Joel D. Hubbard
1903

W. M. Boles
1910

Joel D Hubbard

A TREATISE

ON THE

LAW OF EVIDENCE

BY

SIMON GREENLEAF, LL.D.

Quorsum enim sacræ leges inventæ et sancitæ fuere, nisi ut ex ipsarum justitia unicuique jus suum tribuatur?—MASCARDUS EX ULPIAN.

IN THREE VOLUMES

VOL. I

SIXTEENTH EDITION

REVISED, ENLARGED, AND ANNOTATED

BY

JOHN HENRY WIGMORE

PROFESSOR OF THE LAW OF EVIDENCE IN THE LAW SCHOOL OF NORTHWESTERN UNIVERSITY

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TO THE HONORABLE

JOSEPH STORY, LL. D.,

ONE OF THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,
AND DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY.

Sir, — In dedicating this work to you, I perform an office both justly due to yourself and delightful to me, — that of adding the evidence of a private and confidential witness to the abundant public testimonials of your worth. For more than thirty years the jurisprudence of our country has been illustrated by your professional and juridical labors; with what success, it is now superfluous to speak. Other Jurists have attained distinction in separate departments of the law; it has been reserved for yourself, with singular felicity, to cultivate and administer them all. Looking back to the unsettled state of the law of our national institutions, at the period of your accession to the bench of the Supreme Court of the United States, and considering the unlimited variety of subjects within the cognizance of the Federal tribunals, I do but express the consenting opinions of your contemporaries, in congratulating our country that your life and vigor have been spared until the fabric of her jurisprudence has been advanced to its present state of lofty eminence, attractive beauty, and enduring strength.

But many will regard the foundation of the present Law School in Harvard University as the crowning benefit, which, through your instrumentality, has been conferred on our profession and country. Of the multitude of young men, who will have drunk at this fountain of jurisprudence, many will administer the law, in every portion of this widespread Republic, in the true spirit of the doctrines here inculcated; and succeeding throngs of ingenuous youth will, I trust, be here imbued with

the same spirit, as long as our government shall remain a government of law. Your anxiety to perpetuate the benefits of this Institution, and the variety, extent, and untiring constancy of your labors in this cause, as well as the cheerful patience with which they have been borne, are peculiarly known to myself; while, at the same time, I have witnessed and been instructed by the high moral character, the widely expanded views, and the learned and just expositions of the law, which have alike distinguished your private Lectures and your published Commentaries. With unaffected sincerity I may be permitted to acknowledge that, while my path has been illumined for many years by your personal friendship and animating example, to have been selected as your associate in the arduous and responsible labors of this Institution, I shall ever regard as the peculiar honor and happiness of my professional life. *Beatè vixisse videar, quia cum Scipione vixerim.*

Long may you continue to reap the rich reward of labors so vast, so incessant, and of such surpassing value, in the heartfelt gratitude of our whole country, and in the prosperity of her institutions, which you have done so much to establish and adorn.

I am, with the highest respect,

Your obliged friend,

SIMON GREENLEAF.

CAMBRIDGE, Massachusetts,
February 23, 1842.

PREFACE TO THE SIXTEENTH EDITION.

SIMON GREENLEAF was born at Newburyport, Massachusetts, December 5, 1783, but during his childhood the family removed to the District now Maine. He began the study of law at New Gloucester, with Ezekiel Whitman, afterwards Chief Justice. In 1806 he began the practice of law in Standish, removing in 1818 to Portland. He acquired a high standing in the profession; and in 1820, when Maine was set off and admitted as a State and a Supreme Court was established, Mr. Greenleaf was appointed its reporter, — a position then and long thereafter, in some of the older States, of such distinction that it often served as a stepping-stone to the Bench. In 1833 he was appointed Royall professor of law in the Law School of Harvard University; and in 1846 he became Dane professor of law, in the same school, in succession to Mr. Justice Story, long his colleague, to whom he dedicated the present work. In 1848 he resigned, and became professor emeritus. He died on October 6, 1853.

In 1842, in the tenth year of his professorate, he published the present treatise on the law of Evidence. At that time the only treatise of American origin on that subject was the small volume of Chief Justice Swift, of Connecticut, published in 1810; besides this, the profession at that time made chief use of the American editions of the works of Mr. Starkie and Mr. Phillipps. The professional approval of Mr. Greenleaf's work was immediate and constant. There have been printed down to the present time fifteen editions of the first volume, the dates of which were as follows: 1842, 1844, 1846, 1848, 1850, 1852, 1854, 1856, 1858, 1860, 1863, 1866, 1876, 1883, 1892. It will thus be seen that, up to the time of the twelfth edition, a new edition was called for at almost regular intervals of two years, — a fortune that has fallen to few even of the classical treatises. Of these

editions, his own hand prepared the first seven; the seventh, indeed, appeared (in 1854) only after his death; but all the alterations and additions had been made by him, except a few citations of decisions rendered since his death; and the text of this edition has always been taken as the text for the succeeding ones. The twelfth edition (of 1866) was prepared by Isaac F. Redfield, the eminent legal author, and Chief Justice of the Supreme Court of Vermont; the thirteenth edition (of 1876) was prepared by John Wilder May, also a legal author of repute, and Chief Justice of the Municipal Court of Boston; the fourteenth and fifteenth editions (of 1883 and 1892) were prepared by Simon Greenleaf Croswell, a grandson of the author of the work, and himself the author of well known legal treatises.

In none of these posthumous editions was there any attempt to deal with the text, except in a few instances, chiefly by the insertion of brief references to statutory changes. But for the present edition a different treatment seemed to have become necessary. The broad statutory changes in the past two generations, the detailed development of many doctrines, the numerous novel applications of established principles, required not only many additions which could not be conveniently relegated to cumbrous notes, but also the omission of some portions of the text rendered obsolete by statutory abolitions. Moreover, in the expositions of principle, account could not fail to be taken of the new epoch in the understanding of the rules of evidence, due to the historical studies of Professor James Bradley Thayer, the great master of the law of evidence. No book purporting to represent the present state of our knowledge could omit to recognize and make use of his results, in the exposition of the principles of evidence. In this as well as in other respects an effort has been made, in the present edition, to bring the text into harmony with the established results of modern research.

On the other hand, it was necessary to leave the original text still available in its classical integrity. The profession has long been accustomed to rely on this work. In the opinions of every Court for the last fifty years occur references to its sections; and, even of the errors that are to be found in its pages, it may often be said that they have become law in many jurisdictions because they were put forth in these pages. The innumerable judicial references to its text rendered it necessary, in any new edition, to

permit the original text to remain available to those who wished to verify such citations and consult the original phraseology.

The effort has been to answer both of the requirements above described, — to make the work as useful as possible to the profession and to the student of the present time, while still leaving the original text available for those who might wish to consult it. Accordingly the following plan has been pursued. All portions of the text omitted for any reason have been placed in the Appendix (except that brief sentences omitted have been placed in a footnote), under the original section-number; at the point in the text, the original section-number alone is preserved, with a reference in a footnote to the Appendix; so that one who has a reference to the original text will easily find it by the cross-reference at the place of omission. All editorial insertions in the text have been indicated by full-faced brackets [ ], if made by the present editor, and by braces { }, if representing the statements of prior editors; most of such insertions are of the former character. In many instances, transpositions of the original sections have been required, in order to remedy clear errors in the order of treatment; in such cases the original section-number is preserved at the place of omission, and a footnote gives a cross-reference to the section as newly numbered and placed. The new numbers in such instances are designated by letters of the alphabet, so as to avoid any change in other numbers; thus, one who is referred to the original section 249 will find at that place the section-number 249, with a cross-reference to its new number, 254 *c*; and at 254 *c* the transferred section has also the original number, 249, bracketed. Thus, there need be no confusion in the use of references based on the former editions, nor any break in the continuity of usage of the work.

The notes have been more freely treated. The author's own notes have been in some instances elevated to the text; in most instances they have been preserved intact; but in a few cases, particularly where they consisted of cumbrous and unnecessary quotations, and where they did not involve any personal opinion of the author and the citations were amply covered by the editorial material added in detail, they were omitted. The material of prior editors in the notes is represented by braces { }; and for this matter the present editor assumes no responsibility. The material added by the present editor is invariably represented by

full-faced brackets [ ]; except that in the three chapters and the Appendix inserted entire from his hands, these brackets have been omitted in the notes.

The omissions from the original text (to be found in Appendix II) consist chiefly of portions rendered obsolete by statutory changes, namely, the portions dealing with variance (never, in truth, an evidential topic) and the portions dealing with incompetency by reason of interest. Much more than the space thus gained has been taken up by the present editor's additions, namely, three entire chapters (IV, V, and XI), and more than a hundred new sections, besides additions to the original sections; together with an Appendix giving in full all constitutional provisions about evidence and the statutory enactments upon the competency of witnesses, and another Appendix dealing in necessary detail with the subject of confessions before magistrates. The cases cited in the preceding edition numbered, in all, nearly ten thousand; in the present edition, they number some fifteen thousand. The main intention has been to add the useful decisions of the last seven years; but on a large number of questions having particular interest or subject to special difference of opinion, the editor's effort has been to make the citations as full as possible by furnishing all the available authorities. The notes to §§ 14 *k* (notes 7, 8), 14 *o* (note 56), 195 *d* (note 2), 439 *h*, 444 (note 5), 461 *b*, 461 *c*, will serve as examples of this. In many such instances it has been thought most useful to give the mere citations, without indicating in detail the precise tenor of the decision; for space would not suffice to do this accurately for each citation; and the practitioner is to-day usually better served by giving him the mere citations for his own jurisdiction, to be consulted by himself in the original, than by furnishing a few cases from other jurisdictions, fully stated, perhaps, but not of service as representing the utterances of his own Court. For the benefit of teacher and student, an attempt has also been made, on subjects of particular interest or difference of opinion, to note expressly the leading cases, — that is, either the classical cases establishing the doctrine, or the cases best worth consulting for learning the arguments of policy on both sides. The notes to §§ 13 *j* (note 9), 14 *b* (note 14), 195 *b* (note 1), 238 (note 3), 310 (note 14), 441 *b* (note 3), 441 *e* (note 8), 461 *a* (notes 1, 4), 461 *d* (notes 1, 2, 3, 4, 5), 462 (note 6),

will serve as illustrations of this. A few typographical improvements have also been attempted. The original text contained no section-headings; in the thirteenth edition these were introduced; but, in all editions except the twelfth, the separate chapters and the general table of contents contained no summaries of the section-topics; in the present edition the section-headings have been revised, and detailed summaries of them prefixed to each chapter and placed also in the general table of contents. In the previous editions the running title at the top of the page gave only the chapter-subject; in the present edition this running title is made to give not only the chapter-subject but the section-subject; moreover, the number of chapter and section is inserted at the head of each page for convenience in turning to a passage cited. The recent citations end with the number of the National Reporter System appearing December 31, 1898; except that a few important rulings in the numbers up to March 1, 1899, have been added while the work was going through the press.

J. H. W.

Northwestern University Law School, Chicago,
May 1, 1899.

PREFACE TO THE FIRST EDITION.

THE profession being already furnished with the excellent treatises of Mr. Starkie and Mr. Phillipps on Evidence, with large bodies of notes, referring to American decisions, perhaps some apology may be deemed necessary for obtruding on their notice another work, on the same subject. But the want of a proper text-book, for the use of the students under my instruction, urged me to prepare something to supply this deficiency; and, having embarked in the undertaking, I was naturally led to the endeavor to render the work acceptable to the profession, as well as useful to the student. I would not herein be thought to disparage the invaluable works just mentioned; which, for their accuracy of learning, elegance, and sound philosophy, are so highly and universally esteemed by the American Bar. But many of the topics they contain were never applicable to this country; some others are now obsolete; and the body of notes has become so large, as almost to overwhelm the text, thus greatly embarrassing the student, increasing the labors of the instructor, and rendering it indispensable that the work should be rewritten, with exclusive reference to our own jurisprudence. I have endeavored to state those doctrines and rules of the Law of Evidence which are common to all the United States; omitting what is purely local law, and citing only such cases as seemed necessary to illustrate and support the text. Doubtless a happier selection of these might be made, and the work might have been much better executed by another hand; for now it is finished, I find it but an approximation towards what was originally desired. But in the hope that it still may be found not useless, as the germ of a better treatise, it is submitted to the candor of a liberal profession.

CAMBRIDGE, Massachusetts,
February 23, 1842.

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A TREATISE

ON

THE LAW OF EVIDENCE.

A TREATISE

ON

THE LAW OF EVIDENCE.

CHAPTER I.

PRELIMINARY OBSERVATIONS.

§ 1. Definitions.
§ 2. Distinctions.
§ 2 *a*. Scope of the Rules of Evidence; Criminal Law and Equity; Federal Courts; Constitutional Aspects.
§ 3. Division of the Subject.

§ 1. **Definitions.** The word EVIDENCE, in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved.[1] This term, and the word *proof*, are often used indifferently, as synonymous with each other; but the latter is applied by the most accurate logicians to the effect of evidence, and not to the medium by which truth is established.[2] None but mathematical truth is susceptible of that high degree of evidence, called *demonstration*, which excludes all possibility of error, and which, therefore, may reasonably be required in support of every mathematical deduction. Matters of fact are proved by moral evidence alone; by which is meant not only that kind of evidence which is employed on subjects connected with moral conduct, but all the evidence which is not obtained either from intuition, or from demonstration. In the ordinary affairs of life, we do not require demonstrative evidence, because it is not consistent with the nature of the subject, and to insist upon it would be unreasonable and absurd. The most that can be affirmed of such things is, that there is no reasonable doubt concerning them.[3] The true question, therefore, in trials of fact, is not whether it is possible that the testimony may be false, but whether there is sufficient probability of its

[1] See Wills on Circumstantial Evid. 2; 1 Stark. Evid. 10; 1 Phil. Evid. 1; [compare Thayer, Preliminary Treatise on Evidence, ch. 6.]
[2] Whately's Logic, b. 4, ch. 3, § 1.
[3] See Gambier's Guide to the Study of Moral Evidence, p. 121.

truth; that is, whether the facts are shown by competent and satisfactory evidence. Things established by competent and satisfactory evidence are said to be proved.

§ 2. **Distinctions.** By *competent evidence* is meant that which the very nature of the thing to be proved requires, as the fit and appropriate proof in the particular case, such as the production of a writing, where its contents are the subject of inquiry. By *satisfactory evidence*, which is sometimes called *sufficient* evidence, is intended that amount of proof, which ordinarily satisfies an unprejudiced mind, beyond reasonable doubt.[1] The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a common man; and so to convince him, that he would venture to act upon that conviction, in matters of the highest concern and importance to his own interest. Questions respecting the competency and admissibility of evidence are entirely distinct from those which respect its sufficiency or effect;[2] the former being exclusively within the province of the Court; the latter belonging exclusively to the jury.[3] *Cumulative* evidence is evidence of the same kind, to the same point. Thus, if a fact is attempted to be proved by the verbal admission of the party, evidence of another verbal admission of the same fact is cumulative; but evidence of other circumstances, tending to establish the fact, is not.

§ 2 *a*. **Scope of the Rules of Evidence; Criminal Law and Equity; Federal Courts; Constitutional Aspects.** [(1) It may be noted, at the outset, that, in proceedings at common law, there is no distinction to be drawn between the rules of evidence in *criminal* and in *civil* cases. It is true that the doctrines about burden of proof and presumptions differ decidedly in the two departments; and it is also true that a few rules — *e. g.* about confessions — do not come into play at all, except in criminal cases; and that many kinds of evidence are commoner in criminal than in civil trials. But, so far as the admissibility of evidence is concerned, there is no distinction between criminal and civil cases as such; in other words, a rule that is good for the one is good in the same terms for the other, so far as applicable to the subject. This has been many times insisted on in judicial utterances.[1]

[1] [These distinctions are in themselves of no importance; for certain purposes, however, some such distinctions are material; see *post*, § 81 *d* (measure of persuasion for the jury); § 14 *w* (judge's control over the jury).]

[2] [For this, see § 14 (3), *post*.]

[3] [For this, see Chap. VII.]

[1] [Lord Melville's Trial, 29 How. St. Tr. 746 (the best case, in facts, argument, and opinion, for illustrating the doctrine); R. *v.* Burdett, 4 B. & Ald. 95, 122; R. *v.* Mallory, 15 Cox Cr. 460; Watson's Trial, 32 How. St. Tr. 492; Stone's Trial, 25 id. 1314; Strother *v.* Barry, 5 Bing. 136, 155; Leach *v.* Simpson, 7 Dowl. Pr. 513; R. *v.* Towey, 8 Cox Cr. 331; Anthon, Law Student, 176; State *v.* Carter, 1 Houst. Cr. 402; Brown *v.* Schock, 77 Pa. 477; Trogdon's Case, 31 Gratt. 862, 874; Crawford *v.* State, 112 Ala. 1; State *v.* Hayes, 23 Mo. 314; Stephen, Hist. Crim. Law, I. 437; Summons *v*

(2) In *Chancery practice* it may perhaps be said that the rules of evidence are the same as at common law, so far as they are not affected by the peculiar methods of pleading and procedure in Chancery;[2] but this qualification is so important and so broad that a correct apprehension of the precise extent of the differences could only be had by a detailed examination of the specific rules. Particular variations are noted from time to time in the ensuing chapters, and the whole subject of Chancery procedure is treated in a subsequent volume of this work.[3]

(3) In the *Federal Courts*, "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;"[4] and, subject to certain rules of competency expressly specified, "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."[5] Thus the Federal Court adopts the rule of evidence that prevails in the State where it is sitting,[6] except where there is by Federal statute a specific Federal rule on the subject.[7] But the interpretation of the phrase "common law," in the above provision, is that it does not include criminal trials, and that for such trials the Federal Court is to apply the rules in force in the respective States when the Judiciary Act of 1789 was passed,[8] — so far, presumably, as not supplanted by Federal legislation.

(4) The rules of evidence sometimes involve *constitutional* questions. (a) So far as a constitutional provision expressly sanctions some rule of evidence, the rule is given the permanent features of a constitutional provision, and is to be interpreted as a part of the Constitution. The most important instance of this kind

State, 5 Oh. St. 325, 352; West *v.* State, 22 N. J. L. 212, 242; compare Vaughton *v.* R. Co., 12 Cox Cr. 580, 587.]

[2] [Henley *v.* Phillips, 2 Atk. 48; Wood *v.* Strickland, 2 Meriv. 461.]

[3] [Vol. III. Part VI.]

[4] [U. S. R. S. § 721.]

[5] [Ib. § 858.]

[6] [McNeil *v.* Holbrook, 12 Pet. 84; Sims *v.* Hundley, 6 How. 1; Vance *v.* Campbell, 1 Black 427; Haussknecht *v.* Claypool, ib. 431; Wright *v.* Bales, 2 id. 535; Packet Co. *v.* Clough, 20 Wall. 528; Conn. M. L. Ins. Co. *v.* Trust Co., 102 U. S. 250.]

[7] [Potter *v.* Bank, 102 U. S. 163; Stephens *v.* Bernays, 42 Fed. 488; a Federal court-rule does not prevail against the State law: Ryan *v.* Bindley, 1 Wall. 66.]

[8] [U. S. *v.* Reid, 12 How. 361; in Logan *v.* U. S., 144 U. S. 263, the common law of Texas at the time of admission was taken. For the *interpretation* of State statutes, as to which different considerations may apply, see Burgess *v.* Seligman, 107 U. S. 20; Coulom *v.* Doull, 133 id. 216, 233; Balt. & O. R. Co. *v.* Baugh, 149 id. 368; Whitney *v.* Fox, 166 id. 637; 17 Sup. 713; Union P. R. Co. *v.* Yates, U. S. App., 79 Fed. 584. For *Admiralty* rules, under St. 1789 (now R. S. § 721, *supra*), see The Ship William Jones, 1 Sprague 485; The Independence, 2 Curt. C. C. 350; The Steamboat Neptune, Olcott 480, 488.]

is the usual provision entitling an accused person to be confronted by the witnesses against him (*post*, § 163 *f*). (b) The constitutional provision against *ex post facto* laws cannot properly be regarded as affecting a change of a rule of evidence; and an early expression of opinion to the contrary in the Federal Supreme Court[9] has apparently been repudiated.[10] Statutes making various kinds of evidence admissible or inadmissible *ex post facto* have often been sanctioned.[11] It would seem that a change in a rule, *e. g.* requiring a certain number of witnesses or a certain kind of corroboration, would be equally unforbidden. (c) Apart from constitutional prohibitions, the rules of evidence may be, and frequently are, changed by statute, and such changes are within the legislative power. But so many things, not rules of evidence, are frequently referred to in terms of evidence, that it is necessary to discriminate changes which may in effect concern rules of property protected by constitutional sanction. A statute adding to the list of those facts which may be taken as *prima facie* evidence of another fact, or as creating a presumption of its existence, is generally regarded as a permissible one;[12] but a statute making a certain fact "conclusive evidence" (*post*, § 15) of another fact may in effect be dealing with the substantive law and affecting rights protected by constitutional provisions.[13]]

§ 3. **Division of the Subject.** This branch of the law may be considered under three general heads, namely: first, the nature and principles of evidence; secondly, the object of evidence, and the rules which govern in the production of testimony; and thirdly, the means of proof, or the instruments by which facts are established. This order will be followed in further treating this subject.[1] But, before we proceed, it will be proper first to consider what things courts will, of themselves, take notice of, without proof.[2]

[9] [Calder *v.* Bull, 3 Dall. 386; declaring the provision applicable to "every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offence in order to convict the offender:" said *obiter*.]

[10] [Thompson *v.* Missouri, 171 U. S. 380; 18 Sup. 922; discrediting certain utterances in Kring *v.* Missouri, 107 U. S. 221, 228, 239; Hopt *v.* Utah, 110 id. 574, 587.]

[11] [Walthall *v.* Walthall, 42 Ala. 450; Pittsfield & F. P. R. Co. *v.* Harrison, 16 Ill. 81; Robinson *v.* State, 84 Ind. 452; Laughlin *v.* Com., 13 Bush 261; Patterson *v.* Hansel, 4 id. 654, 659; O'Bryan *v.* Allen, 108 Mo. 227, 230; Messimer *v.* McCrary, 113 id. 382; State *v.* Thompson, id., 42 S. W. 949; Foster *v.* Gray, 22 Pa. 9, 16.]

[12] [Clarke *v.* Mead, 102 Cal. 516; Chic. B. & Q. R. Co. *v.* Jones, 149 Ill. 361, 382; State *v.* Beach, Ind., 43 N. E. 949; Com. *v.* Smith, 166 Mass. 370. Compare Wantlan *v.* White, 19 Ind. 470.]

[13] [See Callanan *v.* Hurley, 93 U. S. 387; Marx *v.* Hanthorn, 148 id. 172, 182.]

[1] [This analysis cannot be regarded as either sound in theory or helpful in remembering or tracing the specific rules. The first head was used as including the present Chapters I–VI; the second, as including Chapters VII–XXI; the third, as including the remainder; each group of chapters having its own numberings. It has seemed better to abandon this arbitrary grouping, and to number the chapters consecutively without regard to it; the same order of chapters being observed.]

[2] [The following note, formerly appended to the end of this volume, deals chiefly with matters of trial procedure not peculiarly a part of the law of evidence, but deserves preservation because of the weight of the opinion of its author, presumably

Judge Redfield :] [It may be convenient here to advert to *six practical rules* of some importance, all of which will be found applicable to evidence of every description. *First*, where evidence is offered for a *particular purpose*, and an objection is taken to admissibility for that purpose, if the Court pronounces in favor of its *general admissibility* in the cause, a Court of error, on exceptions taken (a bill of exceptions cannot be tendered on a criminal trial: R. *v.* Esdaile, 1 Fost. & Fin. 213, 228, per Ld. Campbell), will support the decision of the Court below, provided the evidence be admissible for *any purpose:* The Irish Society *v.* Bp. of Derry, 12 Cl. & Fin. 641, 665. The proper course for the opposing counsel to take in such a case would seem to be, to call upon the judge to explain to the jury, that the evidence, though generally admissible in the cause, furnishes no proof of the particular fact in question ; and then, should the judge refuse to do so, his direction might be the subject of a distinct exception, or an application might be made to the Court above for a new trial on the ground of misdirection : id. 672–674, per Ld. Brougham. *Secondly*, where inadmissible evidence is received at the trial *without objection*, the opposite party cannot afterwards object to its having been received: Reed *v.* Lamb, 29 L. J. Ex. 452; s. c. 6 H. & N. 75 ; or obtain a new trial on the ground that the judge did not expressly warn the jury to place no reliance npon it: Goslin *v.* Corry, 7 M. & Gr. 342 ; Doe *v.* Benjamin, 9 A. & E. 644. *Thirdly*, where evidence is objected to at the trial, the *nature* of the *objections* must be distinctly stated, whether a bill of exceptions be tendered or not ; and, on either moving for a new trial, on account of its improper admission, or on arguing the exceptions, the counsel will not be permitted to rely on any other objections than those taken at *Nisi Prius:* Williams *v.* Wilcox, 8 A. & E. 314, 337; Ferrand *v.* Milligan, 7 Q. B. 730; Bain *v.* Whitehaven & Furness Junct. Ry. Co., 3 H. of L. Cas. 1, 15–17, per Ld. Brougham. *Fourthly*, where evidence is tendered at the trial on an untenable ground, and is consequently rejected, the Court will not grant a new trial merely because it has since been discovered that the evidence was admissible on another ground ; but the party must go much further, and show, first, that he could not by due diligence have offered the evidence on the proper ground at the trial, and, next, that manifest injustice will ensue from its rejection. His position, at the best, is that of a party who has discovered fresh evidence since the trial: Doe *v.* Beviss, 18 L. J. C. P. 128 ; s. c. 7 Com. B. 456. *Fifthly*, where evidence is rejected at the trial, the party proposing it should *formally tender* it to the judge, and request him to make a note of the fact ; and, if this request be refused, he should then tender a bill of exceptions. If this course has not been pursued, and the judge has no note on the subject, the counsel cannot afterwards complain of the rejection of the evidence : Gibbs *v.* Pike, 9 M. & W. 351, 360, 361; Whitehouse *v.* Hemmant, 27 L. J. Ex. 295 ; Penn *v.* Bibby, 36 L. J. Ch. 455, 461, per Ld. Chelmsford, Ch. *Lastly*, where evidence has been improperly admitted or rejected at *Nisi Prius*, the Court will grant a new trial, unless it be clear *beyond all doubt* that the error of the judge could have had no *possible effect* upon the verdict, in which case they will not enable the defeated party to protract the litigation Wright *v.* Doe d. Tatham, 7 A. & E. 330 ; Baron de Rutzen *v.* Farr, 4 A. & E. 53, 57 ; Crease *v.* Barrett, 1 C. M. & R. 919, 933 ; Doe *v.* Langfield, 16 M. & W. 497. These cases overrule Doe *v.* Tyler, 6 Bing. 561; s. c. 4 M. & P. 377; a *dictum* of Ld. Tenterden in Tyrwhitt *v.* Wynne, 2 B. & Ald. 559 ; and one by Sir J. Mansfield in Horford *v.* Wilson, 1 Taunt. 14. See Mortimer *v.* M'Callan, 6 M. & W. 75 ; Edwards *v.* Evans, 3 East 451. It may further be stated, that the wrongful reception of evidence will not furnish less available ground for a new trial, although the jury accompany their verdict with a distinct and positive statement that they have arrived at it independently of the obnoxious evidence. Bailey *v.* Haines, 19 L. J. Q. B. 73, 78.]

CHAPTER II.

OF WHAT PROPOSITIONS EVIDENCE NEED NOT BE OFFERED; JUDICIAL NOTICE.

§ 3 *a*. Matters that may be judicially noticed.
§ 4. Public Functionaries, Seals, Acts of State, etc.
§ 5. General Usages, Matters of Notoriety, etc.
§ 6. Political Divisions.
§ 6 *a*. Public Officials, their Duties and Acts.
§ 6 *b*. Laws.
§ 6 *c*. Jury's Knowledge.
§ 6 *d*. Implications of the Doctrine.
§ 6 *e*. Other Senses of the term Judicial Notice.

[Of the propositions involved in the pleadings, or relevant thereto, proof by evidence may be dispensed with in two situations: (1) where the opponent by a solemn or infra-judicial admission has waived dispute, and (2) where the Court is justified by general considerations in assuming the truth of the proposition without requiring evidence from the party. The former is more conveniently treated along with other kinds of Admissions (*post*, §§ 186, 205). The latter is the process most commonly meant by the term Judicial Notice.]

§ 3 *a*. **Matters that may be judicially noticed.** [The various senses in which the term Judicial Notice is used will be further examined in § 6 *e*, *post*. In the single sense above noted — *i. e.*, of what propositions in a party's case he will not be required to offer evideuce — the general principle of Judicial Notice is simple and natural enough. In general, it covers (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. It is hardly possible, however, in enumerating these matters to follow strictly this or any other classification.[1]]

§ 4. **Public Functionaries, Seals, Acts of State, etc.** All civilized nations, being alike members of the great family of sovereignties, may well be supposed to recognize each other's existence, and general public and external relations. The usual and appropriate symbols of nationality and sovereignty are the national flag and seal. Every sovereign, therefore, recognizes, and, of course, the public tribunals and functionaries of every nation take notice of, the existence and titles of all the other sovereign powers in the civilized world, their respective flags, and their seals of state. Public acts, decrees, and judgments, exemplified under this seal, are received as true and genuine, it being

[1] [For the most acute and learned discussion of the subject, see Professor J. B. Thayer's "Judicial Notice," in 3 Harv. Law Rev. 285, and ch. 7 in his "Preliminary Treatise on the Law of Evidence."]

the highest evidence of their character.[1] If, however, upon a civil war in any country, one part of the nation shall separate itself from the other, and establish for itself an independent government, the newly formed nation cannot without proof be recognized as such, by the judicial tribunals of other nations, until it has been acknowledged by the sovereign power under which those tribunals are constituted;[2] the first act of recognition belonging to the executive function. But though the seal of the new power, prior to such acknowledgment, is not permitted to prove itself, yet it may be proved as a fact by other competent testimony,[3] and the existence of such unacknowledged government or State may, in like manner, be proved; the rule being, that if a body of persons assemble together to protect themselves, and support their own independence, make laws and have courts of justice, this is evidence of their being a State.[4]

§ 5. **General Usages, Matters of Notoriety, etc.** In like manner, the Law of Nations, and the general customs and usages of merchants, as well as the public statutes and general laws and customs of their own country, as well ecclesiastical as civil, are recognized, without proof, by the courts of all civilized nations.[1] [No exact test can be phrased for distinguishing usages which will or will not be noticed; for example, notice has been taken of a custom of railroads to separate freight and passenger trains,[2] of passengers to ride on the plat-

[1] Church *v.* Hubbart, 2 Cranch 187, 238; Griswold *v.* Pitcairn, 2 Conn. 85, 90; U. S. *v.* Johns, 4 Dall. 416; The Santissima Trinidad, 7 Wheat. 283, 335; Anon., 9 Mod. 66; Lincoln *v.* Battelle, 6 Wend. 475; Coit *v.* Millikin, 1 Denio 376; {Lazier *v.* Westcott, 26 N. Y. 146; U. S. *v.* Wagner, L. R. 2 Ch. App. 585.}

[2] City of Berne *v.* Bank of England, 9 Ves. 347; U. S. *v.* Palmer, 3 Wheat. 610, 634.

[3] U. S. *v.* Palmer, 3 Wheat. 610, 634; The Estrella, 4 Wheat. 298.

[4] Yrissarri *v.* Clement, 2 C. & P. 223, per Best, C. J. [But the rule in U. S. *v.* Palmer, *supra*, seems limited to the case of a defendant denying piratical intent by pleading the authority of a government having colorable existence and engaged in a revolution. On the general question, the correct rule seems to be the contrary of the statement in the text, *i. e.* a Court will look solely to the action of the Executive where the existence of a foreign nation or government is involved: U. S. *v.* Hutchings, 2 Wheel. Cr. C. 543, per Marshall, C. J.; Rose *v.* Himely, 4 Cranch 241, 272; Gelston *v.* Hoyt, 3 Wheat. 246, 324; Nueva Anna, 6 id. 193; Williams *v.* Ins. Co., 13 Pet. 415, 421; Kennett *v.* Chambers, 14 How. 38, 51; *Re* Baiz, 135 U. S. 403, 431; Jones *v.* U. S., 137 id. 202, 212; Underhill *v.* Hernandez, 168 id. 250; U. S. *v.* Trumbull, 48 Fed. 99, 104; The Itata, 56 Fed. 505, 510; 2 Story Constit., §§ 1566, 1567; Mighell *v.* Sultan of Johore, 1894, 1 Q. B. 149.]

[1] Erskine *v.* Murray, 2 Ld. Raym. 1542; Heineccius ad. Pand. l. 22, tit. 3, § 119; 1 Bl. Comm. 75, 76, 85; Edie *v.* East India Co., 2 Burr. 1226, 1228; Chandler *v.* Grieves, 2 H. Bl. 606, n.; Rex *v.* Sutton, 4 M. & S. 542; 6 Vin. Abr. tit. Court, D.; 1 Rol. Abr. 526, D.; {Jewell *v.* Center, 25 Ala. 498; Munn *v.* Burch, 25 Ill. 35; Wiggin *v.* Chicago, 5 Mo. App. 347;} including the usual practice and course of conveyancing: 3 Sugd. Vend. & Pur. 28; Willoughby *v.* Willoughby, 1 T. R. 772, per Ld. Hardwicke; Doe *v.* Hilder, 2 B. & Ald. 793; Rowe *v.* Grenfel, Ry. & M. 398, per Abbott, C. J.; and the general lien of bankers on securities of their customers, deposited with them: Brandao *v.* Barnett, 3 C. B. 519. {Merely local customs, however, will not be judicially noticed: Dutch, etc. Co. *v.* Mooney, 12 Cal. 535; Sullivan *v.* Hense, 2 Col. Terr. 424; Turner *v.* Fish, 28 Miss. 306; Youngs *v.* Ransom, 31 Barb. 49; Lewis *v.* McClure, 8 Oreg. 273; nor customs which do not form part of the law merchant, *e. g.* the rules of a broker's board: Goldsmith *v.* Sawyer, 46 Cal. 209.}

[2] [A. T. & S. F. R. Co. *v.* Headland, 18 Colo. 477, 483; see Clevel. C. C. & S. L. R. Co. *v.* Jenkins, Ill., 51 N. E. 811.]

form of a street-car,[3] of Seventh Day Baptists living in a certain town not to vote at an election on Saturday,[4] of brakemen to have certain general duties,[5] of assessors to rate property at a percentage of the actual value,[6] of cattle-owners to pasture on unsurveyed public lands,[7] of restaurateurs to remove the label from champagne, in serving it from a cooler, before showing the bottle to the customer;[8] while notice has been refused of a custom to mark up the price of land to be sold,[9] of a custom to close lake navigation on April 1,[10] of the duties of a railway superintendent in a certain town,[11] and of the legal status and powers of the Roman Catholic Church.[12]] The seal of a notary-public is also judicially taken notice of by the courts, he being an officer recognized by the whole commercial world.[13] Foreign Admiralty and Maritime Courts, too, being the courts of the civilized world, and of co-ordinate jurisdiction, are judicially recognized everywhere; and their seals need not be proved.[14] Neither is it necessary to prove things which must have happened according to the ordinary course of nature;[15] nor to prove the course of time, or of the heavenly bodies;[16] nor the ordinary public fasts and festivals; nor the coincidence of days of the week with days of the month;[17] {nor the succession of the seasons;[18]} nor the meaning of words,[19] or

[3] [Metrop. R. Co. *v.* Snashall, 3 App. D. C. 420, 433.]
[4] [State *v.* South Kingston, 18 R. I. 258, 273.]
[5] [Matchett *v.* R. Co., 133 Ind. 334.]
[6] [R. & T. Cos. *v.* Board, 85 Fed. 302, 308.]
[7] [Mathews *v.* R. Co., N. D., 72 N. W. 1085.]
[8] [Von Mumm *v.* Wittemann, 85 Fed. 966.]
[9] [State *v.* Chingren, Ia., 74 N. W. 946.]
[10] [Haines *v.* Gibson, Mich., 73 N. W. 126.]
[11] [South. R. Co. *v.* Hagan, Ga., 29 S. E. 760.]
[12] [Baxter *v.* McDonnell, N. Y., 49 N. E. 667. For sundry recent examples, see also Fox *v.* Mining Co., Cal., 41 Pac. 308; Mullen *v.* Sackett, Wash., 44 Pac. 136; Meyer *v.* Krauter, 56 N. J. L. 696; State *v.* Marsh, Vt., 40 Atl. 837.]
[13] Anon., 12 Mod. 345; Wright *v.* Barnard, 2 Esp. 700; Yeaton *v.* Fry, 5 Cranch 335; Browne *v.* Philadelphia Bank, 6 S. & R. 484; Chanoine *v.* Fowler, 3 Wend. 173, 178; Bayley on Bills, 515 (2d Am. ed. by Phillips & Sewall); Hutcheon *v.* Mannington, 6 Ves. 823; {Denmead *v.* Maack, 2 McArth. (D. C.) 475; Porter *v.* Judson, 1 Gray 175.}
[14] Croudson *v.* Leonard, 4 Cranch 435; Rose *v.* Himely, ib. 292; Church *v.* Hubbart, 2 Cranch 187; Thompson *v.* Stewart, 3 Conn. 171, 181; Green *v.* Waller, 2 Ld. Raym. 891, 893; Anon., 9 Mod. 66; Story on the Conflict of Laws, § 643; Hughes *v.* Cornelius, as stated by Lord Holt, in 2 Ld. Raym. 893; and see T. Raym. 473; s. c. 2 Show. 232.
[15] Rex *v.* Luffe, 8 East 202; Fay *v.* Prentice, 9 Jur. 876.
[16] [*E. g.* of moonrise: People *v.* Mayes, Cal., 45 Pac. 860.]
[17] 6 Vin. Abr. 491, pl. 6, 7, 8; Hoyle *v.* Cornwallis, 1 Str. 387; Page *v.* Faucet, Cro. El. 227; Harvy *v.* Broad, 2 Salk. 626; Hanson *v.* Shackelton, 4 Dowl. 48; Dawkins *v.* Smithwick, 4 Fla. 158; {Reed *v.* Wilson, 41 N. J. L. 29; Phil. W. & B. R. Co. *v.* Lehman, 56 Md. 226; McIntosh *v.* Lee, 57 Ia. 358; [Morgan *v.* Burrow, Miss., 16 So. 432;] Sprowl *v.* Lawrence, 33 Ala. 674; Allman *v.* Owen, 31 id. 167; Sasscer *v.* Farmers' Bank, 4 Md. 409; Reed *v.* Wilson, 41 N. J. L. 29; Holman *v.* Burrow, 2 Ld. Raym. 795; including the difference in time in different longitudes: Curtis *v.* Marsh, 4 Jur. N. S. 1112.} [For the use of almanacs, see § 6 *e*.]
[18] {Ross *v.* Boswell, 60 Ind. 235; Tomlinson *v.* Greenfield, 31 Ark. 557; Floyd *v.* Ricks, 14 Ark. 286; Hunter *v.* New York, O. & W. R. R. Co., 116 N. Y. 622; but not particular changes of weather at special times: Dixon *v.* Niccolls, 39 Ill. 372.}
[19] Clementi *v.* Golding, 2 Campb. 25; Commonwealth *v.* Kneeland, 20 Pick. 239;

abbreviations of words,[20] in the vernacular language;[21] [nor the matters enumerated in the official census, at least so far as general figures of population are concerned;[22]] nor the legal weights and measures;[23] nor any matters of public history, affecting the whole people;[24] nor public matters, affecting the government of the country.[25] The current coins of the country, whether established by statute or existing immemorially, will be judicially recognized; the Courts will also take notice of the character of the existing circulating medium, and of the popular language in reference to it,[26] but not of the current value at any particular time.[27] [Occasionally, also, the Court will not require evidence of notorious facts in external nature and in the sciences, arts, and manufactures; for example, it has been judicially noticed that cigars as ordinarily sold are not a drug or medicine,[28] that cigarettes are deleterious,[29] that hair is usually found along with sheep-fleece,[30] that the disease "peach-yellows" is a tree-disease of a baneful and contagious nature,[31] and that the business of an undertaker in a certain locality is offensive;[32] but not that glanders is for human beings a contagious disease.[33] Whether the fact that a certain liquor is intoxicating should be noticed judicially has been the subject of

{Hill *v.* Bacon, 43 Ill. 477;} [Sinnott *v.* Columbet, 107 Cal. 187 ("kindergarten"); Edwards *v.* Publishing Co., 99 id. 431, 435 ("sack," as a corruption-fund).] Where a libel was charged, in stating that the plaintiff's friends, in the advocacy of her claims, "had realized the fable of the Frozen Snake," it was held that the Court might judicially take notice that the knowledge of that fable of Phædrus generally prevailed in society: Hoare *v.* Silverlock, 12 Jur. 695; 12 Q. B. 624. {Yet it was required to prove the meaning of "Black Republicans:" Balt. *v.* State, 15 Md. 376.}

[20] {It has been held that the Court knows judicially that "Adm'r" means administrator: Moseley's Adm'r *v.* Mastin, 37 Ala. 216; but not that "Mo." means Missouri: Ellis *v.* Park, 8 Tex. 205; nor that "La." means Louisiana: Russell *v.* Martin, 15 Tex. 238.}

[21] {But not the proper mode of writing and speaking in a foreign language: State *v.* Johnson, 26 Minn. 316.}

[22] [People *v.* Williams, 64 Cal. 84, 91; State *v.* Braskamp, 87 Ia. 588; Bennett *v.* Marion, id., 76 N. W. 844; Brown *v.* Lutz, 36 Nebr. 527; Kokes *v.* State, id., 76 N. W. 467; Huntington *v.* Cast, Ind., 48 N. E. 1025; State *v.* Marion Co. Court, 128 Mo. 427.]

[23] Hockin *v.* Cooke, 4 T. R. 314.

[24] Bank of Augusta *v.* Earle, 13 Pet. 519, 590; 1 Stark. Ev. 211 (6th Am. ed.); {Ashley *v.* Martin, 50 Ala. 537; Hunter *v.* New York, O. & W. R. R. Co., 116 N. Y. 621; Foscue *v.* Lyon, 55 id. 440; Worcester Bank *v.* Cheney, 94 Ill. 430; *e. g.* the Civil War of 1861–1865: Cuyler *v.* Ferrill, 1 Abb. (U. S.) 169; Simmons *v.* Trumbo, 9 W. Va. 358; The Peterhoff, Blatchf. Prize Cas. 463; the suspension of the statute of limitations during that time: East, etc. Co. *v.* Gaskell, 2 Lea (Tenn.) 748.}

[25] Taylor *v.* Barclay, 2 Sim. 221.

[26] Lampton *v.* Haggard, 3 Monr. 149; Jones *v.* Overstreet, 4 Monr. 547; United States *v.* Burns, 5 McLean C. C. 23; United States *v.* American Gold Coins, 1 Woolw. 217; of the currency of the State at a given time: Buford *v.* Tucker, 44 Ala. 89; Simmons *v.* Trumbo, 9 W. Va. 358.}

[27] Feemster *v.* Ringo, 5 Monr. 336; {Modawell *v.* Holmes, 40 Ala. 391; cf. Bryant *v.* Foot, L. R. 3 Q. B. 497; 37 L. J. Q. B. 217; Hart *v.* State, 55 Ind. 599.}

[28] [Com. *v.* Marzynski, 149 Mass. 72.]

[29] [Austin *v.* State, Tenn., 48 S. W. 305.]

[30] [Lyon *v.* Marine, 8 U. S. App. 409, 412.]

[31] [State *v.* Main, 69 Conn. 123.]

[32] [Rowland *v.* Miller, 139 N. Y. 93.]

[33] [State *v.* Fox, 79 Md. 514, 528.]

much controversy. The doubt seems really to arise from the multiple significance of certain names of liquors. Thus, it seems to be proper to hold that "whiskey" may be assumed to signify an intoxicating liquor,[34] and that a liquor termed "brandy" is intoxicating,[35] and even that "wine,"[36] or malt or hop liquors,[37] are intoxicating; but "beer" is a term applied to so many non-intoxicating drinks that evidence of its qualities in a given instance may well be required.[38] Notorious geographical facts will also frequently be noticed;[39] for example, that the distance between Dubuque, Ia., and Asheville, N. C., exceeds one hundred miles,[40] or that two towns in a State are separated only by a river and are accessible from each other across the ice.[41]]

§ 6. **Political Divisions.** Courts also take notice of the territorial extent of the jurisdiction and sovereignty, exercised *de facto* by their own government; and of the local divisions of their country, as into states, provinces, counties, cities, towns, local parishes, or the like, so far as political government is concerned or affected; and of the relative positions of such local divisions; but not of their precise boundaries, farther than they may be described in public statutes.[1] {They will notice whether a city or town is in the State;[2] and if so, in what county,[3]} [and that a town is the county-seat.[4] They may notice the

[34] {Schlicht *v.* State, 56 Ind. 173; Eagan *v.* State, 53 id. 162; Klare *v.* State, 43 id. 483; Com. *v.* Peckham, 2 Gray 514.}

[35] [Thomas *v.* Com., 90 Va. 92, 94 (apple-brandy); State *v.* Tisdale, 54 Minn. 105 (California brandy).]

[36] [Starace *v.* Rossi, 69 Vt. 303 (Italian "sour wine").]

[37] [*Contra:* People *v.* Rice, 103 Mich. 350 ("hop-pop"); Shaw *v.* State, 56 Ind. 188 (malt).]

[38] [Kerkow *v.* Bauer, 15 Nebr. 150, 155; State *v.* Beswick, 13 R. I. 211, 220; Hansberg *v.* People, 120 Ill. 21, 23; Blatz *v.* Rohrback, 116 N. Y. 450; State *v.* Brewing Co., 5 S. D. 39, 45; State *v.* Church, 6 id. 89; Bell *v.* State, 91 Ga. 227, 231; unless, of course, the statute classifies beer as an intoxicating liquor: Kerkow *v.* Bauer, *supra.*] {That beer is a malt liquor may be noticed: Adler *v.* State, 55 Ala. 16; State *v.* Goyette, 11 R. I. 592.}

[39] {Winnepiseogee Lake Co. *v.* Young, 40 N. H. 420; Hinckley *v.* Beckwith, 23 Wis. 328; Morsman *v.* Forrest, 27 Ind. 233; Neaderhouser *v.* State, 28 id. 257; Cooke *v.* Wilson, 1 C. B. N. S. 153; Com. *v.* King, 150 Mass. 224.}

[40] [Mut. Ben. L. I. Co. *v.* Robison, 19 U. S. App. 266, 279.]

[41] [Siegbert *v.* Stiles, 39 Wis. 533, 536. See also Pettit *v.* State, 135 Ind. 393; Blumenthal *v.* Meat Co., 12 Wash. 331.]

[1] Deybel's Case, 4 B. & Ald. 242; 2 Inst. 557; Fazakerley *v.* Wiltshire, 1 Str. 469; Humphreys *v.* Budd, 9 Dowl. 1000; Ross *v.* Reddick, 1 Scam. 73; Goodwin *v.* Appleton, 9 Shepl. 453; Vanderwerker *v.* People, 5 Wend. 530; {State *v.* Dunwell, 3 R. I. 127; Boston *v.* State, 5 Tex. App. 383; Gooding *v.* Morgan, 70 Ill. 275; Ham *v.* Ham, 39 Me. 263; Com. *v.* Desmond, 103 Mass. 445; Beebe *v.* United States, 11 N. W. Rep. 505;} [State *v.* Snow, 117 N. C. 774.]

[2] {King *v.* Kent's Adm'r, 29 Ala. 542: Com. *v.* Desmond, *supra;* Cummings *v.* Stone, 13 Mich. 70; Solyer *v.* Romanet, 52 Tex. 562; Boston *v.* State, *supra.*} [Distinguish from this certain cases refusing to notice that there is only one town of a name in a State or in the world: Kearney *v.* King, 2 B. & Ald. 301; Andrews *v.* Hoxie, 5 Tex. 171; Thayer, 3 Harv. L. Rev. 310.]

[3] {Smitha *v.* Flournoy's Adm'r, 47 Ala. 345; State *v.* Powers, 25 Conn. 48: Steinmetz *v.* Versailles Turnpike Co., 57 Ind. 457; Martin *v.* Martin, 51 Me. 366;} [People *v.* Etting, 99 Cal. 577; Bauman *v.* Trust Co., 66 Minn. 227; State *v.* Simpson, 91 Me. 83; Gilbert *v.* N. C. R. Co., Ill., 52 N. E. 22; the ruling in Com. *v.* Wheeler, 162 Mass. 429, is anomalous.]

[4] [Hambel *v.* Davis, 89 Tex. 256; Whitner *v.* Belknap, ib. 273; State *v.* Pennington, 124 Mo. 388; People *v.* Faust, 113 Cal. 172.]

boundaries of a city[5] or a county,[6] but not therefore that a boundary is to be located at a given spot.[7] The divisions of land by public survey are also often noticed;[8] but not therefore the location of a certain piece of land with reference to such lines.[9]]

§ 6 *a*. **Public Officials, their Duties and Acts.** Courts will also judicially recognize the political constitution or frame of their own government; its essential political agents or public officers, sharing in its regular administration; and its essential and regular political operations, powers, and action. Thus, notice is taken, by all tribunals, of the accession of the Chief Executive of the nation or state, under whose authority they act; his powers and privileges;[1] the genuineness of his signature,[2] the heads of departments, and principal officers of state, and the public seals;[3] the election or resignation of a senator of the United States; the appointment of a cabinet or foreign minister;[4] marshals and sheriffs,[5] and the genuineness of their signatures,[6] but not their deputies; courts of general jurisdiction, their judges,[7] their seals, their rules,[8] and maxims in the administration of justice, and course of proceeding;[9] [including the duration and dates of terms

[5] [De Baker *v.* R. Co., 106 Cal. 257; Re Independence Boulevard, Ark., 30 S. W. 773.]

[6] [Board *v.* State, 147 Ind. 476.]

[7] [Brune *v.* Thompson, 2 Q. B. 789; Diggins *v.* Hartshorne, 108 Cal. 154.]

[8] {Lewis *v.* Harris, 31 Ala. 689; Gardner *v.* Eberhart, 82 Ill. 316; Murphy *v.* Hendricks, 57 Ind. 593; Atwater *v.* Schenck, 9 Wis. 156; Quinn *v.* Champagne, 38 Minn. 323;} [Sever *v.* Lyon, 170 Ill. 395; Rogers *v.* Cady, 104 Cal. 288; McMaster *v.* Morse, Utah, 55 Pac. 70.]

[9] [Schwerdtle *v.* Placer Co., 108 Cal. 589; Kretzschmar *v.* Meehan, Minn., 77 N. W. 41.]

[1] Elderton's Case, 2 Ld. Raym. 980, per Holt, C. J.; {Lindsey *v.* Attorney-General, 33 Miss. 508; Wells *v.* Company, 47 N. H. 235; Dewees *v.* Colorado Co., 32 Tex. 570.}

[2] Jones *v.* Gale's Ex'r, 4 Martin 635. And see Rex *v.* Miller, 2 W. Bl. 797; 1 Leach Cr. Cas. 74; Rex *v.* Gully, ib. 98; {Yount *v.* Howell, 14 Cal. 465.}

[3] Rex *v.* Jones, 2 Campb. 131; Bennett *v.* State of Tennessee, Mart. & Yerg. 133, Lord Melville's Case, 29 How. St. Tr. 707; {Yount *v.* Howell, *supra*. So, of the head of the Patent Office: York, etc. R. R. Co. *v.* Winans, 17 How. 30.}

[4] Walden *v.* Canfield, 2 Rob. (La.) 466.

[5] Holman *v.* Burrow, 2 Ld. Raym. 794.

[6] Alcock *v.* Whatmore, 8 Dowl. P. C. 615; {Ingram *v.* State, 27 Ala. 17; Thielmann *v.* Burg, 73 Ill. 293; Major *v.* State, 2 Sneed 11; Alford *v.* State, 8 Tex. App. 545; Ward *v.* Henry, 19 Wis. 76.}

[7] Watson *v.* Hay, 3 Kerr, 559.

[8] [Though not of rules of inferior courts: Cornelieson *v.* Foushee, Ky., 40 S. W. 680; Kindel *v.* LeBert, 23 Colo. 385.]

[9] Tregany *v.* Fletcher, 1 Ld. Raym. 154; Lane's Case, 2 Co. 16; 3 Com. Dig. 357; Courts, Q.; Newell *v.* Newton, 10 Pick. 470; Elliott *v.* Edwards, 3 B. & P. 183, 184, per Ld. Alvanley, C. J.; Maberley *v.* Robins, 5 Taunt. 625; Tooker *v.* Duke of Beaufort, Sayer 297. Whether superior Courts are bound to take notice who are justices of the inferior tribunals is not clearly settled. In Skipp *v.* Hooke, 2 Str. 1080, it was objected that they were not; but whether the case was decided on that or on the other exception taken does not appear: Andrews 74 reports the same case, *ex relatione alterius*, and equally doubtful; and see Van Sandau *v.* Turner, 6 Q. B. 773, 786, per Ld. Denman. The weight of American authorities seems rather on the affirmative side of the question: Hawkes *v.* Kennebeck, 7 Mass. 461; Ripley *v.* Warren, 2 Pick. 592; Despau *v.* Swindler, 3 Martin N. S. 705; Follain *v.* Lefevre, 3 Rob. (La.) 13; Jones *v.* Gale's Ex'r, 4 Martin 635; Wood *v.* Fitz, 10 id. 196; {Kennedy *v.* Com., 78 Ky. 447; Kilpatrick *v.* Com., 31 Pa. St. 198; Com. *v.* Jeffts, 14 Gray 19; *Ex parte* Peterson,

of Court,[10] the attorneys licensed to practise,[11]] and the nature and extent of the jurisdiction of the inferior Court whose judgment it revises,[12] [as well as the other proceedings in the same litigation before the same Court;[13]] also, of public proclamations of war and peace,[14] and of days of special public fasts and thanksgivings; stated days of general political elections;[15] the sittings of the Legislature, and its established and usual course of proceeding; the privileges of its members, but not the transactions on its journals.[16] The Courts of the United States, moreover, take judicial notice of the ports and waters of the United States in which the tide ebbs and flows; of the boundaries of the several States and judicial districts.[17]

§ 6*b*. **Laws.** [Courts take notice] in an especial manner of all the laws and jurisprudence of the several States in which they exercise an original or an appellate jurisdiction. [There are, however, some limitations to be noted. (1) In the first place, the doctrine applies in strictness to public or general statutes of the Legislature only. But the distinction between a public or general act and a private or special act is, in this country at least, not always easy to make. It may be said that a restriction of locality does not prevent an act from being public, provided the law is general in its application to persons; *e. g.* a law regulating within certain districts the right of fishing,[1] or the right of navigation,[2] or the lumber trade,[3] or the sale of

33 Ala. 74; [People *v.* McConnell, 155 Ill. 192; People *v.* Ebanks, Cal., 52 Pac. 1078;] cf. Graham *v.* Anderson, 42 Ill. 514; Davis *v.* McEnaney, 150 Mass. 452;} [San Joaquin Co. *v.* Budd, 96 Cal. 47, 51.]

[10] {Kidder *v.* Blaisdell, 45 Me. 461; Fabyan *v.* Russell, 38 N. H. 84; Rodgers *v.* State, 50 Ala. 103; Ross *v.* Anstill, 2 Cal. 183; Spencer *v.* Curtis, 57 Ind. 221; Dorman *v.* State, 56 id. 454; Davidson *v.* Peticolas, 34 Tex. 27;} [State *v.* Toland, 36 S. C. 515, 523; Thomas *v.* Com., 90 Va. 92, 94; even of inferior Courts: Anderson *v.* Anderson, 141 Ind. 567; Rogers *v.* Venis, 137 id. 221; Donovan *v.* Terr., 3 Wyo. 91.]

[11] [Ferris *v.* Bank, 158 Ill. 237; though not inferior Courts: Clark *v.* Morrison, Ariz., 52 Pac. 985; cf. Sutton *v.* R. Co., Wis., 73 N. W. 993.]

[12] Chitty *v.* Dendy, 3 Ad. & El. 319; {March *v.* Com., 12 B. Mon. 25.}

[13] {Dawson *v.* Dawson, 29 Mo. App. 523; State *v.* Bowen, 16 Kan. 475; Pagett *v.* Curtis, 15 La. An. 451; Brucker *v.* State, 19 Wis. 539; Merced Water Co. *v.* Cowles, 31 Cal. 215; Baker *v.* Mygatt, 14 Iowa 131; Monticello *v.* Bryant, 13 Bush 419; Banks *v.* Burnam, 61 Mo. 76;} [State *v.* Electric Co., N. J., 38 Atl. 818; Anderson *v.* Cecil, 86 Md. 490.]

[14] Dolder *v.* Ld. Huntingfield, 11 Ves. 292; Rex *v.* De Berenger, 3 M. & S. 67; Taylor *v.* Barclay, 2 Sim. 213.

[15] {Davis *v.* Best, 2 Iowa 96; State *v.* Minnick, 15 id. 123; Ellis *v.* Reddin, 12 Kan. 306;} [Jackson Co. *v.* Arnold, 135 Mo. 207; and, occasionally, of the result: Thomas *v.* Com., 90 Va. 92, 95; Kokes *v.* State, Nebr., 76 N. W. 467; or of a ticket voted for: State *v.* Downs, 148 Ind. 324.]

[16] [Coleman *v.* Dobbins, 8 Ind. 156, 161; Grob *v.* Cushman, 45 Ill. 119, 125; Burt *v.* R. Co., 31 Minn. 472; Green *v.* Welles, 32 Miss. 650, 686, 711; *contra:* State *v.* Hocker, 36 Fla. 358. The question whether the journals can avail to overthrow an enrolled act is a very different one, and is treated *post*, § 482.]

[17] Story on Eq. Plead. § 24, cites United States *v.* La Vengeance, 3 Dall. 297; The Apollon, 9 Wheat. 374; The Thomas Jefferson, 10 id. 428; Peyroux *v.* Howard, 7 Pet. 342; {Lathrop *v.* Stewart, 5 McLean C. C. 167;} [C. B. & Q. R. Co. *v.* Hyatt, 48 Nebr. 161.]

[1] {Burnham *v.* Webster, 5 Mass. 266.}

[2] {Hammond *v.* Inloes, 4 Md. 139.}

[3] {Pierce *v.* Kimball, 9 Greenl. 54.}

liquor.[4] Acts incorporating municipal corporations, even by special charter, are usually regarded as public,[5] as also acts incorporating State banks,[6] and acts incorporating railways by general provisions,[7] but not by special charter.[8] Moreover, an act declared by the Legislature itself to be deemed a public act will be so treated;[9] and of course an amendment of a private act by a public one,[10] or any amendment of a public one,[11] will be noticed. Occasionally, too, statutes require all private acts to be noticed.[12] (2) The ordinances and regulations of municipal and other local boards and councils are not noticed.[13] The regulations of executive departments or bureaus are sometimes, but not usually, noticed.[14] (3) The laws of other nations and states — not being laws of the forum at all, except by adoption — will not be noticed. But here some further discriminations are necessary. (a) Relatively to each other, the States of the Union are independent, sovereign, and for the present purpose foreign; hence their laws, equally

[4] {Levy *v.* State, 6 Ind. 281; State *v.* Cooper, 101 N. C. 688; cf. Inglis *v.* State, 61 Ind. 212.}

[5] {Albrittin *v.* Huntsville, 60 Ala. 486; Perryman *v.* Greenville, 51 id. 510; Smart *v.* Wetumpka, 24 id. 112; Washington *v.* Finley, 5 Eng. (Ark.) 423; Payne *v.* Treadwell, 16 Cal. 220; Macey *v.* Titcombe, 19 Ind. 136; Johnson *v.* Indianapolis, 16 id. 227; Stier *v.* Oskaloosa, 41 Iowa, 353; Prell *v.* McDonald, 7 Kan. 426; Mass. Pub. Stat. c. 169, § 68; State *v.* Sherman, 42 Mo. 210; State *v.* Murfreesboro', 11 Humph. 217; Gallagher *v.* State, 10 Tex. App. 469; Briggs *v.* Whipple, 7 Vt. 15; Terry *v.* Milwaukee, 15 Wis. 490; Alexander *v.* Milwaukee, 16 id. 247; Swain *v.* Comstock, 18 id. 463.}

[6] {Jemison *v.* Planters', etc. Bank, 17 Ala. 754; Davis *v.* Fulton Bank, 31 Ga. 69; Gordon *v.* Montgomery, 19 Ind. 110; Bank of Newbury *v.* Greenville R. R. Co., 9 Rich. L. 495; Shaw *v.* State, 3 Sneed 86; Buell *v.* Warner, 33 Vt. 570; Hays *v.* Northwestern Bank, 9 Gratt. 127.}

[7] {Heaston *v.* Cincinnati, etc. R. R. Co., 16 Ind. 275.}

[8] {A. T. & S. F. R. Co. *v.* Blackshire, 10 Kan. 477; Perry *v.* New Orleans, etc. R. R. Co., 55 Ala. 413; Ohio, etc. R. R. Co. *v.* Ridge, 5 Blackf. 78;} *contra:* {Wright *v.* Hawkins, 28 Tex. 452.} For other examples of the treatment of private acts by Courts, see {Broad Street Hotel Co. *v.* Weaver's Adm'rs, 57 Ala. 26; Danville, etc. Plank Road Co. *v.* State, 16 Ind. 456; Perdicaris *v.* Trenton, etc. Bridge Co., 5 Dutch. 367; Allegheny *v.* Nelson, 25 Pa. St. 332;} [Miller *v.* Matthews, Md., 40 Atl. 176; Jones *v.* Lake View, 151 Ill. 663.]

[9] {Cincinnati, Hamil. & Indian. R. R. Co. *v.* Clifford, 113 Ind. 467; Hammett *v.* Little Rock, etc. R. R. Co., 20 Ark. 204; Doyle *v.* Bradford, 90 Ill. 416; Eel River, etc. Co. *v.* Topp, 16 Ind. 242; Covington Drawbridge Co. *v.* Shepherd, 20 How. 227; Beaty *v.* Knowler, 4 Pet. 152;} [M. K. & T. R. Co. *v.* Colburn, 90 Tex. 230; Beaumont *v.* Mountain, 10 Bing. 404.]

[10] {Lavalle *v.* People, 6 Ill. App. 157.}

[11] {Belmont *v.* Morrill, 69 Me. 314; State *v.* O'Conner, 13 La. An. 486; Parent *v.* Walmsly's Adm'rs, 20 Ind. 82.}

[12] {Bixler's Adm'x *v.* Parker, 3 Bush 166; Halbert *v.* Skyles, 1 Marsh. 368; Hart *v.* Baltimore, etc. R. R. Co., 6 W. Va. 336.}

[13] {Case *v.* Mobile, 30 Ala. 538; Indianapolis, etc. R. R. Co. *v.* Caldwell, 9 Ind. 397; Garvin *v.* Wells, 8 Iowa 286; Lucker *v.* Com., 4 Bush 440; Hassard *v.* Municipality, 7 La. An. 495; Winona *v.* Burke, 23 Minn. 254; Mooney *v.* Kennet, 19 Mo. 551; Porter *v.* Waring, 69 N. Y. 250; Palmer *v.* Aldridge, 16 Barb. 131;} [Shanfelter *v.* Baltimore, 80 Md. 483; Stittgen *v.* Rundle, Wis., 74 N. W. 536.]

[14] [Caha *v.* U. S., 152 U. S. 211, 221 (Interior Department regulations for land-office suits, noticed); Dominici *v.* U. S., 72 Fed. 46 (Treasury Department regulations, etc., noticed); The Clara, 5 C. C. A. 390 (marine inspectors' regulations, not noticed; Campbell *v.* Wood, 116 Mo. 196, 202 (surveyor general's instructions to deputies, noticed); Com. *v.* Crane, 158 Mass. 218 (internal revenue regulations, not noticed).]

with the laws of other nations, will not be noticed by the Courts of any one of the United States.[15] Nor will the Federal Court of Admiralty notice the law of another nation.[16] (b) The Federal laws of the United States are equally the laws of each State, and hence the Courts of one of the United States notice them, whether ordinary public acts of Congress [17] or treaties;[18] and they are of course noticed by the Federal Courts.[19] (c) Since the judicial powers of the Federal Courts extend to many cases arising under the laws of the various States of the Union, such State laws are for the purpose in hand part of the law of the Federal Courts, and will therefore be noticed by them [20] (though the Federal Supreme Court, on the somewhat scholastic theory that it cannot know on appeal what the Court below could not know, declines, on writ of error to a State Supreme Court, to notice what the latter could not notice, *i. e.* the law of a sister State [21]). Extending this principle, it has been held by State Courts that in cases where appeal may be made to the Federal Courts on questions of Federal law, — *e. g.* the effect of a judgment in another State Court, — the law of such other State may be noticed.[22] (d) So far as by subdivision or amalgamation the former laws of another sovereignty have

[15] {Insurance Co. *v.* Forcheimer, 86 Ala. 541; Continental Nat. Bank *v.* McGeoch, 73 Wis. 332; Millard *v.* Truax, 41 N. W. R. 328; St. Louis & San Fran. R. R. Co. *v.* Weaver, 35 Kan. 426; Polk *v.* Butterfield, 9 Col. 326; Mobile, etc. R. R. Co. *v.* Whitney, 39 Ala. 468; Drake *v.* Glover, 30 id. 382; Cox *v.* Morrow, 14 Ark. 603; Cavender *v.* Guild, 4 Cal. 250; Simms *v.* Southern Express Co., 38 Ga. 129; Chumasero *v.* Gilbert, 24 Ill. 293; Syme *v.* Stewart, 17 La. An. 73; Baltimore, etc. R. R. Co. *v.* Glenn, 28 Md. 287; Eastman *v.* Crosby, 8 Allen 206; Kline *v.* Baker, 99 Mass. 254; Haines *v.* Hanrahan, 105 id. 480; Hoyt *v.* McNeil, 13 Minn. 390; Charlotte *v.* Chouteau, 25 Mo. 465; Condit *v.* Blackwell, 4 Green (N. J.) 193; Cutler *v.* Wright, 22 N. Y. 472; Hooper *v.* Moore, 5 Jones L. 130; Anderson *v.* Anderson, 23 Tex. 639; Taylor *v.* Boardman, 25 Vt. 581; Ward *v.* Morrison, ib. 593; Walsh *v.* Dart, 12 Wis. 635; Dainese *v.* Hale, 91 U. S. 13; Strother *v.* Lucas, 6 Pet. 763; Talbot *v.* Seaman, 1 Cranch 38; Liverpool S. Co. *v.* Ins. Co., 129 U. S. 444;} [Fremoult *v.* Dedire, 1 P. Wms. 429 (Holland); Warner *v.* Com., 2 Va. Cas. 95; Hale *v.* S. N. Co., 15 Conn. 539, 549; Sammis *v.* Wightman, 31 Fla. 10, 30; Chipman *v.* Peabody, 159 Mass. 420, 423. For some statutory alterations, see Bates *v.* McCully, 27 Miss. 584; Lockhead *v.* W. & I. Co., 40 W. Va. 553; Tenn. Code 1896, § 5586. For an exception, see par. (*c*) *supra*. The law of the Chickasaw Nation was refused notice in Wilson *v.* Owens, U. S. App., 86 Fed. 571.]

[16] {The Scotland, 105 U. S. 24, 29;} [but compare Talbot *v.* Seeman, 1 Cr. 1, 37.]

[17] {Morris *v.* Davidson, 49 Ga. 361; Canal Co. *v.* R. R. Co., 4 Gill & J. 1, 63; Kessel *v.* Albetis, 56 Barb. 362; Mims *v.* Swartz, 37 Tex. 13; Bird *v.* Com., 21 Gratt. 800; Bayly's Adm'r *v.* Chubb, 16 id. 284; The Scotia, 14 Wall. 171.}

[18] {Montgomery *v.* Deeley, 3 Wis. 709; Carson *v.* Smith, 5 Minn. 78; Dole *v.* Wilson, 16 id. 525; United States *v.* Reynes, 9 How. 127.}

[19] [Callsen *v.* Hope, 75 Fed. 758, 761 (treaty of Alaska).]

[20] {Owings *v.* Hull, 9 Pet. 624; Carpenter *v.* Dexter, 8 Wall. 513; Merrill *v.* Dawson, 1 Hemp. 563; Miller *v.* McQuerry, 5 McLean C. C. 469; Hinde *v.* Vattier, 5 Pet. 398; U. S. *v.* Turner, 11 How. 663; U. S. *v.* Philadelphia, ib. 654; Jones *v.* Hays, 4 McLean C. C. 521; Lamar *v.* Micou, 112 U. S. 452; s. c. 114 id. 218;} [Merch. Exch. Bk. *v.* McGraw, 15 U. S. App. 332, 341; West. & A. R. Co. *v.* Roberson, 22 id. 187, 202.]

[21] {Hanley *v.* Donoghue, 116 U. S. 1; Renaud *v.* Abbott, ib. 277, 285.}

[22] {State of Ohio *v.* Hinchman, 27 Pa. St. 479; Jarvis *v.* Robinson, 21 Wis. 523; Butcher *v.* Brownsville, 2 Kan. 70; Paine *v.* Schenectady, 11 R. I. 411; Shotwell *v.* Harrison, 22 Mich. 410; Morse *v.* Hewett, 28 Mich. 481; cf. Fellows *v.* Menasha, 11 Wis. 558; Salter *v.* Applegate, 3 Zabr. 115.}

to any extent become a part of the law of the forum, such former law of the other sovereignty may properly be noticed. This principle has been applied to the laws of another of the United States from which that of the forum was formed by subdivision,[23] to the laws of Mexico,[24] to the laws of the British colony of Pennsylvania,[25] and to the laws of England before the American Revolution; but is, of course, not applicable to the laws of England since that time.[26]]

§ 6 *c*. **Jury's Knowledge.** [In general the jury may in modern times act only upon evidence properly laid before them in the course of the trial. But so far as the matter in question is one upon which men in general have a common fund of experience and knowledge, the analogy of judicial notice obtains to some extent, and the jury are allowed to resort to this possession in making up their minds. This doctrine, of course, has several aspects. From the point of view of the jury's duty and function, it appears as an exception to the rule that they must act only upon what is presented to them at the trial. From the point of view of the Hearsay rule, it may also be thought of as a partial exception to that.[1] But additionally it must be considered from the present point of view, for it authorizes the party to ask the jury to refer to their general knowledge upon the matter in question, and thus in effect and to that extent makes it unnecessary for the party to offer such evidence. But the scope of this doctrine is narrow, and is strictly limited to a few matters of elemental experience in human nature, commercial affairs, and every-day life. Thus, the natural instinct of self-preservation with reference to care or negligence at the time of danger may be considered,[2] the dangerousness of smoking a pipe in a barn near the straw,[3] the conditions affecting values,[4] the intoxicating nature of a certain liquor,[5] and even (though this illustrates how local conditions may affect the application) that a game played with bone-counters was played for money;[6] but such a matter of private and disputable belief as the character of a witness cannot be so taken into consideration by the jury.[7] As a natural part

[23] {Arayo *v.* Currel, 1 Mill. (La.) 528, 540–541; Malpica *v.* McKown, ib. 254; Stokes *v.* Macken, 62 Barb. 145; Henthorn *v.* Doe, 1 Blackf. (Ind.) 157.}

[24] [U. S. *v.* Chaves, 159 U. S. 452.]

[25] [Loree *v.* Abner, 6 U. S. App. 649, 660.]

[26] {Liverpool S. Co. *v.* Ins. Co., 129 U. S. 444.}

[1] [See this aspect treated *post*, § 162 *o*.]

[2] [Huntress *v.* R. Co., N. H., 34 Atl. 154; Springfield C. R. Co. *v.* Hoeffner, Ill., 51 N. E. 884; Hopkins *v.* Knapp Co., 92 Ia. 328: Lamoureux *v.* R. Co., 169 Mass. 338; Chase *v.* R. Co., 77 Me. 262 (citing numerous cases); Manning *v.* R. Co., 166 Mass. 230.]

[3] [Lillibridge *v.* McCann, Mich., 75 N. W. 288.]

[4] [Houston *v.* State, 13 Ark. 66; Green *v.* Chicago, 97 Ill. 370, 372; Cummings *v.* Com., 2 Va. Cas. 128; Head *v.* Hargrave, 105 U. S. 45; Parks *v.* Boston, 15 Pick. 198, 209; Bradford *v.* Cunard Co., 147 Mass. 55. See Chic. K. & W. R. Co. *v.* Parsons, 51 Kan. 408.]

[5] [Com. *v.* Peckham, 2 Gray 514.]

[6] [Stevens *v.* State, 3 Ark. 66.]

[7] [Johnson *v.* R. Co., 91 Wis. 233; Chat. R. & C. R. Co. *v.* Owen, 90 Ga. 265

of the doctrine, these matters may be referred to by counsel in their arguments.[8]]

§ 6 *d*. **Implications of the Doctrine.** [Certain subordinate features of the doctrine may now be noted. (1) That a matter is judicially noticed means merely that it is taken as proved without the offering of evidence by the party who should ordinarily have done so. It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable. It is true that occasionally a Court is found declaring a thing judicially noticed and at the same time refusing to listen to evidence to the contrary;[1] but this is in truth laying down a new rule of substantive law by declaring certain facts immaterial; whenever a Court forbids the production of evidence, it removes the subject from the realm of the law of evidence properly so called. (2) The process of taking judicial notice does not necessarily imply that the judge at the moment actually knows and feels sure of the truth of the matter suggested. It merely relieves the party from offering evidence because the matter is one which the judge either knows or can easily discover. Hence, the judge may often think fit to inform himself further on the subject, and it is proper for him to resort to any source of information which he deems authentic.[2] (3) The process of taking judicial notice often implies incidentally a ruling as to the respective functions of judge and jury. It implies that the settlement of the matter rests with the judge and not with the jury, that the jury are to accept the fact from the judge, and that so far as any further investigation is concerned, it is for the judge alone.[3]]

§ 6 *e*. **Other Senses of the Term Judicial Notice.**[1] [The term Judicial Notice has many other applications besides that treated in the foregoing sections. Some of these are traditional and therefore perhaps not to be termed incorrect; others are merely loose ways of naming some process or rule already properly known under another name. The essential thing is to distinguish these applications from

283; Schmidt *v.* Ins. Co., 1 Gray 529, 535. Otherwise, of that knowledge of human nature which affects a witness' credibility in general: Jenney El. Co. *v.* Branham, 145 Ind. 314. See for other examples: R. *v.* Rosser, 6 C. & P. 648; McGarrahan *v.* R. Co., Mass., 50 N. E. 610; Ill. Cent. R. Co. *v.* Greaves, Miss., 22 So. 792; Wills *v.* Lance, 28 Or. 371.]

[8] [State *v.* Lingle], 128 Mo. 528.

[1] [*E. g.* Com. *v.* Marzynski, 149 Mass. 72.]

[2] [Answer of Judges to House of Lords, 22 How. St. Tr. 302 (grammars and lexicons); Barranger *v.* Baum, Ga., 30 S. E. 524 (foreign law); People *v.* Mayes, 113 Cal. 618; Taylor *v.* Barclay, 2 Sim. 213 (consulting the Foreign Office); People *v.* Chee Kee, 61 Cal. 404 (almanac);] {U. S. *v.* Teschmaker, 22 How. 392; Wagner's Case, 61 Me. 178; McKinnon *v.* Bliss, 21 N. Y. 206; The Charkieh, 42 L. J. Adm. 17.}

[3] [Hale *v.* S. N. Co., 15 Conn. 539, 549; State *v.* Main, 69 id. 123; Thomson H. El. Co. *v.* Palmer, 52 Minn. 174, 177; Hooper *v.* Moore, 5 Jones L. 132.]

[1] [For a careful discrimination of these various senses, see Professor Thayer's chapter, already referred to, in 3 Harv. L. Rev. 285, and in his "Preliminary Treatise on the Law of Evidence."]

the chief one above described, *i. e.* the acceptance of a matter as proved without requiring the party to offer evidence of it.

(1) A usage extending far back in our annals is to apply the term where the question is whether a certain pleading, or a certain averment in a pleading, or greater particularity of averment, is necessary.[2] (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,[3] or falsely alleged in the pleading,[4] is a question of the power and duty of the Court, to which this term has been applied. (3) Whether a Court will take judicial notice of the existence of a foreign State[5] 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. (4) Certain rules of evidence, usually known under other names, are frequently referred to in terms of judicial notice. Thus, the admissibility of almanacs and mortality-tables is mainly a question whether an exception to the Hearsay rule can be made in their favor;[6] but a Court occasionally makes this exception by saying that the almanac or the table is to be judicially noticed; although the term is properly applicable only where the Court declares the day of the month, etc., not to need evidence, and then consults the book to inform itself;[7] the practical difference being that in the former case it goes to the jury, but in the latter not. Again, it has been said that judicial notice will be taken of the correctness of the photographic process;[8] which is merely another way of saying that properly verified photographs are admissible evidence. In the same way, to take notice that "mere pasturage upon these western lands is very slight evidence of possession,"[9] is to measure evidence; and it would seem that the so-called judicial notice of certain seals[10] is merely a rule that the production of something purporting to be a seal shall be in these cases sufficient evidence of genuineness to go to the jury or shall suffice to raise a presumption of genuineness. Whether a Court will take judi-

[2] [3 Harv. L. Rev. 289–295; see Douglas *v.* R. Co., W. Va., 28 S. E. 705; Wikel *v.* Board, 120 N. C. 451; Nichols *v.* Lodge, Ky., 48 S. W. 426.]

