to enable the grantees to obtain credit which otherwise they could not obtain. 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 used. And when the maker of such an instrument has voluntarily parted with the possession of it, and delivered it into the care and keeping of a person of his own selection, it seems to us that he ought to be responsible for the use that may in fact be made of it; and that in no other way can the public be protected against the intolerable evil of having our public records encumbered with such false and deceptive instruments.

Another question is, whether the deed conveys the whole or only an undivided half of the grantor's interest in the demanded premises. We think it conveys only an undivided half. . . .

Judgment for plaintiff for one undivided sixth part of the demanded premises, and no more.

PETERS, C. J., VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

812. A. M. KIDD. *Delivery in Escrow.* (1907. Illinois Law Review, II, 110.) Deeds — Delivery in Escrow. — As one ground for it decision, our Supreme Court, in Blake *v.* Ogden, 223 Ill. 204, seems to announce the rule that if A executes a deed in which B is grantee and then delivers the deed to a third person upon the condition expressed dehors, the deed itself that it is not to be delivered to B until the death of the grantor's wife, and the deed is delivered to the grantee B in breach of the condition, B, if he had no notice of the condition, will nevertheless obtain a legal title unimpeachable by the grantor in equity after the death of the grantor's wife, although B was a mere volunteer.

Many States hold rigidly to the view that, unless there is a delivery by the holder in escrow according to the terms of the condition, no legal title passes to the original grantee. Therefore, no legal title can pass to any subsequent grantee and it makes no difference whether the original grantee or any subsequent grantee is a bona fide purchaser for value or not (Smith *v.* South Royalton Bank, 32 Vt. 341; Everts *v.* Agnes, 6 Wis. 453; Gould *v.* Wise, 97 Cal. 532; Jackson *v.* Lynn, 62 N. W. R. 704 (Ia.); Harkreader *v.* Clayton, 56 Miss. 383). The Supreme Court should perhaps be regarded as repudiating this view.

Mr. Wigmore (4 Wigmore on Evidence, § 2420) takes this position: "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." In short, the negligent conduct of the grantor may be made the substitute for an actual intent to deliver free of all conditions. It logically follows 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." Such a principle, however, does not seem to explain the language used in the principal case; because there was no evidence that the third party selected as the holder in escrow was an improper person or that the grantor was in any degree negligent or failed to use proper precautions. Mr. Wigmore's view would seem to apply to the principal case only provided it were ipso facto negligent to make any delivery at all to a third party on condition. Perhaps some cases go so far. (Schurtz *v.* Colvin, 45 N. E. R. 527 (Ohio); Quick *v.* Milligan, 108 Ind. 419.)

It is true that the cases in which the bona fide purchaser is protected in a legal title against the grantor (Schurtz *v.* Colvin, 45 N. E. R. 527 (Ohio); Blight *v.* Shenck, 10 Pa. St. 285; Quick *v.* Milligan, 108 Ind. 419; Hubbard *v.* Greeley, 84 Me. 340) might proceed (apart from Mr. Wigmore's theory) upon the ground that the delivery contrary to the conditions dehors the deed imposed by the grantor nevertheless passes the legal title to the grantee, which the grantee may pass on to others, but that the original grantee or any subsequent purchaser with notice holds the legal title upon a constructive trust for the original grantor. In this view the only question is, what facts exist which cut off the equity of the grantor. Clearly it is cut off if the grantee or any subsequent purchaser from him is a bona fide purchaser.

In the case at bar, however, the facts do not come up to that. The grantee is innocent of any delivery in breach of the condition. He is not a purchaser for value, but a mere volunteer. Ordinarily this is not enough to cut off an equity. But the situation here is peculiar. The event upon which the grantee was to take was sure to have happened sometime and has in fact happened. It seems pretty hard to say that because of the act of the escrowee unknown to the grantee to be improper, the grantee is to be entirely deprived and the grantor's heir let in. And yet the grantor was doing what he wished with his own, and however little he may have been damaged or inconvenienced, the violation of his expressed wishes cannot be made good to him. The breach of the condition is nothing that can be made good to the grantor in money. In this respect the case is not unlike that where there is a breach by the tenant of a condition to keep the premises insured. Equity will not, under those circumstances, relieve the tenant from a forfeiture for breach of the condition, although the tenant has taken out insurance and though no loss has occurred: Rolf *v.* Harris, 2 Price 206; Reynolds *v.* Pitt, 19 Ves. Jr. 134; White *v.* Warner, 2 Meriv. 459; Green v. Bridges, 4 Sim. 96; Meek *v.* Carter, 4 Jur. N. S. 992. Then, too, if there be an equity raised in favor of the grantor in any case where the escrowee delivered contrary to the condition, it might seem unadvisable to make a distinction regarding those sorts of conditions the breach of which will raise a constructive trust of the legal title for the grantor and those that will not.

On the whole, therefore, the declaration of the Court in favor of the grantee might very properly have been reserved for further consideration in a case where the question actually arose.

813. Louis M. Greeley. *Unauthorized Delivery of Escrow.* (1912. Illinois Law Review, VI, 416.) In Forcum *v.* Elwood, 251 Ill. 301, the Supreme Court

holds that where the grantor turns over his deed to a real estate agent to deliver to the grantee, the agent has no authority to deliver the deed to a third person fraudulently impersonating the grantee; and that want of delivery of the deed can be shown to defeat the title of one purchasing in good faith and for value from such third person. The law is clear that a deed delivered by a depositary in violation of the terms and provisions of the deposit or escrow is void for all purposes and that such unauthorized delivery may be shown to defeat the title of a bona fide purchaser for value from the grantee named in the deed. Everts *v.* Agnes, 4 Wis. 343; Jackson *v.* Lynn, 94 Iowa 151; Fearing *v.* Clark, 16 Gray 74; Devlin on Real Estate (3d ed.), § 322.

It is of interest to note that in the case of negotiable paper the contrary rule seems to prevail, and an innocent purchase for value before maturity is allowed to recover, though the instrument was originally delivered by an escrowee in violation of the escrow. Fearing *v.* Clark, 16 Gray 74; Vallette *v.* Parker, 6 Wend. 615. (Contra: Chipman *v.* Tucker, 38 Wis. 43; Roberts *v.* McGrath, 38 Wis. 52; Roberts *v.* Wood, 38 Wis. 60.) Under the Uniform Negotiable Instruments Law, § 16, it is clear the unauthorized delivery by the escrowee would be no defence as against a holder in due course.

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814. GUARDHOUSE *v.* BLACKBURN

PROBATE AND DIVORCE. 1866

L. R. 1 *P. & D.* 109

THE plaintiffs were residuary legatees under a will of Mrs. Hannah Jameson, who died on August 23, 1863, leaving a will dated May 30, 1851, and a codicil dated April 13, 1852. The defendants were the executors. The will charged the testatrix' three estates with legacies to the amount of $1,300.

The plaintiffs admitted the due execution of the will and codicil, and the only question raised by them was as to whether the words "therein and," at the end of the codicil, were entitled to probate. By their plea they denied that the codicil, as executed, expressed the wishes and intentions of the deceased; and alleged that she, having a mind to alter her will, sent for William Carrick, her solicitor, and gave him instructions for a codicil, which he reduced into writing, and which instructions were pleaded; which, after giving and revoking the legacies mentioned in the codicil as executed, concluded, "And I charge all the said legacies on my personal estate." That the said William Carrick, intending to prepare the said codicil for execution, and to make a few verbal alterations only, wrote out the paper propounded, but that he inadvertently, or by mistake, and without any instructions whatever to that effect from the deceased, wrote the words, "And I direct all the legacies therein and herein given (and not revoked) to be paid out of my personal estate," in lieu of "and I charge all the said legacies on my personal estate." That the effect of the said words, "therein and," which had the effect of discharging the estate of Scales of legacies to the

amount of £500, and the estate of Stainton of the payment of legacies to the amount of £800, was not observed by the said William Carrick, nor by the deceased, when she executed the codicil, and that the said paper writing, containing the words "therein and," was not the codicil of the said deceased. William Carrick said in examination: He took the instructions from the testatrix by word of mouth, at her residence, and wrote them down in her presence on the draft. The draft was intended to be copied for execution. From the draft he prepared in her presence a copy for execution for her, varying in a few particulars from the draft, but not in substance, until he came to the words in dispute. He read over the draft to her, and asked if it was as she intended it. She expressed herself satisfied with it. He read the copy over to her, so that she could understand it. She said nothing, but proceeded to execute it. He retained the codicil in his custody until the deceased's death. She gave him no instructions to discharge the real estates of Scales and Stainton from the legacies of £1,300; and he had no instructions from her to insert the words "therein and." He inserted them by inadvertence. Her attention was not particularly directed to them, and his attention was first directed to them after her death.

Dr. *Deane*, Q. C. (Dr. *Tristram* with him), for the defendants, contended: First, it was not competent to the Court to vary a will by parol evidence. By so doing, the very object of the Wills Act would be defeated, which was to do away with all evidence except that which appeared within the four corners of the will. Secondly, the Court was asked to do what the deceased could not have done for herself in her lifetime. If she had inserted these words "per incuriam," and had after execution struck her pen through them, they would be restored to probate. Thirdly, there was no case in which a clause had been expunged from probate, unless it had been inserted by fraud. . . .

Dr. *Spinks* (*Mounsey* with him), for the plaintiffs, submitted there were two questions for the consideration of the Court. First, was parol evidence admissible to correct the mistake? It was laid down in 1 Williams on Executors, p. 330, 5th ed., that, if a particular clause had been inserted in a will by fraud, without the knowledge of the testator in his lifetime, it ought to be excluded from the probate. There was no distinction in principle, and there ought to be none in practice, in expunging a clause, whether inserted in a will by fraud or by mistake. The function of a Court of Probate was to ascertain what the testator intended to constitute as his will. . . . Secondly, did the evidence of Carrick satisfy the Court of the mistake? It was submitted it was ample to do so.

Sir J. P. Wilde. — The plaintiffs have cited the defendants to bring in the probate of the will and codicil of Mrs. Hannah Jameson, that it may be cancelled. The defendants have propounded these papers for probate; and the plaintiffs contend that the words "therein and" ought to be expunged from the codicil before probate is granted thereof. The

effect of these words, which undoubtedly appear in the codicil, and were there, it is admitted, when it was executed, is to discharge certain portions of the real estate from pecuniary legacies of considerable amount, with which they were charged by the will. The ground upon which the Court is asked to expunge them is, that they were inserted by the attorney who drew the codicil by mistake, and without instructions. This is proven to be the fact (if the evidence is admissible, and can be relied upon) by the oath of the attorney, and by a paper which he swears to have been the rough draft of the codicil made by him in the presence of the testatrix, and from her verbal directions. . . . I must premise that the Wills Act has worked a great change in the old testamentary law, as administered by the ecclesiastical Courts on this head. Under that 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. . . . But the words of the Wills Act, "No will shall be valid" unless executed in a certain manner, obviously exclude the probate of unexecuted intructions altogether, and have rendered it no longer possible to the Court of Probate to treat them as part of a will. . . .

But then comes the question, if the Court cannot now, as it could before the statute, give effect to any provision omitted by mistake from the will, does it still retain the power to strike out any portion of the contents of a duly executed paper on the ground that, although such portion formed part of the paper when executed by the testator, it was inserted or retained by mistake or inadvertence? This is what is asked on the present occasion. Against this being done, it was strongly argued that the Court has no such power. The argument was put on several grounds, and, amongst others, upon the ground that parol evidence was inadmissible upon the question. . . .

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 beyond question binding and of full effect. Nor indeed are these rules pressed in the Courts either of law or equity beyond this mark: For if the written document is alleged to have been signed under condition that it should not operate except in certain events, parol evidence has been admitted at law to prove such condition and the breach of it: see Pym *v.* Campbell, 6 E. & B. 370 [*ante*, No. 799]. Or if (going further still) some plain and palpable error has crept into the written document, equity formerly, and the Courts of common law now, sanction the admission of evidence to expose the error: see the case of Wake *v.* Harrop, 6 H. & N. 768. . . . Supposing, then, parol evidence to be admissible in such a case as the present, the question recurs, to what extent is it still open to the Court since the statute, to act upon such evidence, for the

purpose of rejecting the whole or expunging any portion of the written testament to which the testator has duly affixed his name? . . .

After much consideration 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 not know and approve the contents, the paper may be refused probate, if it be proved that any fraud has been purposely practiced 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. . . .

It remains to say a few words on the fifth [proposition]. It is here that the right to derogate from the force of an executed paper approaches and receives its limit. And it is obvious enough, that if the Court should allow itself to pass beyond proof that the contents of any such paper were read or otherwise made known to the testator, and suffer an inquiry by the oath of the attorney or others as to what the testator really wished or intended, the authenticity of a will would no longer repose on the ceremony of execution exacted by the statute, but would be set at large in the wide field of parol conflict, and confided to the mercies of memory. The security intended by the statute would thus perish at the hands of the Court. . . . In the present case, the codicil was proved to have been read over to the testator before the execution thereof; she duly executed the same; and the Court conceives it to be beyond its functions or powers to substitute the oath of the attorney who prepared it, fortified by his notes of the testator's instructions, for the written provisions contained in a paper so executed. The probate will, therefore, be delivered out to the plaintiffs in its present form.

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815. Beamish *v.* Beamish. (Chancery Division, Ireland, 1893. (1894) 1 Ir. Rep. 7, 21.) The President: This principle of proving knowledge and approval

was discussed at great length at the bar, and I was pressed with the consideration that there was never a presumption de jure of the fact. Many authorities were cited, all of which I have considered, and I venture to state the following propositions:

1. Knowledge and approval of a will is necessary, and must be proved.

The execution of a will by a competent testator is presumptive and prima facie proof of the fact.

3. If the competent testator has read the will, or heard it read, the presumption is strong and conclusive, *unless there are special* circumstances attending the execution of the will. . . .

4. Among such special circumstances are fraud, as explained in Fulton *v.* Andrew, L. R. 7 H. L. 448, and which as so explained includes dereliction of duty, as illustrated in that case and Hegarty *v.* King, 7 L. R. Ir. 68. . . .

5. Whether read or not, if in any way the contents of the will have been brought to the notice of the testator, the effect is the same: Guardhouse *v.* Blackburn, L. R. I. P. & M. 116 [*ante*, No. 814] approved in Harter *v.* Harter, L. R. 3 P. & M. 11.

6. Even when there has been a reading of the will, but the state of the testator was such that he could not have had an intelligent appreciation of the words, he must be taken to have known and approved of the will if the words have been bona fide used by a person whom he trusts to draw it up for him.

SUB-TITLE III. ACT VOIDABLE

816. STATE *v.* CASS

SUPREME COURT OF NEW JERSEY. 1889

52 *N. J. L.* 77

CERTIORARI upon a judgment for the plaintiff Catherine Cass, in an action against S. Cummings to recover $125, the price paid to him for a horse, sold on fraudulent representations as to his speed. Mr. Cass, in the presence of his wife, the plaintiff, stated to the defendant that they desired a horse that could make the distance between Rockland and Orange Valley, between seven and eight miles, in one hour or one and a half hours, and stated that if the horse could not do that they didn't want to buy him; to which the defendant replied that the horse could easily do that. There was evidence that the horse was not able to travel seven or eight miles in one hour or in one hour and a half, and was not fit for the purpose for which he had been bought. It appeared on the cross-examination of the plaintiff that at the time of the sale a written warranty of the horse had been given in the following form: "Newark, April 6, 1887. To one gray horse Charley, which I warrant to be sound and kind with the exception of straining of muscle of left hind leg." The counsel for defendant thereupon moved that all evidence as to representations made by the defendant, other than those contained in the written warranty, be stricken out, on the ground that the agreement of the parties having been reduced to writing, such writing could not be varied or enlarged by parol evidence. The Court denied the motion, and allowed an exception.

REED, J. . . . [The parol evidence rule] is not infringed by the admission of parol testimony which is not intended as a substitution for or an addition to a written contract, but which goes to show that the instrument is void or voidable, and that it never had any legal existence or binding force, either by reason of fraud, or for want of due execution and delivery, or for the illegality of the subject-matter of the contract. Nor is the admission of parol evidence for the purpose of avoiding a written contract on the ground of fraud, confined to such testimony as goes to show that a party was lured to make a contract other than that intended, as by the substitution of one contract for another by trickery, or by misreading a contract to an illiterate person. Parol testimony may be admitted to show that the execution of a written contract was brought about by a fraudulent representation. . . . The elements essential to constitute such fraudulent representation will be considered later, and it is now necessary only to remark that such evidence as will lay a foundation for an action of deceit or a ground for the recission of the contract, is always receivable, although it consists of oral representations.

This point was strenuously denied in the arguments submitted by the counsel for the defendant. His contention was, that fraud in the execution of the instrument could be shown, but that oral representations going to a failure of consideration only could not. The seeming strength of his contention lay in the likeness between the written and the oral facts in the present case, both concerning the quality of the animal sold. The written warranty applied to the soundness and kindness of the horse, and the oral testimony to the speed of the animal. The danger of permitting parol declarations to be proved, which were so nearly related to the subject-matter of the written warranty, was strongly pressed as an evil which the rule of evidence already stated seemed especially designed to prevent. But the distinction between such representations as add to the contract and such as avoid the contract, because of their fraudulent character, is too firmly established in our jurisprudence to be now shaken. 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. It is of course obvious, that the fact that there was a written warranty in respect to the soundness and kindness of the animal would be a forcible argument that no other representations as to quality were made. The existence of the written warranty would be useful in determining the probability of the truth of the counter statements of the parties as to the existence or non-existence of the parol declaration. But when the fraudulent affirmations are once proven to exist, the written contract becomes unimportant. This seems to be an elementary principle of the law of evidence. The right to prove fraud, in whatever shape it may exist, to avoid written contracts, has been so uniformly recognized that it can hardly be said to have been the subject of serious judicial discussion. . . . I conclude, therefore, that if the evidence established fraudulent conduct on the part of the defendant, the testimony was properly admitted.

This conclusion leads to the consideration of the testimony received and submitted to the jury. This consideration involves two questions: First, Was the testimony properly submitted to the jury at all? Second, If so, was it submitted under proper instructions? . . . I am convinced that, in assuming that the present case was one in which the falsity of the representation raised the legal inference of fraud, the Court was in error. . . .

For these reasons, I think the judgment below should be reversed.

817. FAIRBANKS *v.* SNOW

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1887

145 *Mass.* 153; 13 *N. E.* 596

THIS is an action upon a promissory note made by the defendant and her husband to the order of the plaintiff. The defendant alleges that her signature was obtained by duress and threats upon the part of her husband. The judge below found for the plaintiff. . . . The judge refused to rule that, if the defendant signed the note under duress, it was immaterial whether the plaintiff knew, when he received the note, that it was so signed. The exception is to this refusal.

HOLMES, J. (after stating the case as above). 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; and if the signature and delivery had not been her acts, for whatever reason, no contract would have been made, whether the plaintiff knew the facts or not. There sometimes still is shown an inclination to put all cases of duress upon this ground. Barry *v.* Equitable Life Assurance Society (59 N. Y. 587, 591). But duress, like fraud, rarely, if ever, becomes material as such, except on the footing that a contract or conveyance has been made which the party wishes to avoid. It is well settled that where, as usual, the so-called duress consists only of threats, the contract is only voidable. . . . This rule necessarily excludes from the common law the often recurring notion just referred to, and much debated by the civilians, that an act done under compulsion is not an act in a legal sense. "Tamen coactus volui" (D. 4. 2. 21, § 5; see 1 Windscheid, Pandekten, § 80).

Again, 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 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. A party to a contract has no concern with the motives of the other party for making it, if he neither knows them nor is responsible for their existence. It is plain that the unknown fraud of a stranger would not prevent the plaintiff from holding the defendant. . . . The authorities with regard to duress, however, are not quite so clear. It is said in Thoroughgood's case, 2 Rep. 9, that "if a stranger menace A. to make a deed to B., A. shall avoid the deed which he made by such threats, as well as if B. himself had threatened him, as it is adjudged 45 E. 3. 6." . . . But in Y. B. 43 E. III. 6, pl. 15, which we suppose to be the case referred to, it was alleged that the defendant was imprisoned by the procurement of the

plaintiff. And we know of no distinct adjudication of binding authority that mere threats by a stranger, made without knowledge or privity of the party, are good ground for avoiding a contract induced by them. . . .

On the case as it is presented to us, we are of opinion that the ruling requested was wrong upon principle and authority.

Exceptions overruled.

A. Norcross & H. C. Hartwell, (*C. F. Baker* with them,) for the defendant. *W. S. B. Hopkins & S. Haynes,* for the plaintiff.

TITLE II. INTEGRATION OF LEGAL ACTS

820. History.[1] The history here 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. In the primitive Germanic notions, at the time of the barbarian invasions and under the Merovingian and Carlovingian monarchies, there was certainly no notion of the indisputability of the terms of a document. The document, 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 this stage 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. The important and unquestionable fact is that the tenor of the writing *does not legally and bindingly establish anything.* 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. 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.

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*, No. 552), 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.

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. 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. Thus the old regime of proof by transaction-witnesses disappears by degrees; by the 1300s they are almost super-

[1] Abridged from the present Compiler's *Treatise on Evidence* (1905. Vol. IV, § 2426).

fluous. 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.

The tool for shaping the new doctrine had now been supplied; and it remained to develop and extend the doctrine. 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. 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. 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." Thus a judicial legislative policy comes to reinforce the other influences.

But, meantime, what of the theory of the rule?

(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.

(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. 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. 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. By the first and third sections 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, 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. The significance of the statute for the present purpose 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. 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 important consequence was, that for that great mass of transactions

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. 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.

SUB-TITLE I. ORDINARY TRANSACTIONS

Topic 1. In General

821. Lilly. *Practical Register.* (1719, fol. 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 manet."

822. Knight *v.* Barber. (1846. Exchequer. 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.) Parke, B. — 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.

823. Van Syckel *v.* Dalrymple. (1880. New Jersey. 32 N. J. Eq. 233.) Van Fleet, C. — 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.

824. BROSTY *v.* THOMPSON

Supreme Court of Errors of Connecticut. 1906

79 *Conn.* 133; 64 *Atl.* 1

Action for the conversion of live stock and other personal property, brought to and tried by the Court of Common Pleas in Fairfield County, Curtis, J.; facts found and judgment rendered for the defendant, and appeal by the plaintiffs. No error.

Clitus H. King and *Henry Greenstine*, for the appellants (plaintiffs). *Edward F. Hall*, for the appellee (defendant).

Torrance, C. J. — The plaintiffs and the defendant entered into an oral agreement relating to the sale, by the plaintiffs to the defendant, of a farm and of certain personal property used thereon. Subsequently they executed a written contract embodying the terms of the oral agree-

ment as to the sale of the farm, which was silent as to the personal property agreed to be sold under the oral agreement; and the question, upon the present appeal is, whether the prior oral agreement for the sale of the personal property is available to the defendant upon the facts found. These facts may be summarized as follows: The plaintiffs in April, 1905, owned a farm in this State on which was used the personal property described in the complaint, which personal property was less than $300 in value. The plaintiffs placed the farm and said personal property in the hands of a broker to sell, and he offered it for sale to the defendant for the lump sum of $3,600. The defendant and the broker visited the farm, and examined it and said personal property, and the defendant then told the broker that he would buy the farm and the personal property for $3,600, but that all he could pay down was $300. Subsequently, in the early part of April, 1905, the plaintiffs and the defendant agreed to the following terms proposed by the broker: the plaintiffs to deliver the farm and said personal property to the defendant on May 1, 1905, the personal property to be the defendant's absolutely, and the real estate to be delivered to the defendant under a contract of sale, the terms of which were subsequently embodied by the broker in a writing called Exhibit A, executed by the parties on April 18th, 1905. In said writing the plaintiffs agreed to convey the farm to the defendant by a suitable deed, "upon the following conditions," which may be summarized as follows: (1) the defendant was to pay to the plaintiffs, upon the execution of the writing, $300; (2) he was to pay to them $30 on the first day of May, 1905, and a like sum on the first day of every month thereafter, until the sum of $1,700 should be paid in full; (3) he was to assume and pay the mortgage on the farm, and the interest thereon as it fell due; (4) he was to pay all taxes assessed upon the farm and to keep the buildings insured for a specified amount; and (5) he was to pay interest upon the unpaid portion of the $1,700 at an agreed rate; and finally he was to forfeit all claims to the farm and to all money paid under the agreement, if he failed to make any of the agreed payments.

Upon the execution of the writing the defendant paid to the plaintiffs $300 as agreed, also $20 in payment of the interest due upon the mortgage to July 1, 1905. The writing was silent as to the sale or disposition of the personal property. In this entire transaction the defendant did not meet the plaintiffs but dealt exclusively with the broker. On May 1, 1905, the plaintiffs delivered, and the defendant took, possession of the farm and of the personal property under the foregoing agreement; and shortly thereafter he sold said personal property for $194; notified the broker that he abandoned the contract, and made no further payments thereon.

Upon the trial the plaintiffs admitted that the personal property was part of the subject-matter of the oral agreement between the parties, but claimed that by that agreement the title to the personal property was to remain in the plaintiffs until the title to the farm passed to the

defendant. The evidence of the existence and terms of the prior oral agreement for the purchase and sale of the farm and the personal property, came in without objection, apparently; but after it was in, the plaintiffs claimed that "the Court should disregard the evidence, and treat the written agreement as the entire contract between the parties." This claim the Court overruled, and from all the evidence in the case found the facts aforesaid, and that the parties did not intend to embody the entire oral agreement in the written one.

The evidence is not before us, but upon the record as it stands we must assume that it warranted the Court in finding as it has.

The plaintiffs claim that the existence of the written agreement rendered the prior oral agreement between the parties, for the purchase and sale of the personal property, of no avail to the defendant. This claim is based upon the so-called "parol evidence rule," that where parties merge all prior negotiations and agreements in a writing, intending to make that the repository of their final understanding, evidence of such prior negotiations and agreements will be rejected as immaterial. The rule itself is firmly established; Galpin *v.* Atwater, 29 Conn. 93, 97; Averill *v.* Sawyer, 62 Conn. 560, 568; Caulfield *v.* Hermann, 64 Conn. 325, 327; and the only question is whether it is applicable in this case.

We think it is not. Whether the parties intended the writing to embody their entire oral agreement, or only a part of it, was a question for the trial Court, to be determined from the conduct and language of the parties and the surrounding circumstances; and that Court has found that the parties had no such intent, and there is nothing in the record to show that the Court, in reaching that conclusion, erred either in law or in logic. 4 Wigmore on Evidence, § 2430. Where the parties do not intend to embody their entire oral agreement in the writing, the rule invoked by the plaintiffs does not apply. Collins *v.* Tillou, 26 Conn. 368; Clarke *v.* Tappin, 32 id. 56; Hall *v.* Solomon, 61 Conn. 476, 482; Averill *v.* Sawyer, 62 Conn. 560; Chapin *v.* Dobson, 78 N. Y. 74. That rule does not apply in this case. There is no error.

In this opinion the other judges concurred.

Topic 2. Sundry Applications of the Rule

826. RAMSDELL *v.* CLARK

SUPREME COURT OF MONTANA. 1897

20 *Mont.* 103; 49 *Pac.* 591

THIS action was upon a lease entered into between the respondent (plaintiff below) and appellant (defendant below), on October 20, 1887. Under the terms of the lease, defendant was to take possession of a certain mine, situated in Silver Bow county, and to work and mine the same in "a good workmanlike, and substantial manner, and to the best

advantage," for one year, unless he negotiated a sale of the said property within that period. He was to "reduce and smelt the ore therefrom, and concentrate the same," at his own expense, and sell the products, and, after deducting all expenses, he was to pay one-half the net proceeds to the plaintiff. Defendant took possession of the mine on the day of the execution of the lease, but worked the same for a period of six months only. Plaintiff instituted an action against defendant in the district court of Silver Bow county on January 30, 1892. The complaint alleged three breaches of the covenants contained in the lease. As the first breach it averred that defendant had worked the mine for six months, but had failed to pay over to plaintiff one-half of the net proceeds realized from the ores extracted. As a second breach it alleged that defendant had failed to work the mine in a good, workmanlike, and substantial manner during said six months, to the damage of plaintiff in a certain sum. The third breach set forth was that the defendant had failed to work the mine at all after the expiration of said six months, to the damage of plaintiff in a certain sum. The defendant answered the complaint, denying certain of the allegations therein. He also averred that the terms of the lease had been modified as to accounting in respect to concentrates. As a defense to the first breach, it was alleged that an accounting had been had with plaintiff under the lease, as modified on July 10, 1888, and that he (plaintiff) had been paid, and had accepted, in full settlement of his claims, what was found to be due him. A replication was interposed, which, among other denials, set forth that there had never been an accounting, and that the plaintiff had never been paid, and had never accepted, any sum in full settlement for what was due him by reason of the first breach of the lease. The case was tried to a jury.

Upon the trial the defendant introduced in evidence the following receipt: "Dec. 6, '94. G. H. M. Office of W. A. Clark, Butte, Montana, 7–10, 1888. Received of Ramsdell Parrott lease, at the hands of W. A. Clark, five hundred and sixty and 79–100 dollars, payment in full for balance of royalty on ore and supplies. $560.79. [Signed] Joseph Ramsdell." The jury returned a verdict in favor of defendant. A motion was made for a new trial, which was granted. The appeal is from the order granting the motion for a new trial. . . .

Corbett & Wellcome, for appellant. *J. W. Cotter* and *Wm. Scallon*, for respondent.

Buck, J.—The appellant . . . objects, however, to the alleged orders in so far as it grants a new trial as to the first and third breaches of the lease. . . . Did the lower Court err in granting a new trial as to the first cause of action set forth in plaintiff's complaint? In this connection it becomes necessary to investigate the law as to the force and effect of a receipt for money paid.

Parsons, in his work on Contracts (8th ed., 1893, vol. 2, p. 671), says:

"A receipt for money is peculiarly open to evidence. It is only prima facie evidence either that the sum stated has been paid, or that any sum whatever

was paid. It is in fact not regarded as a contract, and hardly as an instrument at all, and has but little more force than the oral admission of the party receiving. But this is true only of a simple receipt. It often happens that a paper which contains a receipt or recites the receiving of money or of goods, contains also terms, conditions, and agreements or assignments. Such an instrument, as to everything but the receipt, is no more to be affected by extrinsic evidence than if it did not contain the receipt; but, as to the receipt itself, it may be varied or contradicted by extrinsic testimony in the same manner as if it contained nothing else."

Bishop expresses a similar view in his book on Contracts (enlarged ed., 1887, Sec. 176).

From general expressions as to the rules governing a receipt in many opinions, it would seem that some of the Courts have overlooked this dual character of which a receipt is capable. Thus, it is frequently asserted a receipt is not a contract; a receipt for money is only prima facie evidence of the truth of the statements therein contained; the signer of a receipt is not estopped by it; and no qualification is suggested or distinction expressed as to any contractual feature it may possess. This naturally gives rise to confusion on the subject. We shall quote from some of the opinions which have discussed the law pertaining to receipts, particularly as to what recitals therein may be varied or controlled by extrinsic evidence. . . .

Cowen, J., in M'Crea *v.* Purmort, 16 Wend. 460, 473 (1836): "A release cannot be contradicted or explained by parol, because it extinguishes a pre-existing 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."

It can be seen from these quotations, supra, that, even keeping in mind the distinction between a receipt regarded as a mere acknowledgment, and as possessing a contractual feature, still the rule of law is not absolutely clear when it is to be applied to the language of each particular receipt. . . . All these cases we have cited, however, recognize the distinction given by Parsons and Bishop. The mere expression contained in a receipt "in full payment" does not necessarily render the paper a contract in the nature of a release or waiver. 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.

Let us apply these principles to the receipt given by the plaintiff, and relied upon by the defendant, in the case before us. As to the circumstances under which it was given, Wethey, a witness for defendant, testified that there had been a dispute between plaintiff and defendant as to one or two items of the account due under the terms of the Ramsdell-Parrott lease, and that the last settlement had between them was subsequent to the expiration of the six months during which the defendant had worked the mine. The receipt specifies the lease, and recites that a certain sum has been received by plaintiff as "payment in full for the balance of royalty on ore and supplies." The literal terms of the paper stand admitted, and Wethey's testimony as to it is uncontradicted. It is not suggested that the plaintiff did not actually receive the sum of money specified therein. After the admission in evidence of this testimony and the receipt, the defendant had established a prima facie defense as to the first cause of action. The burden was then upon the plaintiff to destroy the effect of this receipt. He failed to do so. . . .

At the close of the trial, so far as the evidence was concerned, the defendant was entitled to a peremptory instruction that the jury should find in his favor as to the first cause of action.

827. BAUM *v.* LYNN

SUPREME COURT OF MISSISSIPPI. 1895

72 *Miss.* 932; 18 *So.* 428

FROM the Chancery Court of Warren county. Hon. CLAUDE PINTARD, Chancellor. Bill for accounting by Mary Grace Devine Lynn against the executrix of John A. Klein and others. From a decree for plaintiff, defendant, Ellen Baum, executrix of J. F. Baum, appeals. In May, 1873, John A. Klein was appointed guardian to the appellee by the chancery court of Warren county, and gave bond as guardian in the penalty of $2,000, with George M. Klein and J. F. Baum, appellant's testator, as sureties. . . . The prayer is that the executrix of the guardian be required to render his final account as guardian. . . . Decrees were made against George M. Klein and Ellen Baum, executrix of J. F. Baum, for $2,000. . . .