[3] [3 Harv. L. Rev. 297–299; compare Steenerson *v.* R. Co., Minn., 72 N. W. 713, where the Court declined to review the technical matters covered by the findings of the Railroad Commission as to reasonable rates, and "took judicial notice of all such technical learning, knowledge, and information" as the commission possessed.]

[4] [Taylor *v.* Barclay, 2 Sim. 213, where a pleading alleged that a certain government was recognized by H. M. government, and the Court treated this as incorrect: People *v.* Water-Front Co., Cal., 50 Pac. 305, where a demurrer was sustained to a declaration alleging a title which the Court knew not to exist.]

[5] [*Ante*, § 4.]

[6] [*Post*, § 162 *j*.]

[7] [*E.g.* Lincoln *v.* Power, 151 U. S. 436, 441; Scheffer *v.* R. Co., 32 Minn. 521; State *v.* Morris, 47 Conn. 179.]

[8] [Udderzook *v.* Com., 76 Pa. 340.]

[9] [Whitney *v.* U. S., 167 U. S. 529, 546.]

[10] [*Ante*, § 4; *post*, § 14 *n*.]

cial notice of the contents of legislative journals may be properly a question of the present chapter, but the same form of expression is also occasionally used where the real inquiry is whether, as evidence of the statute's terms, or of its passage, the journals are to be preferred to the official certificate appended to the enrolled act.[11] (5) Other anomalous applications of the term, sometimes dealing with matters of substantive law,[12] sometimes with matters of procedure, will occasionally be found. It is unfortunate that the phrase should be so often loosely employed.]

[11] [*Post*, § 482.]

[12] [*E. g.* South. R. Co. *v.* Covenia, 100 Ga. 46, where the Court "took judicial cognizance of the fact" that a child less than two years old is incapable of rendering such services as could be recovered for.]

CHAPTER III.

KINDS OF EVIDENCE.

§§ 7–9. Human Testimony; the Sanction of Instinct.
§ 10. Human Testimony; the Sanction of Experience.
§§ 11,12. Circumstances.
§ 13. Testimonial Evidence and Circumstantial Evidence.
§ 13 a. Real Evidence; Profert; Inspection; View; etc.

§ 7. **Human Testimony; the Sanction of Instinct.** We proceed now to a brief consideration of the general nature and principles of evidence. No inquiry is here proposed into the origin of human knowledge; it being assumed, on the authority of approved writers, that all that men know is referable, in a philosophical view, to perception and reflection. But, in fact, the knowledge acquired by an individual, through his own perception and reflection, is but a small part of what he possesses; much of what we are content to regard and act upon as knowledge having been acquired through the perception of others.[1] It is not easy to conceive that the Supreme Being, whose wisdom is so conspicuous in all his works, constituted man to believe only upon his own personal experience; since in that case the world could neither be governed nor improved; and society must remain in the state in which it was left by the first generation of men. On the contrary, during the period of childhood, we believe implicitly almost all that is told us, and thus are furnished with information which we could not otherwise obtain, but which is necessary, at the time, for our present protection, or as the means of future improvement. This disposition to believe may be termed instinctive. At an early period, however, we begin to find that, of the things told to us, some are not true, and thus our implicit reliance on the testimony of others is weakened: first, in regard to particular things in which we have been deceived; then in regard to persons whose falsehood we have detected; and, as these instances multiply upon us, we gradually become more and more distrustful of such statements, and learn by experience the necessity of testing them by certain rules. Thus, as our ability to obtain knowledge by other means increases, our instinctive reliance on testimony diminishes, by yielding to a more rational belief.[2]

§ 8. It is true, that, in receiving the knowledge of facts from the testimony of others, we are much influenced by their accordance with

[1] Abercrombie on the Intellectual Powers, part 2, § 1, pp. 45, 46.

[2] Gambier's Guide, p. 87; McKinnon's Philosophy of Evidence, p. 40. This subject is treated more largely by Dr. Reid in his profound "Inquiry into the Human Mind," ch. 6, § 24, pp. 428–434.

facts previously known or believed; and this constitutes what is termed their probability. Statements, thus probable, are received upon evidence much less cogent than we require for the belief of those which do not accord with our previous knowledge. But while these statements are more readily received, and justly relied upon, we should beware of unduly distrusting all others. While unbounded credulity is the attribute of weak minds, which seldom think or reason at all, — "quo magis nesciunt eo magis admirantur," — unlimited scepticism belongs only to those who make their own knowledge and observation the exclusive standard of probability. Thus the king of Siam rejected the testimony of the Dutch ambassador, that, in his country, water was sometimes congealed into a solid mass; for it was utterly contrary to his own experience. Sceptical philosophers, inconsistently enough with their own principles, yet true to the nature of man, continue to receive a large portion of their knowledge upon testimony derived, not from their own experience, but from that of other men; and this, even when it is at variance with much of their own personal observation. Thus, the testimony of the historian is received with confidence, in regard to the occurrences of ancient times; that of the naturalist and the traveller, in regard to the natural history and civil condition of other countries; and that of the astronomer, respecting the heavenly bodies; facts, which, upon the narrow basis of his own "firm and unalterable experience," upon which Mr. Hume so much relies, he would be bound to reject as wholly unworthy of belief.

§ 9. The uniform habits, therefore, as well as the necessities of mankind, lead us to consider the disposition to believe, upon the evidence of extraneous testimony, as a fundamental principle of our moral nature, constituting the general basis upon which all evidence may be said to rest.[1]

§ 10. **Human Testimony; the Sanction of Experience.** Subordinate to this paramount and original principle, it may, in the second place, be observed that evidence rests upon our faith in human testimony, as sanctioned by experience; that is, upon the general experienced truth of the statements of men of integrity, having capacity and opportunity for observation, and without apparent influence from passion or interest to pervert the truth. This belief is strengthened by our previous knowledge of the narrator's reputation for veracity; by the absence of conflicting testimony; and by the presence of that which is corroborating and cumulative.

§ 11. **Circumstances.** A third basis of evidence is the known and experienced connection subsisting between collateral facts or circumstances, satisfactorily proved, and the fact in controversy. This is merely the legal application, in other terms, of a process, familiar in natural philosophy, showing the truth of an hypothesis by its coinci-

[1] Abercrombie, pt. 2, § 3.

dence with existing phenomena. The connections and coincidences to which we refer may be either physical or moral; and the knowledge of them is derived from the known laws of matter and motion, from animal instincts, and from the physical, intellectual, and moral constitution and habits of men. Their force depends on their sufficiency to exclude every other hypothesis but the one under consideration. Thus, the possession of goods recently stolen, accompanied with personal proximity in point of time and place, and inability in the party charged, to show how he came by them, would seem naturally, though not necessarily, to exclude every other hypothesis but that of his guilt. But the possession of the same goods, at a remoter time and place, would warrant no such conclusion, as it would leave room for the hypothesis of their having been lawfully purchased in the course of trade. Similar to this in principle is the rule of *noscitur a sociis*, according to which the meaning of certain words, in a written instrument, is ascertained by the context.

§ 12. Some writers have mentioned yet another ground of the credibility of evidence, namely, the exercise of our reason upon the effect of coincidences in testimony, which, if collusion be excluded, cannot be accounted for upon any other hypothesis than that it is true.[1] It has been justly remarked that progress in knowledge is not confined, in its results, to the mere facts which we acquire, but it has also an extensive influence in enlarging the mind for the further reception of truth, and setting it free from many of those prejudices which influence men whose minds are limited by a narrow field of observation.[2] It is also true, that, in the actual occurrences of human life, nothing is inconsistent. Every event which actually transpires has its appropriate relation and place in the vast complication of circumstances, of which the affairs of men consist; it owes its origin to those which have preceded it; it is intimately connected with all others which occur at the same time and place, and often with those of remote regions; and, in its turn, it gives birth to a thousand others which succeed.[3] In all this, there is perfect harmony; so that it is hardly possible to invent a story which, if closely compared with all the actual contemporaneous occurrences, may not be shown to be false. From these causes, minds, deeply imbued with science, or enlarged by long and matured experience, and close observation of the conduct and affairs of men, may, with a rapidity and certainty approaching to intuition, perceive the elements of truth or falsehood in the face itself of the narrative, without any regard to the narrator. Thus, Archimedes might have believed an account of the invention and wonderful powers of the steam-engine, which his unlearned countrymen would have rejected as incredible;

[1] 1 Stark. Evid. 471, note.
[2] Abercrombie on the Intellectual Powers, part 2, § 3, p. 71.
[3] 1 Stark. Evid. 496.

and an experienced judge may instantly discover the falsehood of a witness, whose story an inexperienced jury might be inclined to believe. But though the mind, in these cases, seems to have acquired a new power, it is properly to be referred only to experience and observation.

§ 13. **Testimonial Evidence and Circumstantial Evidence.** In trials of fact, it will generally be found that the *factum probandum* is either directly attested by those who speak from their own actual and personal knowledge of its existence, or it is to be inferred from other facts, satisfactorily proved. In the former case, the truth rests upon the second ground before mentioned, namely, our faith in human veracity, sanctioned by experience. In the latter case, it rests on the same ground, with the addition of the experienced connection between the collateral facts thus proved and the fact which is in controversy; constituting the third basis of evidence before stated. The facts proved are, in both cases, directly attested. In the former case, the proof applies immediately to the *factum probandum*, without any intervening process, and it is therefore called *direct* or *positive* testimony. In the latter case, as the proof applies immediately to collateral facts, supposed to have a connection, near or remote, with the fact in controversy, it is termed *circumstantial;* and sometimes, but not with entire accuracy, *presumptive.* Thus, if a witness testifies that he saw A inflict a mortal wound on B, of which he instantly died; this is a case of direct evidence; and, giving to the witness the credit to which men are generally entitled, the crime is satisfactorily proved. If a witness testifies that a deceased person was shot with a pistol, and the wadding is found to be part of a letter addressed to the prisoner, the residue of which is discovered in his pocket: here the facts themselves are directly attested; but the evidence they afford is termed *circumstantial;* and from these facts, if unexplained by the prisoner, the jury may, or may not, deduce, or infer, or presume his guilt, according as they are satisfied, or not, of the natural connection between similar facts, and the guilt of the person thus connected with them. In both cases, the veracity of the witness is presumed, in the absence of proof to the contrary; but in the latter case there is an additional presumption or inference, founded on the known usual connection between the facts proved, and the guilt of the party implicated. This operation of the mind, which is more complex and difficult in the latter case, has caused the evidence afforded by circumstances to be termed *presumptive evidence;* though, in truth, the operation is similar in both cases.

§ 13 *a*.[1] **Real Evidence; Profert; Inspection; View; etc.** [In seeking evidence leading towards proof of the *factum probandum*,

[1] [The original § 13 *a*, a later insertion of the author's, does not belong in this place; and as it could only mislead, and its matter is fully covered in later sections, it has been placed in the Appendix.]

the tribunal has only the two preceding sorts at its disposal; for all evidentiary facts or data must be of one of those two sorts. But the tribunal has also at its disposition a third possible mode, viz. self-perception or self-observation, or, describing it from the standpoint of the party attempting proof, *Autoptic Proference;*[4] *i. e.* the presentation of the object itself for the personal observation of the tribunal. From the metaphysical point of view, this may perhaps be regarded as merely an additional kind of evidence *i. e.* the senses of the tribunal. But the law does not attempt and does not need to consider theories of metaphysics as to the subjectivity of knowledge or the mediateness of perception; it assumes the objectivity of external nature; and, for the purposes of litigation, a matter found by the tribunal to exist does exist. Thus, the immediate perception of its existence by the tribunal itself, without resort to inference from circumstances or from testimony, is in principle not an employment of evidence, but a process of self-perception of the thing itself.[2] The term "real evidence" has sometimes been applied to this process, but not happily.[3]

Dividing, then, as above, the sources of belief by the tribunal, we find three classes: (1) Direct, or Testimonial, Evidence; (2) Indirect, or Circumstantial, Evidence; (3) Autoptic Proference,[4] or Real Evidence. The first of these involves in effect the qualifications of witnesses, treated *post*, Chapter XXIII; the second may be for a moment postponed, and is treated *post*, Chapter V; the third may most naturally be discussed first, and is dealt with in the ensuing Chapter.

In the use of the above sources of proof, we may assume, before proceeding to the detailed rules of admissibility, two fundamental principles or axioms, as applicable to all kinds of issues and the whole process of proof:[5] (*a*) No fact not having probative value is admis-

[2] [Compare Garrison, J., in Gaunt *v.* State, 50 N. J. L. 490, 495: "Inspection is like an admission, in that while not testimony, it is an instrument for dispensing with testimony;" Gilbert on Evidence, 2: "When perceptions are thus distinguished on the first view, it is called self-evidence, or intuitive knowledge. . . . Now as all demonstration is founded on the view of a man's own proper senses, by a gradation of clear and distinct perceptions, so all probability is founded upon obscure and distinct views or upon report from the sight of others; . . . and this is the original of trials and all manner of evidence;" Robertson, C. J., in Gentry *v.* McGinnis, 3 Dana (Ky.) 382, 386: "Autopsy, or the evidence of one's own senses, furnishes the strongest probability, and indeed the only perfect and indubitable certainty of the existence of any sensible fact."]

[3] [First, because "real" is an ambiguous term, and not sufficiently suggestive for the purpose; secondly, because the process is not the employment of "evidence" at all; and, thirdly, because the inventor of the term (Bentham, Judicial Evidence, III., 26 ff) used the phrase in a sense different from that above and different from that commonly now attached to it; he meant by it any fact about a material or corporal object, *e. g.* a book or a human foot, whether produced in court or not; it is only by later writers that the production in court is made the essential feature.]

[4] [The word "proference" is coined, in analogy to "reference," "inference," "conference," "deference," from the Latin *proferre*, whose form *profert* is intimately associated, in history and in principle, with the process of autoptic proference.]

[5] [These were first clearly formulated and pointed out by Professor J. B. Thayer in

sible; (*b*) Every fact having probative value is admissible, except so far as excluded by some specific rule of policy or tradition. The former is simply a presupposition for any system of evidence claiming to be rational; it excludes all prejudice, whim, and superstition, and adopts reason as the guide of proof.[6] The latter expresses the general principle that judicial proof is not to vary without good cause from what is ordinarily treated as probative. Courts have seldom expressly declared the logical consequence, *i. e.* that when relevancy appears it is for the opponent to point out some specific exclusionary rule, but they have frequently indicated approval of the principle as representing the general and proper attitude of the Courts towards evidence.[7]]

his "Presumptions," 3 Harv. L. Rev. 144, and "Law and Fact," 4 id. 156. Compare Professor Greenleaf's untenable generalizations, § 50, *post*.]

[6] [Note, however, that it does not exclude the subjective use of superstition as indicating consciousness of guilt; as *e. g.* in State *v.* Wisdom, 119 Mo. 539, where the accused's refusal to touch the corpse of the murdered man was treated as relevant.]

[7] [See Cockburn, C. J., in R. *v.* Birmingham, 1 B. & S. 763; Pollock, C. B., in Milne *v.* Leisler, 7 H. & N. 796; Coleridge, C. J., in Blake *v.* Ass. Co., L. R. 4 C. P. D. 94; Parke, B., in Wright *v.* Tatham, 7 A. & E. 384; Hosmer, C. J., in State *v.* Watkins, 9 Conn. 53; Buchanan, C. J., in Davis *v.* Calvert, 5 G. & J. 304; Lumpkin, J., in Johnson *v.* State, 14 Ga. 61; same, in Haynes *v.* State, 17 id. 484; Baldwin, J., in People *v.* Arnold, 15 Cal. 481; Sanderson, J., in People *v.* Farrell, 31 id. 584; Appleton, C. J., in State *v.* Benner, 64 Me. 283.]

CHAPTER IV.

REAL EVIDENCE (AUTOPTIC PROFERENCE [1]).

§ 13 *b*. General Principle; Instances.
§ 13 *c*. Discriminations; Independent Principles not to be confused: (1) Irrelevancy.
§ 13 *d*. Same: (2) Privilege; (3) Sundry Principles.
§ 13 *e*. Limitations germane to the Present Principle: (1) Prejudice of an Accused Person.
§ 13 *f*. Same: (2) Prejudice of a Civil Defendant.
§ 13 *g*. Same: (3) Immodesty or other Impropriety.
§ 13 *h*. Same: (4) Technical Matters.
§ 13 *i*. Same: (5) Inconvenience; View by Jury.
§ 13 *j*. Same: (6) Non-transmission to Appellate Court.

§ 13 *b*. **General Principle; Instances.** [Since either sort of evidence, testimonial or circumstantial, is one step removed from the thing itself to be proved, the production of the thing itself would seem to be the most natural and satisfactory process of proof, and to be at least equally as satisfactory and proper as offering evidence about the thing. If the question is whether a man is of negro complexion, or whether a shoe is fastened by laces or by buttons, the testimony of one who has seen the man or the shoe, or the circumstance that the man's child is a negro or that a button has fallen from the shoe, can at least not be more satisfactory than the inspection of the man or the shoe in court. Accordingly, it might be said, *à priori*, that where the existence or the observable qualities of a material object are in issue or are relevant to the issue, the inspection of the thing itself by the tribunal is always proper, where no specific and collateral reason to the contrary is made to appear. Such ought to be, and probably is, the theory of the law.[1] In a great variety of instances this mode of proof is frequently resorted to. Among the older precedents are the writ *de ventre inspiciendo*,[2] the exhibition of a rupture by a man charged with rape,[2] the coroner's inquest over a deceased person, the inspection of the maimed person on a trial for mayhem,[3] and of the features of a child whose paternity is in issue,[4] and the view of premises.[5] In the same way proof is often made by the production of a person of color,[4] of an alleged infant,[6] of weapons, tools, and other

[1] For the scope of this term, see *ante*, § 13 *a*.

[1] Robertson, C. J., in Gentry *v.* McGinnis, 3 Dana (Ky.) 382, 386; Beck, J., in Stockwell *v.* R. Co., 43 Ia. 474; Rodman, J., in Warlick *v.* White, 76 N. C. 175, 179; Cal. C. C. P. § 1954 (declaring this general principle); Chalmers, J., in Garvin *v.* State, 52 Miss. 207, 209; Rules of Court of 1883 (Eng.), Ord. 50, r. 3 (declaring the general principle).

[2] See § 13 *g*.

[3] Y. B. 28 Ass. pl. 5.

[4] See § 13 *c*.

[5] See §§ 13 *c* (d), 13 *i*, 13 *j*.

[6] See § 13 *c*.

instruments of crime,[7] of the clothing, etc., of a murdered person,[8] and by the inspection of the body of an injured person in a civil suit for bodily injury,[9] of an alleged insane person,[10] of an alleged incompetent employee,[11] or of a drunken witness.[12] A claimant to property whose identity is in dispute may exhibit himself in court,[13] an accused person's marks of identity with the guilty person may be inspected,[14] a sample of goods may be shown,[15] or of the effects of an injurious substance,[16] or of a writing;[17] a suit of clothes may be tried on to show the fit,[18] and the odd case of a judge's taking his watch and noting the length of a minute for the benefit of the jury[19] seems to be an instance of autoptic perception of the lapse of time. The *mode of inspection* is usually by the unaided senses; but the tribunal may properly use such aids as a microscope or magnifying-glass.[20] The *place of inspection* will of course usually be the court-room; but the tribunal itself may sometimes proceed elsewhere to inspect the object.[21]]

§ 13 *c*. **Discriminations; Independent Principles not to be confused; (1) Irrelevancy.** [Before considering the proper limitations to the above general principle, certain cases must first be noted, in which is found the prohibition of autoptic proference, not because of any objection to the process itself, but because of independent rules whose violation would thus be involved.

(1) *Rules of Relevancy*. Whether a person's color is black or white is best ascertained by inspecting the person; but if his color when thus ascertained would be irrelevant, it is obvious that inspection to learn his color would be unnecessary and therefore improper; *e. g.* his color might be relevant to show his race-ancestry, but not to show his state of health, and in the former case inspection would be allowed, in the latter case not; the ruling in each case depending on some independent principle of relevancy. In a large number of cases this is the real question. (*a*) *Color* has always been regarded as evidence of *race-ancestry*,[1] and accordingly the production of the person to ascer-

[7] See § 13 *e*.
[8] See § 13 *e*.
[9] See § 13 *f*.
[10] R. *v*. Goode, 7 A. & E. 535; Guiteau's Trial, *passim*.
[11] Keith *v*. N. H. & N. Co., 140 Mass. 175, 180.
[12] Walker's Trial, 23 How. St. Tr. 1154.
[13] Annesley *v*. Anglesea, 17 How. St. Tr. 1139, 1182; Tichborne Trial (R. *v*. Orton), charge of C. J. Cockburn, *passim*.
[14] See § 13 *d*.
[15] Thomas Fruit Co. *v*. Start, 107 Cal. 206.
[16] Eidt *v*. Cutler, 127 Mass. 522; King *v*. R. Co., 72 N. Y. 607.
[17] See §§ 576 ff.
[18] Brown *v*. Foster, 113 Mass. 136.
[19] People *v*. Constantino, 153 N. Y. 24.
[20] Short *v*. State, 63 Ind. 376, 380; Morse *v*. Blanchard, Mich., 75 N. W. 93. For such use by a witness, see *post*, § 439 *h*.
[21] See § 13 *i*.
[1] See *post*, § 14 *s*.

tain his color is proper;[2] so, also, where his foot-formation is regarded as relevant.[3] (*b*) *Resemblance of features*, as evidence of *paternity*, in cases of bastardy or inheritance, has been a matter of much controversy;[4] but where the fact of resemblance is regarded by the Court as having probative value, the production of the child for the better apprehension of the resemblance has been treated as proper.[5] (*c*) *Appearance* of a person, as indicating *age* (*e. g.* of infancy, of consent to intercourse), is usually regarded as relevant,[6] and if so, the tribunal may properly observe the person brought before them.[7] (*d*) The *condition of premises*, etc., long after an event may not be of probative value to show the condition at the time in issue;[8] and upon this ground a view of the premises or an inspection of the object may properly be refused.[9] (*e*) *Experiments* are often excluded because of the confusion of issues, etc., that might be involved,[10] and this exclusion might operate equally whether the experiments were to be testified to or to be done in court.[11]]

§ 13 *d*. **Same: (2) Privilege. (3) Sundry Principles.** [(2) *Privilege*. Another independent reason that may prohibit autoptic proference is the privilege of an accused person not to criminate himself against his will. Whether this privilege is violated by compelling the exhibition of his body or members in court has been a matter of controversy, but depends wholly on the theory of that privilege.[1] A similar privilege for a plaintiff suing for a bodily injury has been recognized by a few Courts, and raises a similar question.[2] (3) Certain other independent principles sometimes resulting in the prohibition of autoptic proference, or prescribing conditions for its use, need to be discriminated. Specimens of *handwriting*, as evidence of the style

[2] Hudgins *v.* Wrights, 1 Hen. & M. 134, 141; Hook *v.* Pagee, 2 Munf. 379, 384; Gentry *v.* McGinnis, 3 Dana (Ky.) 382, 386; Chancellor *v.* Milly, 9 id. 24; Garvin *v.* State, 52 Miss. 207, 209; Warlick *v.* White, 76 N. C. 175.

[3] Daniel *v.* Guy, 23 Ark. 50, 51.

[4] See *post*, § 14 *s*.

[5] Gaunt *v.* State, 50 N. J. L. 490, 495; Gilmanton *v.* Ham, 38 N. H. 108, 112; *Re* Jessup, 81 Cal. 408, 418; Crow *v.* Jordon, 49 Oh. St. 655; Young *v.* Makepeace, 103 Mass. 50, 54; Paulk *v.* State, 52 Ala. 427, 429; Jones *v.* Jones, 45 Md. 144, 151, *semble*; State *v.* Smith, 54 Ia. 104; Finnegan *v.* Dugan, 14 All. 197; State *v.* Woodruff, 67 N. C. 89, *semble*. It was forbidden in Hanawalt *v.* State, 64 Wis. 84, 87, on the ground of § 13 *j*, *post*. For the cases in which it was forbidden on the above ground of the irrelevancy of resemblance, see *post*, § 14 *s*.

[6] See *post*, § 14 *l*. Distinguish the question whether by the criminal law the *bona fide* belief by a liquor-seller as to the buyer's age, based on his appearance, is material.

[7] State *v.* Arnold, 13 Ired. 184, 192 (criminal age); Com. *v.* Hollis, Mass., 49 N. E. 632 (age of consent); Hermann *v.* State, 73 Wis. 248. In Indiana, in proving the age of a liquor-buyer, this mode of proof is excluded for the reason of § 13 *j*, *post*, *q. v.*

[8] See *post*, § 14 *t*.

[9] Broyles *v.* Prisock, 97 Ga. 643, 25 S. E. 388; Banning *v.* R. Co., 89 Ia. 74, 80; State *v.* Knapp, 45 N. H. 148, 157; French *v.* Wilkinson, 93 Mich. 322.

[10] See *post*, § 14 *v*.

[11] Compare further §§ 13 *e*, 13 *f*, 13 *i*.

[1] See *post*, § 469 *e*.

[2] See *post*, § 469 *m*.

of writing, are in many jurisdictions not to be submitted to the jury.[3] The *Hearsay* rule forbids a jury at a view to hear testimony.[4] The rule of *Primariness, i. e.* that the original of a writing must be presented autoptically to the tribunal, unless it is not available for production,[5] involves, of course, a different question; for there the question is whether the original writing must be presented, while here the only question is whether it may be, and the answer to the latter question has never been doubted. The use of *photographs, models, maps,* and the like, by a witness, is merely one way of giving testimony, and does not concern us here.[6]]

§ 13 *e.* **Limitations germane to the Present Principle; (1) Prejudice of an Accused Person.** [The autoptic proference to the tribunal of the weapons or the tools or the fruits of a crime, of the clothing or the mutilated body of a murdered person, has often been objected to by counsel because of the undue prejudice that might thus be created against the accused, in inflaming the passions of the jury and causing them to subordinate their reasoning powers to their feelings and to omit to be satisfied, by evidence alone, of the accused's complicity.[1] 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 purely frivolous and there is no ground for apprehension.[2] Accordingly, such objections have almost invariably been repudiated by the Court, in allowing the production of tools or weapons,[3] clothing or members of a murdered or injured person's body,[4] and the fruits of the crime or other material objects connected with it,[5] — so far, of course, as the object is relevant, for identification or otherwise.]

[3] See *post*, §§ 576 ff.
[4] See *post*, § 162 *o*.
[5] See *post*, §§ 558 ff.
[6] See *post*, §§ 439 *g*, *h*.

[1] The earliest instances of such objection seem to be Picton's Trial, 30 How. St. Tr. 457, in 1806, and Ing's Trial, 33 id. 1051, 1088 (Cato-street conspiracy), in 1820; in the latter trial, Mr. Adolphus, for the defence, put the objection as clearly and forcibly as it can be stated.

[2] See the remarks of Andrews, C. J., in Walsh *v.* People, 88 N. Y. 467.

[3] Wynne *v.* State, 56 Ga. 113, 118; Crawford *v.* State, Ala., 21 So. 214; Spies *v.* People, 122 Ill. 1, 236; Anderson *v.* State, 147 Ind. 445; Johnson *v.* State, 59 N. J. L. 535; State *v.* Jones, 89 Ia. 182, 188; Taylor *v.* Com., 90 Va. 109, 117; Starchman *v.* State, 62 Ark. 538, 540; State *v.* Cushing, 17 Wash. 544; Mose *v.* State, 36 Ala. 211, 219, 229; McDonel *v.* State, 90 Ind. 320; Foster *v.* People, 63 N. Y. 619.

[4] R. *v.* Reason, 16 How. St. Tr. 42; Dorsey *v.* State, 107 Ala. 157; Burton *v.* State, ib. 108; State *v.* Vincent, 24 Ia. 570, 576 (an extreme case; the severed head of the deceased, preserved in alcohol, exhibited); State *v.* Stair, 87 Mo. 268, 272; People *v.* McCurdy, 68 Cal. 576, 580; Story *v.* State, 99 Ind. 413; State *v.* Murphy, 118 Mo. 7, 14; State *v.* Duffy, 124 id. 1, 10; State *v.* Symmes, 40 S. C. 383, 387; Davidson *v.* State, 135 Ind. 254, 258; People *v.* Hawes, 98 Cal. 648, 652; Gardiner *v.* People, 6 Park. Cr. C. 201; King *v.* State, 13 Tex. App. 277; Hart *v.* State, 15 id. 202, 228.

[5] State *v.* West, 1 Houst. Cr. C. 371, 385 ("museum" of an alleged insane person, containing bottled snakes, etc., exhibited); Adams *v.* State, 93 Ga. 166 (perjury as to pantaloons; the pantaloons exhibited); Keating *v.* People, Ill., 43 N. E. 724; People

§ 13 *f*. **Same: (2) Prejudice of a Civil Defendant.** [Upon the same principle, objection is often made to the exhibition of his injuries by a civil plaintiff suing for compensation; the argument being that a sympathy with the sufferings or mutilation thus made vivid may induce the jury, especially as against a corporation, and particularly a railway corporation, to render a verdict regardless of the evidence of culpability. No doubt, again, this danger needs to be guarded against, and it certainly is of greater frequency here than in the preceding class of cases; but such exhibition is generally and rightly treated as a proper process of proof, subject to occasional exclusion in cases of abuse.[1]]

§ 13 *g*. **Same: (3) Immodesty or other Impropriety.** [When the exhibition or inspection would involve a repulsive or immodest exposure of the body, it may well be forbidden, at least so far as the fact to be learned, or this mode of learning it, is not of serious importance. This general qualification is commonly mentioned by Courts, and occasionally has been applied;[1] yet such exhibitions, whenever it has seemed necessary, have been allowed;[2] and the traditional writ *de ventre inspiciendo* by a jury of matrons[3] illustrates one expedient for avoiding unnecessary offence to modesty. In still other ways there may be a deterrent impropriety in autoptic proference; for example, in offering to have the jury sample liquor alleged to be intoxicating,[4] or to kill dogs and rabbits before the jury to illustrate the symptoms of strychnia-poisoning,[5] or to go through a supposed process of suicide by hanging.[6]]

§ 13 *h*. **Same: (4) Technical Matters.** [The production of a thing or the performance of an experiment before the jury may occasionally afford no help because its features may not be apprehensible by the unskilled jury by mere observation. In such a case, an accom-

v. Winthrop, Cal., 50 Pac. 390; Com. *v.* Burke, 12 All. 182; Mitchell *v.* State, Ala., 22 So. 71; State *v.* Smith, 56 Minn. 78, 84; Powell *v.* State, 61 Miss. 319.

[1] *Admitted:* Langworthy *v.* Green, 95 Mich. 93, 96 (citing many cases); Graves *v.* Battle Creek, 95 Mich. 266, 268; Sherwood *v.* Sioux Falls, S. D., 73 N. W. 913; Louisv. N. A. & C. R. Co. *v.* Wood, 113 Ind. 549 (a leading case, and citing many precedents); Osborne *v.* Detroit, 36 Fed. 36, 38 (allowing the testing of a paralysis by sticking pins into the body); Carrico *v.* R. Co., 39 W. Va. 86, 89; Citizens' S. R. Co. *v.* Willoeby, 134 Ind. 563, 570; Williams *v.* Nally, Ky., 46 S. W. 874; C. & A. R. Co. *v.* Clausen, Ill., 50 N. E. 680; Edwards *v.* Three Rivers, 96 Mich. 625; Indiana C. Co. *v.* Parker, 100 Ind. 181, 199; Tudor Iron Works *v.* Weber, 129 Ill. 535; Barker *v.* Perry, 67 Ia. 146. *Excluded:* L. & N. R. Co. *v.* Pearson, 97 Ala. 211; Carstens *v.* Hanselman, 61 Mich. 426; French *v.* Wilkinson, 93 Mich. 322 (on the ground of § 13 *c* (d), *ante*).

[1] Dacosta *v.* Jones, Cowp. 729; Knowles *v.* Crompton, 55 Conn. 336 (section of corpse); Brown *v.* Swineford, 44 Wis. 282 (private parts).

[2] Hale, Pl. Cr. I., 635 (rupture); C. & A. R. Co. *v.* Clausen, Ill., 50 N. E. 680 (rupture); see Union P. R. Co. *v.* Botsford, 141 U. S. 250, 255.

[3] 1 Co. Litt. 189, Hargreave's note; *Ex parte* Bellet, 1 Cox 297; Taylor, Evidence, § 544 n. An instance occurred as late as 1879, noted in 14 L. Journ. 439.

[4] Com. *v.* Brelsford, 161 Mass. 61, 63; Wadsworth *v.* Dunnam, Ala., 23 So. 699.

[5] R. *v.* Palmer, Annual Register, 1856, pp. 422, 473, 475.

[6] Jumpertz *v.* People, 21 Ill. 375, 396, 408.

panying explanation by an expert will generally remove the difficulty, and Courts are seldom likely to see much force in such an objection.[1]]

§ 13 *i*. **Same: (5) Inconvenience; View by Jury.** [(*a*) It may cause inconvenience to bring the desired object into a court-room; and the Court may of course on this ground exclude it;[1] or it may be illegal to do so, as in the case of public documents or court-records required to be kept in a certain place; or it may be impossible, as where the condition of land or fixtures is involved. (*b*) In such a case, may the jury leave the court-room and inspect the object where it is? The taking of a *view* by the jury has always been regarded as a proper proceeding, though its methods have usually been regulated by statute.[2] The practice under the English statutes was usually confined to actions of ejectment, nuisance, trespass, and the like;[3] and it was said that in criminal cases a view could be had only by consent of the accused;[4] in the cases where it was allowable, the Court granted it where it seemed proper and necessary.[5] The matter is now commonly regulated by statute; but, whether under statute or apart from it, the granting of a view is usually held to lie in the trial Court's discretion.[6]]

§ 13 *j*. **Same: (6) Non-transmission to Appellate Court.** [In one or two jurisdictions the notion has of late obtained a footing that autoptic proference is to be excluded as a method of proof because it is impossible to transmit to the higher Court on appeal the source of belief thus laid before the jury below, and because thus the losing party cannot obtain an adequate revision of the proceedings by the

[1] *E. g.*, in Stockwell *v.* R. Co., 43 Ia. 470, 473, the Court allowed the jury to take a view of a train run under special conditions to illustrate an alleged fact. See a similar instance in Taylor *v.* U. S., U. S. App., 89 Fed. 954.

[1] In Thurman *v.* Bertram, Exch. D., London Mail, July 18, 1879, 20 Alb. L. J. 150, the question being whether an elephant was in appearance likely to frighten a horse, the elephant was brought into court; so also, for a dog, to determine whether he was ferocious, in Line *v.* Taylor, 3 F. & F. 731.

[2] The English statutes are: St. 4–5 Anne, c. 16, s. 8; 8 G. II, c. 25, s. 14; 6 G. IV, c. 50, ss. 23, 24; 15–16 Vict., c. 76, s. 114; 17–18 Vict., c. 125, s. 58; Rules of Court, 1883, Ord. 50, r. 3.

[3] Redfern *v.* Smith, 9 Moore 497; Att'y-Gen'l *v.* Green, 1 Price 130; Stoves *v.* Menhem, 2 Exch. 382.

[4] R. *v.* Redman, 1 Kenyon 384; Com. *v.* Knapp, 9 Pick. 496, 515; Eastwood *v.* People, 3 Park. Cr. 25, 53, *semble*. That it is a criminal case is in itself no objection: R. *v.* Whalley, 2 Cox Cr. 231; R. *v.* Martin, 12 id. 204; Com. *v.* Webster, 5 Cush. 295, 298; and other cases in the ensuing notes.

[5] Lord Mansfield, C. J., in 1 Burr. 252; Davis *v.* Lees, Willes 344, 348; Anon., 2 Chitty 422.

[6] See Campbell *v.* State, 55 Ala. 80; People *v.* White, 116 Cal. 17; Niosi *v.* Laundry, 117 id. 257; Springer *v.* Chicago, 135 Ill. 553, 561; Vane *v.* Evanston, 150 id. 616; Pike *v.* Chicago, 155 id. 656, 40 N. E. 567; Leidlein *v.* Meyer, 95 Mich. 586; Milliken *v.* Corunna, id., 68 N. W. 141; Chute *v.* State, 19 Minn. 271; Brown *v.* Kohont, 61 id. 113; Jenkins *v.* R. Co., 110 N. C. 439; State *v.* Perry, id., 27 S. E. 997; Rudolph *v.* R. Co., Pa., 40 Atl. 1083; State *v.* Musgrave, W. Va., 28 S. E. 813; Boardman *v.* Ins. Co., 54 Wis. 364; Pick *v.* R. H. Co., 27 id. 433, 446. For the impropriety of viewing the place in a changed condition, see *ante*, § 13 *c* (d). For the necessity of the defendant's presence at a view in a criminal case, see *post*, § 162 *o*.

higher Court.[1] This notion has been applied to forbid the consideration of appearance as indicating age,[2] and of the features of a child as indicating paternity,[3] and also to forbid the resort to a view by the jury.[4] The doctrine has been repudiated (after an occasional temporary favor) by all of the Courts whose attention has been called to it.[5] The unfortunate thing is that in repudiating it there has been an inclination to evade the objection (*i. e.* that the "evidence" cannot be reproduced or transmitted on appeal) by declaring that a jury-view does not involve the obtaining of evidence by the jury.[6] There was no necessity for invoking such an untenable doctrine; the sufficient answers to the above objection are (1) that there is no precedent in the common law for recognizing any doctrine that an appellate Court must be able to have every item of evidence reproduced or transmitted to it; (2) that if such a doctrine were sound, there never could have been jury-views, or, in the majority of cases, autoptic proference of any sort; (3) that if such a doctrine were sound, all *viva voce* testimony, which depends so much on the appearance and demeanor of the witness, and all evidence whatever except writings and other portable objects, should be excluded, — an impossible result. To answer the objection by declaring a jury-view not to be the obtaining of evidence, in the sense of an additional source of proof, is to adopt an untenable and unnecessary defence. While, as already pointed out,[7] autoptic proference is to be distinguished from evidence, both testimonial and circumstantial, in the strict sense of the word, it is at any rate an additional source of belief or proof, over and above the statements of witnesses and the circumstantial evidence. Its significance, in this respect, has often been discussed by Courts in ruling upon instructions as to the nature of jury-views; and in spite of some opposing precedents,[8] the generally accepted and the correct doctrine is that a view furnishes a dis-

[1] The theory is best presented in the opinions in J. M. & I. R. Co. *v.* Bowen, 40 Ind. 548. So far as the absence of cross-examination is objected to, see *post*, § 162 *o*.

[2] Stephenson *v.* State, 28 Ind. 272; Ihinger *v.* State, 53 id. 251, 253; Robinius *v.* State, 63 id. 235, 237; Surgart *v.* State, 64 id. 590; Bird *v.* State, 104 id. 385, 389.

[3] Hanawalt *v.* State, 64 Wis. 84, 87.

[4] Smith *v.* State, 42 Tex. 444, 448 (partly on this ground).

[5] Close *v.* Samm, 27 Ia. 503, 507; J. M. & I. R. Co. *v.* Bowen, 40 Ind. 545, 547 (overruling E. R. Co. *v.* Cochran, 10 id. 560); Gagg *v.* Vetter, 41 id. 228, 258; Heady *v.* Turnpike Co., 52 id. 117, 124; Indianapolis *v.* Scott, 72 id. 196, 224; Shuler *v.* State, 105 id. 289; Topeka *v.* Martineau, 42 Kan. 387; State *v.* Stair, 87 Mo. 268, 272; Foster *v.* State, 70 Miss. 755, 765; Hart *v.* State, 15 Tex. App. 202, 228. The Courts cited *post*, notes 8, 9, would apparently also reach the same result.

[6] Cole, J., in Close *v.* Samm, *supra;* J. M. & I. R. Co. *v.* Bowen, *supra;* Wright *v.* Carpenter, 49 Cal. 607, 610 (repudiated in People *v.* Milner, *post*); the explanation usually is that the view merely "illustrates" the subject of inquiry, or "enables the jury to apply" the testimony.

[7] *Ante*, § 13 *a*.

[8] Vane *v.* Evanston, 150 Ill. 616, 621 (confining the prior rulings in this Court, cited below, to views under the eminent-domain statute); Flower *v.* R. Co., 132 Pa. 524; Hoffman *v.* R. Co., 143 id. 503, 22 Atl. 823; Munkwitz *v.* R. Co., 64 Wis. 403; Seefeld *v.* R. Co., 67 id. 96; Sasse *v.* State, 68 id. 530.

tinctly additional source of proof, *i. e.* the thing itself as autoptically observed.[9]

It must be added that the question whether a jury-view involves "evidence," in the sense that the opponent must have an opportunity to be present, is a different one; it is raised by the Hearsay rule, requiring an opportunity of cross-examination, and is treated *post*, § 162 *o*.]

[9] The best expositions of the principle are found in the opinions by Bissell, J., in Denv. T. & F. W. R. Co. *v.* Ditch Co., Colo. App., 52 Pac. 225; Johnston, J., in Topeka *v.* Martineau, 42 Kan. 387; White, P. J., in Hart *v.* State, 15 Tex. App. 202, 228; Lyon, J., in Washburn *v.* R. Co., 59 Wis. 364; Woods, J., in Foster *v.* State, 70 Miss. 755, 765; Wright, J., diss., in Close *v.* Samm, 27 Ia. 511; Henshaw, J., in People *v.* Milner, *infra*. *Accord:* People *v.* Bush, 68 Cal. 623, 630; People *v.* Milner, id., 54 Pac. 833; Peoria A. & D. R. Co. *v.* Sawyer, 71 Ill. 361; Mitchell *v.* R. Co., 85 id. 566; Peoria & F. R. Co. *v.* Barnum, 107 id. 160; Culbertson & B. Packing Co. *v.* Chicago, 111 id. 651; Maywood Co. *v.* Maywood, 140 id. 216, 223; Rock I. P. R. Co. *v.* Brewing Co., id., 51 N. E. 572; Kans. C. & S. R. Co. *v.* Baird, 41 Kan. 69; C. K. & W. R. Co. *v.* Parsons, 51 id. 408; Shepherd *v.* Camden, 82 Me. 535; Parks *v.* Boston, 15 Pick. 198, 200, 209; Davis *v.* Jenny, 1 Metc. 222; Tully *v.* R. Co., 134 Mass. 499, 503; Menard *v.* R. Co., 150 id. 386 (undecided); Neilson *v.* R. Co., 58 Wis. 516, 523; Washburn *v.* R. Co., 59 id. 364, 368; U. S. *v.* Seufert B. Co., 87 Fed. 35, 38.

CHAPTER V.

RELEVANCY; CIRCUMSTANTIAL EVIDENCE.

§ 14. General Principles of Relevancy.
§ 14 *a*. Doctrines of Collateral Inconvenience.

1. *Character as Evidence or in Issue.*

§ 14 *b*. Character as Evidence of an Act done.
§ 14 *c*. Character as otherwise evidentiary.
§ 14 *d*. Character in Issue.

2. *Evidence to prove Character.*

§ 14 *e*. In general.
§ 14 *f*. Particular Conduct as Evidence of an Accused's Character.
§ 14 *g*. Particular Conduct as Evidence of other Persons' Character used evidentially.
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3. *Other Human Qualities as Evidence of an Act.*

§ 14 *i*. Physical Capacity, Skill, Means, etc.
§ 14 *j*. Habit, Custom.
§ 14 *k*. Design, Intention, Plan.

4. *Evidence to prove Capacity, Knowledge, Plan, Intent, Habit, Custom, and other Human Qualities or Conditions.*

§ 14 *l*. Evidence to prove Physical Capacity, Skill, Age, Sanity, etc.
§ 14 *m*. Evidence to prove Design, Plan.
§ 14 *n*. Evidence to prove Habit, Custom.
§ 14 *o*. Evidence to prove Motive, Emotion, Malice, etc.
§ 14 *p*. Evidence to prove Knowledge, Belief, Notice, Consciousness of Guilt, etc.
§ 14 *q*. Other Similar Crimes or Misconduct as Evidence of Knowledge, Intent, Plan, etc.

5. *Sundry Evidence to prove or disprove a Human Act.*

§ 14 *r*. Alibi, Commission by others, etc.
§ 14 *s*. Traces, and other Evidence *à posteriori*.

6. *Evidence of the Condition, Quality, Capacity, of Inanimate Objects.*

§ 14 *t*. Prior or Subsequent Existence of a Thing, Place, Condition, etc.
§ 14 *u*. One Part evidencing another; Samples.
§ 14 *v*. Similar Instances as Evidence of a Quality, Tendency, Capacity, etc.

§ 14.[1] **General Principles of Relevancy.** [The notion of circumstantial evidence, as already explained,[2] is that of any fact, not a human assertion, taken as a basis of inference for or against a proposition of fact the subject of dispute. Difficult as it may be to express with precision in a form of words the scope of this class, the distinction between circumstantial and testimonial evidence runs deep in the law. It is sufficient for practical purposes to note that under the former head are included not merely such marked and suggestive circumstances as usually attend a crime and are often thought of as solely deserving the name, but all evidentiary facts whatsoever, other than human assertions used as the basis of an inference to the truth of the assertion.

[1] The original § 14 is merged with § 15, *post*, Chap. VI.
[2] *Ante*, § 13.

Certain preliminary distinctions are necessary. (1) It is not the law which furnishes the test of relevancy, but logic. Probative value, or capability of supporting an inference, is a matter of reasoning, and the modes of reasoning must be the same in a court-room as in a laboratory; it is only the subject-matter which differs. Whatever rulings upon relevancy are found in our precedents are mere applications of logic by the Court. Nevertheless those notions of logic, in being applied, become the law. Though this legal logic may lead to illogical law, still the ruling is a legal precedent. In other words, there is a law of relevancy,[3] consisting of those rulings which declare when one fact may be received in a court as the basis of inference to another. (2) The logic of the Courts, nevertheless, is an instinctive logic, rarely formulated, and loosely applied. It is usually rough, quick, and unsystematic in its tests, and is the creature of its environment. There is little opportunity for the express application of the recognized canons of reasoning. (3) A most important feature of its use is that it aims merely to test admissibility, and does not concern itself with demonstration or comparative weight. The historian or the naturalist may preserve data of the slightest helpfulness, or may pass final judgment at once upon cogent evidence; but the legal tribunal is divided; the judge first passes upon the offered evidence, and sets aside the tidbits for the jury; that which, for one reason or another affecting its value, is not worth considering, never reaches the auxiliary functionaries, the jury. Thus a marked feature of our system of evidence, distinguishing it radically from the Continental system, and historically due to the separation of function between judge and jury, is the distinction between admissibility and proof. Our law of evidence leaves it usually to the jury to say what constitutes proof or demonstration; and the rules of relevancy aim only to determine whether a given fact is of sufficient probative value to be admissible at all.[4] (4) The degree of strength to which an evidentiary fact must rise in order to be regarded as worth considering, *i. e.* the test of probative value for purposes of admissibility, can hardly be stated except in terms so general as to be practically of little use. It is usually said that the fact must be such as indicates the desired *factum probandum* with a fair or reasonable degree of probability.[5] Only rarely can anything more precise be attempted in the way of a general formula; and such rules as exist are concerned almost entirely with particular con-

[3] Professor Thayer, in 3 Harv. L. Rev. 143, 145, seems to take a contrary view. Yet, at any rate, the fact remains that such decisions exist, and whether they be termed logical or legal rulings, trials will be conducted according to them, and the profession must take note of them. See Cushing, C. J., in State *v.* Lapage, 57 N. H. 288.

[4] For this distinction, see the remarks of Bosanquet, J., in Wright *v.* Tatham, 7 A. & E. 375; Marshall, C. J., in Col. Ins. Co. *v.* Lawrence, 2 Pet. 44; Evans, Notes to Pothier, II, 157; Brickell, C. J., in Nelms *v.* Steiner, Ala., 22 So. 435.

[5] See Richardson *v.* Turnpike Co., 6 Vt. 503; Stevenson *v.* Stewart, 11 Pa. 308; Com. *v.* Jeffries, 7 All. 566; Weidler *v.* Bank, 11 S. & R. 140; Brown *v.* Schock, 77 Pa. 479; Ins. Co. *v.* Weide, 11 Wall. 438, 440; Levison *v.* State, 54 Ala. 528.

crete data. (5) The relevancy of a fact may not appear upon its face, but may depend upon some other fact not yet proved. In such a case it is usual for the trial Court in its discretion to admit the former upon the counsel's assurance that the latter will be proved in due time.[6] (6) It is occasionally said that an "inference upon an inference" will not be allowed, *i. e.* that the circumstantial fact must be directly proved by testimony.[7] There is no such rule; if there were, hardly a single trial could be adequately prosecuted. For example, on a charge of murder, the defendant's gun is found discharged; from this we argue that he has discharged it; and from this we argue that his bullet struck and killed the deceased; or the defendant is shown to have been sharpening a knife; from this we argue that he had a design to use it upon the deceased; and from this we argue that he carried out his design; in these and innumerable other instances we build up inference upon inference, and yet no Court ever thought of forbidding it. All reasoning, all scientific work, and every day's life proceeds on such data; and the above judicial utterances must be taken as valid only for the particular evidence there ruled upon.[8]]

§ 14 *a*. **Doctrines of Collateral Inconvenience.** [A fact may have probative value or relevancy, and still be excluded because of collateral reasons, *i. e.* reasons independent of its probative value. The importance of distinguishing this reason of exclusion is that it may or may not apply in a given case, and that the objection involved in it may be obviated, either in that instance or upon the occasion of other litigation; so that the exclusion may not be an absolute one, due to the inherent probative deficiency of the fact itself, and may thus cease to exist for the same fact offered on some other occasion for the same purpose. These reasons are of a great variety; for example, they are the source of the rules of Privilege, treated *post*, Chap. XIX. But, in their application to circumstantial evidence, they are chiefly (so far as they can be formulated) three in number; (*a*) the doctrine of Undue Prejudice, *i. e.* that the fact, while relevant, may excite passion or receive exaggerated importance in such a way as to lead the jury to decide upon some other ground than the evidence; this reason finds its chief application in excluding character-evidence under certain conditions; (*b*) the doctrine of Unfair Surprise, *i. e.* that the fact offered would find the opponent without any means of anticipating and meeting it by disproof or explanation, and would

[6] See Davis *v.* Calvert, 5 G. & J. 304; Weidler *v.* Bank, 11 S. & R. 139; Mardis *v.* Shackleford, 4 Ala. 493, 501; Zell *v.* Com., 94 Pa. 258, 274; Bischof *v.* Mikels, 147 Ind. 115; Lane *v.* Soc., 67 Minn. 65; State *v.* Cherry, 63 N. C. 493, 494; *ante*, § 3, n. 1.

[7] *E. g.* in U. S. *v.* Ross, 92 U. S. 281; McAleer *v.* Murray, 58 Pa. 126; Globe Acc. Ins. Co. *v.* Gerisch, 163 Ill. 625.

[8] For the weight of circumstantial evidence, as compared with testimonial (a matter not within the present purview), consult R. *v.* Exall, 4 F. & F. 922, 929; Com. *v.* Webster, 5 Cush. 295; {Bowie *v.* Maddox, 29 Ga. 285; Belhaven and Stenton Peerage, L. R. 1 App. Cas. 278; West *v.* State, 76 Ala. 98; Lancaster *v.* State, 91 Tenn. 267.}

thus make it possible to impose fictitious evidence upon the jury; this reason is applied to "particular" facts of various sorts; (*c*) the reason of Confusion of Issues, *i. e.* that the fact would be likely to open up such a complication of rebutting evidence, new witnesses, the impeachment of these witnesses, and the like, that much time would be spent, the jury confused, and the main issues lost sight of; this reason also has many applications, usually in company with the preceding one, and is given greatest force in dealing with evidence of minor probative value.

Most of the rules affecting circumstantial evidence, as the resultant of the above two influences, are thus composite in their source. The reasons leading to them may concern either probative value or collateral inconvenience, or both. It is worth noting that there is usually a reason, however loosely thought out or expressed it may sometimes be. But the result is that, in the practical handling of this evidence, we have to deal with a set of rules, rather than with a system of principles. These rules, too, are ordinarily associated rather with certain concrete kinds of evidentiary facts than with general principles. It is therefore scarcely possible to classify this material in the law except according to the kind of fact with which the rule is commonly associated. In the following exposition the attempt will be merely to take up the chief sorts of evidentiary facts about which any controversy has arisen, and to explain the various rules and distinctions, so far as possible, in the light of the reasons underlying them. The general suggestion may be made at this point that these questions will usually best be put in the way towards solution by recollecting that all use of evidence presupposes both a *factum probandum* and a *factum probans*, so that the latter or evidentiary fact is always relative to the former or proposition to be proved; and by framing for every evidentiary problem in the present region two queries, What is desired to be proved? and, What is offered as tending to prove it? The solution is usually half in sight when the way has been thus cleared.]

1. *Character as Evidence or in Issue.*

§ 14 *b*. **Character as Evidence of an Act done.** [That a human being has a moral disposition or character of a certain sort is of more or less probative value in indicating the likelihood of his doing or not doing an act of a related sort; for example, a disposition as to violence throws light on the probability of a violent killing, and a disposition as to honesty on the probability of committing a fraud. Nevertheless, character is usually not received as evidentiary for such a purpose, the reasons being chiefly the first and the third of those mentioned in the preceding section.

(1) *Character of an Accused Person.* The prosecution in a criminal case is not allowed to resort to the accused's bad character as a basis of inference to his guilt; the reason being that such evidence is too likely to move the jury to condemnation irrespective of his actual guilt of the offence charged.[1] But the accused himself may always invoke his good character as tending to disprove his commission of the offence, no matter what the grade of the offence,[2] and no matter how strong the evidence against him.[3] Moreover, if the accused has offered his good character, the prosecution may in reply introduce his bad character;[4] not so much by way of exception to the rule above mentioned as in order to prevent the accused from imposing upon the tribunal by false evidence of good character. The character, by whichever party offered, must be as to the specific trait — *e. g.* honesty, violence, chastity, etc. — involved in the act charged.[5] The time and the place of the character are matters more easily explained in treating of Reputation.[6] When the accused becomes a witness in his own behalf, his character as a witness but not as a defendant may be put in evidence against him.[7]

(2) *Character of Complainant in Rape.* The lack of consent of the woman being an element in the crime of rape, the woman's character for chastity is universally conceded to be admissible as affecting the probability of her consent.[8] The same rule should apply on

[1] See R. *v.* Rowton, Leigh & C. 520, 540; State *v.* Lapage, 57 N. H. 289, 296; People *v.* Shay, 147 N. Y. 78. Citations are hardly necessary for this fundamental rule.

[2] State *v.* Henry, 5 Jones L. 65; State *v.* Porter, Or., 49 Pac. 964; State *v.* Northrup, 48 Ia. 584; State *v.* Hice, 117 N. C. 782; Com. *v.* Webster, 5 Cush. 324. It was formerly held that it should be admitted in capital cases only: McNally, Evidence, 320; Com. *v.* Hardy, 2 Mass. 317.

[3] Steele *v.* People, 45 Ill 157; State *v.* Laxton, 76 N. C. 216; People *v.* Steward, 28 Cal. 395; People *v.* Van Dam, 107 Mich. 425; State *v.* King, 78 Mo. 556; State *v.* Blue, Utah, 53 Pac. 978. It was formerly thought that it should not be used except in doubtful cases: Davison's Trial, 31 How. St. Tr. 217. What its weight with the jury should be is a different question; see a good survey of it in 48 Ia. 584.

[4] Vin. Abr. xii, 48, tit. Evidence; R. *v.* Rowton, Leigh & C. 520; Com. *v.* Hardy, 2 Mass. 317; U. S. *v.* Holmes, 1 Cliff. 111.

[5] Erskine, in Hardy's Trial, 24 How St. Tr. 1076; Morgan *v.* State, 88 Ala. 224; Captain Kidd's Trial, 14 How. St. Tr. 146; Turner's Trial, 32 id. 1007; Kilgore *v.* State, 74 Ala. 7; Balkum *v.* State, 115 id. 117; Chung Sing *v.* U. S., Ariz., 36 Pac. 205; Kee *v.* State, 28 Ark. 155, 164; People *v.* Josephs, 7 Cal. 129; People *v.* Stewart, 28 id. 395; People *v.* Fair, 43 id. 137, 147; People *v.* Casey, 53 id. 360; People *v.* Doggett, 62 id. 27, 29; Tedens *v.* Schumers, 112 Ill. 263, 267; Fletcher *v.* State, 49 Ind. 124, 131; State *v.* Bloom, 68 id. 54; Carr *v.* State, 135 id. 1; Gordon *v.* State, 3 Ia. 415; State *v.* Kinley, 43 id. 295; State *v.* Curran, 51 id. 112, 117; State *v.* Heacock, id., 76 N. W. 654; State *v.* Parker, 7 La. An. 83, 88; People *v.* Garbutt, 17 Mich. 9, 16; State *v.* Dalton, 27 Mo. 15; State *v.* King, 83 id. 556; Basye *v.* State, 45 Nebr. 261; State *v.* Pearce, 15 Nev. 188, 190; Cathcart *v.* Com., 37 Pa. 108, 111; Poyner *v.* State, Tex. Cr., 48 S. W. 516. *Contra:* Hopps *v.* People, 31 Ill. 385; State *v.* Knapp, 45 N. H. 157.

[6] *Post*, § 461 *d*.

[7] *Post*, § 444 *b*.

[8] R. *v.* Ryan, 2 Cox Cr. 115; People *v.* Johnson, 106 Cal. 289; R. *v.* Clarke, 2 Stark. 243; R. *v.* Tissington, 1 Cox Cr. 48; R. *v.* Clay, 5 id. 146; Camp *v.* State, 8 Kelly 417, 420; McQuirk *v.* State, 84 Ala. 435, 438; Pleasant *v.* State, 15 Ark. 624,

a charge of enticement for prostitution;[9] but obviously not on a charge of rape of one below the age of consent,[10] and perhaps not on a charge of assault with intent to rape.[11] Professional prostitution is here to be assimilated to unchaste character.[12]

(3) *Character of Deceased in a Homicide Charge.* Where the issue of self-defence is made, and the question arises whether the deceased was the aggressor, his character as to violence may throw light on this question. Most of the Courts admitting it for this purpose prescribe as a condition that there shall be some independent evidence of the deceased's aggression, or, in the phrase of some, of an overt act of aggression by the deceased.[13] This use of character, which is of comparatively recent recognition, must be distinguished from that mentioned *post*, § 14 *c*; the important difference being that for the present purpose it is not necessary to show that the character was known by or communicated to the defendant.

(4) *Parties in Civil Causes.* Because of the usual slight probative value of a party's character, and of its confusion of issues to little pur-

653; People *v.* Benson, 6 Cal. 221; People *v.* Kuches, id., 52 Pac. 1002; State *v.* Shields, 45 Conn. 256, 263; Rise *v.* State, 35 Fla. 236; Shirwin *v.* People, 69 Ill. 56, 59; Dimick *v.* Downs, 82 id. 573; Wilson *v.* State, 16 Ind. 393; South Bend *v.* Hardy, 98 id. 582; Anderson *v.* State, 104 id. 471; Carter *v.* Cavenaugh, 1 Greene, 171, 175; Com. *v.* Harris, 131 Mass. 336; People *v.* McLean, 71 Mich. 310; Brown *v.* State, 72 Miss. 997; State *v.* Duffey, 128 Mo. 549; State *v.* Forschner, 43 N. H. 89; O'Blenis *v.* State, 47 N. J. L. 279; People *v.* Jackson, 3 Park. Cr. 398; People *v.* Abbot, 19 Wend. 197; Woods *v.* People, 55 N. Y. 515; State *v.* Jefferson, 6 Ired. 305; State *v.* Cherry, 63 N. C. 32; State *v.* Hairston, id., 28 S. E. 492 (general character); McCombs *v.* State, 8 Oh. St. 643, 646; McDermott *v.* State, 13 id. 331, 335; Titus *v.* State, 7 Baxt. 132, 135; State *v.* McCune, Utah, 51 Pac. 818; State *v.* Johnson, 28 Vt. 512; State *v.* Reed, 39 id. 417; Watry *v.* Forbes, 18 Wis. 500. *Contra:* State *v.* Morse, 67 Me. 429.

[9] Brown *v.* State, 72 Md. 468, 475, 477.

[10] People *v.* Johnson, 106 Cal. 289; People *v.* Abbott, 97 Mich. 484; State *v.* Whitesell, 142 Mo. 467.

[11] *Accord:* R. *v.* Clarke, 2 Stark. 243. *Contra:* Davenport *v.* Russell, 5 Day 145, 148.

[12] R. *v.* Barker, 3 C. & P. 589; R. *v.* Holmes, 12 Cox Cr. 143; R. *v.* Riley, 16 id. 195; People *v.* Abbot, 19 Wend. 196; Woods *v.* People, 55 N. Y. 515; State *v.* Johnson, 28 Vt. 514. For the use of particular acts of unchastity, see *post*, § 14 *g*.

[13] The cases are contradictory, and space does not suffice to indicate the decision in each: Findlay *v.* Pruitt, 9 Port. 195, 199; Fields *v.* State, 47 Ala. 603; Eiland *v.* State, 52 id. 333; Roberts *v.* State, 68 id. 165; Hussey *v.* State, 88 id. 134; Palmore *v.* State, 29 Ark. 248, 263; People *v.* Murray, 10 Cal. 309; Williams *v.* Fambro, 30 Ga. 233; Dukes *v.* State, 11 Ind. 557, 565; Fields *v.* State, 134 id. 46, 56; State *v.* Spendlove, 44 Kan. 1; Com. *v.* Hoskins, Ky., 35 S. W. 284; State *v.* Burns, 30 La. An. 679; State *v.* Johnson, ib. 921; State *v.* Garic, 35 id. 970, 971; State *v.* Nash, 45 id. 1137, 1141; Costley *v.* State, 48 Md. 175; People *v.* Garbutt, 17 Mich. 9, 15; State *v.* Dumphey, 4 Minn. 438, 445; Jolly *v.* State, 13 Sm. & M. 223; Wesley *v.* State, 37 Miss. 327, 346; State *v.* Jackson, 17 Mo. 544; State *v.* Rider, 90 id. 61; State *v.* Wells, 1 N. J. L. 424, 429; Thomas *v.* People, 67 N. Y. 224; People *v.* Druse, 103 N. Y. 655; State *v.* Tackett, 1 Hawks, 210, 216; Pierce *v.* Myrick, 1 Dev. 345; State *v.* Tilly, 3 Ired. 424; State *v.* Barfield, 8 id. 344, 349; Bottoms *v.* Kent, 3 Jones L. 154; State *v.* Hogue, 6 id. 381, 384; State *v.* Floyd, ib. 392, 398; State *v.* Turpin, 77 N. C. 473, 480; State *v.* Chavis, 80 id. 357; State *v.* Byrd, id., 28 S. E. 353; Gandolfo *v.* State, 11 Oh. St. 114, 118; Marts *v.* State, 26 id. 162, 168; Com. *v.* Farrigan, 44 Pa. 388; Copeland *v.* State, 7 Humph. 479, 495; Williams *v.* State, 3 Heisk. 376, 396; Henderson *v.* State, 12 Tex. 525, 530.

pose, and for other reasons variously stated by different judges and not easy to disentangle or to define,[14] it has come to be generally accepted that the character of a party in a civil cause cannot be looked to as evidence that he did or did not do an act charged.[15]

(*a*) It is sometimes said that there is an exception where an act of negligence is in issue and there were no eye witnesses of the occurrence, and that here the person's character for *negligence* or prudence is admissible; but this exception does not generally prevail.[16]

(*b*) It is sometimes said that the plaintiff in an action for defamation charging him with crime may, upon a plea of truth, use his good character as evidence in disproof of the charge, on the theory that he is practically in the position of a defendant charged with crime;

[14] Consult Att'y-Gen'l *v.* Radloff, 10 Exch. 97; Etting *v.* U. S., 11 Wheat. 59, 73 Smets *v.* Plunket, 1 Strobh. 372, 375; Wright *v.* McKee, 37 Vt. 163.

[15] Among the following cases are a few odd instances of admission: Ward *v.* Herndon, 5 Port. 382, 385; Powers *v.* Armstrong, 62 Ark. 267; Woodruff *v.* Whittlesey, Kirby, 60, 62; Grandis *v.* Branden, 5 Day, 260, 271; Anthony *v.* Grand, 101 Cal. 235; Stow *v.* Converse, 3 Conn. 345; Humphrey *v.* Humphrey, 7 id. 117; Boatright *v.* Porter, 32 Ga. 130, 140; Crose *v.* Rutledge, 81 Ill. 267; Rogers *v.* Lamb, 3 Blackf. 155; Walker *v.* State, 6 id. 4; Church *v.* Drummond, 7 id. 19; Cox *v.* Pruitt, 25 Ind. 92, 94; Gebbart *v.* Burket, 57 id. 379, 385; Houser *v.* State, 93 id. 231; Van Sickle *v.* Schenck, id., 50 N. E. 381; Stone *v.* Ins. Co., 68 Ia. 737, 742; Simpson *v.* Westenberger, 28 Kan. 756; Potter *v.* Webb, 6 Me. 14, 18; Low *v.* Mitchell, 18 id. 372, 374; Thayer *v.* Boyle, 30 id. 475, 480; Soule *v.* Bruce, 67 id. 584; Heywood *v.* Reed, 4 Gray, 574, 581; Day *v.* Ross, 154 Mass. 14; Geary *v.* Stevenson, 169 id. 23; Fahey *v.* Crotty, 63 Mich. 383; Schmidt *v.* Ins. Co., ib. 529, 535; Munroe *v.* Godkin, 111 id. 183; Kingston *v.* R. Co., id., 70 N. W. 315; Leinkauf *v.* Brinker, 62 Miss. 255; McKern *v.* Calvert, 59 Mo. 242; Dudley *v.* McCluer, 65 id. 241; Vawter *v.* Hultz, 112 id. 633, 639; Stoppert *v.* Nierle, 45 Nebr. 105; Washburn *v.* Washburn, 5 N. H. 195; Matthews *v.* Huntley, 9 id. 146, 148; Boardman *v.* Woodman, 47 id. 120; Fowler *v.* Ins. Co., 6 Cow. 673; Gough *v.* St. John, 16 Wend. 645 (repudiating Ruan *v.* Perry, 3 Caines 120, and Townsend *v.* Graves, 3 Paige Ch. 453, 455); Pratt *v.* Andrews, 4 N. Y. 496; Jeffries *v.* Harris, 3 Hawks 105; McRea *v.* Lilly, 1 Ired. 118; Beal *v.* Robeson, 8 id. 276; Bottoms *v.* Kent, 3 Jones L. 154; Marcom *v.* Adams, N. C., 29 S. E. 333; Munkers *v.* Ins. Co., 30 Or. 211; Nash *v.* Gilkeson, 5 S. & R. 352; Dietrick *v.* Dietrick, ib. 208; Nusscar *v.* Arnold, 13 id. 323, 328; Anderson *v.* Long, 10 id. 55, 60; Mertz *v.* Detweiler, 8 W. & S. 376, 378; Porter *v.* Seiler, 23 Pa. 424, 429; Battles *v.* Laudenslager, 84 id. 446, 452; Amer. F. Ins. Co. *v.* Hazen, 110 id. 530, 537; Rhodes *v.* Bunch, 3 McC. 66; Smets *v.* Plunket, 1 Strobh. 372; Gable *v.* Ranch, 50 S. C. 95; Ketland *v.* Bissett, 1 Wash. C. C. 144; Lander *v.* Seaver, 32 Vt. 114; Wright *v.* McKee, 37 id. 161.

[16] The authorities on both sides are as follows: Brown *v.* R. Co., 22 Q. B. D. 393; Towle *v.* P. I. Co., 98 Cal. 342; Morris *v.* East Haven, 41 Conn. 252; Saussy *v.* R. Co., 22 Fla. 327, 329; Chic. R. I. & R. Co. *v.* Clark, 108 Ill. 113; Tol. S. L. & K. C. R. Co. *v.* Bailey, 145 Ill. 159; Ill. C. R. Co. *v.* Ashline, 171 id. 313; Penn. F. W. & C. R. Co. *v.* Ruby, 38 Ind. 295, 311; Hall *v.* Rankin, 87 Ia. 261; So. Kans. R. Co. *v.* Robbins, 43 Kan. 145, 148; Erb *v.* Popritz, id., 52 Pac. 871; Lawrence *v.* Mt. Vernon, 35 Me. 100, 104; Dunham *v.* Rackliff, 71 id. 345, 349; Com. *v.* Worcester, Thacher Cr. C. 100, 102; Adams *v.* Carlisle, 21 Pick. 146; Baldwin *v.* R. Co., 4 Gray 333; Robinson *v.* F. & W. R. Co., 7 id. 92, 95; Tenney *v.* Tuttle, 1 All. 185; Gahagan *v.* R. Co., ib. 187; McDonald *v.* Savoy, 110 Mass. 49; Fonda *v.* R. Co., Minn., 74 N. W. 166; Culbertson *v.* R. Co., Mo., 36 S. W. 834; State *v.* M. & L. Railroad, 52 N. H. 549; Warner *v.* R. Co., 44 N. Y. 465, 471; Hays *v.* Millar, 77 Pa. 238; Balt. & O. R. Co. *v.* Colvin, 118 id. 230; Misso. & K. T. R. Co. *v.* Johnson, Tex., 48 S. W. 568; Bryant *v.* R. Co., 56 Vt. 710, 712; Central Vt. R. Co. *v.* Ruggles, 33 U. S. App. 567; Harriman *v.* P. P. C. Co., id., 85 Fed. 353; Carter *v.* Seattle, Wash., 53 Pac. 1102.

For other cases in which a negligent habit rather than a negligent character is involved, see *post*, § 14 *j*. For negligent character in issue, see *post*, § 14 *d*.

but this exception also is generally repudiated.[17] That the defendant in the action for defamation may not use the plaintiff's bad character as evidence to prove a plea of truth is conceded.[18] (*c*) There are a few cases of admission, usually those in which skill or the like is in issue, that stand as exceptional without formulating any general principle.[19]

(5) Occasionally the character of a *third person*, not a party nor the agent of a party, is admitted exceptionally.[20]

(6) The disposition of an *animal*, as showing his probable conduct on a certain occasion, is admissible;[21] the various objections to the above sorts of evidence not being here applicable.]

§ 14 *c*. **Character as otherwise Evidentiary.** [The character of a person may also be evidentiary otherwise than as tending to show an act done or not done by him. Such other uses commonly take as the basis of inference the reputed, as distinguished from the actual character; *i. e.* the reputation is used as indicating that some other person would probably have heard of it and thus become aware of the character of the person. The chief instances are those in which reputation is used as indicating knowledge, belief, reasonable grounds, or the like, in some other person. (1) The reputed character of an *employee* is of course admissible as tending to show that the employer had knowledge of the employee's incompetency, that incompetency

[17] The authorities on both sides are as follows: Starkie, Evidence, II, 305, 463; Sample *v.* Wynn, Busbee 321; Matthews *v.* Huntly, 9 N. H. 146; Cornwall *v.* Richardson, 1 Ry. & Mo. 305; Stow *v.* Converse, 3 Conn. 343; Parke *v.* Blackiston, 3 Harringt. 373, 375; Cox *v.* Strickland, 101 Ga. 482; McCabe *v.* Platter, 6 Blackf. 405; Byrket *v.* Monohon, 7 id. 84; Miles *v.* Van Horn, 17 Ind. 249; Harm *v.* Wilson, 28 id. 301; Wilson *v.* Barnett, 45 id. 163, 168; Downey *v.* Dillon, 52 id. 442, 452; Gebhart *v.* Burket, 57 id. 381; Hanners *v.* McClelland, 74 Ia. 319; Harding *v.* Brooks, 5 Pick. 244; Finley *v.* Widmer, Mich., 70 N. W. 433; Chesley *v.* Chesley, 10 N. H. 327, 330; Severance *v.* Hilton, 24 id. 148; Houghtaling *v.* Kilderhouse, 1 N. Y. 530; Pratt *v.* Andrews, 4 id. 496; Burton *v.* March, 6 Jones L. 409, 412.

[18] Jones *v.* Stevens, 11 Price 235; Cornwall *v.* Richardson, 1 Ry. & Mo. 305; Parke *v.* Blackiston, 3 Harringt. 373, 375; Com. *v.* Snelling, 15 Pick. 337, 343; Stone *v.* Varney, 7 Metc. 86, 92; Dewit *v.* Greenfield, 5 Oh., Pt. 1, 226. *Contra, semble:* Sanford *v.* Rowley, 93 Mich. 119. Distinguish the use of bad reputed character in mitigation of damages, *post*, § 14 *d*.

[19] Grannis *v.* Branden, 5 Day 260, 271; Jeffries *v.* Harris, 3 Hawks 105; *contra:* Mertz *v.* Detweiler, 8 W. & S. 376, 378.

[20] Pendrell *v.* Pendrell, 2 Str. 925 (to show illegitimacy the character of the mother for unchastity was received); Blackman *v.* State, 36 Ala. 295; Com. *v.* Gray, 129 Mass. 476; Fall *v.* Overseers, 3 Munf. 495, 505; Rowt *v.* Kile, Gilmer 102.

[21] Broderick *v.* Higginson, Mass., 48 N. E. 269; Chamberlain *v.* Enfield, 43 N. H. 356; Whittier *v.* Franklin, 46 id. 23; Turnpike Co. *v.* Hearn, 87 Tenn. 291; Dover *v.* Winchester, Vt., 41 Atl. 445. *Excluded:* Kelly *v.* Anderson, R. I., 37 Atl. 12; Stone *v.* Langworthy, id., 40 Atl. 832.

The disposition *after* the time in question may be relevant, under the cases first cited.

A dog's ancestry may be used to show his value: Citizens' P. T. Co. *v.* Dew, Tenn., 45 S. W. 790.

For specific conduct of the animal, as evidence of its disposition, see *post*, § 14 *g*.

For the reputation of an animal, as evidence of the owner's knowledge of its vices, see *post*, § 14 *p*.

For specific instances of its behavior, as showing a certain object to be calculated to frighten animals, see *post*, § 14 *v* (3).

and the knowledge of it being by the substantive law a fact to be proved.[1] In some jurisdictions it is sufficient in law if the employer had the means to know and ought to have known, and in such a case the reputation is not used evidentially but would suffice as a matter of law to charge the employer.[2] (2) The reputed character of the *deceased on a charge of homicide* may be evidential as indicating his reasonable apprehension of an attack, upon an issue of self-defence;[3] for in a quarrel or other encounter the opponent's violent or turbulent character, as known to the accused, may give to his conduct a significance of hostility which would be wanting in the case of a man of ordinary disposition. It is the essence of this principle, however, as all Courts concede, that the reputed character of the deceased should have been known to the accused; and, furthermore, most Courts require (in order to prevent the abuse of the doctrine by treating the deceased's bad character merely as an excuse for the killing) that there should be some independent evidence of aggression by the deceased, or, as it is often phrased, some overt act of aggression;[4] the prosecu-

[1] Cook *v.* Parham, 24 Ala. 21, 34; C. & A. R. Co. *v.* Sullivan, 63 Ill. 293, 297; P. F. W. & C. R. Co. *v.* Ruby, 38 Ind. 294, 311; Cherokee Co. *v.* Dickson, 55 Kan. 62; Dunham *v.* Rackliff, 69 Me. 345, 349; Norf. & W. R. Co. *v.* Hoover, 79 Md. 253, 263; Gahagan *v.* R. Co., 1 All. 187, 190; Gilman *v.* R. Co., 10 id. 233, 235, 239; 13 id. 433, 444; Monahan *v.* Worcester, 150 Mass. 439; Driscoll *v.* Fall River, 163 id. 105; Cox *v.* R. Co., id., 49 N. E. 97; Davis *v.* R. Co., 20 Mich. 105, 123; Hilts *v.* R. Co., 55 id. 437, 442; State *v.* M. & L. Railroad, 52 N. H. 539, 549; Youngs *v.* R. Co., 154 N. Y. 764; Park *v.* R. Co., 155 id. 215; Tex. & P. R. Co. *v.* Johnson, 89 Tex. 519; Balt. & O. R. Co. *v.* Henthorne, 43 U. S. App. 113; Central Vt. R. Co. *v.* Ruggles, 33 id. 567.

[2] Davis *v.* R. Co., 20 Mich. 105, 123; Monahan *v.* Worcester, Gilman *v.* R. Co., Norf. & W. R. Co. *v.* Hoover, *supra*.

[3] Compare the other use, in the preceding section, 14 *b* (3).

[4] Space does not suffice to indicate the exact tenor of each decision, nor the solution of the detailed questions that arise; the Louisiana rulings should be avoided by other Courts, as they are in hopeless confusion through frequently failing to take note of the preceding cases, and as their overt-act limitation is peculiar; for the general principle, consult the opinions of Lumpkin, J., in Monroe *v.* State, 5 Ga. 137; Walker, J., in Franklin *v.* State, 29 Ala. 17; Fisher, J., in Cotton *v.* State, 31 Miss. 511; Roberts, C. J., in Horbach *v.* State, 43 Tex. 250 (best statement); the precedents are as follows (briefly summarizing them, the doctrine is recognized wherever it has been invoked, except in Delaware, Maine, and Massachusetts): Qnessenberry *v.* State, 3 Stew. & P. 308, 315; Pritchett *v.* State, 22 Ala. 39; Franklin *v.* State, 29 id. 10, 14; Eiland *v.* State, 52 id. 333; Roberts *v.* State, 68 id. 165; DeArman *v.* State, 71 id. 360; Storey *v.* State, ib. 329, 341; Williams *v.* State, 74 id. 18, 20; Smith *v.* State, 88 id. 77; Amos *v.* State, 96 id. 120; Karr *v.* State, 100 id. 4; Rufus *v.* State, id., 23 So. 144; Naugher *v.* State, id., 23 So. 26; Palmore *v.* State, 29 Ark. 248, 261, 263; People *v.* Murray, 10 Cal. 309; People *v.* Lombard, 17 id. 316, 320; People *v.* Edwards, 41 id. 640, 643; People *v.* Howard, 112 id. 135; Davidson *v.* People, 4 Col. 145, 150; State *v.* Thawley, 4 Harringt. 562; Bond *v.* State, 21 Fla. 738, 756; Garner *v.* State, 28 id. 113, 136; 31 id. 170, 174; Roten *v.* State, 31 id. 514, 523; Steele *v.* State, 33 id. 348, 350; Hart *v.* State, 38 id. 39; Allen *v.* State, ib. 44; Monroe *v.* State, 5 Ga. 85, 137; Keener *v.* State, 18 id. 194, 220; Bowie *v.* State, 19 id. 7; Croom *v.* State, 90 id. 430; Daniel *v.* State, id., 29 S. E. 767; People *v.* Stack, 1 Ida. 218; Davis *v.* State, 114 Ill. 86, 95; Dukes *v.* State, 11 Ind. 556, 565; Fahnestock *v.* State, 23 id. 231, 237; Boyle *v.* State, 97 id. 322, 324; Bowlus *v.* State, 130 id. 227; Wise *v.* State, 2 Kan. 419; State *v.* Potter, 13 id. 414, 423; State *v.* Riddle, 20 id. 711, 714; State *v.* Scott, 24 id. 68, 70; Payne *v.* Com., 1 Metc. Ky. 370, 379; Bohannon *v.* Com., 8 Bush 481, 488; Riley *v.* Com., 94 Ky. 266; State *v.* Chandler, 5 La. An. 489;

tion is, however, usually not allowed to use in the same way the deceased's reputation for peaceableness,[5] except in rebuttal,[6] though principle would seem to lead to the opposite conclusion.[7]

(3) The reputed character of an arrested person, on a charge of *malicious prosecution* or other issue in which the reasonable grounds for arrest or prosecution are involved, may tend to show the existence of such grounds, and is generally admitted.[8]]

§ 14 *d.* **Character in Issue.** [Character is often, by the substantive law of the case, a part of the issue, and is not used as tending to prove any other fact. In such a case its admission involves only a question of that substantive law, and no question of evidence. The

State *v.* D'Angelo, 9 id. 48; State *v.* Brien, 10 id. 453; State *v.* Jackson, 12 id. 679; State *v.* Robertson, 38 id. 340; State *v.* Burns, ib. 679; State *v.* Vance, 32 id. 1177; State *v.* Ricks, ib. 1098; State *v.* Jackson, 33 id. 1087; State *v.* McNeely, 34 id. 1022; State *v.* Claude, 35 id. 71, 74; State *v.* Garic, ib. 970, 971; State *v.* Watson, 36 id. 148; State *v.* Birdwell, ib. 859, 861; State *v.* Saunders, 37 id. 389; State *v.* Ford, ib. 443, 460; State *v.* Janvier, ib. 644; State *v.* Kervin, ib. 782; State *v.* Jackson, ib. 896; State *v.* Williams, 40 id. 168; State *v.* Cosgrove, 42 id. 753; State *v.* Paterno, 43 id. 514; State *v.* Christian, 44 id. 950, 954; State *v.* Stewart, 45 id. 1164, 1166; State *v.* Carter, ib. 1326; State *v.* Nash, ib. 1137, 1141; State *v.* Williams, 46 id. 708; State *v.* Beck, ib. 1419; State *v.* Green, ib. 1522; State *v.* Vallery, 47 id. 182; State *v.* Campagnet, 48 id. 1470; State *v.* Field, 14 Me. 244; Com. *v.* York, 7 Law Reporter, Mass., 497, 507; Com. *v.* Hilliard, 2 Gray 294; Com. *v.* Mead, 12 id. 167; People *v.* Garbutt, 17 Mich. 9, 15; Brownell *v.* People, 38 id. 732, 735; State *v.* Dumphey, 4 Minn. 438, 445; Jolly *v.* State, 13 Sm. & M. 223, 225; Cotton *v.* State, 31 Miss. 504; Wesley *v.* State, 37 id. 327, 346; Chase *v.* State, 46 id. 683, 703; Harris *v.* State, 46 id. 319, 325; Spivey *v.* State, 58 id. 858, 864; King *v.* State, 65 id. 576, 582; Moriarty *v.* State, 62 id. 654, 661; Smith *v.* State, id., 23 So. 260; State *v.* Jackson, 17 Mo. 544, 548; State *v.* Hicks, 27 id. 588, 590; State *v.* Keene, 50 id. 357, 360; State *v.* Bryant, 55 id. 75, 78; State *v.* Harris, 59 id. 550, 556; State *v.* Elkins, 63 id. 165; State *v.* Kennade, 121 id. 405, 415; State *v.* Pearce, 15 Nev. 188, 191; People *v.* Lamb, 41 N. Y. 360, 366; Abbott *v.* People, 86 id. 461, 469; State *v.* Turpin, 77 N. C. 473, 477; State *v.* Chavis, 80 id. 357; State *v.* Rollins, 113 id. 722, 732; State *v.* Byrd, id., 28 S. E. 353; Gandolfo *v.* State, 11 Oh. St. 114, 118; Marts *v.* State, 26 id. 162, 168; State *v.* Morey, 25 Or. 241, 255; Pa. *v.* Robertson, Add. 246; Com. *v.* Lenox, 3 Brewst. 249, 251; Com. *v.* Ferrigan, 44 Pa. 388; Com. *v.* Straesser, 153 id. 451; State *v.* Smith, 12 Rich. 430, 443; State *v.* Turner, 29 S. C. 34, 41; Wright *v.* State, 9 Yerg. 342; Carroll *v.* State, 3 Humph. 315, 317; Harmon *v.* State, 3 Head 243; Williams *v.* State, 3 Heisk. 376, 397; Jackson *v.* State, 6 Baxt. 452, 465; Henderson *v.* State, 12 Tex. 525, 530; Dorsey *v.* State, 34 id. 651, 658; Horbach *v.* State, 43 id. 242, 255; Evers *v.* State, 31 Tex. Cr. 318; Skaggs *v.* State, ib. 563; Smith *v.* U. S., 161 U. S. 85; Andersen *v.* U. S., 170 id. 481; State *v.* Lull, 48 Vt. 581; Dock *v.* Com., 21 Gratt. 909, 911; State *v.* McGonigle, 14 Wash. 594; State *v.* Evans, 33 W. Va. 417, 424; State *v.* Nett, 50 Wis. 524, 527; Brucker *v.* State, 19 id. 539.

[5] People *v.* Anderson, 39 Cal. 704; People *v.* Powell, 87 id. 348, 362; Pound *v.* State, 43 Ga. 88, 129; State *v.* Potter, 13 Kan. 414, 423; State *v.* Vaughan, 22 Nev. 285; Dock *v.* Com., 21 Gratt. 909, 912.

[6] Davis *v.* People, 114 Ill. 86, 95; Dukes *v.* State, 11 Ind. 557, 565; Fields *v.* State, 134 id. 45, 56; Thomas *v.* People, 67 N. Y. 218, 224.

[7] Carroll *v.* State, 3 Humph. 315, 317; see State *v.* Pettit, 119 Mo. 410.

[8] Fabrigas *v.* Mostyn, 20 How. St. Tr. 94; Rodriguez *v.* Tadmire, 2 Esp. 721; Downing *v.* Butcher, 2 M. & Rob. 374; Martin *v.* Hardesty, 27 Ala. 458; Oliver *v.* Pate, 43 Ind. 132, 138; Gregory *v.* Thomas, 2 Bibb 286; Bacon *v.* Towne, 4 Cush. 240; Geary *v.* Stevenson, 169 Mass. 23; Dorsey *v.* Clapp, 22 Nebr. 564, 568; Beckman *v.* Souther, N. H., 36 Atl. 14. *Contra:* Newsam *v.* Carr, 2 Stark. 69; R. *v.* Turbefield, Leigh & C. 495.

For the similar use of particular acts of misconduct by the arrested or prosecuted person, see *post*, § 14 *p*.

chief instances of this use may here be noted, in order to discriminate them from the foregoing evidentiary uses.

(1) *Reputed Bad Character as Mitigating Damages for Defamation.* Where the question is as to the amount of compensation for defamation of character, it is a plausible argument that the defendant should be allowed to show how little the plaintiff had to lose.[1] The argument in reply is that if such were the rule a person of poor reputation could never recover but nominal or light damages and might thus be defamed with impunity.[2] In most jurisdictions the former argument has prevailed, and the defendant may show the plaintiff's bad reputation in mitigation. Several distinctions, however, must be noted. (*a*) If the general issue is pleaded, the amount of damages is properly in issue, and the result in almost all jurisdictions is as above; (*b*) if a justification of truth is pleaded, some Courts hold that to allow the defendant to go into the plaintiff's reputation would in effect merely allow him to abuse the plaintiff's character instead of properly proving his plea;[3] and (*c*) this is even maintained by some where the charge is a general one — *e. g.* A is a fraudulent rogue — and where the general character is thus in issue on the plea of truth;[4] (*d*) in the Courts admitting the plaintiff's bad reputation, a further difference arises as to whether (*d'*) his general bad reputation alone may be used,[5] or (*d''*) only his reputation for the particular trait involved in the defamation, *e. g.* honesty, chastity, etc.,[6] or (*d'''*) both may be used. Speaking roughly and tentatively, the state of the law seems to be: (*a*) is now the rule everywhere except perhaps in Delaware and Vermont; (*b*) is upheld probably in Delaware and Pennsylvania, but repudiated in England, Illinois, Indiana, Massachusetts, New York, Virginia, and perhaps Wisconsin; (*c*) is perhaps law to the same extent; (*d'*) is no longer the law anywhere; (*d''*) is maintained in Kentucky, Michigan, Missouri, Pennsylvania, Vermont, and perhaps Wisconsin; (*d'''*) is the rule in England, Massachusetts, New Hampshire, South Carolina, and Virginia.[7] (*e*) It has also been a matter of great controversy

[1] See the exposition in Holt's N. P. 308, *arguendo;* Scott *v.* Sampson, 8 Q. B. D. 491; Foot *v.* Tracy, 1 Johns. 46; Buford *v.* M'Luny, 1 Nott & M. 269; Sawyer *v.* Eifert, 2 id. 515.

[2] See the expositions in Jones *v.* Stevens, 11 Price 235, 256; Foot *v.* Tracy, *supra;* Buford *v.* M'Luny, *supra.*

[3] See M'Nutt *v.* Young, 8 Leigh 542.

[4] See J'Anson *v.* Stuart, 1 T. R. 748.

[5] See Steinman *v.* McWilliams, 6 Pa. 175; Conroe *v.* Conroe, 47 id. 202.

[6] See Wilson *v.* Noonan, 27 Wis. 614.

[7] Space does not suffice to analyze each ruling: Dennis *v.* Pawling, Vin. Abr. XII, 159; Hickinbothom *v.* Leach, 10 M. & W. 361; Scott *v.* Sampson, 8 Q. B. D. 491 (noting intervening rulings); Zierenberg *v.* Labouchere, 1892, 2 Q. B. 183; Powell *v.* Harper, 5 C. & P. 590, 592; Stark. Evid., II, 306 *k*, 641 *e;* Jones *v.* Stevens, 11 Price 235, 273; Myers *v.* Carrie, 22 U. C. Q. B. 470; Commons *v.* Walters, 1 Port. 322, 327; Waters *v.* Jones, 3 id. 442, 450; Bradley *v.* Gibson, 9 Ala. 408; Scott *v.* McKinnish, 15 id. 665; Brunson *v.* Lynde, 1 Root 354; Seymour *v.* Merrills, ib. 459; Austin *v.* Hanchet, 2 id. 148; Stow *v.* Converse, 3 Conn. 346; Treat *v.* Browning, 4 id. 414;

whether, in showing the plaintiff's bad reputation, the defendant could show less than a real reputation, *i. e.* a prevalent rumor or common belief that the plaintiff had done the act charged; the argument being that in that event he could not have been much injured by the charge.[8] This argument has been in most jurisdictions repudiated.[9]

(2) *Reputed Bad Character as Mitigating Damages in other Actions.* On the generally accepted principle of the preceding paragraph, reputed character may be considered in mitigation of damages in any action in which the harm to reputation is recognized as an element of

Bennett *v.* Hyde, 6 id. 24; Waples *v.* Burton, 2 Harringt. 446; Parke *v.* Blackiston, 3 id. 373, 375; Young *v.* Bennett, 5 Ill. 43, 47; Sheahan *v.* Collins, 20 id. 328; Henson *v.* Veatch, 1 Blackf. 371; Sanders *v.* Johnson, 6 id. 52; Burke *v.* Miller, ib. 155; McCabe *v.* Platter, ib. 405; Bickenstaff *v.* Perrin, 27 Ind. 528; Hanners *v.* McClelland, 74 Ia. 318, 322; Eastland *v.* Caldwell, 2 Bibb 21, 23; Campbell *v.* Bannister, 79 Ky. 209; Ratcliff *v.* Courier-Journal, 99 Ky. 416; Kendrick *v.* Kemp, 6 Mart. N. S. La. 500; Smith *v.* Wyman, 16 Me. 14; Wolcott *v.* Hall, 6 Mass. 518; Ross *v.* Lapham, 14 id. 279; Bodwell *v.* Swan, 3 Pick. 376; Com. *v.* Snelling, 15 id. 337, 344; Stone *v.* Varney, 7 Metc. 86; Chapman *v.* Ordway, 5 All. 595; Parkhurst *v.* Ketchum, 6 id. 406; Peterson *v.* Morgan, 116 Mass. 350; Clark *v.* Brown, ib. 509; Hastings *v.* Stone, 130 id. 76, 78; Proctor *v.* Houghtaling, 37 Mich. 41, 44; Bathrick *v.* Post, 50 id. 641; Thibault *v.* Sessions, 101 id. 279, 290; Finley *v.* Widner, id., 70 N. W. 433; Georgia *v.* Bond, id., 72 N. W. 232; Fowler *v.* Fowler, id., 71 N. W. 1084; Candrian *v.* Miller, id., 73 N. W. 1004; Simmons *v.* Holster, 13 Minn. 249, 257; Powers *v.* Presgroves, 38 Miss. 227, 241; Anthony *v.* Stephens, 1 Mo. 254; Lamos *v.* Snell, 6 N. H. 413; Severance *v.* Hilton, 24 id. 148; Foot *v.* Tracy, 1 John. 46; Paddock *v.* Salisbury, 2 Cow. 811; Douglass *v.* Tousey, 2 Wend. 352; King *v.* Root, 4 id. 139; Hamer *v.* McFarlin, 4 Den. 509; Vick *v.* Whitfield, 2 Hayw. 222; Sample *v.* Wynn, Busbee 320; Dewit *v.* Greenfield, 5 Oh. 225; Fisher *v.* Patterson, 14 id. 418, 425; Anderson *v.* Long, 10 S. & R. 61; Henry *v.* Norwood, 4 Watts 347, 350; Smith *v.* Ruckecker, 4 Rawle 295; Steinman *v.* McWilliams, 6 Pa. 170, 174; Conroe *v.* Conroe, 47 id. 198; Moyer *v.* Moyer, 49 id. 210; Buford *v.* M'Luny, 1 Nott & M. 268; Sawyer *v.* Eifert, 2 id. 511; Anon., 1 Hill S. C. 251, 253; Randall *v.* Holsenbake, 3 id. 177; M'Nutt *v.* Young, 8 Leigh 542; Lincoln *v.* Chrisman, 10 id. 338, 342; Adams *v.* Lawson, 17 Gratt. 259; Smith *v.* Shumway, 2 Tyler 74; B—— *v.* I——, 22 Wis. 372; Wilson *v.* Noonan, 27 id. 599, 612; Maxwell *v.* Kennedy, 50 id. 645; Haskins *v.* Lumsden, 10 id. 359, 369; Campbell *v.* Campbell, 54 id. 90, 97; Shroyer *v.* Miller, 3 W. Va. 158, 161.

[8] See Bell *v.* Parke, 11 Ir. C. L. 413; Scott *v.* Sampson, 8 Q. B. D. 491; Long *v.* Brougher, 5 Watts 440.

[9] See Leicester *v.* Walter, 2 Camp. 251; Scott *v.* Sampson, 8 Q. B. D. 491 (noting intervening cases); Commons *v.* Walters, 1 Port. 323; Bradley *v.* Gibson, 9 Ala. 406; Holley *v.* Burgess, ib. 730; Bailey *v.* Hyde, 3 Conn. 463, 466; Treat *v.* Browning, 4 id. 408, 414; Cox *v.* Strickland, 101 Ga. 482; Sheahan *v.* Collins, 20 Ill. 328; Henson *v.* Veatch, 1 Blackf. 371; Sanders *v.* Johnson, 6 id. 54; Kelley *v.* Dillon, 5 Ind. 428; Bickenstaff *v.* Perrin, 27 id. 528; Hanners *v.* McClelland, 74 Ia. 320, 322; Barr *v.* Hack, 46 id. 310; Kendrick *v.* Kemp, 6 Mart. N. S. 500; Wolcott *v.* Hall, 6 Mass. 518; Alderman *v.* French, 1 Pick. 1, 17; Stone *v.* Varney, 7 Metc. 91; Watson *v.* Moore, 2 Cush. 140; Peterson *v.* Morgan, 116 Mass. 350; Proctor *v.* Houghtaling, 37 Mich. 41, 44; Wolff *v.* Smith, id., 70 N. W. 1010; Simmons *v.* Holster, 13 Minn. 249, 257; Powers *v.* Presgroves, 38 Miss. 227, 241; Anthony *v.* Stephens, 1 Mo. 254; Moberly *v.* Preston, 8 id. 462, 466; Mason *v.* Mason, 4 N. H. 114; Dame *v.* Kenney, 25 id. 318; King *v.* Root, 4 Wend. 129, 140; Kennedy *v.* Gifford, 19 id. 298, 301; Nelson *v.* Evans, 1 Dev. 9; Luther *v.* Skeen, 8 Jones L. 356; Dewit *v.* Greenfield, 5 Oh. 226; Fisher *v.* Patterson, 14 id. 418, 425; Van Derveer *v.* Sutphin, 5 Oh. St. 293, 298; Smith *v.* Ruckecker, 4 Rawle 295; Long *v.* Brougher, 5 Watts 439; Freeman *v.* Price, 2 Bail. 115; Anon., 1 Hill S. C. 251, 253; Randall *v.* Holsenbake, 3 id. 177; Haskins *v.* Lumsden, 10 Wis. 359. Compare the exclusion of particular acts as evidence of such reputed character in mitigation of damages, *post*, § 14 *h*.

recovery ; in particular, the daughter's reputation for chastity in the father's action for *seduction;* [10] the wife's reputation in the husband's action for *criminal conversation ;* [11] and the reputation of the plaintiff in an action for *malicious prosecution,*[12] breach of *promise of marriage,*[13] or *indecent assault.* [14]

(3) The plaintiff's *good reputed character* in the above instances should not be admitted until after the defendant has offered to show a bad reputation; because the reputation may be assumed to be good.[15]

(4) *Character otherwise in Issue.* In general, wherever by the substantive law of the case a person's character is a part of the issue, it may of course be proved; the chief remaining instances are (*a*) the character of the plaintiff for chastity, in an action for breach of *promise of marriage,* as an excuse for the breach ; [16] (*b*) the character of an *employee,* in actions by a fellow-servant against the employer ; [17] (*c*) the character of a house or a person on the charge of keeping a *house of ill-fame ;* here (*c'*) the reputation of the house is in issue, if the crime consists in the ill-fame of the house kept ; [18] (*c''*) the definition of such a house usually implies a resort to it by persons

[10] Bamfield *v.* Massey, 1 Camp. 460 ; Dodd *v.* Norris, 3 id. 519 ; Carpenter *v.* Wall, 11 A. & E. 804 ; M'Creary *v.* Grundy, 39 U. C. Q. B. 316 ; Drish *v.* Davenport, 2 Stew. 266, 270 ; Davenport *v.* Russell, 5 Day 145, 148 ; Robinson *v.* Burton, 5 Harringt. 335, 337 ; White *v.* Murtland, 71 Ill. 250, 264 ; Shattuck *v.* Myers, 13 Ind. 50 ; Bell *v.* Rinker, 29 id. 269 ; South Bend *v.* Hardy, 98 id. 580 ; Carter *v.* Cavenaugh, 1 Greene 171, 175 ; Boynton *v.* Kellogg, 3 Mass. 189 ; McKern *v.* Calvert, 59 Mo. 242 ; Akerley *v.* Haines, 2 Caines 292 ; Pratt *v.* Andrews, 4 N. Y. 495 ; Hoffman *v.* Kemerer, 44 Pa. 452 ; Reed *v.* Williams, 5 Sneed 580, 582 ; Thompson *v.* Clendening, 1 Head 287, 296 ; Watry *v.* Ferber, 18 Wis. 500, 503.

[11] Starkie, Evidence, II, 305; Davenport *v.* Russell, 5 Day 145, 148; Crose *v.* Rutledge, 81 Ill. 266 ; Pratt *v.* Andrews, 4 N. Y. 495 ; Anderson *v.* Long, 10 S. & R. 61; Ligon *v.* Ford, 5 Munf. 10, 16.

[12] Bacon *v.* Towne, 4 Cush. 240 ; Wolf *v.* Perryman, 82 Tex. 112, 120.

[13] McGregor *v.* McArthur, 5 U. C. C. P. 493 ; Burnett *v.* Simpkins, 24 Ill. 267 ; Williams *v.* Hollingsworth, 6 Baxt. 12, 16.

[14] Gore *v.* Curtis, 81 Me. 403, 405 ; Miller *v.* Curtis, 163 Mass. 127, 130; Mitchell *v.* Work, 13 R. I. 645.

[15] *Defamation ; accord:* Parke *v.* Blackiston, 3 Harringt. 373, 375; McCabe *v.* Platter, 6 Blackf. 405 ; Miles *v.* Vanhorn, 17 Ind. 249 ; Harm *v.* Wilson, 28 id. 301; Harding *v.* Brooks, 5 Pick. 244 ; Severance *v.* Hilton, 24 N. H. 148 ; Dame *v.* Kenney, 25 id. 324 ; Cooper *v.* Phipps, 24 Or. 357, 362 ; Blakeslee *v.* Hughes, 50 Oh. St. 490 ; *contra:* R. *v.* Waring, 5 Esp. 13 ; Givens *v.* Bradley, 3 Bibb 192, 195; Stafford *v.* Assoc., 142 N. Y. 598 ; Sample *v.* Wynn, Busbee 322; Adams *v.* Lawson, 17 Gratt. 250, 258 ; Shroyer *v.* Miller, 3 W. Va. 158, 161.

Seduction: See Bamfield *v.* Massey, 1 Camp. 460 ; Dodd *v.* Norris, 3 id. 520 ; Pratt *v.* Andrews, 4 N. Y. 493 ; State *v.* Lenihan, 88 Ia. 670, 673.

Crim. con.: See R. *v.* Francis, 3 Esp. 116 ; Pratt *v.* Andrews, 4 N. Y. 493.

Malicious prosecution: See Goldsmith *v.* Picard, 27 Ala. 142, 153.

[16] Foulkes *v.* Sellway, 3 Esp. 236 ; Woodard *v.* Bellamy, 2 Root 354 ; Von Storch *v.* Griffin, 77 Pa. 504 ; Smith *v.* Hall, Conn., 38 Atl. 386.

[17] This use needs no citation of precedents ; for the use of reputation as indicating the employer's knowledge, see the preceding section.

[18] Coldwell *v.* State, 17 Conn. 467, 472 ; State *v.* Morgan, 40 id. 44 ; State *v.* Buckley, ib. 246 ; State *v.* Thomas, 47 id. 546 ; State *v.* Brunell, 29 Wis. 435. If the actual use and character of the house is the criminal element, then the reputation is merely hearsay evidence of this character ; see *post,* § 140 *b.*

either actually prostitutes or reputed as such, and thus the character, reputed or real, of such frequenters may be shown ;[19] (*d*) the character of the woman in a statutory prosecution for *seduction*.[20]]

2. *Evidence to prove Character.*

§ 14 *e*. **In general.** [There are three conceivable ways of evidencing the character of a human being: first, by the testimony of those who personally know him; secondly, by his reputation in the community; thirdly, by particular instances of his conduct evincing the trait of character. The first mode has been a matter of much controversy, and as it raises essentially the same questions when offered to prove a witness' character, it will be considered in that place.[1] The second is receivable only by way of excepting to the Hearsay rule ;[2] but as its chief questions are the same as those arising in the proof of a witness' character, it is dealt with under that head.[3] The third method, here to be considered in detail, is usually open to one or more of the objections mentioned in § 14 *a*, *ante*, *i. e.* undue prejudice, unfair surprise, and confusion of issues. These objections are in some classes of cases allowed to prevail, in others not.

§ 14 *f*. **Particular Conduct as Evidence of an Accused's Character.** Here such evidence is universally agreed to be inadmissible ; all three of the above reasons, but particularly the first, being regarded as potent.[1] It seems equally well established, though with less reason, that the accused himself cannot employ particular acts of good conduct as evidence of his good character.[2] When the accused becomes a witness, however, he may be treated as a witness by cross-examination as to past misconduct impeaching his credibility ;[3] and on the cross-examination of witnesses to character, whether of a defendant or a witness, the testimony may be tested by asking whether the witness has heard of specific misconduct.[4] The important bearing of

[19] Wooster *v.* State, 55 Ala. 221 ; State *v.* Jerome, 33 Conn. 265, 269 ; Com. *v.* Kimball, 9 Gray, 328 ; Com. *v.* Gannett, 1 All. 7; Com. *v.* Cardoze, 119 Mass. 210; Shaffer *v.* State, Md., 39 Atl. 313; State *v.* Hendricks, 15 Mont. 194 ; Clementine *v.* State, 14 Mo. 113; State *v.* M'Gregor, 41 N. H. 407 ; State *v.* Hull, 18 R. I. 207 ; State *v.* McDowell, Dudley S. C. 346.

[20] For this, see *post*, § 14 *h*.

[1] *Post*, § 461 *c*.

[2] See *post*, § 140 *b*.

[3] *Post*, § 461 *d*.

[1] For the reasoning, see R. *v.* Oddy, 2 Den. Cr. C. 264 ; Dowling *v.* State, 5 Sm. & M. 686 ; State *v.* Lapage, 57 N. H. 299 ; Com. *v.* Jackson, 132 Mass. 20 ; People *v.* Dye, 75 Cal. 112. No further citations are needed, as the rule is never questioned.

[2] Horne Tooke's Trial, 25 How. St. Tr. 359 ; Davison's Trial, 31 id. 187 ; O'Connor's Trial, 27 id. 31 ; R. *v.* Rowton, Leigh & C. 541 ; Hussey *v.* State, 87 Ala. 133 ; Smalls *v.* State, Ga., 29 S. E. 153 ; State *v.* Ferguson, Conn., 41 Atl. 769 ; White *v.* Com., 80 Ky. 485. The older rule was to the contrary : McNally, Evidence, 322 ; Murphy's Trial, 19 How. St. Tr. 725 ; State *v.* Parker, 7 La. An. 83, 88 ; and it persisted in English practice for some time in trials for treason : R. *v.* O'Connor, 4 State Tr. N. s. 935, 1162 ; R. *v.* Rankin, 7 id. 711, 747.

[3] *Post*, § 444 *b*.

[4] *Post*, § 461 *b*.

the general rule above is that the prosecution may never use other misconduct of the accused against him merely as indicating him to be a bad man, and therefore likely to have done the act charged;[5] there must be some definite evidential connection between the act charged and the other misconduct, so that the latter evidences knowledge, intent, identity, etc.[6]]

§ 14 *g*. **Particular Conduct as Evidence of other Persons' Character used evidentially.** It has already been seen that in some other instances (than that of an accused person) character may be used evidentially to show the doing of an act;[1] in proving such character, may particular instances of conduct be used in evidence? (1) Though the character of a person for *negligence* or prudence is sometimes allowed to be shown,[2] still this sort of evidence of it is generally excluded, for the reasons already mentioned.[3] (2) Though the character for chastity of a complainant in rape is generally regarded as relevant, there has been much controversy over the use of particular acts of unchastity as evidence of that character. There are potent reasons on each side;[4] but the better view seems to admit them, at least with the limitation (to avoid the objection of surprise) that they may only be asked about on cross-examination of the complainant.[5] (3) On the analogy of the use of the character of the *deceased*,

[5] For the use of a former conviction of crime as affecting the measure of the sentence, see People *v.* Sickles, N. Y., 51 N. E. 238, and *post*, § 444 *b*.

[6] For this use, see *post*, § 14 *q*.

[1] *Ante*, § 14 *b* (2) and (4).

[2] *Ante*, §§ 14 *b*, 14 *d*.

[3] *Admitted:* Fulmore *v.* R. W., Minn., 75 N. W. 589, *semble;* Plummer *v.* Ossipee, 59 N. H. 59; Desbrack *v.* State, 38 Oh. St. 365; Mack *v.* R. Co., S. C., 29 S. E. 905.

Excluded: Little R. & M. R. Co. *v.* Harrell, 58 Ark. 454, 468; Pacheco *v.* Mfg. Co., 113 Cal. 541; Howland *v.* R. Co., 115 id. 487; Morris *v.* East Haven, 41 Conn. 252, 254; Lanfer *v.* Traction Co., 68 id. 475; Aug. & S. R. Co. *v.* Randell, 85 Ga. 297; Atl. C. S. R. Co. *v.* Bates, id., 30 Atl. 41; P. F. W. & C. R. Co. *v.* Ruby, 38 Ind. 295, 311; Rumpel *v.* R. Co., Idaho, 35 Pac. 700; So. Kan. R. Co. *v.* Robbins, 43 Kan. 145, 149; Balt. Elev. Co. *v.* Neal, 65 Md. 438, 452; Robinson *v.* F. & W. R. Co., 7 Gray, 92, 95; Maguire *v.* R. Co., 115 Mass. 239; Whitney *v.* Gross, 140 id. 232; Hatt *v.* Nay, 144 id. 186; Connors *v.* Morton, 160 id. 333; Lewis *v.* Gaslight Co., 165 id. 411; Olsen *v.* Andrews, 168 id. 261; Detr. & M. R. Co. *v.* Van Steinburg, 17 Mich. 111; M. C. R. Co. *v.* Gilbert, 46 id. 176, 179; Warner *v.* R. Co., 44 N. Y. 465, 471; Baulec *v.* R. Co., 59 id. 360; Woeckner *v.* Motor Co., Pa., 41 Atl. 28; Cunningham *v.* R. Co., 88 Tex. 534; Sullivan *v.* Salt Lake, 13 Utah, 122; So. Bell T. & T. Co. *v.* Watts, 25 U. S. App. 214; Central Vt. R. Co. *v.* Ruggles, 33 id. 567; Christensen *v.* U. T. Line, 6 Wash. 75, 82.

See also the use of such evidence as showing character for negligence when in issue, *post*, § 14 *h*. For evidence of other injuries at the same place or machinery, see *post*, § 14 *v*.

[4] See People *v.* Abbot, 19 Wend. 194; People *v.* Jackson, 3 Park. Cr. 398; Rice *v.* State, 35 Fla. 236.

[5] The cases on both sides are as follows: R. *v.* Hodgson, R. & R. 211; R. *v.* Clarke, 2 Stare. 243; R. *v.* Martin, 6 C. & P. 562; R. *v.* Tissington, 1 Cox Cr. 48; R. *v.* Robins, ib. 55; R. *v.* Page, 2 Cox Cr. 133; R. *v.* Cockcroft, 11 id. 410; R. *v.* Holmes, 12 id. 137; R. *v.* Riley, 16 Cox Cr. 191; McQuirk *v.* State, 84 Ala. 435, 438; Pleasant *v.* State, 15 Ark. 624, 643; People *v.* Benson, 6 Cal. 221; People *v.* Kuches, id., 52 Pac. 1002; State *v.* Shields, 45 Conn. 256, 263; Rice *v.* State, 35 Fla. 236; Shir-

on a charge of homicide, as tending to show the accused's reasonable apprehensions,[6] particular acts of violence by the deceased ought to be admissible,[7] but are rejected by most Courts.[8] (4) In evidencing the disposition of an *animal* (whether the disposition is an issue, or is used evidentially as noted *ante*, § 14 *b*), it would seem that instances of the animal's behavior would be proper evidence, none of the preceding objections (except perhaps that of surprise) being here applicable;[9] but such evidence is occasionally rejected.[10]]

§ 14 *h*. **Particular Conduct as Evidence of Character in Issue.** [When character is provable as a part of the issue, the objections to evidencing it by particular acts lose most of their force; since there is no undue prejudice (other than is necessarily involved), no unfair surprise (because the issue warns of the evidence to be anticipated), and no confusion of issues (because character is one of them), and furthermore because other equally good evidence is often not available. It has thus been said, as a general principle, that character in issue may be evidenced by particular instances of conduct;[1] though no such general principle is consistently carried out. (1) Where the issue is whether a person is a *common offender*, — *e. g.* gambler, cheat,

win *v.* People, 69 Ill. 56; Dimick *v.* Downs, 82 id. 533; Wilson *v.* State, 16 Ind. 393; South Bend *v.* Hardy, 98 id. 582; Bedgood *v.* State, 115 id. 275, 278; State *v.* McDonough, Ia., 73 N. W. 357; State *v.* Brown, 55 Kan. 766; Com. *v.* Regan, 105 Mass. 593; Com. *v.* McDonald, 110 id. 405; Com. *v.* Harris, 131 id. 336; Miller *v.* Curtis, 163 id. 127, 131; Cargill *v.* Com., 93 Ky. 578; Brown *v.* Com., id., 43 S. W. 214; Strang *v.* People, 24 Mich. 1, 6; People *v.* McLean, 71 id. 309; People *v.* Abbott, 97 id. 484; Anon., 37 Miss. 58; Brown *v.* State, 72 id. 997; State *v.* Forschner, 43 N. H. 89; State *v.* Knapp, 45 id. 154; People *v.* Abbot, 19 Wend. 192, 194; People *v.* Jackson, 3 Park. Cr. 398; Woods *v.* People, 55 N. Y. 517; State *v.* Jefferson, 6 Ired. 305; State *v.* Henry, 5 Jones L. 65, 70; State *v.* Cherry, 63 N. C. 32; McCombs *v.* State, 8 Oh. St. 643, 646; McDermott *v.* State, 13 id. 332; State *v.* Fitzsimon, 18 R. I. 236; Titus *v.* State, 7 Baxt. 132; State *v.* Johnson, 28 Vt. 512; State *v.* Reed, 39 id. 417; State *v.* Hollenbeck, 67 id. 34; Watry *v.* Forbes, 18 Wis. 500, 502.

For intercourse with the defendant as evidence, see *post*, § 14 *o* (3). Whether a witness may be asked, on cross-examination, about discreditable conduct, and whether there is a privilege not to answer questions involving disgrace, are topics that may also come into consideration for the above evidence; for these, see *post*, §§ 469, *i*, *j*, *k*, *l*.

[6] *Ante*, § 14 *c*.

[7] R. *v.* Hopkins, 10 Cox Cr. 229; People *v.* Henderson, 28 Cal. 465, 469, *semble;* Pound *v.* State, 43 Ga. 88, 128, *semble;* Bowie *v.* State, 19 id. 7, *semble;* Boyle *v.* State, 97 Ind. 322, 326; Bowlus *v.* State, 130 id. 227, 230; People *v.* Harris, 95 Mich. 87; Skaggs *v.* State, 31 Tex. Cr. 563.

[8] Jones *v.* State, 76 Ala. 15; Davenport *v.* State, 85 id. 336; Campbell *v.* State, 38 Ark. 498, 508; People *v.* Powell, 87 Cal. 348, 362; State *v.* Woodward, 1 Houst. Cr. C. 455, 458; Garner *v.* State, 28 Fla. 113, 138; 31 id. 170, 175; Croom *v.* State, 90 Ga. 430; Powell *v.* State, 101 id. 9; State *v.* Fontenot, 50 La. An., 23 So. 634; Moriarty *v.* State, 62 Miss. 654, 661; King *v.* State, 65 id. 576, 582; Eggler *v.* People, 56 N. Y. 643; Thomas *v.* People, 67 id. 222; Com. *v.* Straesser, 153 Pa. 451; State *v.* Dill, 48 S. C. 249; Andersen *v.* U. S., 170 U. S. 481.

[9] Worth *v.* Gilling, L. R. 2 C. P. 3; Whitely *v.* China, 61 Me. 202; Todd *v.* Rawley, 8 All. 51; Maggi *v.* Cutts, 123 Mass. 535; Broderick *v.* Higginson, id., 48 N. E. 269; Kennon *v.* Cilmer, 5 Mont. 257, 265; Chamberlain *v.* Enfield, 43 N. H. 356; Whittier *v.* Franklin, 46 id. 23; Stone *v.* Langworthy, R. I., 40 Atl. 832; Dover *v.* Winchester, Vt., 41 Atl. 445.

[10] East Kingston *v.* Towle, 48 N. H. 57, 65.

[1] Clark *v.* Periam, 2 Atk. 337; Fall *v.* Overseers, 3 Munf. 495, 505; Buller, Nisi Prius, 295. *Contra:* Miller *v.* Curtis, 158 Mass. 127, 131.

drunkard, — such evidence is admissible; though in barratry notice of the specific acts charged is said to be necessary.[2] (2) In proving a house to be of *ill-fame* or disorderly, *i. e.* used for purposes of prostitution, particular instances of such use may be given in evidence.[3] (3) In a statutory prosecution or action by the woman for *seduction*, if the "chaste character" of the statute means actual character, then it may well be disproved by particular acts of unchastity;[4] but if "good repute for chastity" is the statutory requirement, actual chastity and therefore particular acts are immaterial;[5] while if the statute is silent on the subject, a requirement of chastity is usually implied into it and particular acts of unchastity are admitted;[6] in any case, acts occurring since the seduction are immaterial.[7] (4) Where the woman's character for unchastity is set up in defence to an action for breach of *promise of marriage*, the character may be evidenced by particular acts.[8] (5) Where a *defamatory charge* involves a general trait of character of the plaintiff, and the truth is pleaded, it may be evidenced by particular acts;[9] but there is some authority for confining this practice to cases where the charge involves a habit or course of dealings rather than a trait of moral character, and for requiring the defendant in the latter case to plead specifically such instances as he relies on in justification.[10] (6) In proving the *incompetency of an employee*, as a fact which if otherwise shown to be known to the employer may make him liable, it would seem to be proper to use particular acts of incompetency, for

[2] Buller, Nisi Prius, 296; McNally, Evidence, 324; R. *v.* Roberts, 1 Camp. 399; Ingram *v.* State, 39 Ala. 247, 253; Com. *v.* Moore, 2 Dana, Ky., 402; Com. *v.* Hopkins, ib. 419; World *v.* State, 50 Md. 49, 54; Com. *v.* Whitney, 5 Gray 85; Com. *v.* McNamee, 112 Mass. 285; Smith *v.* State, 55 Ala. 11; McMahon *v.* Harrison, 6 N. Y. 443, 447.

[3] Caldwell *v.* State, 17 Conn. 467, 473; Egan *v.* Gordan, 65 Minn. 505; State *v.* M'Gregor, 41 N. H. 407, 412; Harwood *v.* People, 26 N. Y. 190; Kenyon *v.* State, 26 N. Y. 203, 209; Lanpher *v.* Clark, 149 N. Y. 472; State *v.* Patterson, 7 Ired. 70; though not, it has been said, particular acts to show the character of persons so resorting: Com. *v.* Gannett, 1 All. 7.

[4] Andre *v.* State, 5 Ia. 389; State *v.* Carron, 18 id. 372, 375; State *v.* Shean, 32 id. 88, 92; State *v.* Higdon, ib. 262; West *v.* Druff, 55 id. 335, 336; State *v.* Timmens, 4 Minn. 325, 334; Crozier *v.* People, 1 Park. Cr. 453; Kenyon *v.* State, 26 N. Y. 203, 208; State *v.* Blize, 111 Mo. 464, 471; Love *v.* Masoner, 6 Baxt. 24, 33.

[5] State *v.* Bryan, 34 Kan. 63, 69; Zabriskie *v.* State, 43 N. J. L. 640, 646; Foley *v.* State, 59 id. 1; Bowers *v.* State, 29 Oh. St. 542, 545.

[6] Wilson *v.* State, 73 Ala. 527, 533; Hussey *v.* State, 86 id. 34; Munkers *v.* State, 87 id. 94, 97; Bracken *v.* State, 111 id. 68; Smith *v.* State, id., 24 So. 55; Suther *v.* State, id., 24 So. 43; Polk *v.* State, 40 Ark. 482, 486; People *v.* Brewer, 27 Mich. 133, 135; People *v.* Clark, 33 id. 112, 118; People *v.* Knapp, 42 id. 267, 268; People *v.* Squires, 49 id. 487, 488.

[7] Bracken *v.* State, 111 Ala. 68; Polk *v.* State, 40 Ark. 482, 487; People *v.* Clark, 33 id. 112, 117; Keller *v.* State, Ga., 31 S. E. 92.

[8] Foulkes *v.* Sellway, 3 Esp. 236; Woodard *v.* Bellamy, 2 Root 354; Sheahan *v.* Barry, 27 Mich. 217, 221; Stratton *v.* Dole, 45 Nebr. 472.

[9] R. *v.* Labouchere, 14 Cox Cr. 419, 428, 430; Ratcliff *v.* Courier-Journal, 99 Ky. 416; Lampher *v.* Clark, 149 N. Y. 472.

[10] See Jones *v.* Stevens, 11 Price 235; Scott *v.* Sampson, 8 Q. B. D. 491; Zierenberg *v.* Labouchere, 1892, 2 Q. B. 183; Talmadge *v.* Baker, 22 Wis. 625; compare the doctrine *ante*, § 14 *d* (1), as to using general character in such a case.

none of the above-mentioned objections apply with any force.[11] Two other uses of such facts must, however, be distinguished: (*a*) former acts of negligence by a defendant's employee as evidence of his negligent character, and therefore of his probably having been negligent at the time in question; here the character is not in issue, but is evidential only, and particular acts are inadmissible;[12] (*b*) other acts of incompetency by the employee as evidence of probable knowledge by the employer, the incompetency itself being otherwise proved; the propriety of this seems generally conceded.[13] (7) In *mitigation of damages*, in actions for *defamation*, the plaintiff's bad reputed character is generally treated as properly to be considered;[14] but particular instances of misconduct are universally regarded as inadmissible; the reasons given by the Courts are not harmonious,[15] but the correct one seems to be that the reputation, not the actual character, is the thing to be proved.[16] In an action by the father for *seduction*, the daughter's chastity is material as affecting the injury to his feelings, and particular acts of her unchastity prior to the seduction are generally regarded as admissible;[17] on the same prin-

[11] Cunningham *v.* R. Co., 88 Tex. 534; Smith *v.* Whittier, 95 Cal. 279, 292; Morrow *v.* R. Co., Minn., 77 N. W. 303; State *v.* Swett, N. J., 38 Atl. 969; Youngs *v.* R. Co., 154 N. Y. 764; Park *v.* R. Co., 155 id. 215. *Contra:* Hatt *v.* Nay, 144 Mass. 186; Connors *v.* Morton, 160 Mass. 333; Kennedy *v.* Spring, ib. 203; Baltimore *v.* War, 77 Md. 593, 598.

[12] See *ante*, § 14 *g* (1).

[13] *Accord:* Baulec *v.* R. Co., 59 N. Y. 356, 358; P. F. & W. & C. R. Co. *v.* Ruby, 38 Ind. 294, 311; E. & T. H. R. Co. *v.* Tothill, 143 id. 49; Balt. Elev. Co. *v.* Neal, 65 Md. 438, 452; Norf. & W. R. Co. *v.* Hoover, 79 id. 253, 264; Davis *v.* R. Co., 20 Mich. 105, 124; M. C. R. Co. *v.* Gilbert, 46 id. 176, 179; Chapman *v.* R. Co., 55 N. Y. 579, 585; Cunningham *v.* R. Co., 88 Tex. 534; Balt. & O. R. Co. *v.* Camp, 31 U. S. App. 213. *Contra:* Frazier *v.* R. Co., 38 Pa. 104; Col. & R. R. Co. *v.* Christian, 97 Ga. 56.

[14] *Ante*, § 14 *d*, (1) and (2).

[15] See Jones *v.* Stevens, 11 Price 235, 265; Scott *v.* Sampson, 8 Q. B. D. 491; Randall *v.* Holsenbake, 3 Hill S. C. 177.

[16] Dennis *v.* Pawling, Vin. Abr., Evidence, I, b, 16; Smithies *v.* Harrison, ib. 15; Buller, Nisi Prius, 9; Knobell *v.* Fuller, Peake Add. Cas. 139; Jones *v.* Stevens, 11 Price, 235; Moore *v.* Oastler, 2 Stark. Ev. 641; Bracegirdle *v.* Bailey, 1 F. & F. 536; Scott *v.* Sampson, L. R. 8 Q. B. D. 491; Seymour *v.* Merrill, 1 Root 459; Waples *v.* Burton, 2 Harringt. 446; Sheahan *v.* Collins, 20 Ill. 329; Campbell *v.* Bannister, 79 Ky. 208; Smith *v.* Wyman, 16 Me. 14; Bodwell *v.* Swan, 3 Pick. 376; Chapman *v.* Ordway, 5 All. 595; Parkhurst *v.* Ketchum, 6 id. 406; McLaughlin *v.* Cowley, 131 Mass. 70, 72; Miller *v.* Curtis, 163 id. 127, 131; Proctor *v.* Houghtaling, 37 Mich. 41, 44; Vick *v.* Whitfield, 2 Hayw. 222; Lamos *v.* Snell, 6 N. H. 413; Foot *v.* Tracy, 1 Johns. 46; Root *v.* King, 7 Cow. 635; King *v.* Root, 4 Wend. 160; Dewit *v.* Greenfield, 5 Oh. 226; Fisher *v.* Patterson, 14 id. 418, 425; Henry *v.* Norwood, 4 Watts 347, 349; Folwell *v.* Journal Co., 19 R. I. 551; Sawyer *v.* Eifert, 2 Nott & M. 511, 515; Buford *v.* M'Luny, 1 id. 268, 271; Randall *v.* Holsenbake, 3 Hill S. C. 177; Wilson *v.* Noonan, 27 Wis. 598, 610; Muetze *v.* Tuteur, 77 id. 236, 243.

[17] Bamfield *v.* Massey, 1 Camp. 460; Dodd *v.* Norris. 3 id. 519; Bate *v.* Hill, 1 C. & P. 100; Andrews *v.* Askey, 8 id. 7; Verry *v.* Watkins, 7 id. 308; Carpenter *v.* Wall, 11 A. & E. 803; Thompson *v.* Nye, 16 Q. B. 175; Drish *v.* Davenport, 2 Stew. 266, 270; Robinson *v.* Burton, 5 Harringt. 335, 338; White *v.* Murtland, 71 Ill. 250, 264; Shattuck *v.* Myers, 13 Ind. 50; South Bend *v.* Hardy, 98 id. 580; Zitzel *v.* Merkel, 24 Pa. 408; Reed *v.* Williams, 5 Sneed 580, 582; Thompson *v.* Clendening, 1 Head, 287, 295; Love *v.* Masoner, 6 Baxt. 24, 33, repudiating Lea *v.* Henderson, 1 Coldw. 146, 150. *Contra:* Bell *v.* Rinker, 29 Ind. 269; Smith *v.* Yaryan, 69 id. 448; Hoffman *v.* Kemerer, 44 Pa. 452.

ciple, particular acts of the the father's, as showing a character incapable of such an injury to the feelings, might well be admissible.[18] In the husband's action for *criminal conversation*, particular acts of unchastity by the wife before seduction are for the same reason admissible;[19] and the principle applies equally, in civil actions for *indecent assault*[20] and for breach of *promise of marriage*,[21] to prior unchaste acts of the female plaintiff.]

3. *Other Human Qualities as Evidence of an Act.*

§ 14 *i*. **Physical Capacity, Skill, Means, etc.** [As indicating the likelihood of a person doing or not doing an act, it is proper to consider his physical strength,[1] his condition as to intoxication,[2] his technical skill or ability,[3] his possession of the appropriate tools or apparatus;[4] on this principle, the lack of money is evidence that a debt was not paid or money not lent,[5] though the possession of it is hardly evidence of the payment or lending.[6]]

§ 14 *j*. **Habit, Custom.** [A habit of doing a thing is naturally of probative value as indicating that on a particular occasion the thing was done as usual, and, if clearly shown as a definite course of action, is constantly admitted in evidence.[1] Nevertheless, there are some

[18] Robinson *v.* Burton, 5 Harringt. 335, 338. *Contra:* Reed *v.* Williams, 5 Sneed 580, 582; Thompson *v.* Clendening, 1 Head 287, 296.

[19] Buller, Nisi Prius 77; Hodges *v.* Windham, Peake 39; Elsam *v.* Faucett, 2 Esp. 563; Thompson *v.* Nye, 16 Q. B. 175; Torre *v.* Summers, 2 Nott & M. 269, 271; or by the husband: Wyndham *v.* Wycombe, 4 Esp. 16; Bromley *v.* Wallace, ib. 237.

[20] Mitchell *v.* Work, 13 R. I. 645; Watry *v.* Ferber, 18 Wis. 500, 503. *Contra:* Gore *v.* Curtis, 81 Me. 403, 405. See Miller *v.* Curtis, 163 Mass. 127, 130.

[21] Sheahan *v.* Barry, 27 Mich. 217, 221; Stratton *v.* Dole, 45 Nebr. 472.

[1] Goodtitle *v.* Braham, 4 T. R. 498; Ellis *v.* Short, 21 Pick. 142; Thiede *v.* Utah, 159 U. S. 510.

[2] Alcock *v.* Ass. Co., 13 Q. B. 292; Wright *v.* Crawfordsville, 142 Ind. 636; State *v.* Horne, 9 Kan. 128; Com. *v.* Ryan, 134 Mass. 223; Cummings *v.* Nichols, 13 N. H. 429; Ingalls *v.* State, 48 Wis. 647, 650; Franklin *v.* Franklin, 90 Tenn. 49. See also *post*, under Habit, § 14 *j*, note 2.

[3] Thompson *v.* Mosely, 5 C. & P. 501. *Contra:* Dow *v.* Spenny, 29 Mo. 390; Mertz *v.* Detweiler, 8 W. & S. 378.

[4] R. *v.* Lambe, Peake N. P. 141; R. *v.* Ball, 1 Camp. 324; Griffits *v.* Payne, 11 A. & E. 131; Thomas *v.* State, 107 Ala. 13; People *v.* Brotherton, 47 Cal. 402; Clark *v.* Fletcher, 1 All. 53, 56; Com. *v.* Choate, 105 Mass. 451; Rosenthal *v.* Bishop, 98 Mich. 527; Miller *v.* S. S. Co., 118 N. Y. 199; Nicholson *v.* Com., 91 Va. 741.

[5] Hale's Trial, 17 How. St. Tr. 293; Lane *v.* Dighton, 1 Ambl. 409, 413; Mayor *v.* Horner, Cowp. 102, 109; Lench *v.* Lench, 10 Ves. Jr. 511, 518; Williams *v.* Gorges, 1 Camp. 217; Fladong *v.* Winter, 19 Ves. Jr. 196; Grenfall *v.* Gridlestone, 2 Y. & C. 662, 681; Dowling *v.* Dowling, 10 Ir. C. L. 236; Stebbins *v.* Miller, 12 All. 591, 597; Winchester *v.* Charter, 97 Mass. 140, 143; Atwood *v.* Scott, 99 id. 177; Woodward *v.* Leavitt, 107 id. 453, 458; Bliss *v.* Johnson, 162 id. 323; Demeritt *v.* Miles, 22 N. H. 523, 528; Wiggin *v.* Plumer, 31 id. 251, 268; Pontius *v.* People, 82 N. Y. 339, 349; Strimpfler *v.* Roberts, 18 Pa. 283, 296; Stauffer *v.* Young, 39 id. 455, 462; Moore *v.* Palmer, 14 Wash. 134.

[6] Hilton *v.* Scarborough, 5 Gray 422; Atwood *v.* Scott, 99 Mass. 177.

[1] State *v.* R. Co., 52 N. H. 528, 532; Hall *v.* Brown, 58 id. 93 (switching trains); Mathias *v.* O'Neill, 94 Mo. 527 (bookkeeper's dealing with notes); Fincher *v.* State, 58 Ala. 221 (keeping a gun); Grantham *v.* State, 95 Ga. 459 (gambling); Riordan *v.* Guggerty, 74 Ia. 693 (destruction of telegrams); People *v.* Burwell, 106 Mich.

instances in which habit may be thought to be obnoxious to the character rule (*ante*, § 14 *b*), particularly a habit of intoxication or intemperance,[2] and a habit of carelessness or negligence;[3] and on these points there is no uniformity of ruling.]

§ 14 *k*. **Design, Intention, Plan.** [The existence of a design, plan, or intention to do a thing is of some probative value to show that it was done, and instances of its use constantly recur.[1] The intention of an accused, as contained in a threat, is perhaps the commonest instance;[2] the question may arise whether the threat is too indefinite to apply to the act charged;[3] but the fact that it is conditional

27; Schuchardt *v.* Allens, 1 Wall. 359, 368; Plumb *v.* Curtis, 66 Conn. 154; Amer. Expr. Co. *v.* Haggard, 37 Ill. 465, 472 (delivery of packages); Beakes *v.* Da Cunha, 126 N. Y. 293 (being at home); Lucas *v.* Novosilieski, 3 Esp. 296 (mode of payment); Evans *v.* Birch, 3 Camp. 110 (same); Lee *v.* Pain, 4 Hare 251 (use of name); Hine *v.* Pomeroy, 24 Vt. 211, 219 (process-serving); Ashe *v.* De Rosset, 8 Jones L. 240 (giving a receipt); Vaughan *v.* R. Co., 63 N. C. 11 (weighing and marking); State *v.* Shaw, 58 N. H. 73 (selling liquor); Smith *v.* Clark, 12 Ia. 32 (accepting in writing); Hart *v.* Alexander, 7 C. & P. 746 (sending circulars); Meighen *v.* Bank, 25 Pa. 288 (entering deposits); Lincoln, etc. Co. *v.* Buckner, 39 Nebr. 83, 85 (depositing ashes); White *v.* State, 100 Ga. 659 (carrying pistol). The following cases concern a habit of mailing a notice or other letter: Hetherington *v.* Kemp, 4 Camp. 193; McKay *v.* Myers, 168 Mass. 312; Thellheimer *v.* Brinckerhoff, 6 Cow. 101; Miller *v.* Hackley, 5 Johns. 375, 384; Coyle *v.* Gozzler, 2 Cr. C. C. 625; Union Bk. *v.* Stone, 50 Me. 595, 601; Trabue *v.* Sayre, 1 Bush 129; Bell *v.* Bank, 7 Gill 216, 227; Brailsford *v.* Williams, 15 Md. 150, 159. The following cases admit the course of business in the post-office to be evidence that a letter mailed is delivered: U. S. *v.* Babcock, 3 Dill. C. C. 571; Sullivan *v.* Kuykendall, 82 Ky. 483; Rosenthal *v.* Walker, 111 U. S. 193; Huntley *v.* Whittier, 105 Mass. 391; and so for telegrams also: Com. *v.* Jeffries, 7 All. 548, 563; Oregon S. Co. *v.* Otis, 100 N. Y. 446. For the presumption on this subject, see *post*, § 40.

[2] See Heland *v.* Allen, 3 All. 407; McCarty *v.* Leary, 118 Mass. 509; Edwards *v.* Worcester, id., 51 N. E. 447; Lane *v.* R. Co., 132 Mo. 4; Kingston *v.* R. Co., Mich., 70 N. W. 315; Warner *v.* R. Co., 44 N. Y. 465; Cleghorn *v.* R. Co., 56 id. 44, 46; Pa. R. Co. *v.* Books, 57 Pa. 339, 343; Hunt. B. T. M. R. Co. *v.* Decker, 82 id. 119, 124; Smith *v.* Smith, 67 Vt. 443; Thompson *v.* Bowie, 4 Wall. 463, 471; Cosgrove *v.* Pitman, 103 Cal. 268, 273; Balt. & O. R. Co. *v.* Pitman, U. S. App., 73 Fed. 634.

[3] See State *v.* M. & L. R. Co., 52 N. H. 528, 549; State *v.* B. & M. R. Co., 58 id. 410; Whitney *v.* Gross, 140 Mass. 232; Bronillette *v.* R. Co., 162 id. 198, 206; Mulville *v.* Ins. Co., 19 Mont. 95; Baker *v.* Irish, 172 Pa. 528, 532.

[1] State *v.* Smith, 44 Conn. 376, 380 (to make an arrest); B. & O. R. Co. *v.* State, 81 Md. 371 (to take a journey); Burton *v.* State, 107 Ala. 68 (to leave the State); Cluverius *v.* Com., 81 Va. 813 (to meet the accused); Invess *v.* R. Co., 168 Mass. 433 (to take the cars); Powell *v.* Olds, 9 Ala. 861 (to make a gift); Woodcock *v.* Johnson, 36 Minn. 217 (to make a deed). *Excluded:* Houston *v.* Gran, 38 Nebr. 637 (instructions to clerk not to sell liquor to deceased). In most of the cases, the only question made is as to the use of the person's statements as declarations under a hearsay exception; for these cases, see *post*, § 162 *c*.

[2] The principle is universally accepted, and no citations are needed; but there is a curious qualification in North Carolina; see State *v.* Norton, 82 N. C. 628; State *v.* Goff, 117 id. 755.

[3] See R. *v.* Hagan, 12 Cox Cr. 357; Commander *v.* State, 63 Ala. 1, 7; Redd *v.* State, 68 id. 492, 497; Ford *v.* State, 71 id. 385, 396; Clarke *v.* State, 78 id. 474, 477; Prater *v.* State, 107 id. 26; Drake *v.* State, 110 id. 9; Linehan *v.* State, 113 id. 70; Burton *v.* State, 115 id. 1; People *v.* Craig, 111 Cal. 460; State *v.* Hoyt, 47 Conn. 518, 539; Dixon *v.* State, 13 Fla. 636, 645; Stafford *v.* State, 55 Ga. 591, 593; Shaw *v.* State, 60 id. 246, 250; State *v.* Larkins, Ida., 47 Pac. 945; State *v.* Davis, id., 53 Pac. 678; Schoolcraft *v.* People, 117 Ill. 271, 277; State *v.* Helm, 97 Ia. 378; State *v.* Pierce, 90 id. 506, 512; Laird *v.* Ass. Co., 98 id. 495; Parker *v.* State, 136 Ind. 284; State *v.* Horne, 9 Kan. 123, 128; Brooks *v.* Com., Ky., 37 S. W. 1043; Com. *v.*

does not exclude it,[4] though it is sometimes said that the condition must be shown to have happened; whether the threats are too remote in time depends on the facts of each case, and is usually left to the trial Court's discretion.[5] Threats by the deceased are now properly regarded by most Courts as admissible, on the issue of self-defence, in a charge of homicide, as tending to show the deceased to have been the aggressor;[6] but usually with the qualification that there must be some independent evidence of his aggression, or, as some phrase it, an overt act.[7] This use of the deceased's

Madan, 102 Mass. 1; Com. *v.* Goodwin, 14 Gray 55; Com. *v.* Chase, 147 Mass. 597; Com. *v.* Quinn, 150 id. 401; State *v.* Guy, 69 Mo. 430; State *v.* Dickson, 78 id. 438, 449; State *v.* Grant, 79 id. 113, 137; State *v.* McNally, 87 id. 649; Culbertson *v.* Hill, ib. 553, 555; State *v.* Crawford, 99 id. 74; State *v.* Fitzgerald, 130 id. 407; State *v.* Hymer, 15 Nev. 49, 54; State *v.* Walsh, 5 id. 315; People *v.* Kennedy, 32 N. Y. 141; Stokes *v.* People, 53 id. 175; Weed *v.* People, 56 id. 628; People *v.* Sutherland, 154 id. 345; Minnus *v.* State, 16 Oh. St. 221, 230; Hopkins *v.* Com., 50 Pa. 9; Abernethy *v.* Com., 101 id. 322, 328; State *v.* Isaacson, 8 S. D. 69; Kinchelow *v.* State, 5 Humph. 9, 12; State *v.* Smalley, 50 Vt. 736, 749; Benedict *v.* State, 14 Wis. 423; Massey *v.* State, 31 Tex. Cr. 371; Holley *v.* State, id. 46 S. W. 39; Stevenson *v.* U. S., U. S. App., 86 Fed. 106.

[4] Redd *v.* State, 68 Ala. 492, 496; Phillips *v.* State, 62 Ark. 119; Everett *v.* State, 62 Ga. 65, 70; Com. *v.* Crowe, 165 Mass. 139; State *v.* Johnson, 76 Mo. 121, 124; State *v.* Adams, ib. 357; Carver *v.* Huskey, 79 id. 509; State *v.* Bradley, 64 Vt. 468, 470; State *v.* Bradley, 67 id. 465.

[5] See Redd *v.* State, 68 Ala. 492, 496; People *v.* Cronin, 34 Cal. 190, 205; People *v.* Hong Ah Duck, 61 id. 387; McDaniel *v.* State, 100 Ga. 67; Com. *v.* Goodwin, 14 Gray 55; Com. *v.* Holmes, 157 Mass. 233, 239; Com. *v.* Quinn, 150 id. 401; Com. *v.* Crowe, 165 id. 139; Hale *v.* Life Co., 65 Minn. 548; Terr. *v.* Roberts, 9 Mont. 12, 14; State *v.* Adams, 76 Mo. 357; State *v.* Grant, 79 id. 137; Carver *v.* Huskey, ib. 509; State *v.* McNally, 87 id. 650; State *v.* Wright, 141 id. 333; U. S. *v.* Neverson, 1 Mackie 152, 169; State *v.* Bradley, 64 Vt. 466, 470; State *v.* Davis, N. H., 41 Atl. 267.

[6] See the reasoning in People *v.* Arnold, 15 Cal. 481; Stokes *v.* People, 53 N. Y. 174.

[7] See Powell *v.* State, 19 Ala. 577, 581; Carroll *v.* State, 23 id. 37; Burns *v.* State, 43 id. 374; Roberts *v.* State, 63 id. 163; Green *v.* State, 69 id. 7; Gunter *v.* State, 111 id. 23; Atkins *v.* State, 16 Ark. 568, 584; Coker *v.* State, 20 id. 53, 55; Pitman *v.* State, 22 id. 353, 356; Harris *v.* State, 34 id. 469, 472; People *v.* Arnold, 15 Cal. 476, 481; People *v.* Scoggins, 37 id. 676, 684, 696; People *v.* Alivtre, 55 id. 263; People *v.* Travis, 56 id. 251, 253; People *v.* Carlton, 57 id. 83; Davidson *v.* People, 4 Colo. 145; Bond *v.* State, 21 Fla. 738, 751; Garner *v.* State, 28 id. 113, 133; Wilson *v.* State, 30 id. 234, 242; Steele *v.* State, 33 id. 348, 350; Lester *v.* State, 37 id. 382; Monroe *v.* State, 5 Ga. 85, 138; Haynes *v.* State, 17 id. 465, 482; Reynolds *v.* State, 1 Kelly 222, 230; Keener *v.* State, 18 Ga. 194, 228; Lingo *v.* State, 29 id. 470, 483; Hawkins *v.* State, 25 id. 207, 210; Hoye *v.* State, 39 id. 718, 722; Pound *v.* State, 43 id. 88, 129; Vaughn *v.* State, 88 id. 731; May *v.* State, 90 id. 793; Pittman *v.* State, 92 id. 480; Peterson *v.* State, 50 id. 142; Campbell *v.* People, 16 Ill. 1; Williams *v.* People, 54 id. 422, 426; Siebert *v.* People, 143 id. 571, 590; Holler *v.* State, 37 Ind. 57, 60; Combs *v.* State, 75 id. 217; Bowlus *v.* State, 130 id. 227, Ellis *v.* State, id., 52 N. E. 82; State *v.* Woodson, 41 Ia. 428; State *v.* Maloy, 44 id. 104, 114; State *v.* Elliott, 45 id. 490; State *v.* Brown, 22 Kan. 222; State *v.* Scott, 24 id. 68, 70; State *v.* Spendlove, 44 id. 1; Cornelius *v.* Com., 15 B. Monr. 539, 546; Sparks *v.* Com., 89 Ky. 644; Tudor *v.* Com., id., 43 S. W. 187; Young *v.* Com., id., 42 S. W. 1141; State *v.* Bradley, 6 La. An. 554, 560; State *v.* Gregor, 21 id. 473, 475; State *v.* Ryan, 30 id. 1177; State *v.* Fisher, 33 id. 1344; State *v.* Williams, 40 id. 168, 170; State *v.* Harris, 43 id. 842, 845; State *v.* Depass, 45 id. 1151; State *v.* Walsh, 44 id. 1122; State *v.* King, 47 id. 28; State *v.* Compagnet, 48 id. 1470; Turpin *v.* State, 55 Md. 462, 473; People *v.* Garbutt, 17 Mich. 9, 15; People *v.* Lilly, 38 id. 277; Brownell *v.* People, ib. 736; People *v.* Palmer, 96 id. 580; State *v.* Dumphey,

threats must be distinguished from another, earlier recognized, viz., to show the accused's reasonable apprehension of violence from the deceased; similar limitations are usually here applied, with the important addition that the threats must be shown to have been communicated to the accused, since otherwise they could not have affected his apprehensions.[8] Where the issue is whether a will was

4 Minn. 438, 449; Newcomb *v.* State, 37 Miss. 383, 404; Johnson *v.* State, 54 id. 430; Holly *v.* State, 55 id. 424, 428; Kendrick *v.* State, ib. 436, 450; Moriarty *v.* State, 62 id. 654, 661; Prine *v.* State, 73 id. 838; State *v.* Sloan, 47 Mo. 604, 609; McMillen *v.* State, 13 id. 30; State *v.* Elkins, 63 id. 159, 164; State *v.* Taylor, 64 id. 358, 361; State *v.* Brown, ib. 367, 375; State *v.* Alexander, 66 id. 148, 161; State *v.* Guy, 69 id. 435; State *v.* Eaton, 75 id. 586, 590; State *v.* McNally, 87 id. 650; State *v.* Rider, 90 id. 54, 60; 95 id. 476, 484; State *v.* Thomas, 138 id. 168; State *v.* Hopper, 142 id. 478; State *v.* Zellers, 7 N. J. L. 237; Stokes *v.* People, 53 N. Y. 174; State *v.* Turpin, 77 N. C. 473, 479; State *v.* Skidmore, 87 id. 509, 512; State *v.* Byrd, id., 28 S. E. 353; Stewart *v.* State, 19 Oh. 302; State *v.* Tarter, 26 Or. 38, 41; Nevling *v.* Com., 98 Pa. 322, 337; State *v.* Bodie, 33 S. C. 130; State *v.* Faile, 43 S. C. 52; Copeland *v.* State, 7 Humph. 479, 495; Williams *v.* State, 3 Heisk. 376, 396; Wiggins *v.* Utah, 93 U. S. 465; Allison *v.* U. S., 160 id. 203; State *v.* Goodrich, 19 Vt. 116, 120; White *v.* Terr., 3 Wash. T. 397, 403; State *v.* Cushing, Wash., 45 Pac. 45, 50 Pac. 512; State *v.* Abbott, 8 W. Va. 743; State *v.* Evans, 33 id. 417, 425.

Compare the analogous use of the deceased's character for violence, *ante*, § 14 *b* (3).

[8] Space does not suffice to analyze the cases: Noble's Trial, 15 How. St. Tr. 740; Powell *v.* State, 19 Ala. 577, 581; Pritchett *v.* State, 22 id. 42; Carroll *v.* State, 23 id. 28, 36; Dupree *v.* State, 33 id. 380, 386; Hughey *v.* State, 47 id. 97, 103; Powell *v.* State, 52 id. 1; Payne *v.* State, 60 id. 80, 86; Myers *v.* State, 62 id. 603; Polk *v.* State, ib. 239; Roberts *v.* State, 68 id. 164; Green *v.* State, 69 id. 8, 10; Jones *v.* State, id., 28 So. 135; Atkins *v.* State, 16 Ark. 568, 584; Coker *v.* State, 20 id. 53, 55; Pitman *v.* State, 22 id. 354, 356; Palmore *v.* State, 29 id. 248, 263; McPherson *v.* State, ib. 225, 228; Harris *v.* State, 34 id. 469, 472; People *v.* Arnold, 15 Cal. 476, 480; People *v.* Lombard, 17 id. 316, 320; People *v.* Scoggins, 37 id. 676, 683; People *v.* Taing, 53 id. 602; People *v.* Travis, 56 id. 251, 253; Bond *v.* State, 21 Fla. 738, 752; Smith *v.* State, 25 id. 517, 521; Garner *v.* State, 28 id. 113, 133; Steele *v.* State, 33 id. 348, 350; Reynolds *v.* State, 1 Kelly 222, 230; Hudgins *v.* State, 2 Ga. 173, 181; Howell *v.* State, 5 id. 48, 54; Monroe *v.* State, ib. 83, 135; Keener *v.* State, 18 id. 194, 225; Hawkins *v.* State, 25 id. 209; Lingo *v.* State, 29 id. 470, 483; Coxwell *v.* State, 66 id. 309; McDonald *v.* People, 168 Ill. 93; De Forest *v.* State, 21 Ind. 23, 26; Wood *v.* State, 92 id. 269, 273; State *v.* Collins, 32 Ia. 63; State *v.* Woodson, 41 id. 425, 428; State *v.* Maloy, 44 id. 104, 114; State *v.* Elliott, 45 id. 490; State *v.* Brown, 22 Kan. 222, 230; State *v.* Scott, 24 id. 68, 70; Cornelius *v.* Com., 15 B. Monr. 539, 546; Young *v.* Com., 6 Bush 318; Philips *v.* Com., 2 Duv. 328, 329; Carico *v.* Com., 7 Bush 124, 129; Bohannon *v.* Com., 8 id. 481, 488; Lightfoot *v.* Com., 80 Ky. 521; Com. *v.* Hoskins, id., 35 S. W. 284; Grayson *v.* Com., id., 35 S. W. 1035; State *v.* Mullen, 14 La. An. 577, 579; State *v.* Robertson, 30 id. 340; State *v.* Ryan, ib. 1177; State *v.* Cooper, 32 id. 1084; State *v.* Vance, ib. 1177; State *v.* Jackson, 33 id. 1087; State *v.* Fisher, ib. 1344; State *v.* Birdwell, 36 id. 859, 861; State *v.* Ford, 37 id. 443, 460; State *v.* Labuzan, ib. 489; State *v.* Janvier, ib. 644; State *v.* Spell, 38 id. 20; State *v.* Brooks, 39 id. 817; State *v.* Demoreste, 41 id. 617; State *v.* Cosgrove, 42 id. 753; State *v.* Wilson, 43 id. 840; State *v.* Jackson, 44 id. 160, 163; State *v.* Harris, 45 id. 842, 845; State *v.* Green, 46 id. 1522; State *v.* Barker, ib. 798, 802; State *v.* King, 47 id. 28; State *v.* Vickers, ib. 1574; State *v.* Compagnet, 48 id. 1470; State *v.* Pruett, 49 id. 283; State *v.* Wiggins, 50 id., 23 So. 334; Turpin *v.* State, 55 Md. 462, 473; People *v.* Garbutt, 17 Mich. 9, 15; Brownell *v.* People, 38 id. 732, 736; People *v.* Lilly, ib. 276; State *v.* Dumphey, 4 Minn. 438, 449; Wesley *v.* State, 37 Miss. 327, 346; Newcomb *v.* State, ib. 383, 400; Evans *v.* State, 44 id. 762, 772; Harris *v.* State, 46 id. 319, 323; Johnson *v.* State, 54 id. 430, 435; Holly *v.* State, 55 id. 424, 428; Kendrick *v.* State, ib. 436, 450; Moriarty *v.* State, 62 id. 654, 661; State *v.* Jackson, 17 Mo. 544, 548; State *v.* Hays, 23 id. 287, 310; State *v.* Sloan, 47 id. 604; State *v.* Keene, 50 id. 357; State *v.* Harris, 59 id. 550, 556; State *v.* Elkins, 63 id. 159, 163; State *v.* Alexander, 66 id. 148, 162; State *v.*

made or revoked or altered, the person's intention as to making it, etc., is admissible.[9] In the same way, an intention to commit suicide should be admissible to show suicide.[10]]

4. *Evidence to prove Capacity, Knowledge, Plan, Intent, Habit, Custom, and other Human Qualities or Conditions.*

[In evidencing the various human conditions or attributes — capacity, knowledge, plan, intent, habit, etc. — a chief source is of course the person's conduct; and it thus happens that the general objections against the use of particular acts in evidence (*ante*, §§ 14 *a*, 14 *f*) are frequently applied to exclude such evidence. This in part explains the frequent lack of harmony in the rulings on the following subjects.]

§ 14 *l*. **Evidence to prove Physical Capacity, Skill, Age, Sanity, etc.** [Physical strength or capacity may well be evidenced by instances of the person's exhibiting such capacity or by his conduct or appearance;[1] and the same way of evidencing skill or dexterity is perhaps allowable.[2] A person's appearance may be evidence of his age, at least within broad limits.[3] Intoxication

Guy, 69 id. 435; State *v.* Harris, 76 id. 364; State *v.* Reed, 137 id. 125; State *v.* Albright, id., 46 S. W. 620; Basye *v.* State, 45 Nebr. 261; State *v.* Hall, 9 Nev. 58; State *v.* Zellers, 7 N. J. L. 237; People *v.* Rector, 19 Wend. 589, 614; Stokes *v.* People, 53 N. Y. 174; State *v.* Scott, 4 Ired. 415; State *v.* Turpin, 77 N. C. 473, 476; State *v.* Byrd, id., 28 S. E. 353; State *v.* Bartmess, Or., 54 Pac. 167; Com. *v.* Lenox, 3 Brewst. 249, 251; Nevling *v.* Com., 98 Pa. 322, 336; State *v.* Smith, 12 Rich. 430, 443; State *v.* Bodie, 33 S. C. 130; State *v.* Wyse, ib. 591; Rippy *v.* State, 2 Head 218; Williams *v.* State, 3 Heisk. 376, 395; Jackson *v.* State, 6 Baxt. 452, 454; Lander *v.* State, 12 Tex. 462, 484; Crim. Code, § 2270; Myers *v.* State, 33 Tex. 525, 542; Dorsey *v.* State, 34 id. 651, 657; Horbach *v.* State, 43 id. 242, 259; Irwin *v.* State, ib. 236, 241; Mealer *v.* State, 32 Tex. Cr. 102, 107; Allison *v.* U. S., 160 U. S. 203, 16 Sup. 252; Wallace *v.* U. S., 162 id. 466; State *v.* Goodrich, 19 Vt. 117, 121; White *v.* Terr., 3 Wash. T. 397; State *v.* McGonigle, 14 id. 594; State *v.* Cushing, 14 id. 527, 17 id. 544; State *v.* Abbott, 8 W. Va. 743, 759; State *v.* Evans, 33 id. 417, 425.

Compare the analogous use of the deceased's reputed character for violence, *ante*, § 14 *c* (2).

[9] Doe *v.* Palmer, 16 Q. B. 747; Keen *v.* Keen, L. R. 3 P. & D. 107; Sugden *v.* St. Leonards, L. R. 1 P. D. 154; Dench *v.* Dench, L. R. 2 P. D. 60, 64; Gould *v.* Lakes, L. R. 6 P. D. 1; Hoppe *v.* Byers, 60 Md. 393; Converse *v.* Allen, 4 All. 512; Hope's Appeal, 48 Mich. 520; Gardner *v.* Gardner, 177 Pa. 218; Johnson *v.* Brown, 51 Tex. 80. The design of a devisee to prevent a will of a certain tenor has also been admitted: Gordon *v.* Burris, 141 Mo. 602.

For other questions as to a testator's utterances, see *post*, § 162 *e*.

[10] See *post*, §§ 14 *r*, 162 *c*.

[1] State *v.* Wentworth, 37 N. H. 196, 211; State *v.* Knapp, 45 id. 148, 154; Keith *v.* N. Co., 140 Mass. 175; Peaslee *v.* R. Co., 152 id. 155, 158; Olsen *v.* Andrews, 168 id. 261; for instances of exclusion, see Ellis *v.* Short, 21 Pick. 142; Hilliard *v.* Beattie, 59 N. H. 462; People *v.* Corey, 148 N. Y. 476; State *v.* Cushing, 17 Wash. 544.

[2] See R. *v.* Williamson, 3 C. & P. 635; R. *v.* Whitehead, 3 C. & K. 202; Costelo *v.* Crowell, 139 Mass. 588.