The objection most strenuously urged to the decree rests upon the following facts, proved or offered to be proved by appellant: The guardian had loaned a part of his ward's money to Mrs. Mary Irving. In June, 1884, the guardian being then dead, and his estate hopelessly insolvent, the appellee, who then resided in the State of Texas, came to this State to look after the estate. On the 16th of June, Mrs. Irving made to her conveyance in the following language:

"This indenture, made and entered into this day, the 16th of June, 1884, by and between Mary Irving, of the city of Vicksburg, county of Warren, and state of Mississippi, party of the first part, and Mary Grace Lynn, of the state of Texas, party of the second part, witnesseth: That whereas, John A. Klein, late of said city of Vicksburg, did, on or about the 14th day of February, 1874, loan the said Mary Irving certain moneys then in his hands as guardian of the said Mary Grace Lynn, then Mary Grace Devine, and whereas, the said Mary Irving now desires to settle in full any balance that may be due by her: Now, therefore, for and in consideration of the premises, and the consideration of the full acquittal, discharge and release of the said Mary Irving from any and all liability to the said John A. Klein as guardian, or the said Mary Grace Lynn for and on account of said loans, and the further consideration of ten dollars in hand paid, the receipt of which is hereby acknowledged, the said party of the first part does hereby convey and warrant to the party of the second part, her heirs and assigns, in fee simple, the following described real estate in the said city of Vicksburg,"

describing the property, and concluding with the usual habendum. The appellant took the deposition of Mr. Irving, who was the husband of the grantor, she being now dead, and that of George M. Klein, and of Mr. Smith, the attorney who prepared the conveyance, all of whom testified that the conveyance was made by Mrs. Irving, and accepted by Mrs. Lynn, in full satisfaction and settlement not only of the debt due by Mrs. Irving to Klein as guardian, but also in discharge and settlement of liability on the part of the guardian to his ward, which liability Mrs. Lynn agreed to discharge and release as a part of the consideration for the conveyance. The complainant moved to suppress these depositions, and objected to them when offered in evidence, upon the ground that it was incompetent to vary by parol proof the written contract of the parties as shown by the deed. The depositions were not admitted.

M. Marshall, for appellant. The recital of the consideration in the deed is always open to parol proof. Besides, John A. Klein was not a party to the conveyance, and was at liberty to show its true consideration.

L. W. Magruder, for appellee. Parol testimony cannot be admitted if the statement as to the consideration, from its terms and context, manifestly embraces, or is intended to embrace, the whole agreement; or, if it forms a part of the contract, it cannot be varied. In this case, the consideration is a release of a pre-existing debt. It is like a conveyance by her of her property, and it is apparent, from the deed, what debt is released. The distinction is clearly stated in Cocke *v.* Blackburn, 58 Miss. 537.

COOPER, C. J. (after stating the case as above). In Gully *v.* Grubbs, 1 J. J. Marsh. 387, Judge ROBERTSON in an admirable and concise manner states the true principle upon which is based the rule of permitting oral evidence to be introduced to show the true consideration of a deed in opposition to that recited, as well as the limitation of the rule. . . . Judge Robertson 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 pre-existing 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 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. . . . Appeal dismissed.

828. LESE *v.* LAMPRECHT

COURT OF APPEALS OF NEW YORK. 1909

196 *N. Y.* 32; 89 *N. E.* 365

ACTION by Louis Lese against Anna Lamprecht, individually, and as executrix of Hugo Lamprecht, From a judgment of the Appellate Division (123 App. Div. 919, 107 N. Y. Suppl. 1132), affirming a judgment of dismissal, plaintiff appeals. Reversed and new trial granted.

This action was brought to compel the specific performance of a written contract made by the defendant's testator in his lifetime with the plaintiff, by which he agreed, at a place and on a day and hour therein named, to convey to the plaintiff a certain piece of real property for the consideration of $7,500. The contract provided that the plaintiff should pay "Five hundred dollars on the execution of this (said) agreement . . . seven thousand dollars in cash on the delivery of the deed, . . ." and said testator agreed, upon receiving such payment, to deliver to the plaintiff "A full covenant warranty deed for the conveying and assuring to him . . . the fee simple of said premises free from all incumbrances . . . and subject to a party wall agreement recorded in the office of the register of the county of New York in Liber 859 of Conveyances at page 375." On the day and hour mentioned in said contract a further contract in writing was entered into by and between the same parties, adjourning the time for closing the title under the original contract to November 3, 1905, at 11 o'clock A. M., at a place therein named, and said contract also provided: "It is understood and agreed that the vendee will pay interest on the balance of the purchase money from the date hereof to November 3, 1905, and that the vendor can remain in possession of the said premises from November 3, 1905 to December 1, 1905, as a tenant at a rental of one dollar ($1.00), title to be closed as of October 5, 1905."

On November 3d, at 11 o'clock A. M., as provided in said further contract, the parties met at the place in said further contract provided. It then appeared that the title to the real property mentioned in the contract was being examined by a well-known firm of attorneys in the city of New York for the purpose of making a loan thereon to the vendee, and that the searches therefor had been made by, but not returned from, the Lawyers' Title Insurance & Trust Company, and the plaintiff asked that the closing of title be held open or adjourned until a later hour of the day, or until the following day. The defendant's testator refused to further adjourn the time for closing title, whereupon, it appearing that there was a mortgage on the property held by a savings bank, the plaintiff stated that if the defendant's intestate would procure a release of the mortgage, he would pay the consideration named in the contract without further delay. The defendant's intestate then tendered a deed without including therewith a cancellation of said mortgage, and demanded the

consideration named in the contract, which being refused, he left the office where the contract was to be closed. A few days thereafter, when this action was about to be commenced, the attorney for the defendant's intestate said that he would endeavor to close the title, and arranged for a meeting of the plaintiff and his client at 8 o'clock in the evening of the day in question. The plaintiff and his attorney were eight minutes late in meeting said engagement, and the defendant's intestate refused to consummate the transaction, although he said that he would have done so if the plaintiff had met him at an earlier hour.

The trial Court found: "Third, That on the 5th day of October, 1905, the parties met according to the terms of said contract, and the defendant then agreed to extend the time for closing, at the request of the plaintiff, to November 3, 1905, at 11 o'clock at the same place, and that defendant appeared on said adjourned day November 3d at the appointed place ready and willing to make title, and did then and there tender a duly executed full covenant warranty deed in accordance with the terms of said contract, and that the plaintiff, through his attorneys and representatives, requested a further adjournment, which, however, was refused by the defendant through his attorney. Fourth. That on October 5, 1905, as a condition for the granting of the adjournment until November 3, 1905, it was agreed that no further adjournment should be granted to the plaintiff, and that the title should close absolutely on that day, and that no other agreement to close at any other or future date was entered into by the defendant either personally or through or by his attorney. Fifth. That the case is without proof that consent was obtained for the closing on any other date than November 3, 1905, at which time defendant was ready and willing to convey."

The third and fourth findings are each based in a material part upon oral testimony received, subject to objection and exception, to the effect that prior to, and contemporaneous with, the making of the original written contract the plaintiff agreed with the defendant's testator to accept the title to said real property without a previous discharge of the savings bank mortgage thereon, and to retain a sufficient portion of the consideration specified in the contract to pay said mortgage thereafter, and also that prior to and contemporaneous with the making of the further contract adjourning the closing of said title from October 5th to November 3d it was orally agreed that no further adjournment should be granted to the plaintiff, and in substance that the time mentioned in the contract be made of the essence thereof.

John D. Connolly, for appellant. As it was not expressly stipulated in the contract that time was of its essence; as the subject of the sale did not fluctuate in value, and there had been no change of circumstances, and the delay, if any, did not involve the vendor in any loss, and every act of the vendee was in affirmance of the contract, specific performance should have been decreed. . . . The Court below improperly admitted oral testimony to vary the terms of the written contract. . . .

Arthur J. Westermayr, for respondent. The time for closing the title was adjourned from October 5, 1905, to November 3, 1905, upon the positive understanding that the title would be closed on that date. As a condition for the adjournment, time was made the essence of the contract (Dwark *v.* Weinberg, 139 N. Y. S. R. 504). The Court below properly admitted testimony as to the mortgage on the property and as to time being of the essence of the contract, although no provisions as to the same were contained in the written adjournment. . . .

CHASE, J. (after stating the case as above). We are of the opinion that such testimony was improperly received. The general rule that oral testimony cannot be received to vary a written contract is well established and generally conceded. It has become a rule of substantive law. It stands as a bar against using oral testimony to overthrow a solemn and deliberate contract, and arises from the presumption that the parties to a contract by placing their engagement in writing intend to avoid the consequences arising from defects of man's memory and the possibly prejudiced statements of interested witnesses.

Contracts are frequently made that are collateral to, but independent of, a written contract, and they can be properly established by oral testimony. Evidence of such contracts is sometimes referred to as an exception to said general rule. It is more accurate to say that collateral and independent contracts can be shown by oral testimony, because it was not the intention of the parties thereto to include such contracts in the writing. Collateral contracts are thus frequently established by oral testimony, because they are collateral; and ambiguous written contracts are explained by oral testimony, because they are ambiguous. The value and integrity of a written instrument is largely dependent upon the fact that it cannot be broken down or modified by a statement of alleged conversations and occurrences leading up to its execution. Where a written contract is clear in its terms, and purports to express the entire arrangement of the parties, and to direct upon all the questions under consideration, it conclusively determines the rights of the parties, and can neither be contradicted, varied, nor explained. Thomas *v.* Scutt, 127 N. Y. 133; Stowell *v.* Greenwich Ins. Co., 163. N. Y. 298; Corse *v.* Peck, 102 N. Y. 513; Brantingham *v.* Huff, 174 N. Y. 53; House *v.* Walch, 144 N. Y. 418; Dady *v.* O'Rourke, 172 N. Y. 447.

In deciding whether a particular promise or agreement is collateral and independent of the principal and written contract it is necessary to determine whether the parties to the written contract intended to include therein all of the promises relating to the subject-matter under consideration. Professor Wigmore, in his work on Evidence, says:

"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, and is in contrast with the looser and incorrect inquiry whether the alleged extrinsic negotiation contradicts the terms of the writing." Wigmore on Evidence, § 2430.

The written contract between the parties now before us provided for a deed free from all incumbrances. It expressly specified one exception to such covenant without including in the written contract a further exception to the effect that the property could be transferred subject to the savings bank mortgage. Again the written contract adjourning the time of closing the title included express agreements binding upon the parties, in connection with the adjournment without expressly making the time to which the closing of title was adjourned of the essence of the contract. In each case the subject-matter upon which the parties contracted included the matter sought to be established by oral testimony. In each case the subject-matter was within the consideration of the parties in making the written contracts; and, in the absence of fraud, it is conclusively presumed that the contracts as written include an accurate and full statement of the intention of the parties. Where a contract is made for the sale of real property, and the time for closing the transaction is not expressly made of the essence of the contract, and where it does not appear from the contract itself and the surrounding circumstances that a delay of a few hours or days would essentially affect carrying out the intention of the parties, Courts of equity may in their discretion compel the specific performance of the contract, even although the party asking for such specific performance has failed to perform his part of the contract in the exact time specified therein, providing such failure has not arisen from bad faith or inexcusable delay. Pomeroy's Equity Jurisprudence (2d Ed.) § 1408; Kahn *v.* Chapin, 152 N. Y. 305; Hun *v.* Bourdon, 57 App. Div. 351, 68 N. Y. Supp. 112.

The judgment, therefore, should be reversed, and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, and WILLARD BARTLETT, JJ., concur. Judgment reversed, etc.

829. HEITMAN *v.* COMMERCIAL BANK OF SAVANNAH

COURT OF APPEALS OF GEORGIA. 1909

6 *Ga. App.* 584; 65 *S. E.* 590

ERROR from City Court of Savannah; DAVIS FREEMAN, Judge.

Action by the Commercial Bank of Savannah and others against J. H. Heitman and others. Judgment for plaintiffs, and defendants Heitman and certain others bring error. Affirmed.

The Commercial Bank of Savannah sued O'Connell, Tietjen, Goette, Fetzer, Manning, Heitman, Whatley, Knight, and Koneman, setting up

its cause of action in two counts. The first count proceeded against O'Connell as maker and the other defendants as sureties on the following promissory note: "$15,000.00. Savannah, Ga., Feb. 7, 1908. Four months after date I promise to pay to the order of the Commercial Bank fifteen thousand dollars, with interest from January 1, 1908, at 7 per cent. per annum at any bank in Savannah, Ga. Value received." O'Connell signed apparently as a maker, while the others signed apparently as indorsers. In the second count it is alleged that all of the parties whose names appear on the note "signed their names to the said note before the same was delivered to your petitioner with the intention of binding themselves to pay the amount therein named with interest to your petitioner, and, after so signing their names, they delivered the said note to your petitioner in payment of an indebtedness of theirs to your petitioner, and for a consideration paid them by your petitioner as per a letter written by them to your petitioner dated February 7, 1908, a copy of which is hereto attached, and they received from your petitioner the consideration mentioned in the said letter, and delivered the said note with their names thereon to your petitioner as makers, and with the intention and for the purpose of making themselves liable to your petitioner upon the said note as makers thereof." The letter to which reference is made is as follows: "Savannah, Ga., February 7, 1908. To the Commercial Bank, City. Gentlemen: In reference to the security notes given by Mr. G. B. Whatley to your bank and which were indorsed by directors of the Sand Lime Brick Company, we beg to state that we have been unable to get all the old indorsers to indorse a new paper, and we therefore request you to accept the note indorsed by us and inclosed herewith, in payment of the old notes, and turn over the same to us so that we can bring suit to determine the liability of all the indorsers thereon." The names appended to the letter are the same as those appended to the note, and the same as those of the original defendants in the court below.

The only defendants who appeared in any way before final judgment were Heitman, Goette, Manning, and Knight. Goette having died pending the action, the suit as to him was voluntarily discontinued without objection from the other defendants. The three above-named defendants filed in due time an answer, in which the jurisdiction of the Court was admitted, as was also the fact that they executed the note sued on as indorsers, that the plaintiff bank was the lawful holder thereof and had duly protested it for nonpayment, but each and every other allegation of each and every other paragraph of the petition was denied. This answer further set up "that heretofore [the exact date whereof defendants cannot say] they executed as indorsers a note payable to the plaintiff for the sum mentioned in the plaintiff's petition, to wit, $15,000; that it was understood between plaintiffs and these defendants that they were not accommodation indorsers or sureties upon said notes, but indorsers pure and simple, neither of defendants receiving any consideration there-

from. Plaintiff is a chartered bank, and, when said note became due and was not paid, it failed and neglected to protest said note, whereby the indorsers upon the same were released. In addition to the parties defendant hereto, H. H. Peeples, J. S. Howkins, Henry Henkin, and E. M. O'Brien were indorsers upon said note. After said note became due, plaintiff, well knowing that these defendants were released by reason of its failure to protest said notes, undertook to procure defendants to indorse the renewal of said notes. These defendants agreed to and indorsed a renewal upon the condition well understood by plaintiff that each of the indorsers on the old notes would indorse the new one, and that their said indorsement was not to be effective or binding unless each of said indorsers indorsed the same. Three of said original indorsers, to wit, E. M. O'Brien, J. S. Howkins, and Henry W. Henkin, without the knowledge of these defendants, failed and refused to indorse said renewal. Plaintiff, instead of canceling said note, kept the same, and the note was renewed several times, these defendants at all times believing that all of the original indorsers were indorsing the renewal notes, and plaintiff knowing at all times that they had not indorsed and were not indorsing the renewals and concealing these facts from these defendants. On or about the 7th day of February, 1908, these defendants learned for the first time that E. M. O'Brien, Henry Henkin and J. S. Howkins had not indorsed the first or succeeding renewal notes, and plaintiff requested defendants to sign the letter attached as an exhibit to plaintiff's petition and the renewal note attached to said petition. Defendants signed said letter and said note upon the distinct understanding and agreement that plaintiff should procure the indorsement thereon of each of the indorsers on the renewal notes, and plaintiff accepted their signatures to said letter and indorsements on said note on the condition and distinct understanding that it was to procure the indorsement of each of said indorsers, including H. H. Peeples, and that said indorsement should not be binding unless such complete indorsement should be obtained. H. H. Peeples refused and failed to indorse said notes. Plaintiff did not advise defendants of this. It kept said note, and, when payment was refused at maturity, protested the same. Defendants say that said note was an incomplete paper, and defendants were not bound as indorsers or as sureties or in any manner whatsoever; that they had never become liable upon said notes or bound to pay the same; and that they did not promise plaintiff that the sums named in said petition or any other sums should be paid, their indorsement having been conditional and the conditions having never been complied with." Pending the argument on a motion to strike the foregoing answer on the ground that it set forth no sufficient legal defense, the defendants offered the following amendment thereto: "That the preparation of the note sued upon and the letter attached to the petition was plaintiff's undertaking; that it undertook to procure said papers for its own profit and benefit; that these defendants signed said note and said letter on the distinct understanding and condition

understood and assented to by plaintiff that neither the letter nor the note was to be complete and binding until H. H. Peeples had signed the letter and signed the note as indorser; that plaintiff procured the signature and indorsement of all the parties whose signature and indorsement it undertook to procure except that of H. H. Peeples. It did not procure his signature and indorsement as it had expressly agreed to do, and, because of its failure to comply with this condition precedent, neither the note nor the letter ever became effective or binding." The court refused to allow the amendment, and granted a motion striking the answer on the ground that no legal defense was set forth therein. This is the first assignment of error in the bill of exceptions. Thereafter, during the same term, which was the first term after the suit was filed, the Court rendered one judgment against all the defendants for the full amount sued for. Four days after this judgment was rendered the defendant Fetzer came into court for the first time, and moved the court to open the judgment which had been rendered and allow him to demur and plead. He offered to pay the costs, but gave no reason for his failure to appear earlier. The Court overruled the motion, and Fetzer assigns error thereon, also excepting to the judgment rendered four days prior thereto. The answer which he offered to file was the same as that which had been filed by the three other defendants and which had been stricken on general demurrer.

Osborne & Lawrence, for plaintiffs in error. *U. H. McLaws, Adams & Adams, G. B. Whatley*, and *J. R. Cain*, for defendants in error.

Russell, J. (after stating the facts as above). . . .

This brings us to a consideration of the orders of the Court striking the answer filed by Heitman, Manning, and Knight, and in refusing to allow the amendment thereto.

1. Attention is called to the fact that the second count is a suit against all the defendants as makers, and the note and the letter are set forth as constituting one contract. The letter is as much a part of the contract as the note itself; and the terms of the contract created by the two papers taken together cannot be altered, varied, or contradicted by parol evidence of prior or contemporaneous agreements as to matters covered therein. Ordinarily, however, there can be no doubt that parol or other extrinsic evidence is admissible to show that a writing bearing every earmark of a complete and perfect contract is not in fact a contract at all because of the nonperformance of a condition precedent as to which the writing is silent. This is not varying the terms of a written contract by extrinsic evidence, for the simple reason that it shows that there is no contract in existence; that, therefore, there is nothing to which to apply the excluding rule. The so-called parol evidence rule presupposes the existence of a valid contract; and, on the questions as to whether or not a valid contract is in existence or has been created, generally parol or other evidence dehors the writing is always competent and legal. Accordingly, it may be shown by extrinsic evidence that the

writing involved is not a valid or enforceable legal obligation for the reason that it does not possess finality of utterance; that there never has been an agreement that the writing is a completed and finally uttered embodiment of all the terms of a contract presently operative and binding.

A few cases will illustrate and delimit this principle. In the great leading case of Pym *v.* Campbell, 6 E. & B. 370 [*ante*, No. 799], it was held that the defendant could show by extrinsic evidence that the writing sued on (on its face a complete and perfect contract for the sale of an interest in a patent) was not binding for the reason that it was signed on an express mutual understanding that it was not to become operative until A. was consulted and approved, and that A. did not approve. The writing did not in any way refer to the necessity for the performance of this condition precedent. In Ware *v.* Allen, 128 U. S. 590, a writing absolute on its face and signed by both parties was shown by parol evidence to have been signed on condition that it was not to become operative as a presently binding contract until an attorney had been consulted and had approved. . . . In Wilson *v.* Powers, 131 Mass. 540, a payee of a promissory note was allowed by extrinsic evidence to prove that a writing signed by him and by the maker of the note extending the time of payment was not to become binding until assented to by the surety. . . . In Blewitt *v.* Borum, 142 N. Y. 357, a contract, relating to the right to sell and manufacture a binder for books, admitted by the defendant to have been signed by him and handed to the plaintiff, was defeated by proof of a parol condition that it was not to become operative until the plaintiff acquired the interest of a third person, which condition the plaintiff had never performed nor had its nonperformance been waived by the defendant. . . . In Burke *v.* Dulaney, 153 U. S. 228, [*ante*, No. 800], the maker of a promissory note, given for the purchase price of an interest in a mine, was allowed to show by parol that he delivered the note to the payee on condition that it was not to be binding until he (the maker) had inspected the mine and approved it; that he had inspected the mine and disapproved it, and had demanded back the note.

It will be noted, however, that in none of the cases just mentioned was the condition covered by the writing involved. There is a plain difference between showing by extrinsic evidence the nonperformance of a condition precedent as to which the writing is silent, and showing by extrinsic evidence that the writing is incomplete or not finally uttered because of the nonperformance of a condition stated in the writing to have been performed or to have been agreed upon as unnecessary. In the former case the writing is not contradicted; in the latter it is. If, therefore, due consideration be given to the reasons which justify the existence of the parol evidence rule, the principle which was the foundation of the decisions in those cases must be limited to the extent that where the contract itself as written, agreed upon, and signed specifically

states that, upon the performance of a certain condition precedent, the contract shall become complete and binding, and that after that time nothing shall remain to be done by either party preliminary to the complete and final utterance of the writing as a presently binding and all-comprehensive embodiment of the entire agreement, then extrinsic evidence of an agreement as to other conditions would be incompetent. For example, if the written instrument, as agreed upon and signed by both parties, contains a stipulation that it is not to be binding until it is signed by a certain number of persons named therein, and that the signatures of these and these only are to be attached thereto, it would be a violation of the so-called parol evidence rule to allow parol evidence of an agreement that other signatures than the ones named in the contract were to be secured as a condition precedent to its final utterance as a completed legal act. This would be an attempt to contradict a written expression of intention by a less trustworthy method of proof.

And, after all, the real raison d'être of the rule excluding parol or other extrinsic evidence which contradicts or alters a written agreement is to be found in the elementary legal principle that the law looks to express and not abstract intent, and holds a man to the natural and probable consequences of what he has said, and not what he thinks he has said. Words, whether oral or written, are but vehicles for conveying ideas; and language, whether communicated orally or in writing, is the best means we have yet devised whereby men may express to one another their ideas and intentions. This being so, the law concerns itself only with the language used, and not with abstract states of mind wholly uncommunicated. When a man's abstract intention is contradictory of his expressed intention (whether expressed verbally or by written symbols), it is legally immaterial. So, where a written expression of intention fairly construed is unambiguous, the writer is bound by the language he has used, and cannot show that he has an abstract idea in mind at variance with such language. As has been so ably said by Mr. Wigmore:

> "We are to fix the person with such expressed consequences as are the reasonable result of his volition. In other words, the act 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." 4 Wigmore on Evidence, § 2413.

When a man has put his signature to a writing expressing his assent to the terms thereof, he has done an act to which the law attaches consequences just as definite and ascertainable as if he had committed some act in the domain of torts. Having led the other party to naturally believe that he has fully assented to the terms of the writing, he cannot show that he had in his mind a different idea. Unless this were true, it would be impossible for parties to put their agreements in writing in such manner as that they would possess comprehensiveness and finality — elements so very necessary and important in this day and time when we have

removed the common-law rule which disqualified parties as witnesses in their own behalf, but as yet have been unable to perfect human recollection or remedy the impairment thereof created by self-interest. The written embodiment of the agreement is the very res gestæ of the transaction, so to speak, and is more reliable than the subsequent recollection of interested witnesses.

2. We come now to the exact question in this case, which is within a narrow compass, to wit, whether the plea and the proffered amendment alleged the nonperformance of a condition precedent which contradicts either the note or the letter or the contract created by both of them together. The plea and the proffered amendment allege, in substance, that the nine defendants and four other persons, to wit, Peeples, Howkins, Henkin, and O'Brien, were indorsers on a note of a corporation of which all of them were directors; that the nine defendants and Peeples indorsed a renewal of this note on the distinct understanding that all of the old indorsers would indorse the new note before it should be binding or complete; that three of the original indorsers, to wit, O'Brien, Howkins, and Henkin, did not sign the renewal note, but that nevertheless the bank, concealing the fact from the defendants who had signed, kept the renewal note and procured several other renewals thereof, all the while concealing from the defendants signing that all the old indorsers were not signing; that as soon as the nine defendants ascertained that all the old indorsers were not signing the new notes, to wit, on February 7, 1908, the bank requested them to sign the letter prepared by it, and the note sued on and referred to in the letter; that defendants signed the letter and the note on the distinct mutual understanding that neither the note nor the letter would be effective, complete, or binding until the bank had procured the signature of Peeples (who had been signing every renewal note up to that time) to both the letter and the note, and that the bank had never performed this condition precedent. Let it be noted right here that the amended answer does not attempt to set up that the signatures of all the indorsers of the original note were to be obtained to the note and the letter as a condition precedent to the finality of their utterance as complete presently binding legal obligations. Such a defense would have been defective in that it would have sought to set up the nonperformance of a condition precedent the necessity for the performance of which is negatived by the contract itself, and would therefore have violated the rule which has been discussed above. The language of the letter is: "We beg to state that we have been unable to get all the old indorsers to indorse a new paper, and we therefore request you to accept the note indorsed by us and inclosed herewith in payment of the old notes." To prove by extrinsic evidence that all the original indorsers were to sign the note would be directly in the teeth of the letter which states to the contrary.

But, according to the answer and the amendment, all the original indorsers were not to sign, but all the indorsers of the renewal notes:

that is to say, all the original 13 indorsers, except Howkins, Henkin, and O'Brien. Does this contradict anything either in the letter or in the note? The words "all the old indorsers" appearing in the letter mean the 13 original indorsers, and not the 10 indorsers who had signed the renewal note immediately preceding the one in suit. This is evident from the allegation in the plea that the letter was signed at the request of the bank as soon as the defendants discovered that three of the original indorsers had not been signing any of the renewal notes. Peeples had been signing every renewal note up to that time. The language used in the letter is consistent with the idea that its purpose was merely to cover definitely the question which had been mooted up to that time, namely, that in future it was definitely understood that Howkins, Henkin, and O'Brien were not to sign the note or the contract. The word "we" used in the letter is not defined therein otherwise than by the exclusion of the idea that all of the 13 indorsers were to sign; and does not exclude the idea that Peeples was to sign. Suppose Peeples had signed, still the words in the letter, "we have been unable to get all the old indorsers to sign," would have been true. If the letter had stated specifically that "we have been unable to get Peeples, Howkins, Henkin and O'Brien, indorsers on former notes, to sign a renewal note, and we inclose herewith a note signed by us," then the idea that Peeples was to sign could not be set up by extrinsic evidence. Since, however, the fact as to whether or not Peeples was to sign does not appear from the letter or the note, proof by extrinsic evidence that he was to sign as a condition precedent to the final utterance of the written documents as completed legal obligations does not alter, vary, or contradict the terms of the written contract, but shows that there never has been a written contract — possessing the element of finality of utterance — made between the parties.

But, say counsel for the bank: "If this letter means anything, it means that the parties inclose this note to the bank requesting that it be accepted, although all had not signed. It was offered as the complete contract, as the final and complete arrangement. It shows that the writers had undertaken to get all to sign, and is utterly inconsistent with the idea that the bank assumed this obligation. According to the letter, these parties unite in this letter, which they send or deliver to the bank inclosing the note sued on, and state to the bank, in effect, that some of the former parties have not signed and are not going to sign. 'We have been unable to get them to sign, but all have signed who are going to sign, and we request you to accept this note as it is. We inclose it with this request. It is complete so far as we are able or expect to complete it.'" The fallacy in this argument, as we see it, is that it assumes that the letter was sent or delivered to the bank unconditionally. The letter speaks only from the time that it was finally and unconditionally delivered, which time according to the plea has never arrived. If the letter was complete, the note was complete; but, if the letter was not complete, there is nothing to show that the note was

complete. Suppose only two of the signatures of the 13 old indorsers were attached to the note and the letter, and that the bodies of these documents were in every respect like they are at present. Could not the 2 indorsers who had signed set up by parol that they signed on the express mutual understanding that the note and the letter were not to be complete until other signatures had been obtained, and that both the letter and the note were delivered to the bank on this condition? Does the letter in its body negative the idea that more than 2 of the 13 old indorsers were to sign it? If not, how does it negative the idea that 10 of the 13 old indorsers were to sign it? The body of the letter is entirely consistent with the idea that any number less than all of the 13 old indorsers were to sign it before it should be complete and binding — before it should speak as the obligation of those who had signed. "'All' means every one, or the whole number of particulars." 1 Words & Phrases, 312. Therefore, when the letter says in its body that not all were to sign, this means simply that not every one was to sign it, but is consistent with the idea that every one except one was to sign it. The only difference between this promissory note and all the other promissory notes in the cases cited above in which the parol condition of additional signatures was allowed is that here we have a letter. But the plea says there is no letter for the reason that it was never complete as a letter, that it was delivered to the bank on a condition to be performed by the bank, and that the bank has never performed this condition.

3. Nor does the fact that there had been a manual tradition of the documents to the bank affect the result. Every case to which reference has been made in this opinion fully recognizes the rule that there may be a conditional delivery of a contract, such as this one, to the obligee, and that proof of failure to perform a condition attached to the act of delivery will invalidate the contract. Take, for example, the case of Moore *v.* Farmers' Mutual Ins. Co., 107 Ga. 199. The policy of insurance there had been handed over to the insured, and it was in his possession, bearing every earmark of a complete and perfect contract, and yet the Court allowed proof of a parol condition unperformed to defeat recovery on the policy. So in the case of Burke *v.* Dulaney, 153 U. S. 234, the promissory note was in the manual possession of the payee possessing all the ordinary elements of a complete and perfect contract of that kind, and yet parol proof that delivery was made on a condition which had never been performed was held to defeat a recovery on the note. The rule of the common law, still of force in this State, that there could be no delivery in escrow of a deed to the grantee, does not apply to the species of contract involved in this case. In olden times, when form was everything and substance nothing, and the only method of transferring title to land was by feoffment with livery of seisin, the transfer of title was accomplished by formal ceremony alone. Usually the transferor and the transferee would go together upon the land, and the former would hand to the latter a piece of soil, or place in his hand the hasp or ring of the door, or a rod,

or perhaps a glove. This ceremony was symbolic of delivery of the land itself. Thereafter the transferee or feofee had been invested with livery of seisin, and he was the owner of the land. 2 Pollock & Maitland, History of the English Law, 82. When in later times the art of writing gained headway, and came into general use in legal proceedings, the law sanctioned the transfer of title to land by a grant or a deed. Much of the older ceremony formerly attending the transfer of title by feoffment with livery of seisin clung to the new method of transfer by grant or deed. The formal act of delivering the deed to the grantee was a mark of finality back of which the law would not look. Delivery to the grantee must be absolute, and not conditional. To quote again from Mr. Wigmore:

"A conditional delivery in escrow to the grantee has come down to us traditionally as a complete act; the condition being deemed vain. 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. In the United States it has been generally trenched upon so far as to recognize an escrow to a co-obligor as incomplete. In other respects it is maintained by the authority of the older decisions in most jurisdictions. But it is being gradually cut away, sometimes by subtly recasting the definition of a delivery; and the solid establishment of the contrary rule for contracts and writings in general (*i.e.*, other than sealed instruments — bonds and land deeds, will ultimately efface this last tradition of formalism." 4 Wigmore on Evidence, § 2408. . . .

There was no error in entering up one judgment against all the defendants after the plea was stricken. In the second count they were sued as makers of one contract, and judgment could properly be entered up against them accordingly.

Judgment reversed as to Heitman, Knight, and Manning, and affirmed as to Fetzer.

HILL, C. J. (dissenting). — I cannot fully concur in the opinion of the majority of the Court delivered herein. My dissent is not from any proposition of law announced, but from what I conceive to be an erroneous construction of the contract sued on in connection with the allegations of the original plea and the amendment thereto. . . . The question of difference between the majority of the Court and myself is therefore within a narrow compass, and depends upon the interpretation of the terms of the contract and the allegations of the original answer and the amendment.

I do not care to go into any extended argument in the attempt to show the incorrectness of the views of the majority of the Court or the soundness of my own. The question must be determined by reference to the terms of the contract and the allegations of the answer and the amendment. To my mind it is perfectly manifest that the note sued on was offered to the bank by the makers thereof as their final and complete contract, and was so accepted by the bank, and the language of the letter which accompanied the note is utterly inconsistent with the sugges-

tion that the bank assumed any obligation with reference to the note. The makers of this note had undertaken to secure the indorsement of all those who had signed the original note. They had failed to do so, and therefore requested the bank to accept the note indorsed by them, and which was inclosed with their letter, as their complete contract, in lieu of the original note; and, if anything further was necessary to make clear the intention of the makers of the note and the writers of the letter that the bank should accept the note as their final and complete contract than the express request that it would do so, it was the additional request that the bank would send to them the former note in order that they might bring suit to determine the liability of all the indorsers thereon. The defense, therefore, that the bank undertook to secure the indorsement of Peeples on the note as a condition precedent to its completion as a binding contract upon those who had signed it, and who sent it to the bank with the request that it be accepted without such indorsement, is a contradiction of the plain meaning of the contract. If the letter inclosed to the bank had expressly stated that Peeples was not to sign the note and the bank was asked to accept it without the signature and the bank did so accept it, it certainly could not be contended that the makers of the note who had made this request could subsequently be heard to set up the defense that Peeples had not signed the note. The letter accompanying the note does, in substance, state this fact, and make this request. The writers say: "We have been unable to get all the old indorsers to indorse a new paper ['all the old indorsers' included Peeples], and we, therefore, request you to accept the note indorsed by us and inclosed herewith [although Peeples has not signed it], in payment of the old note," etc. After the bank had accepted the note without the signature of Peeples and accepted it at the request of the makers of the note, who called attention to the fact that Peeples as one of the old indorsers had not signed the note, it certainly would be a defense inconsistent with their contract as evidenced by the note and the letter to allow them to make the defense that the contract was not complete because, in fact, the bank had undertaken to secure the signature of Peeples to the note and Peeples in fact had not signed it.

I think the Court did right in refusing to allow the amendment to the answer and in striking the original answer. It was clearly and manifestly an effort to ingraft upon the plain, unambiguous terms of a written contract a parol condition wholly inconsistent therewith and expressly negatived thereby. While the rule is well recognized that a written document may be shown by parol or other extrinsic evidence not to be a contract because of a nonperformance of a condition precedent as to which the writing is silent, yet the essential premise must be clearly established before the conclusion is permitted. The rule should not be extended, but strictly applied. It should not be allowed as a loophole through which to escape contract obligations, and should be construed so as not to destroy, but to preserve, that great safeguard which the

law from the earliest times has thrown around written contracts: "Parol evidence is inadmissible to add to, take from, or vary a written contract."