[3] Com. *v.* Hollis, Mass., 49 N. E. 632; Jones *v.* State, 32 Tex. Cr. 108; Elsner *v.* Supreme Lodge, 98 Mo. 645; State *v.* Arnold, 13 Ired. 184, 192. The contrary doctrine in Indiana is anomalous: L. N. A. & C. R. Co. *v.* Wood, 113 Ind. 544, 550. The person's appearance as indicating that another person may reasonably have believed him to be over age is a different use of the evidence; see Hermann *v.* State, 73 Wis

may be evidenced by the fact of his having taken liquor[4] or by conduct significant of inebriety.[5] Sanity and insanity are of course evidenced by the person's conduct; in fact (in the words of Mr. J. Patteson), "Every act of the party's life is relevant to the issue;"[6] in particular, suicide may be evidential of insanity,[7] and an unnatural distribution of property by a testator.[8] Non-payment of debts may be evidence of the pecuniary capacity to lend or pay money.[9]

Furthermore, in all cases where a physical or mental condition is in question, the person's condition at a prior or a subsequent time tends to show what it probably was at the time in question; for example, one's condition as to facial appearance,[10] physical condition,[11] and, most frequently, sanity or insanity; no rule can be laid down as to the range of time which may be covered by the evidence; in practice Courts usually employ great liberality and allow the facts of each case to control[12] (though a few Courts seem to require evidence of remote insanity to be accompanied by evidence of present or intervening insanity[13]); and the condition after as well as before the act in question is admissible,[14] — in particular, of an accused after the act charged.[15] Since insanity may be inherited, the exist-

248. For the question whether the jury may inspect the person in court, see *ante*, §§ 13 *a*, ff.

[4] Fleming *v.* State, 5 Humph. 564; Tuttle *v.* Russell, 2 Day 202.

[5] Bagley *v.* Mason, 69 Vt. 175; State *v.* Harris, 100 Ia. 188.

[6] Wright *v.* Tatham, 5 Cl. & F. 670, 715, 722; to a similar effect, U. S. *v.* Holmes, 1 Cliff. 109; State *v.* Hays, 22 La. An. 39, 40. For sundry instances, see Rouch *v.* Zehring, 59 Pa. 78; Irish *v.* Smith, 8 S. & R. 578; People *v.* Garbutt, 17 Mich. 9, 16; Hopps *v.* People, 31 Ill. 385, 388; Bower *v.* Bower, 142 Ind. 194.

[7] Grand Lodge *v.* Wieting, 168 Ill. 408; Bachmeyer *v.* Assoc., 87 Wis. 325, 340; Hathaway *v.* Ins. Co., 48 Vt. 336, 353; Duffield *v.* Morris, 2 Harringt. 375, 382.

[8] Fountain *v.* Brown, 38 Ala. 74; Sim *v.* Russell, 90 Ia. 656; Demming *v.* Butcher, 91 id. 425; Manatt *v.* Scott, id., 76 N. W. 717; Burns' Will, N. C., 28 S. E. 519.

[9] Pontius *v.* People, 82 N. Y. 339, 349; Woods *v.* Gummert, 67 Pa. 136; Woodward *v.* Leavitt, 107 Mass. 453, 458; Wiggin *v.* Plumer, 31 N. H. 251, 270.

[10] Com. *v.* Campbell, 155 Mass. 537; Com. *v.* Morgan, 159 id. 374; Gilbert *v.* R. Co., 160 id. 403; T. B. & H. R. Co. *v.* Warner, Tex., 32 S. W. 868; see also some cases under § 439 *h*, *post*.

[11] Cowley *v.* People, 83 N. Y. 477.

[12] Beavan *v.* M'Donnell, 10 Exch. 184; Green *v.* State, 59 Ark. 246; Harp *v.* Parr, 168 Ill. 459; State *v.* Felter, 25 Ia. 72, 76; St. George *v.* Biddeford, 76 Me. 598; Somes *v.* Skinner, 16 Mass. 348, 359; Howes *v.* Colburn, 165 Mass. 385; Laplante *v.* Mills, ib. 487; Haines *v.* Hayden, 95 Mich. 332; Pinney's Will, 27 Minn. 282; State *v.* Hayward, 62 id. 474; State *v.* Duestrow, 137 Mo. 44; Rhoades *v.* Fuller, 139 id. 179; State *v.* Lewis, 20 Nev. 342; State *v.* Kelley, 57 N. H. 549; Norwood *v.* Marrow, 4 Dev. & B. 451; Irish *v.* Smith, 8 S. & R. 576; Wilkinson *v.* Pearson, 23 Pa. 120; Stauffer *v.* Young, 39 id. 455; Pidcock *v.* Potter, 68 id. 351; First N. Bank *v.* Wireback, 106 id. 46; Hindman *v.* Van Wyck, 153 id. 243, 246; St. L. I. M. & S. R. Co. *v.* Greenthal, U. S. App., 77 Fed. 150.

[13] Murphree *v.* Senn, 107 Ala. 424; Ashcraft *v.* De Armond, 44 Ia. 233; Spencer *v.* State, 69 Md. 28.

[14] See cases in note 12, *ante*.

[15] McLean *v.* State, 16 Ala. 679; Green *v.* State, 64 Ark. 523; People *v.* Griffin, Cal., 49 Pac. 711; State *v.* Lewis, 45 Ia. 20; State *v.* Newman, 57 Kan. 705; Com. *v.* Pomeroy, 117 Mass. 148; People *v.* Wood, 126 N. Y. 249, 272; People *v.* Nino, 149 id. 317; People *v.* Hoch, 150 id. 291; French *v.* State, 93 Wis. 325. *Contra:* State *v.* Vann, 82 N. C. 631.

ence of insanity in an ancestor, or even in a near collateral relative, is evidential, though the restriction is usually imposed that independent evidence of the person's insane conduct be also forthcoming.[16] Moreover, external events may so excite a weak mind that a condition of frenzy ensues; and occasionally such events — *e. g.* a wife's adultery — have been admitted as tending to show the natural production of insanity in a mind brooding over the disturbing event, provided independent evidence of insanity is also offered.[17]]

§ 14 *m*. **Evidence to prove Design, Plan.** [In evidencing a design or plan, as tending to show the doing of the act planned, the person's conduct[1] is of course the chief source of circumstantial evidence. The kinds of conduct which may be significant are of great variety; the most common being the acquisition or possession of tools or other means of action,[2] lying in wait,[3] making inquiries or experiments as to an act of the sort in question,[4] and often, also, throwing out obscure hints and intimations of such a purpose.[5] The use of similar offences or acts for this purpose is discussed *post*, § 14 *q*.]

§ 14 *n*. **Evidence to prove Habit, Custom.** [A habit or custom is usually evidenced by direct testimony to its existence. But it may also be evidenced by distinct and repeated acts; the conditions being that they should be sufficiently numerous, and should have occurred

[16] Earl Ferrer's Trial, 19 How. St. Tr. 932, 937; M'Adam *v.* Walker, 1 Dow 148, 177; R. *v.* Oxford, 4 State Tr. N. S. 497, 528; R. *v.* Tucket, 1 Cox Cr. 103; Green *v.* State, 64 Ark. 523; State *v.* Hoyt, 47 Conn. 540; Snow *v.* Benton, 28 Ill. 306; Upstone *v.* People, 109 id. 169; Bradley *v.* State, 31 Ind. 492, 510; Sawyer *v.* State, 35 id. 80, 84; State *v.* Felton, 25 Ia. 75; Ross *v.* McQuiston, 45 id. 147; Sim *v.* Russell, 90 id. 656; Demming *v.* Butcher, 91 id. 425; State *v.* Van Tassel, 103 id. 6; St. George *v.* Biddeford, 76 Me. 598; Baxter *v.* Abbott, 7 Gray 71; People *v.* Garbutt, 17 Mich. 9, 17 (leading case); State *v.* Hayward, 62 Minn. 474; State *v.* Spencer, 21 N. J. L. 196, 203; Walsh *v.* People, 88 N. Y. 467; State *v.* Cunningham, 72 N. C. 469, 474; Laros *v.* Com., 84 Pa. 200, 209.

[17] See Sawyer *v.* State, 35 Ind. 80, 84; People *v.* Wood, 126 N. Y. 147; People *v.* Strait, 148 id. 566; State *v.* Jones, 50 N. H. 369, 382; Burkhart *v.* Gladish, 123 Ind. 237; People *v.* Lane, 101 Cal. 513, 517.

For the use of a testator's utterances at various times, as indicating his normal condition of mind with reference to the disposition of his property, see *post*, § 162 *e*.

[1] For the use of declarations of design or plan under the Hearsay exception, see *post*, § 162 *c*.

[2] R. *v.* Jarvis, 7 Cox Cr. 53; French *v.* State, 81 Ala. 41, 49; Spies *v.* People, 122 Ill. 1, 141; State *v.* Hinkle, 6 Ia. 384; State *v.* Adams, 20 Kan. 320; Com. *v.* Williams, 2 Cush. 584; Com. *v.* Choate, 105 Mass. 451; Long *v.* State, 52 Miss. 23, 34; State *v.* Rider, 95 Mo. 474, 485; People *v.* Scott, 153 N. Y. 40; U. S. *v.* Burns, 7 McLean 23, 26.

For similar conduct as evidence of capacity, see *ante*, §§ 14 *i*, 14 *l*.

[3] Smalls *v.* State, 99 Ga. 25; Prindle *v.* Glover, 4 Conn. 266. See R. *v.* Wilson, 1 Lew. Cr. C. 112.

[4] State *v.* Green, Kirby 89; Jackson *v.* Com., Ky., 38 S. W. 422; Com. *v.* Hersey, 2 All. 173, 177; Walsh *v.* People, 88 N. Y. 462, 466. *Excluded:* Costelo *v.* Crowell, 139 Mass. 588.

[5] See Blandy's Trial, 18 How. St. Tr. 1122, 1132; People *v.* Evans, Cal., 41 Pac. 444; State *v.* Hoyt, 47 Conn. 518, 522, 538; State *v.* Smith, Ia., 77 N. W. 499; People *v.* Potter, 5 Mich. 1, 5; State *v.* Gailor, 71 N. C. 88, 90; State *v.* Green, 92 id. 779, 782; Continental Ins. Co. *v.* Delpeuch, 82 Pa. 235; Rowt *v.* Kile, 1 Leigh 217, 223; Nicolas *v.* Com., 91 Va. 741.

For additional instances, see the next section, under Habit.

under fairly similar circumstances. There is of course an opportunity for wide variation in applying this notion to particular cases, and precedents are seldom of much value;[1] in the field of contracts, the principle is applicable to proof of an agency by other acts of authorization to the same person about the same matter,[2] to proof of a contract by other similar contracts with the same person,[3] and even in some instances to proof of a contract by other similar contracts with other persons;[4] but the rulings cannot be reconciled, and it can only be noted that such evidence is receivable so far as it has real probative value, and does not tend unduly to confuse the issues. As applied in proving prescriptive possession, the principle sanctions the use of other acts of possession on premises so connected — *i. e.* as parts of the same manor, estate, or the like — that acts done upon the one would be done only as a part of a system or habit of doing them upon the rest;[5] the bearing of a boundary may well be evidenced in the same way.[6] So, also, a custom in one place or one trade may be evidence of a custom in another place, provided the places or the trades

[1] Sundry instances are as follows: Com. *v.* Ryan, 134 Mass. 223 (drunkenness); Howe *v.* Thayer, 17 Pick. 91, 96 (notice of dissolution); Watts *v.* Fraser, 7 A. & E. 223, 232 (printing of newspaper); Gahagan *v.* R. Co., 1 All. 187 (switching railroad cars); State *v.* Shaw, 58 N. H. 73 (sale of liquor); Davis *v.* Lyon, 91 N. C. 444 (justice's abuse of authority); State *v.* R. Co., 52 N. H. 528, 549 (ringing locomotive bell); Adams *v.* Ins. Co., 70 N. Y. 169 (waiver of insurance-condition); L. E. & W. R. Co. *v.* Craig, 47 U. S. App. 647 (waiver of employer's rule).

[2] See Gibson *v.* Hunter, 2 H. Bl. 288; Barber *v.* Gingell, 3 Esp. 61; Cash *v.* Taylor, Ll. & W. C. C. 178; Llewellyn *v.* Winkworth, 13 M. & W. 599; Morris *v.* Bethell, L. R. 4 C. P. 765; Sun Mut. Ins. Co. *v.* Barrel Co., 114 Ill. 99; Trull *v.* True, 33 Me. 367; Lee *v.* Tinges, 7 Md. 215, 237; People *v.* McLaughlin, 150 N. Y. 365; Stevenson *v.* Hoy, 43 Pa. 191, 196.

[3] See Bourne *v.* Gatliff, 11 Cl. & F. 45, 70; Gardner *v.* Meeker, 169 Ill. 40; Eaton *v.* Tel. Co., 68 Me. 63, 67; Nickerson *v.* Gould, 82 id. 512; Wood *v.* Finson, Me., 31 Atl. 1007; Farnum *v.* Farnum, 13 Gray 508; Huntsman *v.* Nichols, 116 Mass. 521; Schwerin *v.* De Graff, 21 Minn. 354; Iron Mountain Bank *v.* Murdock, 62 Mo. 70, 74; Swamscot M. Co. *v.* Walker, 22 N. H. 457, 467; Holmes *v.* Goldsmith, 147 U. S. 150, 162; Welch *v.* Rieker, 69 Vt. 239; Limerick Nat'l B'k *v.* Adams, id., 40 Atl. 166.

[4] See Carter *v.* Pryke, Peake, 95; Spenceley *v.* Wilmot, 7 East 108; Hollingham *v.* Head, 4 C. B. N. S. 388; Smith *v.* Wilkins, 6 C. & P. 180; Barden *v.* Keverberg, 2 M. & W. 61; Woodward *v.* Buchanan, L. R. 5 Q. B. 285; Stolp *v.* Blair, 68 Ill. 541; Sehmidt *v.* Packard, 132 Ind. 398, 402; Lexing. & E. R. Co. *v.* Lyons, Ky., 46 S. W. 209; Davis *v.* Kneale, 97 Mich. 72, 76; Roles *v.* Mintzer, 27 Minn. 31; Murphy *v.* Backer, 67 id. 510; True *v.* Sanborn, 27 N. H. 383; Jackson *v.* Smith, 7 Cow. 717; McLoghlin *v.* Bank, 139 N. Y. 514, 522; Coxe *v.* Deringer, 82 Pa. 236, 258; Phelps *v.* Conant, 30 Vt. 277, 282; Aiken *v.* Kennison, 58 id. 665; Jones *v.* Ellis, 68 id. 544; Pictorial League *v.* Nelson, 69 id. 162; Hartman *v.* Evans, 38 W. Va. 669, 673; Kelley *v.* Schupp, 60 Wis. 76; Brumell *v.* H. S. M. Co., 86 id. 587; Oliver *v.* Morawetz, 95 id. 1.

[5] Stanley *v.* White, 14 East 332; Barnes *v.* Mawson, 1 M. & S. 85; Doe *v.* Kemp, 7 Bing. 332; Jones *v.* Williams, 2 M. & W. 326; Doe *v.* Roberts, 13 id. 520, 530; Bristow *v.* Cormican, L. R. 3 App. Cas. 641, 670; Neill *v.* Devonshire, L. R. 8 App. Cas. 135, 166; Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633, 746; Abeel *v.* Van Gelder, 36 N. Y. 515.

Compare the somewhat different doctrine as to possession of part of land under a deed of the whole being *prima facie* evidence of title as against one having no paper title: Bowman *v.* Weltig, 39 Ill. 416, 426.

[6] Overton *v.* Davisson, 1 Gratt. 211, 227; Rensens *v.* Lawson, 91 Va. 226; Goldsborough *v.* Pidduck, 87 Ia. 599; Olsen *v.* Rogers, Cal., 52 Pac. 486.

are such that a uniformity of practice may be assumed;[7] in the application of this principle in England to customs of descent, tithes, and the like, it has been regarded as admitting in evidence the custom in the same manor,[8] or in the same township or other entity,[9] and even in other manors where the conditions on the matter in question were presumably the same.[10]]

§ 14 *o*. **Evidence to prove Motive, Emotion, Malice, etc.** [A motive[1]—*i. e.* an emotion, passion, or feeling, as tending to produce an act of a given sort—may be evidenced (1) either by circumstances tending to excite such an emotion, (2) or by conduct exhibiting it, (3) or by the prior or subsequent existence of the emotion.

(1) No specific rules can be laid down as to the kind of circumstance that may excite a certain emotion; the range of possibilities is infinite;[2] but it is necessary that the circumstance should have become known to the person said to have been influenced by it.[3] Of the few matters over which any real controversy has arisen, it is sufficient to note that domestic infidelity in its various shapes, or an illicit sexual connection, is treated as capable of sufficiently exciting the desire to murder;[4] as also the opportunity to obtain

[7] See Noble *v.* Kennoway, 2 Dougl. 510; Milward *v.* Hibbert, 3 Q. B. 120, 139; Falkner *v.* Earle, 3 B. & S. 360; Place *v.* Allcock, 4 F. & F. 1074; Fleet *v.* Morton, L. R. 7 Q. B. 126, 41 L. J. Q. B. N. S. 49; M'Fadden *v.* Murdock, 1 Ir. C. L. 218; Barnes *v.* Ingalls, 39 Ala. 201; Denver & R. G. R. Co. *v.* Glasscott, 4 Colo. 270; Todd *v.* Keene, 167 Mass. 157; Reynolds *v.* Ins. Co., 36 Mich. 131, 142; Walker *v.* Barrow, 6 Minn. 508; Phœnix Ins. Co. *v.* Philip, 13 Wend. 81; Howard *v.* Ins. Co., 4 Den. 507; Tex. & P. R. Co. *v.* Reed, 88 Tex. 439; W. M. W. & N. R. Co. *v.* Duncan, ib. 611; Ins. Co. *v.* Weide, 11 Wall. 438; Anderson *v.* Mining Co., Utah, 50 Pac. 815; Hine *v.* Pomeroy, 30 Vt. 103, 106.

[8] Doe *v.* Sisson, 12 East 62.

[9] Blundell *v.* Howard, 1 M. & S. 292; Jewison *v.* Dyson, 9 M. & W. 540, 556; Leudrum *v.* Deazley, 4 L. R. Ire. 635, 645.

[10] Moulin *v.* Dallison, Cro. Car. 484; Champion *v.* Atkinson, 3 Keb. 90; Somerset *v.* France, 1 Stra. 654; Furneaux *v.* Hutchins, 2 Cowp. 807; Beebee *v* Parker, 5 T. R. 26, 31; R. *v.* Ellis, 1 M. & S. 652, 661; Rowe *v.* Brenton, 8 B. & C. 737, 758; Anglesey *v.* Hatherton, 10 M. & W. 218; see Gilman *v.* Riopelle, 18 Mich. 145, 165.

[1] It is of course not essential, on a charge of crime, to prove a motive: Pointer *v.* U. S., 151 U. S. 396, 413; People *v.* Durrant, 116 Cal. 179.

[2] Johnson *v.* State, 17 Ala. 627; Lyon *v.* Hancock, 35 Cal. 376; Hendrickson *v.* People, 10 N. Y. 13, 31; People *v.* Stout, 4 Park. Cr. 128.

[3] Son *v.* Terr., Okl., 49 Pac. 923; Cheek *v.* State, 35 Ind. 492, 494; State *v.* Shelton, 64 Ia. 333, 338; Stokes *v.* People, 53 N. Y. 176; People *v.* Fitzgerald, id., 50 N. E. 846.

[4] See Com. *v.* Ferrigan, 44 Pa. 386; Johnson *v.* State, 17 Ala. 625; Edmonds *v.* State, 34 Ark. 720, 730; People *v.* Gress, Cal., 32 Pac. 752; State *v.* Watkins, 9 Conn. 47, 52; State *v.* Green, 35 id. 203; Shaw *v.* State, Ga., 29 S. E. 477; Farris *v.* State, 129 Ill. 521, 526; Simons *v.* People, 150 id. 66, 75; Binns *v.* State, 57 Ind. 46, 52; Hinshaw *v.* State, 147 id. 334; State *v.* Hinkle, 6 Ia. 380, 384; State *v.* Kline, 54 id. 183; State *v.* Reed, 53 Kan. 767, 774; Jackson *v.* Com., Ky., 38 S. W. 422; State *v.* Reed, 50 La. An., 24 So. 131; Com. *v.* Madan, 102 Mass. 1, 4; Templeton *v.* People, 27 Mich. 502; State *v.* Lawlor, 28 Minn. 216, 219; Webb *v.* State, 73 Miss. 456; State *v.* Duestrow, 137 Mo. 44; St. Louis *v.* State, 8 Nebr. 405, 411; Dixon *v.* State, 46 id. 298; State *v.* Larkin, 11 Nev. 314, 328; People *v.* Stout, 4 Park. Cr. 71, 128; Pierson *v.* People, 79 N. Y. 424, 435; People *v.* Harris, 136 id. 423, 449; People *v.* Osmond, 138 id. 80, 86; People *v.* Buchanan, 145 id. 1; People *v.* Scott, 153 id. 40; People *v.* Sutherland, 154 id. 345; Com. *v.* Ferrigan, 44 Pa. 386; Turner *v.* Com., 86 id. 54, 70; State *v.* Chase, 68 Vt. 405; Mack *v.* State, 48 Wis. 271, 276.

money,[5] the expediency of preventing discovery or arrest,[6] or the deceased's share in opposing or injuring the accused by litigation or otherwise.[7] Money or pecuniary condition, as connected with motive, has several aspects: first, the possession of money by A is admissible as tending to show a desire in B to rob or kill A to obtain it,[8] and the lack of money by A may tend to show that B would be unwilling to give him credit,—in particular by lending him money,[9] selling him goods,[10] or selling them absolutely,[11] or selling them in good faith as against creditors;[12] secondly, the possession of money by B is some evidence that he would not incline to injure A to obtain money,[13] or would not borrow money;[14] and the lack of money by B is some evidence that he had a motive to borrow,[15] but is hardly evidence of a desire to commit crime to obtain it[16] (except in rebuttal[17]), because this would practically put a poor person under comparative disadvantage and suspicion in such cases; thirdly, where the terms of a contract of sale or hiring are in question, the market value of such articles or services is generally admitted as indicating that the person charged would not have been willing to vary widely from the market value, and in the same way, where the identity of the article delivered is in issue, its relation in value to the agreed price tends to show whether it was the agreed article.[18]

[5] See R. *v.* Flannagan, 15 Cox Cr. 403, 411; Byers *v.* State, 105 Ala. 31; 16 So. 716; Graves *v.* People, 18 Colo. 170; State *v.* Crowley, 33 La. An. 782, 785; Hendrickson *v.* People, 10 N. Y. 13, 31; Kennedy *v.* People, 39 id. 245, 254; Moore *v.* U. S., 150 U. S. 57, 61.

[6] See R. *v.* Clewes, 4 C. & P. 222; Marler *v.* State, 68 Ala. 580, 584; Dunn *v.* State, 2 Ark. 229; State *v.* Seymore, 94 Ia. 699; State *v.* Mulholland, 16 La. An. 376; State *v.* Fontenot, 48 id. 305; State *v.* Morris, 84 N. C. 756, 761; Son *v.* Terr., Okl., 49 Pac. 923; State *v.* Pancoast, 5 N. D. 516.

[7] See Commander *v.* State, 60 Ala. 1, 7; Com. *v.* Gray, Ky., 30 S. W. 1015; Murphy *v.* People, 63 N. Y. 591; Stone *v.* State, 4 Humph. 27, 35.

[8] See note 5, *supra.*

[9] Marcy *v.* Barnes, 16 Gray 161; Cochrane *v.* W. D. Co., 64 Minn. 369.

[10] Plumb *v.* Curtis, 66 Conn. 154; Lee *v.* Wheeler, 11 Gray 236.

[11] Buswell T. Co. *v.* Case, 144 Mass. 350.

[12] Cook *v.* Mason, 5 All. 212; Sweetser *v.* Bates, 117 Mass. 466.

[13] R. *v.* Grant, 4 F. & F. 322. *Contra:* Reynolds *v.* State, 147 Ind. 3.

[14] Stauffer *v.* Young, 39 Pa. 455, 462.

[15] Stevenson *v.* Stewart, 11 Pa. 309; Covanhovan *v.* Hart, 21 id. 495, 502; Harvey *v.* Osborn, 55 Ind. 535, 545; Costello *v.* Crowell, 133 Mass. 352; see Bathrick *v.* Post, 50 Mich. 633; Com. *v.* Jeffries, 7 All. 548, 556.

[16] Com. *v.* Jeffries, *supra;* Reynolds *v.* State, 147 Ind. 3. *Contra:* Com. *v.* Yerkes, Phila. Com. Pleas, 29 Leg. Intell. 60, 12 Cox Cr. 208, 217, 225; Bridges *v.* State, Ga., 29 S. E. 859. Compare § 14 *s, post.*

[17] Fulmer *v.* Com., 97 Pa. 503.

[18] The cases usually add the qualification that the price, etc., must be in dispute, or the evidence conflicting, or direct testimony be wanting: Johnson *v.* Harder, 45 Ia. 677, 679; Bradbury *v.* Dwight, 3 Metc. 31; Rennell *v.* Kimball, 5 All. 356, 365; Parker *v.* Coburn, 10 id. 82, 84: Upton *v.* Winchester, 106 Mass. 330; Brewer *v.* R. Co. 107 id. 277, 278; Norris *v.* Spofford, 127 id. 85; Campau *v.* Moran, 31 Mich. 281; Kumler *v.* Ferguson, 7 Minn. 442, 445; Schwerin *v.* De Graff, 21 id. 354; Miller *v.* Lamb, 22 id. 43; Saunders *v.* Gallagher, 53 id. 422; Zelch *v.* Hirt, 59 id. 360, 362; Blomgren *v.* Anderson, 48 Nebr. 240; Weidner *v.* Phillips, 114 N. Y. 458, 461; Rubino *v.* Scott, 118 id. 662; Short *v.* Yelverton, N. C., 28 S. E. 138; Jefferson *v.* Bur-

(2) Conduct as evidence of motive or emotion presents no topics of real controversy.[19]

(3) In evidencing motive, emotion, passion, etc., by its former or subsequent existence, the chief difficulties arise in fixing a limit of time, and in ascertaining that the emotion relates to the same object. No precise rule can be formulated in either respect. (*a*) Hostility, as leading to *injuries of violence* and the like, may be evidenced by the person's hostile conduct at other times, subject to indefinite limitations on the above points;[20] it is sometimes said[21] that the details of the quarrels or hostilities should not be gone into, as too likely to prejudice or to excuse the defendant unfairly. The precedents in cases of crimes of violence against a wife or paramour may perhaps be grouped by themselves.[22] (*b*) The *sexual passion*, as thus evidenced, raises a variety of questions. It is conceded that such desire is evidential to show the accomplishment of it;[23] and that its existence at the time in question may be evidenced by its existence for the same object at a prior or subsequent time;[24] the limits of time must depend on the circumstances of each case, and should be left to the trial Court's discretion; indecent familiarity, as well as actual intercourse, is evidence of the desire; and the fact that the evidence involves another crime is in itself no objection to its reception.[25] So much is in general established[26] for the various kinds of charges involving such evidence. The cases of adultery, criminal conversation, fornication,

haus, U. S. App., 85 Fed. 952; Koammen *v.* Mill Co., 58 Wis. 399; Valley L. Co. *v.* Smith, 71 id. 304, 306; Bell *v.* Radford, 72 id. 402; Mygatt *v.* Tarbell, 85 id. 457, 467.

[19] *E. g.* Winns *v.* State, 90 Ala. 623 (calling a vile name, admitted); State *v.* Hutchinson, 45 Ia. 566 (making faces during the trial, admitted).

[20] See McManus *v.* State, 36 Ala. 285, 292; Faire *v.* State, 58 id. 74, 79; Commander *v.* State, 60 id. 1, 7; Hudson *v.* State, 61 id. 333, 337; Gray *v.* State, 63 id. 66, 73; McAnally *v.* State, 74 id. 17; Atkins *v.* State, 16 Ark. 568, 581; Billings *v.* State, 52 id. 303, 310; State *v.* Alford, 31 Conn. 40, 43; State *v.* Riggs, 39 id. 498, 501; Pound *v.* State, 43 Ga. 88, 133; Daniel *v.* State, id., 29 S. E. 767; Tracy *v.* People, 97 Ill. 104; State *v.* Westfall, 49 Ia. 328; State *v.* Moelchen, 53 id. 310, 314; Com. *v.* Gray, Ky., 30 S. W. 1015; Tuttle *v.* Com., id., 33 S. W. 823; State *v.* D'Angelo, 9 La. An. 46; State *v.* Jackson, 12 id. 679; State *v.* Cooper, 32 id. 1084; State *v.* McNeely, 34 id. 1022; State *v.* Birdwell, 36 id. 859, 861; Com. *v.* Vaughan, 9 Cush. 594; Com. *v.* Holmes, 157 Mass. 240; Josselyn *v.* McAllister, 22 Mich. 300, 304; Druse *v.* Wheeler, ib. 439, 444; Tyler *v.* Nelson, 109 id. 37; 66 N. W. 671; Osmun *v.* Winters, 30 Or. 177; Holley *v.* State, Tex. Cr., 46 S. W. 39.

[21] In Alabama, Massachusetts, Texas; *contra*, in Kentucky, Louisiana.

[22] See Baalam *v.* State, 17 Ala. 451, 453; People *v.* Kern, 61 Cal. 244; People *v.* Barthleman, Cal., 52 Pac. 112; Austin *v.* Austin, 10 Conn. 221; State *v.* Green, 35 id. 203, 208; Shaw *v.* State, 60 Ga. 246, 250; Painter *v.* People, 147 Ill. 463; Doolittle *v.* State, 93 Ind. 272, 274; Kennedy *v.* Hensley, 94 Ia. 629; Com. *v.* Abbott, 130 Mass. 472; Com. *v.* Holmes, 157 id. 233, 239; State *v.* Nugent, 71 Mo. 136, 140; Gardner *v.* Gardner, 23 Nev. 207; State *v.* Langford, Busbee 436, 442; State *v.* Rash, 12 Ired. 382; Sayres *v.* Com., 88 Pa. 291, 309; Thiede *v.* Utah, 159 U. S. 510; Boyle *v.* State, 61 Wis. 440, 444.

[23] See Thayer *v.* Thayer, 101 Mass. 13; State *v.* Markins, 95 Ind. 465.

[24] See Lawson *v.* Swinney, 20 Ala. 76; Thayer *v.* Thayer, *supra*.

[25] See *post*, § 14 *q*.

[26] Subject to individual variations in some Courts, which space does not suffice to analyze.

and incest present no difficulties; subject to the above limitations, former or subsequent intercourse or improper familiarities of the same persons is generally received.[27] In seduction and bastardy such evidence is generally offered as indicating the probability of intercourse by the man; but in the statutory action or prosecution for seduction, it may be offered to show the probability of consent by the woman without a promise of marriage;[28] in general, intercourse or improper familiarities between the parties at other times is admitted.[29] On a charge of rape,[30] several discriminations are necessary; the woman's prior improper conduct with the defendant is universally conceded to be evidence of her probable consent;[31] the woman's prior improper conduct with other men is, however, evidential only of her general disposition, and its use is disputed;[32] the woman's prior friendly feelings towards the defendant are evidence that he would probably have attempted persuasion rather than force;[33] former improper conduct to the same woman by the defendant indicates a passion for her,[34] though when this involves

[27] Duke of Norfolk *v.* Germaine, 12 How. St. Tr. 943; Boddy *v.* Boddy, 30 L. J. P. M. A. 23; State *v.* Crowley, 13 Ala. 172; Lawson *v.* Swinney, 20 id. 65, 75; McLeod *v.* State, 35 id. 395, 397; Alsabrooks *v.* State, 52 id. 24; People *v.* Patterson, 102 Cal. 239, 244; Brevaldo *v.* State, 21 Fla. 789, 795; Bass *v.* State, Ga., 29 S. E. 966; Crane *v.* People, 168 Ill. 395; Lovell *v.* State, 12 Ind. 18; State *v.* Markins, 95 id. 464; Lefforge *v.* State, 129 id. 551; State *v.* Briggs, 68 Ia. 416, 423; State *v.* Hurd, 101 Ia. 391; State *v.* Witham, 72 Me. 531, 534; Shufeldt *v.* Shufeldt, 86 Md. 519; Com. *v.* Merriam, 14 Pick. 518; Com. *v.* Horton, 2 Gray, 355; Com. *v.* Thrasher, 11 id. 450; Com. *v.* Pierce, ib. 447; Com. *v.* Lahey, 14 id. 92; Com. *v.* Curtis, 97 Mass. 574; Thayer *v.* Thayer, 101 id. 111; Com. *v.* Nichols, 114 id. 288; Brooks *v.* Brooks, 145 id. 574; People *v.* Jenness, 5 Mich. 305, 319; People *v.* Carrier, 46 id. 442, 446; People *v.* Skutt, 96 id. 449, 450; State *v.* Way, 5 Nebr. 283; State *v.* Wallace, 9 N. H. 515; State *v.* Marvin, 35 id. 22, 28; Lockyer *v.* Lockyer, 1 Edm. Sel. C. 108; Stephens *v.* People, 19 N. Y. 549, 571; State *v.* Kemp, 87 N. C. 538; State *v.* Pippin, 88 id. 646; State *v.* Roby, N. C., 28 S. E. 490; Gardner *v.* Madeira, 2 Yeates, 466; Sherwood *v.* Fitman, 55 Pa. 77, 79; Com. *v.* Bell, 166 id. 405; Cole *v.* State, 6 Baxt. 242; Richardson *v.* State, 34 Tex. 142; Burnett *v.* State, 32 Tex. Cr. 86; Wood *v.* State, ib. 476, 478; Duncan *v.* State, id., 45 S. W. 921; State *v.* Bridgman, 49 Vt. 202, 209; State *v.* Colby, 51 id. 291, 296; State *v.* Potter, 42 id. 33, 40; Ketchingman *v.* State, 6 Wis. 426; Porath *v.* State, 90 id. 527.

[28] People *v.* Clark, 33 Mich. 112, 116; Bowers *v.* State, 29 Oh. St. 542, 546. The opposite inference was suggested in Smith *v.* Hall, 69 Conn. 651.

[29] See Verdin *v.* Wray, 2 Q. B. D. 611; Ramey *v.* State, 127 Ind. 243; Keller *v.* Donnelly, 5 Md. 213, 219; People *v.* Clark, 33 Mich. 112, 115; State *v.* Robertson, N. C., 28 S. E. 59; Thayer *v.* Davis, 38 Vt. 163.

[30] See R. *v.* Cockcroft, 11 Cox Cr. 410; R. *v.* Holmes, 12 id. 141; R. *v.* Riley, 16 id. 191; McQuirk *v.* State, 84 Ala. 435, 438; Barnes *v.* State, 88 id. 204, 207; Pleasant *v.* State, 15 Ark. 624, 643; People *v.* Rangod, 112 Cal. 669; Shirwin *v.* People, 69 Ill. 56, 59; Eyler *v.* State, 74 Ind. 49, 51; Bedgood *v.* State, 115 id. 275, 278; Hall *v.* People, 47 Mich. 636; People *v.* McLean, 71 id. 310; People *v.* Abbott, 97 id. 484, 486; State *v.* Bowser, Mont., 53 Pac. 179; State *v.* Forschner, 43 N. H. 89; State *v.* Knapp, 45 N. H. 151, 156; People *v.* Abbot, 18 Wend. 194; People *v.* Jackson, 3 Park. Cr. 398; Woods *v.* People, 55 N. Y. 516; State *v.* Jefferson, 6 Ired. 305; McCombs *v.* State, 8 Oh. St. 643, 646; McDermott *v.* State, 13 id. 331; State *v.* Robinson, Or., 48 Pac. 357; State *v.* Hollenbeck, 67 Vt. 34; Proper *v.* State, 85 Wis. 615, 628; these cases are referred to in the following four notes.

[31] See the preceding cases *passim*.

[32] See *ante*, § 14 *g*; the distinction is illustrated in State *v.* Bridgman, 49 Vt. 212.

[33] See cases in Michigan, Montana, Vermont.

[34] See cases in New Hampshire, Oregon, Wisconsin.

another rape, it is usually excluded under the principle of § 14 *q*, *post*; and the rape of another woman is not only open to the same objection, but is also not evidential to show a desire for the woman in question. (*c*) In actions for *defamation*, the use of other utterances of the defendant as evidence of malice is also beset by special complications which can only be briefly noted. The inference is a double one, *i. e.* that the other utterance indicated malice then, and that malice then indicates malice at the time in question. (a) As to the first inference, expressions of hatred or ill-will, though not in themselves defamatory, are evidential, as all concede;[35] furthermore, any defamatory utterance may evidence malice;[36] whether an unproved plea of justification is open to the same inference has been disputed, but it may well be, if allowed to stand with no attempt to prove it;[37] the subject-matter of the other utterance is in England regarded as immaterial, but in this country it is usually said (in varying phrase) that it must concern the same subject as the utterance sued upon.[38] As to the second inference, there is no question in general;[39] as to the range of time allowable, no limit at all seems to be set in England,[40] but in this country it has been said that there may well be a limit, depending perhaps on the trial Court's discretion.[41] But (b) independently of this question of probative value or relevancy, certain considerations of collateral inconvenience have often been thought to operate; in the first place, it has been argued that if the jury have such utterances before them, they are likely to give damages for them, and thus the defendant would pay for a defamation already barred by statute, or recovered for, or in future to be sued for;[42] in the second place, it has been argued that the doctrines of surprise and confusion of issues (explained *ante*, § 14 *a*) should exclude such evidence.[43] Proceeding upon these reasons, certain limitations have been suggested at various times: first, that all other actionable utterances be excluded,[44] but this has long been discarded in England,[45] and, so far as appears, in this country;[46] secondly, that other actionable utterances not already

[35] Wright *v.* Woodgate, Eng.; for this case, and those cited in the following notes, see *infra*, note 56.

[36] Swift *v.* Dickerman, Conn.

[37] Simpson *v.* Robinson, Eng.; *accord:* California, Maine, Maryland, Massachusetts, New York; also Connecticut and Oregon (qualified).

[38] California, Connecticut, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oregon, Pennsylvania (perhaps), South Carolina (qualified), United States, Vermont, Virginia.

[39] See the reasoning in Barrett *v.* Long, Eng., Gribble *v.* Press Co., Minn.

[40] Barrett *v.* Long.

[41] See cases in Massachusetts, New Hampshire, Wisconsin.

[42] See Bronson, J., in Root *v.* Lowndes, N. Y.; the argument is answered in Pearson *v.* Lemaitre, Barrett *v.* Long, Eng. The answer is that the jury may and should be instructed not to include these utterances in estimating damages.

[43] See Finnerty *v.* Tipper, Eng., Shock *v.* McChesney, Pa., Bronson, J., *ubi supra*.

[44] Cook *v.* Field, and others in England.

[45] Pearson *v.* Lemaitre, Barrett *v.* Long.

[46] Alabama, Indiana, Iowa, Kentucky, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania; and by implication in others.

recovered for be excluded,[47] but this has not become law anywhere; thirdly, that other actionable utterances already recovered for be excluded[48] (*i. e.* just the contrary of the preceding), but this has been nowhere accepted; fourthly, that other actionable utterances not barred by statutory limitation be excluded,[49] but this also has been generally repudiated;[50] fifthly, it has been suggested that just the contrary rule be adopted, excluding other actionable utterances barred by limitation, but this also has been rejected where proposed;[51] sixthly, it has been suggested that subsequent utterances — *i. e.*, meaning usually, after action or trial — be excluded, but this limitation obtains in a few jurisdictions only,[52] and is generally repudiated;[53] seventhly, it has been suggested that other actionable utterances be excluded entirely unless the utterance charged is equivocal, *i. e.* does not in itself clearly indicate malice;[54] this distinction has less frequently been put forward, but obtains in some Courts.[55] The net result of the arguments based on collateral inconvenience is that, except in a few jurisdictions, all the suggested limitations are denied; though it must be noted that the foregoing statements as to the rule in particular jurisdictions are tentative only, and that too much reliance may often be placed on precedents and a consistent obedience to them.[56]]

[47] Symmons *v.* Blake, Eng.

[48] Repudiated in Connecticut.

[49] New York.

[50] Alabama, Maine, New Hampshire, New Jersey, Ohio, Pennsylvania, South Carolina, Virginia.

[51] England (Barrett *v.* Long), Alabama, Indiana, Maine, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Virginia.

[52] Connecticut, New York, Tennessee.

[53] England (Rustell *v.* McQuister, Hemmings *v.* Gasson — with qualifications, — and intervening cases), Alabama, California, Georgia, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, South Carolina, Vermont, Virginia, Wisconsin.

[54] Pearce *v.* Ormsby, Eng.

[55] Indiana, New York; repudiated in England (Barrett *v.* Long), Ohio.

[56] Space does not suffice to analyze the cases: Buller, Nisi Prius, 7; Cook *v.* Field, 3 Esp. 133; Charlton *v.* Barret, Peake N. P. 22; Mead *v.* Daubigny, ib. 125; Lee *v.* Huson, ib. 166; Plunkett *v.* Cobbett, 5 Esp. 136; Rustell *v.* Macquister, 1 Camp. 49; Scott *v.* Lord Oxford, Peake N. P. 127, note; Tate *v.* Humphrey, 1 Camp. 73, note; Finnerty *v.* Tipper, ib. 72; Stuart *v.* Lovell, 2 Stark. 93; Macleod *v.* Wakley, 3 C. & P. 311; Chubb *v.* Westley, 6 id. 436; Defries *v.* Davis, 7 id. 112; Pearce *v.* Ormsby, 1 Moo. & Rob. 477; Wright *v.* Woodgate, 2 C. M. & R. 578; Bond *v.* Douglas, 7 C. & P. 627; Tarpley *v.* Blabey, 2 Bing. N. C. 437; Delegall *v.* Highley, 8 C. & P. 444, 449; Webb *v.* Smith, 4 Bing. N. C. 379; Barwell *v.* Adkins, 1 M. & Gr. 807; Pearson *v.* Lemaitre, 5 id. 700, 719; Simpson *v.* Robinson, 12 Q. B. 511; Warwick *v.* Foulkes, 12 M. & W. 507; Wilson *v.* Robinson, 7 Q. B. 68; Long *v.* Barrett, 7 Ir. L. R. 439; Barrett *v.* Long, 3 H. L. C. 395, 414; Camfield *v.* Bird, 3 C. & K. 56; Hemmings *v.* Gasson, E. B. & E. 346; Teague *v.* Williams, 7 Ala. 844; Scott *v.* McKinnist, 15 id. 168, 170; Stern *v.* Locwenthal, 77 Cal. 340; Westerfield *v.* Scripps, 119 Cal. 607; Hearne *v.* De Young, ib. 670; Holmes *v.* Brown, Kirby 151; Mix *v.* Woodward, 12 Conn. 262, 292; Flint *v.* Clark, 13 id. 361, 366; Williams *v.* Miner, 18 id. 464, 472; Swift *v.* Dickerman, 31 id. 285, 290; State *v.* Riggs, 39 id. 498, 501; Ward *v.* Dick, 47 id. 300, 304; State *v.* Jeandell, 5 Harringt. 475, 479; Craven *v.* Walker, 101 Ga. 845; Scott *v.* Mortsinger, 2 Blackf. 454, 457; M'Glemery *v.* Keller, 3 id. 489; Throgmorton *v.* Davis, 4 id. 176; Burke *v.* Miller, 6 id. 155; McIntire *v.* Young, ib. 498;

§ 14 *p*. **Evidence to prove Knowledge, Belief, Notice, Consciousness of Guilt, etc.** [The state of mind of being aware or conscious, having knowledge or belief, etc., may be evidenced either (1) by outward circumstances which would naturally have brought about such knowledge, belief, etc., or (2) by conduct of the person indicating the existence of knowledge, belief, etc.

(1) Several classes of cases present controversial questions of this sort. To show the reasonable apprehensions of a defendant on a charge of homicide or assault, the deceased person's reputed character,[1] or his communicated threats against the defendant,[2] though probably not particular acts of violence,[3] may be shown, as already explained. On the same principle, to show an employer's knowledge of an employee's incompetency, the employee's reputed character for

Schoonover *v.* Rowe, 7 id. 202; Forbes *v.* Myers, 8 id. 74; Teagle *v.* Deboy, ib. 136; Lanter *v.* McEwen, ib. 496; Burson *v.* Edwards, 1 Ind. 164; Hesler *v.* Degant, 3 id. 504; Vincent *v.* Dixon, 5 id. 270; Meyer *v.* Bohlfing, 44 id. 239; Downey *v.* Dillon, 52 id. 442, 450; Beardsley *v.* Bridgman, 17 Ia. 292; Schrimper *v.* Heilman, 24 id. 505; Ellis *v.* Lindley, 38 id. 461; Prime *v.* Eastwood, 45 id. 640, 642; Harmers *v.* McClelland, 74 id. 320; Eccles *v.* Shackelford, 1 Litt. 36; Allensworth *v.* Coleman, 5 Dana 315; Letton *v.* Young, 2 Metc. 561; Campbell *v.* Bannister, 79 Ky. 208; Kendrick *v.* Kemp, 6 Mart. N. S. La. 500; Smith *v.* Wyman, 4 Shepl. 13; Harmon *v.* Harmon, 61 Me. 233; Conant *v.* Leslie, 85 Me. 257; Duvall *v.* Griffith, 2 H. & G. 30; Rigden *v.* Wolcott, 6 G. & J. 413, 419; Jackson *v.* Stetson, 15 Mass. 48; Bodwell *v.* Swan, 3 Pick. 376; Goodrich *v.* Stone, 11 id. 486, 491; Watson *v.* Moore, 2 Cush. 137; Baldwin *v.* Soule, 6 Gray 321; Markham *v.* Russell, 12 All. 574; Robbins *v.* Fletcher, 101 Mass. 116; Clark *v.* Brown, 116 id. 508; Com. *v.* Damow, 136 id. 449; Sullivan *v.* O'Leary, 146 id. 322; Detroit Post Co. *v.* McArthur, 16 Mich. 446, 454; Proctor *v.* Houghtaling, 37 id. 41, 45; Randall *v.* News Ass., 97 id. 136, 145; Thibault *v.* Sessions, 101 id. 279, 286; Botsford *v.* Chase, 108 id. 432; Reitan *v.* Goebel, 33 Minn. 151; Gribble *v.* Press Co., 34 id. 342; Larrabee *v.* Tribune Co., 36 id. 141, 142; Mason *v.* Mason, 4 N. H. 114; Chesley *v.* Chesley, 10 id. 337; Symonds *v.* Carter, 32 id. 458; Bartow *v.* Brands, 15 N. J. L. 248; State *v.* Robinson, 16 id. 514; Schenck *v.* Schenck, 20 id. 208; Evening Journal Ass'n *v.* McDermott, 44 id. 430; Fahr *v.* Hayes, 50 id. 275, 281; Thomas *v.* Croswell, 7 Johns. 264, 270; Matson *v.* Buck, 5 Cow. 499; Root *v.* King, 7 id. 613, 633; King *v.* Root, 4 Wend. 140; Inman *v.* Foster, 8 id. 608; Kennedy *v.* Gifford, 19 id. 297, 300; Root *v.* Lowndes, 6 Hill 518; Keenholts *v.* Becker, 3 Den. 346; Campbell *v.* Butts, 3 N. Y. 173; Fero *v.* Roscoe, 4 id. 165; Howard *v.* Sexton, ib. 157, 161; Fry *v.* Bennett, 28 id. 324, 327; Thorn *v.* Knapp, 42 id. 474; Titus *v.* Sumner, 44 id. 266; Bassell *v.* Elmore, 48 id. 563, 566; Frazier *v.* McCloskey, 60 id. 337; Daly *v.* Byrne, 77 id. 187; Enos *v.* Enos, 135 id. 609; Brittain *v.* Allen, 2 Dev. 120, 125; 3 id. 167; Lucas *v.* Nichols, 7 Jones L. 32; Carter *v.* McDowell, Wright 100; Seely *v.* Cole, ib. 681; Flamingham *v.* Boucher, ib. 746; Fisher *v.* Patterson, 14 Oh. 418, 424; Stearns *v.* Cox, 17 id. 590; Van Verveer *v.* Sutphin, 5 Oh. St. 293, 295; Alpin *v.* Morton, 21 id. 536, 544; Upton *v.* Hume, 24 Or. 420, 434; Shock *v.* M'Chesney, 2 Yeates 473; Wallis *v.* Mease, 3 Brim. 546, 550; Kean *v.* M'Laughlin, 2 S. & R. 469; M'Almont *v.* M'Clelland, 14 id. 359, 361; Elliott *v.* Boyles, 31 Pa. 65, 68; Barr *v.* Moore, 87 id. 385, 394; Com. *v.* Place, 153 id. 314, 318; Seip *v.* Deshler, 170 id. 334; Miller *v.* Kerr, 2 McC. 286; Randall *v.* Holsenbake, 3 Hill S. C. 175; Morgan *v.* Livingston, 2 Rich. 573, 585; Howell *v.* Cheatham, Cooke 247; Witcher *v.* Richmond, 8 Humph. 475; Saunders *v.* Baxter, 6 Heisk. 369, 387; U. S. *v.* Crandell, 4 Cr. C. C. 683, 692; Cavanaugh *v.* Noble, 42 Vt. 576; Knapp *v.* Fuller, 55 id. 311; Lincoln *v.* Chrisman, 8 Leigh 338, 345; Hansbrough *v.* Stinnett, 25 Gratt. 495; Bradley *v.* Cramer, 66 Wis. 297, 302; Born *v.* Rosenow, 84 id. 620, 622.

[1] *Ante*, § 14 *c*.
[2] *Ante*, § 14 *k*.
[3] *Ante*, § 14 *g*.

competency,[4] and perhaps also particular acts of incompetency,[5] may be shown as already explained; and in the same way, against a defendant whose knowing keeping of a dangerous animal is in issue, the animal's reputation,[6] as well as particular instances of its vicious behavior, are admissible.[7] So, also, in evidencing notice of the dangerous nature of premises, machinery, and the like, the previous occurrence of injuries or the existence of other defects at the same place or machine is some evidence of notice, on the theory that the prior occurrence would naturally be talked about or reported; there is some variation of ruling in determining how similar the injury or the defect or the place must be in order to be likely to give notice; but the general principle is not questioned.[8] Where purchaser's knowledge or ignorance in good faith of the transferor's insolvency is in issue, the transferor's reputation as to solvency,[9] or as to insolvency,[10] if within the same community, is admissible to indicate the purchaser's state of mind;[11] the same principle ought to apply to one dealing with a lunatic.[12] For one dealing with a partnership, a reputation of its dissolution,[13] or a publication in a journal

[4] *Ante*, § 14 *c*.

[5] *Ante*, § 14 *h*.

[6] Wormsdorf *v.* R. Co., 75 Mich. 472, 475.

[7] Worth *v.* Gilling, L. R. 2 C. P. 3; Arnold *v.* Norton, 25 Conn. 92; Graham *v.* Nowlin, 54 Ind. 391; Kittredge *v.* Elliott, 16 N. H. 77; Cockerham *v.* Nixon, 11 Ired. 269; McCaskill *v.* Elliot, 5 Strobh. 196, 197; Keenan *v.* Hayden, 39 Wis. 558.

[8] Malone *v.* Hawley, 46 Cal. 409, 413; Colo. M. & I. Co. *v.* Rees, id., 42 Pac. 42; Chicago *v.* Powers, 42 Ill. 169, 173; Bloomington *v.* Legg, 151 id. 9, 14; Delphi *v.* Lowery, 74 Ind. 520, 523; Moore *v.* Burlington, 49 Ia. 136, 137; Armstrong *v.* Ackley, 71 id. 76, 80; Ruggles *v.* Nevada, 63 Ia. 185; Faulk *v.* Ia. Co., 103 id. 442; Hinckley *v.* Somerset, 145 Mass. 326, 337; Noyes *v.* Gardner, 147 id. 505, 508; Dotton *v.* Albion, 50 Mich. 129, 131; Smith *v.* Sherwood, 62 id. 159, 165; Dundas *v.* Lansing, 75 id. 499, 507; Tice *v.* Bay City, 78 id. 209; Campbell *v.* Kalamazoo, 80 id. 655, 659; O'Neil *v.* West Branch, 81 id. 544, 546; Lombar *v.* East Tawas, 86 id. 14, 20; Fuller *v.* Jackson, 92 id. 191, 205; Corcoran *v.* Detroit, 95 id. 84, 86; Edwards *v.* Three Rivers, 102 id. 153; Strudgeon *v.* Sand Beach, 107 id. 496; Moore *v.* Kalamazoo, 109 id. 176; Butts *v.* Eaton Rapids, id., 74 N. W. 872; Gude *v.* Mankato, 30 Minn. 256, 258; Burrows *v.* Lake Crystal, 61 id. 357; Plattsmouth *v.* Mitchell, 20 Nebr. 228, 230; Willey *v.* Portsmouth, 35 N. H. 303, 310; Potter *v.* Gas. Co., 183 Pa. 575; Smith *v.* R. Co., 10 R. I. 24, 27; Bridger *v.* R. Co., 27 S. C. 456; Valley R. Co. *v.* Keegan, U. S. App., 87 Fed. 849; Thomas *v.* Springville, 9 Utah 426; Elster *v.* Seattle, 18 Wash. 304; Weisenberg *v.* Appleton, 26 Wis. 56; Ripon *v.* Bittel, 30 id. 614; Sullivan *v.* Oshkosh, 50 id. 508, 513; Spearbracker *v.* Larrabee, 64 id. 573, 575; Shaw *v.* Sun Prairie, 74 id. 105; Spaulding *v.* Sherman, 75 id. 77, 79; Propsam *v.* Leatham, 80 id. 608, 611.

For the use of the same facts as evidence of the dangerous, safe, etc., condition of the place or machine, see *post*, § 14 *u*.

[9] See Merrick, J., in Heywood *v.* Reed, 4 Gray 579.

[10] See Stone, J., in Price *v.* Mazange, 31 Ala. 701, 707.

[11] Branch Bank *v.* Parker, 5 Ala. 736; Lawson *v.* Orear, 7 id. 784; Price *v.* Mazange, 31 id. 701, 707; Humes *v.* O'Bryan, 74 id. 81; Kuglar *v.* Garner, 74 Ga. 765, 768; Brander *v.* Ferriday, 16 La. 296, 299; Denny *v.* Dana, 2 Cush. 169; Lee *v.* Kilburn, 3 Gray 594; Cook *v.* Mason, 5 All. 212; Sweetser *v.* Bates, 117 Mass. 468; Bliss *v.* Johnson, 162 id. 323; Benoist *v.* Darby, 12 Mo. 196, 205; Hinds *v.* Keith, 13 U. S. App. 222, 227.

Distinguish the use of reputation as evidence of the fact of solvency or insolvency, under an exception to the hearsay rule, *post*, § 140 *b*.

[12] *Contra:* Greenslade *v.* Dare, 20 Beav. 290.

[13] Humes *v.* O'Bryan, 74 Ala. 81.

likely to come to his hands,[14] is evidence of notice; but the substantive law of constructive notice usually disposes of this class of questions. For one selling liquor to a person of known intemperate habits, the latter's reputation would be evidence of notice.[15] Where the reasonable grounds of belief of a person prosecuting or arresting are in issue, the reputed character of the person sued or arrested is admissible;[16] and, it would seem, on principle, his particular acts of misconduct also.[17] The use of other utterings of forged paper, etc., as evidence of knowledge has complications discussed *post*, § 14 *q*.

(2) Few controversies arise in evidencing knowledge, consciousness, etc., by conduct. The interpretation of the conduct is usually plain enough and does not admit of argument.[18] The most frequent field for this kind of evidence is conduct as indicating consciousness of guilt. That we may use consciousness of guilt as some evidence of guilt is never questioned; the only question is as to the inference to that consciousness from various kinds of conduct.[19] Among the commoner sorts of conduct thus evidential are a defendant's demeanor after the alleged act or at the time of arrest[20] (though we are repeatedly warned by the Courts to remember the fallibility of such inferences[21]); demeanor during the trial;[22] concealment of the fruits of the crime; false statements and fabrication of evidence; refusal to undergo a test appealing to superstitious notions about the superhuman detection of guilt;[23] flight or escape from arrest, a circumstance originally sufficient in itself to bring about forfeiture and escheat,[24] but now treated merely as evidential of a consciousness of guilt;[25] subject to occasional distinction on the ground that the per-

[14] Godfrey *v*. Macauley, Peake 155; Lecson *v*. Holt, 1 Stark. 186; Jenkins *v*. Blizard, ib. 418, 420; Munn *v*. Baker, 2 id. 255.

[15] Stallings *v*. State, 33 Ala. 425; Smith *v*. State, 55 id. 12; Tatum *v*. State, 63 id. 151.

[16] See *ante*, § 14 *c*.

[17] *Contra:* Rodriguez *v*. Tadmire, 2 Esp. 721; Dorsey *v*. Clapp, 22 Nebr. 564, 568; Gregory *v*. Thomas, 2 Bibb 286. See State *v*. Foley, 130 Mo. 482; State *v*. Healey, Ia., 74 N. W. 916.

[18] The following will serve as instances of evidencing knowledge by conduct: Webster's Trial, Bemis' Rep. 178 (asking whether they had found the whole of Dr. Parkman's body, thus indicating a knowledge that it had been cut up); Leslie *v*. State, 35 Fla. 182 (offer to return stolen property, indicating knowledge that it was stolen).

[19] See the reasoning in Moore *v*. State, 2 Oh. St. 502; McAdory *v*. State, 62 Ala. 159.

[20] Johnson *v*. State, 17 Ala. 623; Levison *v*. State, 54 id. 519, 527; McAdory *v*. State, 62 id. 154, 161; Beale *v*. Posey, 72 id. 323; McIlvain *v*. State, 80 Ind. 71; State *v*. Baldwin, 36 Kan. 10, 11; Lindsay *v*. People, 63 N. Y. 143, 155; Greenfield *v*. People, 85 id. 75, 85; Moore *v*. State, 2 Oh. St. 500, 506; Smith *v*. State, 42 Tex. 444, 447; Holt *v*. State, Tex. Cr., 45 S. W. 1016; Dean *v*. Com., 32 Gratt. 912, 924.

[21] Ormond, J., in 9 Ala. 990, 995; Shaw, C. J., in Webster's Trial, Bemis' Rep. 486; Miller, J., in Greenfield *v*. State, 85 N. Y. 86.

[22] Boykin *v*. People, 22 Colo. 496; Graves *v*. U. S., 150 U. S. 118. There are conflicting decisions in Illinois: Rider *v*. People, 110 Ill. 11, 13; Purdy *v*. People, 140 id. 46, 49; Siebert *v*. People, 143 id. 571, 593.

[23] Gassenheimer *v*. State, 52 Ala. 316; State *v*. Wisdom, 119 Mo. 539; State *v*. Guild, 10 N. J. L. 171.

[24] Foxley's Case, 5 Coke's Rep. 109 *b*; Pollock & Maitland, Hist. Eng. Law, II, 588.

[25] See the reasoning in the charges of Parker, J. (late the Federal District Judge for

son must have become aware that he was accused or that mere absence is not equivalent to flight (neither of which seems sound), such evidence is universally received;[26] the defendant may of course offer in evidence any facts reasonably tending to explain his conduct as due to other motives.[27] It would seem that (in spite of the possibility of feigned conduct) an accused person's innocent bearing — in particular, his voluntary surrender, or his refusal to escape when opportunity offered — should equally be admissible in his favor.[28]]

§ 14 *q*. **Other Similar Crimes or Misconduct as Evidence of Knowledge, Intent, Plan, etc.** [The mental conditions of knowledge, intent, and plan (or design) may often be evidenced by conduct of the person, exhibited at other times, but leading, by one process of thought or another, to an inference that he has knowledge, intent, or plan with reference to the act in question. The process of inference, being more or less instinctive and obscure, has seldom been carefully phrased by Courts; and this, with the influence of the Character rule

Western Arkansas and one of the greatest American trial judges), in Starr *v.* U. S., 164 U. S. 627, and Alberty *v.* U. S., 162 id. 499.

[26] Crossfield's Trial, 26 How. St. Tr. 216; R. *v.* Hazy, 2 C. & P. 458; Campbell *v.* State, 23 Ala. 44, 75; Martin *v.* State, 28 id. 71, 81; Murrell *v.* State, 46 id. 89, 91; Levison *v.* State, 54 id. 519, 527; Bowles *v.* State, 58 id. 335; Sylvester *v.* State, 71 id. 23, 26; Ross *v.* State, 74 id. 336; Whitaker *v.* State, 106 id. 30; Jackson *v.* State, ib. 12; White *v.* State, 111 id. 92; Flanagin *v.* State, 25 Ark. 92, 95; Burris *v.* State, 38 id. 221, 225; People *v.* Strong, 46 Cal. 302; People *v.* Stanley, 47 id. 113, 118; People *v.* Wong Ah Ngow, 54 id. 151, 153; People *v.* Winthrop, 118 id. 85; People *v.* Ashmead, ib. 508; Whaley *v.* State, 11 Ga. 123, 126; Revel *v.* State, 26 id. 275, 281; Betts *v.* State, 66 id. 508, 512; Hudson *v.* State, 101 id. 520; People *v.* Ah Choy, 1 Ida. 317, 320; Barron *v.* People, 73 Ill. 256, 260; Porter *v.* State, 2 Ind. 435, 436; Hittner *v.* State, 19 id. 48, 50; Waybright *v.* State, 56 id. 122, 125; Batten *v.* State, 80 id. 394, 400; Anderson *v.* State, 147 id. 445; State *v.* Arthur, 23 Ia. 430, 432; State *v.* James, 45 id. 412; State *v.* Fowler, 52 id. 103, 105; State *v.* Van Winkle, 80 id. 15, 18; State *v.* Minard, 96 id. 267; State *v.* Seymore, 94 id. 699; State *v.* Thomas, 58 Kan. 805; Plummer *v.* Com., 1 Bush 76, 78; Kennedy *v.* Com., 14 id. 345; Clark *v.* Com., Ky., 32 S. W. 131; State *v.* Beatty, 30 La. An. 1267; State *v.* Dufour, 31 id. 804; State *v.* Harris, 38 id., 20 So. 729; State *v.* Frederic, 69 Me. 400, 403; Com. *v.* Tolliver, 119 Mass. 315; Com. *v.* Acton, 165 id. 11; People *v.* Pitcher, 15 Mich. 397, 406; Probasco *v.* Cook, 39 id. 717, 718; People *v.* Caldwell, 107 id. 374; Cicely *v.* State, 13 Sm. & M. 202, 221; Fanning *v.* State, 14 Mo. 386, 390; State *v.* Phillips, 24 id. 475, 484; State *v.* Williams, 54 id. 170; State *v.* Mallon, 75 id. 357; State *v.* King, 78 id. 557; State *v.* Evans, 138 id. 116; State *v.* Hopper, 142 id. 478; State *v.* Rand, 33 N. H. 216, 225; People *v.* Rathbun, 21 Wend. 509, 518; Ryan *v.* People, 79 N. Y. 593, 601; State *v.* Pancoast, 5 N. D. 516; Lanahan *v.* Com., 84 Pa. 80, 86; Tyner *v.* State, 5 Humph. 383.

[27] Chamblee *v.* State, 78 Ala. 466, 468; Golden *v.* State, 25 Ga. 527, 531; Batten *v.* State, 80 Ind. 394, 400; Welch *v.* State, 104 id. 347, 352; Plummer *v.* Com., 1 Bush 76, 78; Com. *v.* Tolliver, 119 Mass. 314; People *v.* Caldwell, 107 Mich. 374; State *v.* Hays, 23 Mo. 287, 316; State *v.* Phillips, 24 id. 484; State *v.* Mallon, 75 id. 355; State *v.* King, 78 id. 557; State *v.* Taylor, 134 id. 109; U. S. *v.* Cross, 20 D. C. 378.

[28] *Accord:* Barnard's Trial, 19 How. St. Tr. 833 (a case little known, but one of the most curious mysteries in legal annals); Pinkard *v.* State, 30 Ga. 759; Boston *v.* State, 94 id. 590; Lewis *v.* State, 4 Kan. 309; State *v.* Vaigneur, 5 Rich. L. 391, 403. *Contra:* Cowen, J., in People *v.* Rathbun, 21 Wend. 509, 519; Oliver *v.* State, 17 Ala. 587, 595; Campbell *v.* State, 23 id. 44, 79; Hall *v.* State, 40 id. 698, 706; Jordan *v.* State, 81 id. 20, 31; State *v.* Henry, 107 id. 22; Dorsey *v.* State, 111 id. 40; People *v.* Montgomery, 53 Cal. 576; People *v.* Shaw, 111 id. 171; Kennedy *v.* State, 101 Ga. 559; Com. *v.* Hersey, 2 All. 173, 177; State *v.* Musick, 101 Mo. 260, 274; State *v.* Smith, 114 id. 406, 424.

(*ante*, 14 *f*), has left the precedents in an uncertain and inharmonious condition. But the apparent confusion is due more to a difference in the application of principles in given cases than to a disagreement as to the principles themselves; and the latter it is possible to distinguish and agree upon without attempting to harmonize the various rulings.

Broadly, three general principles, or processes of inference, may be involved. (1) A person's *knowledge*, as we have seen (*ante*, § 14 *p*), may be inferred from the occurrence of some circumstance that would naturally have brought the matter in question to his attention; for example, that A gave a certain substance to his dog, and that the dog died shortly after, is some evidence that A came to know the substance to be poisonous, because he would probably learn of the dog's death, and the death probably excite his suspicions of the substance given; so also the utterance by A of several forged bank-notes makes it probable that in one or another instance some person would have discovered the forgery and either refused to take them or returned them to him, and thus that he would have had warning or suspicion of that denomination of paper. This principle thus admits, as evidence of knowledge, the prior possession or use of other specimens of a thing charged as knowingly used;[1] the most common instance being the knowing possession or utterance of forged or counterfeit paper. (2) In most crimes an element of the crime is the criminal *intent*, *i. e.* the state of mind, accompanying the act, in which the very act as forbidden by the law is distinctly and deliberately pictured and willed; thus, a gun may be shot by A under the belief that he is shooting at a deer or that he is shooting B; the sum of a column of figures may be incorrectly added up by A as representing the correct sum or as concealing a defalcation; a roll of bills may be taken by A as being his own or as being another's; and the differing mental states, innocent or wrongful, will represent a difference in the criminality of the situation. Now, when the act is conceded, and the state of mind is in issue, the ordinary doctrine of chances is apt to assist us materially in coming to a decision. For example, if A while hunting in a party with B finds a shot from B's gun whistling past his head, A is willing to accept a bad aim or an accidental stumble as the explanation; but the same thing happens again, and if on the third occasion A receives B's bullet in his body, the natural inference of probability is that it was done deliberately. For the basis of this inference we have merely the doctrine of chances, *i. e.* that the chances of three successive accidental and innocent shots of the sort are very small, or (to put it in another way) that inadvertence or accident is abnormal or occasional, and thus the recurrence of the same harmful result indicates a normal, *i. e.* deliberate, origin; in short, similar results do

[1] See R. *v.* Dossett, 2 C. & K. 307; R. *v.* Cooper, 3 Cox Cr. 547; Com. *v.* Jackson, 132 Mass. 18; U. S. *v.* Roudenbush, 1 Baldw. 514.

not usually recur through abnormal causes. Such seems to be the principle upon which, when the doing of a wrongful act is conceded and the innocent intent is in issue, the doing of the same or a similar act upon other occasions is admitted in evidence to negative the innocence of intent.[2] The limitations of this use are (a) that the wrongful act itself is conceded or otherwise proved to be done and the evidence is used only to negative innocent intent; and (b) the other acts must be of the same or a closely similar sort and not widely separated in time, in order to exclude an innocent explanation; and it is this requirement of sameness or similarity which leaves so much room for difference of opinion and accounts largely for the variations in the rulings. This principle is occasionally applied in a peculiar shape, by receiving evidence of other similar anonymous acts, *i. e.* without showing the defendant to be their author; the result is that the innocent intent is negatived, no matter who the doer may be, and then by other evidence the defendant may be shown the doer; as, if A were to find his house on fire three nights in succession, the repetition would serve to negative any innocent cause, no matter who the author, and after A has connected B with the last fire, the evidence of other fires negativing innocent intent is equally applicable even though B cannot be connected with the others.[3] (3) Where the very doing of the act charged is in issue and is to be evidenced, one of the evidential facts admissible (*ante*, § 14 *k*) is the person's plan or *design* to do the act. Now this plan or design itself may be evidenced by his conduct, and such conduct may consist of other similar acts so connected as to indicate a common purpose, including in its scope the act charged. There is a decided difference between this use and the preceding one; for there the object was merely to give a complexion to an act conceded or proved, *i. e.* to negative innocent intent, while here the object is to evidence a prior general plan, scheme, or design, which in its turn is to evidence the doing of the act so planned. Thus, the evidence for the present purpose needs to be much stronger; it must be not merely one or more similar acts such as would suffice to negative inadvertence or accident, but the other acts must be so connected by significant features that a general plan or scheme is seen to have been behind them as a natural explanation.[4]

In the application of the above principles, five sources of difficulty have most commonly operated to cause confusion in the precedents. (1) The elements of knowledge and of intent are both present in some crimes, — *e. g.* forged or counterfeit utterings, false representations

[2] See R. *v.* Francis, L. R. 2 C. C. R. 128, Coleridge, C. J.; Blake *v.* Asso. Co., L. R. 4 C. P. D. 94, 98, Grove, J.; Clark, Att'y-Gen'l, *arguendo*, in State *v.* Lapage, 57 N. H. 245, 261; Cushing, C. J., ib. 294.

[3] See R. *v.* Bailey, 2 Cox Cr. 311.

[4] See Blake *v.* Ass. Co., L. R. 4 C. P. D. 94, 106, Lindley, J.; Com. *v.* Robinson, 146 Mass. 571, C. Allen, J.

— and it is not easy to determine the respective applications of the first and second principles above; (2) in applying the second principle, there is room for much difference of opinion as to the similarity to be required in the other acts before they are properly admissible; (3) the difference between the second and third principles has not always been observed, and the stricter requirements of the third are often laid down in cases where the looser limitations of the second were appropriate; as, for example, in Massachusetts, where, in cases of false representations and fraudulent transfers, several decisions require the other acts to evidence a common scheme or plan, under the third principle, though the second principle is usually the appropriate and sufficient one in those cases; (4) the problem for each sort of offence should be solved according to the particular nature of that offence, for the elements may differ decidedly, and the analogies of other offences may not be appropriate; yet these analogies are often invoked indiscriminately and result in confusion; (5) the fundamental rule that the character of a defendant may not be attacked by evidence of his past crimes or other misconduct (*ante*, § 14 *f*), or, as it is often put, the prohibition against arguing that, because A committed some other crime, therefore he committed the one charged, is so constantly in the minds of Courts that their inclination invariably is to exclude evidence of past misdeeds unless its relevancy to show knowledge, intent, or plan, is clear, and thus a great deal is excluded which has a certain amount of probative value but is distrusted and feared by the Courts as being obnoxious to the above fundamental principle and not sufficiently evidential of intent, etc., to require admission. At the same time, it is entirely settled that if such other acts have evidential value in showing knowledge, intent, or plan, their criminality is in itself no obstacle to their admission;[5] it merely furnishes a reason for caution and for insisting on a clear evidential value; and this ground of objection, though incessantly urged from time to time, has been as repeatedly repudiated by the Courts.[6]

The precedents for the various crimes are so numerous that in the present stage of the law it is most useful to arrange them under the heads of the respective offences and wrongs. The foregoing broad outline must suffice as a guide to the application of the principles under each head. These questions have arisen in cases of forgery and counterfeiting,[7]

[5] See clear expositions of the principle by Williams, J., in R. *v.* Richardson, 2 F. & F. 346; Brackenbrough, J., in Walker's case, 1 Leigh 576; Brewer, J., in State *v.* Adams, 20 Kan. 319; Allen, J., in Com. *v.* Robinson, 146 Mass. 274; Hemingway, J., in Billings *v.* State, 52 Ark. 309; Beatty, C. J., in People *v.* Walters, 98 Cal. 138.

[6] Painter *v.* People, 147 Ill. 463; State *v.* Witham, 72 Me. 531; People *v.* Henssler, 48 Mich. 49; State *v.* Nugent, 71 Mo. 136; State *v.* Davis, N. H., 41 Atl. 267; State *v.* Robinson, 16 N. J. L. 508; People *v.* McLaughlin, 150 N.Y. 386; State *v.* Pancoast, 5 N. D. 516; State *v.* Wintzingerode, 9 Or. 153; Turner *v.* Com., 86 Pa. 70; Moore *v.* U. S., 150 U. S. 57; State *v.* Bridgman, 49 Vt. 212.

[7] Graft *v.* Lord Bertie, Peake Evid. 72; Balcetti *v.* Serani, Peake 142; Gibson *v*

of false pretences or representations (including fraudulent purchase with intent not to pay): [8] of knowing possession or receipt of stolen

Hunter, 2 H. Bl. 288; Viney *v.* Barss, 1 Esp. 293; R. *v.* Wylie, 1 B. & P. N. R. 92; R. *v.* Hough, R. & R. 120; R. *v.* Ball, ib. 132; R. *v.* Ball, 1 Camp. 324; R. *v.* Taverner, Carr. Suppl. 195; R. *v.* Millard, R. & R. 245; R. *v.* Moore, 2 C. & P. 235; R. *v.* Smith, ib. 633; R. *v.* Hodgson, 1 Lew. Cr. C. 103; R. *v.* Sunderland, ib. 102; R. *v.* Phillips, ib. 105; R. *v.* Kirkwood, ib. 103; R. *v.* Martin, ib. 104; R. *v.* Smith, 4 C. & P. 411; R. *v.* Forbes, 7 id. 224; R. *v.* Ball, 1 Moo. Cr. C. 470; R. *v.* Page, 4 B. & Ad. 122; R. *v.* Forster, Dears. Cr. C. 456; R. *v.* Jarvis, 7 Cox Cr. 53, Dears. Cr. C. 552; R. *v.* Weeks, Leigh & C. 18; Roupell *v.* Haws, 2 F. & F. 784; R. *v.* Goodwin, 10 Cox Cr. 534; Thorp *v.* State, 15 Ala. 749; People *v.* Frank, 28 Cal. 507, 517; People *v.* Farrell, 30 id. 316; People *v.* Sanders, 114 id. 216; People *v.* Whiteman, ib. 338; People *v.* Creegan, id., 53 Pac. 1082; State *v.* Smith, 5 Day 175, 178; Stalker *v.* State, 9 Conn. 341; Hoskins *v.* State, 11 Ga. 92, 95; Steele *v.* People, 45 Ill. 152, 157; Blalock *v.* Randall, 76 id. 224, 229; Lascelles *v.* State, 90 id. 347, 355, 375; Fox *v.* People, 95 id. 71, 75; Anson *v.* People, 148 id. 494, 503; McCartney *v.* State, 3 Ind. 354; Bersch *v.* State, 13 id. 435; Harding *v.* State, 54 id. 359, 365; Robinson *v.* State, 66 id. 331, 334; Thomas *v.* State, 103 id. 432; Card *v.* State, 109 id. 415, 420; State *v.* Breckenridge, 67 Ia. 204; State *v.* Saunders, 68 id. 370; Barnes *v.* Com., Ky., 41 S. W. 772; State *v.* McAllister, 24 Me. 139, 143; Dodge *v.* Haskell, 69 id. 429; Bishop *v.* State, 55 Md. 138, 144; Com. *v.* Bigelow, 8 Metc. 235; Com. *v.* Stearns, 10 id. 256; Com. *v.* Miller, 3 Cush. 243, 250; Com. *v.* Price, 10 Gray 473; Com. *v.* Hall, 4 All. 306; Com. *v.* Edgerly, 10 id. 184; Com. *v.* Jackson, 132 Mass. 18; Com. *v.* White, 145 id. 394; Carver *v.* People, 39 Mich. 786; Pearson *v.* Hardin, 95 Mich. 360, 366; State *v.* Mix, 15 Mo. 153, 160; State *v.* Wolff, ib. 173; State *v.* Minton, 116 id. 605; State *v.* Hodges, id., 45 S. W. 1093; State *v.* Van Houten, 2 N. J. L. 248; State *v.* Robinson, 16 id. 507; Ryan *v.* State, id., 38 Atl. 672; People *v.* Thoms, 3 Park. Cr. 256, 270; People *v.* Corbin, 56 N. Y. 363; People *v.* Everhardt, 104 id. 591; State *v.* Twitty, 2 Hawks, 248, 258; State *v.* Hess, 5 Oh. 9; Reed *v.* State, 15 id. 217; Griffin *v.* State, 14 Oh. St. 55, 62; Lindsey *v.* State, 38 id. 507; Penns. Co. *v.* R. Co., 153 Pa. 160, 164; State *v.* Antonio, 2 Constl. Ct. 776, 797; State *v.* Houston, 1 Bail. 300; Peck *v.* State, 2 Humph. 78, 86; Fonte *v.* State, 15 Lea 712, 719; Franklin *v.* Franklin, 90 Tenn. 48; Strang *v.* State, 32 Tex. Cr. 219, 223; U. S. *v.* Moses, 4 Wash. C. C. 725; U. S. *v.* Roudenbush, 8 Pet. 288; 1 Baldw. 514; U. S. *v.* Doebler, ib. 519, 524; U. S. *v.* Burns, 5 McLean 23, 26; U. S. *v.* Brooks, 3 McArth, 315, 317; Finn *v.* Com., 5 Rand. 701, 709; Martin *v.* Com., 2 Leigh 745; Spencer *v.* Com., ib. 751, 756; Hendrick's Case, 5 id. 769, 776; Keith *v.* Taylor, 3 Vt. 153; Redding *v.* Redding's Est., 69 id. 500; State *v.* Morton, 8 Wis. 352.

[8] Hathaway's Trial, 14 How. St. Tr. 664; R. *v.* Roberts, 1 Camp. 399; R. *v.* Whitehead, 1 C. & P. 67; Irving *v.* Motly, 7 Bing. 543; R. *v.* Roebuck, D. & B. 24; R. *v.* Holt, 8 Cox Cr. 411; R. *v.* Findge, L. & C. 390; R. *v.* Stenson, 12 Cox Cr. 111; R. *v.* Francis, L. R. 2 C. C. R. 128; R. *v.* Saunders, 1 Q. B. D. 19; Blake *v.* Ass. Soc., 14 Cox Cr. 246; Martin *v.* Smith, Ala., 22 So. 917; Gardner *v.* Preston, 2 Root 205; Allin *v.* Millison, 72 Ill. 201; Strong *v.* State, 86 Ind. 208; Crum *v.* State, 148 id. 401; State *v.* Rivers, 58 Ia. 102, 108; State *v.* Jamison, 74 id. 613, 617; State *v.* Brady, 100 id. 191; Roche *v.* Coleman, Ky., 42 S. W. 739; McKenney *v.* Dingley, 4 Me. 172; Seaver *v.* Dingley, ib. 306, 320; Hawes *v.* Dingley, 17 id. 341; Carnell *v.* State, 85 Md. 1; Rowley *v.* Bigelow, 12 Pick. 307, 311; Com. *v.* Stone, 4 Metc. 43, 47; Com. *v.* Eastman, 1 Cush. 189, 195; Wiggin *v.* Day, 9 Gray 97; Jordan *v.* Osgood, 109 Mass. 457; Haskins *v.* Warren, 115 id. 523, 538; Com. *v.* Coe, ib. 481, 501; Com. *v.* Jackson, 132 id. 16; Com. *v.* Blood, 141 id. 575; Shipman *v.* Seymour, 40 Mich. 274, 280; Cook *v.* Perry, 43 id. 623, 626; People *v.* Henssler, 48 id. 49, 52; People *v.* Wakely, 62 id. 297, 303; Ross *v.* Miner, 67 id. 410; Stubly *v.* Beachboard, 68 id. 401, 422; State *v.* Wilson, Minn., 75 N. W. 715; State *v.* Jackson, 112 Mo. 585; State *v.* Wilson, id., 44 S. W. 722; State *v.* Turley, 142 id. 403; Davis *v.* Vories, 141 id. 234; Cowan *v.* State, 22 Nebr. 519, 524; Johnson *v.* Gulick, 46 id. 817; Morgan *v.* State, id., 77 N. W. 64; Bradley *v.* Obear, 10 N. H. 477; Augier *v.* Ash, 26 id. 109; State *v.* Call, 48 id. 126, 132; Hovey *v.* Grant, 52 id. 569; Cary *v.* Hotaling, 1 Johns. 311, 316; Allison *v.* Matthieu, 3 id. 235; Hall *v.* Naylor, 18 N. Y. 588; Hennequin *v.* Naylor, 24 id. 139; Hathorne *v.* Hodges, 28 id. 486, 489; Bielschofsky *v.* People, 60 id. 616; Weyman *v.* People, 62 id. 623; People

goods;[9] of embezzlement;[10] of transfers in fraud of creditors[11] and other fraudulent transfers;[12] of false claims of action,[13] fraudulent importation of goods,[14] falsification of documents or books,[15] cheating by false measures,[16] and fraudulent insurance;[17] of perjury[18] and

v. Shulman, 80 id. 373; Mayer *v.* People, ib. 364, 372; Shipply *v.* People, 86 id. 376, 380; People *v.* Dimick, 107 id. 13, 31; People *v.* Peckens, 153 id. 576; State *v.* Durham, N. C., 28 S. E. 26; State *v.* Walton, 114 id. 783; U. S. Ins. Co. *v.* Wright, 33 Oh. St. 533; Tarbox *v.* State, 38 id. 581; Simons *v.* Vulcan Co., 61 Pa. 202, 218; White *v.* Rosenthal, 173 id. 175; Schofield *v.* Schiffer, 156 id. 65, 73; Com. *v.* Yerkes, 29 Phila. Legal Intellig. 60; 12 Cox Cr. 208, 215, 225; Defreese *v.* State, 3 Heisk. 53, 62; Rafferty *v.* State, 91 Tenn. 655, 663; Castle *v.* Bullard, 23 How. 172, 186; Lincoln *v.* Claflin, 7 Wall. 132, 138; Butler *v.* Watkins, 13 Wall. 456, 464; U. S. *v.* Snyder, 4 McCr. 618, 621; Penn. M. L. Ins. Co. *v.* Mechanics' S. B. & T. Co., 37 U. S. App. 692; Mudsill M. Co. *v.* Watrous, 22 id. 12; Spurr *v.* U. S., id., 87 Fed. 701; Trogdon's Case, 31 Gratt. 862, 870; State *v.* Bokien, 14 Wash. 403.

[9] R. *v.* Dunn, 1 Moo. Cr. C. 146; R. *v.* Davis, 6 C. & P. 177; R. *v.* Hinley, 2 Mo. & Rob. 524, 1 Cox Cr. 12; R. *v.* Oddy, 2 Den. Cr. C. 264; R. *v.* Primelt, 1 F. & F. 51; St. 34–35 Vict. c. 112, § 19; R. *v.* Carter, 15 Cox Cr. 448; R. *v.* Drage, 14 id. 85; R. *v.* Harwood, 11 id. 388; Gassenheimer *v.* State, 52 Ala. 313, 318; State *v.* Wood, 49 Conn. 429, 440; Goodman *v.* State, 141 Ind. 35; Lewis *v.* State, 4 Kan. 306; Devoto *v.* Com., 3 Metc. 418; State *v.* Wolff, 15 Mo. 168, 172; State *v.* Harrold, 38 id. 497; State *v.* Flynn, 124 id. 480; People *v.* Rando, 3 Park. Cr. 335, 339; Coleman *v.* People, 55 N. Y. 81, 90; 58 id. 556, 560; Copperman *v.* People, 56 id. 591; People *v.* Dowling, 84 id. 486; State *v.* Murphy, 84 N. C. 741; Shriedley *v.* State, 23 Oh. St. 130, 142; State *v.* Crawford, 39 S. C. 343, 350; State *v.* Humason, 5 Wash. 409, 503.

[10] R. *v.* Richardson, 2 F. & F. 343, 8 Cox Cr. 448; R. *v.* Proud, L. & C. 97, 102; R. *v.* Reardon, 4 F. & F. 79; R. *v.* Stephens, 16 Cox Cr. 387; People *v.* Gray, 66 Cal. 271, 274; People *v.* Bidleman, 104 id. 609, 613; Thalheim *v.* State, 38 Fla. 169; Kribs *v.* People, 82 Ill. 425; Shipp *v.* Com., Ky., 41 S. W. 856; Com. *v.* Tuckerman, 10 Gray 173, 197; Com. *v.* Shepard, 1 All. 575, 581; People *v.* Hawkins, 106 Mich. 479; State *v.* Holmes, 65 Minn. 230; American Surety Co. *v.* Pauly, 38 U. S. App. 254; Edelhoff *v.* State, 5 Wyo. 19, 27.

[11] Cummings *v.* McCullough, 5 Ala. 324, 332; Dent *v.* Portwood, 21 id. 589; Benning *v.* Nelson. 23 id. 801, 804; Nelms *v.* Steiner, 113 id. 562; White *v.* B. & F. G. Co., Ark., 45 S. W. 1060; Hardy *v.* Moore, 62 Ia. 65, 70; Lockhart *v.* Harrell, 6 La. An. 530, 532; Flagg *v.* Willington, 6 Greenl. 386; Blake *v.* Howard, 11 Fairf. 202; Howe *v.* Reed, 12 id. 515; Foster *v.* Hall, 12 Pick. 99; Long *v.* Lamkin, 9 Cush. 361; Cook *v.* Moore, 11 Cush. 213, 216; Williams *v.* Robbins, 15 Gray, 590; Taylor *v.* Robinson, 2 All. 562; Lynde *v.* McGregor, 13 id. 172, 174; Winchester *v.* Charter, 97 Mass. 143; Jordan *v.* Osgood, 109 id. 457; Ganong *v.* Green, 71 Mich. 1, 9; Nicolay *v.* Mallery, 62 Minn. 119; Uhler *v.* Adams, 73 Miss. 332; Lovell *v.* Briggs, 2 N. H. 223; Whittier *v.* Varney, 10 N. H. 291, 294; Augier *v.* Ash, 26 id. 109; State *v.* Johnson, 33 id. 441, 456; Benham *v.* Cary, 11 Wend. 83; Jackson *v.* Timmerman, 12 id. 299; Holmesly *v.* Hogue, 2 Jones L. 391; State *v.* Jeffries, 117 N. C. 727; Zerbe *v.* Miller, 16 Pa. 488, 495; Heath *v.* Page, 63 Pa. 108, 125; M'Elwee *v.* Sutton, 2 Bail. 128, 130; Lowry *v.* Pinson, ib. 324, 328; Bottomley *v.* U. S., 1 Story 145; Kellogg *v.* Clyne, 12 U. S. App. 174, 183; Piedmont Bank *v.* Hatcher, 94 Va. 229; Kaufer *v.* Walsh, 88 Wis. 63, 68.

[12] Somes *v.* Skinner, 16 Mass. 348, 358; Farrington *v.* Sinclair, 15 Johns. 428; Lovell *v.* Briggs, 2 N. H. 218, 223; Castle *v.* Bullard, 23 How. 172.

[13] Hood *v.* R. Co., 95 Ia. 331; Bradford *v.* Ins. Co., 11 Pick. 161; Miller *v.* Curtis, 163 Mass. 127, 131; Young *v.* Dougherty, 183 Pa. 179; Lewis *v.* Barker, 53 Vt. 23; see also under Extortion, *post*, and False Pretences, *ante*.

[14] Bottomley *v.* U. S., 1 Story 135; Wood *v.* U. S., 16 Pet. 342, 360.

[15] Thompson *v.* Mosely, 5 C. & P. 501; Gardner *v.* Way, 8 Gray 189; see also *ante*, under Embezzlement.

[16] Dibble *v.* Nash, 47 Mich. 589; Reid *v.* Ladue, 66 id. 22, 25; Bainbridge *v.* State, 30 Oh. St. 264, 274; Townsend *v.* Graves, 3 Paige Ch. 453; see also *ante*, under False Representations, and *post*, under Larceny.

[17] Contin. Ins. Co. *v.* Ins. Co., 1 U. S. App. 201.

[18] State *v.* Raymond, 20 Ia. 582, 588; People *v.* Van Tassel, N. Y., 51 N. E. 274; U. S. *v.* Wood, 14 Pet. 430, 443.

bribery;[19] of larceny[20] and kidnapping;[21] of robbery, piracy, and burglary[22] and of extortion;[23] of arson;[24] of assault with intent to rape,[25] of rape,[26] and of abortion;[27] of homicide by violence,[28] or by

[19] Webb *v.* Smith, 4 Bing. N. C. 373, 379; State *v.* Durnam, Minn., 75 N. W. 127; State *v.* Williams, 136 Mo. 293; People *v.* Sharp, 107 N. Y. 427, 456.

[20] R. *v.* Ellis, 6 B. & C. 145; R. *v.* May, 1 Cox Cr. 236; R. *v.* Bleasdale, 2 C. & K. 765; R. *v.* Southwood, 1 F. & F. 356; R. *v.* Reardon, 4 id. 79; Dove *v.* State, 37 Ark. 261, 263; Endaily *v.* State, 39 id. 278, 280; State *v.* Wisdom, 8 Port. 511, 516; People *v.* Robles, 34 Cal. 591, 593; People *v.* Lopez, 59 id. 362; People *v.* Cunningham, 66 id. 668; People *v.* Fehrenbach, 102 Cal. 394; Housh *v.* People, Colo., 50 Pac. 1036; Williams *v.* People, 166 Ill. 132; Bonsall *v.* State, 35 Ind. 461; Shears *v.* State, 147 id. 51; State *v.* Van Winkle, 80 Ia. 15, 18; Lewis *v.* State, 4 Kan. 306; State *v.* Thurtell, 29 id. 148; State *v.* Bates, 46 La. An. 849; Pike *v.* Crehore, 40 Me. 503, 511; People *v.* Schweitzer, 23 Mich. 301; People *v.* Machen, 101 id. 401; State *v.* Goetz, 34 Mo. 85, 90; State *v.* Reavis, 71 id. 421; Davis *v.* State, Nebr., 74 N. W. 599; Cheny *v.* State, 7 Oh., Pt. 1, 222; Barton *v.* State, 18 id. 221; State *v.* Harding, 16 Or. 493; Links *v.* State, 9 Lea 701, 712; Gilbraith *v.* State, 41 Tex. 567; Nixon *v.* State, 31 Tex. Cr. 205; Unsell *v.* State, id., 45 S. W. 1022; Walker's Case, 1 Leigh 574; State *v.* Kelley, 65 Vt. 531; Schaser *v.* State, 36 Wis. 429.

[21] Taylor *v.* Horsey, 5 Harringt. 131; Com. *v.* Turner, 3 Metc. 19; State *v.* Ford, 3 Strobh. 517; Cole *v.* Com., 5 Gratt. 696.

[22] Captain Vaughan's Trial, 13 How. St. Tr. 499; Captain Kidd's Trial, 14 id. 154, 182; R. *v.* Vandercomb, 2 Leach (4th ed.) 708; R. *v.* Briggs, 2 Moo. & Rob. 199; Mason *v.* State, 42 Ala. 532; Ford *v.* State, 34 Ark. 649; People *v.* Dubois, 48 Cal. 551; People *v.* McGilver, 67 id. 55, 56; Frazer *v.* State, 135 Ind. 38, 41; State *v.* Desroches, 48 La. An. 428; Com. *v.* Williams, 2 Cush. 584; Com. *v.* Scott, 123 Mass. 225, 234; Lightfoot *v.* People, 16 Mich. 507, 510; McGee *v.* State, Miss., 22 So. 890; State *v.* Greenwade, 72 Mo. 300; State *v.* Cowell, 12 Nev. 337; Leonard *v.* State, N. J. L., 41 Atl. 561; Hope *v.* People, 83 N. Y. 419, 428; Coble *v.* State, 31 Oh. St. 100; Swan *v.* Com., 104 Pa. 218; Dawson *v.* State, 32 Tex. Cr. 535, 552; Long *v.* State, id., 47 S. W. 363; Neubrandt *v.* State, 53 Wis. 89.

[23] Barnard's Trial, 19 How. St. Tr. 825; R. *v.* Winkworth, 4 C. & P. 444; R. *v.* Egerton, R. & R. 375; R. *v.* Cooper, 3 Cox Cr. 547; R. *v.* McDonnell, 5 id. 153; People *v.* Lambert, Cal., 52 Pac. 307; State *v.* Lewis, 96 Ia. 286; Com. *v.* Saulsbury, 152 Pa. 554; Britt *v.* State, 9 Humph. 31; see also *ante*, under False Claims of Action.

[24] R. *v.* Howell, 3 State Tr. N. S. 1087, 1098; R. *v.* Dosset, 2 Cox Cr. 243; R. *v.* Regan, 4 id. 335; R. *v.* Taylor, 5 id. 138; R. *v.* Gray, 4 F. & F. 1102; R. *v.* Nattrass, 15 Cox Cr. 73; Brock *v.* State, 26 Ala. 104; Martin *v.* State, 28 id. 71, 82; Com. *v.* McCarthy, 119 Mass. 355; Com. *v.* Bradford, 126 id. 42; State *v.* Raymond, 53 N. J. L. 260, 264; People *v.* Kennedy, 32 N. Y. 141; Faucett *v.* Nichols, 64 id. 377; People *v.* Murphy, 135 id. 450, 456; People *v.* Fitzgerald, id., 50 N. E. 846; State *v.* Freeman, 4 Jones L. 5; State *v.* Thompson, 97 N. C. 496; State *v.* Graham, id., 28 S. E. 409; Kramer *v.* Com. 87 Pa. 299; State *v.* Smalley, 50 Vt. 738, 750; State *v.* Ward, 61 id. 181; State *v.* Hallock, id., 40 Atl. 51; State *v.* Miller, 47 Wis. 530.

[25] People *v.* Bowen, 49 Cal. 654; State *v.* Walters, 45 Ia. 389; State *v.* Boyland and McCurty, 24 Kan. 186; State *v.* Stevens, Kan., 44 Pac. 992.

[26] R. *v.* Lloyd, 7 C. & P. 318; R. *v.* Chambers, 3 Cox Cr. 92; R. *v.* Reardon, 4 F. & F. 76; People *v.* Fultz, 109 Cal. 258; Parkinson *v.* People, 135 Ill. 401; Janzen *v.* People, 159 id. 440; State *v.* Bonsor, 49 Kan. 758; Conkey *v.* People, 5 Park. Cr. 32, 35; People *v.* O'Sullivan, 104 N. Y. 483; State *v.* Saxton, 76 N. C. 216; Williams *v.* State, 8 Humph. 585, 594; State *v.* Thompson, 14 Wash. 285; Proper *v.* State, 85 Wis. 615, 628.

[27] R. *v.* Perry, 2 Cox Cr. 223; Baker *v.* People, 105 Ill. 452, 456; Com. *v.* Corkin, 136 Mass. 429; Lamb *v.* State, 66 Md. 285; People *v.* Sessions, 58 Mich. 594, 600; People *v.* Seaman, 107 id. 348; People *v.* Abbott, id., 74 N. W. 529.

[28] R. *v.* Mobbs, 6 Cox Cr. 223; R. *v.* Reardon, 4 F. & F. 79; R. *v.* Roden, 12 Cox Cr. 630; R. *v.* Crickmer, 16 id. 701; Makin *v.* Att'y-Gen'l of N. S. Wales, 17 id. 704; Lawrence *v.* State, 84 Ala. 424; Smith *v.* State, 88 id. 76; Baker *v.* State, 4 Ark. 56, 61; Austin *v.* State, 14 id. 555, 558; Melton *v.* State, 43 id. 367, 371; People *v.* Walters, 98 Cal. 138, 141; People *v.* Smith, 106 id. 73, 82; People *v.* Craig, 111 id. 460, 467; People *v.* Miller, id., 53 Pac. 816; Killins *v.* State, 28 Fla. 313, 333; Oliver *v.* State, 38

poisoning,[29] and of assault with intent to do violence and the like,[30] and of riot;[31] of keeping a disorderly house;[32] of gambling or keeping a lottery;[33] of committing a trespass;[34] of casting a vote,[35] of keeping liquor for sale illegally,[36] and of infringing a copyright.[37] We here come to the borders of the principle in those civil actions in which no question of intent or knowledge arises, and the only principle applicable is the third above-mentioned, *i. e.* the use of

id. 46; Milton *v.* State, id., 24 So. 60; Reese *v.* State, 7 Ga. 373; Shaw *v.* State, 60 id. 246, 250; State *v.* Smith, 102 Ia. 656; Saylor *v.* Com., 97 Ky. 184; Green *v.* Com., id., 33 S. W. 100; State *v.* Foutenot, 48 La. An. 305; State *v.* Pike, 65 Me. 111, 113; Com. *v.* Campbell, 7 All. 541; People *v.* Knapp, 26 Mich. 112, 116; People *v.* Marble, 38 id. 117, 123; Herman *v.* State, Miss., 22 So. 872; State *v.* Testerman, 68 Mo. 408, 415; State *v.* Martin, 74 id. 547; State *v.* Sanders, 76 id. 35, 36; State *v.* Emery, ib. 349; State *v.* Vaughan, 22 Nev. 285; Roper *v.* Terr., 7 N. M. 255, 265; Stephens *v.* People, 4 Park. Cr. 396, 511; 19 N. Y. 571; Walters *v.* People, 6 Park. Cr. 15; People *v.* Larubia, 140 N. Y. 87; People *v.* Shea, 147 id. 78; State *v.* Shuford, 69 N. C. 486, 492; State *v.* Mace, 118 id. 1244; Snyder *v.* Com., 85 Pa. 519, 521; Com. *v.* Mudgett, 174 id. 211; Com. *v.* Wilson, id., 40 Atl. 283; Stone *v.* State, 4 Humph. 27, 35; People *v.* Coughlin, 13 Utah, 58; Heath *v.* Com., 1 Rob. Va. 735, 743; Poindexter's Case, 33 Gratt. 766, 788; Nicholas *v.* Com., 91 Va. 741; Albricht *v.* State, 6 Wis. 74.

[29] R. *v.* Mogg, 4 C. & P. 335; R. *v.* Calder, 2 Cox Cr. 348; R. *v.* Bailey, ib. 312; R. *v.* Geering, 18 L. J. M. C. 215; R. *v.* Winslow, 8 Cox Cr. 397; R. *v.* Garner and wife, 3 F. & F. 681, 4 id. 346; R. *v.* Harris, 4 id. 342; R. *v.* Cotton, 12 Cox Cr. 400; R. *v.* Heesom, 14 id. 40; R. *v.* Flannagan, 15 id. 403; Johnson *v.* State, 17 Ala. 618, 622; Com. *v.* Robinson, 146 Mass. 571; Com. *v.* Kennedy, id., 48 N. E. 770; People *v.* Lansing, 21 Mich. 221, 226; People *v.* Thacker, 108 id. 652; People *v.* Wood, 3 Park. Cr. 685; State *v.* Best, 111 N. C. 638; Farrer *v.* State, 2 Oh. St. 54, 67; Brown *v.* State, 26 id. 176, 180; Shaffner *v.* Com., 72 Pa. 60; Goersen *v.* Com., 99 id. 388, 398.

[30] R. *v.* Voke, R. & R. 531; Ross *v.* State, 62 Ala. 224; Horn *v.* State, 102 id. 144, 151, 279; Gaston *v.* State, id., 23 So. 682; People *v.* Wilson, 117 Cal. 688; 49 Pac. 1054; State *v.* Merkley, 74 Ia. 695; State *v.* Patza, 3 La. An. 512; State *v.* Raper, 141 Mo. 327; People *v.* Hopson, 1 Den. 574; Kerrains *v.* People, 60 N. Y. 228; People *v.* Gibbs, 93 id. 470; People *v.* Jones, 99 id. 667; Moore *v.* State, 31 Tex. Cr. 234; Devine *v.* Rand, 38 Vt. 621, 627.

[31] R. *v.* Hunt, 3 B. & Ald. 566, 573; R. *v.* Mailloux, 16 N. Br. 499, 516; State Renton, 15 N. H. 169, 174.

[32] Roop *v.* State, 58 N. J. L. 479; Parks *v.* State, 59 id. 573.

[33] Toll *v.* State, Fla., 23 So. 943; Dunn *v.* People, 40 Ill. 469; Thomas *v.* People, 59 id. 160, 162; Miller *v.* Com., 13 Bush 737; Com. *v.* Ferry, 146 Mass. 209; Clark *v.* State, 47 N. J. L. 556.

[34] Lou. & N. R. Co. *v.* Hill, 115 Ala. 334; Mayer *v.* R. Co., 90 Wis. 522.

[35] People *v.* Shea, 147 N. Y. 78.

[36] See Pearce *v.* State, 40 Ala. 720, 724; Chipman *v.* People, Colo., 52 Pac. 677; State *v.* Arnold, 98 Ia. 253; State *v.* Plunkett, 64 Me. 534; State *v.* Neagle, 65 id. 469; Sherman *v.* Wilder, 106 Mass. 537, 540; Com. *v.* Stochr, 109 id. 365; Com. *v.* Berry, ib. 367; Com. *v.* Dearborn, ib. 370; Com. *v.* Kohlmeyer, 124 id. 322; Com. *v.* Levy, 126 id. 240; Com. *v.* Matthews, 129 id. 487; Com. *v.* Cotton, 138 id. 501; Com. *v.* McCullow, 140 id. 370; Com. *v.* Neylon, 159 id. 544; Com. *v.* Vincent, 165 id. 18; People *v.* Haas, 79 Mich. 457, 461; People *v.* Caldwell, 107 Mich. 374; State *v.* Austin, Minn., 77 N. W. 301; Hans *v.* State, 50 Nebr. 150; State *v.* Shaw, 58 N. H. 73; State *v.* Gorman, ib. 77; State *v.* White, Vt., 39 Atl. 1085; Fosdahl *v.* State, 89 Wis. 482. These rulings depend much on the precise nature of the statutory offence charged.

[37] Spiers *v.* Brown, 31 L. T. 16; Murray *v.* Bogue, 1 Drewry 353, 360; Longman *v.* Winchester, 16 Ves. Jr. 269; Mawman *v.* Tegg, 2 Russ. 385, 394; Webb *v.* Powers, 2 Woodb. & M. 497, 513; Lawrence *v.* Dana, 4 Cliff. 1, 74; Publishing Co. *v.* Keller, 30 Fed. 772; Myers *v.* Callaghan, 128 U. S. 617, 660; Chicago D. D. Co. *v.* Chic. D. Co., 24 U. S. App. 636; West Pub. Co. *v.* Lawyers' Co-op. Pub. Co., id., 79 Fed. 756.

other similar transactions as evidence of a general plan or system of doing such acts; in such cases it is difficult to distinguish for practical purposes between system and habit, the difference being chiefly a verbal one; and the precedents in such cases have been already considered (*ante*, § 14 *n*).]

5. *Sundry Evidence to prove or disprove a Human Act.*

§ 14 *r*. **Alibi, Commission by others, etc.** [One way of evidencing the non-commission of an act by the person charged is to show that he was elsewhere at the time;[1] this sort of evidence presents no difficulty of principle; it may be noted that any absence is relevant and that it is not necessary to show total impossibility of presence, the degree of possibility going only to the weight of the evidence.[2] By an analogous process of reasoning, if some one else can be shown to have done the act charged, then the accused could not have done it (apart from cases of conspiracy or joint commission), and it is thus always relevant to show some one else than the defendant to have been the doer. This other person may have been the injured person himself;[3] and, where the charge is murder, the deceased's suicide may therefore be shown, by evidence either of his plan to commit suicide[4] or of his motive to do so;[5] though a few Courts, somewhat over-cautiously, reject such evidence unless combined with other significant evidence.[6] Or the real doer may be shown to be a third person, by evidence either of plan or threats[7] or of motive[8]

[1] Gilbert, Evidence, 145; Foster, Crown Law, 3d ed., 368; Webster's Trial, 5 Cush. 295, 318, Bemis' Rep. 469.

[2] Stuart *v.* People, 42 Mich. 255, 260; State *v.* Delaney, 92 Ia. 467; Peyton *v.* State, Nebr., 74 N. W. 597; Ford *v.* State, Tenn., 47 S. W. 703. *Contra:* Briceland *v.* Com., 74 Pa. 463, 469.

[3] State *v.* Lee, 65 Conn. 265, 280; Hitchcock *v.* Burgett, 38 Mich. 504; Lush *v.* McDaniel, 13 Ired. 487.

[4] Spencer Cowper's Trial, 13 How. St. Tr. 1166; Jumpertz *v.* People, 21 Ill. 408; State *v.* Asbell, 57 Kan. 398; State *v.* Bradley, 6 La. An. 559; Com. *v.* Trefethen, 157 Mass. 180 (leading case); Smith *v.* Benef. Soc., 123 N. Y. 85; Blackburn *v.* State, 23 Oh. St. 146, 165; Boyd *v.* State, 14 Lea 161, 177; State *v.* Fournier, 68 Vt. 262 (undecided).

Excluded: (but some of these proceed merely on the Hearsay doctrine noted *post*, § 162 *c*); Siebert *v.* People, 143 Ill. 571, 584; Hale *v.* Ins. Co., 65 Minn. 548; State *v.* Fitzgerald, 130 Mo. 407; State *v.* Punshon, 124 id. 448, 457. See *ante*, § 14 *k*.

[5] Jumpertz *v.* People, *supra;* Blackburn *v.* State, *supra;* Boyd *v.* State, *supra;* State *v.* Marsh, Vt., 40 Atl. 839.

Excluded: State *v.* Punshon, *supra*.

[6] See the excluding cases in the preceding notes.

[7] People *v.* Williams, 18 Cal. 193; Morgan *v.* Com., 14 Bush 106, 112; Worth *v.* R. Co., 51 Fed. 171; Alexander *v.* U. S., 138 U. S. 353.

Excluded: State *v.* Beaudet, 53 Conn. 543; Schoolcraft *v.* People, 117 Ill. 271, 277; Carlton *v.* People, 150 id. 181, 188; State *v.* Crawford, 99 Mo. 74, 80; State *v.* Taylor, 136 id. 66; State *v.* Fletcher, 24 Or. 295, 300; Crookham *v.* State, 5 W. Va. 510, 513; see also citations under n. 9, *infra*.

[8] Crawford *v.* State, 12 Ga. 142, 145; McElhannon *v.* State, 99 id. 672; State *v.* Johnson, 30 La. An. 921.

Excluded: State *v.* D'Angelo, 9 La. An. 46; Com. *v.* Abbott, 130 Mass. 475 (leading case).

or of other data;[9] but most Courts here also impose the condition that two or more of such evidentiary facts must be offered, so as to make out a plausible case against the third person, and that a single fragment of evidence against him will not be received. It would seem that the conviction of another person for the act charged (supposing it to have been feasible by one person only) would be significant; but technical difficulties as to the effect of a judgment seem to exclude this.[10] For the same reason it could not be shown, for the prosecution, that another person had been acquitted of the charge;[11] but it would be proper to offer facts exonerating another person, who was one of the possible perpetrators.[12]]

§ 14 *s*. **Traces, and other Evidence à posteriori.** [One of the commonest kinds of evidence of an act is the traces which it leaves behind. In criminal cases this sort of evidence is particularly frequent, in the shape of marks, stains, and the like, found on the person of the accused;[1] but the inferences usually present no difficulty. The presumption arising from the possession of stolen goods[2] rests on a similar inference; and the possession of the fruits of a crime is in other cases equally admissible, — as, in burglary,[3] forgery,[4] counterfeiting;[5] so also the exit of a person, drunk or carrying liquor in a vessel, from a house is some evidence of its sale therein;[6] the possession of specific pieces of money is of course evidence of the larceny of it; and, even though the money is not identified as the same, the sudden acquisition of wealth is some evidence of acquisition by the dishonest means charged.[7] The post-office mark on a letter is evidence that it passed through the mails.[8]

[9] R. *v.* Dytche, 17 Cox Cr. 39; Phillips *v.* State, 33 Ga. 281, 287; State *v.* Haynes, 71 N. C. 79; State *v.* Wallace, 44 S. C. 357; Rowt *v.* Kile, Gilmer Va. 202.

Excluded: Smith *v.* State, 9 Ala. 990, 995; Levison *v.* State, 54 id. 519, 527; Whitaker *v.* State, 106 id. 30; McPherrin *v.* Jennings, 66 Ia. 626; State *v.* May, 4 Dev. 328, 331; State *v.* Duncan, 6 Ired. 236, 239; State *v.* White, 68 N. C. 158; State *v.* Bishop, 73 id. 44; State *v.* Davis, 77 id. 483; State *v.* Baxter, 82 id. 602; State *v.* Barron, 37 Vt. 57, 60; State *v.* Barker, 53 id. 23; Dover *v.* Winchester, id., 41 Atl. 445. For the confession of a third person, see under the Hearsay rule, *post*, § 152 *d*.

[10] State *v.* Smarr, N. C., 28 S. E. 549; Chamberlain *v.* Pierson, U. S. App., 87 Fed. 420.

[11] People *v.* Mitchell, 100 Cal. 328, 334.

[12] Bram *v.* U. S., 168 U. S. 562.

[1] *E. g.*, State *v.* Kingsbury, 58 Me. 238, 243 (arson; kerosene stains on the defendant's shirt).

[2] R. *v.* Exall, 4 F. & F. 922; see *post*, § 34.

[3] Short *v.* State, 63 Ind. 376, 380.

[4] Com. *v.* Talbot, 2 All. 161; R. *v.* James, 4 Cox Cr. 90.

[5] R. *v.* Fuller, R. & R. 308.

[6] Com. *v.* Taylor, 14 Gray 26; Com. *v.* Maloney, 16 id. 20; Com. *v.* Finnerty, 148 Mass. 165.

[7] Leonard *v.* State, 115 Ala. 80; State *v.* Grebe, 17 Kan. 458; Com. *v.* Montgomery, 11 Metc. 534; Bost. & W. R. Co. *v.* Dana, 1 Gray 101; Gates *v.* People, 14 Ill. 433; Com. *v.* Mulrey, Mass., 49 N. E. 91. The ruling in Williams *v.* U. S., 168 U. S. 382, is unsound.

[8] R. *v.* Johnson, 7 East 65; R. *v.* Plumer, R. & R. 264; N. Haven Bank *v.* Mitchell, 15 Conn. 206, 225; for the presumption, see *post*, § 40.

The possession of an instrument of obligation usually surrendered on payment is evidence of a discharge;[9] and the presumption of delivery of a deed from its possession by the grantee[10] rests on a similar inference. The presumptions of payment[11] and of death[12] from lapse of time are based on an inference from the absence of such traces as would otherwise naturally exist.

The significant traces may, however, also be not merely mechanical but organic or physiological. Thus, an inference from the birth of a child during marriage to the paternity of the mother's husband is the basis of the presumption of legitimacy;[13] and in the same way, in a bastardy proceeding, the birth of a child is evidence of some one's intercourse with the mother, while other evidence may serve to fix the identity of the father. As tending to disprove the husband's paternity, the wife's adultery would be relevant, except so far as the historical peculiarity of the presumption of legitimacy stands in the way;[14] but in cases of bastardy this obstacle does not exist, and the woman's intercourse with others within the appropriate time is generally admitted for the defence;[15] mere improper conduct, however, is excluded.[16] In cases of bastardy and inheritance, the fact of the resemblance of the child to the alleged father is some indication of paternity rests on a physiological fact long and generally accepted, and was in English practice unquestioned;[17] but the lack of definiteness in the features of infants of the earliest age and the possibility of fanciful notions of resemblance by partisan witnesses have led some Courts in this country to exclude such evidence entirely or to apply certain limitations; the five attitudes represented by the decisions are: (a) the fact of resemblance is accepted without any limitation; or (b) it is accepted provided the child is old enough to have well-formed features; or (c) it is accepted only

[9] Egg *v.* Barnett, 3 Esp. 196; Sluby *v.* Champlin, 4 Johns. 461, 468.
[10] *Post*, § 38.
[11] *Post*, § 39.
[12] *Post*, § 41.
[13] *Post*, § 28.
[14] See *post*, § 28.
[15] *Excluded:* State *v.* Bennett, 75 N. C. 305; State *v.* Parish, 83 id. 613.
Admitted: Nugent *v.* State, 18 Ala. 521; Walker *v.* State, 6 Blackf. 1; Hill *v.* State, 4 Ind. 112; Townsend *v.* State, 13 id. 357; Whitman *v.* State, 69 id. 448; Benham *v.* Richardson, 91 id. 82; State *v.* Wickliff, 95 Ia. 386; Ginn *v.* Com., 5 Litt. Ky. 300; Eddy *v.* Gray, 4 All. 435, 439; Force *v.* Martin, 122 Mass. 5; Anon., 37 Miss. 54, 58; Stoppert *v.* Nierle, 45 Nebr. 105; Young *v.* Johnson, 123 N. Y. 226; State *v.* Britt, 78 N. C. 439, 442; U. S. *v.* Collins, 1 Cr. C. C. 592; State *v.* Johnson, 28 Vt. 512, 523; Fall *v.* Overseers, 3 Munf. 495, 502; Humphrey *v.* State, 78 Wis. 571. {See Easdale *v.* Reynolds, 143 Mass. 127; Odewald *v.* Woodsum, 142 id. 512; Francis *v.* Rosa, 151 id. 535; Davison *v.* Cruse, 47 Nebr. 829.}
[16] Rawles *v.* Ford, 56 Ind. 433; Houser *v.* State, 86 id. 231. *Contra:* State *v.* Wickliff, 95 Ia. 386.
[17] Piercy's Case, 12 How. St. Tr. 1199; Annesley *v.* Anglesea, 17 id. 1139, 1318, 1324; Douglas Peerage Case, quoted 2 Hargr. Collect. Jurid. 402, Lord Mansfield, C. J. (leading case); Day *v.* Day, Trial, 3d ed., 327, quoted in Nicolas, Adulterine Bastardy, 140, and Hubback, Succession, 384 (the language of Mr. J. Heath in this case has sometimes been perverted in American judicial opinions to read against the use of such evidence); Andrews *v.* Askey, 8 C. & P. 7, 9.

where the child is shown in court, and not upon witnesses' testimony; or (d) it is accepted only from witnesses, and the showing in court is not allowed; or (e) it is not accepted as relevant under any conditions.[18] On the same principle, complexion, hair, and other features may be evidence of negro or Indian race-ancestry,[19] and even of foreign birth in general.[20]

There may also be mental or psychological traces of an act. The use of consciousness of guilt in evidence,[21] and of a testator's belief as to the execution of a will,[22] rest on this ground; and in investigating a person's identity with another, his recollection or non-recollection of events in the latter's life may help to indicate that he is the person to whom they have happened.[23] It seems to be on this ground that the use of a bloodhound's discoveries as evidence of the accused's presence at the place of a crime[24] is to be justified (*i. e.* the known trustworthiness of the animal's instincts justifies us in inferring from the impression on his olfactory senses to the existence of definite physical causes for that impression); and the recognition by an animal of its supposed owner or possessor may in the same way be evidence of that person's familiarity with the animal.]

6. *Evidence of the Condition, Quality, Capacity, etc., of Inanimate Objects.*

[Where the matter in issue is the existence of a condition, quality, capacity, tendency, or the like, of an inanimate object, — danger-

[18] The cases are as follows: Paulk *v.* State, 52 Ala. 427, 429; *Re* Jessup, 81 Cal. 408, 417; Risk *v.* State, 19 Ind. 152; Reitz *v.* State, 33 id. 187; Stumm *v.* Hummel, 39 Ia. 478, 480; State *v.* Danforth, 48 id. 43, 47; State *v.* Smith, 54 id. 104; Shorten *v.* Judd, 56 Kan. 43; Keniston *v.* Rowe, 16 Me. 38; Clark *v.* Bradstreet, 80 id. 454; Jones *v.* Jones, 45 Md. 144, 151; Eddy *v.* Gray, 4 All. 435, 438; Finnegan *v.* Dugan, 14 id. 197; Young *v.* Makepeace, 103 Mass. 50, 54; Farrell *v.* Weitz, 160 id. 288; Gaunt *v.* State, 50 N. J. L. 490, 495; Gilmanton *v.* Ham, 38 N. H. 108, 113; State *v.* Woodruff, 67 N. C. 89; Crow *v.* Jordon, 49 Oh. St. 655; State *v.* Britt, 78 id. 439, 442; U. S. *v.* Collins, 1 Cr. C. C. 592; Hanawalt *v.* State, 64 Wis. 84.

For the propriety of offering the child in court, to show the resemblance, see *ante*, § 13*c*.

[19] Daniel *v.* Guy, 23 Ark. 50; Bryan *v.* Walton, 20 Ga. 480, 508; Nave's Adm'r *v.* Williams, 22 Ind. 370; Gentry *v.* McGinnis, 3 Dana Ky. 382, 388; Chancellor *v.* Milly, 9 id. 24; Clark *v.* Bradstreet, 80 Me. 454, 457; Fox *v.* Lambson, 8 N. J. L. 275; Warlick *v.* White, 76 N. C. 175, 178; White *v.* Collector, 3 Rich. L. 138; Hudgins *v.* Wrights, 1 Hen. & M. 134, 137; Hook *v.* Pagee, 2 Munf. 379, 383; Gregory *v.* Baugh, 4 Rand. 611, 613.

[20] Dennis *v.* Brewster, 7 Gray 351.

[21] *Ante*, § 14 *p*.

[22] Sugden *v.* St. Leonards, L. R. 1 P. D. 203, Hannen, J.; Steele *v.* Price, 5 B. Monr. 69; McBeth *v.* McBeth, 11 Ala. 601; Collagan *v.* Burns, 57 Me. 458; Patten *v.* Paulton, 4 Jur. N. S. 341; Whiteley *v.* King, 10 id. 1079; R. *v.* Castro, charge of C. J. Cockburn, I, 614; Gould *v.* Lakes, L. R. 6 P. D. 1; *Re* Johnson's Will, 40 Conn. 587; *Re* Page, 118 Ill. 581; Hoppe *v.* Byers, 60 Md. 393; Foster's Appeal, 87 Pa. 75; Smiley *v.* Gambill, 39 Tenn. 165; Bergere *v.* U. S., 168 U. S. 66. These cases, with others involving the use of post-testamentary declarations by a testator, are examined more fully, from the point of view of the Hearsay rule, *post*. § 162 *e*.

[23] Notably used in the Tichborne case: charge of C. J. Cockburn, I, 16, 630, II, 162, 167, 327, 403.

[24] Simpson *v.* State, 111 Ala. 6; Pedigo *v.* Com., Ky., 44 S. W. 143. See also State *v.* Ward, 61 Vt. 185 (horse).

ousness, safety, capacity of work, tendency to produce marks, stains, injuries, etc., mode of operation, effect of operation, etc., — there are three chief modes of evidencing this circumstantially. One consists in showing the prior or subsequent existence of the thing, place, condition, etc., and thence inferring its existence at the time in question. Another consists in using the nature of one part as evidence of another part united with the former as like parts of a whole. Still another consists in showing particular instances on other occasions in which the condition, quality, tendency, etc., of the thing in question has been exhibited, and thence inferring the general existence of that quality, etc.]

§ 14 *t*. **Prior or Subsequent Existence of a Thing, Place, Condition, etc.** [The natural limitation of this sort of evidence is that the prior or subsequent time must be so near that nothing may be supposed to have occurred to cause a change; and the distance of time will depend entirely on the thing whose existence is in question; thus, the limit would vary according as the thing in question was a soap-bubble or Mt. Everest or a sidewalk. The facts of each case must control,[1] and precedents are of little value. This sort of evidence has been used with reference to all manner of objects, — a highway,[2] a bridge,[3] a railway track,[4] a stream,[5] land and buildings,[6] the condition of a human body,[7] of animals.[8]]

§ 14 *u*. **One Part evidencing another; Samples.** [Where by the possession of a uniform nature certain things form like parts of a whole, the nature of one part will be some evidence of the nature of another part; the requirement, for evidential purposes, being that the two should be so related as to form fairly homogeneous parts of an entity including them both. This principle receives frequent application in evidencing the condition of one part of a highway by

[1] See Com. *v.* Billings, 97 Mass. 405.

[2] Hunt *v.* Dubuque, 96 Ia. 314; Faulk *v.* Iowa Co., 103 id. 442; Barrenberg *v.* Boston, 137 Mass. 231; Fuller *v.* Jackson, 92 Mich. 197, 203; Hall *v.* Austin, Minn., 75 N. W. 1121; Link *v.* R. Co., 165 Pa. 75; Potter *v.* Natural Gas Co., 183 id. 575; Beardsley *v.* Columbia Tp., id., 41 Atl. 618; Rosenbaum *v.* Shoffner, 98 Tenn. 624; Schuenke *v.* Pine River, 84 Wis. 669, 677.

[3] Jessup *v.* Osceola Co., 92 Ia. 178; Wash. C. & A. T. *v.* Case, 80 Md. 36.

[4] B. U. R. Co. *v.* Alexander, 93 Ala. 133, 136; Dyson *v.* R. Co., 57 Conn. 24; Pennsylvania Co. *v.* Boylan, 104 Ill. 595, 599; Hipsley *v.* R. Co., 88 Mo. 348, 354; Stoher *v.* R. Co., 91 id. 509, 516; Hampton *v.* R. Co., S. C., 27 S. E. 96.

[5] Lewin *v.* Simpson, 38 Md. 468, 483; Brooke *v.* Winters, 39 id. 509; Dewey *v.* Williams, 43 N. H. 384, 387.

[6] Osgood *v.* Chicago, 154 Ill. 194; Ulrich *v.* People, 39 Mich. 245; Colo. M. & I. Co. *v.* Rees, 21 Colo. 435; Sievers *v.* P. B. & L. Co., Ind., 50 N. E. 877; Marston *v.* Dingley, 88 Me. 546; Com. *v.* Powers, 123 Mass. 244; Leidlein *v.* Meyer, 95 Mich. 586, 591.

[7] W. C. St. R. Co. *v.* Kennedy-Cahill, 165 Ill. 496; Williams *v.* State, 64 Md. 390; French *v.* Wilkinson, 93 Mich. 322. Compare some of the cases cited *post*, § 439 *h*, under Photographs, where the same question may arise; it may also arise in connection with evidence of the condition of a place by its effects, *post*, § 14 *v*.

[8] Kansas S. Y. Co. *v.* Couch, 12 Kan. 612, 614; Freyman *v.* Knecht, 78 Pa. 141, 143.

the condition of another part close at hand;[1] or of a railway track or roadbed[2] or other artificial structures,[3] or of a natural growth or formation.[4] It is also illustrated by the use of samples, to show the quality or condition of the whole substance;[5] where the samples are taken from a different lot or series, and not the very one in question, then the two must of course first be shown to be identical in the qualities in question.[6]]

§ 14 *v*. **Similar Instances as Evidence of a Quality, Tendency, Capacity, etc.** [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 influence of some other element introduced by the differing circumstances.[1]

But in the use of this mode of evidence, the inconveniences of unfair surprise and confusion of issues (*ante*, § 14 *a*) are prone to arise and often serve to exclude the evidence. The difficulty for the opponent of anticipating the particular instances that may be alleged, the length of time that may be spent on these minor evidential matters, and the possible confusion of the issues in the mind of the jury, may overweigh the slight probative value of the evidence.[2] The most rational and practical solution of the difficulty would be to determine each case upon its own circumstances, and to leave it largely to the trial Court to draw the line of exclusion whenever the above objections in fact present themselves;[3] for it is obvious that

[1] Taylor *v*. Monroe, 43 Conn. 42; Hoyt *v*. Des Moines, 76 Ia. 430; Riley *v*. Iowa Falls, 83 id. 761; Brooks *v*. Acton, 117 Mass. 204; Campbell *v*. Kalamazoo, 80 Mich. 655, 660; Edwards *v*. Three Rivers, 102 id. 153; Will *v*. Mendon, 108 id. 251; Canfield *v*. Jackson, id., 70 N. W. 444; Haynes *v*. Hillsdale, id., 71 N. W. 466; Kelly *v*. R. Co., 28 Minn. 98, 100; Emerson *v*. Lebanon, N. H., 39 Atl. 466; Osborne *v*. Detroit, 36 Fed. 36, 38.

[2] Cleve. C. & C. & I. R. Co. *v*. Newell, 104 Ind. 264, 267; L. & N. R. Co. *v*. Fox, 11 Bush, 505; Louisv. & N. R. Co. *v*. Henry, Ky., 44 S. W. 428; Turner *v*. R. Co., 158 Mass. 261, 266; Grand R. & I. R. Co. *v*. Huntley, 38 Mich. 537, 540; Morse *v*. R. Co., 30 Minn. 465; Hipsley *v*. R. Co., 88 Mo. 348, 354; Reed *v*. R. Co., 45 N. Y. 574, 580.

[3] Fort Wayne *v*. Coombs, 107 Ind. 87; Snyder *v*. Albion, Mich., 71 N. W. 475; Plummer *v*. Ossipee, 59 N. H. 57; Randall *v*. Tel. Co., 54 Wis. 140.

[4] Central R. Co. *v*. Ingram, 98 Ala. 395, 397; Cleland *v*. Thornton, 43 Cal. 437; Stambaugh *v*. Smith, 23 Oh. 594.

[5] Epps *v*. State, 102 Ind. 549; Com. *v*. Schaffner, 146 Mass. 512, 514; Com. *v*. Kendrick, 147 id. 444; Vietti *v*. Nesbitt, 22 Nev. 390; Fox *v*. Mining Co., 108 Cal. 475; Brown *v*. Leach, 107 Mass. 367.

[6] Jupitz *v*. People, 34 Ill. 520 (brass couplings); Com. *v*. Goodman, 97 Mass. 117 (liquor from another barrel).

[1] See the phrasing in Hunt *v*. Gaslight Co., 8 All. 169; C. S. L. & P. R. Co. *v*. Champion, Ind., 32 N. E. 874; Baxter *v*. Doe, 142 Mass. 558; State *v*. Justus, 8 Or. 182.

[2] See the reasoning in Amoskeag Co. *v*. Head, 59 N. H. 332, 337; Ins. Co. *v*. Tobin, 32 Oh. St. 90; Phillips *v*. Willow, 70 Wis. 9.

[3] Darling *v*. Westmoreland, 52 N. H. 401, 408 (leading case); Metrop. Dist. Asylum *v*. Hill, 47 L. T. R. N. S. 29; Bemis *v*. Temple, 162 Mass. 342, 344.

they do not invariably or even usually exist for all evidence of this sort. But this course has not been usual, and the evidence is more commonly either admitted or rejected by an inflexible rule.

Besides the above two proper sorts of limitations (those depending on relevancy and those depending on collateral inconvenience), which operate for frequent exclusion and at the same time make the precedents difficult to harmonize, there are one or two other distinctions, not founded in reason or policy, but occasionally put forward by Courts as justifying exclusion. (a) A distrust of instances obtained by deliberate experiment, as distinguished from casual observation, is sometimes shown. But the distinction has no value; if the conditions are shown to be substantially the same, an experiment is as significant as an instance casually observed, and sometimes more so; and, for some matters, an experiment is feasible where no instance of casual observation is possible.[4] (b) It is sometimes thought that a negative instance is inadmissible, *e. g.* in showing that a place is not dangerous, the fact that it has been constantly used but without injurious effects.[5] Such evidence, however, is in effect merely the affirmative fact that the place has shown itself safe; moreover, whatever its form or its substance really is, it has constant employment in scientific research, and is equally proper and probative with evidence in form affirmative.[6]

We may now examine the various data to which the above principles have been applied, without attempting to note the precise result of the rulings in each topic, except where special difficulties exist or special development of principle has occurred. The arrangement of the various precedents is a matter of much difficulty; but, having regard to the kind of fact offered in evidence and the helpfulness of the analogies, it may be best to consider them according as the evidential fact is (1) a material effect (*e. g.* marks on a board from a pistol-shot, injuries to a house by smoke, fire set by a locomotive spark, work done by machinery, etc.); (2) corporal effects (*e. g.* wounds produced by gunshots, illness produced by a poisonous

[4] Some of the rulings are as follows (all of these being later cited under their respective subjects): (*a*) Admitted: Broder *v.* Saillard, 2 Ch. D. 692; Brooke *v.* R. Co., 81 Ia. 511; Mo. P. R. Co. *v.* Moffatt, 56 Kan. 667; Swett *v.* Shumway, 102 Mass. 368; Stone *v.* Ins. Co., 71 Mich. 81; Dillard *v.* State, 58 Miss. 386; Leonard *v.* R. Co., 21 Or. 555; Sullivan *v.* Com., 93 Pa. 288, 296; Hoffman *v.* R. Co., 143 id. 503; Osborne *v.* Detroit, 32 Fed. 36; State *v.* Flint, 60 Vt. 304, 308, 317; Roskee *v.* Pulp. Co., 169 Mass. 528; Burg *v.* R. Co., 90 Ia. 106, 116; Young *v.* Clark, Utah, 50 Pac. 832; Balt. & O. R. Co. *v.* Hellenthal, U. S. App., 88 Fed. 116; Hayes *v.* R. Co., Utah, 53 Pac. 1001. (*b*) Excluded because the tests of relevancy were not fulfilled: State *v.* Fleteher, 24 Or. 295; People *v.* Woon Tuck Wo, Cal., 52 Pac. 833; Com. *v.* Piper, 120 Mass. 190; Jones *v.* State, 71 Ind. 83; Ulrich *v.* People, 39 Mich. 245; Justus *v.* State, 11 Or. 182. (*c*) Excluded for sundry reasons: Alab. G. S. R. Co. *v.* Collier, Ala., 14 So. 327; State *v.* Lindoen, 87 Ia. 702; Jumpertz *v.* People, 21 Ill. 408; Wynne *v.* State, 56 Ga. 113.

[5] Nave *v.* Flack, 90 Ind. 205; Bauer *v.* Indianapolis, 99 id. 56.

[6] *E. g.*, Doyle *v.* R. Co., 42 Minn. 79; Crofter *v.* R. Co., L. R. 1 C. P. 300; Baird *v.* Daly, 68 N. Y. 550; Sinton *v.* Butler, 40 Oh. St. 158, 168.

substance, injury caused by a defect in a highway, etc.); and (3) psychological or moral effects, *i. e.* effects on human conduct (*e. g.* efforts to escape danger, time required for work, cautions taken at a dangerous place, etc.). This classification is for given instances more or less arbitrary; but so must any be; and this one seems best to group the related and analogous evidential data.

(1) *Material Effects.* Under this head may be noted the use of other similar instances as evidence of the character of a place, building, factory, etc., alleged to be a nuisance,[7] — in particular, a railroad;[8] of the injurious effects of water by flowage, etc.;[9] of the injurious quality of gases on trees, paint, etc.;[10] of the tendency of machines to operate defectively or otherwise, as shown by other instances of the action of the same machine[11] or of a similar machine;[12] and of sundry other things.[13] The matter that has given rise to most controversy is the use of emissions of sparks by locomotives as evidence of the setting of a fire; but here two distinct purposes must be noted; for in charging the owner of the locomotive (factory-chimney, etc.), the effort may be, first, to show that it has the capacity or tendency to emit flaming sparks and thus may have caused the fire, or, secondly, to show that it is dangerously likely to emit such sparks, *i. e.* it is negligently constructed; for the latter purpose the evidence should be stronger, but there is no difference of

[7] See Tennant *v.* Hamilton, 5 Cl. & F. 122; R. *v.* Fairie, 8 E. & B. 486, 488; Broder *v.* Saillard, 2 Ch. D. 692; Metrop. Asylum Dist. *v.* Hill, 47 L. T. R. N. S. 29; Cooper *v.* Randall, 59 Ill. 320; Lincoln *v.* Mfg. Co., 9 All. 181.

[8] See Metrop. W. S. E. R. Co. *v.* Dickinson, 161 Ill. 22, 24; Concord R. Co. *v.* Greely, 23 N. H. 237, 243; Doyle *v.* R. Co., 128 N. Y. 488, 495; Hine *v.* R. Co., 149 N. Y. 154.

[9] See Folkes *v.* Chadd, 3 Doug. 157; Clark *v.* Water Power Co., 52 Me. 75; Standish *v.* Washburn, 21 Pick. 237; Hawks *v.* Charlemont, 110 Mass. 112; Verran *v.* Baird, 150 id. 142; Pettibone *v.* Smith, 37 Mich. 580; Dorman *v.* Ames, 12 Minn. 451; Reed *v.* Dick, 8 Watts, 480, 481; Haynes *v.* Burlington, 38 Vt. 350, 363.

[10] See Ottawa G. & C. Co. *v.* Graham, 35 Ill. 348; Eidt *v.* Cutter, 127 Mass. 522; Evans *v.* Gas. Co., 148 N. Y. 112.

[11] See Baber *v.* Rickart, 52 Ind. 594, 597; Davis' Sons *v.* Sweeney, 80 Ia. 393; State *v.* Delaney, 92 id. 467; Kramer *v.* Messner, 101 id. 88; Bradford *v.* Ins. Co., 11 Pick. 161; Brierly *v.* Davol Mills, 128 Mass. 291; Tremblay *v.* Harnden, 162 id. 383; Flaherty *v.* Powers, 167 id. 61; Roskee *v.* Pulp Co., 169 id. 528; Spaulding *v.* Mfg. Co., id., 50 N. E. 543; McCurragher *v.* Rogers, 120 N. Y. 526; Findlay Brewing Co. *v.* Bauer, 50 Oh. 560; Baker *v.* Hagey, 177 Pa. 128; Taylor *v.* U. S., U. S. App., 89 Fed. 954. For evidence of defective condition by corporal injuries received, see *post*, this section.

[12] See Blackman *v.* Collier, 65 Ala. 312; Stockton C. H. & A. W. *v.* Ins. Co., Cal., 53 Pac. 565; McCormick H. M. Co. *v.* Gray, 100 Ind. 285, 292; Nat'l B. & L. Co. *v.* Dunn, 106 id. 110, 115; Osborn *v.* Simerson, 73 Ia. 509, 512; Gage *v.* Meyers, 59 Mich. 300, 306; Osborne *v.* Bell, 62 id. 214, 218; Avery *v.* Burrall, id., 77 N. W. 272; Shute *v.* Mfg. Co., N. H., 40 Atl. 391; Tilton *v.* Miller, 66 Pa. 388; Carpenter *v.* Corinth, 58 Vt. 216.

[13] See R. *v.* Heseltine, 12 Cox Cr. 404; People *v.* Brotherton, 47 Cal. 402; People *v.* Hope, 62 id. 291, 295; People *v.* Durrant, 116 id. 179; 48 Pac. 75; State *v.* Smith, 49 Conn. 381; Tomlinson *v.* Earnshaw, 112 Ill. 313; Lake E. & W. R. Co. *v.* Mugg, 132 Ind. 168; Cinc. St. L. & P. R. Co. *v.* Champion, id., 32 N. E. 874; Swett *v.* Shumway, 102 Mass. 368; Com. *v.* Piper, 120 id. 190; Polin *v.* State, 14 Nebr. 540; Linsday *v.* People, 63 N. Y. 143, 156; Otey *v.* Hoyt, 2 Jones L. 72; Leonard *v.* R. Co., 21 Or. 555; Hoffman *v.* R. Co., 143 Pa. 503; State *v.* Ward, 61 Vt. 182.

principle in its use. Moreover, in both cases the evidence may conceivably consist of other emissions either by the same engine or by other engines; the latter sort of circumstance is equally relevant with the former, provided the construction of all the engines is similar. The result of the precedents seems to be as follows: (1) Other emissions of sparks are generally received either (a) to show a capacity to emit sparks and cause the fire,[14] or (b) to show a negligent construction dangerously likely to emit sparks;[15] the instances may be either before or after the time in question, but perhaps, if they are not near in time, it should be shown that no change of condition had occurred; (2) these emissions may be not only of the same engine, but of other engines of similar construction;[16] it is generally

[14] See Henry *v.* R. Co., 50 Cal. 176, 183; Balt. & O. R. Co. *v.* Tripp, Ill., 51 N. E. 833; Ross *v.* R. Co., 6 All. 87; Loring *v.* R. Co., 131 Mass. 469; Hoyt *v.* Jeffers, 30 Mich. 181, 189; Haseltine *v.* R. Co., 64 N. H. 545; Hinds *v.* Barton, 25 N. Y. 544; Collins *v.* R. Co., 109 id. 243, 249; Phil. & R. R. Co. *v.* Hendrickson, 80 Pa. 182, 189; Pa. Co. *v.* Watson, 81 id. 293, 296; Patteson *v.* R. Co., 94 Va. 16; Brusberg *v.* R. Co., 55 Wis. 106.

[15] The cases are as follows (but the Pennsylvania cases are in great confusion, and should not be used as precedents elsewhere): Aldridge *v.* R. Co., 3 M. & Gr. 515, 522; Vaughan *v.* R. Co., 3 H. & N. 743, 750, 5 id. 679, 688; L. & N. R. Co. *v.* Miller, 109 Ala. 500; Louisv. & N. R. Co. *v.* Malone, ib. 509; Henry *v.* R. Co., 50 Cal. 176, 183; Butcher *v.* R. Co., 67 id. 518; East T. V. & G. R. Co. *v.* Hesters, 90 Ga. 11; Ill. Cent. R. Co. *v.* McClelland, 42 Ill. 355; Lake E. & W. R. Co. *v.* Middlecoff, 150 id. 27, 39; First N. B. of Hoopeston *v.* R. Co., id., 50 N. E. 1023; Gagg *v.* Vetter, 41 Ind. 228, 257; Gandy *v.* R. Co., 30 Ia. 420; Slossen *v.* R. Co., 60 id. 215; Lanning *v.* R. Co., 68 id. 502, 505; St. Jos. & D. C. R. Co. *v.* Chase, 11 Kan. 47, 54; Atch. T. & S. F. R. Co. *v.* Campbell, 16 id. 200, 204; Atch. T. & S. F. R. Co. *v.* Osborn, 58 id. 768; Taylor *v.* R. Co., Ky., 41 S. W. 551; Annap. & E. R. Co. *v.* Gautt, 39 Md. 115, 134; Ireland *v.* R. Co., 79 Mich. 163, 165; Davidson *v.* R. Co., 34 Minn. 51; Fitch *v.* R. Co., 45 Mo. 322, 327; Longabaugh *v.* R. Co., 9 Nev. 271, 289; Field *v.* R. Co., 32 N. Y. 338, 349; Webb *v.* R. Co., 49 id. 420, 424; Collins *v.* R. Co., 109 id. 243, 249; Flinn *v.* R. Co., 142 id. 11, 19; Koontz *v.* O. R. & N. Co., 20 Or. 3; R. Co. *v.* Yeiser, 8 Pa. 366, 376; Huyett *v.* R. Co., 23 id. 374; Erie R. Co. *v.* Decker, 78 id. 293; Pa. Co. *v.* Watson, 81* Pa. 293, 296; Lehigh V. R. Co. *v.* McKeen, 90 id. 122, 123, 130; Jennings *v.* R. Co., 93 id. 337, 340; Albert *v.* R. Co., 98 id. 316, 321; Gowen *v.* Glaser, 3 Centr. R. 108; Pa. R. Co. *v.* Page, 21 W. N. Pa. 52; Henderson *v.* R. Co., 144 Pa. 461, 476; Thomas *v.* R. Co., 182 id. 538; Grand T. R. Co. *v.* Richardson, 91 U. S. 454, 458, 470; North P. R. Co. *v.* Lewis, 7 U. S. App. 254, 272; R. Co. *v.* Rogers, 76 Va. 443, 448; N. York P. & N. R. Co. *v.* Thomas, 92 id. 606; Kimball *v.* Borden, Va., 28 S. E. 207; Cleavelands *v.* R. Co., 42 Vt. 449, 456; Brusberg *v.* R. Co., 55 Wis. 106; Gibbons *v.* R. Co., 58 id. 335; Allard *v.* R. Co., 73 id. 165; Menomenie R. S. & D. Co. *v.* R. Co., 91 id. 447.

[16] This seems to hold everywhere except in Arkansas and Mississippi. There are of course details of development which cannot be here considered; and to the following cases should be added most of those in the preceding note, where the evidence deals with sparks from other engines, but no discrimination on that ground seems to have been attempted; the limitation above-mentioned as to identifiable engines originated in Pennsylvania, and has been accepted in Michigan, Missouri, Wisconsin, and Illinois (in the latter Court under the erroneous impression that it represented the weight of authority). The cases are as follows: Piggot *v.* R. Co., 3 C. B. 229; Railway Co. *v.* Jones, 59 Ark. 105; Butcher *v.* R. Co., 67 Cal. 518; Brown *v.* Benson, 101 Ga. 753; Ill. Cent. R. Co. *v.* McClelland, 42 Ill. 355; Babcock *v.* R. Co., 62 Ia. 593, 597; Bell *v.* R. Co., 64 id. 321, 325; Thatcher *v.* R. Co., 85 Me. 502; Dunning *v.* R. Co., 91 id. 87; Annap. E. R. Co. *v.* Gautt, 39 Md. 115, 134; Ross *v.* R. Co., 6 All. 87; Campbell *v.* R. Co., 121 Mo. 340, 349; Matthews *v.* R. Co., 142 id. 645; Tribette *v.* R. Co., 71 Miss. 212, 233; Longabaugh *v.* R. Co., 9 Neb. 271, 288; Boyce *v.* R. Co., 42 N. H. 97, 100; Smith *v.* R. Co., 63 id. 25, 29; Sheldon *v.* R. Co., 14 N. Y.

and properly held, moreover, that this similarity of construction may be assumed where the engines belong to the same line, and it need not be shown beforehand by the offeror of the evidence; there is in a few jurisdictions the further limitation that such evidence as to other engines is not receivable if the particular engine setting the fire in question is identifiable; but this has no support in principle and should not be extended.

(2) *Corporal Effects.* Under this head may be noted the use of other instances (often those obtained by experiment) of the tendency of a gunshot or pistol-shot with reference to the kind of wound made;[17] of the nature of a drug, gas, food, or other substance with reference to its corporal effects and symptoms,[18] and, in particular, of the intoxicating nature of a liquor.[19] 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. There seems here to be no impropriety in the nature of an inference; just as the character of a white powder with reference to producing illness may be evidenced by its effects on those taking it, so the tendency of a machine or a place in the highway, with reference to producing injury to those who use it or pass over it may be judged of by its effects in given instances; provided only the conditions are substantially similar to those in the case at issue. Nevertheless, the doctrines of unfair surprise and confusion of issues (as explained above) have been thought to have an especial bearing here; and for some time (particularly in a series of cases in Massachusetts beginning with Collins *v.* Dorchester, but now apparently in effect repudiated in that jurisdiction) much distrust of this sort of evidence was shown. The almost universal

218, 220; Hinds *v.* Barton, 25 id. 544, 546; Field *v.* R. Co., 32 id. 338, 348; Koontz *v.* O. R. & N. Co., 20 Or. 3; Pa. R. Co. *v.* Stranahan, 79 Pa. 405; Henderson *v.* R. Co., 144 id. 461, 487; Smith *v.* R. Co., 10 R. I. 24, 27; Grand T. R. Co. *v.* Richardson, 91 U. S. 454, 470; Chic. S. P. M. & O. R. Co. *v.* Gilbert, 10 U. S. App. 375; Gulf C. & S. F. R. Co. *v.* Johnson, ib. 629; Kimball *v.* Borden, Va., 28 S. E. 207; Hoskison *v.* R. Co., 66 Vt. 618; Gibbons *v.* R. Co., 58 Wis. 335.

[17] See Evans *v.* State, 109 Ala. 11; Wynne *v.* State, 56 Ga. 113, 118; State *v.* Cater, 100 Ia. 501; State *v.* Asbell, 57 Kan. 398; Becket *v.* Aid Assoc., 67 Minn. 298; Vaughan *v.* State, 3 S. M. & M. 555; Dillard *v.* State, 58 Miss. 386; State *v.* Justus, 11 Or. 182; State *v.* Fletcher, 24 id. 295, 298; Sullivan *v.* Com., 93 Pa. 288, 296; Boyd *v.* State, 14 Lea 161, 171; Moore *v.* State, 96 Tenn. 209; Ball *v.* U. S., 163 U. S. 662.

[18] See Spencer Cowper's Trial, 13 How. St. Tr. 1162; R. *v.* Webb, 1 Moo. & Rob. 405, 412; R. *v.* Palmer, Annual Register 1856, pp. 403, 422, 473, 475, 509; Bush *v.* Jackson, 24 Ala. 274; Ala. G. S. R. Co. *v.* Collier, Ala., 14 So. 327; Remy *v.* Olds, Cal., 34 Pac. 216; Wallace *v.* Wren, 32 Ill. 150; Epps *v.* State, 102 Ind. 549; State *v.* Lindoen, 87 Ia. 702, 704; Champ *v.* Com., 2 Metc. Ky. 17, 26; Hunt *v.* Lowell Gaslight Co., 1 All. 343, 350, 8 id. 169, 171; Baxter *v.* Doe, 142 Mass. 558, 561; Reeve *v.* Dennett, 145 id. 28; Shea *v.* Glendale E. F. Co., 162 id. 463; Com. *v.* Kennedy, id., 48 N. E. 770; Pinney *v.* Cahill, 48 Mich. 586; People *v.* Holmes, 111 id. 364; State *v.* Isaacson, 8 S. D. 69; Osborne *v.* Detroit, 32 Fed. 36; The T. F. Oakes, 82 id. 759; U. S. *v.* Reed, 86 id. 308; Weeks *v.* Lyndon, 54 Vt. 645; Willett *v.* St. Albans, 69 id. 330; Bateman *v.* Rutland, id., 41 Atl. 500.

[19] See Knowles *v.* State, 80 Ala. 9; Brantly *v.* State, 91 id. 47; State *v.* Pfefferle, 36 Kan. 90, 91; State *v.* Adams, 44 id. 135; Fairly *v.* State, 63 Miss. 333; Com. *v.* Reyburg, 122 Pa. 299, 305.

attitude of the Courts at the present time, however[20] (apart from minor peculiarities), is to admit such evidence, subject to the limitations already described at the beginning of this section. The other instances of injuries thus offered in evidence may concern defects in highways,[21] or defects in railroad-tracks, machines, premises, and the like.[22]

(3) *Effects on Human Conduct.* The tendency or nature of a material object may often be ascertainable by its psychological or moral effects; and it seems proper to place here a number of sorts of evidence, in which it is perhaps not usual to perceive such a process of inference. Nevertheless, this analysis seems at once to embrace the various kinds and also to supply the reasons upon which their admission depends. It may be thought that the Hearsay rule is violated by using as evidence the conduct of persons not before the Court; but that rule excludes only the assertions of such persons taken as evidence of the truth of the fact asserted, and though the line between conduct and assertions is not always easy to draw, the distinction is a real one and leaves the Hearsay rule not applicable to the

[20] Darling *v.* Westmoreland, 52 N. H. 401, opinion by Doe, J., is the leading case.

[21] See Birm. Un. R. Co. *v.* Alexander, 93 Ala. 133; Birmingham *v.* Starr, 112 id. 98; Bailey *v.* Trumbull, 31 Conn. 581; Calkins *v.* Hartford, 33 id. 57; Taylor *v.* Monroe, 43 id. 42; Tomlinson *v.* Derby, 43 id. 562; Wilson *v.* Granby, 47 id. 75; Anderson *v.* Taft, id., 39 Atl. 191; Augusta *v.* Hafers, 61 Ga. 48; Gilmer *v.* Atlanta, 77 id. 688; Aurora *v.* Brown, 12 Ill. App., 131; Bloomington *v.* Legg, 151 Ill. 9, 13; Delphi *v.* Lowery, 74 Ind. 520, 525; Nave *v.* Flack, 90 id. 205, 214; Bauer *v.* Indianapolis, 99 id. 56, 60; L. N. A. & C. R. Co. *v.* Wright, 115 id. 378, 393; Salem S. & L. Co. *v.* Griffin, 139 id. 141; Hudson *v.* R. Co., 59 Ia. 581; Hoyt *v.* Des Moines, 76 id. 430; Mathews *v.* Cedar Rapids, 80 id. 459; Hunt *v.* Dubuque, 96 id. 314; Topeka *v.* Sherwood, 39 Kan. 690; Hubbard *v.* R. Co., 39 Me. 506; Branch *v.* Libbey, 78 id. 321; Balt. & Y. T. R. Co. *v.* State, 71 Md. 573, 584; Collins *v.* Dorchester, 6 Cush. 396; Aldrich *v.* Pelham, 1 Gray, 510; Kidder *v.* Dunstable, 11 id. 342; Schoonmaker *v.* Wilbraham, 110 Mass. 134; Marvin *v.* New Bedford, 158 id. 464, 466; Bemis *v.* Temple, 162 id. 342, 345; McCool *v.* Grand Rapids, 58 Mich. 41, 46; Dundas *v.* Lansing, 75 id. 499, 503; Lombar *v.* East Tawas, 86 id. 14; Retan *v.* R. Co., 94 Mich. 146; Corcoran *v.* Detroit, 95 id. 84; Phelps *v.* Mankato, 23 Minn. 276, 279; Kelly *v.* R. Co., 28 id. 98, 100; Phelps *v.* R. Co., 37 id. 487; Burrows *v.* Lake Crystal, 61 id. 357; Griffin *v.* Auburn, 58 N. H. 121; Temperance Hall Ass'n *v.* Giles, 33 N. J. L. 260; Quinlan *v.* Utica, 74 N. Y. 603; Pomfrey *v.* Saratoga Springs, 104 id. 459, 469; Hoyt *v.* R. Co., 118 id. 399; Gillrie *v.* Lockport, 122 id. 403; Mansfield C. & C. Co. *v.* McEuery, 91 Pa. 185, 192; Dist. of Columbia *v.* Armes, 107 U. S. 519, 524; Osborne *v.* Detroit, 32 Fed. 36; Scott *v.* New Orleans, U. S. App., 75 Fed. 373; Lester *v.* Pittsford, 7 Vt. 158; Kent *v.* Lincoln, 32 id. 591; Walker *v.* Westfield, 39 id. 247; Elster *v.* Seattle, 18 Wash. 304; Phillips *v.* Willow, 70 Wis. 6; Barrett *v.* Hammond, 87 Wis. 654, 657.

[22] See Crofter *v.* R. Co., L. R. 1 C. P. 300; M. & M. R. Co. *v.* Ashcraft, 48 Ala. 15, 32; Schlaff *v.* R. Co., 100 id. 377, 388; Mayer *v.* Building Co., id., 22 So. 859; Hodges *v.* Bearse, 129 Ill. 89; Libby *v.* Scherman, 146 id. 540; West Chic. St. R. Co. *v.* Kennelly, 170 id. 508; Brooke *v.* R. Co., 81 Ia. 511; Bryce *v.* R. Co., id., 72 N. W. 780; Parker *v.* Publishing Co., 69 Me. 173; Balt. & Y. T. R. Co. *v.* Leonhardt, 66 Md. 70, 78; Wise *v.* Ackerman, 76 id. 375, 390; Lewis *v.* Smith, 107 Mass. 334; Peverly *v.* Boston, 136 id. 366; Doyle *v.* R. Co., 42 Minn. 79, 82; Hipsley *v.* R. Co., 88 Mo. 348, 354; Graney *v.* R. Co., 140 id. 89; Dougan *v.* Champlain Co., 56 N. Y. 7; Baird *v.* Daly, 68 id. 550; Ins. Co. *v.* Tobin, 32 Oh. St. 90; Sinton *v.* Butler, 40 id. 158, 168; Bridger *v.* R. Co., 27 S. C. 456; Pearson *v.* Spartanburg Co., 51 S. C. 480; Patton *v.* R. Co., U. S. App., 82 Fed. 979; Hurd *v.* R. Co., 8 Utah 241, 244; Snowden *v.* Coal Co., id., 52 Pac. 599.

former. In the following summary of the material, attention will be called merely to the various instances that have come before the Courts, without attempting to note the result of the rulings.

The simplest instance is the use of other instances of fright by horses at a particular object — a whistle, a pile of stones, a flag, a railroad-car, etc. — as evidence of its tendency to cause fright in horses.[23] Closely analogous to this is the use, on an issue whether a person's fright and jumping from a train, etc., was natural, of the alarmed conduct of other persons in the same situation.[24] On the same general principle — *i. e.* the use of mental impressions as indicating the nature of a material object — the impressions of other persons (usually obtained by experiment) as to whether a thing could be seen, heard, or identified under given circumstances of time, place, and other surroundings, has usually been received.[25] Whether a distance is capable of being traversed in a given time, or a locomotive capable of being stopped by the engineer, or any other thing capable of being done by a human being, may properly be evidenced by the experience of the same or other persons under similar conditions.[26] It seems to be upon the same principle that, upon an issue of care, reasonableness, necessity, or the like, the conduct of other persons, as involved in their practice or custom under the same conditions, is to be received as evidential; *e. g.* if we wish to learn, before leaving the house, whether it is raining enough to require the protection of an umbrella, we look out to see whether persons on the street have lifted their umbrellas; *i. e.* the issue being the nature of the rain with reference to its requiring certain conduct on our part, the conduct of others is some evidence

[23] See Brown *v.* R. Co., 22 Q. B. D. 391; House *v.* Metcalf, 27 Conn. 631; Knight *v.* Goodyear Mfg. Co., 38 id. 438, 442; Tomlinson *v.* Derby, 43 id. 562; Cleveland R. Co. *v.* Wynant, 114 Ind. 525; Topeka Water Co. *v.* Whitney, 58 Kan. 639; Hill *v.* R. Co., 55 Me. 438; Crocker *v.* McGregor, 76 id. 282; Bemis *v.* Temple, 162 Mass. 342; Smith *v.* Sherwood, 62 Mich. 151; Darling *v.* Westmoreland, 52 N. H. 40; Gordon *v.* R. Co., 58 id. 396; Folsom *v.* R. Co., id.. 38 Atl. 209; Valley *v.* R. Co., id., 38 Atl. 383; Potter *v.* Natural Gas Co., 183 Pa. 575; Thomas *v.* Springville, 9 Utah 426, 430; Bloor *v.* Delafield, 59 Wis. 273.

[24] See Mobile & M. R. Co. *v.* Ashcraft, 48 Ala. 31; Mitchell *v.* R. Co., 87 Cal. 62; Galena & C. U. R. Co. *v.* Fay, 16 Ill. 558, 568; Hohnan *v.* R. Co., Mich., 72 N. W. 202; Twomley *v.* R. Co., 69 N. Y. 161; Hallahan *v.* R. Co., 102 id. 199.

[25] See R. *v.* Robinson, Annual Register 1824, App. 33; Lou. & N. R. Co. *v.* Hill, 115 Ala. 334; People *v.* Woon Tuck Wo, Cal., 52 Pac. 333; Sealy *v.* State, 1 Kelly 220; Jumpertz *v.* People, 21 Ill. 408; Painter *v.* People, 147 id. 444, 459; Jones *v.* State, 71 Ind. 83, 84; Burg *v.* R. Co., 90 Ia. 106, 116; Mo. P. R. Co. *v.* Moffatt, 56 Kan. 667; White *v.* Com., 80 Ky. 483; Salem I. R. Co. *v.* Adams, 23 Pick. 256, 264; Com. *v.* Webster, Bemis' Rep. 281, 5 Cush. 295, 302; Stone *v.* Ins. Co., 71 Mich. 81; Berckmans *v.* Berckmans, 16 N. J. Eq. 127; Smith *v.* State, 2 Oh. St. 517; Balt. & O. R. Co. *v.* Hellenthal, U. S. App., 88 Fed. 116; Young *v.* Clark, Utah, 50 Pac. 832.