830. ADAMS *v.* GILLIG

COURT OF APPEALS OF NEW YORK. 1910

199 *N. Y.* 314; 92 *N. E.* 670

APPEAL from Supreme Court, Appellate Division, Fourth Department.

Action by Catherine Adams against Alexander L. Gillig and others, doing business under the firm name and style of George Kempf's Sons. From a judgment of the Appellate Division (131 App. Div. 494, 115 N. Y. Supp. 999), affirming a judgment for plaintiff, defendants appeal. Affirmed.

The defendant Gillig is the person to whom the deed hereinafter mentioned was given. The defendants Frank C. Kempf and Nicholas Kempf are contractors, who at the time of the commencement of this action were under contract with the defendant Gillig to do certain work upon the real property described in said deed. When the defendant is hereinafter referred to, the defendant Gillig is intended.

On and prior to June 2, 1908, the plaintiff was the owner in fee simple of a lot of land 100 feet front and about 160 feet in depth, situated on the east side of Elmwood Avenue in the city of Buffalo, and also of two other lots of land fronting on Highland Avenue in said city, and which run back to and adjoin the first-mentioned lot. The lots fronting on Highland Avenue had houses on them, and the lot fronting on Elmwood Avenue was vacant. The immediate neighborhood of said lots, so far as the same have been built upon, is devoted exclusively to residences. The defendant sought to purchase a portion of the plaintiff's lot fronting on Elmwood Avenue, and stated that he desired to purchase the same for residence purposes. The negotiations were carried on with the plaintiff's agents, and the defendant stated to the representative of the plaintiff's agents, and also to the agents themselves, that he intended to build dwellings upon the lot if purchased. The plaintiff's agents communicated to her the statement of the defendant and his offers, and she asked her agents if they were sure the sale would not affect the value of the remaining vacant lot, and she was told by her agents that the defendant would build either single or double houses upon the lot so to be purchased. The representations of the defendant that he intended to build dwellings on the lot to be purchased by him were false and fraudulent and made with the intent to deceive the plaintiff. The plaintiff relied upon the representations of the defendant that he intended to build dwellings upon the lot when purchased, and, believing such statements to be true, executed and delivered to him a deed of 65 feet front and 160 feet in depth in consideration of $5,525.

During all the time that the defendant was negotiating for the purchase of the lot in question, he intended to build a public automobile garage thereon, which fact was unknown to the plaintiff, and which the defendant fraudulently concealed from her. On the day following the purchase of said lot, the defendant instructed his architect to prepare plans for a garage to be built thereon to cover substantially the entire lot, and in less than two weeks thereafter he entered into a contract for the erection of such garage. The plaintiff without delay communicated with the defendant and offered to procure another site for his garage, pay all the expenses he had incurred up to that time, and restore the consideration he had paid for the property if he would reconvey the property to her. This the defendant refused to do. The plaintiff was deceived by said misrepresentations of the defendant, and the construction of the proposed garage will greatly damage the remaining property belonging to the plaintiff. It will decrease the value of the remaining vacant lot on Elmwood Avenue about one-half, and the value of her lots, with houses fronting on Highland Avenue, about one-fourth. The referee found in favor of the plaintiff, and directed a reconveyance of the property.

From the judgment entered upon the report of the referee an appeal was taken to the Appellate Division of the Supreme Court, where it was affirmed by a divided Court.

Horace McGuire, V. H. Riordan and *Paul J. Batt*, for appellant. The referee's conclusion of law that the plaintiff was entitled to a rescission of the contract and deed constituted error. . . .

Adelbert Moot, Helen Z. M. Rogers and *James W. Persons*, for respondent. The conclusion of law that plaintiff was entitled to a rescission of the contract and deed was the necessary and logical result of the facts found. . . .

CHASE, J. — Any contract induced by fraud as to a matter material to the party defrauded is voidable. There are many rules as to what constitutes an inducement by fraud, and also affecting the general statement that any contract will be set aside for fraud, that have been established as necessary to protect the rights of all the parties to a contract, which need not be stated in this discussion, except so far as they affect the particular transaction under consideration. It may be assumed that promises of future action that are a part of the contract between the parties, to be binding upon them, must be stated in the contract. An oral restrictive covenant, or any oral promise to do or refrain from doing something affecting the property about which a written contract is made and executed between the parties, will not be enforced, not because the parties should not fulfill their promises and their legal and moral obligations, but because the covenants and agreements being promissory and contractual in their nature and a part of, or collateral to, a principal contract, the entire agreement between the parties must be deemed to have been merged in the writing. The value of a writing would be very seriously impaired if the rule mentioned in regard to including the entire

agreement in such writing is not enforced. . . . The rule is quite universal that statements promissory in their nature and relating to future actions must be enforced if at all by an action upon the contract. . . .

It is not claimed on this appeal that the defendant made promises which became a part of the contract, or that the deed could be reformed by including therein restrictive covenants. The rule in regard to including the entire agreement between the parties in the writing does not take away or detract from the general rule by which a contract can always be set aside for fraud affecting the transaction as to a material fact that is not promissory in its nature. Any statement of an existing fact material to the person to whom it is made that is false and known by the person making it to be false and which is made to induce the execution of a contract, and which does induce the contract, constitutes a fraud that will sustain an action to avoid the contract if the person making it is injured thereby.

We have in this case findings by the trial Court sustained by the record, which show that the defendant purposely, intentionally, and falsely stated to the plaintiff that he desired to purchase a portion of her vacant lot for the purpose of building a dwelling or dwellings thereon. He must have known that if he thereby induced her to convey to him such portion of the lot, and his intention was carried out, it would injure her to an extent in excess of the full consideration to be paid by him to her for such lot. . . .

The simple question in this case is therefore whether the alleged intention of the defendant to build a dwelling or dwellings upon the lot which he sought to purchase is such a statement of an existing material fact as authorizes the Court to cancel the deed because of the fraud. The distinction between a collateral agreement as a part of a contract to do or not to do a particular thing and a statement and representation of a material existing fact made to induce the contract may be further profitably considered. A promise as such to be enforceable must be based upon a consideration, and it must be put in such form as to be available under the rules relating to contracts and the admission of evidence relating thereto. It may include a present intention, but as it also relates to the future it can only be enforced as a promise under the general rules relating to contracts. A mere statement of intention is a different thing. It is not the basis of an action on contract. It may in good faith be changed without affecting the obligations of the parties. A statement of intention does not relate to a fact that has a corporal and physical existence, but to a material and existing fact, nevertheless not amounting to a promise, but which, as in the case under discussion, affects and determines important transactions.

The question here under discussion is not affected by the rules relating to the admission of testimony. As it was not promissory and contractual in its nature, there is nothing in the rules of evidence to prevent oral proof of the representations made by the defendant to the plaintiff. In an action brought expressly upon a fraud, oral evidence of facts to

show the fraud is admissible. Pomeroy's Equity Jurisprudence, § 889. This case stands exactly as it would have stood if the plaintiff and defendant before the execution and delivery of the deed had entered into a writing by which the defendant had stated therein his intention as found by the Court on the trial, and the plaintiff had stated her acceptance of his offer based upon her belief and faith in his statement of intention, and it further appeared that the statement was so made by the defendant for the purpose of inducing the plaintiff to sell to him the lot, and that such statement was so made by him falsely, fraudulently, and purposely for the purpose of bringing about such sale. . . .

Unless the Court affirms this judgment, it must acknowledge that although a defendant deliberately and intentionally, by false statements, obtained from a plaintiff his property to his great damage, it is wholly incapable of righting the wrong, notwithstanding the fact that by so doing it does in no way interfere with the rules that have grown up after years of experience to protect written contracts from collateral promises and conditions not inserted in the contract. We are of the opinion that the false statements made by the defendant of his intention should under the circumstances of this case be deemed to be a statement of a material, existing fact of which the Court will lay hold for the purpose of defeating the wrong that would otherwise be consummated thereby. We have not overlooked the many authorities called to our attention by the appellant. In Wilson *v.* Deen, 74 N. Y. 531, Kley *v.* Healy, 127 N. Y. 555, 561, Gray *v.* Palmer, 2 Rob. 500, affirmed 41 N. Y. 620, Lexow *v.* Julian, 21 Hun 577, affirmed 86 N. Y. 638, Gallager *v.* Brunel, 6 Cow. 346, Gage *v.* Lewis, 68 Ill. 604, Hacnni *v.* Bleisch, 146 Ill 262, and many other cases in this and other States, the Court had under consideration representations that were promissory and contractual in their nature, and which, if enforced at all, could only be enforced under the rules relating to contracts. . . .

It is said that this decision will open the door to other litigation. If that is the effect of it, then, so far as the decision asserts power in the Court to prevent dishonesty, false dealing, and bad faith in business transactions, it should be welcomed. It is not the intention of the Court to extend the effect of this decision by implication, or to a case other than one where the facts are clearly found against the defendant. . . . We do not concede the accuracy of the statement made before us on behalf of the defendant to the effect that false statements similar to the one made by the defendant to induce the execution of the deed by the plaintiff are common in business transactions. But if true, and controversies arise over the retention of the fruits of such frauds, and the fraudulent inducement is conceded or proven beyond reasonable controversy, the transactions will not have the approval and sanction of the Courts.

The judgment should be affirmed, with costs.

Cullen, C. J., and Gray, Vann, Werner, Willard Bartlett, and Hiscock, JJ., concur. Judgment affirmed.

SUB-TITLE II. JUDICIAL RECORDS

Topic 1. In General

832. Sir F. Pollock and Professor F. W. Maitland. *History of the English Law.* (1895. 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 incontrovertible 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.[1] 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.

833. Sir Edward Coke. *Commentaries upon Littleton.* (1628 p. 260.) "Recordum" is a memorial 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 proofs 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.

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[1] ["Recordari" = remember, recall to mind.]

834. SAYLES *v.* BRIGGS

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1842

4 *Metc.* 421

TRESPASS upon the case for malicious prosecution. The declaration contained three counts, charging three distinct prosecutions of the plaintiff by the defendant. . . .

To support the third count, the plaintiff gave in evidence a complaint to a magistrate, signed and sworn to by the defendant, charging the plaintiff with forging a record of a magistrate; but he did not give in evidence any warrant issued on said complaint, nor prove that he was arrested and held to answer to the complaint, except by parol testimony. The plaintiff was arraigned before a justice of the peace, who made the following record, and no other, of the proceedings before him: "Berkshire ss. At a justice's court holden before me, at house of Franklin Bartlett, in Adams, on Wednesday, 13th day of February 1839, at one of the clock in the afternoon, Commonwealth *vs.* Franklin O. Sayles, on the complaint of Peter Briggs, Esq., for forgery. After full hearing in the case, the complainant withdrew his prosecution, and it was thereupon ordered by me the said justice, that the said Franklin O. be discharged." The plaintiff offered parol testimony of the said justice and others, that he was arraigned on all the aforesaid complaints, and pleaded to the same, and that a hearing thereon was had before said justice, who discharged the plaintiff.

The defendant objected to the admission of this testimony. But, as it appeared that no record had been made, by said justice, of the proceedings had before him, except that above set forth; and as it further appeared that said justice was no longer a justice of the peace under the commission held by him at the time of the trial and hearing of said cases before him, and that he had declined to qualify himself as a justice under a new commission which he had since received, and had also declined to make any further record in relation to said proceedings; the judge, before whom the trial was had, ruled that it was competent for the plaintiff to introduce parol evidence, if not contradictory to said record, to prove the issuing of the warrant on the third complaint, and also that the plaintiff was arraigned on all said complaints, and pleaded to the same, and that, upon a hearing before said justice, he was, by said justice, discharged therefrom. The proposed evidence was thereupon admitted, and a general verdict was returned for the plaintiff, which is to be set aside, and a new trial granted, if said ruling was erroneous.

Porter & Rockwell, for the defendant. *Bishop & Byington*, for the plaintiff.

HUBBARD, J. — To sustain an action for malicious prosecution, it is

necessary for the plaintiff to give evidence, by the production of the record, or a true copy of it, of the proceedings and an acquittal of the charge, with the further proof that the accusation was malicious and without probable cause. Bul. N. P. 13-15. Stone *v.* Crocker, 24 Pick. 87. In the present case, . . . the parol evidence, which was admitted to prove the issuing of the third warrant, the arraignment on all the complaints, and the discharge therefrom, was objected to by the defendant, and the question for consideration is, whether it was properly admitted. The ground of the admission was, that it was not contradictory to the record.

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. . . .

But records, like other documents, are exposed to casualties, and, like them, may also be misplaced or lost; or owing to the accidents which continually occur, the record may not, in a given instance, have been extended from the minutes of the proceedings. And the cases are abundant to show that a lost record, like a lost deed, may be proved by parol; and that the minutes may be introduced, where the record has not been drawn out "in extenso," as containing the elements of the record, and, in truth, for the time being, the record itself. . . . But in the present case, no facts or circumstances were introduced tending to prove either the loss of records, or the existence of any other record than the one produced; nor any minutes, from which another record might be completed. On the other hand, it appears that no record, other than the one in evidence, was ever made, and that no minutes were taken, at the time of the alleged trial, from which such further record could be made. It is impracticable, therefore, to support the introduction of this testimony on the ground that the record or a part of it was lost.

Again, 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 today and another tomorrow, 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.

There is, then, no record of an acquittal on the charge contained in the second count, nor of the issuing of a warrant, or of an acquittal, on the third count; and, for the reasons given, the want of such a record cannot be supplied by parol proof.

As the parol testimony ought not to have been admitted, the verdict must be set aside, and a new trial granted.

835. HUGHES *v.* PRITCHARD

SUPREME COURT OF NORTH CAROLINA. 1910

153 *N. C.* 23; 68 *S. E.* 906

APPEAL from Superior Court, Camden County; FERGUSON, Judge. Proceedings by M. E. Hughes, Sr., against D. T. Pritchard to establish a division line. From a judgment for plaintiff, defendant appeals. Affirmed.

This is a proceeding which was instituted for the purpose of establishing the dividing line between a tract of land alleged by the plaintiff to be the homestead of the defendant, and an adjoining tract, which was purchased by the plaintiff at a sale under an execution issued against the defendant. In his deed the sheriff conveyed to the plaintiff the tract of land upon which he had levied under the execution, but excepted therefrom the homestead of the defendant.

It appeared that the report of the appraisers, who set apart the homestead to the defendant, could not after diligent search be found in the clerk's office. There was evidence tending to show that an allotment of the homestead had been made by three appraisers, at the request of the sheriff, and that their report was prepared and signed by them. This report was seen in the clerk's office among the papers in the judgment roll of the case in which the execution had been issued. A copy of the report was made, and, after proving the loss of the original report, the plaintiff proposed to prove, by oral evidence and by the copy, the contents of the original report, for the purpose of showing the boundaries of

the homestead and the proper location of the disputed line. This testimony was objected to by the defendant, but admitted by the Court.

W. A. Worth and *H. S. Ward*, for appellant. *E. F. Aydlett, J. C. B. Ehringhaus*, and *Pruden & Pruden*, for appellee.

WALKER, J. (after stating the case as above). The testimony was clearly competent. The defendant's objection was based upon the ground that oral evidence cannot be received to prove the contents of a judicial record, unless in a proceeding brought to establish the lost or destroyed record, under chapter 11 of the Revisal, and that the record thus restored by proof and the judgment of the Court is the only evidence admissible to show the contents of the lost record. This is a misapprehension of the meaning and scope of that enactment. It is an enabling act, and it was not intended to exclude oral evidence, which was admissible at common law to prove the contents of a lost instrument, whether a deed or the record of a Court. This has been well settled by the decisions of this Court. Mobley *v.* Watts, 98 N. C. 284; and cases cited in the annotated edition; Cox *v.* Lumber Co., 124 N. C. 80; Aiken *v.* Lyon, 127 N. C. 175; Jones *v.* Ballou, 139 N. C. 526; Wells *v.* Harrell, 152 N. C. 218. In this case the plaintiff did not depend altogether upon the memory of a witness as to the contents of the report, but introduced an examined copy, or one which had been compared with the original and found to be correct. This is the principal exception of the defendant, and in passing upon it we must sustain the ruling of the Court below. . . .

No error.

836. COTE *v.* NEW ENGLAND NAVIGATION CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1912

213 *Mass.* 177; 99 *N. E.* 972

EXCEPTIONS from Superior Court, Bristol County; JABEZ FOX, Judge.

Action by Edmond Cote against the New England Navigation Company. There was a verdict for plaintiff, and defendant brings exceptions. Overruled.

Arthur S. Phillips, of Fall River, for plaintiff. *Arthur W. Blackman*, of Boston, for defendant.

RUGG, C. J.—This is an action of contract. The declaration alleges that the defendant as common carrier received a log of veneer of the value of $62 shipped to the plaintiff, which it failed to deliver. The only defence now material is that the plaintiff has sued the New York, New Haven & Hartford Railroad Company for the same cause of action, wherein the plaintiff recovered judgment which had been satisfied. The defendant admitted that it transported the veneer. It was undisputed that prior to the present action the plaintiff had brought action

against the New York, New Haven & Hartford Railroad Company, in which the declaration was in three counts, the first in contract alleging failure as a common carrier to deliver to the plaintiff the log of veneer valued at $62, the second count also in contract for failure as common carrier to transport oak stain to the value of $13.50, and (the plaintiff alleging doubt as to whether his action sounded in tort or contract) a third count in tort alleging conversion of both the log of veneer and the wood stain, the respective values of which were averred to be the same as in the contract counts. The log of veneer referred to in that declaration was the same as that which is the subject of the present action.

The defendant offered in evidence the full record of the earlier action, which showed judgment for the plaintiff in the sum of $13.50, and judgment satisfied. The plaintiff called as a witness the magistrate, before whom that action was tried. Subject to the exception of the defendant, he read from a paper in his possession, which was a motion by the plaintiff to discontinue his action set forth in the first count, and testified that the paper was left with him by the plaintiff's attorney at the trial of the action. Ascertaining on June 17, 1912, that this paper bore no file mark, he directed the clerk of the Court to file the paper, and caused the docket to be amended accordingly, and that the paper was in truth filed on June 19, 1911, which was the date of the trial of that action. The duly certified copy of the record in evidence did not show the filing or allowance of any such motion or any other motion affecting the declaration or the plaintiff's claims under it at the trial. It is to be observed that this testimony did not relate to the matters actually tried out and decided in the action, but merely to the Court record. Plainly, the admission of this evidence was improper. It was said in Wells *v.* Stevens, 2 Gray 117:

> "No principle is more firmly established than that which excludes oral testimony when offered to vary or contradict written judicial records. The record of a Court of competent jurisdiction imports incontrovertible verity as to all the proceedings which it sets forth as having taken place, and is of so high a nature that no averment can be made against it."

The record failed to show the presentation or allowance of the motion, and no parol evidence was admissible to amplify, modify, or contradict it. This rule is based upon considerations of public policy, and is too well established to require discussion. Kelley *v.* Dresser, 11 Allen 31; Lund *v.* George, 1 Allen 403; Sayles *v.* Briggs, 4 Metc. 421 [*ante*, No. 834]; Speirs Fish Co. *v.* Robbins, 182 Mass. 128, 65 N. E. 25.

But the defendant fails to show that it has suffered injury. The defendant in support of its plea of former judgment and satisfaction, offered no other evidence except the record. From this it appeared that the action was not between the same parties as those to the present action. Hence the general rule, that a judgment on its merits in a former action between the same parties is a bar, as to every issue which in fact was or in law might have been litigated, to later action upon the same cause,

has no application. There is nothing to indicate that the present defendant is a privy of the defendant in the earlier action. Apparently they are strangers. The defence is different in kind, and is founded on another rule, to the effect that a plaintiff cannot obtain twice satisfaction for the same debt or wrong. The plaintiff as a shipper of merchandise can have but one satisfaction of the debt or claim due to him for the failure to deliver his property, which the defendant undertook to transport as a common carrier. . . . New York Bank Note Co. *v.* Kidder Press Mfg. Co., 192 Mass. 391, 408; Crow *v.* Bowlby, 68 Ill. 23; Jenners *v.* Oldham, 6 Blackf. (Ind.) 235. The defence that the plaintiff had already received satisfaction of his debt or claim was an affirmative one, and the burden of proving it rested on the defendant. All it did was to introduce the record of an action, in which the present plaintiff was the plaintiff and another common carrier was the defendant, and in which the declaration sufficiently alleged, by two separate counts in contract, failure to deliver two distinct articles of merchandise and alternatively by one count in tort conversion of the same articles, in which the judgment was general and in which there was satisfaction. One only of these articles was the same as the subject of the present action. This evidence did not sustain the burden of proof as to the issue raised by the defendant. It did not show that the plaintiff had already received payment of the claim sought to be enforced against the defendant. It well might have been that the only issue tried and settled in the earlier case related to the other articles of merchandise and not to that now in litigation. So far as the exceptions show anything touching that matter, they indicate that the value of the log of veneer was not recovered in the earlier case. . . . When the second action is not between the same parties or does not relate to exactly the same claim or demand, then the effect of the prior judgment and its satisfaction can extend no further than the issue in fact litigated and determined. When the record does not demonstrate what issues actually were tried and decided, they may be shown by extrinsic evidence. . . . Sometimes this may appear on the record itself. But it does not in the present case. The party upon whom rests the burden of proof must introduce evidence to show that the matters in truth tried and settled in the earlier case were the same as those sought to be tried again in the second case, before it can be said that the satisfaction of the earlier judgment proves or warrants a finding that the plaintiff has been paid for the claim sought to be recovered in the second action. . . . Newhall *v.* Enterprise Mining Co., 205 Mass. 585; Virginia-Carolina Chemical Co. *v.* Kirven, 215 U. S. 252, and cases cited at 257.

The result is that the defendant failed to make out any defence under its answer of satisfaction of judgment for the same claim, and hence suffered no injury by the error in admission of evidence.

Exceptions overruled.

Topic 2. Jury's Verdict

837. VAISE *v.* DELAVAL. (1785. 1 T. R. 11.) Motion by *Law* for a rule to set aside a verdict, upon an affidavit of two jurors, who swore that the jury, being divided in their opinion, tossed up, and that the plaintiff's friends won.

Lord MANSFIELD, C. J. — The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is very high misdemeanor. But in every such case the Court must derive their knowledge from some other source; such as from some person having seen the transaction through a window, or by some such other means.

838. OWEN *v.* WARBURTON. (1807. 1 B. & P. N. R. 326, 329.) MANSFIELD, C. J. — The affidavit of a juryman [to a 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.

839. ROBBINS *v.* WINDOVER

SUPREME COURT OF VERMONT. 1802

2 *Tyl.* 11

MOTION for new trial, stating that some of the jurors of the jury who tried the cause, after the cause was submitted to them, witnessed or related to others of the panel certain matters and things in relation to the issue not witnessed or related on the trial of the cause in Court. . . .

Chauncey Langdon, for defendant, offered to read the affidavit of one of the jurors. To the reading of this affidavit an objection was taken. . . .

TYLER, Assistant Judge, the Chief Judge being absent, delivered the opinion of the Court.

The defendant rests his motion on two grounds: The first is, that certain jurors of the panel who tried the cause, witnessed or 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.

It may be observed here, that it is not alleged that these matters and things had any effect in determining the verdict; and the Court will not in any case set aside a verdict by intendment, where it appears that substantial justice has been done. But the previous question, whether the affidavit of one of the jurors shall be admitted, to show what passed

during the investigation of the cause in the jury room, renders any further observation upon what would have been the effect of such testimony, if admitted, unnecessary.

Upon the point in question, the Court are decidedly of opinion, that the affidavit cannot be admitted to be read. 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 favorably 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.

We learn by the cases cited from the books, and from others within the recollection of the Court, that the English judges consider the admission of such affidavits as not common, and of dangerous tendency. . . . But whatever may have been the opinions of the English jurists on this point, the Court consider that the mode of our trials affords so many opportunities for a losing party to have his cause reconsidered by Court and jury, unknown in the mother country, that the reasons operative there, if any exist, for the admission of affidavits of jurymen, exhibiting the deliberations of the jury room, cannot apply here. . . . The affidavit of the jurymen cannot therefore be read in evidence, and consequently the defendant cannot rest on the first ground of his motion. . . .

Motion dismissed, with costs.

Landgon, for defendant. *Darius Chipman*, for plaintiffs.

840. WRIGHT *v.* TELEGRAPH CO.

SUPREME COURT OF IOWA. 1866

20 *Ia.* 195

SUIT to recover damages for the injury sustained by him on account of the casualties aforesaid. The cause was tried to a jury and resulted in a verdict of three hundred and forty-five dollars and sixty-six cents for plaintiff.

The defendant moved for a new trial, based mainly upon alleged erroneous giving and refusing instructions, misconduct of the jury, and newly discovered evidence. In support of the alleged misconduct of the jury, the defendant filed the affidavits of four of the jurors who tried the cause. Each affidavit stated, in substance, that, in order to arrive at the plaintiff's damages, it was agreed that each juror should mark down such sum as he thought proper to allow; that the aggregate should be divided by twelve, and the quotient should be the verdict; which agreement was carried out by each juror, and the quotient thus obtained was returned to the Court as the verdict of the jury. The plaintiff then moved to strike the affidavits of the jurors from the files, because they could not be read as evidence in support of the motion for a new trial. This motion to strike was sustained and the motion for a new trial overruled. The defendant excepted and appeals.

C. Baldwin, for the appellant. *Clinton & Sapp*, for the appellee.

COLE, J. — The first question presented by the transcript, and argued by the counsel, is, whether affidavits of jurors may be read in support of a motion for a new trial, based upon the alleged misconduct of the jury, in the manner of arriving at the verdict. . . .

[After reviewing the Iowa decisions,] This want of entire or perfect consistency in our own Court, naturally stimulates an inquiry as to the course pursued by other Courts upon the same question. . . . A brief review of them, in view of the importance and frequent recurrence of the question, seems a plain duty. . . .

It was shown in Aylett *v.* Jewel, 2 W. Black. 1299, by the affidavit of defendant's attorney, that some of the jury had confessed to him that, not being able to agree on their verdict, all the names were written on separate papers, and shook together in a hat, and it was agreed that a majority of the six names first drawn should decide the verdict, and it was so done; but the Court refused to interfere, because there was no affidavit by the jurors, but only hearsay evidence. See also, to same effect, Clark *v.* Stevenson, 2 W. Black. 803; Mellish *v.* Arnold, Bunbury 51; Straker *v.* Graham, 4 M. & W. 721; s. c., 7 Dowl. P. C. 223; Burgess *v.* Langley, 5 M. & G. 722. But see, contra, Addison *v.* Williamson, 5 Jur. (Exch.) 466. In Rex *v.* Simmons, Sayre 35, s. c. Wils., 329, the jury were directed to inquire as to two matters — the *act* and the *intent*, but unless

they found the defendant guilty of both they should acquit. On the coming in of the jury, who only had found the defendant guilty of the act, the judge understood them to declare their verdict to be guilty, although one of the jurors said at the time, "No intent, no intent." There was much noise in the court room at the time. The affidavits of jurors were afterwards received, in explanation of the whole matter, and thereon the verdict was set aside upon the ground that it was contrary to the directions of the judge in a matter of law. See, also, Sargent *v.* Deniston, 5 Cow. 106; and *Ex parte* Caykendall, 6 *Ibid.*, 53. There were two different issues in Cogan *v.* Ebden, 1 Burr. 383, and the jury agreed to find for plaintiff on one issue, and for defendant on the other; but the foreman gave a general verdict for defendant. The mistake was discovered by the jurors about an hour afterwards, but not till after the judge had gone to his lodgings. The affidavits of eight of them were received as a basis for a rule to show cause why the verdict should not be amended. In King *v.* Woodfall, 5 Burr. 2661, it was held that, when there is a doubt upon the judge's report, as to what passed at the time of bringing in the verdict, affidavits of jurors may be received upon a motion for a new trial; but an affidavit of a juror cannot be read, as to what he then thought or intended. . . . In Little *v.* Larrabee, 2 Greenl. 34, the action was a writ of entry, and the Court received the affidavits of jurors to show that they intended to find for the *tenant*, whereas, by mistakes in the legal terms, they returned a verdict for *demandant*, and thereon set the verdict aside. . . . That affidavits of jurors will not be received to show that the verdict was obtained by each juror marking down and dividing aggregate by twelve, or by lot, etc., was decided in the following cases: Vaise *v.* Delaval [*ante*, No. 837]; Owen *v.* Warburton [*ante*, No. 838]; Dana *v.* Tucker, 4 Johns. 487. That affidavits of jurors will not be received to show the detail of the deliberations of the jury, or that they or one or more of them misunderstood the evidence or instructions, etc., or did not agree to the verdict, etc., see Robbins *v.* Windover, 2 Tyler 11 [*ante*, No. 839]. . . .

It is very apparent from this review of the authorities, that each case has been decided, not on any recognized or fixed principle, but upon its own supposed merits, according to individual views of the judge delivering the opinion of the Court deciding the case; and although previous cases are sometimes cited, the question seems very often to have been treated as one of first impression. Under such circumstances, it is, of course, impossible to deduce a general rule from, or state one that will be consistent with, all the cases.

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 the 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, 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 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.

We are, therefore, of the opinion that the District Court erred in striking from the files and refusing to consider the affidavits of the four jurors, that the verdict was determined by each juror marking down such sum as he thought fit, and dividing the aggregate by twelve and taking the quotient as their verdict, pursuant to a previous agreement to accept it as such. These affidavits, uncontradicted, are sufficient to sustain the motion to set aside the verdict and grant a new trial.

841. CAPEN *v.* STOUGHTON

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1860

16 *Gray* 364

PETITION entered at April term 1858 of the Court of Common Pleas in Norfolk, setting forth that in November 1856 a town way was laid out over the land of the petitioners in Stoughton, and damages assessed therefor, by which the petitioners were aggrieved, and the county commissioners, upon their application and after due notice, issued a warrant for a reassessment of the damages by a jury; that a jury was empanelled and the case tried before them; that blank forms of verdict for the petitioners and for the respondents were handed to them by the sheriff; that the jury agreed upon and filled out a verdict for the petitioners, but through mistake omitted to sign it, and signed a verdict for the respondents; that both verdicts were sealed up in one envelope and returned into the Court of Common Pleas; that the petitioners received information from some of the jurors that the verdict returned was in their favor, and so told their counsel, and he, relying on this information, without inspecting the verdict, moved the Court at December term 1857 to accept it, and it was accepted and ordered to be certified to the county commis-

sioners. The prayer of the petition was that this judgment should be vacated, the case brought forward on the docket, and leave given the petitioners to sue out a writ of review. SANGER, J., ruled that, assuming all the facts stated in the petition to be true, the petitioners were not legally entitled to the relief prayed for, and the Court had no discretionary power to grant it; and dismissed the petition. The petitioners alleged exceptions, which were argued in January 1859, and sustained, and the case remitted. . . .

A hearing was had in the Court of Common Pleas at April term 1859, at which AIKEN, J., against the objection of the respondents, allowed three of the persons who had composed the sheriff's jury to testify 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; and ordered the former case to be brought forward on the docket, and the acceptance of the verdict to be vacated as prayed for. The respondents alleged exceptions to the admission of the testimony of the jurors. . . .

BIGELOW, C. J. . . . We think this case differs essentially from those cited by the counsel for the respondents, in which it has been held, that the testimony of jurors is inadmissible in support of a motion to set aside a verdict on the ground of mistake, irregularity, or misconduct of the jury, or of some one or more of the panel. It has been settled upon sound considerations of public policy that mistake of the testimony, misapprehension of the law, error in computation, irregular or illegal methods of arriving at damages, unsound reasons or improper motives, misconduct during the trial or in the jury room, cannot be shown by the evidence of the jurors themselves, as the ground of disturbing a verdict, duly rendered. . . .

But in the present case the mistake which is proved by the testimony of the jurors is of a different character. It is not one connected with the consultations of the jury, or the mode in which the verdicts were arrived at or made up. No fact or circumstance is offered to be proved, which occurred prior to the determination of the case by the jury and their final agreement on the verdict which was to be rendered by them. But 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 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. Exceptions overruled.

842. KOCH *v.* STATE

SUPREME COURT OF WISCONSIN. 1906

126 *Wis.* 470; 106 *N. W.* 531

ERROR to Municipal Court, Milwaukee County; A. C. BRAZEE, Judge.

Edward Koch was convicted of larceny from the person, and he brings error. Reversed.

Plaintiff in error was tried jointly with one Meyers upon an information for robbery and larceny from the person under § 4378, Rev. St. 1898. At the close of the testimony on the evening of November 18, 1904, both parties stipulated, before the jury retired to deliberate on their verdict, that should they agree during the night and after the adjournment of Court, they might write out their verdict, date it, and the foreman sign it, inclose it in an envelope, seal it up, and the foreman take it with him, and the jury retire from the jury room and return their verdict into Court at the opening thereof the following morning. The jury were also told, before retiring, that they were not at liberty to state to any person what their verdict was, until they had delivered it into Court. Before they retired, the Court submitted to them the following forms of verdict: (1) We find the defendants guilty as charged. (2) We find the defendants guilty of larceny from the person. (3) We find the defendants guilty of assault, or, if you find one guilty and one not guilty, then you will so pronounce by your verdict. (4) We find the defendants not guilty. The jury retired at 5:30 P.M. and at about 8:45 P.M. agreed upon a verdict, which was reduced to writing, sealed in an envelope, and placed in possession of the foreman, and the jury then dispersed, and were discharged from the custody of the sheriff who had charge of them while deliberating. At the opening of Court on the following morning, they entered the box and delivered to the Court the following verdict: "Milwaukee, Nov. 18, 1904. We, the jury, find defendant, Mr. Meyers, guilty as charged. We, the jury, find the defendant, Mr. Koch, guilty for larceny and also recommend the Court to be lenient with Mr. Koch. F. A. Woodford, Foreman." Counsel for plaintiff in error moved that the verdict be recorded as read; whereupon the Court replied that it would be recorded, but not until the Court had requested the jury as to what their intentions were when they found plaintiff in error guilty of

larceny. Counsel for plaintiff in error also objected to the jury being permitted to orally contradict their written verdict, which objection was overruled, and exception taken. The Court then asked the jury if they meant to find plaintiff in error guilty of plain larceny, or larceny from the person, and the foreman answered: "Guilty of larceny from the person, is the way I understand it." The Court then instructed the clerk to ask each juror whether he meant to find plaintiff in error guilty of larceny, or larceny from the person, and upon being asked the question by the clerk, each juror answered that he meant to find him guilty of larceny from the person, to all of which counsel for plaintiff in error objected, and excepted to the proceedings and rulings of the Court.

Motion for new trial was made and denied, and the Court sentenced Meyers and plaintiff in error each to a term of one year in the Wisconsin State Reformatory; from which judgment and conviction plaintiff in error sued out his writ of error.

W. B. Rubin, for plaintiff in error. *L. M. Sturdevant*, Atty.-Gen., and *A. C. Titus*, Asst. Atty.-Gen., for the State.

KERWIN, J. (after stating the facts). The errors assigned raise the following questions for review: . . . third whether error was committed in receiving and changing the written verdict. . . .

3. Error is assigned because the verdict received was a nullity, and could not be amended after the jury had separated. The sealed verdict returned into court found the plaintiff in error guilty of larceny only. There was no finding that he was guilty of larceny from the person, nor of the value of the property taken. It is clear this finding was not sufficient to support the conviction. McEntee *v.* State, 24 Wis. 43; La Tour *v.* State, 93 Wis. 603, 67 N. W. 1138; Allen *v.* State, 85 Wis. 22, 54 N. W. 999. The question, therefore, arises whether the verdict could have been amended upon the facts heretofore stated. It is contended on the part of the State that it was not error to permit the jury, even after separation, to correct and explain their verdict, and several cases are cited, civil and criminal, which, it is claimed, support this position. In State ex rel. Town of White Oak Springs *v.* Clementson, 69 Wis. 628, 35 N. W. 56, it was held that the jury may, after announcing a verdict, if they see fit and before they are discharged, change the same and render a different one, and that where the jury have manifestly made an omission or mistake in their verdict, the presiding judge may call their attention to that fact, and return it to them for correction. In Victor S. M. Co. et al. *v.* Heller, 44 Wis. 265, after the jury had returned their verdict, the judge told them they were discharged, but immediately and before they left their seats or communicated with any one called their attention to imperfections in the verdict and put it in the form which they affirmed was intended, and it was signed by the foreman and declared by the jury to be their verdict; it was held that, it being clear that the verdict entered was the one intended, there was no error. . . . In these cases the jury had not

separated during their deliberations; the changes in the verdicts being made during the time of deliberation, and before discharged or separation, and while the jury were still together as such. . . . These cases are mainly relied upon here by counsel for the State. But it will be seen from a careful examination of them that they do not reach the question before us.

The cases, however, are not altogether uniform upon this subject. Respectable authority may be found holding that verdicts in criminal. as well as civil, cases, can be amended after separation of the jury. . . . In Allen *v.* State, 85 Wis. 22, 54 N. W. 999, it was held that a defective verdict in a murder case could not be corrected either by the Court or by reassembling the jury after they had been discharged. In Illinois and Massachusetts, it has been held that in a prosecution for felony it is error for the Court to allow the verdict to be corrected or amended in matter of substance after it has been agreed upon, signed and sealed, and the jury has separated. Farley et al. *v.* People, 138 Ill. 97, in a trial on charge of larceny, the Court, with the consent of defendants' counsel, given in open Court, directed that the jury be permitted to seal their verdict when arrived at and return the same into Court at the opening session the following day, and on the same afternoon the jury separated and went to their respective homes; returning into Court the following morning and producing what they intended as a sealed verdict of guilty as to both defendants. The verdict, however, failed to fix the term of imprisonment of one defendant. Thereupon the Court directed them to again retire and complete their verdict. Defendant objected, which was overruled. After some delay, the jury brought in a second verdict, finding defendants guilty and fixing the punishment. Judgment was entered on the last verdict, and reversed on appeal on the ground that after the jury had separated they had no further power over their verdict. The Court distinguished the case from separation during the trial, and said:

"This is not the case of a jury having been allowed to separate during the progress of a trial, or coming in contact with the people generally, in which case it must appear that some injury resulted to the defendant, and therefore the authorities cited by counsel for the people have no application." . . .

In Commonwealth *v.* Tobin, 125 Mass. 206, in a prosecution for felony, the Court said:

"When the jury have been permitted to separate after agreeing upon and sealing up a verdict, there is this difference between civil and criminal cases: In a civil action, if the written verdict does not pass upon the whole case, or the jury refuse to affirm it, the Court may send them out again, and a fuller or different verdict afterwards returned will be good. But in a criminal case, the oral verdict pronounced by the foreman in open Court cannot be received, unless it is shown to accord substantially with the form sealed up by the jury before their separation."

We believe the rule in Illinois and Massachusetts, above cited, is best calculated to elevate the standard of jury trials and preserve the purity

and integrity of the jury system. Whatever tends to subject a jury to temptation or improper influence during the trial, and especially after they have retired for deliberation, should be jealously guarded against, to the end that the accused may be protected in his constitutional right of a fair trial by an impartial jury.

In the case before us the verdict agreed upon and delivered into Court was a nullity. . . . The jury agreed upon a verdict, signed and sealed it, and then separated. Their function for deliberation and agreeing upon a verdict ceased as soon as they separated. They had no further office to perform, except to deliver into Court and announce the sealed verdict as the verdict of the jury. They could deliver this verdict orally, but they could not deliver a different verdict, orally or otherwise. Commonwealth *v.* Tobin, *supra*. . . . It follows, therefore, that the Court erred in excluding evidence on cross-examination, in permitting the verdict to be amended, and in denying the motion for new trial.

Judgment of the Court below is reversed, and the cause remanded for a new trial.

SUB-TITLE III. CORPORATE RECORDS

845. UNITED STATES BANK *v.* DANDRIDGE

SUPREME COURT OF THE UNITED STATES. 1827

12 *Wheat.* 65

THIS is a writ of error to the Circuit Court for the district of Virginia. The original action was debt on a bond, purporting to be signed by Dandridge, as principal, and Carter B. Page, Wilson Allen, James Brown, Jr., Thomas Taylor, Harry Heth and Andrew Stevenson, as his sureties, and was brought jointly against all the parties. The condition of the bond, after reciting that Dandridge had been appointed cashier of the office of discount and deposit of the Bank of the United States, at Richmond, Virginia, was, that if he should well and truly, and faithfully discharge the duties and trust reposed in him as cashier of the said office, then the obligation to be void, otherwise to remain in full force and virtue. The declaration set forth the condition, and assigned various breaches. Dandridge made no defence; and the suit was abated, as to Heth, by his death. The other defendants severed in their pleas. . . . Stevenson and Allen pleaded, among other pleas *non est factum* generally, and also special pleas of *non est factum*, on which issues were joined; and that all the defendants, in various forms, pleaded, that the instrument was not the deed of Stevenson; and further pleaded, that the bond had never been approved, according to the provisions of the 30th article of the rules and regulations of the bank. Issues were also taken on these pleas; and the cause came on for trial upon all the issues of fact.

At the trial, evidence was offered for the purpose of establishing the due execution of the bond by the defendants, and particularly by Stevenson and Allen, and its approval by the plaintiffs. The evidence was objected to, on behalf of the defendants, as not sufficient to be left to the jury, to infer a delivery of the bond, and the acceptance and approval thereof by the directors of the bank, according to the provisions of their charter; and the objection was sustained, the Court being of opinion, that although the scroll affixed by Allen to his name is, in Virginia, equivalent to a seal of wax, and although proof of the handwriting of Stevenson, and the bond being in possession of the plaintiffs, and put in suit by them, and the introduction of Dandridge into the office of cashier, and his continuing to act in that office, would, in general, be prima facie evidence, to be submitted to the jury, as proof that the bond was fully executed and accepted; yet it was not evidence of that fact, or of the obligation of the bond, in this case; because, under the Act of Congress, incorporating the Bank of the United States, the bond ought to be *satisfactory* to the board of directors, before the cashier can legally enter on the duties

of his office, and consequently, before his sureties can be responsible for his non-performance of those duties; and that the evidence in this case did not prove such acceptance and approbation of the bond, as is required by law for its completion. . . .

The Court excluded the whole, and every part of the said evidence from the jury, being of opinion, that the board of directors keep a record of their proceedings, which record, or a copy of it, showing the assent of the directors to this bond, was necessary to show that such assent was given; and if such assent had not been entered on the record of the proceedings of the said directors, the bond was ineffectual, and no claim in favor of the plaintiffs could be founded thereon, against the defendants in these issues.

This cause was very elaborately argued by the *Attorney-General* and Mr. *Webster*, for the plaintiffs, and by Mr. *Tazewell*, for the defendants.

STORY, J., for the majority (after stating the case as above). . . . It is admitted, in the opinion of the Circuit Court, that the evidence offered would in common cases, between private persons, have been prima facie evidence, to be submitted to the jury, as proof that the bond was fully executed and accepted. But it is supposed, that a different rule prevails in cases of corporations; that their acts must be established by positive record of proofs; and that no presumptions can be made, in their favor, of corporate assent or adoption, from other circumstances, though in respect to individuals, the same circumstances would be decisive. The doctrine, then, is maintained from the nature of corporations, as distinguished from natural persons; and from the supposed incapacity of the former to do any act, not evidenced by writing, and if done, to prove it, except by writing. . . .

In ancient times, it was held, that corporations aggregate could do nothing but by deed under their common seal. But this principle must always have been understood with many qualifications; and seems inapplicable to acts and votes passed by such corporations at corporate meetings. It was probably, in its origin, applied to aggregate corporations at the common law, and limited to such solemn proceedings as were usually evidenced under seal, and had to be done by those persons who had the custody of the common seal, and had authority to bind the corporation thereby, as their permanent official agents. Be this as it may, 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. Mr. Justice BAYLEY, in Harper *v.* Charlesworth, 4 B. & C. 575, said, "A corporation can only grant by deed; yet there are many things which a corporation has power to do, otherwise than by deed. It may appoint a bailiff, and do other acts of a like nature." And it is now firmly established, both in England and America, that a corporation may be bound by a promise, express or implied, resulting from the acts of its authorized agent, although such authority be only by virtue of a corporate vote, unaccompanied with the corporate seal. But whatever may be the implied

powers of aggregate corporations, by the common law, and the modes by which those powers are to be carried into operation, corporations created by statute must depend, both for their powers and the mode of exercising them, upon the true construction of the statute itself. . . . 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. If the statute imposes such a restriction, it must be obeyed; if it does not, then it remains for those who assert the doctrine to establish it by the principles of the common law, and by decisive authorities. None such have, in our judgment, been produced. . . . If a person acts notoriously as cashier of a bank, and is recognized by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed; and his acts, as cashier, will bind the corporation, although no written proof is or can be adduced of his appointment. In short, we think, that the acts of artificial persons afford the same presumptions as the acts of natural persons. . . .

But the present question does not depend upon the point, whether the acts of a corporation may be proved otherwise than by some written document. . . . In the present case, the acts of the corporation itself, done at a corporate meeting, are not in controversy. . . . The corporation is altogether a distinct body from the directors, possessing all the general powers and attributes of an aggregate corporation, and entitled to direct and superintend the management of its own property, and the government of the institution, and to enact by-laws for this purpose. . . . Assuming, then, that the directors of the parent bank were, as a board, to approve of the bond, so far as it respects the sureties, in what manner is that approval to be evidenced? Without question, the directors keep a record of their proceedings as a board; and it appears by the rules and regulations of the parent bank, read at the bar, that the cashier is bound "to attend all meetings of the board, and to keep a fair and regular record of its proceedings." If he does not keep such a record, are all such proceedings void, or is the bank at liberty to establish them by secondary evidence? In the present case (we repeat it), the whole argument has proceeded upon the ground, as conceded, that no such record exists of the approval of the present bond. The charter of the bank does not, in terms, require that such an approval shall be by writing, or entered of record. It does not, in terms, require that the proceedings of the directors shall generally be recorded; much less, that all of them shall be recorded. It seems to have left these matters to the general discretion of the corporation, and of the directors; and though it obviously contemplates, that there will be books kept by the corporation, which will disclose the general state of affairs, it is not a just inference, that it meant that every official act of the directors should be recorded, of whatever nature it might be. . . . Upon what ground it can be maintained, that the ap-

proval of the bond by the directors must be in writing? It is not required by the terms of the charter, or the by-laws. In each of them, the language points to the fact of approval, and not to the evidence by which it is to be established, if controverted. It is nowhere said, the approval shall be in writing, or of record. The argument at the bar, upon the necessity of its being in writing, must, therefore, depend for its support, upon the ground, that it is a just inference of law from the nature and objects of the statute, from the analogy of the board of directors to a corporate body, from principles of public convenience and necessity, or from the language of authorities, which ought not to be departed from. Upon the best consideration we can give the subject, we do not think that the argument can be maintained, under any of these aspects.

MARSHALL, CH. J. (dissenting). I should now, as is my custom, when I have the misfortune to differ from this Court, acquiesce silently in its opinion, did I not believe that the judgment of the Circuit Court of Virginia gave general surprise to the profession, and was generally condemned. . . .

The plaintiff is a corporation aggregate; a being created by law; itself impersonal, though composed of many individuals. These individuals change at will: and, even while members of the corporation, can, in virtue of such membership, perform no corporate act, but are responsible in their natural capacities, both while members of the corporation, and after they cease to be so, for everything they do, whether in the name of the corporation or otherwise. The corporation being one entire impersonal entity, distinct from the individuals who compose it, must be endowed with a mode of action peculiar to itself, which will always distinguish its transactions from those of its members. This faculty must be exercised according to its own nature. Can such a being speak, or act, otherwise than in writing? Being destitute of the natural organs of man, being distinct from all its members, can it communicate its resolutions, or declare its will, without the aid of some adequate substitute for those organs? If the answer to this question must be in the negative, what is that substitute? I can imagine no other than writing. The will to be announced is the aggregate will; the voice which utters it, must be the aggregate voice. Human organs belong only to individuals; the words they utter are the words of individuals. These individuals must speak collectively, to speak corporately, and must use a collective voice; they have no such voice, and must communicate this collective will in some other mode. That other mode, as it seems to me, must be by writing. A corporation will generally act by its agents; but those agents have no self-existing power. It must be created by law, or communicated by the body itself. This can be done only by writing. . . . It is stated in the old books (Bro. Corp. 49), that a corporation may have a ploughman, butler, cook, etc., without retaining them by deed; and in the same book (p. 50), WOOD says, "small things need not be in writing, as to light a candle, make a fire, and turn cattle off the land." FAIRFAX said, "A corporation

cannot have a servant but by deed; small things are admissible, on account of custom, and the trouble of a deed in such cases, not by strict law." Some subsequent cases show that officers may be appointed without deed, but not that they may be appointed without writing. Every instrument under seal was designated as a deed, and all writings not under seal were considered as acts by parol. Consequently, when the old books say a thing may be done without deed, or by parol, nothing more is intended than that it may be done without a sealed instrument. It may still require to be in writing. . . . According to the decisions of the Courts of England, then, and of this Court, a corporation, unless it be in matters to which the maxim "de minimis non curat lex" applies, can act or speak, and, of course, contract, only by writing. . . .

It may be said, that although certain things ought to appear in writing, it is not necessary that all the transactions of a bank should so appear; and the assent of the directors to the bonds given by their cashiers, need not appear. Such grave acts or omissions as may justify the suing out a scire facias, to vacate the charter, ought to be evidenced by their records; but such unimportant acts as taking bonds from their officers, need not appear; these may be inferred. I do not concur in this proposition. . . . The counsel for the plaintiffs has sought to escape the almost insuperable difficulties which must attend any attempt to maintain the proposition that a corporation aggregate can act without writing, by insisting that the directors are not the corporation, but are to be considered merely as individuals who are its agents. If this proposition can be successfully maintained, it becomes a talisman, by whose magic power the whole fabric which the law has erected respecting corporations, is at once dissolved. In examining it, we encountered a difficulty in the commencement. Agents are constituted for special purposes, and the extent of their power is prescribed, in writing, by the corporate body itself. The directors are elected by the stockholders, and manage all their affairs, in virtue of the power conferred by the election. The stockholders impart no authority to them, except by electing them as directors. But we are told, and are told truly, that the authority is given in the charter. The charter authorizes the directors to manage all the business of the corporation. But do they act as individuals, or in a corporate character? If they act as a corporate body, then the whole law applies to them as to other corporate bodies. If they act as individuals, then we have a corporation which never acts in its corporate character, except in the instances of electing its directors, or instructing them. . . . The president and directors form, by the charter, a select body, in which the general powers of the corporation are placed. This body is, I think, the acting corporation. . . . The board must keep a record of its proceedings. Were the by-laws silent on the subject, this would be, as I think, rendered indispensable, by the fact, that it is the act of a corporation aggregate. If there must be a record of their proceedings, and even were this necessity not absolute, if the by-laws show that there is one, it follows, that this

record, not the oral testimony of the members, or of bystanders, must prove their acts. . . . This record, or an authentic copy of it, must, according to the rules of evidence, be produced, that it may prove itself. May its existence be presumed in this case? The corporation, which claims this presumption, keeps the record, and is now in possession of it, if it exists. No rule of evidence is more familiar to the profession than that a paper cannot be presumed, under such circumstances.

I have stated the view which was taken by the Circuit Court of this case. I have only to add, that the law is now settled otherwise, perhaps to the advancement of public convenience. I acquiesce, as I ought, in the decision which has been made, though I could not concur in it.

846. CHESAPEAKE & OHIO R. CO. *v.* DEEPWATER R. CO.

SUPREME COURT OF APPEALS OF WEST VIRGINIA. 1905

57 *W. Va.* 643; 50 *S. E.* 890

ERROR from Circuit Court, Raleigh County.

Action by the Chesapeake & Ohio Railway Company against John L. Trail and others. Judgment for plaintiff, and the Deepwater Railway Company brings error. Reversed.

A. N. Campbell and *Brown, Jackson & Knight*, for plaintiff in error. *Simms & Enslow* and *W. P. Hubbard*, for defendant in error.

POFFENBARGER, J. — Although, in form, a proceeding by one railroad company to condemn, for its roadbed, a strip of land owned by another railroad company, which purchased said land for its roadbed, this case is in reality a controversy between said railroad companies over the question of priority of right to appropriate the strip of land in question, and calls for the settlement of principles governing the rights of rival companies contending for the same location for their respective roads.

The conflict is between a branch line of the Chesapeake & Ohio Railroad, called the "Piney Creek Extension," commencing at Prince Station on the main line, and on New river, and running for several miles up Piney creek and its branches, and thence across the divide to the waters of the Guyandotte river, and an extension of the Deepwater Railway, commencing at Glen Jean on Loup creek, another branch of the New river, and not far from Piney creek, and running across the divide to the waters of the Guyandotte river, and thence across the mountains to the Bluestone river. The point of conflict is a place called Jenny's Gap, on the ridge between the waters of New river tributaries and those of Guyandotte river branches. There is space for two locations through this gap, but the one in question is preferable to the other. . . .

A review of the authorities clearly establishes the following principles: First, When the statute does not make the filing of a map or plat of a railroad location a prerequisite to the adoption of it, an appropriation

of it may be made without the filing of such maps. . . . Third, A mere survey made by the engineers of a railroad company, not adopted or determined upon by the corporation itself, through its board of directors or otherwise, as the location of the route, does not amount to an appropriation, giving priority of right as against third persons. Fourth, A survey staked out upon the ground as a center line, a preliminary line, or as an actual location, whether delineated on paper or not, if adopted by the corporation as aforesaid, is a location within the meaning of the statute, and the company first making such location has a right to it superior to that of any other company. . . . The application of these principles to the facts must determine whether the applicant is entitled to the right of way through Jenny's Gap.

The record here presents the three distinct issues of

(1) A location by the Deepwater Company before September 11, 1902.

(2) A location by the Chesapeake & Ohio Company, September 11, 1902, and

(3) A location by the Deepwater Company, September 26, 1902. . . .

The directors of the Deepwater Company, on the 26th day of September, 1902, passed a resolution reciting that the engineer had located the company's proposed railroad from Glen Jean up the Dunloup creek to the mouth of Sugar creek, and up Sugar creek, crossing the divide, to Pack's Branch of Paint creek, down that branch and up Paint creek, crossing the divide, to Miller's Camp Branch of the Marsh Fork of Coal river, down that branch to the junction of the same with Surveyor's Fork, up that fork to Jenny's Gap, and through that gap to the waters of Slab Fork, and then on to the Bluestone river as hereinbefore described. . . . This was a formal, specific, and a deliberate adoption of that location by the corporate authorities of the Deepwater Railway Company. This is undisputed. . . . If, prior to the 26th day of September, 1902, the Chesapeake & Ohio Company had not, by corporate action, adopted the same location through Jenny's Gap, the right of the Deepwater Company to that location, by force of the action of its directors on September 26, 1902, is beyond dispute. The defendant in error claims to have adopted the location on the 11th day of September by a resolution passed by its board of directors at a meeting held on that day in the city of New York.

For proof of this, it introduced, over the objection of plaintiff in error, what purports to be a record of the minutes of such meeting, including the adoption of such a resolution. This record is in the form of typewritten sheets, pasted in a regular book of the company kept at Richmond, Va., by the secretary of the company, who testified that he had not attended the meeting, and knew nothing of it or what had been done thereat, other than what was disclosed by the type written matter. This typewritten record on sheets of paper, signed by the president of the company and the assistant secretary, had been received by him and pasted in the minute book, but he did not even say when they had

been received. Neither the president, assistant secretary, nor any other person who appears to have attended the meeting was called to testify that such meeting was held and such resolution passed, and nothing was shown by way of excuse for not calling them. Furthermore, it was admitted that both the president and assistant secretary were living, and residing, respectively, in Richmond and Philadelphia. The defendant in error attempts to use this record as evidence to prove its own act in its own favor against a total stranger to it. It is not used for the purpose of establishing any contractual relation between it and the plaintiff in error. It makes no charge against the plaintiff in error. It does, however, make use of this resolution to prove title in itself to a thing which the plaintiff in error says it has not acquired, and to which the plaintiff in error is entitled, unless, by prior acquisition, it has become the property of the defendant in error.

In support of the admissibility of the record for this purpose, upon showing that it was entered in the book by one having authority to do so, it is contended that the records of a private corporation are admissible evidence against all persons to prove its corporate acts. The able counsel for defendant in error say the following is deducible from the authorities as a rule on the subject: "The records of a corporation are admissible to establish a right in it which grows out of its own proceedings, although they may not be admissible to fasten the liability on others." In testing the soundness of this proposition, it is necessary to bear in mind that the decisions relating to the admissibility of such evidence present many distinctions in respect to the subject-matter of the controversy, the relation of the parties to it, and to one another, and the nature of the fact sought to be proved by such evidence.

(1) That the records of a corporation are always admissible against it is perfectly apparent. They are admissions and declarations against its interest, and may be used as such, just as the books, memoranda, letters, and declarations of an individual may be used against him, although not admissible in his favor. Jones, Evidence, § 530; Townsend *v.* Church, 6 Cush. 279. The cases illustrating this use of corporation records and books can have no possible bearing on the question presented here. Hence no time need be spent in collecting and analyzing them.

(2) When the controversy is between stockholders, concerning their interests in the corporation, and involves the consideration of the acts of the corporation as affecting directly its status and indirectly their interests, the records and books are admissible if authenticated by showing that they are the records and books of the corporation and have been regularly kept as such. This is done by calling as a witness the secretary or other recording officer, if he can be had. This rule rests upon considerations of convenience, and also upon sound legal principle. By becoming a stockholder in a corporation, a person creates, between himself and all other stockholders of the corporation, and between himself and the corporation, a contractual relation, which is affected and con-

trolled, in some degree, by every proper act of the corporation, whether done by its board of directors, its officers, or its mere employees. . . . He is deemed to have known, when he established his relationship of stockholder, that such records and entries would be made, and that they would indirectly relate to and affect his interest. Having access to the books and constructive knowledge of their contents, there is ground for a presumption that he would not have suffered an improper entry to remain in them without objection. Moreover, a relationship closely allied to that of partnership exists between the stockholders of a corporation. Because of the relation of agency existing between copartners, and the right of inspection of the books relating to the partnership business and affairs, the books of a copartnership are admissible evidence in controversies between the members thereof. . . .

(3) Though, according to good authority, there is no legal principle upon which the action can be justified, Courts almost everywhere hold that the records and proceedings of a corporation are admissible to prove, prima facie, against an individual, his membership in it as a stockholder. This rule is stated in Turnbull *v.* Payson, 95 U. S. 418, 24 L. Ed. 437, as follows:

"A person is presumed to be the owner of stock when his name appears upon the books of the company as a stockholder, and, when he is sued as such, the burden of disproving that presumption is cast upon him."

It was adopted by this Court in Railway *v.* Applegate, 21 W. Va. 172, without any reference to other authorities for a verification of its soundness. . . . Commenting upon this rule, Morawetz on Corporations, § 76, says:

"While the rule stated in the preceding section appears to be well established by authority, it is difficult to support it by any principle of the common law. The stock-books of a corporation are undoubtedly evidence against it as admissions, but they cannot be admitted on this ground, for the company, against a person who denies that he is a shareholder."

In this the author is supported by Wheeler *v.* Walker, 45 N. H. 355, and Chase *v.* Railroad Co., 38 Ill. 215. Though denouncing the rule as indefensible in principle, the Alabama Court enforced it in Semple *v.* Glenn, 91 Ala. 245, 6 South. 46, 9 South. 265, 24 Am. St. Rep. 894.

A review of the cases will show that, except in a few instances, there was evidence other than the mere appearance of the defendant's name upon the stockbook to show his connection with the company as a stockholder. . . . Railroad Co. *v.* White, 41 Me. 512, 66 Am. Dec. 257; Railroad Co. *v.* Sherman, 8 R. I. 564; Vawter *v.* Franklin College, 53 Ind. 88; Stuart *v.* Railway Co., 32 Grat. 146; and Turnpike Co. *v.* McKean, 10 Johns. 154, 6 Am. Dec. 324 — all belong to the class of cases just examined. Very few, if any, of these cases, may be regarded as having enunciated the proposition that, in the absence of proof of a subscription, or other substantial connection of the defendant with the corporation,

so as to make him a participant in the enterprise, the presence of his name alone on the books of the company, written there by one of its agents, is prima facie proof of membership. If, however, such doctrine is established, it affords no reason for extending the departure to any other class of cases. It has been denounced as unsound in principle by both Courts and text-writers.

(4) A very numerous class of cases in which corporations have been permitted to introduce their records and books for the purpose of proving their acts is that in which it is necessary to establish only de facto corporate existence, and not existence de jure. For instance, a bank sues on a note, or a railroad company on a contract, and the plea of nul tiel record is interposed, denying that the plaintiff is a corporation. Here proof of corporate existence is required, but it need not be full, nor need the evidence be such as is necessary to prove many kinds of specific corporate acts. Many decisions say that for this purpose it suffices to introduce the charter, act of incorporation, or articles of incorporation, and then proof that the plaintiff has acted as such corporation — carried on a banking business or railroad business. The issue is collateral in its nature. The plea simply requires the plaintiff to establish a status — show that it is what it claims to be. In that question, the other party has no direct, but only an incidental, interest. The fact thus put in issue is distinct from, and practically independent of, the real controversy between the parties. See Way *v.* Billings, 2 Mich. 397; Insurance Co. *v.* Allis, 24 Minn. 75; Henderson *v.* Bank, 14 Miss. 314; Bank *v.* Harrison, 39 Mo. 433, 93 Am. Dec. 285. . . .

(5) Practically all the cases found in which it has been held that the books and records of private corporations are evidence of their acts and proceedings, as against strangers, belong to this last class. This accounts for the oft-repeated proposition that, for such purposes, such records are admissible in controversies with strangers to the corporation. To say that the same rule must be applied to the determination of a question of vital interest between the corporation and a stranger would ignore the distinction which ought to be made between the cases in which the issue is one in which the stranger has no direct and substantial interest and the case in which the records are offered to prove the very fact which is directly in controversy between them. A corporation may be permitted to appeal to its records to establish a collateral issue without permitting it to introduce self-made and self-serving entries upon its books to prove that which is directly in issue between it and a stranger. That they cannot do so to prove title and claims against strangers has been decided in a number of cases. Jones *v.* University, 46 Ala. 626; Railroad Co. *v.* Cunnington, 39 Ohio St. 327; Railroad Co. *v.* Noel, 77 Ind. 110; Coosaw Mining Co. *v.* Mining Co. (C. C.) 75 Fed. 860; London *v.* Lynn, 1 H. Bl. 205, 214. . . . Owings *v.* Speed, 5 Wheat. 420, 5 L. Ed. 124, is relied upon, but that was a case in which the records of a public corporation were held admissible. It affords no precedent for the admission of records

of private corporations. All authorities admit this distinction. Jones on Evidence, § 526; Wigmore, Evidence, § 1661. Even the records of public corporations are not admissible to prove anything but acts of a public nature. Thus, in Attorney General *v.* Warwicke, 4 Russell 222, it was said: "Private entries in the books of a corporation, which are under their own control, and to which none but the members of the corporation have access, cannot be made use of to establish rights of the corporation against third parties." So, in Marriage *v.* Lawrence, 3 B. & A. 142, the Court held that "an entry in the public books of a corporation is not evidence for them, unless it be an entry of a public nature."

(6) Counsel for defendant in error base their contention largely upon an observation made in Railroad Co. *v.* Eastman, 34 N. H. 137, quoted in 2 Thompson, Corporations, § 1921. But as no question calling for such principle arose in that case, the declaration is obiter. Mr. Thompson also says, in volume 6 of his work on Corporations, § 7740, that

"the general rule is believed to be that, except for the purpose of proving what the corporation did, or what action its corporators took in effecting the organization, its books and records are not evidence as against a stranger." . . .

. . . The latest, and perhaps the most analytical, work on the subject of evidence, states the proposition in this language:

"The records of the proceedings and acts of an ordinary private corporation are, according to one theory, the constitutive acts of the corporation; they are not the evidence of what is done, but they are what is done, since the proceedings must be in writing." 3 Wigmore on Evidence, § 1661.

The author cites no cases illustrating what he means, but his view seems to be the idea above expressed. If so, expression in another form would be that they are not evidence that a thing was done, but are the evidence of the identity of the thing done; it being granted or proved that something was done because whatever was done was put in writing, and the writing itself is the evidence of it. Proceeding, he says:

"According to the other theory, they are merely entries of the oral doings, and are thus analogous to any ordinary person's contemporary entries of his doings."

This makes them mere memoranda, to be considered as a part of the oral testimony of the clerk or officer who entered them, testifying as a witness that the things purporting to have been done were done. That this is the true interpretation of his language appears from the following:

"The general practical difference between the two theories is as to their effect on the conclusiveness of the entries."

Under the first theory, the written memorial of what was done could not be varied by parol evidence; under the second, it could. This shows that he does not mean to say the record is proof that it was made at the time, in the manner, and by the authority recited therein. Further proof of this is found in a subsequent paragraph of the same section, in which he says:

"Books of entries of corporate proceedings are (as above quoted) ordinarily not receivable under the regular entries exception without calling the clerk or other entrant. But the records of a public officer are admissible under the present exception without calling the entrant, because he is a public officer; and therefore the books of a public corporation (that is, with us, usually a municipal governing body) are receivable without calling the official entrant." . . .

The effort here is to prove title, not by purchase, recovery, or otherwise, from the adverse party, but to show title nevertheless. It is title by appropriation from the public. Shall it be proved by evidence different in character from what is required in other cases? Could title by purchase, in case of conflict between two corporations, be established by the exhibition of a resolution on the books of one of them, on the theory that, as to the other, it was a corporate act, and not a transaction with such other company? . . . Against them stand several holding the contrary. Therefore the weight of authority, reason, and sound legal principles all assert the contrary. . . .

As this evidence must be discarded as inadmissible, nothing reinains to support the claim of a location by the defendant in error on the 11th day of September, 1902. . . .

The conclusions above stated require reversal of the two judgments complained of, setting aside of the verdict, restitution of the land in controversy to the plaintiff in error. . . .

BRANNON, P. (dissenting in part). I cannot concur in that feature of the foregoing opinion or syllabus laying down, as a permanent rule of evidence, that the record of proceedings of the directors of a railroad company is not admissible evidence alone to prove that the directors adopted a particular location for its road. It is an act which can be done alone by the directors. It cannot be done except in regular meeting. The act of adoption is a resolution in its record books. It may not be going too far to say that is the only evidence, if the record be in existence. It is not necessary to say that; but I do say that the resolution on record is competent evidence. It cannot create a debt or liability against a stranger; it cannot operate to take away his right; but where the law demands that the corporation do any act by its directory, that book is competent evidence to prove the doing of that act. Our Code of 1899 says, in chapter 53, § 52: "They shall keep a record, which shall be verified by the signature of the president." That "record" must have force to prove an act demanded of the directors by law. The authorities cited by Judge POFFENBARGER, properly construed, show this. Wigmore, Evidence, says: "No one doubted that the records of a meeting were receivable to prove the doings of a meeting." That is just the case — to prove the adoption of a resolution. In this case, as Wigmore says, this record is in fact not simply evidence of the act, but the very "act itself." 2 Wigmore, Evidence, § 1074 (3). I think the law is well phrased in Sigua *v.* Brown, 171 N. Y. 496, 64 N. E. 196:

"The books of corporations, for many purposes, are evidence, not only between the corporation and its members, and between its members, but also as between the corporation, or its members, and strangers. They are received in evidence generally to prove corporate acts of a corporation, such as its incorporation, its list of stockholders, its by-laws, the formal proceedings of its board of directors."

Thompson, Corporations, § 7740, will sustain this view. It is not claimed that such a record is conclusive, but admissible, evidence. Thompson says: "The general rule is believed to be that, except for the purpose of proving what the corporation did, or what action its corporators took, in effecting its organization, its books and records are not evidence against strangers." As the location had to be adopted by the directors, under this authority the record is competent to prove what the board did.