[26] See Spencer Cowper's Trial, 13 How. St. Tr. 1162, 1178; Aug. & S. R. Co. *v.* Dorsey, 68 Ga. 235; McMurrin *v.* Rigby, 80 Ia. 325; Balt. C. P. R. Co. *v.* Cooney, Md., 39 Atl. 359; People *v.* Morrigan, 29 Mich. 5; Ulrich *v.* People, 39 id. 245; Klanowski *v.* R. Co., 64 id. 279, 286; Davis *v.* State, Minn., 70 N. W. 894; Byers *v.* R. Co., 94 Tenn. 345; West Pub. Co. *v.* Lawyers' Co-op. P. Co., U. S. App., 79 Fed. 756; Hayes *v.* R. Co., Utah, 53 Pac. 1001; State *v.* Flint, 60 Vt. 304, 317.

So also, whether animals can do a certain thing: see Chic. & N. W. R. Co. *v.* Hart, 22 Ill. App. 209; Carlton *v.* Hescox, 107 Mass. 410; Harwood *v.* R. Co., 67 Vt. 664.

of the nature of the rain in that respect. This sort of evidence is constantly resorted to in everyday life, and it is of usefulness and propriety in litigation. The chief limitation is that we should treat the conduct of others merely as some evidence, and should not erect it into an absolute legal standard or test of liability or excuse; and it is through fear that the evidence may be thus abused, or through inability to perceive any other than this improper use of it, that a few Courts have excluded this sort of evidence. There is, however, no objection to its use, provided the above distinction be observed and the jury be instructed as to the purely evidential use of the conduct of other persons.[27] The precedents, while in general illustrating what has been said above, cannot be reconciled; they cover a wide variety of data, and concern the conduct, practice, or custom of others, as to whether certain treatment of animals [28] or children [29] was proper; whether conduct with reference to stopping or avoiding fire was proper; [30] whether a mode of switching, managing, or riding on railway-cars was proper; [31] whether a mode of construction of a bridge, track, machine, highway, etc., was proper; [32] whether an appliance on a locomotive or other engine was proper; [33] whether a machine, place, etc., was properly operated or protected; [34] whether

[27] The distinction is well illustrated in the following two leading cases: Cass *v.* R. Co., 14 All. 448; Maynard *v.* Buck, 100 Mass. 40.

[28] See Murphy *v.* Manning, 2 Exch. D. 307; Brady *v.* McArdle, 15 Cox Cr. 516; Callaghan *v.* S. P. C. A., 16 id. 101; Lewis *v.* Fermor, L. R. 18 Q. B. D. 532; Ford *v.* Wiley, 23 id. 203, 221.

[29] See Boldron *v.* Widdows, 1 C. & P. 65; Lander *v.* Goodenough, 32 Vt. 114, 125; compare DeMay *v.* Roberts, 46 Mich. 160.

[30] See Hatchett *v.* Gibson, 13 Ala. 587, 598; Gibson *v.* Hatchett, 24 id. 201; Hilder *v.* McCartney, 31 id. 501.

[31] See Warden *v.* R. Co., 94 Ala. 277, 285; Andrews *v.* R. Co., 99 id. 439; Kan. C. M. & Br. Co. *v.* Burton, 97 id. 240, 251; Hill *v.* R. Co., 100 id. 447; George *v.* R. Co., 109 id. 245; Metrop. S. R. Co. *v.* Johnson, 91 Ga. 466; Chic. City R. Co. *v.* Taylor, Ill., 48 N. E. 831; Chic. R. I. & P. R. Co. *v.* Clark, 108 id. 118; Hamilton *v.* R. Co., 36 Ia. 31, 37; Hosic *v.* R. Co., 75 id. 683; South. K. R. Co. *v.* Robbins, 43 Kan. 145; Hickey *v.* R. Co., 14 All. 429; Caswell *v.* R. Co., 98 Mass. 194, 200; Glover *v.* Scotten, 82 Mich. 369; Wilds *v.* R. Co., 29 N. Y. 315, 326; Houston & T. C. R. Co. *v.* Cowser, 57 Tex. 293, 303; Gulf, C. & S. F. R. Co. *v.* Compton, 75 id. 667; Gulf, C. & S. F. R. Co. *v.* Harriett, 80 id. 73, 81; Gulf, C. & S. F. R. Co. *v.* Smith, 87 id. 348, 357; Humphreys *v.* V. Co., 33 W. Va. 135; Andrews *v.* R. Co., 96 Wis. 348; Colf *v.* R. Co., 87 id. 273, 276.

[32] See Jones *v.* Lumber Co., 58 Ark. 125; Burns *v.* Sennett, 99 Cal. 363, 373; Weaver *v.* R. Co., 3 D. C. App. 436; Clevel. C. C. & St. L. R. Co. *v.* Walter, 147 Ill. 60, 64; Miller *v.* R. Co., 89 Ia. 567; Louisv. N. A. & C. R. Co. *v.* Pedigo, 108 Ind. 481, 484; Louisv. N. A. & C. R. Co. *v.* Wright, 115 id. 378, 390; Lake E. & W. R. Co. *v.* Mugg, 132 id. 168, 175; Hill Mfg. Co. *v.* P. & N. Y. S. Co., 125 Mass. 292, 303; Marvin *v.* New Bedford, 158 id. 464; Kelly *v.* R. Co., 28 Minn. 98; Doyle *v.* R. Co., 42 id. 79; Hemon *v.* R. Co., U. S. App., 79 Fed. 903; Faerber *v.* Lumber Co., 86 Wis. 226.

[33] See Metzgar *v.* R. Co., 76 Ia. 387; Berberich *v.* Bridge Co., Ky., 46 S. W. 691; Hoyt *v.* Jeffers, 30 Mich. 181, 191; Frankford & B. T. Co. *v.* R. Co., 54 Pa. 345, 351.

Distinguish the question of substantive law whether the owner of the locomotive, etc., is bound to use the best appliances known.

[34] See Hartford Dep. Co. *v.* Sollitt, 172 Ill. 222; Mayhew *v.* Mining Co., 76 Me. 100, 111; Rooney *v.* S. & D. C. Co., 161 Mass. 153, 161; French *v.* Spinning Co., 169 id. 531; Kolsti *v.* R. Co., 32 Minn. 133; Koons *v.* R. Co., 65 Mo. 592, 597; Helfenstein *v.* Medart, 136 id. 595; Belleville Stone Co. *v.* Comben, N. J. L., 39 Atl. 641; Reese

the precautions taken by a bailee were adequate;[35] whether a highway was used in a proper manner;[36] whether a railroad track was properly guarded or watched;[37] whether a stock of goods kept was usual or proper.[38] Upon the same principle the patronage of an article may furnish some evidence (by noting the difference between patronage before and after the use of the alleged defective article) of the quality of the article;[39] and also (particularly as represented in rental values) of the discomforts or annoyances of a place of living or trading.[40] Market-value is simply the potential patronage of buyers expressed in terms of money; and, so far as relevancy is concerned, the selling-value of other similar articles is some evidence of value,[41] provided the conditions are substantially the same. But here the disadvantages of surprise and confusion of issues (*ante*, § 14 *a*) have by a few Courts been thought to outweigh the slight utility of such evidence and to require its exclusion.[42] The principle applies to values of every kind, — land, personalty, and services; but consistency is not always found in the precedents of each jurisdiction.[43]]

v. Hershey, 163 Pa. 253, 257; Bridger *v.* R. Co., 27 S. C. 456; Gulf, C. & S. F. R. Co. *v.* Evansich, 61 Tex. 3; Jenkins *v.* Irrig. Co., 13 Utah, 100; Congdon *v.* Scale Co., 66 Vt. 255; Richm. L. & M. W. *v.* Ford, 94 Va. 627.

Distinguish the question whether the defendant's sufferance of a general custom to act in a certain way implied a license to the plaintiff to do the same. Note also that if the plaintiff has assumed the risk of a danger, the present evidence becomes immaterial.

[35] See Cass *v.* R. Co., 14 All. 448; Maynard *v.* Buck, 100 Mass. 40; Hendrick *v.* R. Co., Mass., 48 N. E. 835; Isham *v.* Post, 141 N. Y. 100, 110.

[36] See Judd *v.* Fargo, 107 Mass. 264; Bassett *v.* Shares, 63 Conn. 39, 43.

[37] See Bailey *v.* N. H. & N. Co., 107 Mass. 497; Grand T. R. Co. *v.* Richardson, 91 U. S. 454, 458, 469; Bryant *v.* R. Co., 56 Vt. 710; Rauney *v.* R. Co., 67 id. 594. See note 34, *ante*, for a distinction.

[38] See Ins. Co. *v.* Weide, 11 Wall. 438; Jones *v.* Ins. Co., 36 N. J. L. 29, 43.

[39] See Holcombe *v.* Hewson, 2 Camp. 391; Cunningham *v.* Stein, 109 Ill. 377.

[40] See Drucker *v.* R. Co., 106 N. Y. 157, 164; Doyle *v.* R. Co., 128 id. 488, 497; Kane *v.* R. Co., 125 id. 164, 187; Cook *v.* R. Co., 144 id. 115.

[41] The questions whether price is a test of value, whether value at another place may be considered, etc., involve in most instances a rule of the law of damages as to the standard of value, and are beyond the scope of the present treatment.

[42] See the reasoning in East Pa. R. Co. *v.* Hiester, 40 Pa. 55; Matter of Thompson, 127 N. Y. 468. The true solution of the difficulty is, as in Massachusetts and New Hampshire, to leave the matter to the discretion of the trial Court in each instance.

[43] Of the following list of cases it may be said that all but a few jurisdictions receive such evidence; the distinction is occasionally taken (as in California and Kansas) that such facts may be inquired about on the cross-examination of an opponent's value-witness for the purpose of testing his consistency; or (as in Illinois and Pennsylvania) may be inquired about in examining one's own witness as to the grounds of his qualifications; in Illinois, and particularly in New York, the precedents are in confusion: Cent. P. R. Co. *v.* Pearson, 35 Cal. 247, 262; West. & A. R. Co. *v.* Calhoun, Ga., 30 S. E. 868; White *v.* Hermann, 51 Ill. 243, 246; Cook *v.* Com'rs, 61 id. 115, 124; St. L. & V. & T. H. R. Co. *v.* Haller, 82 id. 208, 211; Chic. & W. I. R. Co. *v.* Maroney, 95 id. 179, 182; Haish *v.* Payson, 107 id. 365, 371; Culb. & B. P. & P. Co. *v.* Chicago, 111 id. 651, 654; Sherlock *v.* R. Co., 130 id. 403; Louisv. N. A. & C. R. Co. *v.* Wallace, 136 id. 87; Peoria G. & C. Co. *v.* R. Co., 146 id. 372, 374; Metrop. W. S. E. R. Co. *v.* Dickinson, 161 id. 22, 24; Metrop. R. Co. *v.* White, 166 id. 375; Nathan *v.* Brand, 167 id. 607; Boecker *v.* Naperville, id., 48 N. E. 1058; King *v.* R. Co., 34 Ia. 458, 461; Cherokee *v.* Land Co., 52 id. 279; Cummins *v.* R. Co., 63 id. 397, 404; Atch. & N. R. Co. *v.* Harper, 19 Kan. 529,

534; Kan. C. & T. R. Co. *v.* Splitlog, 45 id. 68; Kan. C. & T. R. Co. *v.* Vickroy, 46 id. 248, 250; Chicago, K. & N. R. Co. *v.* Stewart, 47 id. 703, 706; Warren *v.* Wheeler, 21 Me. 484, 491; Fogg *v.* Hill, ib. 529, 532; Norton *v.* Willis, 73 id. 580; Moale *v.* Baltimore, 5 Md. 314, 324; Wyman *v.* R. Co., 13 Metc. 316, 326; Davis *v.* R. Co., 11 Cush. 506, 509; Bost. & W. R. Co. *v.* O. C. & F. R. Co., 3 All. 142, 146; Paine *v.* Boston, 4 id. 168; Shattuck *v.* R. Co., 6 id. 115, 117; Ham *v.* Salem, 100 Mass. 350, 352; Benham *v.* Dunbar, 103 id. 365; Presbrey *v.* R. Co., ib. 1, 8; Lawton *v.* Chase, 108 id. 238, 241; Green *v.* Fall River, 113 id. 262, 263; Chandler *v.* Aqueduct, 122 id. 305; Gardner *v.* Brookline, 127 id. 358, 363; Sawyer *v.* Boston, 144 id. 470; Patch *v.* Boston, 146 id. 52, 57; Lowell *v.* Com'rs, 146 id. 403; Thompson *v.* Boston, 148 id. 387; Amory *v.* Melrose, 162 id. 556, 558; Lyman *v.* Boston, 164 id. 99; Bowditch *v.* Boston, ib. 107; Pierce *v.* Boston, ib. 92; Teele *v.* Boston, 165 id. 88; Buck *v.* Boston, ib. 509; Beale *v.* Boston, 166 id. 53; Comstock *v.* Smith, 20 Mich. 338, 346; Eggleston *v.* Boardman, 37 id. 14, 18; Lehmicke *v.* R. Co., 19 Minn. 464, 483; Stinson *v.* R. Co., 27 id. 284, 289; Senrer *v.* Horst, 31 id. 479, 480; Lexington *v.* Long, 31 Mo. 369, 374; Springfield *v.* Schmook, 68 id. 394; St. Louis R. & N. W. R. Co. *v.* Clark, 121 id. 169, 185; Forsyth Boulevard *v.* Forsyth, 127 id. 417; St. Louis O. H. & C. R. Co. *v.* Fowler, 142 id. 670; Kirkendall *v.* Omaha, 39 Nebr. 1, 6; March *v.* P. & C. R. Co., 19 N. H. 372, 376; Concord R. *v.* Greely, 23 id. 237, 242; White *v.* Concord R., 30 id. 188, 208; Ferguson *v.* Clifford, 37 id. 86, 105; Carr *v.* Moore, 41 id. 131, 133; Swain *v.* Cheney, ib. 232, 234; Dewey *v.* Williams, 43 id. 384, 387; Cross *v.* Wilkins, ib. 332, 334; French *v.* Piper, ib. 439; Kingsbury *v.* Moses, 45 id. 222, 223; Kelsea *v.* Fletcher, 48 id. 282; Haines *v.* Ins. Co., 52 id. 467, 468; Hoit *v.* Russell, 56 id. 559, 563; Amoskeag Co. *v.* Head, 59 id. 332, 337; Montclair R. Co. *v.* Benson, 36 N. J. L. 557; Laing *v.* R. & C. Co., 54 id. 576; Gonge *v.* Roberts, 53 N. Y. 619; Blanchard *v.* Steamboat Co., 59 id. 292, 294, 300; People *v.* McCarthy, 102 id. 630, 639; McGean *v.* R. Co., 117 id. 219, 224; Huntington *v.* Attrill, 118 id. 365, 378; Matter of Thompson, 127 id. 463, 470; Roberts *v.* R. Co., 128 id. 455, 473; People *v.* Myers, 133 id. 626, 636; Jamieson *v.* R. Co., 147 id. 322, 325; Witmark's Case, 149 id. 393; Searle *v.* R. Co., 33 Pa. 57, 63; East Pa. R. Co. *v.* Hiester, 40 id. 53, 55; Pittsb. V. & C. R. Co. *v.* Rose, 74 id. 362, 369; Hays *v.* Briggs, ib. 373, 386; Varderslice *v.* Philadelphia, 103 id. 102, 109; Pittsb. & W. R. Co. *v.* Patterson, 107 id. 461, 464; Pittsb. etc. R. Co. *v.* Vance, 115 id. 325, 331; Curtin *v.* R. Co., 135 id. 20, 30; Becker *v.* R. Co., 177 id. 252; Daigneault *v.* Woonsocket, 18 R. I. 378; Stanton *v.* Embery, 93 U. S. 548, 557; Kerr *v.* Com'rs, 117 id. 379, 387; Lehigh V. C. Co. *v.* Chicago, 26 Fed. 415, 419; Schradsky *v.* Stimson, 40 U. S. App. 455; Vilas *v.* Downer, 21 Vt. 419, 424; Davis *v.* Cotey, Vt., 39 Atl. 628; Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 509; West *v.* R. Co., 56 Wis. 318, 321; Watson *v.* R. Co., 57 id. 332, 349; Washburn *v.* R. Co., 59 id. 364, 377; Atkinson *v.* R. Co., 93 id. 362; Stolze *v.* Term. Co., id., 75 N. W. 987.

CHAPTER VI.

BURDEN OF PROOF, AND PRESUMPTIONS.

1. *General Theory.*

§ 14 *w*. Burden of Proof; Presumption; In general.

§ 14 *x*. Burden of Proof; Senses of the Term; Tests for ascertaining the Burden; Shifting of the Burden.

§ 14 *y*. Presumptions of Law and of Fact; Conclusive Presumptions; Conflicting Presumptions; *Prima facie* Evidence.

2. *Various Specific Presumptions.*

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§ 43 *a*. Identity of Name; Sundry Presumptions.

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3. *Burden of Proof in Specific Cases.*

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§ 81 *a*. Sanity.

§ 81 *b*. Criminal Cases; *Alibi;* Self-defence.

§ 81 *c*. Measure of Persuasion; Proof beyond a Reasonable Doubt.

§ 81 *d*. Same: Proof by Preponderance of Evidence.

1. *General Theory of Presumptions and Burden of Proof.*[1]

§ 14 *w*. **Burden of Proof; Presumption; In general.** [In every attempt to explain the principles of the law as to burden of proof

[1] [For an acute and comprehensive examination of the subject of this chapter, see chapters 8 and 9 in Professor Thayer's Preliminary Treatise on Evidence, the publication of which may fairly be regarded as epoch-making.]

and presumption, two things at least present themselves for consideration, — the general process, logical and legal, involved in determining the parties by whom evidence is to be produced, and the significance and usage of various terms employed and the incidental problems of each part of the process. The difficulties of such an attempt, almost insuperable,[2] 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. At the outset, then, it will be more satisfactory to analyze the logical and legal situation considered in itself and independently of the various usages and terms that chiefly cause the confusion.

(1) *Burden of Proof; Risk of Non-persuasion.* Whenever A and B are at issue upon any subject of controversy (not necessarily legal), and M is to take action between them, and their desire is, hence, respectively to persuade M as to their contention, it is clear that the situation of the two, as regards its advantages and risks, will be very different. Suppose that A has property in which he would like to have M invest money, and that B is opposed to having M invest money; M will invest in A's property if he can learn that it is a profitable object, and not otherwise. Here it is seen that the advantage is with B, and the disadvantage with A; for unless A succeeds in persuading M up to the point of action, A will fail and B will remain victorious; the burden of proof, or, in other words, the risk of non-persuasion, is upon A. This does not mean that B is absolutely safe though he does nothing, for he cannot tell how much it will require to persuade M; a very little argument from A might suffice; or, if M is of a rashly speculative tendency, the mere mention of the proposition by A might without more 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 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 wished 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

[2] [The following remark will be thought singular, in view of the condition of the precedents on this subject: "Every student of the law fully understands the exact import of the phrase 'burden of proof:'" State *v.* Thornton, S. D., 73 N. W. 196.]

of proof as affecting persons in controversy.[3] The removal of the burden is not in itself a matter of logical necessity. It is the desire to have action taken that is important. In the affairs of life there is a penalty for not sustaining the burden of proof, — *i. e.* not persuading M beyond the doubting point, — namely, that M will not take the desired action, to which his persuasion is a prerequisite.

Thus, in practical affairs generally, the burden of proof (in the sense of risk of non-persuasion) signifies that upon a person desiring action from M will fall the penalty of M's non-action unless M can be persuaded beyond the doubting-point as to the truth of the propositions prerequisite to his action. What, then, is the difference, if any, between this risk of non-persuasion in affairs at large and the same risk in litigation? In litigation, the penalty is of course different; the action which is desired of M is the verdict of the jury, the decree, order, or finding of the judge, or some other appropriate action of the tribunal; but so also the action differs in other affairs, according as M is an investor with money to lend, or an employer with a position to fill, or a friend with a favor to grant. Is there no other and more radical difference? The radical difference in litigation, as distinguished from practical affairs at large, is as to the mode of determining the propositions of persuasion which are a prerequisite to M's action. In affairs at large, these are determined solely by M's notion of the proper grounds for his action, depending thus on the circumstances of the situation as judged by M. In litigation, these prerequisites are determined, first and broadly, by the substantive law, which fixes the groups of data that enter into legal relations and constitute rights and duties, and, secondly and more in detail, by the laws of pleading and procedure, which further group and subdivide these larger groups of data and assign one or another sub-group to this or that party as the 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 will define and limit, in the first place, the reasons to be regarded as justifiable, and will thus narrow the total

[3] ["In Logic, then, when we speak of the burden of proof, we are not speaking of some merely artificial law, with artificial penalties attached to it. . . . No penalty follows the misplacement of the burden of proof, except the natural consequence that the assertion remains untested, and the audience therefore (if inquiring) unconvinced. . . . There is no 'obligation' on any one to prove an assertion, — other than any wish he may feel to set an inquiring mind at rest or to avoid the imputation of empty boasting. It is a natural law alone with which we are here concerned, — the law that an unsupported assertion may, for all that appears, be either true or false:" Alfred Sidgwick, Fallacies, 163.]

of facts that can in any event be involved; and, in the second place, the law of pleading will further subdivide and apportion these facts. It will inform A that he need persuade the tribunal of two facts only, namely, that A was beaten and it was B who beat him;[4] and that, upon persuading the tribunal of these facts, its action will be taken in his favor, and A's risk of the tribunal's non-action will thereupon cease. It will inform B that at this point the risk of non-action will turn upon him, in the sense that he needs the tribunal's action in order to relieve himself from the consequences of its previous action, and that this action (by way of reversing its provisional action in A's favor) will depend upon his persuading the tribunal as to certain specified facts by way of excuse or justification. Perhaps the same law of pleading may further apportion to A a third set of facts to be the subject of a replication, in case B succeeds in obtaining action in his favor on his plea. But the groupings defined by the substantive law and the further subdivision by the law of pleading does not necessarily end the process of apportionment by law. Even within a single pleading there are instances in which the burden of proof (in the sense of a risk of non-persuasion) may be taken from the pleader desiring action and placed upon the opponent. In criminal cases, for example, though there is no affirmative pleading for the defence, it is put upon the defendant, in some jurisdictions, to prove the excuse of self-defence; in many jurisdictions in which payment need not be affirmatively pleaded to a contract-claim, the burden of proving payment is nevertheless put upon the debtor; and so in many other instances.[5] 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[6] be disposed of before trial or the entering into evidence; while by the former method the apportionment is not made until the trial proper has begun. The former 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.[7]

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

[4] [Assuming, of course, that there is no controversy as to whether inadvertence or the like is a proper subject for the general issue or for an affirmative plea.]

[5] [See instances *post*, §§ 78 ff.]

[6] [Though in practice not usually at the present time; see Langdell, Discovery under the Judicature Acts, 11 Harv. L. Rev. 157, 205.]

[7] [The result is that what were properly questions of pleading are often discussed in terms of the burden of proof, *e. g.* Hopson *v.* Caswell, Tex. Civ. App., 36 S. W. 312, indexed under "Burden of Proof," where it is said, of a plea in abatement, "the burden of sustaining the plea was upon the defendant;" Goodell *v.* Gibbons, Va., 22 S. E. 504, where the question of pleading affirmatively the statute of limitations is discussed indifferently in terms of pleading and of burden of proof.

specific facts which will in turn fall to him as the prerequisites of obtaining action in his favor by the tribunal. It is this apportionment which forms the important element of controversy for legal purposes. Each party wishes to know of what facts he has the risk of non-persuasion. By what considerations, then, is this apportionment determined? Is there any single principle or rule which will solve all cases and afford a general test for ascertaining the incidence of this risk? By no means. It is often said that the burden is upon the party having the affirmative allegation.[8] But this is not an invariable test, nor even a significant circumstance; the burden is often on one who has a negative assertion to prove; a common instance is that of a promisee alleging non-performance of a contract.[9] It is sometimes said that it is upon the party to whose case the fact is essential. This is correct enough, but it merely advances the inquiry one step; *i. e.* we must ask whether there is any general principle which determines to what party's case a fact is essential. The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience of the different situations. Thus, in most actions of tort there are many possible justifying circumstances, — self-defence, leave and license, *volenti non fit injuria*, and the like; but it would be both contrary to experience to assume that one of them was probably present and unfair to require the plaintiff to disprove the existence of each one of them; so that the plaintiff is put to prove merely the nature of his harm, and the defendant's share in causing it; and the other circumstances, which would if they existed leave him without a claim, are put upon the defendant to prove. Nevertheless, in malicious prosecution, on the one hand, the facts as to the defendant's good faith and probable cause, which might otherwise have been set down for the defendant to show in excuse (as the analogous facts in an action for defamation are reserved for a plea of privilege), are here put upon the plaintiff, who is required to prove their non-existence; because as a matter of experience and fairness this seems to be the wiser apportionment. So, on the other hand, in an action for defamation ("false words," in the old nomenclature), it might have been supposed on other analogies that to the plaintiff it would fall to prove the falsity of the defendant's utterance; yet as a matter of fairness, it has in fact been put upon the defendant to prove the truth of his utterance. Thus, no one principle will serve in torts as a guiding rule for the various cases. In criminal cases, the innovation, in some jurisdictions, of putting upon the accused the burden of proving his insanity has apparently been based on an experience as to the abuses of the contrary practice. In claims based on written

[8] [*E. g.*, *post*, §§ 74, 78.]

[9] [*E. g.*, again, Carmel N. G. & I. Co. *v.* Small, Ind., 50 N. E. 476 (action to recover money from an officer not legally elected).]

instruments, experience has led in most jurisdictions to a statutory provision, requiring the execution by the defendant to be specially traversed or else taken for admitted, — a step which stops short of changing the burden of proof, but well illustrates the considerations affecting its incidence. The controversy whether a plaintiff in tort should be required to prove his own carefulness or the defendant should be required to prove the plaintiff's carelessness has depended in part on experience as to a plaintiff being commonly careful or careless, in part on the fairness of putting the burden on one or the other, and this in part on the consideration which of the parties has the means of proof more available. This last consideration has often been advanced as a special test for solving a limited class of cases, *i. e.* the burden of proving a fact is said to be put on the one who presumably has peculiar knowledge enabling him to prove its falsity if it is false.[10] But this consideration furnishes no working rule; if it did, then the plaintiff in an action for defamation charging him to be living in adultery should be required to prove that he is lawfully married. This consideration, after all, merely takes its place among other considerations of fairness and experience as one to be kept in mind in apportioning the burden of proof in a specific case.

There is, then, no one principle, or set of harmonious principles, which afford a sure 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.

(2) *Burden of Proof; Duty of producing Evidence.* So far as concerns the principles explained above, the matter may have come before any kind of tribunal. The inquiry peculiarly concerns the procedure in legal controversies; but the settlement of it is not affected by the nature of the tribunal. The tribunal might be a judge, or a jury, or both, so far as regards apportioning the risk of non-persuasion. Nothing has been said, or need be, about a distinction between judge and jury. But we come now to a peculiar set of rules which have their source in the bi-partite 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 to the historical 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.[11] The treatment of the situation, and the operation of the rules, can best be comprehended by keeping this consideration in mind, namely, that the evidential material that may be offered does

[10] [*E. g.*, *post*, § 79.]
[11] [See *post*, Chap. VII; and Thayer, Preliminary Treatise, ch. 5.]

not go to the jury as a matter of course, that each party must first with his evidence pass the gauntlet of the judge, and that the judge, as a part of his function in administering the law, is to keep the jury within the bounds of reasonable action; and, in short, that in order to get to the jury on the issue, and bring into play the burden of proof (in the sense of the risk of non-persuasion of the jury), both parties alike must satisfy the judge that they have evidence fit to be considered by the jury, and to form a reasonable basis for the verdict. This duty of satisfying the judge is peculiar in its operation, because if it is not fulfilled, the party in default loses by order of the judge, and the jury is not given an opportunity to debate and form conclusions as if the issue were open to them. It operates somewhat as follows:[12] —

(*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 at least enough evidence be put in to be worth considering by the jury. There was an old phrase that a "mere scintilla of evidence" was sufficient;[13] but this seems to have been generally abandoned,[14] and it is now commonly said (though the phrasing differs) that it must be "sufficient evidence to sustain a verdict," or evidence so weak that a verdict for the opponent would be set aside as against the evidence, or better still, "[The proposition] cannot be merely, Is there evidence? . . . The proposition seems to me to be this: Are there facts in evidence which if unanswered would

[12] [See on this part of the subject a useful article by the late Professor Austin Abbott, entitled "Two Burdens of Proof," in 6 Harv. L. Rev. 125.]

[13] [For the jurisdictions in which this rule still obtains, see Thompson on Trials, §§ 2246 ff.; see also Holland *v.* Kindregan, 155 Pa. 156; Evans *v.* Chamberlain, 40 S. C. 104.]

[14] [Jewell *v.* Parr, 13 C. B. 909; Toomey *v.* R. Co., 3 C. B. N. S. 146; Ryder *v.* Wombwell, L. R. 4 Ex. Ch. 32; Dublin R. Co. *v.* Slattery, L. R. 3 App. Cas. 1155, 1208; Denny *v.* Williams, 5 All. 1; Market & F. N. B'k *v.* Sargent, 85 Me. 349; Offutt *v.* Expos. Co., Ill., 51 N. E. 650; Bartlett *v.* Bank, 119 Ill. 259; Haines *v.* Trust Co., 56 N. J. L. 312; Fornes *v.* Wright, 91 Ia. 392; State *v.* Couper, Or., 49 Pac. 959; Joske *v.* Irvine, Tex., 44 S. W. 1059; Ewing *v.* Goode, 78 Fed. 442; Com'rs *v.* Clark, 94 U. S. 278; North P. R. Co. *v.* Bank, 123 id. 727; Elliott *v.* R. Co., 150 id. 245; Monroe *v.* Ins. Co., 5 U. S. App. 179, 191; Colo. C. C. M. Co. *v.* Turck, 12 id. 85, 107; Laclede F. B. M. Co. *v.* Hartford Co., 19 id. 510; and see People *v.* Cook, 5 Den. 74, and Mt. Adams & E. P. I. R. Co. *v.* Lowery, U. S. App., 74 Fed. 463, for good expositions; and an article in the Western Reserve Law Journal, October, 1898.]

justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?" [15] If the judge finds this duty not satisfied, he "ought to withdraw the question from the jury, and direct a nonsuit or a verdict for the defendant if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant," [16] *i. e.* decide against the proponent having the risk of non-persuasion on that particular issue, whether he be plaintiff or defendant. The ruling will of course depend entirely on the nature of the evidence offered in the case in hand, and it is seldom possible that a ruling can serve as a precedent; it has been ruled, for instance, that to show a *scienter* of a horse's unmanageable disposition, a single instance of its having run away is, though admissible, not sufficient evidence for the jury; [17] mere identity of name has sometimes been thought insufficient evidence of identity of person; [18] but even these can hardly be taken as fixed precedents.

(*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, with reference to any rule of law in the hands of the judge, to produce evidence. Either party may introduce it, and doubtless both parties will do so; but there is nothing that requires either to do so under penalty of a ruling of law against him. The proponent, however, has his burden of proof in the sense of the risk of non-persuasion of the jury; *i. e.* should the jury be in doubt after hearing the evidence of the proponent, either with or without evidence from the opponent, the proponent fails to obtain their verdict upon that issue, and the opponent remains successful. In this second stage of the trial, with the evidence before the jury, the only burden operating is that which concerns the jury, — the risk of non-persuasion; and not that which concerns the judge, — the duty of producing evidence.

(*c*) Suppose, however, that the proponent has been able to go further and to adduce evidence which if believed would make it beyond reason to repudiate the proponent's claim, — evidence such that the jury, acting as reasonable men, must be persuaded and

[15] [Brett, J., in Bridges *v.* R. Co., L. R. 7 H. L. 213; and see the cases in the last note.]

[16] [Lord Blackburn, in Dublin R. Co. *v.* Slattery, *supra*. The wholly groundless doubt has been sometimes raised whether this process is within the judge's constitutional power under the provision for jury trial or for making juries judges of fact or for prohibiting a charge upon the facts; this doubt (sanctioned in Gannon *v.* Gaslight Co., Mo., 46 S. W. 968; Littlejohn *v.* Fowler, 5 Coldw. 284) has rightly been repudiated: Norris *v.* Chinkscales, 47 S. C. 488; Catlett *v.* R. Co., 57 Ark. 461.]

[17] [Benoit *v.* R. Co., N. Y., 48 N. E. 524.]

[18] [*Post*, § 43 *a*; see other possible instances *post*, § 575 *a*.]

render a verdict on that issue for the proponent. Here the proponent has now put himself in the same position that was occupied by the opponent at the opening of the trial, *i. e.* unless the opponent now offers evidence against the claim and thus changes the situation, the jury should not be allowed to render a verdict against reason, — a verdict which would later have to be set aside as against evidence. The matter is thus in the hands of the judge again, as having the supervisory control of the proof; and now he may, as applying a rule of law, require the opponent to produce evidence, under penalty of losing under the direction of the judge. Thus, a duty of producing evidence, under this penalty for default, has 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 to render a verdict on that issue for the proponent. The propriety of this has sometimes been doubted by Courts which 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;[19] but the better authority gives ample recognition to this process.[20] (*c''*) Another mode under which this process is carried out employs the aid of a fixed rule of law applicable to inferences from specific evidence to specific facts forming part of the issue rather than to the general mass of evidence bearing on the proposition in issue. If it is a part of the proponent's case, for example, to prove that a person is deceased, and he has offered evidence that the person has been absent, unheard from, for seven years or more, and there is no other evidence on the subject, then the proponent may ask that the jury be directed, if they believe this fact of absence, to take as true the proposition that the person is deceased; if that, moreover, were the only proposition at issue, then the direction would be to find a verdict for the proponent if this fact of absence were believed. The result is the same as in the preceding form of the process (*c'*), *i. e.* the opponent loses as a matter of law, in default of evidence to the contrary; in other words, the presumption creates for the opponent a duty of producing evidence, in default of which he loses as a matter of legal ruling, the matter not being open

[19] [See Anniston Bank *v.* Committee, N. C., 28 S. E. 134; Cable *v.* R. Co., id. 29 S. E. 377.]

[20] [See Delaware L. & W. R. Co. *v.* Converse, 139 U. S. 469; Union P. R. Co. *v.* McDonald, 152 id. 262, 284; Phœnix Assur. Co. *v.* Lucker, U. S. App., 77 Fed. 243; Com. *v.* Magee, Pa. 1873, 12 Cox Cr. 549.]

for the jury, and the risk of non-persuasion, which applies only to the jury's deliberations, having ceased to affect the proponent. This particular form of the process, however (*c*''), happens to have become known as a *presumption*. The term "presumption" has been the subject of much confused usage. The particular ambiguity which we need here to guard against is the confusion between the inference itself — *i. e.* the propriety of making the inference from the evidence to the *factum probandum* [21] — and the effect of the inference in the hands of the judge. So far as "presumption" means anything for the present purpose, it signifies a ruling as to the duty of producing evidence. "The essential character and operation of presumptions, so far as the law of evidence is concerned, is in all cases the same, whether they be called by one name or the other; that is to say, they throw upon the party against whom they work the duty of going forward with the evidence; and this operation is all their effect, regarded merely in their character as presumptions." [22] 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 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 requiring the jury to find according to the presumption. "All is then turned into an ordinary question of evidence, and the two or three general facts presupposed in the rule of presumption take their place with the rest, and operate, with their own natural force, as a part of the total mass of probative matter. . . . The main point to observe is that the rule of presumption has vanished;" [23] because its function was as a legal rule to settle the matter only provisionally, and to cast upon the opponent the duty of producing evidence, and this duty and this legal rule he has satisfied.[24]

[21] [This is one of the earlier uses of "presumption;" it is in effect an equivalent of "inference." Such are Coke's "presumptions, whereof there be three sorts, viz., violent, probable, and light or temerary:" Co. Litt. 6, *b*. This is what is usually meant by "presumption of fact," *post*, §§ 14 *y*, 44; see, in general, Thayer, *ubi supra*, 313.]

[22] [Thayer, *ubi supra*, 339.]

[23] [Thayer, *ubi supra*, 346.]

[24] [The following passage from Professor Abbott's article, already mentioned, will serve to illustrate the general situation involved in the duty of producing evidence:

(*d*) 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 to the jury, under penalty, in case of default, of suffering a ruling against him by the judge as a matter of law? This result is possible in principle, and there are instances of it, though rare; for example, a plaintiff, in an action for the burning of his property by the defendant railway-company's negligence, created a presumption of negligence by showing the setting of the fire by sparks from the defendant's locomotive; the duty of producing evidence was thus put upon the defendant, who not only removed it 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.[25]

The important practical distinction between these two senses of "burden of proof" seems thus to be that the risk of non-persuasion operates when the case has come into the hands of the jury, while the duty of producing evidence implies a liability to a ruling by the judge disposing of the issue without leaving the question open to the jury's deliberations.]

§ 14 *x*. **Burden of Proof; Senses of the Term; Tests for ascertaining the Burden; Shifting of the Burden.** [(1) The term "burden of proof" is used commonly as applying equally to the two preceding kinds of situations, and often is applied in both senses in the same judicial opinion. Apart, therefore, from the difficulty of some of the problems of law germane to each situation, peculiar confusion is added by the unfortunate ambiguity of the terms of discussion. There is at this day a fairly widespread acceptance and understand-

[1] "To use a homely illustration, a civil jury trial may be compared to a game of shuffleboard. The first and nearest to the player is the field of mere scintillas; if the plaintiff's evidence halts there, he is lost. The next, or middle, field is that of balancing probabilities: if his evidence reaches and rests there, he gets to the jury; but they alone can decide the cause, and they may decide it either way, or may disagree. The third and last field is that of legal conclusion: if his evidence can be pushed into that division, he is entitled to his victory at the hands of the judge, and the jury cannot draw it into doubt; but before the judge can do so, the defendant has a right to give evidence, and that evidence may bring the plaintiff's evidence back into doubt again, and leave the case in the field of balancing probabilities."

[25] [Menomenie R. S. & D. Co. *v.* R. Co., 91 Wis. 447; the opinion particularly distinguishes previous cases in which the defendant had merely removed the presumption against him by evidence sufficient to go to the jury, but had not raised a counter-presumption requiring a ruling of the judge in his favor.]

ing, in judicial utterances, of the distinction between the two things themselves, the risk of non-persuasion of the jury, and the duty of going forward with evidence sufficient to satisfy the ruling of the judge; and the law which regulates respectively this risk and this duty is in most respects either generally settled or is the subject of local differences of decision (some of the chief features of which have just been noted) whose lines of dispute are not difficult to discern; and the main source of difficulty lies in the interchangeable uses of the term "burden of proof," which forces the judges from time to time to distinguish, explain, and even repudiate former judicial utterances employing analogous language but dealing with distinct situations; and thus there is an appearance (and to some extent, a reality) of confusion in the precedents on the subject.

(2) As to the tests for determining the burden of proof, it has already been pointed out that (*a*) for the one burden, the risk of non-persuasion, the substantive law and the pleadings, primarily, serve to do this, and, subsidiarily, a rule of practice, within the stage of a single pleading, may further apportion the burden; but this apportionment depends ultimately on broad considerations of policy, and, for individual instances, there is nothing to do but ascertain the rule, if any, that has been judicially determined for that particular class of cases. (*b*) For the other burden, the duty of going forward with evidence, there is always, at the outset, such a duty for the party having the first burden, or risk of non-persuasion, until by some rule of law (either by a specific ruling of the judge upon the particular evidence, or by the aid of an appropriate presumption, or by matter judicially noticed) this line is passed; then comes the state in which there is no such duty of law for either party (although, if the proponent has invoked some presumption, this stage is immediately passed over); and then, either by a ruling on the general mass of evidence, or by the aid of some applicable presumption, the duty of law arises anew for the opponent; and finally, it may supposably, by similar modes, be later re-created for the proponent. There is therefore no one test, of any real significance, for determining the incidence of this duty; at the outset the test is furnished by ascertaining who has the burden of proof, in the sense of the risk of non-persuasion, 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 proponent; and still later, whether, for the purposes of the judge's ruling, the proponent has satisfied this duty. It has been suggested[1] as a

[1] [Best, Evidence, § 268.]

test that "the test ought in strict accuracy to be expressed thus, namely: which party would be successful if no evidence at all, or no more evidence (as the case may be), were given?" But it is obvious that this is not a test, in any sense of being a useful mode for ascertaining the unknown from the known; it is simply defining and re-stating in other words the effect of this duty of producing evidence; it says "the burden of proof, in this sense, means that the party liable to it will lose as a matter of judicial ruling if no evidence or no more evidence is given by him;" and this does not solve the main problem of determining which is the party thus liable to these consequences.

(3) As to the "shifting" of the burden of proof. (*a*) The first burden above described — the risk of non-persuasion — 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 facts respectively apportioned to the case of each party; and each party may know beforehand, from these rules, what facts will be a part of his case, so far as concerns the ultimate risk of non-persuasion. He will know from these rules that such facts, whenever the time comes, will be his to prove, and not the other party's; and that they will not be sometimes his and sometimes the other's, or possibly his and possibly the other's. The other party and himself will of course have their turns in proving their respective *facta probanda* (though under a strict system of pleading these turns of proof will be more clearly fixed before trial, and may occur at different stages and not the same stage of the cause); and the putting-in of evidence may therefore "shift" in the sense that each will take his turn in proving the respective propositions apportioned to him. But the burden does not "shift" in any real sense; for each may ascertain beforehand from rules of law the *facta probanda* apportioned to him, and this apportionment will always remain as thus fixed, to whatever stage the cause may progress. (*b*) The second kind of burden, however — the duty of producing evidence, a duty of satisfying 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 be (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, and, moreover, neither party can ascertain beforehand at what time it will come upon him [2] or cease to be upon him or by what evidence it will be removed or created, — except so far as a presumption has by a rule of law been laid down as determining the effect attached to certain facts. Moreover, in a distinctive sense, this kind of burden "shifts" and

[2] [Except that it comes first upon the proponent having the burden of proof in the former sense.]

the other does not, in that during the unchanged prevalence of the first kind of burden for one party, the second kind may be shared in turn by one and the other, though the first — the risk of non-persuasion of the jury, should the case be left in their hands — has not come to an end.[3]

(4) Finally, the whole situation is complicated, quite apart from any ambiguity of terms, by the operation of presumptions upon specific fragments of the issue under a single pleading, in combination with the established practice of leaving the whole pleading to the jury for a general verdict. For example, suppose that the whole of the plaintiff's case and the whole proposition as to which he has the burden of proof in the first sense and the whole of the issue under the pleadings is that A is dead without heirs; suppose that the plaintiff has offered testimony that A has been for seven years absent from home and unheard from, and that there is also testimony in contradiction of these facts from the defendant and also testimony from both sides as to the existence of heirs. Here it is obvious that the case is not in the hands of the judge to order a verdict for the plaintiff, first, because the death of the plaintiff, assuming the presumption from absence to determine this, is not the only proposition essential to the plaintiff's case, and, secondly, because he cannot pass upon the truth of the plaintiff's contradicted testimony as to absence and therefore it cannot then be known whether the fact exists on which the presumption operates; and thus the case is still in appearance in the hands of the jury. Nevertheless, the matter is still in the hands of the judge (in theory of law, at least) as much as it ever was; that is to say, the presumption or rule of law still operates that the fact of absence for seven years unheard from is to be taken, by a rule of law independent of the jury's belief, as equivalent to death, in the absence of any explanatory facts to the contrary from the defendant. This rule of law is still applied, notwithstanding the additional elements in the case; for the judge will instruct the jury that if they find the fact of absence for seven years unheard from, and find no explanatory facts to account for it, then by a rule of law they are to take for true the fact of death and are to reckon

[3] [For the language of the Courts (not always clear or correct) on this subject, see the following citations collected by former editors of this work:] {Scott *v.* Wood, 81 Cal. 400; Powers *v.* Russell, 13 Pick. 69; Burnham *v.* Allen, 1 Gray 500; Blanchard *v.* Young, 11 Cush. 345; Delano *v.* Bartlett, 6 id. 364; Jennison *v.* Stafford, 1 id. 168; Spaulding *v.* Hood, 8 id. 605; Eaton *v.* Alger, 47 N. Y. 351; Caldwell *v.* New Jersey Steam Navigation Co., ib. 290; Kitner *v.* Whitlock, 88 Ill. 513; Pickup *v.* Thames Ins. Co., L. R. 3 Q. B. Div. 594; Willett *v.* Rich, 142 Mass. 356; Nichols *v.* Munsell, 115 id. 567; Simpson *v.* Davis, 119 id. 269; Crowninshield *v.* Crowninshield, 2 Gray 524; Heinemann *v.* Heard, 62 N. Y. 448; Cass *v.* R. Co., 14 All. 448; Perley *v.* Perley, 141 Mass. 104; Phipps *v.* Mahon, 141 id. 471; Com. *v.* McKie, 1 Gray 61; State *v.* Wingo, 66 Mo. 181; Black *v.* State, 1 Tex. App. 368; State *v.* Patterson, 45 Vt. 308.} [But the Massachusetts cases are in some respects peculiar; see the comments on them in Thayer, *ubi supra*, pp. 379, 387.]

upon it accordingly in making up their verdict upon the whole issue. The situation here is even simpler than it is in perhaps the majority of issues in litigation; so that the theoretical effect of presumptions as legal rulings affecting the duty of producing evidence tends to be lost sight of, in that the issue does go to the jury and the case of the opponent of the presumption is apparently not brought to an end by a ruling of the judge. Nevertheless, in theory this legal effect is merely postponed, and will have due place if the jury understands the instructions and does its duty.]

§ 14 *y*. **Presumptions of Law and of Fact; Conclusive Presumptions; Conflicting Presumptions; Prima facie Evidence.** [(1) The distinction between presumptions "of law" [1] and presumptions "of fact" [2] is in truth the difference between things that are in reality presumptions (in the sense explained above) and things that are not presumptions at all. A presumption, as already explained, is in its characteristic feature a rule of law laid down by the judge and attaching to one evidentiary fact certain consequences as to the production of evidence by the opponent. They are based, in their policy, upon the probative strength, as a matter of reasoning and inference, of the evidentiary fact; but the presumption is not the fact itself nor the inference itself, but the legal consequence attached to it. The legal consequence removed, the inference, as a matter of reasoning, may still remain; and a presumption of fact, in the usual sense, is merely an improper term for the rational potency, or probative value, of the evidentiary fact, regarded as not having this necessary legal consequence. "They are, in truth, but mere arguments," [3] and "depend upon their own natural force and efficacy in generating belief or conviction in the mind." [3] They have no significance so far as affects the duty of one or the other party to produce evidence, because there is no rule of law attached to them, and the jury may give to them whatever force or weight it thinks best, — just as it may to other evidence. There may be a preliminary question whether the evidence is relevant and admissible as having any probative value at all; [4] but, once it is admitted, the probative strength of the evidence is for the jury to consider; [5] and, so long as the law attaches no legal consequences in the way of a duty upon the opponent to come forward with contrary evidence, there is no propriety in applying the term "presumption" to such facts, however great their probative significance. The employment here of the term "presumption" is due simply to historical usage, by which "presumption" was originally a term equivalent, in one sense, to "inference;" [6] and the

1 [*Post*, § 33.]
2 [*Post*, § 44.]
3 [*Post*, § 44.]
4 [See *ante*, Chapter V.]
5 [See the author's concordant remarks in § 48, *post*.]
6 [As in the passage from Coke, cited *supra*; so Abbott, C. J., as late as 1820, in

distinction between presumptions of fact and of law was a mere borrowing of misapplied Continental terms.[7] There is in truth but one kind of a presumption; and the term "presumption of fact" should be discarded as useless and confusing.[8]

(2) Nor, on the other hand, can there be such a thing, in strictness, as a "conclusive presumption."[9] Wherever from one fact another is conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule really provides that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case;[10] and to provide this is to make a rule of substantive law, and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence. The term has no place in the principles of evidence[11] (although the history of a "conclusive presumption" often includes a genuine presumption as its earlier stage[12]), and should be discarded.

(3) Presumptions are sometimes spoken of as "conflicting." But, in the sense above explained, presumptions do not conflict. The evidentiary facts, free from any rule of law as to the duty of producing evidence, may tend to opposite inferences, which may be said to conflict. But the rule of law which prescribes this duty of production either is or is not at a given time upon a given party. If it is, and he removes it by producing contrary evidence, then that presumption, as a rule of law, is satisfied and disappears; he may then by his evidence succeed in creating another presumption which now puts the same duty upon the other party, who may in turn be able to dispose of it satisfactorily. But the same duty cannot at the same time exist for both parties, and thus in strictness the presumptions raising the duty cannot conflict. There may be successive shiftings of the duty, by means of presumptions successively invoked by each; but it is not the one presumption that overturns the other, for the mere introduction of sufficient evidence would have the same effect in stopping the operation of the presumption as a rule of law. This shifting of the duty of production of evidence, by reason of the successive invoca-

R. *v.* Burdett, 4 B. & Ald. 161: "A presumption of any fact is properly an inferring of that fact from other facts that are known; it is an act of reasoning." Compare Professor Thayer's account (p. 317 ff.) of the progress in various instances from the mere suggestion of such inferences to the creation of rules of law attached to them.]

[7] [See Thayer, *ubi supra*, p. 343.]

[8] [In §§ 33–48 some of the things termed "presumptions of law" are in truth merely "presumptions of fact," and *vice versa*.]

[9] [*Post*, § 15.]

[10] [Willard, A. J., in State *v.* Platt, 2 S. C. 150, 154: "Where several independent acts are required to be performed in order to accomplish a given result, to say that proof of the performance of one of them shall be admitted as conclusive proof of the performance of the other, is to say in effect that one alone is really requisite."]

[11] [For a possible exception, see the discussion *post*, § 97 *d*.]

[12] [See instances in Thayer, *ubi supra*, p. 317 ff., and *post*, §§ 17, 46.]

tion of different presumptions, may create a complicated situation difficult to work out; but it can more properly be spoken of as a case of successive presumptions than of conflicting presumptions; and the ultimate key to the situation is very often found by ascertaining the incidence of the burden of proof in the other sense, *i. e.* the ultimate risk of non-persuasion.[13]

(4) The term "*prima facie* evidence" or "*prima facie* case" is used in two senses, and it is often difficult to detect which of these is intended in the passage in hand. (*a*) In discussing presumptions, the term "*prima facie*" is often used as equivalent to the notion of a presumption, even in the strict sense of a ruling of the judge putting upon the opponent the duty of producing evidence.[14] In other words, the term is thus applied to the stage of the case noted in a preceding section (§ 14 *w*) as (*c'*) and (*c''*), namely, where the proponent, having the burden of proving the issue (*i. e.* the risk of non-persuasion of the jury), has not only removed by sufficient evidence the duty of producing evidence, to get to the jury, but has gone further, and, either by means of a presumption or by a general mass of strong evidence, has entitled himself to a ruling that the opponent should fail if he does nothing more in the way of producing evidence. This usage for the term is not an objectionable one, if clearly signified; it is, in fact, a useful one, for it serves to subsume under one name the similar legal effects, (*c'*) and (*c''*), produced by a presumption or by a ruling on the evidence in the particular case. (*b*) But it is also, and clearly enough, found used in a very different sense, as representing the stage noted in a foregoing section (§ 14 *w*) as (*a*), namely, where the proponent, having the first duty of producing some evidence in order to pass the judge to the jury, has fulfilled that duty, satisfied the judge, and may properly claim that the jury be allowed to consider his case. This sufficiency of evidence to go to the jury (the significance of which is that the proponent is no longer liable to a nonsuit or to a setting aside of the verdict as against evidence) is also often referred to as a *prima facie* case.[15] In

[13] [See some good instances of these situations worked out by Professor Thayer, *ubi supra*, pp. 343–350; quoted *post*, § 35.]

[14] [*E. g.*, Bowen, L. J., in Abrath *v.* R. Co., L. R. 11 Q. B. D. 440, 455, 32 W. R. 50, 53: "If he [the plaintiff] makes a *prima facie* case, and nothing is done by the other side to answer it, the defendant fails;" Mansfield, C. J., in Banbury Peerage Case, 1 Sim. & St. 153: "In every case in which there is *prima facie* evidence of any right existing in any person, the *onus probandi* is always upon the person or party calling such right in question;" Best, Evidence, § 273: "The burden of proof is shifted . . . by every species of evidence strong enough to establish a *prima facie* case against a party."]

[15] [So, for example, Story, J., in Crane *v.* Morris, 6 Pet. 598, 621 (referring to evidence of a deed): "Whenever evidence is offered to the jury which is in its nature *prima facie* proof, . . . whatever just influence it may derive from that character, the jury have a right to give it; . . . the law has submitted it to them to decide for themselves." In the following Irish case, the obscurity of the legal phrase was brought out by a question from an intelligent juror: R. *v.* O'Doherty, 6 State Tr. N. s. 831, 873; Pennefather, B., charging the jury, in a prosecution for publishing an article with

this sense the phrase is used to emphasize the distinction between evidence which is merely admissible, so far as the various rules of evidence might have excluded it, and evidence which, being all the evidence offered by the proponent, is still not enough in quantity to be worth submitting to the jury.[16] The difference between the two senses of the term is practically of much consequence; for, in the latter sense, it means merely that the proponent is safe in having relieved himself of his duty of going forward, while in the former sense it signifies that he has further succeeded in creating it anew for his opponent. One of the chief fields of its use, and therefore of an unfortunate obscurity in the significance of the rulings, is in the proof of execution of attested documents,[17] or of the identity of the person signing them,[18] or of the authentication of ancient writings,[19] where it is often difficult to determine whether the effect of the ruling is merely that the document may be read or amounts to directing the jury to take it for genuine.]

2. *Various Specific Presumptions.*

§ 15. **Kinds of Presumptions.** The general head of Presumptive Evidence[1] is usually divided into two branches; namely, *presumptions of law* and *presumptions of fact*. Presumptions of Law consist of those rules which, in certain cases, either forbid[2] or dispense[2] with any ulterior inquiry. They are founded, either upon the first principles of justice; or the laws of nature; or the experienced course of human conduct and affairs, and the connection usually

seditious intent: "The publishing them is certainly *prima facie* evidence against him, as being the registered proprietor [of the newspaper];" a juror: "There is a difference of opinion among the jurors; some hold that, from your lordship stating there being *prima facie* evidence of the prisoner's guilt, we should at once go to find him guilty; others receiving the phrase thus, that your lordship did not mean to convey that it was sufficient [to require that finding];" Pennefather, B.: "I did not mean, gentlemen, to direct you or tell you that in point of law, because he was the publisher and proprietor of the paper, he therefore necessarily knew the contents. I did not mean to convey that. But I told you that it was evidence that he did know the contents, and that you were to form your judgment upon the whole of the case, reading the documents and the evidence."]

[16] [As in a case already cited (Benoit *v.* R. Co., N. Y., 48 N. E. 524), where it was ruled, the plaintiff having to show the defendant's *scienter* of a horse's unmanageable disposition, that a single instance of its having run away, though admissible evidence, was not sufficient evidence to go to the jury.]

[17] [*Post*, § 575.]

[18] [*Post*, § 575 *a*.]

[19] [*Post*, § 575 *b*.]

[1] [Presumptive evidence is an older term for inferences or circumstantial evidence: *supra*, § 14 *y*. It is not "presumptive evidence" that is here to be classified, but presumptions. The procedural rules called presumptions are different things from the evidential material formerly termed presumptive evidence: see *ante*, § 14 *w*.]

[2] [These two words are not to be taken as interchangeable, but represent radically different principles. When A offers to prove fact Z by evidence M, to "dispense" A from offering further evidence (*i. e.* to put upon B the duty of going forward with evidence to meet A's evidence) is one thing; and to "forbid" B to offer any such evidence to meet A's is a very different and quite the opposite thing.]

found to exist between certain things. The general doctrines of presumptive evidence are not therefore peculiar to municipal law, but are shared by it in common with other departments of science. Thus, the presumption of a malicious intent to kill, from the deliberate use of a deadly weapon, and the presumption of aquatic habits in an animal found with webbed feet, belong to the same philosophy; differing only in the instance, and not in the principle, of its application. The one fact being proved or ascertained, the other, its uniform concomitant, is universally and safely presumed. It is this uniformly experienced connection which leads to its recognition by the law without other proof; the presumption, however, having more or less force, in proportion to the universality of the experience. And this has led to the distribution of presumptions of law into two classes; namely, *conclusive* and *disputable*.

Conclusive, or, as they are elsewhere termed, imperative, or absolute presumptions of law are rules determining the quantity of evidence requisite for the support of any particular averment which is not permitted to be overcome by any proof that the fact is otherwise. They consist chiefly of those cases in which the long-experienced connection, before alluded to, has been found so general and uniform as to render it expedient for the common good that this connection should be taken to be inseparable and universal. They have been adopted by common consent, from motives of public policy, for the sake of greater certainty, and the promotion of peace and quiet in the community; and therefore it is that all corroborating evidence is dispensed with, and all opposing evidence is forbidden.[8]

§ 16. **Limitation of Claims.** Sometimes this common consent is expressly declared, through the medium of the Legislature, in stat-

[8] The presumption of the Roman law is defined to be, — "Conjectura, ducta ab eo, quod ut plurimum fit. Ea conjectura vel a *lege* inducitur, vel a *judice*. Quæ ab ipsa lege inducitur, vel ita comparata, ut probationem contrarii haud admittat; vel ut eadem possit elidi. *Priorem* doctores *præsumptionem* JURIS ET DE JURE, *posteriorem præsumptionem* JURIS, adpellant. Quæ a *Judice* indicitur conjectura, *præsumptio* HOMINIS vocari solet; et semper admittit probationem contrarii, quamvis, si alicujus momenti sit, probandi onere relevet." Hein. ad Pand., pars. 4, § 124. Of the former, answering to our conclusive presumption, Mascardus observes, — "Super hac præsumptione lex firmum sancit jus, et eam *pro veritate, habet*." De Probationibus, vol. i, quæst. x, 48.

[It is obvious, however, that, so far as all opposing evidence is forbidden and further investigation into the truth is stopped, just so far the question ceases to be one of evidence. To say that the truth of a fact is immaterial and will not be investigated is to say that the fact itself is immaterial for the purposes of the demandant's right; and to say this is to lay down a proposition of substantive law as to the facts essential as elements of a claim or defence. Thus these so-called conclusive presumptions are in reality rules of substantive law (*ante*, § 14 *y*). The only doubtful instances are those in which an official makes a record of something done before him, and then this record is taken as true and cannot be disputed, or can be disputed only in case of fraud or the like. Here it seems not always possible to say that the record of the official becomes the final and only material element of the inquiry; the act done before him seems still to be the important thing, — as in the case of a witness' testimony before a magistrate. The principle of this class of instances is discussed *post*, § 97 *d*.]

utes. Thus, by the statutes of limitation, where a debt has been created by simple contract, and has not been distinctly recognized, within six years, as a subsisting obligation, no action can be maintained to recover it; that is, it is conclusively presumed to have been paid. A trespass, after the lapse of the same period, is, in like manner, conclusively presumed to have been satisfied. So the possession of land, for the length of time mentioned in the statutes of limitation, under a claim of absolute title and ownership, constitutes, against all persons but the sovereign, a conclusive presumption of a valid grant.[1]

§ 17. **Title by Prescription.** In other cases, the common consent, by which this class of legal presumptions is established, is declared through the medium of the judicial tribunals, it being the common law of the land; both being alike respected, as authoritative declarations of an imperative rule of law, against the operation of which no averment or evidence is received. Thus, the uninterrupted enjoyment of an incorporeal hereditament, for a period beyond the memory of man, is held to furnish a conclusive presumption of a prior grant of that which has been so enjoyed. This is termed a title by prescription.[1] If this enjoyment has been not only uninterrupted, but exclusive and adverse in its character, for the period of

[1] This period has been limited differently at different times; but, for the last fifty years, it has been shortened at succeeding revisions of the law, both in England and the United States. By Stat. 3 & 4 Wm. IV, c. 27, all real actions are barred after twenty years from the time when the right of action accrued. And this period is adopted in most of the United States, though in some of the States it is reduced to seven years, while in others it is prolonged to fifty: see 3 Cruise's Dig. tit. 31, c. 2, the synopsis of Limitations at the end of the chapter (Greenleaf's ed.); see also 4 Kent Comm. 188, note (*a*); *post*, Vol. II, §§ 537–546. The same period in regard to the title to real property, or as some construe it, only to the profits of the land, is adopted in the Hindu law: see McNaghten's Elements of Hindu Law, vol. i, p. 201.

[1] 3 Cruise's Dig. 430, 431 (Greenleaf's ed.). "Præscriptio est titulus, ex usu et tempore substantiam capiens, ad authoritate legis." Co. Litt. 113 *a*. What length of time constitutes this period of legal memory has been much discussed among lawyers. In this country, the Courts are inclined to adopt the periods mentioned in the statutes of limitation, in all cases analogous in principle: Coolidge *v.* Learned, 8 Pick. 504; Melvin *v.* Whiting, 10 Pick. 295; Ricard *v.* Williams, 7 Wheat. 110; {*post*, Vol. II, §§ 537, 546.} In England, it is settled by Stat. 2 & 3 Wm. IV, c. 71, by which the period of legal memory has been limited as follows: In cases of rights of common or other benefits arising out of lands, except tithes, rents, and services, *prima facie* to thirty years; and conclusively to sixty years, unless proved to have been held by consent, expressed by deed or other writing; in cases of aquatic rights, ways, and other easements, *prima facie* to twenty years; and conclusively to forty years, unless proved in like manner, by written evidence, to have been enjoyed by consent of the owner; and, in cases of lights, conclusively to twenty years, unless proved in like manner, to have been enjoyed by consent. In the Roman Law, prescriptions were of two kinds, — *extinctive* and *acquisitive*. The former referred to rights of action, which, for the most part, were barred by the lapse of thirty years. The latter had regard to the mode of acquiring property by long and uninterrupted possession; and this, in the case of immovable or real property, was limited, *inter præsentes*, to ten years, and, *inter absentes*, to twenty years. The student will find this doctrine fully discussed in Mackeldey's Compendium of Modern Civil Law, vol. i, pp. 200–205, 290 *et seq.* (Amer. ed.), with the learned notes of Dr. Kaufman. See also Novel. 119, c. 7, 8. [See the reference to this presumption in Thayer, *ubi supra*, 317.]

twenty years, this also has been held, at common law, as a conclusive presumption of title.[2] There is no difference, in principle, whether the subject be a corporeal or an incorporeal hereditament; a grant of land may as well be presumed as a grant of a fishery, or a common, or a way.[3] But, in regard to the effect of possession alone for a period of time, unaccompanied by other evidence, as affording a presumption of title, a difference is introduced, by reason of the statute of limitations, between corporeal subjects, such as lands and tenements, and things incorporeal; and it has been held, that a grant of lands, conferring an entire title, cannot be presumed from mere possession alone, for any length of time short of that prescribed by the statute of limitations. The reason is, that, with respect to corporeal hereditaments, the statute has made all the provisions which the law deems necessary for quieting possessions; and has thereby taken these cases out of the operation of the common law. The possession of lands, however, for a shorter period, when coupled with other circumstances indicative of ownership, may justify a jury in finding a grant; but such cases do not fall within this class of presumptions.[4]

§ 18. **Natural Consequences of Acts; Intent; Murder; Libel; etc.** Thus, also, a sane man is conclusively presumed to contemplate the natural and probable consequences of his own acts; and, therefore, the intent to murder is conclusively inferred from the deliberate use of a deadly weapon.[1] So the deliberate publication of calumny,

[2] Tyler *v.* Wilkinson, 4 Mason 397, 402; Ingraham *v.* Hutchinson, 2 Conn. 584; Bealey *v.* Shaw, 6 East 208, 215; Wright *v.* Howard, 1 Sim. & Stu. 190, 203; Strickler *v.* Todd, 10 Serg. & Rawle 63, 69; Balston *v.* Bensted, 1 Campb. 463, 465; Daniel *v.* North, 11 East 371; Sherwood *v.* Burr, 4 Day 244; Tinkham *v.* Arnold, 3 Greenl. 120; Hill *v.* Crosby, 2 Pick. 466. See Best on Presumptions, p. 103, n. (*m*); Bolivar Manuf. Co. *v.* Neponset Manuf. Co., 16 Pick. 241. See also *post*, Vol. II, §§ 537–546, tit. PRESCRIPTION.

[3] Ricard *v.* Williams, 7 Wheat. 109; Prop'rs of Brattle-Street Church *v.* Bullard, 2 Met. 363.

[4] Sumner *v.* Child, 2 Conn. 607, 628–632, per Gould, J.; Clark *v.* Faunce, 4 Pick. 245; [see their treatment *post*, §§ 45, 46.]

[1] 1 Russ. on Crimes, 658–660; R. *v.* Dixon, 3 M. & S. 15; 1 Hale P. C. 440, 441; Britton, 50, § 6. But if death does not ensue till a year and a day (that is, a full year) after the stroke, it is conclusively presumed that the stroke was not the sole cause of the death, and it is not murder: 4 Bl. Comm. 197; Glassford on Evid. 592. The doctrine of presumptive evidence was familiar to the Mosaic Code, even to the letter of the principle stated in the text. Thus, it is laid down in regard to the manslayer, that "if he smite him with an *instrument of iron*, so that he die;" or, "if he smite him with throwing a *stone wherewith* he may die, and he die; or, "if he smite him with a *hand-weapon of steel wherewith* he may die, and he die, he is a murderer." See Numb. xxxv, 16, 17. Here, every instrument of *iron* is conclusively taken to be a deadly weapon; and the use of any such weapon raises a conclusive presumption of malice. The same presumption arose from *lying in ambush*, and thence destroying another. Id. v. 20. But, in other cases, the existence of malice was to be proved, as one of the facts in the case; and, in the absence of malice, the offence was reduced to the degree of manslaughter, as at the common law. Id. v. 22, 23. This very reasonable distinction seems to have been unknown to the Gentoo Code, which demands life for life in all cases, except where the culprit is a Brahmin. "If a man deprives another of life, the magistrate shall deprive that person of life." Hal-

which the publisher knows to be false, or has no reason to believe to be true, raises a conclusive presumption of malice.[2] So the neglect of a party to appear and answer to process, legally commenced in a court of competent jurisdiction, he having been duly served therewith and summoned, is taken conclusively against him as a confession of the matter charged.[3] [It is commonly said that

hed's Gentoo Laws, book 16, § 1, p. 233. Formerly, if the mother of an illegitimate child, recently born and found dead, concealed the fact of its birth and death, it was conclusively presumed that she murdered it. Stat. 21 Jac. I, c. 37, probably copied from a similar edict of Henry II, of France, cited by Domat. But this unreasonable and barbarous rule is now rescinded, both in England and America.

The subject of implied malice, from the unexplained fact of killing with a lethal weapon, was fully discussed in Com. *v.* York, 9 Met. 103, upon a difference of opinion among the learned judges, and the rule there laid down, in favor of the inference, was reaffirmed in Com. *v.* Webster, 5 Cush. 305.

{In Com. *v.* Hawkins, 3 Gray 463, Chief Justice Shaw said that the doctrine of York's Case is that, where the killing is proved to have been committed by the defendant, and *nothing further is shown*, the presumption of law is that it was malicious, and an act of murder, and that it was inapplicable to a case when the circumstances attending the homicide were fully shown by the evidence; that, in such a case, the homicide being conceded, and no excuse being shown, it was either murder or manslaughter, and that the jury, upon all the circumstances, must be satisfied beyond a reasonable doubt that it was done with malice, before they could find the defendant guilty of murder. This qualification of the rule in York's Case limits the application of the rule very much, for in very few cases will the killing by the defendant be the *only* thing shown. The circumstances in every case will tend to prove or to disprove malice, which then becomes a question of fact to be decided by the jury. This view of the rule is in accord with Hawthorne *v.* State, 58 Miss. 778; State *v.* Patterson, 45 Vt. 308; State *v.* McDonnell, 32 id. 491; Brown *v.* State, 4 Tex. App. 275; Whart. Homicide, §§ 669, 671; State *v.* Smith, 77 N. C. 488; State *v.* Knight, 43 Me. 12; Stokes *v.* People, 53 N. Y. 164; Thomas *v.* People, 67 id. 218. Cf. Com. *v.* McKie, 1 Gray, 61; [see People *v.* Wolf, 95 Mich. 625; State *v.* Whitson, 111 N. C. 695; Gilbert *v.* State, 90 Ga. 691; Terr. *v.* Lucero, N. M., 46 Pac. 18; Herman *v.* State, Miss., 22 So. 872.] In Kentucky (Farris *v.* Com., 14 Bush 362) and Louisiana (State *v.* Swayze, 30 La. An. 1323; State *v.* Tribas, 32 id. 1086) it is said that there is no such presumption as that stated in York's Case. The presumption is in any event rebuttable, however, and it may be that it will be rebutted by the evidence for the prosecution. If so, no evidence need be put in by the defendant on this point. If not, he must introduce evidence to rebut the presumption.

On indictments for malicious mischief, wilful injuries, and similar offences, where malice, *i. e.* a spirit of wanton cruelty or wicked revenge, is a necessary ingredient in the offence, this will have to be proved, unless the unlawful act which constitutes the crime is of such a nature as to give rise to a natural inference of malice, or has been judicially decided to be a malicious act; evidence may be given by the defendant to rebut this proof of malice. R. *v.* Matthews, 14 Cox Cr. C. 5; People *v.* Hunt, 8 Pac. C. L. J. 590; State *v.* Heaton, 77 N. C. 505; U. S. *v.* Imsand, 1 Woods C. C. 581; Seibright *v.* State, 2 W. Va. 591; State *v.* Hessenkamp, 17 Iowa 25.}

[2] Bodwell *v.* Osgood, 3 Pick. 379; Haire *v.* Wilson, 9 B. & C. 643; R. *v.* Shipley, 4 Doug. 73, 177, per Ashhurst, J.; {see *post*, Vol. II, § 418.}

[3] 2 Erskine, Inst. 780. Cases of this sort are generally regulated by statutes, or by the rules of practice established by the Courts; but the principle evidently belongs to a general jurisprudence. So is the Roman law: "Contumacia, eorum, qui, jus dicenti non obtemperant, litis damno coercetur:" Dig. lib. 42, tit. 1, l. 53; "Si citatus aliquis non compareat, habetur pro consentiente:" Mascard, de Prob. vol. iii, p. 253, concl. 1159, n. 26; see further on this subject, *infra*, §§ 204–211. The right of the party to have notice of the proceedings against him, before his non-appearance is taken as a confession of the matter alleged, has been distinctly recognized in the Courts both of England and America, as a rule founded in the first principles of natural justice, and of universal obligation: Fisher *v.* Lane, 3 Wils. 302, 303, per Lee, C. J.; The Mary, 9 Cranch 144, per Marshall, C. J.; Bradstreet *v.* Neptune Ins. Co., 3 Sumn. 607, per Story, J.

every man is presumed to know the law; but this is merely another way of holding that, for the purpose of the substantive law in hand, ignorance of it is immaterial.[4]]

§ 19. **Correctness of Records.** Conclusive presumptions are also made in favor of judicial proceedings. Thus the records of a court of justice are presumed to have been correctly made;[1] a party to the record is presumed to have been interested in the suit;[2] and after verdict, it will be presumed that those facts, without proof of which the verdict could not have been found, were proved, though they are not expressly and distinctly alleged in the record; provided it contains terms sufficiently general to comprehend them in fair and reasonable intendment.[3] The presumption will also be made, after twenty years, in favor of every judicial tribunal acting within its jurisdiction, that all persons concerned had due notice of its proceedings.[4] A like presumption is also sometimes drawn from the solemnity of the act done, though not done in court. Thus a bond or other specialty is presumed to have been made upon good consideration, as long as the instrument remains unimpeached.[5]

§ 20. **Observance of Legal Formalities.** To this class of legal presumptions may be referred one of the applications of the rule, "Ex diuturnitate temporis omnia præsumuntur ritè et solenniter esse acta;" namely, that which relates to transactions, which are not of record, the proper evidence of which, after the lapse of a little time, it is often impossible, or extremely difficult to produce. The rule itself is nothing more than the principle of the statutes of limitation, expressed in a different form, and applied to other subjects. Thus,

[4] {See instances in U. S. *v.* Anthony, 11 Blatchf. C. C. 200; Com. *v.* Bagley, 7 Pick. 279; Brent *v.* State, 43 Ala. 297; R. *v.* Esop, 7 C. & P. 456; Barronet's Case, 1 E. & B. 1; R. *v.* Esop, 7 C. & P. 456; Finch *v.* Mansfield, 97 Mass. 89, 92.}

[1] Reed *v.* Jackson, 1 East 355; "Res judicata pro veritate accipitur:" Dig. lib. 50, tit. 17, l. 207. [It would seem, in truth, that the records *are* the judicial acts themselves; the law as to what constitutes a judicial act and whether it must be in writing is the law here concerned: see *post*, § 86.]

[2] Stein *v.* Bowman, 13 Pet. 209.

[3] Jackson *v.* Pesked, 1 M. & S. 234, 237, per Ld. Ellenborough; Stephen on Pl. 166, 167 (Tyler's ed. 163, 164); Spiers *v.* Parker, 1 T. R. 141; {see Beale *v.* Com., 25 Pa. St. 11; Blake *v.* Lyon Company, 77 N. Y. 626; Lathrop *v.* Stuart, 5 McLean C. C. 167; Sprague *v.* Litherberry, 4 id. 442; Hardiman *v.* Herbert, 11 Tex. 656; Morrison *v.* Woolson, 9 Fost. N. H. 510; Com. *v.* Blood, 97 Mass. 538.}

[4] Brown *v.* Wood, 17 Mass. 68. A former judgment, still in force, by a Court of competent jurisdiction, in a suit between the same parties, is conclusive evidence, upon the matter directly in question in such suit, in any subsequent action or proceeding: Duchess of Kingston's Case, 20 Howell St. Tr. 355; Ferrer's Case, 6 Co. 7. The effect of judgments will be further considered hereafter: §§ 528–543.

[5] Lowe *v.* Peers, 4 Burr. 2225. {It is sometimes said that there is a conclusive presumption that *legislative* and *judicial acts* are in force on *every part of the day* specified: *Re* Wellman, 20 Vt. 653; but this is only a way of stating that the policy of that subject requires the fractions of a day to be ignored; and for purposes of determining private rights these fractions will be inquired into where policy permits it: see *Ex parte* D'Obree, 8 Ves. 83 (Sumner's ed.), note (*a*); *Re* Richardson, 2 Story 571; Ferris *v.* Ward, 9 Ill. 499; Lang *v.* Phillips, 27 Ala. 311; Whittaker *v.* Wisley, 9 Eng. L. & Eq. 45.}

where an authority is given by law to executors, administrators, guardians, or other officers to make sales of lands, upon being duly licensed by the Courts, and they are required to advertise the sales in a particular manner, and to observe other formalities in their proceedings; the lapse of sufficient time (which in most cases is fixed at thirty years)[1] raises a conclusive presumption that all the legal formalities of the sale were observed.[2] The license to sell, as well as the official character of the party, being provable by record or judicial registration, must in general be so proved; and the deed is also to be proved in the usual manner; it is only the intermediate proceedings that are presumed. "Probatis extremis, præsumuntur media."[3] The reason of this rule is found in the great probability that the necessary intermediate proceedings were all regularly had, resulting from the lapse of so long a period of time, and the acquiescence of the parties adversely interested; and in the great uncertainty of titles, as well as the other public mischiefs, which would result, if strict proof were required of facts so transitory in their nature, and the evidence of which is so seldom preserved with care. Hence it does not extend to records and public documents, which are supposed always to remain in the custody of the officers charged with their preservation, and which, therefore, must be proved, or their loss accounted for, and supplied by secondary evidence.[4] Neither does the rule apply to cases of prescription.[5]

§ 21. **Genuineness of Ancient Instruments.** The same principle applies to the proof of the execution of ancient deeds and wills. Where these instruments are more than thirty years old, and are unblemished by any alterations, they are said to prove themselves; the bare production thereof is sufficient: the subscribing witnesses being presumed to be dead.[1] This presumption, so far as this rule

[1] See Pejepscot Prop'rs *v.* Ransom, 14 Mass. 145; Blossom *v.* Cannon, id. 177; Colman *v.* Anderson, 10 Mass. 105. In some cases, twenty years has been held sufficient, — as, in favor of the acts of sheriffs: Drouet *v.* Rice, 2 Rob. La. 374. So, after partition of lands by an incorporated land company, and a several possession, accordingly, for twenty years, it was presumed that its meetings were duly notified: Society, etc. *v.* Young, 2 N. H. 310; Williams *v.* Eyton, 4 H. & N. 357; s. c. 5 Jur. N. s. 770. [For instances of such presumptions, see King *v.* Little, 1 Cush. 436; Freeman *v.* Thayer, 33 Me. 76; Cobleigh *v.* Young, 15 N. H. 493; Freeholders of Hudson Co. *v.* State, 4 Zabr. 718; State *v.* Lewis, 2 id. 564; Allegheny *v.* Nelson, 25 Pa. St. 332; Plank-road Co. *v.* Bruce, 6 Md. 457; Emmons *v.* Oldham, 12 Tex. 18; Austin *v.* Austin, 50 Me. 74; Stevens *v.* Taft, 3 Gray 487.]

[2] [For instances of this principle applied in the shape of ordinary, not conclusive presumptions, see *post*, § 38 *a*.]