TITLE III. FORMALITIES OF LEGAL ACTS

847. John H. Wigmore. *A Treatise on Evidence.* (1905. Vol. IV, § 2454.) When it is required that a transaction, to have legal effect, must be in writing, the requirement is one of *form* or solemnity. This principle of Solemnization, or Formality, 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, was in all that time not required to be in a single document. So, too, of insurance applications under modern statutes. On the other hand, when the parties have voluntarily reduced their transaction to a single writing, the rule of Integration applies, 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.

Even among statutes, there are few of wide scope. These date back to the innovating provisions of the 1500s, by which bargains and sales, as well as wills, 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 personality.

The remaining varieties of Formality in vogue in our law are applicable only to specific kinds of legal acts, *e.g.*, attestation, for wills only; registration, for conveyances only. Hence they are not features common to legal acts in general, and do not fall within the present purview.

TITLE IV. INTERPRETATION OF LEGAL ACTS

848. INTRODUCTORY.[1] *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 were to be contented with proclaiming his contracts at the top of a mountain, or nailing his deeds to the front 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. 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.[2] 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.

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 out and instantaneously transform, with the presto of a magician, the existing to the desired state of things, they must embody their will 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 effect 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 perceives the station-pole standing straight above the cliffs. Until the current can be intercepted, it is but a useless rod of steel; it sends no message and accomplishes no purpose. It may have any one of various attunements; and it will

[1] Abridged from the present Compiler's *Treatise on Evidence* (1905. Vol. IV, §§ 2458, 2459).

[2] *Answer of Judges* to the House of Lords, 22 How. St. Tr. 301 (1789): "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."

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 official 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 uniliteral 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.

Intention and Meaning, distinguished. Before proceeding, however, to these two parts of the subject in 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 discover the actor's association of words with external objects, what is the term, in one word, which describes the object of 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 words only.

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, volition, or intent to utter, as the subjective element of an act, making 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 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 utterances as 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 execution of an act, 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 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 con-

tradistinguished 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" suggests 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 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 Execution of the act and its Interpretation as executed 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 shape 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 only by mistake; 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 peculiar 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.

SUB-TITLE I. STANDARD OF INTERPRETATION

850. History.[1] 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. 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. 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.

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.

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. 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.

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.

This notion was barely beginning to give way by the end of the 1700s. Interpretation by local usage, for example, today the plainest case of legitimate

[1] Abridged from the present Compiler's *Treatise on Evidence* (1905. Vol. IV, § 2460).

deviation from the normal standard, was still but making its way. 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 of conservatism), heretical enough. 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." And yet to give effect to a more flexible principle was to threaten the "landmarks of property," as the Bar was repeatedly warned.

But the law of England was merely passing through the same stages as the law of Rome. 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.

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*. The following passages show its phrasing:

Lane *v.* Stanhope. (1795. 6 T. R. 345, 354.) Lord Kenyon, Ch. J.: It is our duty in construing a will to give effect to the devisor's intention as far as we can consistently with the rules of law; not conjecturing, but expounding his will from the words used. 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. But if there be no such appropriate meaning to the words used in a will, if the devisor's intention be clear and the words used be sufficient to give effect to it, we ought to construe those words so as to give effect to the intent.

Beacon Life & Fire Assurance Co. *v.* Gibbs. (1862. Privy Council. 1 Moore, P. C. n. s. 73, 98.) Lord Chelmsford: 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.

851. ATTORNEY-GENERAL *v.* SHORE

Chancery. 1833–43

11 *Sim.* 592, 615

In 1704, Lady Hewley, a Protestant Non-conformist, conveyed estates to trustees for the benefit of "such poor and godly preachers for the time being of Christ's Holy Gospel," and for such poor and godly widows for the time being, of "poor and godly preachers of Christ's Holy Gospel," as the trustees for the time being should think fit; for promoting the preaching of "Christ's Holy Gospel," in such manner and in such poor places as the trustees for the time being should think fit;

for educating such young men designed for the ministry of "Christ's Holy Gospel" as the trustees for the time being should approve and think fit; and for relieving such "godly persons in distress," being fit objects of her own and the trustees' charity, as the trustees for the time being should think fit. At the date of the deed, all religious sects tolerated by law believed in the Trinity, but, in the course of time, the estates became vested in trustees, of whom the majority (though called Presbyterians) were Unitarians, and one was a member of the Church of England; and they applied the rents for the benefit of Unitarians. . . .

Dr. John Pye Smith, a witness for the Relators, deposed . . . that the ordinary sense and meaning of the term Presbyterians or Presbyterian dissenters, at or about the time of the foundation of Lady Hewley's charities, was a particular class of separatists from the Establishment, who differed from the two other classes on certain points of external discipline. The Rev. Thomas Scales, for the relators, deposed . . . that the word or term Presbyterian, at the time referred to, was commonly used as the name or description of a class or denomination of English Protestant dissenters, and that they were so large and influential a body as to give a name to all dissenters. These witnesses deposed to the above facts from "tradition and authentic publications"; and gave their opinions, derived from the same sources, as to the meaning, in 1704 and 1707, of "poor godly preachers," &c., &c. . . . The following are the questions propounded to the learned Judges, by the House of Lords:

First, — Whether the extrinsic evidence adduced in this cause, or what part of it, is admissible for the purpose of determining who are entitled, under the terms "godly Preachers of Christ's Holy Gospel," "Godly Persons," and the other descriptions contained in the deeds of 1704 and 1707, to the benefit of Lady Hewley's bounty? . . .

Tindal, C. J. — 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 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.

. . . On this account, I think all the extrinsic evidence which was actually given, in the cause, for the purpose of determining who were entitled under the terms "godly preachers of Christ's Holy Gospel" and other expressions used in the deeds, was inadmissible. Such, for instance, as the evidence of Dr. Pye Smith and Dr. Bennett as to the religious opinions of the Presbyterians and of other Protestant dissenters in the time of Lady Hewley; their interpretation of the terms used in the deeds; and their evidence of the religious opinions of Lady Hewley herself. The production also of the will of Sir John Hewley and of Lady Hewley, in proof of the private religious opinions of Lady Hewley, appears to me, both in respect to the point to which they were produced, and to the character of the evidence itself, not admissible by law.

[A majority of the other judges concurred with Tindal, C. J.]

852. Re Jodrell

Chancery. 1890

L. R. 44 *Ch. D.* 590

The Rev. Sir Edward Repps Jodrell, Bart., who died on the 12th of November, 1882, by his will, made on the 23rd of March, 1868, appointed

his wife and two friends whom he named to be his executors and trustees, and gave various specific legacies. . . . By clause 23 the testator directed the trustees to invest the sum of £5000, and to hold the same in trust to pay the income to his cousin, Major George King. . . . By clause 24 there was a similar gift of £5000 to hold in trust to pay the income to his cousin, Georgiana Forde. . . . By clause 25 there was a like gift of £5000 to hold in trust to pay the income thereof to his cousin, Emily MacDonnell. . . . By clause 37 the testator gave as follows: "As to all the residue and remainder of my real and personal estate not hereby effectually disposed of, I direct the same to be equally divided amongst such of my relatives hereinbefore named. . . ."

In an administration action commenced by originating summons on the 13th of March, 1888, . . . the Chief Clerk, on the 15th of March, 1889, certified that . . . the persons named in clauses 23, 24, and 25 were not legitimately related to the testator, but were the legitimate descendants of George Morison King and Mary Margaret Morison Moylan, formerly King, both of whom and the testator's mother were the natural children of Caroline Amelia Morison. . . .

The summons was adjourned into Court, and came on for hearing before Mr. Justice STIRLING, on the 26th of October, 1889.

C. Lyttelton Chubb, for the plaintiffs, the executors and trustees, stated the facts, and said that questions had arisen as to whether persons named in the will as "my cousins," but who were not cousins legally, could take under the residuary clause as "relatives"; . . .

Rigby, Q. C., (*Christopher James* with him), for Charles Seale Hayne: . . . The testator knew the fact that his own mother was a natural child, and that the persons called "cousins" in clauses 23, 24, and 25 were not in law relatives, but in blood purely. . . .

Sir *Henry James*, Q. C., *Renshaw*, Q. C., and *Ingle Joyce*, the defendants. . . . The mere fact that the testator in his will treated persons who were the children of illegitimate children as his cousins is not sufficient in law to entitle persons who were not really his relatives to take a share. . . .

STIRLING, J. . . . The main question then arises as to the meaning of the words "relatives hereinbefore named"; and as to that, three views have been put forward. The first rests on two elementary rules of construction, viz., that a will is so to be construed as to give effect to each word rather than in a way which will leave some of them inoperative; and that the words are to be taken in their strict and accurate meaning, unless an intention can be inferred to use them in another. The strict and accurate meaning of the word "relatives" is "legitimate relatives." The strict and accurate meaning of the word "named" . . . is "persons mentioned *nominatim*, if not by all their names, by some at least, either Christian or their surnames." If the testator used the words "relatives" and "named" with those meanings, it is found that the class of persons who would have taken under clause 37, if the testator had died

immediately after the execution of his will, consisted of, at most, five persons, viz., Charles Phillip Paul Jodrell, named in clause 12; Charles Seale Hayne, named in clause 20; Emily Higgins, named in clause 21; and Mary Champagne and Blanche Champagne, named in clause 22. . . . The result is that, in the events which have happened, Mr. Charles Seale Hayne is entitled to the whole of the residue.

From this decision several of the legatees who had been excluded appealed. . . .

Lord HALSBURY, L. C. — I am called upon to express an opinion on what is the meaning of this written instrument, and I repudiate entirely the notion of laying down any canon of construction which is to extend beyond the particular instrument that I am called upon to give an interpretation to. . . . The law will allow you, if you choose, expressly and in terms, to leave things to your wife's relations, or to leave things to persons who are not your legitimate descendants; and, inasmuch as the law permits both those things to be done expressly, I myself am wholly unable to understand in what way a Court of construction is called upon to put particular interpretations upon particular words with reference to any supposed presumption that the law makes either way. For myself, I am prepared to look at the instrument such as it is; to see the language that is used in it; to look at the whole of the document, and not to part of it; and, having looked at the whole of the document, to see (if I can) through the instrument what was the mind of the testator. Those are general principles for the construction of all instruments — and to that extent it may be said that they are canons of construction.

But the moment I depart from those general canons of construction applicable to all instruments, and I am overwhelmed with authorities about what particular Judges have thought about other particular instruments, and whether in this or that particular instrument the Judge has been sufficiently satisfied that such and such was the meaning of the testator, I confess myself to be in a hopeless state of confusion. In the first place, I do not know what mental thermometer there is to ascertain what exact degree of certainty is to be obtained. If there is sufficient to establish the meaning, why is it sufficient? And what does that mean? It must mean sufficient in the mind of the particular tribunal that has to decide. . . .

But now I come to construe the particular instrument, and I do not desire to express my meaning otherwise than to use the language of Lord CAIRNS in Hill *v.* Crook, L. R. 6 H. L. 265, 285, and he says, very truly, I think,

> "If you find that that is the nomenclature used by the testator, taking his will as the dictionary from which you are to find the meaning of the terms that he has used, that is all which the law, as I understand the cases, requires."

It seems to me that that is a very simple test, and, adding only to that the circumstances of the case with which the testator was dealing in

order that you may put yourself as much as you can into the position, and diving so into the mind of the person who has made the instrument which you are endeavoring to construe, it appears to me you have all the legitimate materials from which you can deduce what was the meaning of the testator.

Now, applying to the present case those general observations which are applicable to the interpretation of all such instruments, I find that the testator has described a number of persons as his "cousins." . . . When we do come to the word "relative" in section 37 we must find out what the testator has meant by the word "relative." . . . I find, therefore, that the word "relative" is used as a general word applicable to some of the persons whom he has hereinbefore described.

Now, with reference to Major King, Georgiana Forde, and to Emily MacDonnell, this observation applies — I take those as examples, though I believe there are more — those are persons who are not cousins in the strict sense which is insisted on on the other side. They are persons, all three of them, with respect to whom the bar sinister would prevent the actual application in strictness of that language. . . . Did he mean those persons when he spoke of his "relatives"? I confess for myself I cannot entertain the smallest doubt that they were in his mind as relatives. . . . He has, therefore, to use the language of Lord Cairns, given me a dictionary whereby I find that his wife's relatives, the nieces, and his illegitimate cousins are his relatives. . . .

Under those circumstances I cannot entertain a doubt that we ought not to follow the decision of the learned Judge below. I think that the decision was erroneous and must be reversed.

We are also of opinion that the legatees are to take per capita and not per stirpes.

Lindley, L. J. (concurring). . . . 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. — I am of the same opinion. . . . It seems to me that

the law laid down in Hill *v.* Crook, L. R. 6 H. L. 265, 285, by Lord Cairns is the true law. And although I do not disguise from myself that many judges, from Lord Eldon's time down to the present, judges of the highest authority and of the greatest learning, have used language (so to speak) of warning, and language that amounts to more than Lord Cairns has said — have used language to the effect that you must, before you can include under the name which the law usually appropriates to a legitimate tie persons who stand outside that strict line, find a necessary inference, or a very clear intention to that effect, it seems to me that the only weight one can give to such language 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. . . .

It seems to me that here the true construction of the will must be that in the term "relatives hereinbefore named" the testator intended to include all those he had before treated as relatives, whether he was correct in law in so treating them or not, and the children of those whom he had referred to in the preceding clauses.

853. TILTON *v.* AMERICAN BIBLE SOCIETY

Supreme Court of New Hampshire. 1880

60 *N. H.* 377

Bill in equity, by the executor of the will of Joseph Tilton, for the interpretation of the third item of the will. Facts found by the Court. The third item is, "I give and bequeath to the Bible Society, Foreign Mission Society, the Home Mission Society, and the Tract Society, five hundred dollars each." There are no societies known by those names. From 1851 until his death in 1864, the testator and his wife were members of the Congregational church and society at Littleton, and were regular attendants at the services and meetings of the church and society.

Subject to the plaintiff's exception, it was proved that during that time, at such meetings, annual contributions were taken for the New Hampshire Bible Society, the American Board of Commissioners for Foreign Missions, the New Hampshire Home Missionary Society, and the American Tract Society (who are defendants claiming the legacies); that when such contributions were taken, they were called collections for the New Hampshire Bible Society, Foreign Missions, the New Hampshire Missionary Society, and the American Tract Society; and that during the same period a similar custom of contribution for the same societies prevailed in the other Congregational churches and societies of this state, the donees being usually designated as the Bible Society, Foreign Missions, Home Missions, and the Tract Society. There was no evidence that the testator had knowledge of the usage in other towns than Littleton, except his connection with the Littleton church and society. Franklin Tilton was a member of the Congregational church and society at Littleton from July, 1858, until his death, was a regular attendant at their meetings, and took part therein, during a part of the time was superintendent of the Sabbath-school, and was familiar with the usages of the church and society. The residuary legatees contend that the bequests of the third item are void for uncertainty. Upon these facts the Court found that the societies for whom the annual contributions were taken were the societies which the testator intended to make legatees in the third item of his will.

Bingham, Mitchell & Batchellor, for the plaintiff and heirs. There are no societies known by the names used by the testator. The defendant societies are neither named nor described in the will; and their names, or descriptions of them or their objects in the will, are essential. . . .

C. R. Morrison, for the societies. . . . A misdescription of the legatee does not render the legacy void, unless the ambiguity is such as to render it impossible, either from the will or otherwise, to ascertain who was intended as the object of the testator's bounty. Smith *v.* Smith, 4 Paige Ch. 271; Society *v.* Hatch, 48 N. H. 393, 397. . . .

Doe, C. J.—There is no patent ambiguity. If there had been but one Bible society, the bequest to "the Bible Society" would not have been void for uncertainty.

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 character, 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. . . .

The New Hampshire Bible Society being pointed out by such terms in the will as he would be likely to use in describing that society, being the one he would probably mean when he spoke of "the Bible Society," and being found, upon competent evidence, to be the society intended by him, the law does not withhold the legacy from the donee intended by him, and does not give it to those who he meant should not have it.

A person known to a testator as A. B., and to all others as C. D., may take a legacy given to A. B. Samuel may take a legacy given to Edward, the testator having been in the habit of calling him Edward. Parsons *v* Parsons, 1 Ves. Jr., 266. . . . Case discharged.

Stanley, J., did not sit. The others concurred.

854. MYERS *v.* SARL

Queen's Bench. 1860

3 *E. & E.* 306

Action for a sum due on a building contract. By the contract it was provided that "no alteration or additions shall be admitted unless directed by the architects of" the defendants "in writing under his hand; and a weekly account of the work done thereunder shall be delivered to the said architect or the clerk of the works on every Monday next ensuing the performance of such work; and the delivery of such account shall be a condition precedent to the right of" the plaintiff "to recover payment for such addition or alteration." It was contended before the arbitrator, on behalf of the defendants, that the plaintiff was not entitled to recover for some of the extra work done by him, on the ground that the same was not directed to be done by the architect by any writing under his hand pursuant to the clause in the contract above set out, and also on the ground that no sufficient weekly accounts of such work were delivered by the plaintiff within the meaning of that clause. With respect to the latter objection it appeared in evidence that certain accounts of the extra work were delivered by the plaintiff as and for weekly accounts within the meaning of the contract; and it was contended on his behalf that the term "weekly account," as used in the contract, was a term of art well known in the building trade, and to all builders and architects, and that parol testimony was admissible to prove its meaning.

The admissibility of such evidence was objected to on the part of the defendants. The arbitrator held that the words used were a term of art, and that such evidence was admissible: and he accordingly received the same.

Bovill (*Tompson Chitty* with him), for the plaintiff. . . . Secondly,

the arbitrator was clearly right in admitting parol evidence to explain the term "weekly account," that being, as he has found, a term of art in the building trade. . . .

Lush, contra. — The case is not within the principles upon which parol evidence is admissible to explain written documents. The parol evidence, here, was not restricted to the meaning of an ambiguous word or expression, but was admitted to contradict the plain meaning of the words "a weekly account of the work done thereunder," *i.e.*, under the direction of the architect, and to prove that those words were satisfied by the delivery of accounts of extra work not done under such direction. Grant *v.* Maddox, 15 M. & W. 737, is distinguishable. Parol evidence was properly admitted, in that case to show that, by the word "year" in the contract there in question, the theatrical year was intended. (BLACKBURN, J. — Does not the principle of that decision show that evidence is admissible to explain that, by a "weekly account of the work," an account of certain portions of weekly work was meant? . . . That is a fair meaning of the words, and it would be contradicted by the parol evidence.)

HILL, J. . . . The question turns upon the meaning to be given, in the contract, to the words "a weekly account of the work done thereunder." Mr. Lush says that the plain, ordinary meaning of these words is a "weekly account of all the work done thereunder." The usage of the trade is proved to be that they mean "a weekly account of the day work done thereunder." We have to determine whether evidence of that usage was rightly received. Now the rule governing the admissibility of evidence to explain the language of contracts is, that words relating to the transactions of common life are to be taken in their plain, ordinary, and popular meaning; but if a contract be made with reference to a subject-matter as to which particular words and expressions have by usage acquired a peculiar meaning different from their plain, ordinary sense, the parties to such a contract, if they use those words or expressions, must be taken to have used them in their restricted and peculiar signification. And parol evidence is admissible of the usage which affixes that meaning to them. The admissibility of such evidence does not depend upon whether the expression to be construed is ambiguous or unambiguous; but merely upon whether or not the expression has, with reference to the subject-matter of the contract, acquired the peculiar meaning.

BLACKBURN, J. — I am of the same opinion. I agree with my Brother HILL that the words of a written commercial contract are to be understood in the sense which they have acquired in the trade to which the contract relates. It is a prima facie presumption that, if the parties to such a contract use expressions which bear a peculiar meaning in the trade, they use them in that peculiar meaning, which can be ascertained only by parol evidence. 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 it 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. . . .

Consequently, I think that the arbitrator was quite right in admitting the evidence.

Judgment for plaintiff on first point, and for defendants on the second.

855. BROWN *v.* BYRNE. (1854. Queen's Bench. 3 E. & B. 703.) COLERIDGE, J.—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."

856. WALLS *v.* BAILEY

COURT OF APPEALS OF NEW YORK. 1872

49 *N. Y.* 463

THIS action was instituted to recover a balance alleged to be due to the plaintiffs for plastering the defendant's house. The work in question was done under a written contract, of which the following is a copy:

"BUFFALO, N. Y., January 18, 1869.

"We hereby agree to do the plastering work of house now being built by George Bailey, on Maine street, at the prices named below, viz.:

"For one coat work, twenty-five cents per square yard.

"For two coat work with hard finish, thirty-three cents per square yard.

"The prices to include all labor and cost of material, we paying said Bailey the invoice price for all laths purchased and supplied by him. All work to be done with the 'International Lime Company's' lime; the laths to be securely nailed before plastering, and all work to be done in a good, workmanlike manner, and to the satisfaction of said Bailey.

"Plastering with hydraulic cement, forty-five cents per square yard, to be done in a good, workmanlike manner, and to the satisfaction of said Bailey.

WALLS & LECK."

The plaintiffs claimed that in determining the number of square yards for which they are entitled to pay, under the agreement, the openings, including doors and windows, are to be measured as plastering. That in

rooms plastered with two or three coat work, the part of the work behind the cornice and base-board is to be measured as though actually plastered with two or three coats, though the same was only plastered with one coat. This claim was based on the assumption that at the time the agreement was made it was the custom of plasterers in the city of Buffalo to measure and charge for openings; and for wall not plastered, where the same was covered by a cornice or base-board. The Court allowed proof of such custom to be given on the trial under defendant's objections.

Defendant was called as a witness in his own behalf, and his counsel asked him this question: "When you made the contract had you any knowledge of any custom in Buffalo of measuring openings in measuring plastering?" This was objected to and the Court excluded the testimony. The Court charged that the contract was to be construed with reference to the custom of the place where made, that such custom must be reasonable and public, general and uniform, to which defendant excepted.

The jury found a verdict for the full amount claimed by the plaintiffs.

Benjamin H. Williams, for the appellant. The work was done under a contract clear and unequivocal, which could not be varied by parol proof of a custom. . . . Knowledge of the customs by the party sought to be charged must be shown, and the presumption of such knowledge may be rebutted. . . .

David F. Day, for the respondents. The usage of plasterers in Buffalo was properly proven, and the contract is to be construed in reference to it. . . . Defendant was bound to know the custom of the trade with which he dealt. . . .

FOLGER, J.—The contract between the parties was in writing. By it the plaintiffs were to furnish the material for the plastering work of the defendant's house, and to do the work of laying it on. The defendant was to pay them for the work and material a price per square yard. Of course, the total of the compensation was to be got at by measurement. But when the parties came to determine how many square yards there were, they differed. The query was, the square yards of what? Of the plaster actually laid on, or of the whole side of the house, calling it solid, with no allowance for the openings by windows and doors? . . . Evidence of usage is received, as is any other parol evidence, when a written contract is under consideration. It is to apply the written contract to the subject-matter, to explain expressions used in a particular sense, by particular persons, as to particular subjects, to give effect to language in a contract as it was understood by those who made use of it. The jury, in the case before us, have found the existence of the usage contended for by the plaintiffs, and upon evidence which well sustains the finding. The same evidence shows that the usage was uniform, continuous and well settled. Nor was it one which was in opposition to well settled principles of law, or which was unreasonable. . . .

These views dispose of the points made by the appellant in this court,

save the one that the trial Court erred in overruling the question put to the defendant when on the stand as a witness in his own behalf, to wit: "When you made that contract, had you any knowledge of any custom in Buffalo of measuring openings in measuring plastering?" . . . It would seem, however, that upon principle, for a party to be bound by a local usage, or a usage of a particular trade or profession, he must be shown to have knowledge or notice of its existence. For upon what basis is it that a contract is held to be entered into with reference to, or in conformity with, an existing usage? Usage is engrafted upon a contract or invoked to give it a meaning, on the assumption that the parties contracted in reference to it; that is to say, that it was their intention that it should be a part of their contract wherever their contract in that regard was silent or obscure. But could intention run in that way unless there was knowledge of the way to guide it? No usage is admissible to influence the construction of a contract unless it appears that it be so well settled, so uniformly acted upon, and so long continued, as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference thereto. There must be some proof that the contract had reference to it, or proof arising out of the position of the parties, their knowledge of the course of business, their knowledge of the usage, or other circumstance from which it may be inferred or presumed that they had reference to it. . . . The jury may presume, from all the circumstances of the case, that knowledge or notice existed. . . . It seems then, to come to this: Is the presumption, which the jury may thus make conclusive, or may not that presumption be repelled by express negatory proof of ignorance? When the defendant proposed, by the question which was rejected, to offer evidence tending to show his ignorance of the existence of the usage, he claimed no more than to exercise the right of attempting, by direct evidence, to repel the presumption of his knowledge, which might without that proof, or perhaps in opposition to it, be made from the facts of the case. . . . In this view it was proper for the defendant to put and answer the question rejected.

In my judgment, the trial Court should have admitted the question. For this reason, the judgment should be reversed and a new trial ordered, with costs to abide the event of the action.

All concur, except PECKHAM, J., dissenting. Judgment reversed.

857. STOOPS *v.* SMITH

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1868

100 *Mass.* 63

CONTRACT against a trader in sewing machines in Worcester on the following agreement signed by him:

"Worcester, August 30, 1866. I promise to pay Walter Stoops the sum of fifty dollars for inserting business card in two hundred copies of his advertising chart; to be paid when the chart is published and the card appears to the exclusion of all others in the sewing machine trade."

The declaration alleged the full performance of the condition by the plaintiff, and the defendant's refusal nevertheless to pay the stipulated sum on demand. The answer alleged that any sum which the defendant agreed to pay to the plaintiff was in consideration of the plaintiff's promise that the copies of the chart should be made of cloth, and be published by posting in the most public and conspicuous places within forty miles of Worcester; that there had been a failure of such consideration; and that the plaintiff made the promise with intent to defraud. . . . The defendant, 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. This offer was rejected.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

G. F. Verry, for the defendant. *F. H. Dewey* and *F. P. Goulding*, for the plaintiff.

Wells, J. — The writing, upon which this action is brought, contains a promise on the part of the defendant only. It recites, imperfectly and in general terms, the agreement to be performed on the part of the plaintiff, as the consideration upon which the promise of the defendant is made. At the trial, the defendant offered evidence to show the whole arrangement between the parties; particularly the representations of the plaintiff as to the material of which the chart was to be made, and the manner in which it would be published; and contended that he was not bound to pay, because the plaintiff had failed so to make and publish the chart. The Court excluded the evidence, and ruled that no evidence of extrinsic facts was admissible for any purpose.

The alleged representations related to that which was then in the future, and were, in one aspect, of a promissory nature. The principle of law is clear and well settled, that the obligation of a written contract cannot be abridged or modified by or made conditional upon another preceding or contemporaneous parol agreement, not referred to in the writing itself. But it is equally well settled that, for the purpose of applying the terms of the written contract to the subject matter, and removing or explaining any uncertainty or ambiguity which arises from such application, parol testimony is admissible, and has a legitimate office. For this purpose, all the facts and circumstances of the transaction out of which the contract arose, including the situation and relations of the parties, may be shown. The subject matter of the contract may be identified by proof of what was before the parties, by sample or otherwise, at the time of the negotiation. The terms of the negotiation itself, and statements therein made, may be resorted to for this purpose.

. . . The purpose of all such evidence is, to ascertain in what sense the parties themselves used the ambiguous terms in the writing which set 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 purpose 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." The representations as to the material of which the chart was to be made, and the mode of publication, constitute his description of what "his advertising chart" was. Macdonald *v.* Longbottom, 1 El. & El. 977. . . .

It follows that the evidence offered by the defendant was improperly excluded. . . . Exceptions sustained.

858. GOODE *v.* RILEY. (1891. Massachusetts. 153 Mass. 585; 28 N. E. 228.) HOLMES, J. — 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.

859. VIOLETTE *v.* RICE

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1899

173 *Mass.* 82; 53 *N. E.* 144

BILL in Equity, filed November 20, 1896, in the Superior Court, against Charles E. Rice and Edward E. Rice, copartners as C. E. and E. E. Rice, and others not material to be named, to reach and apply property in payment of damages for an alleged breach of a contract of employment. Hearing before SHELDON, J., who ordered a decree to be entered dismissing the bill; and, the plaintiff having appealed, reported the case, at the request of the parties, for the determination of this court.

This is a bill in equity to reach and apply property which is alleged to have been conveyed in fraud of the plaintiff, claiming damages for a breach of contract to employ the plaintiff in the part of "Bertha Gessler" in a play called "Excelsior Junior." The contract was in writing, and engaged the plaintiff in general terms "to *render services at any theaters*," etc.; the plaintiff agreeing "to conform to and abide by the rules and regulations adopted by said Edward E. Rice for the government of said companies." . . . At the hearing evidence was taken de bene that at the time of signing the contract it was agreed that the general word "services" meant services in the particular part named. This evidence ultimately was rejected, and the only question is whether it should have been admitted.

W. R. Sears, for the plaintiff. *T. J. Barry*, for the defendants, submitted the case on a brief.

HOLMES, J. (after stating the case). We are of opinion that the evidence could not be received. . . The engagement to render services expressed a general employment, which could not be limited to a single part without contradiction; for to give evidence requiring words to receive an abnormal meaning is to contradict. It is settled that the normal meaning of language in a written instrument no more can be changed by construction than it can be contradicted by an avowedly inconsistent agreement, on the strength of the talk of the parties at the time when the instrument was signed. . . . When evidence of circumstances or local or class usage is admitted, it tends to show the ordinary meaning of the language in the mouth of a normal speaker, situated

as the party using the language was situated; "but to admit evidence to show the sense in which the words were used by particular individuals is contrary to sound principle." Drummond *v.* Attorney General, 2 H. L. Cas. 837, 863. "If that sort of evidence were admitted, every written document would be at the mercy of witnesses that might be called to swear anything." Nichol *v.* Godts, 10 Exch. 191, 194.

The case of Keller *v.* Webb, 125 Mass. 88, goes a good way, but was not intended, we think, to qualify the principle, settled by the earlier and later Massachusetts cases, some of which we have cited. In that case evidence of conversation was admitted to show that "casks" in a written contract, meant casks of a certain weight. It was assumed that the contract meant casks of some certain weight, but did not state what, and thus that the evidence supplemented, without altering, the written words. A similar explanation applies to Stoops *v.* Smith, 100 Mass. 63, [*ante*, No. 857].

The other cases cited do not need particular notice.

Decree affirmed.

860. RICKERSON *v.* HARTFORD FIRE INSURANCE CO.

COURT OF APPEALS OF NEW YORK. 1896

149 *N. Y.* 307; 43 *N. E.* 856

THIS action was founded upon a policy of fire insurance issued to P. Sammet and J. Alexander by the Hartford Fire Insurance Company, payable to the Washington Life Insurance Company, as mortgagee and as its interest might appear, upon premises known as number 160 Mott street in the city of New York. . . . On the first of May, 1890, Sammet and Alexander transferred the property to the plaintiff by a conveyance which described the premises by metes and bounds, and also as "known and distinguished as number one hundred and sixty Mott street," being the same description that there was in the mortgage. At the same time, both policies were transferred to the plaintiff, and the change of interest was duly noted and indorsed thereon by the insurance companies. . . . The trial Court found that, at the date of insurance, "there were two buildings on the lot known as No. 160 Mott street, New York city, viz., a three-story brick building, fronting on the street, twenty-five feet wide by forty-six feet deep, with an extension, and a five-story brick building twenty-four feet wide and thirty-nine feet deep." On the 13th of December, 1890, a fire occurred that injured the three-story building to the amount of a few hundred dollars, but which injured the five-story building to the amount of several thousand dollars. The insurance companies repaired the damage to the former only, and refused to pay any part of the damage to the latter. The complaint was dismissed for the reason that the policy did not cover the rear building, and that the

defendant had fulfilled its contract by repairing the damages to the front building. . . .

At the trial, the defendant's manager was asked: "When your company issued this policy on which this action is brought, which building did you intend to insure?" This was objected to as "incompetent, irrelevant and immaterial, and as calling for a conclusion"; but the objection was overruled and the plaintiff excepted. The witness answered, in substance, that he intended to insure the front building only. He was then asked: "Did you intend to insure more than one building?" and subject to the same objection, ruling and exception, he answered, "No."

George Richards and *Thomas McAdam*, for appellant. It was error to allow Coit to say what structure he intended to cover by the policy. . . .

William D. Murray, for respondent. All of the evidence to which objection was made was admissible as it was introduced to place the court in the position of the contracting parties, not to vary the terms of the written contract, but, an ambiguity having been raised by the plaintiff, to enable the court to interpret the contract in the light of surrounding facts as they existed at the time of its execution. . . .

VANN, J. . . . The application for insurance was very brief, consisting mainly of the names of persons desiring insurance, and a description of the property to be insured, as "160 Mott," occupied for "stores and dwellings." The company consulted its insurance map before issuing the policy, and thus learned that there were two buildings upon the property, and the general location of each. It also learned the same facts from the clerk who delivered the application. The policy describes the property insured as "the brick building and additions, . . . situate No. 160 Mott street, city of New York, occupied for stores and dwellings." . . . We have a policy which, if it had been read before the fire by a person standing upon the premises and familiar with the buildings and the way they were occupied, would leave him in doubt whether the property insured embraced all the buildings or only a part. For this ambiguity the company is responsible, because it prepared and executed the contract, and the language used is wholly its own. While it is the duty of the Court to so construe the policy as, if possible, to give effect to every word used, if the sense in which they were used is uncertain and the meaning is ambiguous, that meaning should be given which is most favorable to the insured. . . . The trial Court, however, resolved the doubt in favor of the insurer, as it found that the company "intended to insure and did insure only the three-story brick building situate on the front of the lot No. 160 Mott street in the city of New York," and that it "did not intend to insure and did not insure the five-story brick building situate on the rear of the lot No. 160 Mott street, New York city." . . .

In finding the fact, it is reasonable to presume that he was influenced

by the testimony of the manager of the defendant in relation to that subject, [stating the testimony excepted to.]