[3] 2 Erskine Inst. 782; Earl *v.* Baxter, 2 W. Bl. 1228. Proof that one's ancestor sat in the House of Lords, and that no patent can be discovered, affords a presumption that he sat by summons: The Braye Peerage, 6 Cl. & Fin. 757. See also, as to presuming the authority of an executor, Piatt *v.* McCullough, 1 McLean, 73.

[4] Brunswick *v.* McKeen, 4 Greenl. 508; Hathaway *v.* Clark, 5 Pick. 490. [See also, in general, *post*, § 38 *a*.]

[5] Eldridge *v.* Knott, Cowp. 215; Mayor of Kingston *v.* Horner, id. 102.

[1] R. *v.* Farringdon, 2 T. R. 471, per Buller, J.; Doe *v.* Wolley, 8 B. & C. 22; Bull. N. P. 255; 12 Vin. Abr. 84; Gov. &c. of Chelsea Waterworks *v.* Cowper, 1 Esp. 275; R. *v.* Ryton, 5 T. R. 259; R. *v.* Long Buckby, 7 East 45; M'Kenire *v.* Fraser,

of evidence is concerned, is not affected by proof that the witnesses are living. But it must appear that the instrument comes from such custody as to afford a reasonable presumption in favor of its genuineness; and that it is otherwise free from just grounds of suspicion;[2] and, in the case of a bond for the payment of money, there must be some indorsement of interest or other mark of genuineness, within the thirty years, to entitle it to be read.[3] Whether, if the deed be a conveyance of real estate, the party is bound first to show some acts of possession under it, is a point not perfectly clear upon the authorities; but the weight of opinion seems in the negative, as will hereafter be more fully explained.[4] But after an undisturbed possession for thirty years, of any property, real or personal, it is too late to question the authority of the agent, who has undertaken to convey it,[5] unless his authority was by matter of record.

§ 22. **Estoppels.**[1] Estoppels may be ranked in this class of presumptions. A man is said to be estopped, when he has done some act which the policy of the law will not permit him to gainsay or deny. The law of estoppel is not so unjust or absurd as it has been too much the custom to represent.[2] Its foundation is laid in the obligation which every man is under to speak and act according to the truth of the case, and in the policy of the law, to prevent the great mischiefs resulting from uncertainty, confusion, and want of confidence in the intercourse of men, if they were permitted to deny that which they have deliberately and solemnly asserted and received as true. If it be a recital of facts in a deed, there is implied a solemn engagement that the facts are so as they are recited. The doctrine of estoppels has, however, been guarded with great strictness; not because the party enforcing it necessarily wishes to exclude the truth, — for it is rather to be supposed that that is true which the opposite party has already solemnly recited, — but because the estoppel *may* exclude the truth. Hence estoppels must be certain to every intent; for no one shall be denied setting up the truth, unless

9 Ves. 5; Oldnall *v.* Deakin, 3 C. & P. 402; Jackson *v.* Blanshan, 3 Johns. 292; Winn *v.* Patterson, 9 Peters 674, 675: Bank U. S. *v.* Dandridge, 12 Wheat. 70, 71; Henthorn *v.* Doe, 1 Blackf. 157; Bennett *v.* Runyon, 4 Dana 422, 424; Cook *v.* Totton, 6 id. 110; Thruston *v.* Masterson, 9 id. 233; Hynde *v.* Vattier, 1 McLean 115; Walton *v.* Coulson, ib. 124; Northrup *v.* Wright, 24 Wend. 221. [This subject is treated more fully *post*, §§ 570, 575 *a*. But it is not an instance of a conclusive presumption, and probably not of a presumption of any sort. The above circumstances are merely sufficient evidence to go to the jury, under the principle of § 14 *w*, *ante*.]

[2] Roe *v.* Rawlings, 7 East 279, 291; 12 Vin. Abr. 84, Evid. A, b. 5; Swinnerton *v.* Marquis of Stafford, 3 Taunt. 91; Jackson *v.* Davis, 5 Cowen 123; Jackson *v.* Luquere, ib. 221; Doe *v.* Beynon, 4 P. & D. 193; Doe *v.* Samples, 3 Nev. & P. 254.

[3] Forbes *v.* Wale, 1 W. Bl. 532; 1 Esp. 278; s. c. *infra*, §§ 121, 122.

[4] *Infra*, § 144; [transferred *post*, as § 575 *a*.]

[5] Stockbridge *v.* West Stockbridge, 14 Mass. 257. Where there had been a possession of thirty-five years, under a legislative grant, it was held conclusive evidence of a good title, though the grant was unconstitutional: Trustees of the Episcopal Church in Newbern *v.* Trustees of Newbern Academy, 2 Hawks 233.

[1] [Other aspects of this subject are dealt with *post*, §§ 204, 207–211.]

[2] Per Taunton, J., 2 Ad. & El. 291.

it is in plain and clear contradiction to his former allegations and acts.[3]

§ 23. **Same: Estoppel by Recitals in Deeds.** In regard to recitals in deeds, the general rule is that all parties to a deed are bound by the recitals therein,[1] which operates as an estoppel, working on the interest in the land, if it be a deed of conveyance and binding both parties and privies; privies in blood, privies in estate, and privies in law. Between such parties and privies, the deed or other matter recited needs not at any time be otherwise proved, the recital of it in the subsequent deed being conclusive. It is not offered as secondary, but as primary evidence, which cannot be averred against, and which forms a muniment of title. Thus, the recital of a lease, in a deed of release, is conclusive evidence of the existence of the lease against the parties, and all others claiming under them in privity of estate.[2]

[3] Bowman *v.* Taylor, 2 Ad. & El. 278, 289, per Ld. C. J. Denman; ib. 291, per Taunton, J.; Lainson *v.* Tremere, 1 Ad. & El. 792; Pelletreau *v.* Jackson, 11 Wend. 117; 4 Kent Comm. 261, note; Carver *v.* Jackson, 4 Peters 83.

{It must also appear that the party pleading the estoppel is or may be prejudiced by the act on which he claims to estop: Nourse *v.* Nourse, 116 Mass. 101; Security Ins. Co. *v.* Fay, 22 Mich. 467; Bank of Hindustan *v.* Alison, L. R. 6 C. P. 227. Estoppels, by matter of record and by deed, will not operate conclusively unless they be expressly pleaded when an opportunity of pleading them has been afforded: Bradley *v.* Beckett, 7 M. & G. 994; see also 2 Smith's Lead. Cas. 670 *et seq.* If not pleaded, they will be presumed to be waived: Outram *v.* Morewood, 3 East 346; Matthew *v.* Osborne, 13 C. B. 919; Wilson *v.* Butler, 4 Bing. N. C. 748; Young *v.* Raincock, 7 C. B. 310. If, however, no opportunity has been afforded to plead, they may be offered in evidence with the same effect as if pleaded: Adams *v.* Barnes, 17 Mass. 365; Trevivan *v.* Lawrance, 1 Salk. 276; Lord Feversham *v.* Emerson, 11 Exch. 385. See Bigelow on Estoppel, for the general subject.}

[1] But it is not true, as a general proposition, that one claiming land under a deed to which he was not a party, adopts the recitals of facts in an anterior deed, which go to make up his title. Therefore, where, by a deed made in January, 1796, it was recited that S became bankrupt in 1781, and that, by virtue of the proceedings under the commission, certain lands had been conveyed to W, and thereupon W conveyed the same lands to B for the purpose of enabling him to make a tenant to the *præcipe;* to which deed B was not a party; and afterwards, in February, 1796, B by a deed, not referring to the deed last mentioned, nor to the bankruptcy, conveyed the premises to a tenant to the *præcipe*, and declared the uses of the recovery to be to his mother for life, remainder to himself in fee; it was held that B, in a suit respecting other land, was not estopped from disputing S's bankruptcy: Doe *v.* Shelton, 3 Ad. & El. 265, 283. If the deed recite that the consideration was paid by a husband and wife, parol evidence is admissible to show that the money consisted of a legacy given to the wife: Doe *v.* Statham, 7 D. & Ry. 141.

[2] Shelley *v.* Wright, Willes 9; Crane *v.* Morris, 6 Peters 611; Carver *v.* Jackson, 4 id. 1, 83; Cossens *v.* Cossens, Willes 25. But such recital does not bind strangers, or those who claim by title paramount to the deed; [in particular,] it does not bind persons claiming by an adverse title, or persons claiming from the parties by a title anterior to the date of the reciting deed. See Carver *v.* Jackson, *ubi supra;* in this case, the doctrine of estoppel is very fully expounded by Mr. Justice Story, where, after stating the general principle, as in the text, with the qualification just mentioned, he proceeds (p. 83) as follows: "Such is the general rule. But there are cases in which such a recital may be used as evidence even against strangers. If, for instance, there be the recital of a lease in a deed of release, and in a suit against a stranger the title under the release comes in question, there the recital of the lease in such a release is not *per se* evidence of the existence of the lease. But if the existence and loss of the lease be established by other evidence, there the recital is admissible, as secondary proof, in the absence of more perfect evidence, to establish the contents of the lease; and if the

§ 24. **Same: Estoppel by Deed, in general.** Thus, also, a grantor is, in general, estopped by his deed from denying that he had any title in the thing granted. But this rule does not apply to a grantor acting officially, as a public agent or trustee.[1] A covenant of warranty also estops the grantor from setting up an after-acquired title against the grantee, for it is a perpetually operating covenant;[2] but he is not thus estopped by a covenant, that he is seised in fee and has good right to convey;[3] for any seisin in fact, though by wrong, is sufficient to satisfy this covenant, its import being merely this, that he has the seisin in fact, at the time of conveyance, and thereby is qualified to transfer the estate to the grantee.[4] Nor is a *feme covert* estopped, by her deed of conveyance, from claiming the land by a title subsequently acquired; for she cannot bind herself personally by any covenant.[5] Neither is one who has purchased land in his own name, for the benefit of another, which he has afterwards conveyed by deed to his employer, estopped by such deed, from claiming the land by an elder and after-acquired title.[6] Nor is the heir estopped from questioning the validity of his ancestor's deed, as a fraud against an express statute.[7] The grantee, or lessee, in a deed-poll, is

transaction be an ancient one, and the possession has been long held under such release, and is not otherwise to be accounted for, there the recital will of itself, under such circumstances, materially fortify the presumption, from lapse of time and length of possession, of the original existence of the lease. Leases, like other deeds and grants, may be presumed from long possession, which cannot otherwise be explained; and under such circumstances, a recital of the fact of such a lease in an old deed is certainly far stronger presumptive proof in favor of such possession under title, than the naked presumption arising from a mere unexplained possession. Such is the general result of the doctrine to be found in the best elementary writers on the subject of evidence. . . . [After examining the authorities,] the distinction, then, which was urged at the bar, that an estoppel of this sort binds those claiming under the same deed, but not those claiming by a subsequent deed under the same party, is not well founded. All privies in estate by a subsequent deed are bound in the same manner as privies in blood. . . . The same doctrine was acted upon and confirmed by the same Court, in Garwood *v.* Dennis, 4 Binn. 314. In that case, [however,] the Court further held that a recital in another deed was evidence against strangers, where the deed was ancient and the possession was consistent with the deed. That case also had the peculiarity belonging to the present, that the possession was of a middle nature; that is, it might not have been held solely in consequence of the deed, for the party had another title: but there never was any possession against it. There was a double title, and the question was, to which the possession might be attributable. The Court thought that, a suitable foundation of the original existence and loss of the recited deed being laid in the evidence, the recital in the deed was good corroborative evidence, even against strangers. And other authorities certainly warrant this decision."

[1] Fairtitle *v.* Gilbert, 2 T. R. 171; Co. Lit. 363 *b*.

[2] Terrett *v.* Taylor, 9 Cranch 43; Jackson *v.* Matsdorf, 11 Johns. 97; Jackson *v.* Wright, 14 id. 193; McWilliams *v.* Nisly, 2 Serg. & Rawle 515; Somes *v.* Skinner, 3 Pick. 52; {see Blanchard *v.* Ellis, 1 Gray 195.}

[3] Allen *v.* Sayward, 5 Greenl. 227.

[4] Marston *v.* Hobbs, 2 Mass. 433; Bearce *v.* Jackson, 4 id. 408; Twambly *v.* Henly, ib. 441; Chapel *v.* Bull, 17 Mass. 213; {see *contra*, Richardson *v.* Dorr, 5 Vt 9; Lockwood *v.* Sturdevant, 6 Conn. 373.}

[5] Jackson *v.* Vanderhayden, 17 Johns. 167; {Lowell *v.* Daniels, 2 Gray 161.}

[6] Jackson *v.* Mills, 13 Johns. 463; 4 Kent Comm. 260, 261, n.

[7] Doe *v.* Lloyd, 8 Scott 93.

not, in general, estopped from gainsaying anything mentioned in the deed; for it is the deed of the grantor or lessor only; yet if such grantee or lessee claims title under the deed, he is thereby estopped to deny the title of the grantor.[8]

§ 25. **Same: Estoppel of Lessee as to Lessor.** It was an early rule of feudal policy, that the tenant should not be permitted to deny the title of the lord, from whom he had received investiture, and whose liegeman he had become; but, as long as that relation existed, the title of the lord was conclusively presumed against the tenant, to be perfect and valid. And though the feudal reasons of the rule have long since ceased, yet other reasons of public policy have arisen in their place, thereby preserving the rule in its original vigor. A tenant, therefore, by indenture, is not permitted, at this day, to deny the title of his lessor, while the relation thus created subsists. It is of the essence of the contract under which he claims, that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease, and that possession shall be surrendered at its expiration. He could not controvert this title without breaking the faith which he had pledged.[1] But this doctrine does not apply with the same force, and to the same extent between other parties, such as releasor and releasee, where the latter has not received possession from the former. In such cases, where the party already in possession of land, under a claim of title by deed, purchases peace and quietness of enjoyment, by the mere extinction of a hostile claim by a release, without covenants of title, he is not estopped from denying the validity of the title, which he has thus far extinguished.[2] Neither is this rule applied in the case of a lease already expired; provided the tenant has either quitted the possession, or has submitted to the title of a new landlord;[3] nor is it applied to the case of a tenant, who has been ousted or evicted by a title paramount; or who has been drawn into the contract by the fraud or misrepresentation of the lessor, and has, in fact, derived no benefit from the possession of the land.[4] Nor is a defendant in ejectment estopped from showing that the party, under whom the lessor claims, had no title when he conveyed to the lessor, although the defendant himself claims from the same party, if it be by a subsequent conveyance.[5]

[8] Co. Lit. 363 *b*; Goddard's Case, 4 Co. 4. But he is not always concluded by recitals in anterior title-deeds: see *supra*, § 23, n.

[1] Com. Dig. Estoppel, A, 2; Craig. Jus. Feud. lib. 3, tit. 5, §§ 1, 2; Blight's Lessee *v.* Rochester, 7 Wheat. 535, 547; {see Blake *v.* Sanderson, 1 Gray 332;} [the whole subject is more fully treated *post*, § 207.]

[2] Fox *v.* Widgery, 4 Greenl. 214; Blight's Lessee *v.* Rochester, 7 Wheat. 535, 547; Ham *v.* Ham, 2 Shepl. 351. Thus, where a stranger set up a title to the premises, to which the lessor submitted, directing his lessee in future to pay the rent to the stranger; it was held that the lessor was estopped from afterwards treating the lessee as his tenant; and that the tenant, upon the lessor afterwards distraining for rent, was not estopped to allege that the right of the latter had expired: Downs *v.* Cooper, 2 Q. B. 256.

[3] England *v.* Slade, 4 T. R. 682; Balls *v.* Westwood, 2 Campb. 11.

[4] Hayne *v.* Maltby, 3 T. R. 438; Hearn *v.* Tomlin, Peake's Cas. 191.

[5] Doe *v.* Payne, 1 Ad. & El. 538.

§ 26. **Same: Estoppel by Deed Recitals as to Consideration, etc.** This rule in regard to the conclusive effect of recitals in deeds is restricted to the recital of things in particular, as being in existence at the time of the execution of the deed; and does not extend to the mention of things in general terms. Therefore, if one be bound in a bond, conditioned to perform the covenants in a certain indenture, or to pay the money mentioned in a certain recognizance, he shall not be permitted to say that there was no such indenture or recognizance. But if the bond be conditioned, that the obligor shall perform all the agreements set down by A, or carry away all the marl in a certain close, he is not estopped by this general condition from saying, that no agreement was set down by A, or that there was no marl in the close. Neither does this doctrine apply to that which is mere description in the deed, and not an essential averment: such as the quantity of land; its nature, whether arable or meadow; the number of tons in a vessel chartered by the ton; or the like; for these are but incidental and collateral to the principal thing, and may be supposed not to have received the deliberate attention of the parties.[1] Whether the recital of the payment of the consideration-money, in a deed of conveyance, falls within the rule, by which the party is estopped to deny it, or belongs to the exceptions, and therefore is open to opposing proof, is a point not clearly agreed. In England, the recital is regarded as conclusive evidence of payment, binding the parties by estoppel.[2] But the American Courts have been disposed to treat the recital of the *amount* of the money paid, like the mention of the date of the deed, the quantity of land, the amount of tonnage of a vessel, and other recitals of quantity and value, to which the attention of the parties is supposed to have been but slightly directed, and to which, therefore, the principle of estoppels does not apply. Hence, though the party is estopped from denying the conveyance, and that it was for a valuable consideration, yet the weight of American authority is in favor of treating the recital as only *prima facie* evidence of the amount paid, in an action of covenant by the grantee to recover back the consideration, or in an action of *assumpsit* by the grantor to recover the price which is yet unpaid.[3]

[1] 4 Com. Dig. Estoppel, A, 2; Yelv. 227 (by Metcalf), note (1); Doddington's Case, 2 Co. 33; Skipworth *v.* Green, 8 Mod. 311; s. c. 1 Str. 610.

[2] Shelley *v.* Wright, Willes 9; Cossens *v.* Cossens, ib. 25; Rowntree *v.* Jacob, 2 Taunt. 141; Lampon *v.* Corke, 5 B. & Ald. 606; Baker *v.* Dewey, 1 B. & C. 704; Hill *v.* Manchester and Salford Water Works, 2 B. & Ad. 544; see also Powell *v.* Monson, 3 Mason 347, 351, 356.

[3] The principal cases are, in Massachusetts, Wilkinson *v.* Scott, 17 Mass. 249; Clapp *v.* Tirrell, 20 Pick. 247; Livermore *v.* Aldrich, 5 Cush. 431: in Maine, Schillinger *v.* McCann, 6 Greenl. 364; Tyler *v.* Carlton, 7 Greenl. 175; Emmons *v.* Littlefield, 1 Shepl. 233; Burbank *v.* Gould, 3 id. 118: in Vermont, Beach *v.* Packard, 10 Vt. 96: in New Hampshire, Morse *v.* Shattuck, 4 N. H. 229; Pritchard *v.* Brown, id. 397: in Connecticut, Belden *v.* Seymour, 8 Conn. 304: in New York, Shephard *v.* Little, 14 Johns. 210; Bowen *v.* Bell, 20 id. 338; Whitbeck *v.* Whitbeck, 9 Cowen 266; McCrea *v.* Purmort, 16 Wend. 460: in Pennsylvania, Weigly *v.* Weir,

§ 27. **Same: Estoppel by Statements acted upon.** In addition to estoppels by deed, there are two classes of admissions which fall under this head of conclusive presumptions of law; namely, solemn admissions, or admissions *in judicio*, which have been solemnly made in the course of judicial proceedings, either expressly, and as a substitute for proof of the fact, or tacitly, by pleading; and unsolemn admissions, *extra judicium*, which have been acted upon, or have been made to influence the conduct of others, or to derive some advantage to the party, and which cannot afterwards be denied without a breach of good faith. Of the former class are all agreements of counsel, dispensing with legal proof of facts.[1] So if a material averment, well pleaded, is passed over by the adverse party, without denial, whether it be by confession, or by pleading some other matter, or by demurring in law, it is thereby conclusively admitted.[2] So also the payment of money into court, under a rule for that purpose, in satisfaction of so much of the claim as the party admits to be due, is a conclusive admission of the character in which the plaintiff sues, and of his claim to the amount paid.[3] The latter class comprehends, not only all those declarations, but also that line of conduct by which the party has induced others to act, or has acquired any advantage to himself.[4] Thus, a woman cohabited with, and openly recognized, by a man, as his wife, is conclusively presumed to be such, when he is sued as her husband, for goods furnished to her, or for other civil liabilities growing out of that relation.[5] So where the sheriff returns anything as fact, done in the course of his duty in

7 S. & R. 311; Watson *v.* Blaine, 12 id. 131; Jack *v.* Dougherty, 3 Watts 151: in Maryland, Higdon *v.* Thomas, 1 Har. & Gill, 139; Lingan *v.* Henderson, 1 Bland Ch. 236, 249: in Virginia, Duval *v.* Bibb, 4 Hen. & Munf. 113; Harvey *v.* Alexander, 1 Rand. 219: in South Carolina, Curry *v.* Lyles, 2 Hill 404; Garrett *v.* Stuart, 1 McCord 514: in Alabama, Mead *v.* Steger, 5 Port. 498, 507: in Tennessee, Jones *v.* Ward, 10 Yerg. 160, 166: in Kentucky, Hutchison *v.* Sinclair, 7 Monroe 291, 293; Gully *v.* Grubbs, 1 J. J. Marsh. 389. The Courts in North Carolina seem still to hold the recital of payment as conclusive: Brocket *v.* Foscue, 1 Hawks 64; Spiers *v.* Clay, 4 id. 22; Jones *v.* Sasser, 1 Dev. & Batt. 452. And in Louisiana, it is made so by legislative enactment: Civil Code of Louisiana, art. 2234; Forest *v.* Shores, 11 La. 416; see also Steele *v.* Worthington, 2 Ohio 350; {Carpenter *v.* Buller, 8 M. & W. 212; Cruise's Dig. (Greenl. 2d ed.) tit. 32, c. 2, § 38, n.; c. 20, § 52, n. (Greenl. 2d ed. vol. ii, pp. 322, 607). But the recital is not even *prima facie* evidence of payment when the deed is attacked as fraudulent by creditors of the grantor: Bolton *v.* Jacks, 6 Robt. N. Y. 166; Whittaker *v.* Garnett, 3 Bush 402; see Blanchard *v.* Ellis, 1 Gray 195; [and *post*, § 190.] And the grantor's privies in estate are also estopped, though the grantor had no title when he conveyed: White *v.* Patten, 24 Pick. 324. But such a covenant does not estop the grantor from claiming a way of necessity over the land granted: Brigham *v.* Smith, 4 Gray 297.

[1] See *infra*, §§ 169, 170, 186, 204, 205; Kohn *v.* Marsh, 3 Rob. La. 48.

[2] Young *v.* Wright, 1 Camp. 139; Wilson *v.* Turner, 1 Taunt. 398. But if a deed is admitted in pleading, there must still be proof of its identity: Johnston *v.* Cottingham, 1 Armst. Macartn. & Ogle 11.

[3] Cox *v.* Parry, 1 T. R. 464; Watkins *v.* Towers, 2 T. R. 275; Griffiths *v.* Williams, 1 T. R. 710. See *infra*, § 205, Vol. II, § 600.

[4] See *infra*, §§ 184, 195, 196, 207, 208.

[5] Watson *v.* Threlkeld, 2 Esp. 637; Monro *v.* De Chemant, 4 Campb. 215; Robinson *v.* Mahon, 1 Campb. 245; *post*, § 207.

the service of a precept, it is conclusively presumed to be true against him.[6] And if one party refers the other to a third person for information concerning a matter of mutual interest in controversy between them, the answer given is conclusively taken as true, against the party referring.[7] This subject will hereafter be more fully considered, under its appropriate title.[8]

§ 28. **Incapacity; Legitimacy; Husband's Coercion.** Conclusive presumptions of law are also made in respect to infants and married women. Thus, an infant under the age of seven years is conclusively presumed to be incapable of committing any felony, for want of discretion;[1] and, under fourteen, a male infant is presumed incapable of committing a rape.[2] A female under the age of ten years is presumed incapable of consenting to sexual intercourse.[3] Where the husband and wife cohabited together, as such, and no impotency is proved, the issue is conclusively presumed to be legitimate, though the wife is proved to have been at the same time guilty of infidelity.[4]

[6] Simmons *v.* Bradford, 15 Mass. 82; [see note to § 15, *ante*.]

[7] Lloyd *v.* Willan, 1 Esp. 178; Delesline *v.* Greenland, 1 Bay 458; Williams *v.* Innes, 1 Camp. 364; Burt *v.* Palmer, 5 Esp. 145.

[8] See *infra*, §§ 204–212.

[1] 4 Bl. Comm. 23; [see *post*, Vol. III, § 4.]

[2] 1 Hale P. C. 630; 1 Russell on Crimes, 801, 5th Eng. ed. 859; R. *v.* Philips, 8 C. & P. 736; R. *v.* Jordan, 9 C. & P. 118; {see *post*, Vol. III, §§ 4, 215.}

[3] 1 Russell on Crimes, 810, 5th Eng. ed. 871; [this age has been increased in many jurisdictions.

There is, in the law of real property, a rule by which for the purpose of dealing with estates of remainder, etc., a woman past some limit of age is regarded as *incapable of bearing children;* it is often spoken of as a conclusive presumption; but no fixed age is taken as the standard: see instances in Groves *v.* Groves, 9 L. T. R. N. S. 533; *Re* Widdows' Trusts, L. R. 11 Eq. 408; *Re* Millner's Estate, L. R. 14 Eq. 245; Maden *v.* Taylor, 45 L. J. Ch. 569; *Re* Taylor's Trustees, 21 L. T. R. N. S. 795; Davidson *v.* Kimpton, L. R. 18 Ch. D. 213; and a full citation of cases in a note to Apgar's Estate, 37 N. J. Eq. 502.]

[4] Cope *v.* Cope, 1 Moo. & Rob. 269, 276; Morris *v.* Davies, 3 C. & P. 215; St. George *v.* St. Margaret, 1 Salk. 123; Banbury Peerage Case, 2 Selw. N. P. (by Wheaton) 558; s. c. 1 Sim. & Stu. 153; R. *v.* Luffe, 8 East 193; *post*, Vol. III, §§ 150, 151. [But it is now fully understood that this presumption is not a conclusive one, and that the ordinary presumption may be rebutted by showing "non-access or non-generating access by means of such legal evidence as is admissible in every other case in which a legal fact has to be proved;" see the English authorities fully examined, and the history of the rule traced from the old conclusive presumption (applied except where the husband had been beyond the four seas), in the painstaking work of Nicolas on Adulterine Bastardy; also a large collection of cases in Hubback on Succession, Pt. II, ch. 5; and see the following more modern cases: {Morris *v.* Davies, 5 Cl. & F. 163, 251; R. *v.* Mansfield, 1 G. & Dav. 7; R. *v.* Maidstone, 12 East 550; Barony of Saye & Sele, 1 H. L. C. 507; Gardner *v.* Gardner, L. R. 2 App. Cas. 723; Hawes *v.* Draeger, L. R. 23 Ch. D. 173; Legge *v.* Edmonds, 25 L. J. Eq. 125, 135; R. *v.* Mansfield, 1 Q. B. 444; Rideout's Trusts, L. R. 10 Eq. 41; Phillips *v.* Allen, 2 Allen 453; Sullivan *v.* Kelly, 3 id. 148; Pittsford *v.* Chittendon, 58 Vt. 51; State *v.* Pettaway, 3 Hawks 623; Com. *v.* Shepherd, 6 Binn. 283; Tate *v.* Penne, 7 Mart. La. N. S. 548; Cross *v.* Cross, 3 Paige, 139; Com. *v.* Wentz, 1 Ashm. 269; Vaughn *v.* Rhodes, 2 McCord, 227; Canjolle *v.* Ferrié, 26 Barb. 177; Strode *v.* Magowan, 2 Bush 621; Van Aernam *v.* Van Aernam, 1 Barb. Ch. 375; Herring *v.* Goodson, 43 Miss. 392; Dean *v.* State, 29 Ind. 483; Patterson *v.* Gaines, 6 How. 550;} Bullock *v.* Knox, 96 Ala. 195; Rabeke *v.* Baer, Mich., 73 N. W. 242; Randolph *v.* Easton, 23 Pick. 242; Matthews' Estate, 153 N. Y. 443; for the peculiar rule of the Louisiana

And if a wife act in company with her husband in the commission of a felony, other than treason or homicide, it is conclusively presumed that she acted under his coercion, and consequently without any guilty intent.[5]

§ 29. **Survivorship.** Where the succession to estates is concerned, the question, which of two persons is to be presumed the survivor, where both perished in the same calamity, but the circumstances of their deaths are unknown, has been considered in the Roman law, and in several other codes; but in the common law, no rule on the subject has been laid down. By the Roman law, if it were the case of a father and son, perishing together in the same shipwreck or battle, and the son was under the age of puberty, it was presumed that he died first, but if above that age, that he was the survivor; upon the principle, that in the former case the elder is generally the more robust, and, in the latter, the younger.[1] The French Code has regard to the ages of fifteen and sixty; presuming that of those under the former age the eldest survived; and that of those above the latter age the youngest survived. If the parties were between those ages, but of different sexes, the male is presumed to have survived; if they were of the same sex, the presumption is in favor of the survivorship of the younger, as

Code, see McNeely *v.* McNeely, 47 La. An. 1321. For the exclusion of the testimony of husband and wife on this point, see *post*, § 254 *b*.]

[5] 4 Bl. Comm. 28, 29; Anon., 2 East P. C. 559. {But this presumption also is no longer regarded as conclusive; it is no more than an ordinary presumption of law. At present the rule as established by the cases seems to be that when it is shown that a crime has been committed by a married woman in the presence of her husband, if it is not shown that she took a willing and active part in the crime, or was the inciter of it, a presumption of law exists that she was under his coercion; but if evidence tending to show willing participation is put in, the question is for the jury upon the whole evidence, whether the woman took such a part in the crime as to show that she was exercising her own free will, and was not acting under compulsion by her husband: R. *v.* John, 13 Cox Cr. C. 100; R. *v.* Torpey, 12 id. 45; R. *v.* Cohen, 11 id. 99; Goldstein *v.* People, 82 N. Y. 231; U. S. *v.* De Quilfeldt, 2 Crim. L. Mag. 211; Seiler *v.* People, 77 N. Y. 411; R. *v.* Hughes, 2 Lewin C. C. 229; R. *v.* Pollard, 8 C. & P. 553; R. *v.* Stapleton, 1 Jeff. C. C. 93; Com. *v.* Burk, 11 Gray 437; Com. *v.* Eagan, 103 Mass. 71; Com. *v.* Butler, 1 Allen, 4; Com. *v.* Hopkins, 133 Mass. 381; Com. *v.* Gormley, ib. 580; Com. *v.* Conrad, 28 Leg. Int. 310; Com. *v.* Lindsey, 2 Leg. Chron. 232.

The presence of the husband may be constructive as well as actual; if the woman is so near him as to be under his immediate influence and control, the presumption arises though he may be in another room: Com. *v.* Burk, *supra;* Com. *v.* Munsey, 112 Mass. 287; Com. *v.* Flaherty, 140 id. 454. The presumption of coercion extends also to *torts committed by the wife;* the presence of the husband when the tort was committed raises a presumption that it was done by his direction, but this presumption is not conclusive: Franklin's Adminis. Appeal, 115 Pa. St. 538; Cassin *v.* Delaney, 38 N. Y. 178. This presumption is also of force against the husband, as well as in favor of the wife; for instance, in the case where a man was indicted for keeping and maintaining a common nuisance, to wit, a house of ill-fame, it was held that the evidence of acts done by his wife in his immediate presence were presumed to be done by his direction: Com. *v.* Hill, 145 Mass. 305.}

[1] Dig. lib. 34, tit. 5; De rebus dubiis, l. 9, §§ 1, 3; id. l. 16, 22, 23; Menochius de Presumpt. lib. 1, Quæst. x. n. 8, &c. This rule, however, was subject to some exceptions for the benefit of mothers, patrons, and beneficiaries.

opening the succession in the order of nature.[2] The same rules were in force in the territory of Orleans at the time of its cession to the United States, and have since been incorporated into the Code of Louisiana.[3]

§ 30. This question first arose, in common-law courts, upon a motion for a *mandamus*, in the case of General Stanwix, who perished, together with his second wife, and his daughter by a former marriage, on the passage from Dublin to England; the vessel in which they sailed having never been heard from. Hereupon his nephew applied for letters of administration, as next of kin; which was resisted by the maternal uncle of the daughter, who claimed the effects upon the presumption of the Roman law, that she was the survivor. But this point was not decided, the Court decreeing for the nephew upon another ground; namely, that the question could properly be raised only upon the statute of distributions, and not upon an application for administration by one clearly entitled to administer by consanguinity.[1] The point was afterwards raised in chancery, where the case was, that the father had bequeathed legacies to such of his children as should be living at the time of his death; and he having perished, together with one of the legatees, by the foundering of a vessel on a voyage from India to England, the question was, whether the legacy was lapsed by the death of the son in the lifetime of the father. The Master of the Rolls refused to decide the question by presumption, and directed an issue to try the fact by a jury.[2] But the Prerogative Court adopts the presumption that both perished together, and that therefore neither could transmit rights to the other.[3] In the absence of all evidence of the particular circumstances of the calamity, probably this rule will be found the safest and most convenient;[4] but if any circumstances

[2] Code Civil, §§ 720, 721, 722; Duranton, Cours de Droit Français, tom. vi. pp. 39, 42, 43, 48, 67, 69; Rogron, Code Civil Expli. 411, 412; Toullier, Droit Civil Français, tom. iv. pp. 70, 72, 73. By the Mahometan law of India, when relatives thus perish together, "it is to be presumed that they all died at the same moment, and the property of each shall pass to his living heirs, without any portion of it vesting in his companions in misfortune:" see Baillie's Moohummudan Law of Inheritance, 172. Such also was the rule of the ancient Danish law: "Filius in communione cum patre et matre denatus, pro non nato habetur:" Ancher, Lex Cimbrica, lib. 1, c. 9, p. 21.

[3] Civil Code of Louisiana, art. 930–933; Digest of the Civil Laws of the Territory of Orleans, arts. 60–63.

[1] Reg. *v.* Dr. Hay, 1 W. Bl. 640; the matter was afterwards compromised, upon the recommendation of Lord Mansfield, who said he knew of no legal principle on which he could decide it: see 2 Phillim. 268, in note; Fearne's Posth. Works, 38.

[2] Mason *v.* Mason, 1 Meriv. 308.

[3] Wright *v.* Netherwood, 2 Salk. 593, n. (*a*) by Evans; more fully reported under the name of Wright *v.* Sarmuda, 2 Phillim. 266–277, n. (*c*); Taylor *v.* Diplock, 2 Phillim. 261, 277, 280; Selwyn's Case, 3 Hagg. Eccl. 748; In the Goods of Murray, 1 Curt. 596; Satterthwaite *v.* Powell, 1 Curt. 705. See also 2 Kent's Comm. 435, 436 (4th ed.), n. (*b*); Colvin *v.* H. M. Procurator-Gen., 1 Hagg. Eccl. 92; Moehring *v.* Mitchell, 1 Barb. Ch. 264; Sillick *v.* Booth, 1 Y. & C. New Cas. 117; Burge, Comm. on Colonial and Foreign Laws, IV, 11–29.

[4] It was so held in Coye *v.* Leach, 8 Metc. 371; and see Moehring *v.* Mitchill, 1 Barb. Ch. 264.

of the death of either party can be proved, there can be no inconvenience in submitting the question to a jury, to whose province it peculiarly belongs.[5]

§ 31. **International Law.** Conclusive presumptions of law are not unknown to the law of nations. Thus, if a neutral vessel be found carrying despatches of the enemy between different parts of the enemy's dominions, their effect is presumed to be hostile.[1] The spoliation of papers, by the captured party, has been regarded, in all the States of Continental Europe, as conclusive proof of guilt; but, in England and America, it is open to explanation, unless the cause labors under heavy suspicions, or there is a vehement presumption of bad faith or gross prevarication.[2]

§ 32. **Principle of Conclusive Presumptions.** In these cases of conclusive presumption, the rule of law merely attaches itself to the circumstances, when proved; it is not deduced from them. It is not a rule of inference from testimony;[1] but a rule of protection, as expedient, and for the general good. It does not, for example, assume that all landlords have good titles; but that it will be a public and general inconvenience to suffer tenants to dispute them. Neither does it assume that all averments and recitals in deeds and records are true; but that it will be mischievous, if parties are permitted to deny them. It does not assume that all simple contract debts, of six years' standing, are paid, nor that every man, quietly occupying land twenty years as his own, has a valid title by grant; but it deems it expedient that claims opposed by such evidence as the lapse of those periods affords, should not be countenanced,

[5] {This also is not to be regarded, and apparently never was, as a conclusive presumption. The rule as now established by the English and American cases is, that where it is proved that two or more persons perished in the same calamity, there is no presumption of law that one survived the others, or that all perished at the same time; the burden of proving that one survived the others, or that all perished simultaneously, is on the person who asserts such to be the fact. If death by the same calamity is all that is proved, the person who asserts the survivorship must fail; but it seems if there is evidence arising from the age, sex, or physical condition of the persons who perished, from which a reasonable inference of survivorship may be drawn, such inferential proof may suffice; in any case if there is evidence arising from the nature of the accident, and the manner of death of the parties, which tends to show that some one did in fact survive the others, the whole question is one of fact, to be decided in each case by the jury before whom the cause is brought: Underwood *v.* Wing, 19 Beav. 459; 4 De G. M. & G. 633; Wing *v.* Angrave, 8 H. L. Cas. 183; Wollaston *v.* Berkeley, L. R. 2 Ch. Div. 213; *Re* Phené's Trusts, L. R. 5 Ch. 139; *Re* Murray, 1 Curt. 596; Taylor *v.* Diplock, 2 Phil. Ecc. R. 261; Smith *v.* Croom, 7 Fla. 81; Newell *v.* Nichols, 12 Hun, 604; s. c. 75 N. Y. 78; Pell *v.* Ball, 1 Chev. Eq. 99; Robinson *v.* Gallier, 2 Wood C. C. 178; Stinde *v.* Ridgway, 55 How. Pract. 301; Stinde *v.* Goodrich, 3 Redf. Surr. 87; Matter of Ridgway, 4 id. 226; Kansas, etc. R. R. Co. *v.* Miller, 2 Col. Terr. 442; Fuller *v.* Linzee, 135 Mass. 468; Abram *v.* Ehle, 73 Wis. 445; Johnson *v.* Merithew, 80 Me. 116;} [Schaub *v.* Griffin, 84 Md. 557; *Re* Wilbor, R. I., 37 Atl. 634.]

[1] The Atalanta, 6 Rob. Adm. 440.

[2] The Pizarro, 2 Wheat. 227, 241, 242, n. (*e*); The Hunter, 1 Dods. Adm. 480, 486; [see *post*, §§ 37, 195 *a*.]

[1] [See *ante*, § 15, note.]

and that society is more benefited by a refusal to entertain such claims, than by suffering them to be made good by proof. In fine, it does not assume the impossibility of things which are possible; on the contrary, it is founded, not only on the possibility of their existence, but on their occasional occurrence; and it is against the mischiefs of their occurrence that it interposes its protecting prohibition.[2]

§ 33. **Disputable Presumptions; In general.** The second class of presumptions of law, answering to the *presumptiones juris* of the Roman law, which may always be overcome by opposing proof,[1] consists of those termed disputable presumptions. These, as well as the former, are the result of the general experience of a connection between certain facts, or things, the one being usually found to be the companion or the effect of the other. The connection, however, in this class, is not so intimate, nor so nearly universal, as to render it expedient that it should be absolutely and imperatively presumed to exist in every case, all evidence to the contrary being rejected; but yet it is so general, and so nearly universal, that the law itself, without the aid of a jury, infers the one fact from the proved existence, of the other, in the absence of all opposing evidence. In this mode, the law defines the nature and amount of the evidence which it deems sufficient to establish a *prima facie* case, and to throw the burden of proof on the other party; and, if no opposing evidence is offered, the jury are bound to find in favor of the presumption. A contrary verdict would be liable to be set aside, as being against evidence.[2]

§ 34. **Innocence; Ownership; Stolen Goods; etc.** The rules in this class of presumption, as in the former, have been adopted by common consent, from motives of public policy, and for the promotion of the general good; yet not, as in the former class, forbidding all further evidence; but only excusing or dispensing with it, till some proof is given on the other side to rebut the presumption thus raised. Thus, as men do not generally violate the penal code, the law presumes every man innocent; but some men do transgress it, and therefore evidence is received to repel this presumption. This legal presumption of innocence is to be regarded by the jury, in every case, as matter of evidence, to the benefit of which the party is entitled.[1] And where a criminal charge is to be

[2] See 6 Law Mag. 348, 355, 356.

[1] Heinnec. ad Pand. pars iv, § 124; [see the explanations *ante*, §§ 14 *w*, 14 *y*.]

[2] {See Crane *v.* Morris, 6 Pet. 598; Com. *v.* Hogan, 113 Mass. 7; U. S. *v.* Wiggins, 14 Pet. 334.}

[1] {See instances in Edwards *v.* State, 21 Ark. 512; Case *v.* Case, 17 Cal. 598; Goggans *v.* Monroe, 31 Ga. 331; McEwen *v.* Portland, 1 Oreg. 300; Harrington *v.* State, 19 Ohio 264;} [People *v.* O'Brien, 106 Cal. 104; Bryant *v.* State, Ala., 23 So. 40. This phrase, that "the presumption of innocence is to be regarded by the jury in every case, as matter of evidence" (for which no authority is cited), is an unfortunate one, and has served to create some misunderstanding and confusion. The "presump-

proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion.[2] On the other hand, as men seldom do unlawful acts with innocent intentions, the law presumes every act, in itself unlawful, to have been criminally intended, until the contrary appears; thus, on a charge of murder, malice is presumed from the fact of killing, unaccompanied with circumstances of extenuation; and the burden of disproving the malice is thrown upon the accused.[3]

tion of innocence" is in truth merely another form of expression for a part of the accepted rule for the burden of proof in criminal cases, *i. e.* the rule that it is for the prosecution (1) to adduce evidence, and (2) to produce persuasion beyond a reasonable doubt. As to this latter part, the measure of persuasion, the "presumption" says nothing. As to the former part, the "presumption" implies what the other rule says, viz., that the accused (like every other person on whom the burden of proof does not lie) may remain inactive and secure until the prosecution has taken up its burden and produced evidence and effected persuasion; *i. e.*, to say in this case, as in any other, that the opponent of a claim or charge is presumed not to be guilty is to say in another form that the proponent of the claim or charge must prove it. But in a criminal case the term does convey a special hint over and above the other form of the rule about the burden of proof, in that it cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced. In other words, the rule about burden of proof requires the prosecution by evidence to convince the jury of the accused's guilt; while the presumption of innocence, too, requires this, but conveys for the jury a special and additional caution (which is perhaps only an implied corollary to the other) to consider, in the material for their belief, *nothing but the evidence, i. e.*, no surmises based on the present situation of the accused, — a caution particularly needed in criminal cases. So far, then, as the "presumption of innocence" adds anything, it is a warning not to treat certain things improperly as evidence. It cannot be said to be itself a piece of evidence, — "matter of evidence," as the author above terms it. No presumption can be evidence. It is a rule about evidence (*ante*, § 15). This is, in itself, merely a matter of the theory of presumptions, and to that extent may be regarded as a mere question of words, of the way of phrasing a rule upon the substance of which there is no dispute. But when this erroneous theory is made the reason for ordering new trials because of the mere wording of a judge's instruction to a jury, the erroneous theory is capable of causing serious harm to the administration of justice. A glaring instance of this fault is to be found in the decision of Coffin *v.* U. S., 156 U. S. 432, where the opinion of the Court, by Mr. J. White, proceeding upon the above phrase of the author as a leading authority, declares this "presumption" to be "evidence in favor of the accused." This ruling received apparent sanction in the later case of Allen *v.* U. S., 164 id. 492; and was cited, though left unapproved, in Bartley *v.* State, Nebr., 75 N. W. 832. But in Agnew *v.* U. S., 165 U. S. 36, the particularly objectionable sentence declaring that "legal presumptions are treated as evidence" is referred to as "having a tendency to mislead;" in this case the trial Court had refused to give an offered instruction copying that sentence, and the refusal was held proper; so that the Agnew decision may perhaps be taken as a recantation to this extent of the unfortunate heresy put forward in the Coffin case. (In People *v.* Ostrander, 110 Mich. 60, the view of the Coffin case was in effect repudiated.) It is to be observed that the opinion in the Agnew case (in 1897) was published subsequently to a notable lecture on the Presumption of Innocence, apropos of the Coffin case, delivered by Professor Thayer at the Yale University Law School (in 1896), in which the history of the presumption was carefully examined, its meaning acutely expounded, and the fallacies of the opinion in the Coffin case exposed in detail. For a fuller exposition of the whole subject, see the relevant portions of this lecture, now printed as an Appendix to his "Preliminary Treatise on Evidence," p. 551.]

[2] Hodge's Case, 2 Lewin Cr. Cas. 227, per Alderson, B.; [see *post*, § 81 *c*.]

[3] Foster's Crown Law, 255; Rex *v.* Farrington, Russ. & Ry. 207. This point was re-examined and discussed, with great ability and research, in York's Case, 9 Metc. 93,

The same presumption arises in civil actions, where the act complained of was unlawful. So, also, as men generally own the personal property they possess, proof of possession is presumptive proof of ownership.[4] But possession of the fruits of crime recently after its commission, is *prima facie* evidence of guilty possession; and, if unexplained either by direct evidence, or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, it is taken as conclusive.[5] This rule of presumption is

in which a majority of the learned judges affirmed the rule as stated in the text: [see *ante*, § 18.]

[4] {Armory *v.* Delamirie, 1 Stra. 505; Magee *v.* Scott, 9 Cush. 150; Fish *v.* Skut, 21 Barb. 333; Millay *v.* Butts, 35 Me. 139; Linscott *v.* Trask, id. 150; Vining *v.* Baker, 53 id. 544; Succession of Alexander, 18 La. Ann. 337; Stoddard *v.* Burton, 41 Iowa 582; Wilber *v.* Sisson, 53 id. 262; Andrews *v.* Beck, 23 Tex. 455;} [People *v.* Oldham, 111 Cal. 648; Sullivan *v.* Goldman, 19 La. An. 12; Com. *v.* Blanchette, 157 Mass. 486.] {This presumption of ownership from possession arises only when the character of the possession is wholly unexplained, *i. e.* when the possession and nothing more appears; if the evidence of possession is shown to be equally consistent with an outstanding ownership in a third person, as with a title in the one having the possession, the presumption is rebutted: Rawley *v.* Brown, 71 N. Y. 85; New York, etc. R. R. Co. *v.* Haws, 56 id. 175. So, in general, possession by a broker, factor, or agent of property such as he is in the habit of having in his possession in the regular course of his business, does not raise the presumption of ownership: Succession of Boisbanc, 32 La. Ann. 109.} [For the presumption as applied to title to *negotiable instruments*, see Cobleskill N. B'k *v.* Emmitt, 52 Kan. 603; Jones *v.* Jones, Ky., 43 S. W. 412; Saunders *v.* Bates, Nebr., 74 N. W. 578; Halsted *v.* Colvin, 51 N. J. Eq. 387, 398. For the presumption as applied to *real property*, see {Smith *v.* Lorillard, 10 Johns. 338; Jackson *v.* Denn, 5 Cow. 200;} Hewes *v.* Glos, 170 Ill. 436; Teass *v.* St. Albans, 38 W. Va. 1, 22. For the presumption as applied to *possession by a wife or husband*, see {Kingsbury *v.* Davidson, 122 Pa. 383;} Farwell *v.* Cramer, 38 Nebr. 61.]

[5] [By "conclusive" is meant merely that, like other presumptions, it requires that the fact presumed be taken as true if no evidence to the contrary is offered; if such evidence is offered, then the presumption as such ceases and all the evidence goes to the jury with no rule of presumption to bind them, the fact on which the presumption is based being then merely evidence along with the other facts (*ante*, § 14 *w*). The controversy referred to in the cases below is whether the possession of goods recently stolen creates a presumption requiring the jury to find guilt in case no evidence explaining honest possession, or the like, is offered; or whether no presumption (*i. e.* rule of law) is created but the fact is to be regarded merely as strong evidence. The controversy is partly due to the common phrasing that "recent possession, if unexplained," creates the presumption; this should mean that recent possession alone creates the presumption, and that if no evidence at all is offered by the accused the verdict should find him guilty. In this sense, there probably was no such presumption in English practice (see the cases cited below). But there was apparently an attempt to say (on the principle described in § 14 *w*, *ante*) whether certain facts should be sufficient to justify the jury in convicting, and the chief doubt was as to what kind of possession (how recent, etc.) should be sufficient to put the accused to an explanation, *i. e.* to justify the jury in finding him guilty if he made no explanation; hence, apparently, the true significance of the clause "if unexplained," *i. e.* "he is called upon to account for having it, and if he fails to do so, the jury may very well infer" his guilt (R. *v.* Langmead, *infra*, per Blackburn, J.).

The precise significance of whatever rule exists is obscured, in recent times, by much reference to "presumptions of law" and "presumptions of fact," with no careful definition or general agreement of the meaning of the terms used; and the controversy often becomes a mere matter of verbal quibbling. In general, it may be said, the Courts decline to recognize that there is any presumption at all in the sense (*ante*, §§ 14 *w*, 14 *y*) of a rule of law requiring a verdict of guilty in case no explanation is offered; but the phrasing in the various jurisdictions, and even in the same Court, varies much. For the general question, see the following cases: R. *v.* Cockin, 2 Lew. Cr. C. 235; R. *v.* Partridge, 7 C. & P. 551; R. *v.* Dredge, 1 Cox Cr. 235; R. *v.* Burton;

not confined to the case of theft, but is applied to all cases of crime, even the highest and most penal. Thus, upon an indictment for arson, proof that property, which was in the house at the time it was burnt, was soon afterwards found in the possession of the prisoner, was held to raise a probable presumption that he was present, and concerned in the offence.[6] The like presumption is raised in the case of murder, accompanied by robbery;[7] and in the case of the possession of an unusual quantity of counterfeit money.[8]

§ 35. **Innocence; Life and Death; Conflicting Presumptions.** This presumption of innocence is so strong, that even where the guilt can be established only by proving a negative, that negative must, in most cases, be proved by the party alleging the guilt; though the general rule of law devolves the burden of proof on the party holding the affirmative. Thus, where the plaintiff complained that the defendants, who had chartered his ship, had put on board an article highly inflammable and dangerous, without giving notice of its nature to the master, or others in charge of the ship, whereby the vessel was burnt; he was held bound to prove this negative averment.[1] In some cases, the presumption of innocence has been

Dears. Cr. C. 282; R. *v.* Exall, 4 F. & F. 925 (leading case); R. *v.* Harris, 8 Cox Cr. 333; R. *v.* Langmead, Leigh & C. 427, 9 Cox Cr. 464; R. *v.* Hughes, 14 Cox Cr. 223; Bryant *v.* State, Ala., 23 So. 40; People *v.* Luchetti, 119 Cal. 501; Brooke *v.* People, 23 Colo. 375; {State *v.* Raymond, 46 Conn. 345;} Leslie *v.* State, 35 Fla. 171; Brooks *v.* State, 96 Ga. 353; {Sahlinger *v.* People, 102 Ill. 241;} Keating *v.* People, 160 id. 480; Doan *v.* State, 26 Ind. 495; Pfan *v.* State, 148 id. 539; Campbell *v.* State, id., 49 N. E. 905; Oxier *v.* U. S., Ind. T., 38 S. W. 331; {State *v.* Richart, 57 Ia. 245;} State *v.* Lagrange, 94 id. 60; State *v.* Hoffman, 53 Kan. 700; State *v.* Kelley, 50 La. An., 23 So. 543; Com. *v.* Bell, 102 Mass. 165; {Com. *v.* McGorty, 114 id. 301;} Com. *v.* Randall, 119 id. 107; {Stokes *v.* State, 58 Miss. 677;} Fort *v.* State, 73 Miss. 734; State *v.* Kelly, 73 Mo. 608; State *v.* Wilson, 137 id. 592; State *v.* Dodge, 50 N. H. 510 (leading case); {State *v.* Rights, 82 N. C. 675;} Johnson *v.* Terr., Okl., 50 Pac. 90; State *v.* Pomeroy, 30 Or. 16; People *v.* Hart, 10 Utah 204; Kibler *v.* Com., 94 Va. 804; State *v.* Walters, 7 Wash. 246; {Ingalls *v.* State, 48 Wis. 647.} Incidentally, the question arises how recent the possession must be, *i. e.* how *near to the time* of the stealing; no specific rule can be laid down; see {R. *v.* Harris, *supra;* State *v.* Bennet, 2 Mills' Const. 692; State *v.* Adams, 1 Hayw. 463; State *v.* Rights, *supra;*} State *v.* Foulk, Kan., 52 Pac. 864. The question also arises how far the possession must appear to have been *exclusively* that of the accused; see Moncrief *v.* State, 99 Ga. 295; State *v.* Owsley, 111 Mo. 450; {R. *v.* Hughes, *supra;* M'Queen *v.* Great Western Ry. Co., L. R. 10 Q. B. 569; People *v.* Hurley, 8 Pac. C. L. J. 1134; 3 Crim. L. Mag. 440; Gablick *v.* People, 40 Mich. 292.} For the *history* of the presumption, see Thayer, Preliminary Treatise on Evidence, 328. For the use of such facts merely as circumstantial evidence, see *ante*, § 14 *a*.]

[6] Rickman's Case, 2 East P. C. 1035.

[7] Wills on Circumst. Evid. 72; [see Wilson *v.* U. S., 162 U. S. 613.]

[8] R. *v.* Fuller *et al.*, Russ. & Ry. 308; [State *v.* Hodges, Mo., 45 S. W. 1093. For its application to burglary, arson, and sundry offences, see State *v.* Moore, 117 Mo. 395, 404; Johnson *v.* Terr., Okl., 50 Pac. 90;] {Stuart *v.* People, 42 Mich. 255; State *v.* Bishop, 51 Vt. 287; State *v.* Snell, 46 Wis. 524; Neubrandt *v.* State, 9 N. W. Rep. 824; R. *v.* Hughes, *supra;* People *v.* Mitchell, 55 Cal. 236; Com. *v.* Talbot, 2 Allen 161; People *v.* Ah Sing, 3 Crim. L. Mag. 115.}

[1] William *v.* E. Ind. Co., 3 East 192; Bull. N. P. 298. So, of allegations that a party had not taken the sacrament: R. *v.* Hawkins, 10 East 211; had not complied with the act of uniformity, etc.: Powell *v.* Milburn, 3 Wils. 355, 366; that goods were

deemed sufficiently strong to overthrow the presumption of life. Thus, where a woman, twelve months after her husband was last heard of, married a second husband, by whom she had children; it was held that the Sessions, in a question upon their settlement, rightly presumed that the first husband was dead at the time of the second marriage.[2]

not legally imported: Sissons *v.* Dixon, 5 B. & C. 758; that a theatre was not duly licensed: Rodwell *v.* Redge, 1 C. & P. 220.

[2] R. *v.* Twyning, 2 B. & Ald. 385. But in another case, where, in a question upon the derivative settlement of the second wife, it was proved that a letter had been written from the first wife from Van Diemen's Land, bearing date only twenty-five days prior to the second marriage, it was held that the Sessions did right in presuming that the first wife was living at the time of the second marriage: R. *v.* Harborne, 2 Ad. & El. 540. [On such cases, see *ante*, § 14 *y*, where the notion of "conflicting presumptions" is referred to; and compare the following comments of Professor Thayer on these cases above, in his "Preliminary Treatise," p. 345: "The true analysis of such a case seems rather to be this: We observe that the party seeking to move the Court proved the existing marriage (contracted between five and six years ago) and children born of it. On the other side, the only evidence to prove the invalidity of this marriage was the fact of another one, contracted about seven years ago, and the disappearance of the first husband a few months thereafter (about a year earlier than the second marriage), on occasion of his enlisting and going abroad in the foreign military service; that husband had never been heard of since. These facts might well seem inadequate, in evidential force, to impeach the validity of the existing marriage, and the legitimacy of the children. For one thing, the absence, although not long, was upon a dangerous service. Presumptions are displaced or made inapplicable by such special facts. It was not strange, therefore, in 1835, to find the matter handled in a different way. (King *v.* Harborne, 2 Ad. & El. 540. Compare State *v.* Plym, 43 Minn. 385.) Here the first spouse had been heard from up to twenty-five days before the second marriage as having written to her family at that time, and the Court quashed an order which assumed the validity of the second marriage. Lord Denham, C. J., said: 'I must take this opportunity of saying that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances, such, for instance, as the age or health of the party. . . . The only questions in such cases are, what evidence is admissible and what inference may fairly be drawn from it.' . . . In an English case, in 1881 (R. *v.* Willshire, 6 Q. B. D. 366), the defendant was indicted for bigamy in marrying A in 1880, while his wife B, married by him a year before, in 1879, was living. When these marriages and the present life of B had been proved, the defendant on the other hand showed, by the record, his own previous conviction upon an indictment for bigamy; he had married C in 1868, while his wife D, married four years before, was still living. Thus he introduced into the case facts having a tendency to show that B, like several other women in like condition, was not his wife. And so the case was left. How should these facts be treated? On some theory of conflicting presumptions, and their relative force? Or simply by having regard to the evidential quality of the facts, and to the relative duty of the government and the accused, in establishing and defending the case? By the latter method, the essential inquiry was (1) whether D, the true and undivorced wife, was living when B was married? and (2) supposing that matter to be left in doubt, who loses? . . . The government, of course, had to make out guilt beyond a reasonable doubt; the accused needed only to create such a doubt. Guilt depended on whether D, living on April 22, 1868, when C was married, was alive on Sept. 7, 1879, when B was married. The government, to succeed, must satisfy the jury beyond a reasonable doubt of a proposition which included the fact that D was then dead. The accused, to be discharged, must, at least, create a reasonable doubt whether she was then alive. In fact, the case was disposed of below by holding that, as the evidence lay, 'the burden of proof was on the prisoner;' and he was convicted. But on a question reserved 'whether he was properly convicted,' the conviction was quashed, [the majority holding that there was evidence both ways, which should have been left to the jury.] . . . The case, then, was rightly disposed of; and the notion of conflicting presumptions had no real bearing upon it." For analogous instances involving the presumption of life as affecting the

§ 36. **Libel.** An exception to this rule, respecting the presumption of innocence, is admitted in the case of a libel. For where a libel is sold in a bookseller's shop, by his servant, in the ordinary course of his employment, this is evidence of a guilty publication by the master; though, in general, an authority to commit a breach of the law is not to be presumed. This exception is founded upon public policy, lest irresponsible persons should be put forward, and the principal and real offender should escape. Whether such evidence is conclusive against the master, or not, the books are not perfectly agreed; but it seems conceded, that the want of privity in fact by the master is not sufficient to excuse him; and that the presumption of his guilt is so strong as to fall but little short of conclusive evidence.[1] Proof that the libel was sold in violation of express orders from the master would clearly take the case out of this exception, by showing that it was not sold in the ordinary course of the servant's duty. The same law is applied to the publishers of newspapers.[2]

§ 37. **Spoliation; Fabrication of Evidence.** The presumption of innocence may be overthrown, and a presumption of guilt be raised by the misconduct of the party, in suppressing or destroying evidence which he ought to produce, or to which the other party is entitled.[1] Thus, the spoliation of papers, material to show the neutral character of a vessel, furnishes a strong presumption, *in odium spoliatoris* against the ship's neutrality.[2] A similar presumption is raised against a party who has obtained possession of papers from a witness, after the service of *subpœna duces tecum* upon the latter for their production, which is withheld.[3] The general rule is,

validity of a marriage, see {Quin *v.* State, 46 Ind. 459; Com. *v.* McGrath, 140 Mass. 296; Murray *v.* Murray, 6 Oreg. 17; Spears *v.* Burton, 31 Miss. 547; Lockhart *v.* White, 18 Texas 102; Sharp *v.* Johnson, 22 Ark. 75; Klein *v.* Landman, 29 Mo. 259;} involving presumption of a previous divorce as affecting the validity of a marriage: Hunter *v.* Hunter, 111 Cal. 261; Leach *v.* Hall, 95 Ia. 611; Rash's Estate, Mont., 53 Pac. 312; Schmisseur *v.* Beatrie, 147 Ill. 210; Wenning *v.* Temple, 144 Ind. 189;] {involving the presumption of legitimacy: Dinkins *v* Samuel, 10 Rich. 66; Strode *v.* McGowan, 2 Bush 621; Harrison *v.* South, 21 Eng. L. & Eq. 343; Ward *v.* Dulaney, 23 Miss. 410; Shuman *v.* Hurd, 79 Wis. 654; Shuman *v.* Shuman, 83 id. 250.}

[1] R. *v.* Gutch, 1 M. & M. 433; Harding *v.* Greening, 8 Taunt. 42; R. *v.* Almon, 5 Burr. 2686; R. *v.* Walter, 3 Esp. 21; 1 Russ. on Crimes, 341 (3d ed. p. 251); Ph. & Am. on Evid. 466; 1 Phil. Evid. 446.

[2] 1 Russ. on Crimes, 341; R. *v.* Nutt, Bull. N. P. 6 (3d ed. p. 251); Southwick *v.* Stevens, 10 Johns. 443; {see Cooper *v.* Slade, 6 H. of L. 786; R. *v.* Dixon, 3 M. & S. 11; R. *v.* Medley, 6 C. & P. 292. Analogous to this is the question whether a sale of liquor by an employee raises a presumption of authority; that it does not, but merely furnishes sufficient evidence, see Com. *v.* Briant, 142 Mass. 463; Com. *v.* Stevenson, ib. 466; Com. *v.* Hayes, 145 id. 289.}

[1] [In these cases it is seldom that a genuine presumption is enforced; the opponent's act of spoliation, fabrication, or non-production of evidence is treated merely as a significant fact for the jury, going to them as an admission of the thing which the opponent desires to prove. For this use of such evidence, see *post*, §§ 195 *a*, ff., and the authorities there collected.]

[2] The Hunter, 1 Dods. 480; The Pizarro, 2 Wheat. 227; 1 Kent Comm. 157; *supra*, § 31.

[3] Leeds *v.* Cook, 4 Esp. 256; Rector *v.* Rector, 3 Gilm. 105.

omnia præsumuntur contra spoliatorem.[4] His conduct is attributed to his supposed knowledge that the truth would have operated against him. Thus, if some of a series of documents of title are suppressed by the party admitting them to be in his possession, this is evidence that the documents withheld afford inferences unfavorable to the title of that party.[5] Thus, also, where the finder of a lost jewel would not produce it, it was presumed against him that it was of the highest value of its kind.[6] But if the defendant has been guilty of no fraud, or improper conduct, and the only evidence against him is of the delivery to him of the plaintiff's goods, of unknown quality, the presumption is that they were goods of the cheapest quality.[7] The fabrication of evidence, however, does not of itself furnish any presumption of law against the innocence of the party, but is a matter to be dealt with by the jury.[8] Innocent persons, under the influence of terror from the danger of their situation, have been sometimes led to the simulation of exculpatory facts; of which several instances are stated in the books.[9] Neither has the mere non-production of books, upon notice, any other legal effect, than to admit the other party to prove their contents by parol, unless under special circumstances.[10]

§ 38. **Course of Trade; Payment; Delivery.** Other presumptions of this class are founded upon the experience of human conduct in the course of trade; men being usually vigilant in guarding their property, and prompt in asserting their rights, and orderly in conducting their affairs, and diligent in claiming and collecting their dues. Thus, where a bill of exchange, or an order for the payment of money or delivery of goods, is found in the hands of the drawee, or a promissory note is in the possession of the maker, a legal pre-

[4] 2 Poth. Obl. (by Evans) 292; Dalston *v.* Coatsworth, 1 P. Wms. 731; Cowper *v.* Earl Cowper, 2 P. Wms. 720, 748–752; R. *v.* Arundel, Hob. 109, explained in 2 P. Wms. 748, 749; D. of Newcastle *v.* Kinderley, 8 Ves. 363, 375; Annesley *v.* E. of Anglesea, 17 How. St. Tr. 1430. See also Sir Samuel Romilly's argument in Lord Melville's Case, 29 How. St. Tr. 1194, 1195; Anon., 1 Ld. Raym. 731; Broom's Legal Maxims, p. 485. In Barker *v.* Ray, 2 Russ. 73, the Lord Chancellor thought that this rule had in some cases been pressed a little too far. See also Harwood *v.* Goodright, Cowp. 87; [Hay *v.* Peterson, Wyo., 45 Pac. 1073; Fox *v.* Mining Co., 108 Cal. 369 (applied to a mode of dealing with ore).]

[5] James *v.* Biou, 2 Sim. & Stu. 600; {see Att'y-Gen'l *v.* Windsor, 24 Beav. 679; Thompson *v.* Thompson, 9 Ind. 323; Jones *v.* Knauss, 31 N. J. Eq. 609; Botts *v.* Wood, 56 Miss. 136; Spring G. I. Co. *v.* Evans, 9 Md. 1; Joannes *v.* Bennett, 5 All. 169.}

[6] Armory *v.* Delamirie, 1 Str. 505; Sutton *v.* Devonport, 27 L. J. C. P. 54.

[7] Clunnes *v.* Pezzey, 1 Campb. 8; {Harris *v.* Rosenberg, 43 Conn. 227; Tea *v.* Gates, 10 Ind. 164; Lawton *v.* Sweeney, 8 Jur. 964.}

[8] {See Winchell *v.* Edwards, 57 Ill. 41; 1 Ph. Ev. (4th Am. ed.) 639; Com. *v.* Webster, 5 Cush. (Mass.) 316; Gardiner *v.* People, 6 Parker C. C. 155; and *post*, Vol. III, § 34. As to alteration of documents, see *post*, § 565, and State *v.* Knapp, 45 N. H. 148.}

[9] See 3 Inst. 104; Wills on Circumst. Evid. 113.

[10] Cooper *v.* Gibbons, 3 Camph. 363. {But see Cross *v.* Bell, 34 N. H. 83; Barber *v.* Lyon, 22 Barb. (N. Y.) 622; Spring Garden Mutual Ins. Co. *v.* Evans, 9 Md. 1;} [and the authorities in § 195 *c*, *post*.]

sumption is raised that he has paid the money due upon it, and delivered the goods ordered.[1] A bank-note will be presumed to have been signed before it was issued, though the signature be torn off.[2] So, if a deed is found in the hands of the grantee, having on its face the evidence of its regular execution, it will be presumed to have been delivered by the grantor.[3] {An instrument is presumed to have been made on the day on which it is dated; and if several documents are dated the same day, it will be presumed that they were made in the order necessary to effect the object for which they were executed, unless some indications of fraud appear.[4]} So a receipt for the last year's or quarter's rent is *prima facie* evidence of the payment of all the rent previously accrued.[5] But the mere delivery of money by one to another, or of a bank check, or the transfer of stock, unexplained, is presumptive evidence of the payment of an antecedent debt, and not of a loan.[6] The same presumption arises upon the payment of an order or draft for money; namely, that it was drawn upon funds of the drawer in the hands of the drawee. But

[1] Gibbon *v.* Featherstonhaugh, 1 Stark. 225; Egg *v.* Barnett, 3 Esp. 196; Garlock *v.* Geortner, 7 Wend. 198; Alvord *v.* Baker, 9 id. 323; Weidner *v.* Schweigart, 9 Serg. & R. 385; Shepherd *v.* Currie, 1 Stark. 454; Brembridge *v.* Osborne, ib. 374. [As to this presumption of payment from possession by the obligor of the instrument of debt after maturity (which is not always enforced by the Courts as a genuine presumption), see Excelsior Mfg. Co. *v.* Owens, 58 Ark. 556; Smith *v.* Gardner, 36 Nebr. 741; Poston *v.* Jones, N. C., 29 S. E. 951; Collins *v.* Lynch, 157 Pa. 246, 256; Seattle F. N. B'k *v.* Harris, 7 Wash. 139; Bates *v.* Cain, Vt., 40 Atl. 36. It is said not to apply where the obligor was in such a situation as to have free access to the obligee's papers: Grimes *v.* Hilliary, 150 Ill. 141, 149; Erhart *v.* Dietrich, 118 Mo. 418, 428.]

[2] Murdock *v.* Union Bank of La., 2 Rob. La. 112; Smith *v.* Smith, 15 N. H. 55. The production, by the plaintiff, of an I O U, signed by the defendant, is *prima facie* evidence that it was given by him to the plaintiff: Curtis *v.* Rickards, 1 M. & G. 46.

[3] Ward *v.* Lewis, 4 Pick. 518; [Campbell *v.* Carruth, 32 Fla. 264; Rohr *v.* Alexander, 57 Kan. 381; *contra*, for a government grant, Bergere *v.* U. S., 168 U. S. 66. The presumption was applied to an insurance policy in Jones *v.* Ins. Co., 168 Mass. 245.]

[4] {New Haven *v.* Mitchell, 15 Conn. 206; Williams *v.* Woods, 16 Md. 220; Anderson *v.* Weston, 6 Bing. N. C. 302; Houliston *v.* Smith, 2 C. & P. 24; Malpas *v.* Clements, 19 L. J. Q. B. 435; Potez *v.* Glossop, 2 Exch. 191; Sinclair *v.* Bagalley, 4 M. & W. 318; Trelawney *v.* Colman, 2 Stark. 193; [Kendrick *v.* Dellinger, 117 N. C. 491.] When any document purporting to be stamped as a deed is properly signed and delivered, it is, in most States, presumed to have been sealed, though no trace of one is left: *Re* Sandilands, L. R. 6 C. P. 411; see *post*, Vol. II, §§ 296, 297.} [But distinguish from this the question whether a seal will be presumed to have existed on the original where it is wanting on the recorded copy or on a certified copy; see, for example, Rensens *v.* Lawson, 91 Va. 226.]

[5] 1 Gilb. Evid. (by Lofft) 309; Brewer *v.* Knapp, 1 Pick. 337; {Hodgdon *v.* Wight, 36 Me. 326.} [That a receipt raises a presumption of payment, see Ramsdell *v.* Clark, 70 Mont. 103; *contra*, Terryberry *v.* Woods, 69 Vt. 94.]

{So, of an unsigned account in the handwriting of the maker, in the hands of the debtor: Nichols *v.* Alsop, 10 Conn. 263. The possession by a party of a receipt from a common carrier raises the presumption of a proper delivery, and of the possessor's assent to its terms: Boorman *v.* Am. Exp. Co., 21 Wis. 152.}

[6] Welch *v.* Seaborn, 1 Stark. 474; Patton *v.* Ash, 7 Serg. & R. 116, 125; Breton *v.* Cope, Peake's Cas. 30; Lloyd *v.* Sandilands, Gow 13, 16; Cary *v.* Gerrish, 4 Esp. 9; Aubert *v.* Walsh, 4 Taunt. 293; Boswell *v.* Smith, 6 C. & P. 60; {Gerding *v.* Walter, 29 Mo. 426.}

in the case of an order for the delivery of goods it is otherwise, they being presumed to have been sold by the drawee to the drawer.[7] Thus, also, where the proprietors of adjoining parcels of land agree upon a line of division, it is presumed to be a recognition of the true original line between their lots.[8]

§ 38 *a*. **Execution of Attested Instruments; Regularity of Official Acts; Appointment to Office.** Of a similar character is the presumption in favor of the due execution of solemn instruments. Thus, if the subscribing witnesses to a will are dead, or if, being present, they are forgetful of all the facts, or of any fact material to its due execution, the law will in such cases supply the defect of proof, by presuming that the requisites of the statute were duly observed.[1] The same principle, in effect, seems to have been applied in the case of deeds.[2] {On the maxim, "*Omnia præsumuntur recte esse acta*," that will be presumed to have been done which ought to have been done, as that a bill in Chancery was sworn to;[3] that a notice printed, posted, and apparently signed by the commander of a military post, was by his order;[4] that a church, long used, was duly consecrated;[5] that a parish certificate, long recognized, was duly executed;[6] and generally when an official act has been done, which can only be lawful and valid, by the doing of certain preliminary acts, it will be presumed that those preliminary acts have also been done.[7] So it will be presumed that the designation of a foreign official is true.[8] But jurisdiction will not be presumed in favor of inferior courts; or those established for special purposes.[9] So it will be presumed that lost instruments had all the requisites to make them valid, as that they were stamped;[10] but not if when last seen they were not stamped.[11]} [A presumption of due appointment to

7 Alvord *v.* Baker, 9 Wend. 323, 324.

8 Sparhawk *v.* Bullard, 1 Met. 95.

1 Burgoyne *v.* Showler, 1 Roberts, Eccl. 10; *In re* Leach, 12 Jur. 381.

2 Burling *v.* Paterson, 9 C. & P. 570; Dewey *v.* Dewey, 1 Met. 349; Quimby *v.* Buzzell, 4 Shepl. 470; New Haven Co. Bank *v.* Mitchell, 15 Conn. 206; [see more fully, *post*, § 575.] But there is no presumption, in the case of a deed, that the witnesses, being dead, would, if living, testify to the grantor's soundness of mind at the time of delivery: Flanders *v.* Davis, 19 N. H. 139. But one will be presumed to understand the contents of an instrument signed by him, and whether dated or not: Androscoggin Bank *v.* Kimball, 10 Cush. 373.

3 {R. *v.* Benson, 2 Campb. 508.}

4 {Bruce *v.* Nicolopopulo, 11 Ex. 129.}

5 {Rugg *v.* Kingsmill, L. R. 1 Ad. Ec. 343; R. *v.* Mainwaring, 26 L. J. M. C. 10.}

6 {R. *v.* Upton, 10 B. & C. 807; R. *v.* Stainforth, 11 Q. B. 66.}

7 {R. *v.* Whiston, 4 A. & E. 607; R. *v.* Broadhempston, 28 L. J. M. C. 18; Gosset *v.* Howard, 10 Q. B. 411.}

8 {Saltar *v.* Applegate, 3 Zabr. 115.}

9 {R. *v.* All Saints, etc., 7 B. & C. 790; R. *v.* Totness, 11 Q. B. 80.}

10 {Hart *v.* Hart, 1 Hare, 1; R. *v.* Long Buckby, 7 East 45.}

11 {Arbon *v.* Fussell, 9 Jur. N. S. 753.}

[For other instances see Amer. M. Co. *v.* Hill, 92 Ga. 297 (regularity of verdict); State *v.* Lord, 118 Mo. 1 (regularity of indictment); Harkrader *v.* Carroll, 76 Fed. 474 (proceedings of Land Office); Goldie *v.* McDonald, 78 Ill. 605 (service of process); Green *v.* Barker, 47 Nebr. 934 (conveyance by municipal board); Fisher *v.* Kaufman,

office is raised by showing that the person is acting notoriously as such officer. This strictly involves two elements: first, the acting; secondly, the notoriety or openness of such action, or, as sometimes put, the repute of being such officer. But often the first element alone is mentioned as essential.[12] This presumption, however, must be distinguished from the question of substantive law whether for a given purpose the acts of a *de facto* officer are valid.]

§ 39. **Payment from Lapse of Time.** On the same general principle, where a debt due by specialty has been unclaimed, and without recognition, for twenty years, in the absence of any explanatory evidence, it is presumed to have been paid. The jury may infer the fact of payment from the circumstances of the case, within that period; but the presumption of law does not attach till the twenty years are expired.[1] This rule, with its limitation of twenty years, was first introduced into the courts of law by Sir Matthew Hale, and has since been generally recognized, both in the courts of law and of equity.[2] It is applied not only to bonds for the payment of money, but to mortgages, judgments, warrants to confess judgments, decrees, statutes, recognizances, and other matters of record, when not affected by statutes;[3] but with respect to all other claims not under seal nor of record, and not otherwise limited, whether for the payment of money, or the performance of specific duties, the general analogies are followed, as to the application of the lapse of time, which prevail on kindred subjects.[4] But in all these cases, the presumption of payment may be repelled by any evidence of the situation of the parties, or other circumstance tending to satisfy the jury that the debt is still due.[5]

170 Pa. 444 (correctness of official survey); Eyman *v.* People, 6 Ill. 4 (laying out of a highway); Bishop *v.* Cone, 3 N. H. 513 (proceedings of a town meeting). See also *ante*, § 20.]

[12] [See this point noted in Com. *v.* Wright, 158 Mass. 149, 157; the authorities on the general subject are collected in §§ 83, 92, *post;* § 92 being now transferred *post*, as § 563 *g*.]

[1] Oswald *v.* Legh, 1 T. R. 270; Hillary *v.* Waller, 12 Ves. 264; Colsell *v.* Budd, 1 Campb. 27; Boltz *v.* Bullman, 1 Yeates 584; Cottle *v.* Payne, 3 Day 289. In some cases, the presumption of payment has been made by the Court, after eighteen years: R. *v.* Stephens, 1 Burr. 434; Clark *v.* Hopkins, 7 Johns. 556; but these seem to be exceptions to the general rule.

[2] Mathews on Presumpt. Evid. 379; Haworth *v.* Bostock, 4 Y. & C. 1; Grenfell *v.* Girdlestone, 2 Y. & C. 662; [Sellen *v.* Norman, 4 C. & P. 80; Cox *v.* Brower, 114 N. C. 422; Devereux's Estate, 184 Pa. 429; King *v.* King, 90 Va. 177. But it is not always enforced as a genuine presumption. For its application to payments of insurance-dues, see Niblack, Benefit Societies and Accident Insurance, § 155; Bacon, Benefit Societies, § 114.]