. . . The witness was thus permitted to testify to the secret operation of his own mind, although it had not been communicated to the other party to the contract. He wrote the policy and countersigned it, and in doing so stood for the company. When the Court allowed him to state his intention in issuing the policy, it virtually permitted one party to a written agreement to state what he meant by it, against the objection of the other. The writing, itself, was the best evidence of the intent and meaning of the company. As its meaning was ambiguous, evidence was properly received to place the court in the position of the parties and enable it to appreciate the force of the words they used in reducing the contract to writing. It then became the duty of the Court, sitting without a jury, to decide what the parties, thus situated, meant by the language employed. But one party to a written contract cannot state how he understood it when he signed it, nor testify as to its meaning or as to his intent. That would be a violation of the rule that the writing is the best evidence and would tend to destroy the effect of the promise. What the parties intended should have been gathered from the contract, read in the light of the circumstances surrounding them when they used the doubtful words. Parol evidence was not admissible to show what either party secretly intended, as that would add to or take from the writing which is presumed to express the intention of both.

We think that the evidence above referred to was improperly received and that the judgment appealed from should, therefore, be reversed and a new trial granted, with costs to abide the event.

All concur. Judgment reversed.

SUB-TITLE II. SOURCES FOR DETERMINING INTERPRETATION

862. History.[1] It was a part of the stiff formalism of earlier interpretation, not only that the law should fix the meaning of words and phrases, 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, "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 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, 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." 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."

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 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." This was at first the sole specific exception.

(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. By the 1800s the weight of opinion conceded what Lord Thurlow had laid down, that not only for an equivocation, but also for any real and insurmountable uncertainty of meaning, resort to extrinsic circumstances for light was permissible.

(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." Instead of the fallacious notion that "there should be interpretation only when it is needed," the fact is that there must always be interpretation.

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[1] Abridged from the present Compiler's *Treatise on Evidence* (1905. Vol. IV, § 2470).

863. Sir James Wigram, V. C. *Extrinsic Evidence in Aid of the Interpretation of Wills.* (1831. 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 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.

864. Attorney General *v.* Drummond. (1842. Chancery. 1 Dr. & W. 356.) Sugden, V. C. (interpreting a deed containing the words "Christian" and "Protestant dissenter"). The Court is at liberty to inquire into all the surrounding circumstance 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 has not merely a right, but it is its duty to inquire into the surrounding circumstances, before it can approace the construction of the instrument itself.

Topic 1. Declarations of Intention

865. Francis, Lord Bacon. *Maxims.* (circa 1597. Works, Spedding's ed., 1861, vol. XIV, p. 273). Rule XXV. 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.

(1) *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 averment, 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. *hoeredibus,*" 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.

(2) 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 ambiguity is matter in fact; and therefore it shall be holpen by averment, whether of them it was that the parties intended should pass.

(3) 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.

866. THE LORD CHEYNEY'S CASE (1591)

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 testators" 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.

867. MILLER *v.* TRAVERS

Chancery. 1832

8 *Bing.* 244

In this case the plaintiff, John Riggs Miller, filed his bill against the defendants for the purpose of establishing the will of the late Sir John Edward Riggs Miller, Bart., and for carrying into execution the trusts thereof. . . . The testator by his will, duly executed, devised "all his freehold and real estates whatsoever, situate *in the county of Limerick, and in the city of Limerick*," to certain trustees therein named and their heirs. At the time of making his will he had no real estate in the county

of Limerick, but he had a small real estate in the city of Limerick, and considerable real estates situate in the county of Clare. The real estate in the city of Limerick is admitted to have passed under the devise; but the plaintiff contends that he is at liberty to show by parol evidence that the testator intended his estates in Clare also to pass under the same devise.

TINDAL, C. J. . . . The main question between the parties, and which has formed the principal subject of argument before us, is this, Whether parol evidence is admissible to show the testator's intention that his real estates in the county of Clare should pass by his will? . . . This question arises upon facts, either admitted or proved in the cause, which are few and simple.

The general character of the parol evidence which the plaintiff contends he is at liberty to produce, in order to establish such intention in the devisor, is this; first, that the estate in the city of Limerick is so small and so disproportioned to the nature of the charges laid upon it, and the trusts which are declared, as to make it manifest there must have been some mistake; and in order to show what that mistake was, the plaintiff proposes to prove that in the copy of the will which had been submitted to the testator for his inspection, and had been approved and returned by him, the devise in question stood thus: "All my freehold and real estates whatsoever situate in the *counties of Clare*, Limerick and in the city of Limerick;" that the testator directed some alterations to be made in other parts of his will, and that the same copy of the will, accompanied with a statement of the proposed alterations, was sent by the testator's attorney to his conveyancer, in order that such alterations might be reduced into proper form; and that upon such occasion the conveyancer, besides making the alterations directed, did by mistake, and without any authority, strike out the words "counties of Clare" and substitute the words "county of" in lieu thereof, so as to leave the devise in question in the same precise form as it now stands in the executed will. The plaintiff further proposes to prove that a fair copy of the will so altered was sent to the testator, who, after having kept it by him for some time, executed the same in the manner required by law, without adverting to the alteration above pointed out.

Upon the fullest consideration, however, it appears to the Lord Chief Baron and myself, that admitting it may be shown from the description of the property in the city of Limerick, that *some* mistake may have arisen, yet, still, as the devise in question has a certain operation and effect, namely, the effect of passing the estate in the city of Limerick, and as the intention of the testator to devise any estate in the county of Clare cannot be collected from the will itself, nor without altering or adding to the words used in the will, such intention cannot be supplied by the evidence proposed to be given.

It may be admitted, that in all cases in which a difficulty arises in applying the words of a will to the thing which is the subject-matter of

the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence, upon the same subject, calculated to explain what was the estate or subject-matter really intended to be devised, or who was the person really intended to take under the will; and this appears to us to be the extent of the maxim "Ambiguitas verborum latens, verificatione suppletur."

But the cases to which this construction applies will be found to range themselves into two separate classes, distinguishable from each other, and to neither of which can the present case be referred.

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.

. . . But the case now before the Court does not appear to fall within either of these distinctions. There are no words in the will which contain an imperfect, or, indeed, any description whatever of the estates in Clare. The present case is rather one in which the plaintiff does *not* endeavor to apply the description contained in the will to the estates in Clare, but in order to make out such intention is compelled to introduce new words and a new description into the body of the will itself. The testator devises all his estates "in the county of Limerick and the city of Limerick." . . . The plaintiff, however, contends, that he has a right to prove, that the testator intended to pass not only the estate in the city of Limerick, but an estate in a county not named in the will, namely, the county of Clare, and that the will is to be read and construed as if the word Clare stood in the place of or in addition to that of Limerick. But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will

itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent from a defective or mistaken description; it is making the will speak upon the face of the will. It is not simply removing a difficulty arising upon a subject on which it is altogether silent, and is the same in effect as the filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted. Now, the first objection to the introduction of such evidence is that it is inconsistent with the rule, which reason and sense lay down and which has been universally established for the construction of wills, namely, that the testator's intention is to be collected from the words used in the will, and that words which he has not used cannot be added.

But it is an objection no less strong that the only mode of proving the alleged intention of the testator is, by setting up the draft of the will against the executed will itself. As, however, the copy of the will which omitted the name of the county of Clare was for some time in the custody of the testator, and, therefore, open for his inspection, which copy was afterwards executed by him with all the formalities required by the Statute of Frauds, the presumption is that he must have seen and approved of the alteration, rather than that he overlooked it by mistake. It is unnecessary to advert to the danger of allowing the draft of the will to be set up as of greater authority to evince the intention of the testator than the will itself, after the will has been solemnly executed, and after the death of the testator. If such evidence is admissible to introduce a new subject-matter of devise, why not also to introduce the name of a devisee altogether omitted in the will? If it is admissible to introduce new matter of devise, or a new devisee, why not to strike out such as are contained in the executed will? The effect of such evidence in either case would be, that the will, though made in form by the testator in his lifetime, would really be made by the attorney after his death; that all the guards intended to be introduced by the Statute of Frauds would be entirely destroyed, and the statute itself virtually repealed. And upon examination of the decided cases on which the plaintiff has relied in argument, no one will be found to go the length of supporting the proposition which he contends for; on the contrary, they will all be found consistent with the distinction above adverted to, — that an uncertainty which arises from applying the description contained in the will either to the thing devised or to the person of the devisee, may be helped by parol evidence; but that a new subject-matter of devise, or a new devisee, where the will is entirely silent upon either, cannot be imported by parol evidence into the will itself. . . .

The cases against the plaintiff's construction appear to bear more closely on the point. In the first place, it is well established, that where a complete *blank* is left for the name of a legatee or devisee, no parol evidence, however strong, will be allowed to fill it up as intended by the

testator. Hunt *v.* Hort, 3 Bro. C. C. 311, and in many other cases. Now the principle must be precisely the same, whether it is the person of the devisee, or the estate or thing devised, which is left altogether in blank. And it requires a very nice discrimination to distinguish between the case of a will, where the description of the estate is left altogether in blank, and the present case, where there is a total omission of the estates in Clare. . . .

As well, therefore, upon the authority of the cases, and more particularly of that which is last referred to, as upon reason and principle, we think the evidence offered by the plaintiff would be inadmissible upon the trial of the issue, and that it would therefore be useless to grant the issue in the terms directed by the Vice-Chancellor. . . .

Order of the Vice-Chancellor reversed.

868. DOE DEM. SIMON HISCOCKS *v.* JOHN HISCOCKS

EXCHEQUER. 1839

5 *M. & W.* 363

EJECTMENT for lands in the county of Devon. At the trial before BOSANQUET, J., at the Devonshire Spring Assizes, 1838, it appeared that the lessor of the plaintiff claimed the premises in dispute under the will of Simon Hiscocks, the grandfather of both the lessor of the plaintiff and the defendant, dated July 7, 1822. . . . By his will, Simon Hiscocks, after devising estates to his son Simon for life, and from and after his death to his grandson, Henry Hiscocks, in tail male, and making, as to certain other estates, an exactly similar provision in favor of his son John for life; then, after his death, the testator devises those estates to "my grandson, John Hiscocks, eldest son of the said John Hiscocks." It is on this devise that the question wholly turns. In fact, John Hiscocks, the father, had been twice married; by his first wife he had Simon, the lessor of the plaintiff, his eldest son; the eldest son of the second marriage was John Hiscocks, the defendant. The devise, therefore, does not, both by name and description, apply to either the lessor of the plaintiff, who is the eldest son, but whose name is Simon, nor to the defendant, who, though his name is John, is not the eldest son. The cause was tried before Mr. Justice BOSANQUET, at the Spring Assizes for the County of Devon, 1838, and that learned judge admitted evidence of the instructions of the testator for the will, and of his declarations after the will was made, in order to explain the ambiguity in the devise, arising from this state of facts; and the verdict having been found for the lessor of the plaintiff, a rule has been obtained for a non-suit or new trial, on the ground that such evidence of intention was not receivable in this case. . . .

Crowder and *Bere* showed cause, and contended that this was a case of

latent ambiguity, which did not arise until the state of the family was proved, and it appeared that the testator had made a mistake in the name of the intended devisee; and the case therefore fell within the established principle, that a latent ambiguity, where no uncertainty appeared on the face of the will itself, might be holpen by extrinsic evidence. . . .

Erle and *Butt*, contra. . . . The evidence of the testator's intention was not admissible in this case, because it went to show an intention contradictory of one which was plainly expressed in the will, and was capable of an application; or, if not applicable by inquiry into the surrounding circumstances, that the devise was altogether void. . . .

The judgment of the Court was now delivered by

Lord ABINGER, C. B. (after stating the case). After fully considering the question, which was very well argued on both sides, we think that there ought to be a new trial.

The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained, without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects of his allusions or statements; and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property, to which the will relates, are undoubtedly legitimate and often necessary evidence, to enable us to understand the meaning and application of his words. Again, the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cypher, or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will.

But there is another mode of obtaining the intention of the testator, which is by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous.

Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and

where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors, of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls "an equivocation," *i.e.*, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction.

It appears to us that, in all other cases parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will. . . . We are prepared on this point (the point in judgment in the case of Miller *v.* Travers [*ante*, No. 867]) to adhere to the authority of that case.

Where the description is partly true as to both claimants, and no case of equivocation arises, what is to be done is to determine whether the description means the lessor of the plaintiff or the defendant. The description, in fact, applies partially to each, and it is not easy to see how the difficulty can be solved. If it were "res integra," we should be much disposed to hold the devise void for uncertainty; but the cases of Doe *v.* Huthwaite, 3 B. & Ald. 632, Bradshaw *v.* Bradshaw, and others, are authorities against this conclusion. If, therefore, by looking at the surrounding facts to be found by the jury, the Court can clearly see, with the knowledge which arises from those facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide, and direct the jury accordingly. But we think that, for this purpose, they cannot receive declarations of the testator of what he intended to do in making his will. . . .

Rule absolute for a new trial.

869. WILLARD *v.* DARRAH

SUPREME COURT OF MISSOURI. 1902

168 *Mo.* 660; 68 *S. W.* 1023

APPEAL from Saline Circuit Court. Hon. RICHARD FIELD, Judge. Reversed.

This is a suit in ejectment for the possession of an undivided one-eighth interest in a tract of land in Saline county, described in the petition.

William Nelson, late of said county, deceased, is the common source of title. He died testate on December 12, 1892, seized in fee simple of the premises; leaving him surviving: three daughters, the defendant, Mariah Darrah, and her two sisters, Nannie Brown and Sarah Bryan; two sons, James Nelson and John Nelson; and four grandsons, Ord Nelson and Corley Nelson, sons of his deceased son Lawrence, and plaintiff John Willard and his brother William Willard, sons of his deceased daughter Elizabeth. By his will the testator devised the premises in question to his said daughter the defendant Mariah Darrah, named therein, his sons James and John; made provision for his other two granddaughters, Nannie Brown and Sarah Bryan, and for his two grandsons, Ord and Corley Nelson, and made the following further devise: "4th. I give, devise and bequeath to my well-beloved nephews, John and William Willard, the following described tracts," . . .

On the trial, the plaintiff introduced parol evidence tending to prove that at the time of his death the testator had a nephew named John D. Willard, and several grandnephews, sons of the said John D., one of whom was named John Willard, and the other named William Willard, and upon these facts claimed that he was pretermitted in said will, and as one of the heirs at law of his grandfather is entitled to the interest sued for in the land devised to the defendant Mrs. Darrah. To meet this claim the defendant introduced evidence tending to prove that the said nephew John D Willard, and the said grandnephews John Willard and William Willard, sons of the said John D., were strangers to the testator, never visited him and never resided near him. That the grandsons John Willard and William Willard lived near their grandfather, owned land adjoining the land described in the fourth clause of the will, that he was very intimate and friendly with them, and repeatedly declared that he had bought this land for them, and also introduced E. M. Edwards, a lawyer, as a witness who testified in substance that he drew the will at the request of the testator, who directed that this land should be given to the said grandchildren John and William Willard, but by mistake he wrote the word "nephews" instead of "grandchildren" in that clause of the will. Without setting out this parol evidence at length, it is sufficient to say, that it appears therefrom, beyond a reasonable doubt, that the testator intended by the fourth clause of his will to devise the land therein described to his well-known and well-beloved grandchildren, the plaintiff John Willard and his brother William Willard, and not to his two grandnephews of the same names, who were not personally known to, or well-beloved of him. The case was tried before the Court without a jury. The Court rejected the evidence of Edwards the scrivener, found the issues for the plaintiff, and from the judgment in his favor the defendant appeals. . . .

W. M. Williams and *Duggins & Rainey*, for appellant. . . . The grandsons, John and William Willard, being mis-described as nephews, and there being no nephews bearing those names, this creates a latent

ambiguity in the will of William Nelson. . . . The incorrect naming in a will of a beneficiary (a granddaughter) creates a latent ambiguity, and extrinsic evidence is admissible to remove it. . . . Where the language of the will is applicable to each of two or more persons or things, it is not only permissible to introduce evidence directly as to the intention of the testator, based upon the circumstances of the case, but evidence of the testator's own declarations may be adduced to show the person or thing intended. . . .

Alf. F. Rector, A. R. Strother and *Frank P. Sebree,* for respondent. The evidence of Edwards as to the instructions given to him by the testator for drawing the will, and as to the declarations made to him by the testator as to what disposition he intended to make of his property, and as to what provisions he intended to make for his grandchildren, John and William Willard, was all incompetent and was therefore properly excluded. . . . There is no latent ambiguity in the case. . . . There were not two sets of nephews named John and William Willard nor two sets of grandchildren of those names. The terms used can not therefore "apply equally to two different things or subjects." There were two grandnephews and two grandsons of those names, and one nephew named John D. Willard. . . . Giving full effect to the evidence of Edwards, which was excluded by the trial Court, it amounts only to this, that the clear and unambiguous language of the will was a mistake of the scrivener. The Court is now asked, not to construe the will and resolve a latent ambiguity, but to reform the will itself and correct this alleged mistake, and make a will for the testator which he did not make. This can not legally be done. . . .

Brace, P. J. (after stating the case as above). The difficulty in these cases is to determine how far in that direction the Courts may go in order to discover the true intent and meaning of the testator. . . . There is much conflict of judicial opinion on the subject. . . . A learned and able text-writer, from such a review, deduces the following conclusion:

"The two classes of cases, then, in which direct evidence dehors the will appears admissible to show the testator's intention, are these: (1) Where the person or thing, the object or subject of the disposition, is described in terms which are applicable indifferently to more than one person or thing. (2) Where the description of the person or thing is partly correct and partly incorrect, and the correct part leaves something equivocal." . . . (Schouler on Wills, 3d ed., § 576.)

Here 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 grand-nephews, 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.

Hence, we conclude that the Court erred in rejecting the evidence of the scrivener Edwards, and in holding that the plaintiff was not named or provided for in the will of his grandfather, the said William Nelson. The judgment of the Circuit Court is therefore reversed.

All concur.

870. Sir James Fitzjames Stephen. *Digest of the Law of Evidence.* (3d ed. Note XXXIII, to Article 91, Oral Interpretation of Documents.) It is difficult to justify the line drawn between the rule as to cases in which evidence of expressions of intention is admitted and cases in which it is rejected [paragraph 7, illustrations (k), (l), (m), and paragraph 8, illustrations (n) and (o)]. When placed side by side, such cases as Doe *v.* Hiscocks [*ante*, No. 868] [illustration (k)] and Doe *v.* Needs [illustration (n)] produce a singular effect. The vagueness of the distinction between them is indicated by the case of Charter *v.* Charter, 1871, L. R. 2 P. & M. 315. In this case the testator Forster Charter appointed "my son Forster Charter" his executor. He had two sons, William Forster Charter and Charles Charter, and many circumstances pointed to the conclusion that the person whom the testator wished to be his executor was Charles Charter. Lord Penzance not only admitted evidence of all the circumstances of the case, but expressed an opinion (p. 319) that, if it were necessary, evidence of declarations of intention might be admitted under the rule laid down by Lord Abinger in Hiscocks *v.* Hiscocks, because part of the language employed ("my son —— Charter") applied correctly to each son, and the remainder, "Forster," to neither. This mode of construing the rule would admit evidence of declarations of intention both in cases falling under paragraph 8, and in cases falling under paragraph 7, which is inconsistent not only with the reasoning in the judgment, but

with the actual decision in Doe *v.* Hiscocks. . . . That part of Lord PENZANCE's judgment above referred to was unanimously overruled in the House of Lords. . . .

Conclusive as the authorities upon the subject are, it may not, perhaps, be presumptuous to express a doubt whether the conflict between a natural wish to fulfil the intention which the testator would have formed if he had recollected all the circumstances of the case, the wish to avoid the evil of permitting written instruments to be varied by oral evidence, and the wish to give effect to wills, has not produced in practice an illogical compromise. The strictly logical course, I think, would be either to admit declarations of intention both in cases falling under paragraph 7, and in cases falling under paragraph 8, or to exclude such evidence in both classes of cases, and to hold void for uncertainty every bequest or devise which was shown to be uncertain in its application to facts.

871. A. M. KIDD. *Note on Doe v. Hiscocks.* (1912. California Law Review, I, 87.) *Wills: Parol Evidence to Explain Ambiguity and Misconceptions.* — In the Estate of Donellan (44 Cal. Dec. 462, Sept. 27, 1912), the testatrix left one-fourth of the residue of her property to her niece, Mary, a resident of New York, daughter of her deceased sister, Mary. The evidence disclosed two daughters of the sister, Annie and Mary. Annie, the elder of the two daughters, married in Ireland, came to this country, settled in Brooklyn, New York, and still lived there when the present case arose. Mary never came to this country, and still lived in Ireland. The evidence also showed that testatrix knew of the existence of but one niece; that when Annie was six years old at the time of the death of her father, testatrix wanted her to come and live with her; that testatrix wrote to a Boston relative inquiring about her niece and was referred by the relative to the New York niece; that Annie was called Mary by a relative in Boston with whom she lived when she first came to this country. This was substantially all the evidence, except some hearsay erroneously admitted. The Superior Court held the will applied to Mary, relying upon the maxim that the name controlled the description. The Supreme Court refused to consider this maxim as binding and directed the trial Court to construe the clause to apply to Annie, unless on a rehearing further evidence should require a different decision, upon the ground that testatrix meant the niece who came to this country. . . .

In accordance with the ruling in the Supreme Court in the Estate of Dominici (151 Cal. 181; 90 Pac. 448; 1907), evidence was admitted of the testatrix's statements of intention to the lawyer who prepared the will. While the general rule in construing a will is that all extrinsic evidence is admissible, there is an exception to the rule by the exclusion of declarations of intention. It is considered dangerous to permit the solemn written expression in the will to be affected by other statements of the testator as to what he intended. In one case, however, such statements have always been admitted, — the case of equivocation, where the bequest is to "my niece Mary" and there are two nieces named Mary. In such a case the declarations of the testator are admitted to show which niece was meant. The will in the present case, however, is not one of equivocation but of misdescription; neither niece fits the requirements accurately. One niece satisfies the description by residence but not by name, the other by name but not by residence. Under these facts the English Courts have refused to admit declarations of intention, although it is hard to see why the same principle

that applies to "equivocation" should not apply to "misdescription." In fact English judges have been unable to see the distinction.[1] In admitting the statements made by the testatrix to the lawyer in the principal case the Court is in accord with sound theory and authority in this country.

It may be questioned, however, whether this result, commendable as it is on principle, has been achieved without doing violence to § 1340 of the Civil Code. The annotations of the Code Commissioners show that they recognize the conflict in the decisions and deliberately adopted the English rule as established in Doe *v.* Hiscocks (5 M. & W. 363; 1839).

Topic 2. Falsa Demonstratio

873. Myers *v.* Ladd. (1861. 26 Ill. 415, 417.) Caton, C. J. — 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 in 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.

874. WINKLEY *v.* KAIME

Supreme Judicial Court of New Hampshire. 1855

32 *N. H.* 268

Writ of Entry. The premises claimed are a part of lot No. 97 in the 2d division in Barnstead, containing about forty acres, more or less, of wild land which has never been improved or enclosed by fences. The plaintiff claimed title by devise from Benjamin Winkley of "thirty-six acres, more or less, in lot 37, in second division in Barnstead, being same I purchased of John Peavey," and in proof of title in said Winkley,

[1] "Why the law should be so, in cases where some error of description involving a latent ambiguity has to be corrected, when evidence of the same kind is admitted in what Lord Bacon describes as cases of 'equivocation' (Maxims of the Law, Rule XXIII), I am not sure that I clearly understand, but it has been conclusively so settled by a series of authorities to which we are bound to adhere." Charter *v.* Charter, L. R. 7 H. L. 364 (1874).

offered: 1. Deed from John Peavey to said Winkley, dated March 25, 1839, of thirty-six acres, more or less, in lot 97, in 2d division, bounded and described in the plaintiff's declaration. . . .

The defendant offered in evidence: 1. Deed from Thomas and Hannah Johnson to him, dated November 14, 1851, of certain lands in Barnstead, being nineteen acres out of lot 97, being same deeded by Benjamin Winkley as collector of taxes to J. G. Kaime, dated May 1, 1801, in common, and of lot formerly owned by Hale and others. . . .

No evidence was offered by either party to show what lands were intended and conveyed by the several deeds offered by them respectively, and whose descriptions are hereinbefore particularly mentioned, except as is in this case expressly stated. A witness for the plaintiff testified that he never knew of John Peavey occupying any such lot as 37 in 2d division, or that there was any such lot. And there was no evidence that there was any such. The plaintiff, in order to show what lands were conveyed by the deeds offered by the defendant Winkley to J. G. Kaime, and T. & H. Johnson to the defendant, . . . offered a witness, who testified that in about 1820 his father, now deceased, was in the occupation of a part of lot 97, not including these premises, and when so in possession stated to the witness that he was in possession under Hale and others. To this last the defendant objected as incompetent, but the same was admitted.

Whereupon it was agreed by the parties that the questions arising in this case be transferred to the Superior Court of Judicature for determination, said Court to order such judgment for the plaintiff or defendant as on the foregoing case shall be proper.

Bellows, for the plaintiff. . . . *Leavitt* and *Bell*, for the defendant.

Eastman, J. — The demandant declares for forty acres of land, more or less, of lot No. 97, in the 2d division in Barnstead. The case was turned into an agreed one at the trial, and we take the evidence as finding the facts. The first step in the demandant's title is a devise from Benjamin Winkley to the demandant, of "thirty-six acres, more or less, in lot 37 in the 2d division in Barnstead, being same I purchased of John Peavey." It is apparent that here is a radical difference between the description of the premises demanded and those contained in the devise; the land demanded being a part of lot No. 97, and that bequeathed being a part of lot No. 37. The plaintiff contends that there is a latent ambiguity in the devise, and that the testator intended to bequeath to him the land in lot 97, as set forth in his declaration, and not 37. To prove this, parol evidence was introduced on the trial, tending to show that the lands occupied by Peavey were a part of 97 in the 2d division, and that there is no such lot as 37 in the 2d division in that town.

There is nothing ambiguous in the terms of this devise, but the evidence shows that, as it stands, it cannot take effect, for there is no such lot as No. 37 in the 2d division. The ambiguity is latent; shown so to be by the evidence; and if that stands well with the words of the will, it

will be competent, as showing the meaning and intention of the testator. Without going into any extended examination of the question of latent ambiguity at the present time, it is sufficient for the present case to say that it appears to come very properly under the rule of "falsa demonstratio non nocet"; the principle being, that if there is a sufficient description of the land devised, or of the person of the devisee intended by the testator, independent of the erroneous description, the will will take effect. . . . By rejecting the words and figures, "in lot 37," in this devise, it will stand thus, "thirty-six acres, more or less, in 2d division in Barnstead, being same I purchased of John Peavey." What the testator purchased of Peavey is shown to be in the 2d division; is bounded, and answers in all respects to the description in the devise, except the number of the lot. The extrinsic evidence thus manifestly shows what must have been the intention of the testator, and, both upon the doctrine of the authorities and the justice of the case, we think the devise should be made to take effect.

The tenant, then, not showing either title or possession paramount to that of the demandant, must fail, and according to the provisions of the case there must be Judgment for the plaintiff.

875. KURTZ *v.* HIBNER

SUPREME COURT OF ILLINOIS. 1870

55 *Ill.* 514

BILL for petition by John Hibner and others, children and heirs of John Hibner, deceased, against Charles, Elizabeth and James Kurtz, the latter claiming under a will of John Hibner. The Circuit Court refused to hear parol evidence, to explain the language of the will. The relevant provisions of the will were the following: "Third — I give and bequeath to my daughter, Elizabeth Kurtz, all that tract or parcel of land situate in the town of Joliet, Will County, Illinois, and described as follows: The west half of the southwest quarter of section 32, township 35, range 10, containing eighty acres, more or less, together with all the appurtenances thereunto belonging, or in anywise appertaining." "Seventh — I give and bequeath to my grandson, James Kurtz, all that part or parcel of land described as the south half of the east half of the south quarter section 31, in township 35, range 10, containing forty acres, more or less."

Appellants offered to prove that the testator, at the time of his death owned only one eighty-acre tract, in township thirty-five, which was the one described in the bill; that a mistake was made in drafting the will, by the insertion of the words "section thirty-two," instead of "section thirty-three"; that Charles and Elizabeth Kurtz had been in the actual

possession of the tract for a number of years, and upon the repeated promise of the testator in his lifetime, that he would give the same to Elizabeth, had made lasting and valuable improvements, at their own expense, on the land — had fenced it, and erected thereon a dwelling-house, barn and corn cribs, dug wells and set out fruit-trees. Appellants also offered to prove that James Kurtz, at the time of the death of the testator, was in the actual possession of the forty-acre tract, as the tenant of the deceased, and that the draughtsman of the will, by mistake, inserted the word "one," after the words "section thirty," instead of "two," so as to bequeath to James land in section thirty-one instead of section thirty-two. This evidence was rejected by the Court, on the hearing.

Mr. *D. H. Pinney*, for the appellants. In this case the testator intended to devise land which he owned, the description of which differed from that named in the will, in the number of the section. The devisee could show by extrinsic evidence that the draughtsman of the will, by mistake, inserted the wrong numbers in attempting to describe the land intended to be devised. . . . Parol evidence was admissible on other grounds; for, after rejecting the number of the section, enough remains to show the property intended. . . .

Mr. *W. C. Goodhue*, for the appellees. Equity, in no proceeding, however direct, affords any remedy against mistakes made in a last will and testament, — mistakes that can only be made out by averment and proof outside of the will. . . . This case presents the simple question of construction. What is the meaning of the will as made by the testator? The description of the land, which is sought to be changed by extrinsic evidence, is too clear to require the aid of such evidence to identify it. There is no ambiguity to be explained.

THORNTON, J. — It has been strongly urged by counsel for appellants, that this evidence should have been received, for the purpose of ascertaining the intention of the testator. The law requires that all wills of lands shall be in writing, and extrinsic evidence is never admissible, to alter, detract from, or add to, the terms of a will. To permit evidence, the effect of which would be to take from a will plain and unambiguous language, and insert other language in lieu thereof, would violate the foregoing well-established rule. For the purpose of determining the object of a testator's bounty, or the subject of disposition, parol evidence may be received, to enable the Court to identify the person or thing intended. In this regard, the evidence offered afforded no aid to the Court. . . . The thing devised is certain and specific. Section, township, and range are given. The evidence offered, as to the mistake in the section, would have made a new and different will. . . .

The case of Riggs *v.* Myers, 20 Mo. 239, is also cited by counsel for appellants. That case is very different from the one under consideration. The testator, in that case, made a full disposition of all his estate, and then described certain lands, locating them in a township in which he

owned no lands. The land intended to be devised, was, however, identified, by reference to "the big spring" upon it. In the case before the Court there is no disposition, either specifically or generally, of the lands in the bill mentioned.

We think, therefore, there was no error.

876. Notes Upon Kurtz *v.* Hibner. Isaac T. Redfield, C. J. (of Vermont; Editor of the Register. 10 American Law Register, New Series, 93; 1871). We regret the necessity of dissenting, so entirely as we must, from the argument and conclusions of the learned judge in the foregoing opinion [of Kurtz *v.* Hibner.]. . . The Court say, indeed, that the evidence was offered by the appellants for the purpose of showing that the will was by mistake drawn differently from what the testator intended. That precise point was immaterial, and the evidence was not, strictly speaking, admissible for that purpose. That would be to add a new term to the will by making it read, in terms, as the testator would have had it made, if he had recollected the numbers of the sections in which his lands lay, which can never be done. . . . But nothing is more common, or we might say universal, than to receive oral proof to show, that language was used in a peculiar sense, or that one term was used for another, or that an essential term, to make the definition perfect, was wholly omitted, or erroneously stated. . . . One rule upon the subject is so thoroughly established as to have become a maxim in the law, "falsa demonstratio non nocet." The practical meaning of this maxim is, that however many errors there may be in the description, either of the legatee or of the subject-matter of the devise, it will not avoid the bequest, provided enough remains to show, with reasonable certainty, what was intended. . . . In the principal case, there could be no question of the admission of oral evidence to show the state and extent of the testator's property, in order to place the court in the same position the testator was at the time he made the will. No reasonable man could question this upon the decided cases. This being done, it appears the testator had no such land as that described, in the particular sections named. This rendered it clear, absolutely certain, we may say, that the sections named were erroneous and could have no possible operation, and must be rejected. The devise then was the same as if the sections had not been named at all, or had been named, leaving the numbers blank. We are then compelled to fall back upon the remaining portion of the description, "eighty acres of land in range ten, in township thirty-five," and "forty acres of land in range ten, in township thirty-five"; and, upon inquiry, we find precisely such pieces of land in "range ten, in township thirty-five," belonging to the testator. This renders the devise as certain as it is possible to make it. . . . We trust we have not failed to express our views in regard to the foregoing case with all that moderation and respect which is due to the decision of so learned and able a court, and which we most sincerely feel. But that the decision is fatally and flagrantly

erroneous there can be no more question or doubt than of the axioms of geometry or the propositions in the most exact sciences.

877. The Same. John D. Caton, J. (of Illinois; American Law Register, ibid. p. 353). I have perused with some care and much interest the reports of the case of Kurtz *v.* Hibner et al., ante, p. 93, and the editorial note appended, in which the learned editor feels compelled to dissent from the conclusions of the court, as announced in the opinion of Mr. Justice Thornton. The principle involved is of the highest importance, and is worthy of the most careful consideration of the profession. From the best consideration which I have been able to give the subject, I am constrained to the conclusion that the decision of the Court is right, and that the editor has fallen into an error. The great learning and deservedly high reputation of the editor who wrote that note, and the profound respect I have ever entertained for him as an eminent jurist, whose labors have done much to advance the science of the law, have caused me to hesitate long before allowing myself to disagree with him.

The fundamental error of the editor, in my apprehension, consists in his assuming that necessarily the testator designed to devise land to which he had a present existing title. To maintain this assumption we must find that the Court, as a matter of law, must declare that it was impossible for the testator to intend to devise property to which he had not a present title, when there is no expression in the will intimating such a purpose. I have met with no case, and certainly none that has been cited in the editorial note, in which such a doctrine is intimated. While in the particular case we may admit that this is most probably true, we must also admit that it is not necessarily so, and the Court had no warrant for saying, as matter of law, or as a necessary legal conclusion, that such was the case; and hence it had no right to act upon such a conclusion. We may suppose a thousand cases in which the testator would devise a particular piece of land to which he at the time had no title. It is sufficient to suggest the case of an honest mistake as to the ownership, or of a contemplated purchase. At any rate, he had a right to do so, and so it has no doubt been done by ten thousand before him through misapprehension or even caprice. The devise in this will is of "the west half of the south-west quarter, section 32, township 35, range 10, containing 80 acres, more or less." Here then we have the range, the township, the section, the quarter section, and the half-quarter section set down, and *nothing more*. The description is complete and definite, but we find nowhere a single word of additional description. We find no attempt to duplicate the description as "my" land, or "in the possession of A. B.," or "on which is the Big Spring," or "my land on the Bluff," nor any other single word on which the Court may seize to enable it, with the aid of parol proof, to say that "thirty-two" was a false description, and so reject it, and still determine from the words of the will that section thirty-three was in truth meant. Strike the word "thirty-two" from this de-

scription and the whole is left entirely unintelligible, for there is nothing else in the will to supply its place.

I entirely agree with the learned editor, in his definition of the maxim "falsa demonstratio non nocet." He says, "The practical meaning of this maxim is, that however many errors there may be in the description, either of the legatee or of the subject-matter of the devise, it will not avoid the bequest, PROVIDED *enough remains to show, with reasonable certainty, what was intended.*" I have emphasized the latter part of this definition because I think it an important, nay, an indispensable part of it, and which, in its application to the principal case, was quite overlooked in the note. If we reject the false description, which is in the number of the section, and so leave that a blank as the editor in fact does, leaving only a specified eighty-acre tract in an unspecified section in a given township, we have a description which applies alike to no less than 36 different lots, so far as the description goes, and nothing "remains in the will to show with reasonable certainty" which of the 36 tracts was intended. . . .

If in this case the word *my* had been used instead of *the* in connection with, or rather in duplication of the description, then indeed there would have been something *in the will* to construe, and by the aid of parol proof the Court might ascertain what the testator meant when he used it — then there would have been an additional description by which the Court might have determined the subject of the devise, after having eliminated *thirty-two*. I repeat, without some sort of additional description in the will, the Court had no right to destroy the description, which is clear, precise, and single, and insert an additional description of its own, and then go on and construe it. It is impossible to say that there is a false description where there is but one description which, as in this case, is plain and perfect, without an additional reference or word by which the Court might be enabled to determine what land was in the mind of the testator when he wrote or dictated the description proposed to be eliminated from the will. The central idea on which this doctrine of "falsa, &c.," turns is, that there must be two descriptions of some sort, which facts aliunde, if need be, show are inconsistent with each other, and enable the Court to say satisfactorily which is the true and which is the false description, when it will discard the false and give effect to the true, as if the false description had never been written. . . . The legal acumen for which the editor, with whom I feel compelled though reluctantly to disagree, is so justly celebrated, will, I am satisfied, upon more mature reflection, convince him that he has for once, at least, fallen into an error; and his well-known candor, I am sure, must make him anxious, that if such be the case, it should be pointed out in a courteous and proper way.

878. THE SAME. JOHN H. WIGMORE. *Note on Kurtz v. Hibner* (1910–11. Illinois Law Review, V, 314). *Kurtz v. Hibner. Misdescription*

of Tracts in a Will. The cases subsequent to Kurtz *v.* Hibner, 55 Ill. 514, in this State, have now been placed on a footing which is entirely satisfactory. Graves *v.* Rose, Ill., 92 N. E. 601 (October 12, 1910), places the only real issue squarely where it can be precisely understood and debated. The three dissents leave the issue fairly open for future settlement.

The original problem is: When a description of a tract — *e.g.*, as here, "the W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 12" — is found not to fit exactly any land subject to the testator's disposition, but there is other land partly answering the description, what can be done to carry out the devise?

In the first place, it has long been plain that no method which involved setting aside the will on the ground of mistake in drafting would be sanctioned; this would go counter to the principle that the terms of a legal document duly executed must stand as final; and the possible alleviation by applying to wills the equitable methods of "reformation" long used for mutual mistake inter vivos has never been given any countenance.

In the second place, the process of interpretation authorizes a description to be construed as a whole, and permits it to be enforced, even though it does not fit in some details not essential. Therefore, if one of the items of description is "N. W. $\frac{1}{2}$," and the "W" does not fit, but the remainder of the description commends itself as the essential terms in the testator's effort to identify the thing devised, the description will be applied, in disregard of the "W" not fitting. This is a natural consequence of the fact that a descriptive series of terms might conceivably be infinite in detail; that all description, therefore, consists, practically, in the selection of a few details taken as cumulative marks; and that when the cumulation of marks is plain in its identification as a whole, the variance of one or more marks is immaterial. On this principle numerous such devises have been carried out — notably, when the area of the tract or the testator's title was given as one of the marks of description; as in Decker *v.* Decker, 121 Ill. 341; Whitman *v.* Rodney, 156 Ill. 116; Huffman *v.* Young, 170 Ill. 290; Felkel *v.* O'Brien, 231 Ill. 329; Collins *v.* Capps, 235 Ill. 560.

But, in the third place, since this process of interpretation must, after disregarding the item that does not fit, be based on remaining items that do fit and are sufficient, the remaining items must be found existing in the words of the will, and *cannot be implied into it.* This was the part of the principle on which the latest case, Graves *v.* Rose, above, came to turn, as it was also for the earliest case, Kurtz *v.* Hibner, according to the explanation of CATON, J., given in his letter in 10 Amer. L. Reg. N. S. 353 [*ante*, No. 877]. If a description does not contain words such as "*my* land" or "owned *by me*" or "being *my* homestead," or "now occupied by C. J. R.," and if without such a term the remaining items are too vague to identify, then the desired term cannot be implied into the description.

On this point the majority and the minority opinions seem to be squarely at issue. The minority opinion invokes "the *presumption* that the testator intended to dispose of property *which he owned*," and maintains that this presumption was virtually the basis of the decision in the chief prior cases sustaining such descriptions. Whether that interpretation of the prior issues is correct does not here matter. We note merely that the effect of such a presumption would be to imply a term into the will, and that the propriety of this is the real issue. Now, it is safe to assert that in our country and generation (differing therein from the Roman custom) testators do mean always to devise only property owned by them, so that the presumption is sound. Hence, as a matter of practical safety in construing wills, the propriety of so implying that term into a will would be justified. It comes down then to a simple question: Shall we adhere rigorously to the theoretical rule against implying terms into a will, or shall we frankly admit an exception on grounds of common experience and practical safety? We are disposed to accept the latter solution.

879. The Same. Henry Schofield. *Note on Kurtz v. Hibner* (1912. Illinois Law Review, VI, 485). Of course there is no equity jurisdiction to reform wills. Indeed there is no judicial power to reform wills, and, under existing law, an exertion of such judicial power by a court would be usurpation of ungranted judicial power. No one ever has suggested that judicial power to reform wills ought to exist, except Stephen, in the preface to the third edition of his Digest of the Law of Evidence (Thayer, Evidence, 437, note 2); which suggestion seems to have been dropped by Stephen from his later editions. The suggestion evidently was ill considered, though no doubt the legislature of Illinois has the power to authorize the Courts to write wills for the dead, which legislative power may be exercised if enough people ever come to want it.

It often happens that a testator describing his land by the government description leaves out one of the points of the compass, puts in a wrong point, duplicates a point, puts in a wrong fraction, leaves out the right fraction, or duplicates a fraction, or puts in the wrong section number, and the question has arisen whether a testator's mistake of that kind can be corrected by the judicial process of construction. The question is not one in equity jurisdiction at all, but has arisen, and may arise, in courts of law as well as in courts of equity, without any regard to the form of the action at law or the nature of the bill in equity. The question first came up in Illinois in 1870, in Kurtz *v.* Hibner, 55 Ill. 514, and has been coming up regularly ever since, the last case being Graves *v.* Rose, 246 Ill. 76, in 1910, where the court divided four to three, Cartwright, J., writing the opinion, and Dunn, J., the dissenting opinion. As is well known, the decision in Kurtz *v.* Hibner, denying correction, was assailed by Judge Redfield and defended by Judge Caton and by Mr.

Julius Rosenthal. See the literature collected in 4 Wigmore, Evidence, p. 3517, note 6. The Caton-Rosenthal several and not joint defense was identical, viz.: that the court was powerless to insert words of ownership not written in the will by the testator, such as "my land" or "land owned by me." . . . Neither the Supreme Court, nor any judge thereof in a dissenting opinion, ever has adopted the Caton-Rosenthal defense of Kurtz *v.* Hibner, but, on the contrary, as it seems to me, the rule now is that a will necessarily speaks of the testator's own property at the time of his death; that words of ownership must be implied in every will, and it is not a question of inserting words of ownership, but of striking out words of ownership written in by the law, which striking out is not allowable, unless the text of the will excludes words of ownership, which never has happened and very likely never will happen. (In 4 Wigmore, Evidence, pp. 3514, 3417, *quaere* whether the learned author has not given too much weight to the Caton-Rosenthal point.)

All the reported Illinois cases are cases where the practical effect of the mistake in the government description in the will was, on the face of things if the mistake was left uncorrected, to devise land the testator did not own instead of land that he did own, or to leave the testator intestate as to a parcel of land that he did own. To try to reconcile the Illinois cases involves a useless mental strain; they are irreconcilable; they stand about evenly divided, half correcting the mistake, and the other half refusing correction, the cases of correction being most of the later ones, commencing in 1887, but the last case refuses correction. The doctrine prevailing now generally outside Illinois is, that a testator's mistake of the kind mentioned ordinarily is correctable by the judicial process of construction by a court of law or by a court of equity, by means of an application of the rule, "falsa demonstratio non nocet," under which, striking out the words of mistake, it commonly happens in most cases that enough descriptive words are left in the will, when aided by evidence of proper extrinsic facts, to identify and pass the land in question the testator did own. But it is said over and over in the Illinois cases that such correction of such a mistake of description in a will "is more than construction, — it is reformation," as by Bailey, J., speaking for the court, in Bingel *v.* Voltz, 142 Ill. 214, in 1892, and by Vickers, J., dissenting, in Gano *v.* Gano, 239 Ill. 539, 547, in 1909, and in the last case of Graves *v.* Rose, 246 Ill. 76, 87, Cartwright, J., speaking for the majority said: "That such *a change* in a deed, contract or instrument other than a will, to make it conform to the intention of the maker, would be a reformation has never been questioned, *and we do not see how it can be called anything different in case of a will.*" . . .

The evidence of surrounding extrinsic facts that may be called the "stock evidence" to put the judicial process of *reformation* into play and action to correct a mistake of description in a contract or deed, *i.e.*, evidence of "mistake of the scrivener." (34 Cyc. 910), ordinarily cannot be used at all to aid the correction of a like mistake in a will, deed or other

instrument by the judicial process of *construction*. (4 Wigmore, Evidence, § 2471; 30 Am. and Eng. Ency. of Law, 2 ed., 680.) And in so far as Kurtz *v.* Hibner and the other Illinois cases deny the right to use evidence of that kind of an extrinsic fact to aid construction, they are sound in principle.

APPENDICES

APPENDIX I

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607. Bembridge's Trial (warning by judge)	IV	2269	1742
608. Mayo *v.* Mayo " " "	"	"	"
609. Cloyes *v.* Thayer (privilege personal to witness)	"	2270	1743
610. State *v.* Kent alias Pancoast (privilege personal to witness)	"	"	1744
611. Regina *v.* Garbett (who decides)	"	2271	1745
612. State *v.* Thaden " "	"	"	"
613. People *v.* Tyler (inference from claim)	"	2272	1746
614. Commonwealth *v.* Webster (inference from claim)	"	2273	1748
615. Brock *v.* State " " "	"	"	"
616. Commonwealth *v.* Richmond (comment by counsel)	"	"	1747
617. Arthur Train, "The Prisoner at the Bar"	"	"	"
Sub-topic C. Waiver of the Privilege			
618. East India Co. *v.* Atkins (by contract)	IV	2275	1749
619. Regina *v.* Garbett (by testimony)	"	2276	1751
620. Fitzpatrick *v.* United States (by testimony)	"	"	"
Sub-topic D. Removal of the Privilege by Grant of Immunity			
621. Counselman *v.* Hitchcock (effect of statute)	IV	2282	1754
622. Brown *v.* Walker (effect of statute)	"	"	"
623. Hale *v.* Henkel (mode of obtaining immunity)	"	2281*a*	1755
624. State *v.* Murphy " " "	"	"	"
625. Heike *v.* United States " "	"	"	"
Sub-topic E. Policy of the Privilege			
627. Marquis of Nayve's Trial	IV	2251	—
628. Sir J. F. Stephen, "History of the Criminal Law"	"	"	—
629. Committee on Trial Procedure, Institute of Criminal Law and Criminology	"	"	—
630. Arthur Train, "The Prisoner at the Bar"	"	"	—
631. John H. Wigmore, "A Treatise on Evidence"	"	"	—
SUB-TITLE III. PRIVILEGED RELATIONS			
633. Introductory (general principle)	IV	2285	1760
Topic 1. Attorney and Client			
635. Greenough *v.* Gaskell (general principle)	IV	2292	1765
636. Anderson *v.* Bank " "	"	"	"
637. Statutes (general principle)	"	"	"
638. Craig dem. Annesley *v.* Anglesea (plan of crime)	"	2298	1772
639. Hatton *v.* Robinson (conveyancing)	"	2297	1770
640. Barnes *v.* Harris (law student)	"	2301	1774
641. Mitchell's Case (documents)	"	2309	1784
642. Skinner *v.* Great Northern R. Co. (documents)	"	2318	1785
643. Ex parte Schoepf (documents)	"	"	"
644. Sheehan *v.* Allen (consultation as attorney)	"	2303, 2306	1777, 1780

BOOK II

HOW AND WHEN EVIDENCE IS TO BE PRESENTED

(PROCEDURE OF ADMISSIBILITY)

TITLE I. THEORY OF ADMISSIBILITY

	TREATISE VOL.	TREATISE §	CODE §
677. Parnell Commission's Proceedings (general principle)	I	14	45
678. Ellis *v.* Thayer (general principal)	III	1871	1360
679. Putnam *v.* Harris (motion to strike out)	III	1871	"
TITLE II. MODE OF INTRODUCING EVIDENCE			
Topic 1. The Offer			
682. Goodhand *v.* Benton (specific purpose)	I	17	65
683. Farleigh *v.* Kelley (good in part only)	"	"	"
684. Indianapolis & Martinsville R. T. Co. *v.* Hall (good in part only)	"	"	"
685. Marshall *v.* Marshall (expected answer not shown)	"	"	66
Topic 2. The Objection			
687. Cady *v.* Norton (general principle)	I	18	71
688. Marsh *v.* Hand (time)	"	"	72
689. John H. Wigmore, "A Treatise on Evidence" (time)	"	"	"
690. Albers Commission Co. *v.* Sessel (time, for deposition)	"	"	78
691. Rush *v.* French (tenor)	"	"	83
692. Rindskoff *v.* Malone (general objection overruled)	"	"	84
693. Tooley *v.* Bacon (general objection sustained)	"	"	86
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695. Spencer *v.* Potter's Estate (general objection overruled)	"	"	84
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698. State *v.* Moran (revocation, by striking out)	"	"	"
699. Gulliford *v.* McQuillen (revocation, by striking out)	"	"	"
700. John H. Wigmore, "A Treatise on Evidence" (judicial discretion)	"	16	49
701. Norris *v.* Clinkscales (judicial discretion)	"	"	"
702. De Camp *v.* Archibald (notary's power to rule)	IV	2195	1671
703. Ex parte Jennings " " " "	"	"	"
704. Ex parte Schoepf " " " "	"	"	"
705. Dowagiac Mfg. Co. *v.* Lochren (master's power)	"	"	"
Topic 4. The Exception			
707. Wright *v.* Sharp (general principle)	I	20	97
708. Hunnicutt *v.* Peyton (time)	"	"	98
709. Rush *v.* French (tenor)	"	"	100
710. Griffin *v.* Henderson (tenor)	"	"	"
Topic 5. New Trial for Erroneous Ruling			
711. John H. Wigmore, "A Treatise on Evidence" (history)	I	21	—
712. State *v.* Crawford (principle)	"	"	"
TITLE III. ORDER OF INTRODUCING EVIDENCE			
Topic 1. In General			
714. Lord Lovat's Trial (order of examination	III	1883	1352
715. Hathaway *v.* Hemingway (order of case)	"	1869	"

	TREATISE VOL.	TREATISE §	CODE §
813. Louis M. Greeley, "Unauthorized Delivery of Escrow" (delivery by escrowee)	IV	2420	1910
814. Guardhouse *v.* Blackburn (will)	"	2421	1911
815. Beamish *v.* Beamish "	"	"	"
SUB-TITLE III. ACT VOIDABLE			
816. State *v.* Cass (fraud)	IV	2423	1913
817. Fairbanks *v.* Snow (duress)	"	"	"
TITLE II. INTEGRATION OF LEGAL ACTS			
820. History	IV	2426	1915
SUB-TITLE I. ORDINARY TRANSACTIONS			
Topic 1. In General			
821. Lilly, "Practical Register" (general principle)	IV	2425	1920
822. Knight *v.* Barber " "	"	"	"
823. Van Syckel *v.* Dalrymple " "	"	2430	"
824. Brosty *v.* Thompson (sale)	"	2442	1925
Topic 2. Sundry Applications of the Rule			
826. Ramsdell *v.* Clark (receipt of payment)	IV	2432	1927
827. Baum *v.* Lynn (recital of consideration)	"	2433	1929
828. Lese *v.* Lamprecht (contract to accept title)	"	2442	1925
829. Heitman *v.* Commercial Bank of Savannah (renewal of note)	"	"	1931
830. Adams *v.* Gillig (contract to convey)	"	"	1925
SUB-TITLE II. JUDICIAL RECORDS			
Topic 1. In General			
832. Sir F. Pollock and Frederic W. Maitland, "History of English Law"	IV	2450	—
833. Sir Edward Coke, "Commentaries upon Littleton"	"	"	—
834. Sayles *v.* Briggs (general principle)	"	"	1947
835. Hughes *v.* Pritchard " "	"	"	"
836. Cote *v.* New England Navig. Co. (general principle)	"	"	"
Topic 2. Jury's Verdict			
837. Vaise *v.* Delaval (general principle)	IV	2348	1947
838. Owen *v.* Warburton " "	"	"	"
839. Robbins *v.* Windover (juror's motives)	"	2349	"
840. Wright *v.* Telegraph Co. (juror's misconduct)	"	2352	"
841. Capen *v.* Stoughton (error in drafting verdict)	"	2355	"
842. Koch *v.* State (amendment after separation)	"	2356	"
SUB-TITLE III. CORPORATION RECORDS			
845. United States Bank *v.* Dandridge	IV	2451	1945
846. Chesapeake & Ohio R. Co. *v.* Deepwater R. Co.	"	"	"
TITLE III. FORMALITIES OF LEGAL ACTS			
847. John H. Wigmore, "A Treatise on Evidence"	IV	2454	1950

APPENDIX II

REVIEW PROBLEMS, FOR APPLYING THE RULES OF EVIDENCE[1]

1. The plaintiff receives a letter sent to him by the defendant, and desires to offer it in evidence. (1) May or must he first put in his own letter to which the defendant's was an answer? (2) If he may or must, how can he prove the contents of his own letter, (*a*) if he has kept a copy, (*b*) if he has not kept a copy?

2. Upon a trial for illegal liquor-selling, in cross-examining witnesses A and B called by the defendant, (1) may the prosecuting counsel ask each whether he was ever convicted of illegal liquor-selling? (2) If he is allowed to ask, and A refuses to answer, may A be compelled? (3) If B answers that he was not, may the contrary be proved? (4) May the fact of conviction be proved without having questioned A or B at all?

3. In the same case, (*a*) may the defendant, by witnesses K and L, show the good reputation of witnesses A and B? (*b*) If so, may the

[1] These problems may be used for review by allotting one to each student and requesting a written report for discussion at the next lecture. Each report should cite the cases in this book exemplifying the rules invoked in the problem, with a brief statement of the question thereby raised: *e.g.*

No. 39. Offer (1). (*a*) Whether the testimony involves the contents of the check, and therefore whether the rule for producing the original is applicable at all: Case 331, Lamb *v.* Moberly.

(*b*) Even if applicable, whether the pleadings are a sufficient implied notice to produce: Case 310, U. S. *v.* Doebler.

(*c*) Whether notice to produce is necessary, if the plaintiff's attorney is the possessor of the check: Case 308, Lawrence *v.* Clark; Case 311, Eure *v.* Pittman.

Offer (2). (*a*) Whether the wife may be called against her husband: Case 586, State *v.* Briggs.

(*b*) Whether a privileged communication is involved: Case 650, Sexton *v.* Sexton.

(*c*) Whether the oral admission of the check's contents is receivable: Case 335, Slatterie *v.* Pooley.

(*d*) Whether the admission may be proved without first inquiring of the plaintiff on the stand whether he made it: Case 226, Adams *v.* Herald Pub. Co.

In all such reviews, no rule should be stated without the citation of a specific authority most nearly applicable, and a categoric statement of the supposed rule.

Most of the following problems have been culled from the Editor's own examination papers. A few have been added from the volume "Examinations in Law," edited by him in 1900, and containing examination papers from Cornell, Harvard, Iowa, New York, and other Universities.

prosecution, in cross-examining K and L, ask them if they had ever heard that the defendant had sold liquor illegally in Wichita before he came to Chicago?

4. In the same case, (1) the defendant, in cross-examining the principal witness for the prosecution, asks him whether he did not see a license for the sale of liquor nailed on the wall of the defendant's saloon in public view; the judge excludes the question. (2) Later when the defendant has opened his case, he produces a document purporting to be such a license, signed by the Mayor. The judge requires proof of the Mayor's signature. Are these two rulings correct?

5. The issue being whether A died from lack of proper medical attendance on February 1st, M is called by the prosecution to testify that he saw A on January 15th so ill with the fever as to need a physician; this is excluded. M is then asked whether A, at the time M saw him, was complaining of illness; this is allowed. Are the rulings correct?

6. The plaintiff, a car-inspector, was injured by the starting of the defendant's train while the former was between the wheels. At the trial the plaintiff offers to show (1) that several accidents of the same sort to other car-inspectors at the same station had occurred within the previous six months, (2) that the engineer of the train in question was reputed to be hasty in starting his trains without warning. Should these offers be allowed?

7. A is tried for the murder of X. A and B had been arrested for the murder but B had been taken from the jail and hanged by a mob; just before the hanging, B had made a confession of his guilt, entirely exonerating A. May the confession be offered in evidence on A's behalf?

8. Upon the issue whether S, claiming an estate, is the son of the intestate A, the marriage of A to N is offered to be proved (1) by acquaintances testifying to his life with N as wife, (2) by a document purporting to be the city clerk's certified copy of the recorded return of marriage by the clergyman C, (3) by children of A testifying that A always spoke to them of N as his wife, (4) by N testifying to their marriage. Are any of these methods inadmissible?

9. In an action on a written contract for the sale of 20 carloads of No. 2 steel billets, deliverable in Chicago, "at the rate of $2.27 net cash," the defendant offers to show that by the custom of the trade "cash" was understood to mean "within ten days after arrival of goods at the freight-house." Is this allowable?

10. To prove the date of a storm, a witness A produces a daily record of the weather, which he has been for many years in the habit of keeping; a witness B produces a similar record kept by his father now deceased. How, if at all, can these documents be used?

11. A recorded deed, bearing the signature of persons purporting to be grantor and witness, is desired to be proved, and you have the deed itself, as well as a certified copy. How would you prove the deed?

12. A will is offered for probate containing a devise of "my cemetery

lot in Graceland Cemetery." In fact it appears that the testator had a lot in Rose Hill Cemetery, but not in Graceland Cemetery. The draftsman is offered to prove that he inserted by mistake the words "in Graceland Cemetery," that the testator said nothing to him of the place of the lot, and that the testator signed the will without reading it over. Is this admissible?

13. In a prosecution for illegal liquor-selling, the chief witness for the prosecution is asked on cross-examination, against objection, (*a*) whether he has ever been drunk (*b*) or ever arrested for drunkenness. (*c*) In rebuttal the prosecution is not allowed to prove the witness' character for sobriety. Are these rulings correct?

14. In the same trial, the defendant, taking the stand, is asked on cross-examination whether he had not sold liquor illegally on four prior occasions in the same month. The question being allowed against objection, he then refuses to answer on the ground that his answer would tend to criminate him; but the Court without further questioning compels him to answer. Are these rulings correct?

15. Supposing the rulings to be correct, and supposing the defendant to answer in the negative, on what conditions could the prosecution use an affidavit by the defendant, made since the date of the alleged sales, applying for a Federal liquor-license, and stating that the affiant had never before sold liquor?

16. In a railroad collision, several persons are seriously injured. On what conditions could you use the statement (*a*) of the injured persons, (*b*) of the trainmen made to the party rescuing the injured from the wreck?

17. In probating the will of a person who disappeared from New York in 1890, on whom is the burden of proof, and what evidence would suffice to sustain it?

18. In an action against a city for injuries received on a defective sidewalk, the plaintiff offers to show (*a*) that other persons fell and were injured at the same place the next day, and (*b*) that on the third day the city re-planked the whole walk. Is this admissible?

19. In the same action, a witness for the plaintiff is asked whether the place was safe when he saw it; this is allowed. He is then asked on cross-examination whether one of the injured persons, who afterwards died, had not admitted that the place was safe and that it was by his own carelessness that he fell in; this is excluded. Are these rulings correct?

20. In a criminal prosecution under an Illinois statute, for conspiring and combining on and after May 1, 1903, to restrain trade and establish a monopoly by fixing the price of beef sold on the hoof at the stock yards, one of the defendants, taking the stand, is asked on cross-examination, whether during the year 1902 he had been a party to a similar agreement made and acted on in Kansas City, Missouri. (*a*) On objection, the question is held to be improper. Is this ruling correct? (*b*) Supposing the question to have been properly allowed, could the witness have declined to answer?

21. In the same case, (*a*) supposing the defendant to answer the question in the negative, can the fact of such an agreement in Kansas City be established by calling other witnesses? (*b*) Supposing that it could be, would it be proper to do so by asking these witnesses whether they had heard the defendant admit the signing of such an agreement?

22. In the same case, supposing that the defendant had answered the question in the affirmative, and supposing the agreement to have been in writing and now in fact in his possession, how could the prosecution prove its contents?

23. In the same case, supposing the prosecution to desire to prove the illegality of the Kansas City agreement under the laws of Missouri, how could the prosecution prove (1) the Missouri statute defining the crime, and (2) a record of the conviction of the defendant in Missouri for the offence as committed by making this agreement?

24. John Doe and Mary his wife go out driving; the horse is frightened by a derrick left in the street by the defendant Metropolitan Construction Co.; the horse runs away, and John Doe is thrown out of the carriage, expiring shortly after he is taken to the hospital. In an action by his son, as administrator, for the death, the plaintiff offers to show (1) the habits of the deceased as a prudent driver, and (2) several prior instances, during the same week, of the frightening of horses by the same derrick. Are these offers admissible?

25. In the same case, the defendant offers to show that the deceased, immediately after the injury and while being lifted into the ambulance, said: "It was my own fault; I knew that the horse would not pass the derrick. Take me home, I would rather die there than in the hospital." Is this admissible, or any part of it?

26. In the same case (1) the plaintiff calls the widow to prove the age and the income of the deceased. This being permitted against objection, (2) the defendant then asks the witness, on cross-examination, whether the deceased had not frequently admitted to her his knowledge of the horse's skittish disposition. This also is permitted, against objection. Are these rulings correct?

27. In the same case; suppose that the wife was the only eye-witness, and that, being called for the plaintiff, she testifies on cross-examination that the deceased, when the horse showed signs of fright at approaching the derrick, insisted on driving up to it, though he might easily have turned aside into a street leading equally well to his destination; and suppose that the plaintiff rests without other evidence as to the circumstances of the injury. On a motion to direct a verdict for the defendant on the ground of contributory fault, how should the judge rule?

28. In the same case (supposing the judge to deny the preceding motion), the defendant offers a document, signed by the plaintiff, releasing the defendant from all liability, by reason of this injury, in consideration of $500 received. The plaintiff offers to show (1) that the true con-

sideration was not only $500, but also a promise by the defendant to give employment to the plaintiff as bookkeeper, which promise the defendant has not kept; and (2) that the plaintiff signed this release as attorney for his father, while the father was still alive and a possibility of recovery existed, on the express understanding with defendant that the agreement should not be binding in case the father died. May either of these facts be shown?

29. The following questions are desired to be put to an opponent's witness on cross-examination: "Were you ever in jail?" "Were you in 1899 convicted of disorderly conduct?" "Were you in 1898 indicted for forgery?" "Did you ever say that you would get even with the party against whom you are now testifying?" May these questions be asked?

30. In an action of ejectment, the title to the land depending on the alienage of one Hans Brinker, the plaintiff's grantor, it is in issue whether Hans was born in Holland or Illinois; Hans' father Diedrich, with his family, having come to Illinois from Holland in 1860. A diary of Diedrich is offered, containing the following entry: "June 1, 1866. Bought at the village store the first pair of breeches, price $2, for my boy Hans, to-day three years old; I am to pay the storekeeper in chickens." Is this admissible?

31. In the same action, the plaintiff offers to prove the handwriting of Diedrich in this book by submitting to an expert in handwriting, for comparison, the will of Diedrich, under which Hans claimed title to the land. The Court prohibits this. The plaintiff then asks to have the jury make the comparison. This the Court allows. Are these rulings correct?

32. In the same action, the plaintiff desires to prove the record of naturalization of Diedrich (who was naturalized in the Federal Court in Illinois), and a deed of the land to Diedrich from one Jonas. How can he prove these documents?

33. In the same action, the defendant, to disprove the validity of Diedrich's naturalization, calls the widow of Diedrich, to testify that he often admitted to her that he had in his naturalization application misstated the date of his arrival in Illinois as 1860 instead of 1863. May the testimony be received?

34. On May 31 the Northwestern Elevated Railroad was opened for traffic, and on June 6 a girder, fastened with screwbolts of a certain kind, came loose, and caused an accident in which the plaintiff was injured. The defendant, at the trial, offers to prove (1) that during the six days of operation six hundred trains had been run without any other accident; and (2) that similar screwbolts were used for fastening girders on elevated roads in other cities. May this be proved?

35. At the same trial, the foreman of the defendant's construction gang is called to prove the number of bolts put in each girder. He proposes to use a time-book made by him from daily oral reports of

section bosses under him. An objection to this is overruled by the Court. Was this ruling correct?

36. On the same trial, the plaintiff offers, in regard to this foreman, (1) to prove his reputation in the machine-shops for incompetency; (2) to call a former employer to testify that he would not believe the foreman on oath. Should these offers be rejected?

37. In a will contest, the trial judge rules that "the burden of proof of the testator's sanity is on the proponent throughout the case." Is this correct?

38. The plaintiff was the New York broker of the defendant, a Chicago dealer in wheat. The plaintiff received from the defendant on May 31 a telegram reading, when translated from cipher: "No. 3 red dropped two points; don't buy forty thousand." The plaintiff bought; but the defendant refused to pay. In an action for expenses, the plaintiff offers to prove that, for securing greater secrecy of communication, it had always been understood between his principal and himself that on telegraphic orders he was to buy when the telegram read "don't buy," and *vice versa*. May this be shown?

39. Action for a debt; plea, payment. (1) The defendant offers a witness to the delivery of a check to the plaintiff's attorney; an objection that the check must be produced, or notice given, is sustained. (2) The defendant then calls the plaintiff's wife to testify to an admission, by the plaintiff, made to the defendant in her presence, that he had received the check; general objection to this is overruled. Are these rulings correct?

40. Suppose the Supreme Court holds that both of these rulings were erroneous. Would it make any difference to the defendant, in taking advantage of them, that one objection was specific and the other general?

41. In an action by the United States against a person landing in this country, for a penalty for fraudulently evading the customs laws, the defendant offers a certified copy, from the Treasury Department, of a report of a Treasury detective to the Superintendent of Customs, in which it is stated that the defendant did not attempt to conceal the goods. The plaintiff objects. Should the objection be sustained?

42. "Where a document has been attested by witnesses, these witnesses must be called before any other evidence of execution can be resorted to; but where the witnesses are shown to be deceased, then it is sufficient to prove the maker's handwriting." Point out the errors, if any, in this statement.

43. In a proceeding of quo warranto to determine the title to the office of State Treasurer, the only points practically in dispute being the number of votes cast, and the petitioner's eligibility as a citizen of the State, the judge rules that the burden of proof is upon the petitioner to show that he had received the highest number of votes, and upon the respondent to show that the petitioner was not a citizen. What is the effect of this ruling?

44. In the trial of the same proceeding, to prove the number of votes cast at a certain precinct, one of the inspectors of election at that precinct desires to use a tallied check-list kept by another inspector, now deceased, who acted with him. Can it be used in any way?

45. A's will gave to B "my S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 8, township 18, range 28." It is discovered, in carrying out the will, (1) that the only land owned by A was the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 18, township 8, range 28; (2) that B is A's son-in-law, already long in possession of this land by A's consent; (3) that A dictated to the attorney drawing the will a description as in (1) above, but that the typewriter preparing the will for signature erroneously transcribed the description. On the trial of title to the land, may any of these things be shown?

46. On a criminal prosecution for furnishing the army in Cuba a supply of fresh beef knowingly treated with injurious chemicals, testimony to the fitness of the beef consumed is offered from (1) a private soldier, (2) an army surgeon, both of whom had partaken of the beef. What objections would you, for the opponent, make to the testimony of either, and how, if at all, could the objections be obviated?

47. In the same case, the prosecution offers to show (1) that beef similarly treated was furnished by the defendant to the camps in Chattanooga and Tampa, and (2) that the defendant's agent in Cuba, already called as a witness, had admitted that the supply sent to Cuba was so treated. This is received. The defendant offers to show (1) that the agent's reputation for veracity is bad, and (2) that his own reputation for integrity is good. This is received. Are these rulings correct?

48. In the same case is offered a declaration, made at the point of death, of a private soldier, since deceased, as to the nature of his pains and symptoms. Is this admissible?

49. A police officer, testifying to a quantity of burglar's tools found on the defendant's premises, proposes to use a list made by the police sergeant at the time, from the dictation of the witness. Most of the articles the witness cannot remember; he only knows that he gave an exact list at the time he dictated. The Court allows him to read from the list, but will not let the paper be shown to the opposing counsel or handed to the jury. Is this ruling correct or not?

50. On an indictment for murder, the evidence was that the accused and the deceased were in a house alone, and suddenly the deceased came running out with her throat cut; a bystander reached her within one minute and asked her who did it. She could not speak, but pointed repeatedly at the house. In a few moments she expired from loss of blood. Was the evidence of gestures admissible for any purpose or not, and on what principle?

51. At the trial of Daniel Coughlin on the charge of murder, the prosecution offers Mrs. Foy to testify to conversations between the accused and her husband detailing a plan to commit the alleged crime. May she testify?

52. To prove the contents of a deed of land in Indiana, the deed being recorded, and the original being in your client's possession in Indiana, what evidence will you offer in a trial in Omaha?

53. On the second trial of a case the short-hand report of the testimony of witness B of the first trial is offered. B is in court, but swears that he has now forgotten the facts, as they occurred more than three years before. Can the short-hand report be used? Is there any other way of meeting the difficulty?

54. On an indictment for receiving stolen goods, to wit: 14 pieces of bar-iron, knowing them to be stolen, evidence is offered that on searching the defendant's premises, various stolen articles were found, including two axes, ten pieces of cloth and a bicycle. Is this admissible or not, and on what principle?

55. On the examination of a witness six years old, the Court requires the offering party to show that the child understands the significance of a lie. Is this correct or not?

56. In an action of trover, the defendant puts in articles of antenuptial marriage settlement, dated January, 1891, in which the property was given to his wife A, the marriage occurring in February, 1891. The plaintiff shows that the parties had previously married in 1889. The defendant then shows that A's first husband M had disappeared in 1885, and was reported dead, that in this belief he and A married in 1889, but that on hearing again in 1891 that M had died only in 1890, they repeated the ceremony. There is no evidence as to his death, except his disappearance in 1885. In this lack of evidence, which party fails in his case?

57. In an action of ejectment for land claimed by the plaintiff as heir, the defence being that the plaintiff was born before marriage, and, therefore, illegitimate, the plaintiff offers his father's sister as a witness to the inscription on a ring worn by the mother and naming the date of the wedding. The inscription was put on by the father, and the sister was with him when the order was given. The defendant objects: (1) that the ring is not produced, (2) that the mother is not put on the stand, (3) that the father is not put on the stand. The plaintiff testifies that the father is dead; and the Court overrules all three objections. Is this correct or not?

58. In an action against a School Board by a teacher of a High School for salary unpaid, the defence is that the teacher refused to take a class in a special summer school, established during the World's Fair, for the months of July and August. The contract provides for a salary of $1,500 a year, and says nothing about vacations; but the teacher offers to show a custom in all schools of the State to allow a three months' vacation during July, August and September. The Court declares the evidence immaterial. Is this correct or not?

59. In a will probated in Chicago in August, 1893, a bequest of $10,000 is made to the "Board of Foreign Missions." There are Boards of Foreign Missions in several religious bodies and there is an "Ameri-

can Board of Foreign Missions" of the Presbyterian Church. Evidence is offered (1) that the deceased was a Baptist and had never given to the "American Board;" (2) that he said to his lawyer in July, 1893, "I shall give the Presbyterians something, for I have never yet given them any money." Is any of this admissible or not, and on what principle?

60. *Press Dispatch*, Jan. 4, 1896: "A very curious mistake, which renders two wills void and presents an interesting point of law, recently came before Surrogate Dorland, in Poughkeepsie, N.Y. Matilda and Adeline Wescott, sisters, residing near Glenham, and owning some land, decided a few years ago to take a trip south together and to make their wills before going. They went together to the same lawyer, and when the wills were prepared each signed the other's will, supposing that she was signing her own. Adeline has just died, the mistake has been discovered, and her will, just offered for probate, has been rejected." Comment on this situation.

61. *Best*, "Evidence," § 268: "As however the question of burden of proof may present itself at any moment during a trial, the test ought in strict accuracy to be expressed thus, viz.: Which party would be successful if no evidence at all, or no more evidence (as the case may be) were given?" Comment on this suggestion.

62. In an action for illness caused by the inhalation of gas negligently allowed to escape, a witness was offered to testify (*a*) that the defendant's gas had to his knowledge caused illness in several families in the same block. An objection to this was sustained. (*b*) He was then offered to testify to the fact that to his knowledge there had been illness in several families in the same block where the defendant's gas had escaped into the houses. An objection to this was also sustained. Were the rulings correct?

63. Upon an indictment for forging a note, evidence is offered by the prosecution of previous forgeries by the defendant. The Court, excluding the evidence, says: "It would have been evidence of the prisoner being a bad man and likely to commit the offenses thus charged. But the law does not permit the issue of criminal trials to depend on this species of evidence." State your opinion of this.

64. In a statutory action in the name of the State to obtain support from the alleged father for a bastard child, the declarations of the prosecutrix' deceased sister are offered to show the date of birth of the prosecutrix' child. Are they admissible?

65. In an indictment for knowingly using the U. S. mails for the sending of an immoral book, the prosecution, to show knowledge by the defendant of the character of the book, wishes to prove that it was forbidden to be imported into Canada because of its immorality, and has therefore obtained a certificate to that effect from the Canadian Customs Department. What evidential steps will the court require to be taken before it will admit this certificate, and what evidence, therefore, must the prosecution be ready with?

66. A defendant in a criminal case, after taking the stand and being cross-examined, retires; but is later recalled by the prosecution to identify his signature to a document offered in rebuttal. He claims his privilege. Is he right?

67. (*a*) A witness for the defendant is asked whether he had not threatened to "get even with" the plaintiff; the question is excluded. (*b*) He is then asked whether he did not take things that did not belong to him when he left his last employer; this also is excluded. (*c*) Another witness is then offered to prove the facts thus suggested; but this testimony is also excluded. Are the rulings correct?

68. In an action in a State court, a deposition is taken after due notice to the defendant, who did not appear to cross-examine. The suit being then voluntarily withdrawn, and re-instituted against the same defendant for the same cause of action in a Federal court on the ground of diverse citizenship, the deposition is offered, but is objected to (*a*) because the deponent is not shown to be deceased; (*b*) because there was no cross-examination; (*c*) because the deposition was not taken in the same court. Is either of these objections valid?

69. Action on a bond; defence, non est factum, and payment by check. To prove the handwriting of the bond, the check is handed to a witness for the defendant, who has qualified as to handwriting, and he is asked whether he believes them to be in the same handwriting; the check and the bond are then shown to the jury for their inspection. On objection, should either of these things have been allowed?

70. In the foregoing case (*a*) on whom is the burden of proof of payment? (*b*) After the check is introduced, what is the situation as to burden of proof?

71. Action by a bank against a surety company on the bond of the cashier, for sums embezzled by falsification of the books. To show the amount of money received over the counter, the bookkeeper is called, and testifies to the accuracy of a ledger-account kept by him and made up from deposit-tags stamped by the receiving-teller and handed to the bookkeeper; the teller has committed suicide. May the account be received?

72. On the same trial, to show the cashier's fraudulent knowledge and intent, evidence is offered (*a*) of other incorrect entries made by him as paying-teller before being promoted to the position of cashier, (*b*) of incorrect monthly balance-sheets for the preceding year, made out by the bookkeeper and handed each month to the cashier. Are these admissible?

73. On the same trial, the wife of the deceased receiving-teller is called by the defendant to testify to a confession made by her husband, just before his death, to the cashier in her presence, acknowledging that he was the one who had embezzled the money and promising to disclose all to the directors. May this be asked for?

74. To prove the contents and execution of a will by J. S. of Madison,

Wisconsin, dated Jan. 1, 1897, you have brought to court (*a*) a document purporting to be a copy of the will, with an appended certificate by the clerk of the Probate Court at Madison that the document is a copy of a will of that tenor duly probated and filed with him, and (*b*) a book of Wisconsin Statutes, from the library of the Law Institute of Chicago, containing a statute authorizing the lawful custodians of documents duly filed in a public office to certify to the correctness of copies thereof. Are you sufficiently prepared?

75. The above will (if you have succeeded in proving it) bequeaths the sum of $100,000 to "Northwestern College in the State of Illinois," the income to be appropriated for ten years to the needs of "The Law Department of the said College," and then the principal to be spent in the purchase of a law library "for the said College." The claimants are two: "Northwestern College," situated in Naperville, Illinois, and "Northwestern University," situated in Evanston, Illinois. On behalf of the latter claimant, by whom you have been retained, you offer evidence as follows: (*a*) That in popular usage little or no discrimination is made between the terms "university" and "college," and that they are constantly applied to institutions of identical character; (*b*) that the testator had never heard of the existence of the institution at Naperville; (*c*) that the institution at Naperville had no law department before or at the time of the testator's death; (*d*) that the testator had on several occasions expressed an intention to leave money to the "College at Evanston." Will the Court admit this evidence?

76. To prove the age of the buyer of liquor, in a prosecution for selling liquor to a minor, the prosecution offers (1) the buyer himself, (2) his school teacher from the High School, who proposes to testify (*a*) by referring to a record of pupils' ages made by him at the beginning of the term, (*b*) by stating what the buyer's father said to the teacher as to the buyer's age. Are any of these proper?

77. In the same case, the prosecution calls the defendant's counsel, who happened to be present when the sale occurred, and asks him (1) what the defendant said at the time about the buyer's age, and (2) whether the liquor was intoxicating. Would this testimony be admissible?

78. In the same case, if the law exonerates the defendant for a sale made in bona fide belief that the vendee was of age, what is the situation, after the prosecution has introduced evidence that the boy was 20 years of age, as to the burden of proof?

79. Murder by poisoning with arsenic a cup of tea drunk by the deceased while an inmate of the defendant's house. Evidence is offered by the prosecution (1) that six other persons who partook of the tea on the same occasion were taken ill with the same symptoms, (2) that in the cup habitually used by the deceased while in the defendant's house an arsenious deposit had been noticed on three previous occasions in the same week. Is this admissible?

80. In an action by the engineer of a train for injury in a derailment alleged to have been due to the switchman's carelessness, the plaintiff offers to show the switchman's negligent habits (1) by one who knew them, (2) by reputation, (3) by various instances of former carelessness. Is any of this admissible?

81. The law of an ante-nuptial contract, by which the intended wife accepts a sum of money in lieu of dower, etc., is assumed to be that the contract is valid, unless by the intending husband's fraudulent concealment the wife was ignorant of the real amount of his estate. It may also be assumed, as a rule of evidence, that the fact of serious disproportion between the amount of his estate, and the sum given to the woman in the contract, raises a presumption of his fraudulent concealment and her ignorance. Suppose (1) a bill for partition by the heirs, making the wife a defendant, (2) an action by the wife to set apart dower from the estate, making the heirs defendants. In each of these actions, who will have to be ready with what evidence in the various stages of the case?

82. In an action on a policy of life insurance there is a question as to the cause of the death of the party insured, whether from disease or as the result of an accident. The attending physician testifies as to the condition of the patient, and in giving the reasons of his opinion is allowed to state what the patient told him, (*a*) as to the manner of the accident, (*b*) as to his symptoms from the time of the injury to the time of consultation. Are these admissible?

83. A sues B for damages done by B's dog. For the purpose of effecting a settlement, A and B meet by agreement to talk over the case. During the conversation B says "the dog never hurt anyone but once before." No settlement being effected, these declarations are offered against B on the trial to prove scienter. Are they admissible?

84. The question is, whether A was lawfully married to B. A statement by a deceased clergyman that he performed the marriage under circumstances which would have rendered him liable to criminal prosecution is offered in evidence. Is it admissible? Give reasons.

85. (*a*) A is served with a subpoena duces tecum requiring him to produce a certain letter in his possession. A refuses to produce the letter on the trial. (*b*) Defendant is served with notice to produce a certain letter in his possession on the trial. Defendant refuses to produce the letter. How would you prove the contents of the letters in the above cases?

86. The plaintiff in an action against a railroad company for personal injuries caused by the negligence of defendant's telegraph operator, offers evidence that the general reputation of the operator as regards fitness for such duties is bad. Is the evidence admissible?

87. A kills B, a friend, when there are no witnesses present. As a matter of fact, A is a quarrelsome and passionate man, has killed two other men, one in a duel, and one in circumstances like the present, — has threatened B's life, and has frequently stated that he would kill any

man who used certain words in his presence. How far, if at all, can these facts, or any of them, be used against him when on trial for the murder?

88. The question is whether a railway train stopped long enough at a station to enable passengers to get off. The railroad company calls conductors and trainmen to testify that in their opinion the time allowed was sufficient for that purpose. Is the evidence competent?

89. In an action for the price of a desk, the plaintiff, to show the price agreed on, offers his books with the entry of the sale, the salesman having reported the price to the bookkeeper and knowing nothing of the entry. The bookkeeper is dead, but the salesman is not. May the book be received?

90. In an action on a policy of life insurance, the company sets up the defence that the deceased committed suicide. Can it introduce in evidence the verdict of a coroner's jury finding this to be the fact?

91. On which party is the burden of proof as to suicide, in the foregoing case?

92. You have occasion, in suing on a contract made by telegrams, to prove the terms of certain telegraphic communications between the plaintiff and defendant. How do you do it?

93. In an action by A to recover real estate, he offers in evidence the record of a deed to himself contained in the Deed Record from the office of the Recorder of the County. What objection, if any, is sound?

94. A is taken ill while passing through Boston to New Hampshire, and makes his will, devising to his nephew "My farm in Portland, Maine, which I bought from J. S. in 1891." Evidence is offered on behalf of the nephew, in an action to try title, (1) that the person who drew the will inserted by inadvertence "Maine," instead of "Oregon" as directed; (2) that the only land the testator owned was in Portland, Oregon, where he had a son and a daughter, and that here he had bought land from J. S. in 1891; (3) that he had never seen the land, but had bought it through a land agent, who, instead of investing in a farm as ordered, had bought a series of town-lots, which the testator had always believed to be and spoken of as a farm. Is any of this admissible?

95. In the same case, suppose that the first offer, being ruled admissible, is sustained by a witness K. who testifies to the residence of J. S. in Portland, Oregon, and to J. S.'s ownership of the farm there in 1891; that objection is made by the opponent that the deed from J. S. to the testator is not yet proved; that counsel for the nephew declares his intention to produce the deed later in the trial; that the Court thereupon admits K's testimony; and that the deed from J. S. is afterwards not offered, nor is further alluded to by either party, until after verdict for the nephew and on motion for new trial. Can the opponent take advantage of the nephew's failure to prove the deed?

96. In a proceeding to restrain a person from practicing as an attorney without a license, the petitioner, (*a*) on cross-examination of the respondent, who has taken the stand in his own behalf, asks him whether he did

not in 1898 leave the State of New York in order to avoid disbarment proceedings; on objections sustained, (*b*) the petitioner offers a record of the respondent's disbarment in the Court of Appeals of the State of New York; this is admitted. Are these rulings correct?

97. *St. Louis Times*, April, 1909: "In a Georgia city a recent traveler, approaching the clerk of the best hotel, said: 'I would like a room.' Responded the clerk: 'You want a dollar or a dollar and a half room?' 'A dollar and a half room.' The guest was given a key to his room, and upon having been shown to it by a bellboy, unlocked the door and found upon a table, conspicuously in the middle of the room, a quart of the best whisky, which probably would have cost him about a dollar and a half anywhere in America. This he put in his pocket, and demurely went his way. It seems that some time later the prohibitionists of the city, having got wind of this evasive method of circumventing the liquor law, employed a detective to go through the same process. He did so, obtained his whisky, and had the proprietor of the hotel arrested for selling the liquor without a license. In court, under the cross-examination of the defendant's attorney, the detective admitted that in the first place he had not purchased any liquor, and that in the second place he carried away the liquor he found upon the table he had hired — whereupon he promptly was arrested for petty larceny."

On the trial of the detective for larceny, can this testimony of his be used against him?

98. *Associated Press Dispatch:* "Matteawan, N.Y., April 17, 1909. — Dr. Robert T. Lamb, superintendent of the Matteawan Hospital for the Criminal Insane, and who was one of the principal witnesses in the Thaw trial proceedings, had a narrow escape from death yesterday at the hands of John Tohlman, a professor of languages, who was sent to the institution three years ago, after having killed a man. Tohlman struck Dr. Lamb over the head with a steel shovel, three feet long, cutting his head and rendering him unconscious. Luckily, the blow was a glancing one, and the injury inflicted is not serious in character."

If there should be a criminal trial of Tohlman for this assault, could either Dr. Lamb or Professor Tohlman testify?

99. In the same case, if Dr. Lamb should be at the time of the trial still confined to his bed from the injury, can his deposition be taken and used?

100. *Associated Press Dispatch:* "Mercer, Pa., April 23, 1909. — District Attorney J. Mede Lininger to-day attempted to have Mrs. James H. Boyle, one of the couple held on the charge of kidnaping Willie Whitla, testify before the grand jury. She was taken from the jail to the grand jury room. When her counsel, former Judge Miller, heard of it, he rushed to the room and instructed her to refuse to say a word. She followed his advice. Mr. Lininger then asked Judge Williams to commit the woman for contempt. Judge Williams ruled that neither Boyle nor his wife could be compelled to testify until he decided the

question. The first question asked of Mrs. Boyle was, 'Are you married to James H. Boyle?'"

Can the woman be allowed or compelled to testify for the prosecution or for the defence on the trial?

101. *Associated Press Dispatch:* "Boston, April 15, 1909. — Frank T. Bryson, nineteen years old, of 47 Lincoln road, Nonantum, was held for the grand jury in $3,000, in the Newton court this morning, Judge Kennedy having found probable cause on a charge of breaking and entering. Bryson was arrested about 1:30 o'clock this morning by two policemen who found him hiding near a railroad signal tower opposite the junction of Crafts and Washington streets, Newtonville. They were searching the vicinity in response to a call for aid from Dr. T. F. O'Donnell, whose house is nearby. Margaret Ryan, a servant in the O'Donnell house, had awakened suddenly and saw a man lighting a match at the foot of her bed. Her screams frightened the intruder away and aroused the family. The officers found footprints in the yard, and after they had arrested Bryson they took off his shoes and found that they fitted the marks. The prisoner declared that he had not been near the O'Donnell house, and said that he was on the street at that hour because he had quarreled with his father, who would not admit him to the house. Miss Ryan positively identified him as the man whom she had seen in her room. Bryson has a police record. Entrance to the O'Donnell house was gained through a window opening onto a stairway landing."

How could that "police record" be used on the trial?

102. *Brown v. Feldwert* (1905), 46 Ore. 363. The defendant signed, without reading it, a paper which was a promissory note. In the hands of a *bona fide* transferee for value before maturity, can the note be recovered on, in spite of the circumstances of signing it?

104. *Gardiner v. McDonough*, 147 Cal. 313. The plaintiff and the defendant, dealers in produce, negotiated a sale, of which a memorandum was made reciting a contract for so many "peas" and "pinks," at so much "per 100." A dispute having arisen, one of the parties wishes to show that by the trade usage "peas" signifies "white beans" and "pinks" signifies "pink beans" and "per 100" signifies "per 100 pounds." Is this allowable?

105. *Dick v. Zimmermann* (1904), 207 Ill. 636, permits a cross-examiner to "elicit suppressed facts which weaken or qualify the case of the party introducing the witness or support the case of the party cross-examining." Is any part of this statement inconsistent with the rule in the Federal Courts?

106. *Tifft v. Greene* (1904), 211 Ill. 389. It is desired to prove records of tax-sales by certified copy. They are kept in a room in the county building, by a certain official who fills the offices both of county clerk and of clerk of the county court. How would you be able to tell what officer should certify the copies in order to make them admissible?

107. *Walker v. Southern R. Co.* (1907), Ala., 56 S. E. 952. Bills of

lading were made out in triplicate. One was signed by the shipper and filed with the carrier's auditor; another was sent to the shipper with the shipper's signature copied into it; and the third, with the shipper's signature copied into it, was kept in the carrier's freight office. In an action by the shipper against the carrier, which one or ones of these may the shipper use, and on what conditions, if any?

108. *Smith v. Lehigh Valley R. Co.* (1904), 177 N. Y. 379. Issue as to the defendant's engineer having rung the bell at the crossing where the plaintiff was injured. The engineer testified that he did, and, further, that the bell was rung automatically at all the prior crossings for several miles up the road. The plaintiff offered witnesses to show that the bell was not ringing at certain of those prior crossings. This was held inadmissible, one judge dissenting. Is the decision or the dissent more sound?

109. In the same case, suppose that the trial Court rules the plaintiff's offer to be admissible, and the evidence is accordingly admitted; but that later in the trial, when a further witness on the same point is offered and objected to, the trial Court, after argument, changes its ruling and orders that the prior testimony on that subject be stricken out. Assuming that the Supreme Court also holds the evidence inadmissible, will the defendant's exception to the original ruling nevertheless be sustained?

110. *Champion v. McCarthy* (1907), Ill., 81 N. E. 808. Inheritance of J., an intestate, illegitimate son of S. The plaintiff claims as another illegitimate son of S. S. also had legitimate children, by marriage to C. To prove the plaintiff to be son of S., declarations of J., of S., and of deceased members of C's family, are offered. Are they admissible?

111. In a prosecution for perjury committed in testifying on oath before Federal Commissioner of Corporations Garfield, how would you prove (*a*) the Federal Statute empowering him to administer the oath? (*b*) the words of the testimony constituting the alleged perjury?

112. The plaintiff's intestate was killed while lawfully riding on a freight train in charge of cattle. A witness offered to testify that the deceased had a ticket from Chicago to Oshkosh; it was objected that the ticket should be produced or accounted for; the objection was overruled. Was this correct? (215 Ill., 158.)

113. Probate of a will; issue of undue influence; what sort of declarations by the testator are admissible? (76 N. E. 678, Ill.)

114. Injury to a mine-workman by the lowering of the cage at a speed exceeding the statutory rate; the statute makes the mine-owner liable for an injury caused by a wilful violation of the statute. The fact that the engineer had "repeatedly lowered the cage" at an excessive speed is offered. Is it admissible for any purpose? (77 N. E. 131, Ill.)

115. "When the direct examination opens on a general subject, the cross-examination may go into any phase of that subject;" said of an accused's conversations. What are the different varieties of rule on the subject? (73 N. E. 601, Ind.; 69 N. E. 919, Ill.)

116. Action on a claim for cigars and liquors. The plaintiff offered an original book, sworn to by the clerk keeping it, and made up by him from tickets punched by a registering machine operated by the salesman, who sent the tickets to the clerk, who made the entries in the book; neither the tickets nor the salesman were produced or accounted for. The book was excluded. Is this ruling correct? (73 N. E. 656, Mass.)

117. Action on an insurance policy; defence, false representations as to health. The insured's statements as to his present condition of health, made pending the application for insurance, were admitted. Can this ruling be supported on any ground? (73 N. E. 592, Ind.)

118. Action on an alleged creditors' agreement in writing; the defendant admitted his signature, but denied his liability, and offered to show that the document had been signed by him and delivered to the plaintiff's agent on the understanding that it should not be binding until a certain proportion of the creditors should also have signed and that these additional signatures had not been obtained. The plaintiff testified that he personally knew nothing of this understanding. Is the defendant liable? (71 N. E. 117, Mass.)

119. *News Dispatch:* "Evansville, Texas, May 11, 1907. — By marrying August January, a wealthy Nebraska farmer, Garnet Collins today took unto herself as husband the man on whose testimony the Federal authorities expected to send her to jail and also the man who was the innocent cause of the prosecution of the case against her. The girl and her mother, Mrs. J. C., were arrested several days ago on charges of using mails to defraud, on complaint of numerous men over the country who had answered their matrimonial advertisements and sent them money on which to come to them. Their apartments were searched and a number of letters, all speaking of money inclosed, were found. Among the letters were several from January, and in all of them were references to cash forwarded for a trip to Nebraska or to tickets wired. January was immediately sent for by the authorities to come to Evansville and testify; but on his arrival he and the younger Collins woman were quietly married, and the authorities now admit he cannot be forced to testify against her."

On the trial of the mother, (*a*) Can August January be obliged to testify? (*b*) Can the daughter be obliged to testify, if the Federal attorney hands her a pardon on calling her to the stand?

120. Action by Doe against Roe on a contract, signed by both. Roe has gone to Nebraska, taking the only original of the contract. Doe has no copy. The trial is set for next week. How can Doe prove his contract without Roe's testimony?

121. In the same case, are there any conditions on which Doe can get Roe's testimony by interrogatories before trial, Roe being still in Nebraska?

122. On cross-examination, in a personal injury action, may an eyewitness for the plaintiff be asked: "Did you ever make an affidavit, in

which you denied being present at the time of the injury?" (136 Ill. 317; 219 Ill. 222.)

123. Prosecution of M. for receiving stolen goods from one K., well knowing them to have been stolen by K. The prosecution, to prove the theft, offers a written voluntary confession by K., implicating M. Is this admissible? (Ind., 76 N. E. 245.)

124. In the same case, would the confession of K. be deemed voluntary if made to a chief of police while under arrest and in answer to questions?

125. A will was duly signed and attested, and left all the property to a certain woman. In a proceeding to probate the will, contested by the next of kin, one of the attesting witnesses testified that the testator had laughed and said to him, just after the document was executed and the woman legatee had left the room, "This paper is a fake, and it is only done for a purpose." Is this admissible? (187 Mass. 120.)

126. Action for slander by the defendant in saying that the plaintiff whipped her own mother. May the plaintiff's character as to brutality, or the opposite, to her mother, be introduced by either plaintiff or defendant? (Wis., 109 N. W. 633.)

127. Action for damage by the spread of fire negligently set by the defendant railroad's employees while clearing stubble. May the plaintiff show that twice before in the same month a fire has spread to his land from fire set by the defendant's employees?

128. In the preceding case, if the defendant's employees are in another State, how could the plaintiff take and use their depositions?

129. In the preceding case, an employee of the defendant, called by the plaintiff, is afterwards called by the defendant on the same point. May the plaintiff impeach him by self-contradictions? (Kan., 86 Pac. 461.)

130. A statute required druggists to file in a city office a monthly report of sales of liquors. On a prosecution for selling unlawfully to a minor, may such a report, filed by the defendant one month before the prosecution was begun, be used as a part of the evidence to prove the fact of the sale? (123 Mich. 317.)

131. Forgery of a note in the name of A. S., judge of the Superior Court. May the forgery be evidenced (1) by the testimony of the county-treasurer, who has often seen the judge's signature in indorsement on his salary-drafts, (2) by specimens of the judge's handwriting from the files of the Superior Court?

APPENDIX III

PRACTICAL EXERCISES IN INTRODUCING EVIDENCE IN COURT[1]

1. *Allen v. Whitman.* Breach of contract to pay for goods; plea, goods not delivered as agreed. Defendant is to prove, by his employees and his or their books, the total amount actually delivered.

2. *People v. Watrous.* Murder. Defendant is an employee of Jameson's department store; to prove an alibi he desires to use the employees' patent time-indicator, showing his time of entering and leaving.

3. *Billings v. Paine.* Slander. To impeach the defendant's witness, Alton, a reporter, now on the stand, plaintiff desires to show that Alton also has slandered plaintiff by writing an article in the newspaper about him.

4. *Johnson v. Doe.* Ejectment. To show prescriptive title, defendant desires to prove the building of a fence in 1860 by his grandfather, now deceased; defendant calls a witness who heard the grandfather talk about it.

5. *Mortimer v. Morton.* Action on a note purporting to be made by defendant and endorsed to plaintiff by George Williams; defense, forgery of endorsement by plaintiff. Plaintiff desires to prove Williams' admission of the genuineness of the endorsement, in a letter written by Willaims.

6. *Steele v. Sanchez.* Goods (kerosene oil) sold and delivered. Plea, goods not equal to warranty. Defendant's employee has testified to the bad quality. Plaintiff wishes to show the witness' inexpertness as a judge of oil by proving his discharge by his former employer, etc., etc.

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[1] These Exercises are simple, and are not intended to lead to argument over rules having scientific controversial difficulties. Their aim is merely to give the student his first plunge across the Rubicon. The first actual experience in making or opposing an offer of evidence marks a stage in his development, and the public struggles of each counsel to do one of these simple things is a useful object-lesson to the others.

Each case is allotted to two counsel, — one to make the offer and one to oppose it. A calendar is set. The offering counsel prepares his evidence as he sees fit, but always keeping within the strict limits of the problem as stated. His object is to introduce the described evidence in accordance with the rules applicable. The opponent's duty is merely to be prepared to check any violation of the rules. Each must be ready to cite some authority in the Case-book or Statute-book, when called upon to justify a point of law. Any document designed to be used must, to save time, be submitted to the opponent's inspection before the case is called. No case is expected to take more than ten minutes.

7. *Eldon v. Ellenborough.* Inheritance of John Eldon, father of plaintiff. Prove the date of father's marriage and the date of plaintiff's birth, by the same witness.

8. *Wilson v. Walters.* Contract to deliver cotton. Plea, non-assumpsit. Prove the signatures to the defendant's letters, by a witness to the signature, and by other specimens of the defendant's handwriting.

9. *Elmer v. Edwards.* Contract to sell a horse; plea, written warranty and a breach. Prove the written warranty by a copy.

10. *Johnson v. Jones.* Inheritance depending on the date of the plaintiff's father's marriage. Prove the date by a copy of the marriage-register.

11. *Mason v. Moon.* Contract to sell machinery. The contract being made by letters and telegrams, plaintiff desires to prove the plaintiff's letter of Jan. 19, and his telegram of Feb. 1, both being in the defendant's possession.

12. *Shand v. Thompson.* Action on a judgment rendered in the seventh Judicial District of Iowa; prove the law of Iowa as to the jurisdiction of the court.

13. *Nansen v. Nomad.* Action for wrongful ejection from a railroad train, defendant claiming that the ticket of the plaintiff did not read to the right station; plaintiff is to prove the ticket and its issuance, by the plaintiff as a witness, the ticket being in his possession.

14. *Manson v. Fitch.* Action for wrongful arrest by a police officer on the charge of disorderly conduct. Defendant wishes to show the plaintiff's bad reputation somehow. Plaintiff has already testified.

15. *Edwards v. Raymond.* Action for wages; plea, discharge for incompetency. Defendant is to prove plaintiff's incompetency somehow.

16. *Field v. Walton.* Injury by a collision with the defendant's wagon. The plaintiff wishes somehow to prove that the defendant is a careless driver.

17. *Westerly v. Adams.* Action for ten cases of tobacco; plea, goods not equal to sample. Prove for the plaintiff that the goods were equal to sample.

18. *Dennison v. Pierce.* Slander; plea of privilege. Plaintiff is to prove the defendant's malice. The defendant has been on the stand.

19. *State v. Rogers.* Conspiracy to murder. The prosecution puts an accomplice on the stand. The defendant desires to impeach him by showing an indictment against him for the same crime.

20. *Winston v. Gray.* Injury at a railroad crossing. The plaintiff desires to prove the speed of the train by a witness.

21. *People v. Anson.* Embezzlement. The prosecution desires to prove the payment of $130 by a bank on a check drawn by the defendant.

22. *Pritchett v. Eliot.* Contract to sell land. The defendant wishes to prove the execution and contents of a deed from the plaintiff, registered in Cook County, the land being in Cook County.

23. *Connor v. Dale.* Action against the endorser of a promissory note

payable in Chicago. The plaintiff desires to prove the dishonor and notice by a notary's certificate of protest.

24. *Walters v. Ross.* Action for sums of money lent. Defendant pleads that plaintiff told him to pay $15 of it to George Wilson; and defendant wishes to prove a receipt signed by Wilson.

25. *Berry v. Eames.* Action on a note for $375; plea, payment. The defendant wishes to prove a copy of the payment-check. The original is in possession of the Chicago Bank.

26. *Easton v. Lewis.* Action on a promissory note; plea, payment. Prove the written receipt by the plaintiff's admissions.

27. *Hoosier v. Wade.* Action on a judgment in the Rogers County Court of Indiana. Prove the judgment by a certified copy.

28. *Flim v. Flam.* Action for money loaned, viz., $100; plea, payment; the plaintiff, admitting the receipt of certain currency, maintains that it was counterfeit. The plaintiff has the currency in court, and wishes to prove it counterfeit.

29. *Beans v. Bones.* Action for goods sold; the defendant disputes the price agreed on; the plaintiff wishes to evidence the price from his store account books.

30. *Pomeroy v. Benjamin.* Action for nuisance by smoke from the defendant's factory. The plaintiff wishes to prove that the smoke has injured the furniture in adjacent houses also.

31. *Holmes v. White.* Prosecution for violating the State law against public gambling. The defendant wishes to show that he has obtained immunity from prosecution by testimony before a legislative investigating committee.

32. *People v. James.* Bigamy. The prosecution desires to prove either the first or the second marriage by one of the wives.

33. *Philips v. Charlestown.* Personal injury by falling into a hole in a defective city sidewalk. The plaintiff's statements, made out of court as to the nature of his injury and suffering, are to be proved.

34. *Ford v. Rivers.* Personal injury. The defendant's witness, who has examined the plaintiff, is to qualify as a physician and surgeon.

35. *Rankin v. Houseworth.* Action on a guaranty of a note. To prove the maker's non-payment, the plaintiff offers a deposition, taken in Iowa, of the cashier of a bank.

36. *Files v. Jasper.* Action for the price of hogs sold Jan. 14. The plaintiff, to prove damages, calls a witness to the market price of hogs at the Chicago Stockyards on Jan. 14.

37. *State v. Copp.* Prosecution of a policeman for assault and battery. The policeman pleads his official authority to arrest. The defendant having testified that he was wearing his star at the time the prosecution calls a witness to testify that the star was at the time in the station-house on the defendant's coat there hanging up.

38. *Simpkins v. Trask.* Bankruptcy. The plaintiff desires to prove a claim of $175, based on an account stated.

39. *Atkins v. Sullivan.* Action on a contract to carry the plaintiff's trunk to the station, the breach being the loss of the trunk. To prove damages, the plaintiff takes the stand to prove the contents and value, consisting of clothing and jewelry.

40. *Wilkerson v. Stimson.* Action on a contract to give title. To show the offered title to be defective, the plaintiff desires to prove an unrecorded deed of 1880 from Jones to Smith.

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