[3] [Jarvis *v.* Albro, 67 Me. 310; Fisher *v.* Mayor, 13 N. Y. Sup. Ct. 64.]

[4] [Worth *v.* Gray, 6 Jones (N. C.) Eq. 4; Knight *v.* Macomber, 55 Me. 132.] This presumption of the common law is now made absolute in the case of debts due by specialty, by Stat. 3–4 Wm. IV, c. 42, § 3. See also Stat. 3–4 Wm. IV, c. 27, and 7 Wm. IV.–1 Vic. c. 28; and American statutes.

[5] A more extended consideration of this subject being foreign from the plan of this work, the reader is referred to the treatise of Mr. Mathews on Presumptive Evidence, cc. 19, 20; and to Best on Presumptions, part 1, cc. 2, 3.

§ 40. **Course of Business; Post-office; Telegrams; etc.** Under this head of presumptions from the course of trade may be ranked the presumptions frequently made from the regular course of business in a public office. Thus postmarks on letters are *prima facie* evidence that the letters were in the post-office at the time and place therein specified.[1] If a letter is sent by the post, it is presumed, from the known course in that department of the public service, that it reached its destination at the regular time, and was received by the person to whom it was addressed, if living at the place, and usually receiving letters there.[2] So, where a letter was put into a box in an attorney's office, and the course of business was that a bellman of the post-office invariably called to take the letters from the box; this was held sufficient to presume that it reached its destination.[3] [So the delivery of a telegram may be presumed from the fact that it was handed to the telegraph company correctly addressed.[4]] So the time of clearance of a vessel sailing under a license, was presumed to have been indorsed upon the license, which was lost, upon its being shown that, without such indorsement, the custom-house would not have permitted the goods to be entered.[5] So, on proof that goods which cannot be exported without license were entered at the custom-house for exportation, it will be presumed that there was a license to export them.[6] The return of a sheriff, also, which is conclusively presumed to be true, between the parties to the process, is taken *prima facie* as true, even in his own favor; and the burden of proving it false, in an action against him for a false return, is devolved on the plaintiff, notwithstanding it is a negative allegation.[7] In fine, it is presumed until the contrary

[1] Fletcher *v.* Braddyll, 3 Stark. 64; R. *v.* Johnson, 7 East 65; R. *v.* Watson, 1 Campb. 215; R. *v.* Plumer, Russ. & Ry. 264; New Haven Co. Bank *v.* Mitchell, 15 Conn. 206; [see *ante*, § 14 *s*.]

[2] Saunderson *v.* Judge, 2 H. Bl. 509; Bussard *v.* Levering, 6 Wheat. 102; Lindenberger *v.* Beall, id. 104; Bayley on Bills (by Phillips & Sewall), 275, 276, 277; Walter *v.* Haynes, Ry. & M. 149; Warren *v.* Warren, 1 Cr. M. & R. 250; Russell *v.* Buckley, 4 R. I. 525; {Briggs *v.* Hervey, 130 Mass. 187; Folsom *v.* Cook, 115 Pa. 548; Huntley *v.* Whittier, 105 Mass. 391; First, etc. Bank *v.* McManigle, 66 Pa. 156; Greenfield Bank *v.* Crafts, 4 Allen 447; Rosenthal *v.* Walker, 111 U. S. 185, 193; Austin *v.* Holland, 69 N. Y. 571, 576; Loud *v.* Merrill, 45 Me. 516; Freeman *v.* Morey, id. 50; Hedden *v.* Roberts, 134 Mass. 38; *post*, Vol. II, § 188;} [Young *v.* Clapp, 147 Ill. 176, 190; Goodwin *v.* Ass. Soc., 97 Ia. 226; Chase *v.* Surry, 88 Me. 468; McDowell *v.* Ins. Co., 164 Mass. 444; Dade *v.* Ins. Co., 54 Minn. 336; State *v.* Howell, N. J. L., 38 Atl. 748; Jensen *v.* McCorkell, 154 Pa. 323. As usually phrased, the rule assumes it to be shown that the letter was properly stamped and correctly addressed. But the rule is not always enforced as a genuine presumption.

For the presumption as to the *genuineness* of a letter received in answer through the mail, see *post*, § 575 *c*.]

[3] Skilbeck *v.* Garbett, 9 Jur. 339; s. c. 7 Ad. & El. N. s. 846; {Spencer *v.* Thompson, 6 Ir. C. L. 537; see McGregor *v.* Keily, 3 Ex. 794.}

[4] {Oregon Steamship Co. *v.* Otis, 100 N. Y. 451; Com. *v.* Jeffries, 7 Allen 548; U. S. *v.* Babcock, 3 Dill. C. C. 571;} [Eppinger *v.* Scott, 112 Cal. 369; Perry *v.* Bank, Nebr., 73 N. W. 538; Gray, Telegrams, § 136.]

[5] Butler *v.* Allnut, 1 Stark. 222.

[6] Van Omeron *v.* Dowick, 2 Campb. 44.

[7] Clarke *v.* Lyman, 10 Pick. 47; Boynton *v.* Willard, ib. 169. {In Massachusetts,

is proved, that every man obeys the mandates of the law, and performs all his official and social duties.[8] The like presumption is also drawn from the usual course of men's private offices and business, where the primary evidence of the fact is wanting.[9]

§ 41. **Continuity; Life; Death.** Other presumptions are founded on the experienced continuance or permanency of longer and shorter duration, in human affairs. When, therefore, the existence of a person, a personal relation, or a state of things, is once established by proof, the law presumes that the person, relation, or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised, from the nature of the subject in question, [in this way, continuance of ownership of property[1] may be presumed; of possession of property;[2] of residence;[3] of an agent's authority;[4] and the like.[5]] Where the issue is upon the life or death of a person, once shown to have been living, the burden of proof lies upon the party who asserts the death.[6] But after the

the report of an auditor raises a presumption in favor of the facts found by him: see the practice illustrated in Phillips *v.* Cornell, 133 Mass. 546; Peaslee *v.* Ross, 143 id. 275; Tobin *v.* Jones, ib. 448.}

[8] Ld. Halifax's Case, Bull. N. P. 298; U. S. Bank *v.* Dandridge, 12 Wheat. 69, 70; Williams *v.* E. Ind. Co., 3 East 192; Hartwell *v.* Root, 19 Johns. 345; The Mary Stewart, 2 W. Rob. Adm. 244; {Lea *v.* Polk Co. C. Co., 21 How. 493; Cooper *v.* Granberry, 33 Miss. 117; Curtis *v.* Herrick, 14 Cal. 117; Isbell *v.* R. Co., 25 Conn. 556.} Hence, children born during the separation of husband and wife, by a decree of divorce *a mensa et thoro*, are *prima facie* illegitimate: St. George *v.* St. Margaret, 1 Salk. 123.

[9] Doe *v.* Turford, 3 B. & Ad. 890, 895; Champneys *v.* Peck, 1 Stark. 404; Pritt *v.* Fairclough, 3 Camph. 305; Dana *v.* Kemble, 19 Pick. 112. [For these cases, which seem here to be misused, see *post*, § 120 *a*.]

[1] {Hanson *v.* Chiatovich, 13 Nev. 395; Flanders *v.* Merritt, 3 Barb. 201; Adams *v.* Clark, 8 Jones L. 56; McGee *v.* Scott, 9 Cush. 148;} [Brown *v.* Castellow, 33 Fla. 204; Lind *v.* Lind, 53 Minn. 48; Chapman *v.* Taylor, 136 N. Y. 663.]

[2] [Hollingsworth *v.* Walker, 98 Ala. 543.]

[3] {R. *v.* Tanner, 1 Esp. 304; Kilburn *v.* Bennet, 3 Met. 199; Rixford *v.* Miller, 49 Vt. 319; Prather *v.* Palmer, 4 Ark. 456; Nixon *v.* Palmer, 10 Barb. 175, 178;} [Botna V. S. B'k *v.* Silver C. B'k, 87 Ia. 479; Ripley *v.* Hebron, 60 Me. 379, 393; Price *v.* Price, 156 Pa. 617, 626.]

[4] [Heusel *v.* Maas, 94 Mich. 563.]

[5] {Additional instances are as follows: Relations proved to exist between parties are presumed to continue: Eames *v.* Eames, 41 N. H. 177; Caujolle *v.* Ferrié, 23 N. Y. 90; Smith *v.* Smith, 4 Paige 432; Leport *v.* Todd, 32 N. J. L. 124; Body *v.* Jensen, 33 Wis. 402; Cooper *v.* Dedrick, 22 Barb. 516; a custom to continue (Scales *v.* Key, 11 A. & E. 819); coverture to continue (Erskine *v.* Davis, 25 Ill. 251); a judgment to remain in force (Murphy *v.* Orr, 32 Ill. 489); a state of mind to continue (Blackburn *v.* State, 23 Ohio St. 146). See also Farr *v.* Payne, 40 Vt. 615; Leport *v.* Todd, 32 N. J. L. 124; and *post*, §§ 42, 47, n.}

[It must be understood that a genuine presumption of continuance is seldom found; the rulings usually declare merely that certain facts in the case in hand are sufficient evidence.]

[6] Throgmorton *v.* Walton, 2 Roll. 461; Wilson *v.* Hodges, 2 East 313; Battin *v.* Bigelow, 1 Pet. C. C. 452; Gilleland *v.* Martin, 3 McLean 490; see Lapsley *v.* Grierson, 1 H. L. C. 498. "Vivere etiam usque ad centum annos quilibet præsumitur, nisi probetur mortuus:" Corpus Juris Glossatum, tom. ii, p. 718, n. (q); Mascard. De Prob. vol. i, Concl. 103, n. 5. {Life to the common age of man may be presumed: Stevens *v.* McNamara, 36 Me. 176. And the extreme age of a hundred years will not warrant a conclusive presumption of death: Burney *v.* Ball, 24 Ga. 505; nor infirm

lapse of seven years, without intelligence concerning the person, the presumption of life ceases, and the burden of proof is devolved on the other party; this period was inserted, upon great deliberation, in the statute of bigamy,[7] and the statute concerning leases for lives,[8] and has since been adopted, from analogy, in other cases;[9] it is not necessary that the party be proved to be absent from the United States; it is sufficient, if it appears that he has been absent for seven years from the particular State of his residence, without having been heard from.[10] The presumption in such cases is, that the person is dead; but not that he died at the end of the seven years, nor at any other particular time.[11] The time of the death is to be inferred by the jury from the circumstances.[12] But where the presumption of life conflicts with that of innocence, the latter

health and eighty years: Matter of Hall, 1 Wall. Jr. 85. On the other hand, where a term was for sixty years, the possibility of the term or being alive after the expiration of the term was considered by the Court: Beverley *v.* Beverley, 2 Vern. 131; Doe *v.* Andrews, 15 Q. B. 756; and a deposition, taken sixty years before the trial, was rejected, no search having been made for the deponent, and no reason shown why he was not produced: Benson *v.* Olive, 2 Str. 920. This presumption of the continuance of life is one of fact, depending on the circumstances of the case, and not one of law: Hyde Park *v.* Canton, 130 Mass. 505.} [In other words, it is not possible to say that there is a genuine presumption of any definite sort. The state of the pleadings will show whose duty it is to prove life at a certain time; and upon his showing life at a preceding time, the Court will usually leave it to the jury to say whether he has proved his case, but may sometimes apply a genuine presumption shifting the duty of producing evidence: see Re Phené's Trusts, L. R. 5 Ch. 139.]

[7] 1 Jac. I, c. 11.

[8] 19 Car. II, c. 6.

[9] Doe *v.* Jesson, 6 East 85; Doe *v.* Deakin, 4 B. & Ald. 433; Hopewell *v.* De Pinna, 2 Camp. 113; Watson *v.* England, 14 Sim. 28; Dowley *v.* Winfield, ib. 277; Cuthbert *v.* Purrier, 2 Phill. 199; Loring *v.* Steineman, 1 Metc. 204; Cofer *v.* Thermond, 1 Kelly 538; King *v.* Paddock, 18 Johns. 141; {Flynn *v.* Coffee, 12 All. 133; Smith *v.* Smith, 49 Ala. 156; Prud. Ass. Co. *v.* Edmonds, L. R. 2 App. Cas. 487.} [For the history of the rule, see Thayer, Preliminary Treatise, 319.]

[10] Newman *v.* Jenkins, 10 Pick. 515; Innis *v.* Campbell, 1 Rawle 373; Spurr *v.* Trimble, 1 A. K. Marsh. 278; Wambaugh *v.* Schenck, 2 Penningt. 167; Woods *v.* Woods, 2 Bay 476; {see other instances in Stevens *v.* McNamara, 36 Me. 176; Stinchfield *v.* Emerson, 52 Me. 465; Crawford *v.* Elliott, 1 Houst. 465; McDowell *v.* Simpson, id. 467; Winship *v.* Conner, 42 N. H. 341; Whitney *v.* Nicholl, 46 Ill. 230; Primm *v.* Stewart, 7 Tex. 178; Holmes *v.* Johnson, 42 Pa. 159; Garwood *v.* Hastings, 38 Cal. 217; Keller *v.* Stuck, 4 Redf. 294; Wambaugh *v.* Schenck, 1 Penn. N. J. 229; Newman *v.* Jenkins, 10 Pick. 515; Hyde Park *v.* Canton, 130 Mass. 505;} [Watson *v.* Adams, Ga., 30 S. E. 573; Hitz *v.* Algreen, 170 Ill. 60; Hoyt *v.* Beach, 104 Ia. 257; Bowditch *v.* Jordan, 131 Mass. 321; Claflin *v.* R. Co., 157 id. 489; Manley *v.* Patterson, 73 Miss. 417; Francis *v.* Francis, 180 Pa. 644.]

[11] Doe *v.* Nepean, 5 B. & Ad. 86; Nepean *v.* Knight, 2 M. & W. 894; {*Re* Phené's Trusts, L. R. 5 Ch. 139; *Re* Lewes's Trusts, L. R. 11 Eq. 236, 6 Ch. 356; *Re* Corbishley's Trusts, L. R. 14 Ch. Div. 846; Hickman *v.* Upsall, L. R. 20 Eq. 136; Davie *v.* Briggs, 97 U. S. 628; Johnson *v.* Merithew, 80 Me. 115; Spencer *v.* Roper, 13 Ired. 333; State *v.* Moore, 11 id. 160; McCartee *v.* Camel, 1 Barb. Ch. 455; Hancock *v.* American L. Ins. Co., 62 Mo. 26;} [Schaub *v.* Griffin, 84 Md. 557;] {*contra*, but unsound: Montgomery *v.* Bevans, 1 Sawy. C. C. 653; Packett *v.* State, 1 Sneed 355; Clarke's Executors *v.* Canfield, 2 McCart. 119; Eagle *v.* Emmett, 4 Bradf. 117; Smith *v.* Knowlton, 11 N. H. 191.}

[12] Rust *v.* Baker, 8 Sim. 443; Smith *v.* Knowlton, 11 N. H. 191; Doe *v.* Flanagan, 1 Kelly 543; Burr *v.* Sim, 4 Whart. 150; Bradley *v.* Bradley, ib. 173; [see note 14, *infra*.]

is generally allowed to prevail.[13] Upon an issue of the life or death of a party, as we have seen in the like case of the presumed payment of a debt, the jury may find the fact of death from the lapse of a shorter period than seven years, if other circumstances concur; as, if the party sailed on a voyage which should long since have been accomplished, and the vessel has not been heard from.[14] But the presumption of the common law, independent of the finding of the jury, does not attach to the mere lapse of time, short of seven years,[15] unless letters of administration have been granted on his estate within that period, which, in such case, are conclusive proof of his death.[16]

§ 42. **Continuity; Partnership; Insanity.** On the same ground, a partnership, or other similar relation, once shown to exist, is presumed to continue, until it is proved to have been dissolved.[1] And a seisin, once proved or admitted, is presumed to continue, until a disseisin is proved.[2] The opinions, also, of individuals, once entertained and expressed, and the state of mind, once proved to exist, are presumed to remain unchanged, until the contrary appears. Thus, all the members of a Christian community being presumed to entertain the common faith, no man is supposed to disbelieve the existence and moral government of God, until it is shown from his own declarations. In like manner, every man is presumed to be of sane mind, until the contrary is shown; but, if derangement or imbecility be proved or admitted at any particular period, it is presumed to continue, until disproved, unless the derangement was accidental, being caused by the violence of a disease.[3]

[13] R. *v.* Twyning, 2 B. & Ald. 386; [see the comments *ante*, § 35.]

[14] In the case of a missing ship, bound from Manila to London, on which the underwriters have voluntarily paid the amount insured, the death of those on board was presumed by the Prerogative Court, after an absence of only two years, and administration was granted accordingly; *Re* Hutton, 1 Curt. 595. See also Sillick *v.* Booth, 1 Y. & Col. N. C. 117; [Twemlow *v.* Oswin, 2 Camp. 85; Watson *v.* King, 1 Stark. 121; Houstman *v.* Thornton, Holt N. P. 242; Koster *v.* Reed, 6 B. & C. 19;] {Matter of Ackerman, 2 Redf. 521; Hancock *v.* American L. Ins. Co., 62 Mo. 26; Stouvenal *v.* Stephens, 2 Daly 319; Gibbes *v.* Vincent, 11 Rich. L. 323; Sprigg *v.* Moale, 28 Md. 497; Loring *v.* Steinman, 1 Metc. 204; and cases *supra*; *Re* Main, 1 Sw. & Tr. 11; Johnson *v.* Merithew, 80 Me. 115.} If the person was unmarried when he went abroad and was last heard of, the presumption of his death carries with it the presumption that he died without issue: Rowe *v.* Hasland, 1 W. Bl. 404; Doe *v.* Griffin, 15 East 293; [*contra*, Still *v.* Hutto, 48 S. C. 415.]

[15] Watson *v.* King, 1 Stark. 121; Green *v.* Brown, 2 id. 1199; Park on Ins. 433.

[16] Newman *v.* Jenkins, 10 Pick. 515; {but see Jochumsen *v.* Bank, 3 All. 87; Roderigas *v.* Savings Inst., 63 N. Y. 460.} The production of a will, with proof of payment of a legacy under it, and of an entry in the register of burials, were held sufficient evidence of the party's death: Doe *v.* Penfold, 8 C. & P. 536.

[1] Alderson *v.* Clay, 1 Stark. 405; 2 Stark. Evid. 590, 688; {Eames *v.* Eames, 41 N. H. 177; Clark *v.* Alexander, 8 Scott N. R. 161.}

[2] Brown *v.* King, 5 Metc. 173; [see *ante*, § 41, note 1.]

[3] Attorney-General *v.* Parnther, 3 Bro. Ch. Cas. 443; Peaslee *v.* Robbins, 3 Metc. 164; Hix *v.* Whittemore, 4 id. 545; 1 Collinson on Lunacy, 55; Shelford on Lunatics, 275; 1 Hal. P. C. 30; Swinb. on Wills, Part II, § iii, 6, 7. [For the burden of proof as to insanity, see *post*, §§ 77, 81 *a*; that there is a presumption (frequently en-

§ 43. **Foreign Law.** A spirit of comity and a disposition to friendly intercourse are also presumed to exist among nations, as well as among individuals. And, in the absence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, Courts of justice presume the adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interest,[1] [— for the purpose, that is, of giving legal effect to acts done without the local jurisdiction. But, with reference to ascertaining the terms of the foreign law, it is to be noted that the Court does not know it judicially,[2] and that it must therefore be proved like any *factum probandum*,[3] and that in aid of such proof a presumption may within certain limits be resorted to. (1) If it is the law of a State possessing the English common law as the foundation of its system, in particular, one of the United States, it will be presumed to be the same as that of the forum;[4] but not if it involves the existence of a statutory enactment changing the common law.[5] (2) If the foreign State is not one whose system is founded on the common law the presumption will probably not be made,[6] unless the principle involved is one of the law merchant common to civilized countries.[7]

forced in the genuine sense of the term) that a state of insanity arising from more or less permanent causes may be presumed to continue, see {State *v.* Wilner, 40 Wis. 304; Lilly *v.* Waggoner, 27 Ill. 395; Crouse *v.* Holman, 19 Ind. 30; Cook *v.* Cook, 53 Barb. 180;} [People *v.* Schmitt, Cal., 39 Pac. 204; Armstrong *v.* State, 30 Fla. 170, 204; Taylor *v.* Pegram, 151 Ill. 106, 119; Rodgers *v.* Rodgers, 56 Kan. 483; Lessee *v.* Hoge, 1 Pet. 163. For evidence of insanity, in general, see *ante*, § 14 *l*.]

[1] Bank of Augusta *v.* Earle, 13 Peters 519; Story on Confl. of Laws, §§ 36, 37.

[2] [*Ante*, Chap. II.]

[3] [Whether to the Court or to the jury is the subject of a difference of opinion; see *post*, § 81 *g*.]

[4] {Holmes *v.* Broughton, 10 Wend. 75; Savage *v.* O'Neil, 44 N. Y. 298; Flato *v.* Mulhall, 72 Mo. 522; Hickman *v.* Alpaugh, 21 Cal. 225; Hill *v.* Grigsby, 32 Cal. 55; Atkinson *v.* Atkinson, 15 La. Ann. 491; Cooper *v.* Reaney, 4 Minn. 528; Green *v.* Rugely, 23 Tex. 539; Stokes *v.* Macken, 62 Barb. 145; Com. *v.* Kenney, 120 Mass. 387; Cluff *v.* Mutual B. Ins. Co., 13 Allen 308; Hydrick *v.* Burke, 30 Ark. 124; Cox *v.* Morrow, 14 id. 603; Bundy *v.* Hart, 46 Mo. 463; Reese *v.* Harris, 27 Ala. 301;} [Louisv. & N. R. Co. *v.* Williams, 113 Ala. 402; Pattillo *v.* Alexander, 96 Ga. 60; Goodwin *v.* Ass'n, 97 Ia. 226; Roehl *v.* Porteous, 47 La. An. 1582; Scroggin *v.* McClelland, 37 Nebr. 644; Fitzgerald *v.* F. & M. C. Co., 41 id. 374, 472; E. O. St. R. Co. *v.* Godola, 50 id. 906; Musser *v.* Stauffer, 178 Pa. 99; Morris *v.* Hubbard. S. D., 72 N. W. 894; Tempel *v.* Hunter, 89 Tex. 69; State *v.* Shattuck, 69 Vt. 403.]

[5] {*E. g.* statutes making contracts formed on Sunday void: Murphy *v.* Collins, 121 Mass. 6 (*contra*, Brimhall *v.* Van Campen, 8 Minn. 13); statutes of usury: Cutler *v.* Wright, 22 N. Y. 472; Hall *v.* Augustine, 23 Wis. 383; statutes giving an action for damages resulting from death caused by culpable negligence: McDonald *v.* Mallory, 77 N. Y. 547; Leonard *v.* Columbia, etc. Company, 84 id. 48; see Smith *v.* Whitaker, 23 Ill. 367;} [statute requiring contracts to be in writing: Miller *v.* Wilson, 146 Ill. 523, 531; statutes regulating jurisdiction in divorce proceedings: Kelley *v.* Kelley, 161 Mass. 111. But this limitation is not always observed: see, for example, Cavallaro *v.* R. Co., 110 Cal. 348: Burgess *v.* Tel. Co., Tex., 46 S. W. 794.]

[6] {See Norris *v.* Harris, 15 Cal. 226; Flato *v.* Mulhall, 72 Mo. 522; Du Val *v.* Marshall, 30 Ark. 230; Savage *v.* O'Neil, 44 N. Y. 298;} [Brown *v.* Wright, 58 Ark. 20 (Texas law). But this proviso is not always observed, *e. g.* in Simms *v.* Express Co., 38 Ga. 129, 132 (Louisiana law).]

[7] {Dubois *v.* Mason, 127 Mass. 37; Cribbs *v.* Adams, 13 Gray 597.}

It has been suggested that in reality there is no presumption, and that the true process is merely that of refusing to recognize a presumption that the foreign State has a different law;[8] and no doubt this will sufficiently describe the situation in many cases; but the ordinary mode of stating the question seems correct enough in most instances; the proper phrasing depending upon the state of the burden of proof in the case in hand.]

§ 43 *a.* **Identity of Name; Sundry Presumptions.** [In regard to the supposed presumption of identity of person from identity of name, three things are to be said. (1) "A concordance in name alone is always some evidence of identity, and it is not correct to say with the books that, besides proof of the facts in relation to the persons named, their identity must be shown, implying that the agreement of name goes for nothing; whereas it is always a considerable step towards that conclusion."[1] (2) In the greater number of cases the ruling is merely that identity of name, with or without other evidence, is or is not sufficient evidence to go to the jury or sufficient to support a verdict, on the principle of § 14 *w*, *ante*. The oddness of the name, the size of the district and length of the time within which the persons are shown to have coexisted, and other circumstances, affect this result differently in different cases. (3) Often a genuine presumption is enforced by the Courts, in the sense that the duty of producing evidence to the contrary is thrown upon the opponent. But these rulings cannot be said to attach a presumption to a definite and constant set of facts; they apply the presumption upon the circumstances of the particular case.

It is thus necessary, in ascertaining the state of the law in a given jurisdiction, to examine the facts in each case. There is, moreover, some difference in the strictness with which the evidence of identity is treated for different sorts of documents or persons. There is perhaps a greater strictness shown in dealing with the identity of a person named as the signer of an answer or affidavit in Chancery,[2] or as the object of a conviction of crime,[3] or even as a party to a negotiable instrument;[4] but where an identity of names is found in deeds or the like, in tracing title from ancestors and grantors, the Courts

[8] [Corson, P. J., in Mener *v.* R. Co., S. D., 75 N. W. 823.]

[1] [Hubback on Succession, 444.]

[2] [See Gilbert, Evidence, 51; Anon., 3 Mod. 116; R. *v.* Morris, 2 Burr. 1189; Salter *v.* Turner, 2 Camp. 87; Dartmouth *v.* Roberts, 16 East 334; Hodgkinson *v.* Willis, 3 Camp. 401; Hennell *v.* Lyon, 1 B. & Ald. 185 (standing for a more liberal rule); Studdy *v.* Sanders, 2 Dowl. & R. 347; Garvin *v.* Carroll, 10 Ir. L. R. 323, 330.]

[3] [See R. *v.* Tissington, 1 Cox Cr. 51; R. *v.* Levy, 8 id. 73; People *v.* Rolfe, 61 Cal. 540; Bayha *v.* Munford, 58 Kan. 445; State *v.* McGuire, 87 Mo. 642; Erfert *v.* Lytle, 172 Pa. 356.]

[4] [See Bulkeley *v.* Butler, 2 B. & C. 434; Whitelocke *v.* Musgrave, 1 Cr. & M. 522; Warren *v.* Anderson, 8 Scott 384; Greenshields *v.* Crawford, 9 M. & W. 374; Jones *v.* Jones, 9 M. & W. 75; Sewall *v.* Evans, 4 Q. B. 633; Stebbing *v.* Spicer, 8 C. B. 827; Aultman *v.* Timm, 93 Ind. 158; Cunningham *v.* Bank, 21 Wend. 561; McConeghy *v.* Kirk, 68 Pa. 200.]

are more frequently found enforcing a genuine presumption.[5] Beyond this, no general tendencies seem traceable.[6]

It is usually said that the relation of parent and minor child raises a presumption that services rendered by the latter to the former were intended to be gratuitous;[7] that a voluntary transfer by a father to a child is presumed to have been intended as an advancement;[8] that one obtaining a conveyance from another to whom he stands in a fiduciary position is presumed, under certain circumstances, to have obtained it by undue influence or fraud.[9] These and the preceding instances are merely some of those in most frequent application, and indicate the wide field of conduct and of substantive law within which presumptions are serviceable.]

The instances here given, it is believed, will sufficiently illustrate this head of presumptive evidence. Numerous other examples and cases may be found in the treatises already cited, to which the reader is referred.[10]

[5] See {McMinn *v.* Whelan, 27 Cal. 300;} [Lee *v.* Murphy, 119 Cal. 364; Scott *v.* Hyde, 21 D. C. 531; Brown *v.* Metz, 33 Ill. 339; Graves *v.* Colwell, 90 id. 612; {Ellsworth *v.* Moore, 5 Ia. 486;} Gilman *v.* Sheets, 78 id. 499; Cates *v.* Loftus, 3 A. K. Marsh. 202; {Bennett *v.* Libhart, 27 Mich. 489;} Flournoy *v.* Warden, 17 Mo. 435; Gitt *v.* Watson, 18 id. 274; Rupert *v.* Penner, 35 Nebr. 587; Mooers *v.* Bunker, 29 id. 420, 432; Jackson *v.* Goes, 13 Johns. 518; Jackson *v.* King, 5 Cow. 237; Jackson *v.* Cody, 9 id. 140, 148; Kimball *v.* Davis, 19 Wend. 437; Brown *v.* Kimball, 25 id. 259, 272; Sailor *v.* Hertzogg, 2 Pa. St. 182; Balbec *v.* Donaldson, 2 Pa. 459; Burford *v.* McCue, 53 Pa. 427; Brotherline *v.* Hammond, 69 id. 128; Sitler *v.* Gehr, 105 id. 577, 601; Bogue *v.* Bigelow, 29 Vt. 179; Colchester *v.* Culver, ib. 111; Cross *v.* Martin, 46 id. 14; Pollard *v.* Lively, 4 Gratt. 73; Sweetland *v.* Porter, 43 W. Va. 189.]

[6] [For instances involving the identity of a party to a *marriage*, see Draycott *v.* Talbot, 3 Bro. P. C. 564; Birt *v.* Barlow, 1 Dougl. 175; Hemmings *v.* Smith, 4 id. 33; Wedgwood's Case, 8 Greenl. 75; State *v.* Moore, 61 Mo. 276.

For instances involving the identity of persons named in or signing *sundry kinds of documents*, see Barber *v.* Holmes, 3 Esp. 190; Smith *v.* Fuge, 3 Camp. 456; Middleton *v.* Sandford, 4 id. 34; Hughes *v.* Wilson, 1 Stark. 179; Sayer *v.* Glossop, 2 Exch. 409; R. *v.* Weaver, L. R. 2 C. C. R. 85; Heacock *v.* Lubukee, 108 Ill. 641; Aultman *v.* Timm, 93 Ind. 158; Mode *v.* Beasley, 143 id. 306; Cobb *v.* Haynes, 8 B. Monr. 137; Webber *v.* Davis, 5 All. 393; Morrissey *v.* Ferry Co., 47 Mo. 521; West *v.* State, 22 N. J. L. 212, 238; Jackson *v.* Christman, 4 Wend. 278; Liscomb *v.* Eldredge, R. I., 38 Atl. 1052.

For instances involving the identity of a person *acting*, *speaking*, *dying*, *etc.*, see Corfield *v.* Parsons, 1 Cr. & M. 730; Smith *v.* Henderson, 9 M. & W. 798; Mullery *v.* Hamilton, 71 Ga. 720; Nicholas *v.* Lansdale, Litt. Sel. Cas. 21; Mason F. J. Co. *v.* Paine, 166 Pa. 352; Kinney *v.* Flynn, 2 R. I. 319.

It is sometimes said that where there are two persons of the same name, it is presumed to be applied to the father: Stebbing *v.* Spicer, 8 M. G. & S. 827; Kincaid *v.* Howe, 10 Mass. 205; State *v.* Vittum, 9 N. H. 519.]

[7] [Donahue *v.* Donahue, 53 Minn. 560; Kloke *v.* Martin, Nebr., 76 N. W. 168. *Contra:* Ulrich *v.* Ulrich, 136 N. Y. 120.]

[8] [Culp *v.* Wilson, 133 Ind. 294; Phillips *v.* Phillips, 90 Ia. 541; Find *v.* Garrett, 102 id. 381.]

[9] [See Garrett *v.* Heflin, 98 Ala. 615; Little *v.* Knox, 96 id. 179; Hill *v.* Miller, 50 Kan. 659; Barnard *v.* Gantz, 140 N. Y. 249, 256; Ten Eyck *v.* Whitbeck, id., 50 N. E. 963; Barney's Will, Vt., 40 Atl. 1027;] {Nottidge *v.* Prince, 2 Giff. 246; 1 Story Eq. Jur. §§ 308–324; Baker *v.* Bradley, 25 L. J. Ch. 7; Cooke *v.* Lamotte, 15 Beav. 234; Gresley *v.* Mousley, 28 L. J. Ch. 620; Lyon *v.* Home, 37 L. J. Ch. 674; Dimsdale *v.* Dimsdale, 25 L. J. Ch. 806; Baker *v.* Monk, 33 Beav. 419; Hargreave *v.* Everard, 6 Ir. Eq. 278, and the additional cases cited *post*, Vol. III, § 253 *a*.}

[10] See Mathews on Presumptive Evid. c. 11–22; Best on Presumptions, *passim*.

§ 44. **Presumptions of Fact; In general.**[1] Presumptions of fact, usually treated as composing the second general head of presumptive evidence, can hardly be said, with propriety, to belong to this branch of the law. They are, in truth, but mere arguments, of which the major premise is not a rule of law; they belong equally to any and every subject-matter; and are to be judged by the common and received tests of the truth of propositions and the validity of arguments. They depend upon their own natural force and efficacy in generating belief or conviction in the mind, as derived from those connections, which are shown by experience, irrespective of any legal relations. They differ from presumptions of law in this essential respect, that while those are reduced to fixed rules, and constitute a branch of the particular system of jurisprudence to which they belong, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever. Such, for example, is the inference of guilt, drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house, which, by means of such an instrument, had been burglariously entered. These presumptions remain the same in their nature and operation, under whatever code the legal effect or quality of the facts, when found, is to be decided.[2]

§ 45. There are, however, some few general propositions in regard to matters of fact, and the weight of testimony by the jury, which are universally taken for granted in the administration of justice, and sanctioned by the usage of the bench, and which, therefore, may with propriety be mentioned under this head. Such, for instance, is the caution, generally given to juries, to place little reliance on the testimony of an accomplice, unless it is confirmed, in some material point, by other evidence. There is no presumption of the common law against the testimony of an accomplice; yet experience has shown, that persons capable of being accomplices in crime are but little worthy of credit; and on this experience the usage is founded.[1] A similar caution is to be used in regard to mere verbal admissions of a party; this kind of evidence being subject to much imperfection and mistake.[2]

[1] [The author's observations in this section are well-founded (compare what is said *ante*, § 14 *y*); but so far as the term "presumption" is employed merely as denoting an inference, more or less strong, from circumstances, and not a rule of law as to shifting the duty of producing evidence, it is apt to mislead. Moreover, in some of the following sections the rules dealt with are true presumptions, and should have been placed *ante*. In other instances, the question is merely as to the sufficiency of evidence to go to the jury, or of an instruction on the weight of evidence such as at common law judges may properly give to the jury.]

[2] See 2 Stark. Evid. 684; 6 Law Mag. 370.

[1] See *infra*, §§ 380, 381.

[2] Earle *v.* Picken, 5 C. & P. 542, n.; R. *v.* Simons, 6 C. & P. 540; Williams *v.* Williams, 1 Hagg. Consist. 304; *post*, § 200.

§ 45 *a*. **Lapse of Time; Grants from the Sovereign.** Thus, also, though lapse of time does not, of itself, furnish a conclusive legal bar to the title of the sovereign, agreeably to the maxim, "nullum tempus occurrit regi;" yet, if the adverse claim could have had a legal commencement, juries are instructed or advised to presume such commencement, after many years of uninterrupted adverse possession or enjoyment. Accordingly, royal grants have been thus found by the jury, after an indefinitely long-continued peaceable enjoyment, accompanied by the usual acts of ownership.[1] So, after less than forty years' possession of a tract of land, and proof of a prior order of council for the survey of the lot, and of an actual survey thereof accordingly, it was held that the jury were properly instructed to presume that a patent had been duly issued.[2] In regard, however, to crown or public grants, a longer lapse of time has generally been deemed necessary, in order to justify this presumption, than is considered sufficient to authorize the like presumption in the case of grants from private persons.

§ 46. **Same; Grant from an Individual.** Juries are also often instructed or advised, in more or less forcible terms, to presume conveyances between private individuals, in favor of the party who has proved a right to the beneficial enjoyment of the property, and whose possession is consistent with the existence of such conveyance, as is to be presumed; especially if the possession, without such conveyance, would have been unlawful, or cannot be satisfactorily explained.[1] This is done in order to prevent an apparently just title from being defeated by matter of mere form. Thus, Lord Mansfield declared that he and some of the other judges had resolved never to suffer a plaintiff in ejectment to be nonsuited by a term, outstanding in his own trustees, nor a satisfied term to be set up by a mortgagor against a mortgagee; but that they would direct the jury to presume

[1] R. *v.* Brown, cited Cowp. 110; Mayor of Kingston *v.* Horner, Cowp. 102; Eldridge *v.* Knott, Cowp. 215; Mather *v.* Trinity Church, 3 S. & R. 509; Roe *v.* Ireland, 11 East 280; Read *v.* Brookman, 3 T. R. 159; Goodtitle *v.* Baldwin, 11 East 488; 2 Stark. Evid. 672. {See other instances in Little *v.* Wingfield, 11 Ir. C. L. 63; Doe *v.* Wilson, 10 Moo. P. C. 502; O'Neill *v.* Allen, 9 Ir. C. L. 132; Att.-Gen. *v.* Ewelme Hospital, 17 Beav. 366; Mayor of Exeter *v.* Warren, 5 Q. B. 773, 801; Calmady *v.* Rowe, 6 C. B. 861; Beaufort *v.* Swan, 3 Ex. 413; Healey *v.* Thorne, 4 Ir. R. C. L. 495; State *v.* Wright, 41 N. J. L. 478; Carter *v.* Fishing Co., 77 Pa. 310;} [see *post*, Vol. II, §§ 537–546.]

[2] Jackson *v.* M'Call, 10 Johns. 377. "Si probet possessionem excedentem memoriam hominum, habet vim tituli et privilegii, etiam a Principe. Et haec est differentia inter possessionem xxx. vel. xl. annorum, et non memorabilis temporis; quia per illam acquiritur non directum, sed utile dominium; per istam autem directum:" Mascard. De Probat. vol. i, p. 239, Concl. 199, n. 11, 12.

[1] The rule on this subject was stated by Tindal, C. J., in Doe *v.* Cooke, 6 Bing. 174, 179: "No case can be put," says he, "in which any presumption has been made, except where a title has been shown, by the party who calls for the presumption, good in substance, but wanting some collateral matter, necessary to make it complete in point of form. In such case, where the possession is shown to have been consistent with the fact directed to be presumed, and in such cases only, has it ever been allowed;" and he cites as examples, Lade *v.* Holford, Bull. N. P. 110; England *v.* Slade, 4 T. R. 682; Doe *v.* Sybourn, 7 T. R. 2; Doe *v.* Hilder, 2 B. & Ald. 782; Doe *v.* Wrighte, ib. 710. See Best on Presumptions, pp. 144–169; [and for a more detailed treatment of the subject, Best on Evidence, §§ 367–399; and *post*, Vol. II, §§ 537–546.]

it surrendered.[2] Lord Kenyon also said, that in all cases where trustees ought to convey to the beneficial owner, he would leave it to the jury to presume, where such presumption could reasonably be made, that they had conveyed accordingly.[3] After the lapse of seventy years, the jury have been instructed to presume a grant of a share in a proprietary of lands, from acts done by the supposed grantee in that capacity, as one of the proprietors.[4] The same presumption has been advised in regard to the reconveyance of mortgages, conveyances from old to new trustees, mesne assignments of leases, and any other species of documentary evidence, and acts *in pais*, which is necessary for the support of a title in all other respects evidently just.[5] It is sufficient that the party, who asks for the aid of this presumption, has proved a title to the beneficial

[2] Lade *v.* Holford, Bull. N. P. 110.

[3] Doe *v.* Sybourn, 7 T. R. 2 ; Doe *v.* Staple, 2 T. R. 696. The subject of the presumed surrender of terms is treated at large in Mathews on Presumpt. Evid. ch. 13, pp. 226–259, and is ably expounded by Sir Edw. Sugden, in his Treatise on Vendors and Purchasers, ch. 15, § 3, vol. iii, pp. 24–67, 10th ed. See also Best on Presumptions, §§ 113–122.

[4] Farrar *v.* Merrill, 1 Greenl. 17. A by-law may, in like manner, be presumed : Bull. N. P. 211 ; The case of Corporations, 4 Co. 78 ; Cowp. 110.

[5] Emery *v.* Grocock, 6 Madd. 54 ; Cook *v.* Soltan, 2 Sim. & Stu. 154 ; Wilson *v.* Allen, 1 Jac. & W. 611, 620 ; Roe *v.* Reade, 8 T. R. 118, 122 ; White *v.* Foljambe, 11 Ves. 350 ; Keene *v.* Deardon, 8 East 248, 266 ; Tenny *v.* Jones, 3 M. & Scott 472 ; Roe *v.* Lowe, 1 H. Bl. 446, 459 ; Van Dyck *v.* Van Beuren, 1 Caines 84 ; Jackson *v.* Murray, 7 Johns. 5 ; 4 Kent Comm. 90, 91 ; Gray *v.* Gardiner, 3 Mass. 399 ; Knox *v.* Jenks, 7 Mass. 488 ; Society, etc. *v.* Young, 2 N. H. 310 ; Colman *v.* Anderson, 10 Mass. 105 ; Pejepscot Proprieters *v.* Ranson, 14 id. 145 ; Bergen *v.* Bennet, 1 Caines Cas. 1 ; Blossom *v.* Cannon, 14 Mass. 177 ; Battles *v.* Holley, 6 Greenl. 145 ; Lady Dartmouth *v.* Roberts, 16 East 334, 339 ; Livingston *v.* Livingston, 4 Johns. Ch. 287 ; [so also in favor of a grant of fishing rights : Little *v.* Wingfield, 11 Ir. C. L. 63 ; Leconfield *v.* Lonsdale, L. R. 5 C. P. 657 ; Carter *v.* Tinicum Fishing Co., 77 Pa. St. 310 ; see Mills *v.* Mayor, L. R. 2 C. P. 476 ; and of easements and incorporeal hereditaments generally : Kingston *v.* Leslie, 10 S. & R. 383 ; Rooker *v.* Perkins, 14 Wis. 79 ; Edson *v.* Munsell, 10 Allen 557 ; Nichols *v.* Boston, 98 Mass. 39 ; Briggs *v.* Prosser, 14 Wend. 227 ; Munro *v.* Merchant, 26 Barb. 383 ; Attorney-General *v.* Proprietors, etc., 3 Gray 1, 62–65 ; St. Mary's College *v.* Attorney-General, 3 Jur. N. S. 675 ; Munroe *v.* Gates, 48 Me. 463 ; so also of a deed of partition : Russell *v.* Marks, 3 Metc. Ky. 37 ; and of a deed of manumission : Lewis *v.* Hart, 33 Mo. 535.]

Whether deeds of conveyance can be presumed, in cases where the law has made provision for their registration, has been doubted. The point was argued, but not decided, in Doe *v.* Hirst, 11 Price 475 ; and see 24 Pick. 322. The better opinion seems to be that though the Court will not, in such case, presume the existence of a deed as a mere inference of law, yet the fact is open for the jury to find, as in other cases ; see R. *v.* Long Buckby, 7 East 45 ; Trials per Pais, 237 ; Finch 400 ; Valentine *v.* Piper, 22 Pick. 85, 93, 94 ; [Brown *v.* Oldham, 123 Mo. 621, 630 ; Dunn *v.* Eaton, 92 Tenn. 743, 753.] This rule has been applied to possessions of divers lengths of duration ; as fifty-two years, Ryder *v.* Hathaway, 21 Pick. 298 ; fifty years, Melvin *v.* Prop'rs of Locks, etc., 16 Pick. 137, 17 Pick. 255, s. c. ; [forty-three years, Howell *v.* House, 2 Mill Const. 80, 85 ;] thirty-three years, White *v.* Loring, 24 Pick. 319 ; thirty years, McNair *v.* Hunt, 5 Mo. 300 ; twenty-six years, Newman *v.* Studley, id. 291 ; twenty years, Brattle-Square Church *v.* Bullard, 2 Met. 363 ; but the latter period is held sufficient. The rule, however, does not seem to depend so much upon the mere lapse of a definite period of time as upon all the circumstances, taken together ; the question being exclusively for the jury. [But on this point there is a difference of opinion, and in modern cases the matter is often made a presumption of law : see Bryant *v.* Foot, L. R. 2 Q. B. 161 ; Best, Evidence, § 399 ; and *post*, Vol. II, §§ 537–546.]

ownership, and a long possession not inconsistent therewith; and has made it not unreasonable to believe that the deed of conveyance, or other act essential to the title, was duly executed. Where these merits are wanting, the jury are not advised to make the presumption.[6]

§ 47. **Same; Personalty.** The same principle is applied to matters belonging to the personalty. Thus, where one town, after being set off from another, had continued for fifty years to contribute annually to the expense of maintaining a bridge in the parent town, this was held sufficient to justify the presumption of an agreement to that effect.[1] And, in general, it may be said that long acquiescence in any adverse claim of right is good ground, on which a jury may presume that the claim had a legal commencement; since it is contrary to general experience for one man long to continue to pay money to another, or to perform any onerous duty, or to submit to any inconvenient claim, unless in pursuance of some contract, or other legal obligation.

§ 48. **Presumptions of Fact; Summary.**[1] In fine, this class of presumptions embraces all the connections and relations between the facts proved and the hypothesis stated and defended, whether they are mechanical and physical, or of a purely moral nature. It is that which prevails in the ordinary affairs of life, namely, the process of ascertaining one fact from the existence of another, without the aid of any rule of law; and, therefore, it falls within the exclusive province of the jury, who are bound to find according to the truth, even in cases where the parties and the Court would be precluded by an estoppel, if the matter were so pleaded. They are usually aided in their labors by the advice and instructions of the judge, more or less strongly urged, at his discretion; but the whole matter is free before them, unembarrassed by any considerations of policy or convenience, and unlimited by any boundaries but those of truth, to be decided by themselves, according to the convictions of their own understanding.

§ 49.[2]

[6] Doe *v.* Cooke, 6 Bing. 174, per Tindal, C. J.; Doe *v.* Reed, 5 B. & A. 232; Livett *v.* Wilson, 3 Bing. 115; Schauber *v.* Jackson, 2 Wend. 14, 37; Hepburn *v.* Auld, 5 Cranch 262; Valentine *v.* Piper, 22 Pick. 85; {where, for instance, the possession was taken under a title inconsistent with that claimed: Colvin *v.* Warford, 20 Md. 357; or where the origin of the claim is in fact shown not to have been such a deed: Nicto *v.* Carpenter, 21 Cal. 455; [Claflin *v.* R. Co., 157 Mass. 489, 499;] see Grimes *v.* Bastrop, 26 Tex. 310; or where the possession did not fulfil the requisites of adverse possession, in that it was continuously resisted: Field *v.* Brown, 24 Gratt. 74; or that it was secret: Chasemore *v.* Richards, 7 H. L. C. 349; Roath *v.* Driscoll, 20 Conn. 533; Wheatley *v.* Baugh, 25 Pa. St. 528; Frazier *v.* Brown, 12 Ohio St. 294.}

[1] Cambridge *v.* Lexington, 17 Pick. 222. See also Grote *v.* Grote, 10 Johns. 402; Schauber *v.* Jackson, 2 Wend. 36, 37.

[1] [See note to § 44.]

[2] [Transferred *post*, as § 81 *e*, in a separate chapter dealing with "Law and Fact; Judge and Jury."]

§ 50.[3]
§§ 51–73.[4]

3. *Burden of Proof in Specific Cases.*

§ 74. **In general.**[1] A third rule which governs in the production of evidence is, that the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue.[2] This is a rule of convenience, adopted not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable.[3] It is, therefore, generally deemed sufficient, where the allegation is affirmative, to oppose it with a bare denial, until it is established by evidence. Such is the rule of the Roman law. "Ei incumbit probatio qui dicit, non qui negat."[4] As a consequence of this rule, the party who asserts the affirmative of the issue is entitled to begin and to reply; and having begun, he is not permitted to go into half of his case, and reserve the remainder; but is generally obliged to develop the whole.[5] Regard is had, in this matter, to the substance and effect of

[3] [This section is as follows: "The production of evidence to the jury is governed by certain principles, which may be treated under four general heads or rules. The *first* of these is, that the evidence must correspond with the *allegations*, and be confined to the point in issue. The *second* is, that it is sufficient, if the *substance* only of the issue be proved. The *third* is, that the burden of proving a proposition, or issue, lies on the party holding the affirmative. And the *fourth* is, that the best evidence of which the case, in its nature, is susceptible, must always be produced. These we shall now consider in their order." This well-known classification of the author cannot be defended from any point of view; and since it serves only to mislead, has no essential connection with his exposition of the various topics, and serves here only to separate the cognate subjects of Presumptions and Burden of Proof, it has been withdrawn from the text to a note.]

[4] [These sections have been placed in Appendix II. Sections 51*a*–55 deal in very brief compass with a small part of the material now covered by the editor's Chapter V, on Circumstantial Evidence, *ante;* in the view of the author, this subject answered substantially to the first head in his classification quoted in the preceding note. Sections 56–73 deal almost exclusively, and in much detail, with the subject of Variance, — a matter, strictly, of the law of Pleading, not of Evidence, and, moreover, one of little consequence under modern legislation; in the view of the author this subject answered to the second head in his classification quoted in the preceding note. The third head of that classification, the Burden of Proof, is taken up in the sections now following.]

[1] [The principle of the burden of proof has been already examined, *ante*, §§ 14 *w*–14 *y*, and the following sections are to be read in the light of what is there said. No attempt is made in these sections to call attention to all the specific inconsistencies between the author's statements and the principles there explained.]

[2] [See note to § 78.]

[3] Drangnet *v.* Prudhomme, 3 La. 83, 86; Costigan *v.* Mohawk & Hudson R. R. Co., 3 Denio 609; {Com. *v.* Tuey, 8 Cush. 1; Burnham *v.* Allen, 1 Gray 496; Crowninshield *v.* Crowninshield, 2 id. 524.}

[4] Dig. lib. 22, tit. 3, l. 2; Mascard. de Prob. Concl. 70, tot.; Concl. 1128, n. 10. See also Tait on Evid. p. 1.

[5] Rees *v.* Smith, 2 Stark. 31; 3 Chitty Gen. Pract. 872–877; Swift's Law of Evid. p. 152; Bull. N. P. 298; Browne *v.* Murray, Ry. & M. 254; Jones *v.* Kennedy, 11 Pick. 125, 132. The true test to determine which party has the right to begin, and of course to determine where is the burden of proof, is to consider which party would be entitled to the verdict, if no evidence were offered on either side; for the burden of proof lies on the party against whom, in such case, the verdict ought to be given. Leete *v.* Gresham Life Ins. Co., 7 Eng. Law & Eq. 578; 15 Jur. 1161; and see Huck-

the issue, rather than to the form of it; for in many cases the party, by making a slight change in his pleading, may give the issue a negative or an affirmative form, at his pleasure. Therefore in an action of covenant for not repairing, where the breach assigned was that the defendant did not repair, but suffered the premises to be ruinous, and the defendant pleaded that he did repair, and did not suffer the premises to be ruinous, it was held that on this issue the plaintiff should begin.[6] If the record contains several issues, and the plaintiff hold the affirmative in any one of them, he is entitled to begin; as, if in an action of slander for charging the plaintiff with a crime, the defendant should plead not guilty, and a justification. For wherever the plaintiff is obliged to produce any proof in order to establish his right to recover, he is generally required to go into his whole case, according to the rule above stated, and therefore is entitled to reply. How far he shall proceed in his proof, in anticipation of the defence on that or the other issues, is regulated by the discretion of the judge, according to the circumstances of the case; regard being generally had to the question, whether the whole defence is indicated by the plea, with sufficient particularity to render the plaintiff's evidence intelligible.[7]

§ 75. **Damages; Right to open and close.** Whether the necessity of proving damages, on the part of the plaintiff, is such an affirmative as entitles him to begin and reply, is not perfectly clear by the authorities. Where such evidence forms part of the proof necessary to sustain the action, it may well be supposed to fall within the general rule; as, in an action of slander, for words actionable only in respect of the special damage thereby occasioned; or, in an action on the case, by a master for the beating of his servant *per quod servitium amisit*. It would seem, however, that where it appears by the record, or by the admission of counsel, that the damages to be recovered are only nominal, or are mere matter of computation, and

man *v.* Fernie, 3 M. & W. 510; {Veiths *v.* Hagge, 8 Clarke 163; Kent *v.* White, 27 Ind. 390. Mr. Taylor suggests another test, *i. e.* to examine what would be the effect of striking out of the record the allegations to be proved, for the burden of proof rests upon the party whose case would be thereby destroyed: 1 Taylor Ev. § 338; citing Amos *v.* Hughes, 1 M. & Rob. 464, per Alderson, B.; Doe *v.* Rowlands, 9 C. & P. 735, and Osborn *v.* Thompson, 2 M. & Rob. 256, as to the first, and Mills *v.* Barber, 1 M. & W. 427, as to the second;} [but compare what has been said on this subject *ante*, § 14 *a*.]

[6] Soward *v.* Leggatt, 7 C. & P. 613.

[7] Rees *v.* Smith, 2 Stark. 31; Jackson *v.* Hesketh, id. 518; James *v.* Salter, 1 M. & Rob. 501; Rawlins *v.* Desborough, 2 id. 328; Comstock *v.* Hadlyme, 8 Conn. 261; Curtis *v.* Wheeler, 4 C. & P. 196; s. c. 1 M. & M. 493; Williams *v.* Thomas, 4 C. & P. 234; 7 Pick. 100, per Parker, C. J.; {York *v.* Pease, 2 Gray 282; Holbrook *v.* McBride, 4 id. 218; Cushing *v.* Billings, 2 Cush. 158.} In Browne *v.* Murray, Ry. & M. 254, Lord C. J. Abbott gave the plaintiff his election, after proving the general issue, either to proceed immediately with all his proof to rebut the anticipated defence, or to reserve such proof till the defendant had closed his own evidence; only refusing him the privilege of dividing his case into halves, giving part in the first instance, and the residue after the defendant's case was proved. {Evidence in rebuttal is not inadmissible because it corroborates the evidence in chief: Wright *v.* Foster, 109 Mass. 57.}

there is no dispute about them, the formal proof of them will not take away the defendant's right to begin and reply, whatever be the form of the pleadings, provided the residue of the case is affirmatively justified by the defendant.[1] And if the general issue alone is pleaded, and the defendant will at the trial admit the whole of the plaintiff's case, he may still have the advantage of the beginning and reply.[2] So also in trespass *quare clausum fregit*, where the defendant pleads not guilty as to the force and arms and whatever is against the peace, and justifies as to the residue, and the damages are laid only in the usual formula of treading down the grass, and subverting the soil, the defendant is permitted to begin and reply; there being no necessity for any proof on the part of the plaintiff.[3]

§ 76. **Same; Unliquidated Damages.** The difficulty in determining this point exists chiefly in those cases, where the action is for unliquidated damages, and the defendant has met the whole case with an affirmative plea. In these actions the practice has been various in England; but it has at length been settled by a rule, by the fifteen judges, that the plaintiff shall begin in all actions for personal injuries, libel, and slander, though the general issue may not be pleaded, and the affirmative be on the defendant.[1] In actions upon contract, it was, until recently, an open question of practice; having been sometimes treated as a matter of right in the party, and at other

[1] Fowler *v.* Coster, 1 Moo. & M. 243, per Lord Tenterden. And see the reporter's note on that case in 1 Moo. & M. 278–281. The dictum of the learned judge, in Brooks *v.* Barrett, 7 Pick. 100, is not supposed to militate with this rule; but is conceived to apply to cases where proof of the note is required of the plaintiff. Sanford *v.* Hunt, 1 C. & P. 118; Goodtitle *v.* Braham, 4 T. R. 497.

[2] Tucker *v.* Tucker, 1 Moo. & M. 536; Fowler *v.* Coster, id. 241; Doe *v.* Barnes, 1 M. & Rob. 386; Doe *v.* Smart, id. 476; Fish *v.* Travers, 3 C. & P. 578; Comstock *v.* Hadlyme, 8 Conn. 261; Laeon *v.* Higgins, 3 Stark. 178; Corbett *v.* Corbett, 3 Campb. 368; Homan *v.* Thompson, 6 C. & P. 717; Smart *v.* Rayner, id. 721; Mills *v.* Oddy, id. 728; Scott *v.* Hull, 8 Conn. 296. But see *post*, § 76, n. 4.

[3] Hodges *v.* Holder, 3 Campb. 366; Jackson *v.* Hesketh, 2 Stark. 518; Pearson *v.* Coles, 1 M. & Rob. 206; Davis *v.* Mason, 4 Pick. 156; Leech *v.* Armitage, 2 Dall. 125. {Where a defendant under a rule of court filed an admission of the plaintiff's *prima facie* case, in order to obtain the right to open and close, he was held not to be thereby estopped from setting up in defence the statute of limitations: Emmons *v.* Hayward, 11 Cush. 48; nor from showing that the plaintiff had no title to the note sued on: Spaulding *v.* Hood, 8 id. 602. An auditor's report in favor of the plaintiff will not give the defendant the right to open and close: Snow *v.* Batchelder, ib. 513; see Washington Ice Co. *v.* Webster, 68 Me. 449. The rule, however, in Massachusetts, is to allow the plaintiff to open and close in every case, even when the defendant admits the plaintiff's cause of action and files a declaration in set-off, or matter in avoidance: Hurley *v.* O'Sullivan, 137 Mass. 86; Dorr *v.* Tremont Nat. Bank, 128 id. 358; Page *v.* Osgood, 2 Gray 260; see Gaul *v.* Fleming, 10 Ind. 253. In probate trials, the executor propounding the will begins and closes without regard to the burden of proof: Dorr *v.* Tremont Bank, *supra*; Crowninshield *v.* Crowninshield, 2 Gray 524. In equity, the same rule that the plaintiff is in all cases entitled to open and close prevails: Dorr *v.* Tremont Bank, *supra*. In cases of land damages, the owner of the land has the right to begin and reply, even though the proceedings are formally begun by the other party: Parks *v.* Boston, 15 Pick. 198, 208; Conn. River R. R. *v.* Clapp, 1 Cush. 559; Winnisimmett Co. *v.* Grueby, 111 Mass. 543; Burt *v.* Wigglesworth, 117 id. 302; Dorr *v* Tremont Bank, *supra*.}

[1] Carter *v.* Jones, 6 C. & P. 64.

times regarded as resting in the discretion of the judge, under all the circumstances of the case.[2] But it is now settled, in accordance with the rule adopted in other actions.[3] In this country it is generally deemed a matter of discretion, to be ordered by the judge at the trial, as he may think most conducive to the administration of justice; but the weight of authority, as well as the analogies of the law, seem to be in favor of giving the opening and closing of the cause to the plaintiff, wherever the damages are in dispute, unliquidated, and to be settled by the jury upon such evidence as may be adduced, and not by computation alone.[4]

§ 77. **Will Cases.** Where the proceedings are not according to the

[2] Bedell *v.* Russell, Ry. & M. 293; Fowler *v.* Coster, 1 M. & M. 241; Revett *v.* Braham, 4 T. R. 497; Hare *v.* Munn, 1 M. & M. 241, n.; Scott *v.* Hull, 8 Conn. 296; Burrell *v.* Nicholson, 6 C. & P. 202; 1 Moo. & R. 304, 306; Hoggett *v.* Exley, 9 C. & P. 324. See also 3 Chitty Gen. Practice, 872–877.

[3] Mercer *v.* Whall, 9 Jur. 576; 5 Q. B. 447.

[4] Such was the course in Young *v.* Bairner, 1 Esp. 103, which was assumpsit for work, and a plea in abatement for the non-joinder of other defendants; s. p., Robey *v.* Howard, 2 Stark. 555; s. p., Stansfeld *v.* Levy, 3 id. 8; Lacon *v.* Higgins, ib. 178, where, in assumpsit for goods, coverture of the defendant was the sole plea. Hare *v.* Munn, 1 M. & M. 241, n., which was assumpsit for money lent, with a plea in abatement for the non-joinder of other defendants; s. p., Morris *v.* Lotan, 1 Moo. & R. 233; Wood *v.* Pringle, ib. 217, which was an action for a libel, with several special pleas of justification as to part, but no general issue; and, as to the parts not justified, judgment was suffered by default. See acc. Comstock *v.* Hadlyme, 8 Conn. 261; Ayer *v.* Austin, 6 Pick. 225; Hoggett *v.* Exley, 9 C. & P. 324; s. c. 2 Moo. & R. 251. On the other hand are Cooper *v.* Wakley, 3 C. & P. 474; s. c. 1 M. & M. 248, which was a case for a libel, with pleas in justification, and no general issue; but this is plainly contradicted by the subsequent case of Wood *v.* Pringle, and has since been overruled in Mercer *v.* Whall; Cotton *v.* James, 1 M. & M. 273; s. c., 3 C. & P. 505, which was trespass for entering the plaintiff's house, and taking his goods with a plea of justification under a commission of bankruptcy; but this also is expressly contradicted in Morris *v.* Lotan; Bedell *v.* Russell, Ry. & M. 293, which was an action of trespass for assault and battery, and for shooting the plaintiff, to which a justification was pleaded; where Best, J., reluctantly yielded to the supposed authority of Hodges *v.* Holder, 3 Campb. 366, and Jackson *v.* Hesketh, 2 Stark. 518; in neither of which, however, were the damages controverted; Fish *v.* Travers, 3 C. & P. 578, decided by Best, J., on the authority of Cooper *v.* Wakley and Cotton *v.* James; Burrell *v.* Nicholson, 6 Car. & P. 202, which was trespass for taking the plaintiff's goods in his house, and detaining them one hour, which the defendant justified as a distress for parish rates; and the only issue was, whether the house was within the parish or not. But here, also, the damages were not in dispute, and seem to have been regarded as merely nominal. See also Scott *v.* Hull, 8 Conn. 296. In Norris *v.* Ins. Co. of North America, 3 Yeates 84, which was covenant on a policy of insurance, to which performance was pleaded, the damages were not then in dispute, the parties having provisionally agreed upon a mode of liquidation. But in England the entire subject has recently undergone a review, and the rule has been established, as applicable to all personal actions, that the plaintiff shall begin, wherever he goes for substantial damages not already ascertained: Mercer *v.* Whall, 9 Jur. 576; 5 Q. B. 447; see 9 Jur. 578; 5 Q. B. 458. Ordinarily speaking, the decision of the judge, at *Nisi Prius*, on a matter resting in his discretion, is not subject to revision in any other court. But in Huckman *v.* Fernie, 5 M. & W. 505, the Court observed that, though they might not interfere in a very doubtful case, yet if the decision of the judge "were clearly and manifestly wrong," they would interfere to set it right. In a subsequent case, however, it is said that, instead of "were clearly and manifestly wrong," the language actually used by the Court was, "did clear and manifest wrong;" meaning that it was not sufficient to show merely that the wrong party had begun, but that some injustice had been done in consequence: see Edwards *v.* Matthews, 11 Jur. 398; Geach *v.* Ingall, 9 id. 691; 14 M. & W. 95.

course of the common law, and where, consequently, the *onus probandi* is not technically presented, the Courts adopt the same principles which govern in proceedings at common law. Thus, in the probate of a will, as the real question is whether there is a valid will or not, the executor is considered as holding the affirmative; and therefore he opens and closes the case, in whatever state or condition it may be, and whether the question of sanity is or is not raised.[1]

[It seems to be generally conceded that the burden of proof as to the testator's *sanity* is on the proponent of the will, in the sense that, when the case goes to the jury, he has the risk of non-persuasion;[2] since the testator's sanity is a fact essential to the proponent's claim. But there is a difference of practice as to the duty of going forward with evidence. According to one view, the evidence of execution, introduced by the proponent, may suffice to raise a presumption of sanity, so as to require the opponent to introduce evidence of insanity. By another view, the evidence of execution does not raise this presumption, and the proponent therefore has the duty of coming forward, as in any other case, with some evidence of his *factum probandum, i. e.* sanity.[3] As to the burden of proof in regard to *undue influence*, however, the difference of opinion goes back to the main burden of persuasion; *i. e.* by one opinion, the voluntariness of the testator's act is a part of the proponent's case, and with the jury he has the risk of non-persuasion; by the other view, the fact of undue influence is treated as in the nature of a counter-plea of the contestant, and therefore to be proved as a part of his case.[4]]

§ 78. **Sundry Instances.** To this general rule, that the burden of proof is on the party holding the affirmative,[1] there are some excep-

[1] Buckminster *v.* Perry, 4 Mass. 593; Brooks *v.* Barrett, 7 Pick. 94; Comstock *v.* Hadlyme, 8 Conn. 254; Ware *v.* Ware, 8 Greenl. 42; Hubbard *v.* Hubbard, 6 Mass. 397.

[2] [Not in Indiana; see *infra*.]

[3] [The Courts do not always make their meaning clear; the following cases show the practice in various States: Sutton *v.* Sadler, 3 C. B. N. S. 87; Barber's Estate, 63 Conn. 393; Taylor *v.* Pegram, 151 Ill. 106, 118; Harp *v.* Parr, 168 Ill. 459; Blough *v.* Parry, 144 Ind. 463; Young *v.* Miller, 145 id. 652; Roller *v.* Kling, id., 49 N. E. 948; Johnson *v.* Stevens, 95 Ky. 128; Bey's Succession, 46 La. An. 773, 787; Crowninshield *v.* Crowninshield, 2 Gray 524; Baxter *v.* Abbott, 7 id. 71; Prentis *v.* Bates, 93 Mich. 234, 245 (and note in 17 L. R. A. 494); Moriarty *v.* Moriarty, 108 id. 249; Sheehan *v.* Kearney, Miss., 21 So. 41; Maddox *v.* Maddox, 114 Mo. 35, 46; Gordon *v.* Burris, 141 id. 602; Murry *v.* Hennessey, 48 Nebr. 608; Jones *v.* Jones, 137 N. Y. 610;] {Elkinton *v.* Brick, 44 N. J. Eq. 158; Mayo *v.* Jones, 78 N. C. 402.}

[4] [See Barry *v.* Butlin, 2 Moore P. C. 480; Bulger *v.* Ross, 98 Ala. 267; King *v.* King, Ky., 42 S. W. 347; Teegarden *v.* Lewis, 145 Ind. 98; Bush *v.* Delano, Mich., 71 N. W. 628; Sheehan *v.* Kearney, Miss., 21 So. 41; Morton *v.* Heidorn, 135 Mo. 608; McFadin *v.* Catron, 138 id. 197.

For the presumption of undue influence or fraud arising from a beneficiary's drafting of the will, see *ante*, § 43 *a*.]

[1] [This mode of putting the principle is perhaps misleading. The only rule is that the burden of proof of a fact (in the sense of the risk of non-persuasion) is on the party for whom the fact is an essential part of his case; and this rule is invariable (*ante*, § 14 *x*). But when we come to determine whose case the fact ought to be essential to, we then come to considerations of general policy which vary with various situations

tions, in which the proposition, though negative in its terms, must be proved by the party who states it. One class of these exceptions will be found to include those cases in which the plaintiff grounds his right of action upon a negative allegation, and where, of course, the establishment of this negative is an essential element in his case;[2] as, for example, in an action for having prosecuted the plaintiff maliciously and without probable cause. Here, the want of probable cause must be made out by the plaintiff, by some affirmative proof, though the proposition be negative in its terms.[3] So, in an action by husband and wife, on a promissory note made to the wife after marriage, if the defendant denies that she is the meritorious cause of action, the burden of proving this negative is on him.[4] So, in a prosecution for a penalty given by statute, if the statute, in describing the offence, contains negative matter, the count must contain such negative allegation, and it must be supported by *prima facie* proof. Such is the case in prosecutions for penalties given by statutes, for coursing deer in enclosed grounds, not having the consent of the owner;[5] or for cutting trees on lands not the party's own, or taking other property, not having the consent of the owner;[6] or for selling, as a peddler, goods not of the produce or manufacture of the country;[7] or for neglecting to prove a will, without just excuse made and accepted by the Judge of Probate therefor.[8] In these, and the like cases, it is obvious, that plenary proof on the part of the affirmant can hardly be expected; and, therefore, it is considered sufficient if he offer such evidence as, in the absence of counter testimony, would afford ground for presuming that the allegation is true. Thus, in an action on an agreement to pay £100, if the plaintiff would not send herrings for one year to the London market, and, in particular, to the house of J. & A. Millar, proof that he sent none to that house was held sufficient to entitle him to recover, in the absence of opposing testimony.[9] And generally where a party seeks,

and claims. No doubt the difficulty of proving a negative is one of the most important of these considerations of policy, and helps to induce us, in this or that instance, to put the fact over upon the other party and treat it as a part of his case. But it is hardly possible to say that this is done by a general rule, with its specific exceptions; it is not the case of a definite rule, but of an important underlying policy not capable of being handled as a rule. For the rule we can look only to specific kinds of actions.]

[2] 1 Chitty on Pl. 206; Spieres *v.* Parker, 1 T. R. 141; R. *v.* Pratten, 6 T. R. 559; Holmes *v.* Love, 3 B. & C. 242; Lane *v.* Crombie, 12 Pick. 177; Harvey *v.* Towers, 15 Jur. 544; 4 Eng. Law & Eq. Rep. 531.

[3] Purcell *v.* Macnamara, 1 Campb. 199; s. c. 9 East 361; Ulmer *v.* Leland, 1 Greenl. 135; Gibson *v.* Waterhouse, 4 id. 226; {Nash *v.* Hall, 4 Ind. 44.}

[4] Philliskirk *v.* Pluckwell, 2 M. & S. 395, per Bayley, J.

[5] R. *v.* Rogers, 2 Campb. 654; R. *v.* Jarvis, 1 East 643, n.

[6] Little *v.* Thompson, 2 Greenl. 223; R. *v.* Hazy *et al.*, 2 C. & P. 458.

[7] Com. *v.* Samuel, 2 Pick. 103.

[8] Smith *v.* Moore, 6 Greenl. 274. See other examples in Com. *v.* Maxwell, 2 Pick. 139; 1 East P. C. 166, § 15; Williams *v.* Hingham and Quincy Turnpike Co., 4 Pick. 341; R. *v.* Stone, 1 East 639; R. *v.* Burdett, 4 B. & Ald. 95, 140; R. *v.* Turner, 5 M. & S. 206; Woodbury *v.* Frink, 14 Ill. 279.

[9] Calder *v.* Rutherford, 3 Brod. & Bing. 302; s. c. 7 Moore 158; {Vigus *v.* O'Bannon, 118 Ill. 348; Beardstown *v.* Virginia *et al.*, 76 id. 34.}

from extrinsic circumstances, to give effect to an instrument which, on its face, it would not have, it is incumbent on him to prove those circumstances, though involving the proof of a negative; for, in the absence of extrinsic proof, the instrument must have its natural operation and no other. Therefore, where real estate was devised for life with power of appointment by will, and the devisee made his will, devising "all his lands," but without mention of or reference to the power, it was held no execution of the power, unless it should appear that he had no other lands; and that the burden of showing this negative was upon the party claiming under the will as an appointment.[10]

§ 79. **Sundry Instances.** But where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party.[1] Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any persons, except those who are duly licensed therefor; as, for selling liquors, exercising a trade or profession, and the like. Here the party, if licensed, can immediately show it, without the least inconvenience; whereas, if proof of the negative were required, the inconvenience would be very great.[2]

§ 80. **Sundry Instances.** So, where the negative allegation involves a charge of criminal neglect of duty, whether official or otherwise; or fraud; or the wrongful violation of actual lawful possession of property; the party making the allegation must prove it; for in these cases the presumption of law, which is always in favor of innocence and quiet possession, is in favor of the party charged.[1] Thus, in an information against Lord Halifax, for refusing to deliver up the rolls of the Auditor of the Exchequer, in violation of his duty, the prosecutor was required to prove the negative. So, where one in office was charged with not having taken the sacrament within a

[10] Doe *v.* Johnson, 7 Man. & Gr. 1047.

[1] [See the comments *ante*, § 14 *w.*]

[2] R. *v.* Turner, 5 M. & S. 206; Smyth *v.* Jefferies, 9 Price 257; Sheldon *v.* Clark, 1 Johns. 513; U. S. *v.* Hayward, 2 Gall. 485; Geuing *v.* State, 1 McCord 573; Com. *v.* Kimball, 7 Met. 304; Harrison's Case, Paley on Conv. 45, n.; Apothecaries' Co. *v.* Bentley, Ry. & M. 159; Haskill *v.* Com., 3 B. Monr. 342; State *v.* Morrison, 3 Dev. 299; State *v.* Crowell, 11 Shepl. 171; Shearer *v.* State, 7 Blackf. 99; {Com. *v.* Curran, 119 Mass. 206; Com. *v.* Dean, 110 id. 357; Com. *v.* Leo, ib. 414; Mass. P. S. c. 214, § 12; Lovell *v.* Payne, 30 La. An. Pt. I. 511; Great Western R. R. Co. *v.* Bacon, 30 Ill. 347; Wheat *v.* State, 6 Wis. 455;} [Hornberger *v.* State, Nebr., 66 N. W. 23; Parker *v.* State, N. J. L., 39 Atl. 651; State *v.* Shelton, Wash., 48 Pac. 258; Black, Intoxicating Liquors, § 507;] {*contra:* State *v.* Evans, 5 Jones 250; see, further, Com. *v.* Thurlow, 24 Pick. 374; Com. *v.* Kimball, 7 Metc. 304; Com. *v.* Babcock, 110 Mass. 107; Com. *v.* Towle, 138 id. 490; Com. *v.* Lahy, 8 Gray 459; Com. *v.* Locke, 114 Mass. 288; Com. *v.* Welch, 144 id. 356.

In civil cases it has been held that, to recover the price of liquor sold, the plaintiff must show that he was licensed to sell: Bliss *v.* Brainard, 41 N. H. 256; Solomon *v.* Dreschler, 4 Minn. 278; Kane *v.* Johnston, 9 Bosw. 154; *contra:* Wilson *v.* Melvin, 13 Gray 73; Craig *v.* Proctor, 6 R. I. 547.}

[1] {Kline *v.* Baker, 106 Mass. 61; Phelps *v.* Cutler, 4 Gray 139.}

year; and where a seaman was charged with having quitted the ship, without the leave in writing required by statute; and where a shipper was charged with having shipped goods dangerously combustible on board the plaintiff's ship, without giving notice of their nature to any officer on board, whereby the ship was burned and lost; in each of these cases, the party alleging the negative was required to prove it.[2] So, where the defence to an action on a policy of insurance was, that the plaintiff improperly concealed from the underwriter certain facts and information which he then already knew and had received, it was held that the defendant was bound to give some evidence of the non-communication.[3] So, where the goods of the plaintiff are seized and taken out of his possession, though for an alleged forfeiture under the revenue laws, the seizure is presumed unlawful until proved otherwise.[4]

§ 81. **Sundry Instances.** So, where infancy is alleged;[1] or where one born in lawful wedlock is alleged to be illegitimate, the parents not being separated by a sentence of divorce;[2] or where insanity is alleged;[3] or a person once living is alleged to be dead, the presumption of life not being yet worn out by lapse of time;[4] or where nonfeasance or negligence is alleged, in an action on contract;[5] [or where the contributory negligence of the plaintiff, in an action of tort, is involved;[6]] or where the want of a due stamp is alleged, there be-

[2] U. S. *v.* Hayward, 2 Gall. 498; Hartwell *v.* Root, 19 Johns. 345; Bull. N. P. [298]; R. *v.* Hawkins, 10 East 211; Frontine *v.* Frost, 3 B. & P. 302; Williams *v.* E. India Co., 3 East 192. See also Com. *v.* Stow, 1 Mass. 54; Evans *v.* Birch, 3 Campb. 10.

[3] Elkin *v.* Janson, 13 M. & W. 655; {so also of the claim that the policy-holder has burnt his own property: Tidmarsh *v.* Wash. F. & M. Ins. Co., 4 Mason 439; Fiske *v.* N. E. Mar. Ins. Co., 15 Pick. 310; Murray *v.* N. Y. L. Ins. Co., 85 N. Y. 236; Heilman *v.* Lazarus, 90 id. 672.}

[4] Aitcheson *v.* Madock, Peake's Cas. 162. An exception to this rule is admitted in Chancery in the case of attorney and client; it being a rule there, that if the attorney, retaining the connection, contracts with his client, he is subject to the burden of proving that no advantage has been taken of the situation of the latter: 1 Story Eq. Jur. § 311; Gibson *v.* Jeyes, 6 Ves. 278; Cane *v.* Ld. Allen, 2 Dow 289, 294, 299; [for the case of this presumption, see *ante*, § 43 *a*.]

[1] Borthwick *v.* Carruthers, 1 T. R. 648.

[2] Case of the Banbury Peerage, 2 Selw. N. P. (by Wheaton) 558; Morris *v.* Davies, 3 C. & P. 215, 427.

[3] Attorney-General *v.* Parnther, 3 Bro. C. C. 441, 443, per Lord Thurlow; cited with approbation in White *v.* Wilson, 13 Ves. 87, 88; Hoge *v.* Fisher, 1 Pet. C. C. 163; [see further § 81 *a*.]

[4] Throgmorton *v.* Walton, 2 Roll. 461; Wilson *v.* Hodges, 2 East 313; *supra*, § 41.

[5] Crowley *v.* Page, 7 C. & P. 790; Smith *v.* Davies, ib. 307; Clarke *v.* Spence, 10 Watts 335; Story on Bailm. §§ 454, 457, n. (3d ed.); Brind *v.* Dale, 8 C. & P. 207. See further, as to the right to begin, and, of course, the burden of proof, Pontifex *v.* Jolly, 9 C. & P. 202; Harnett *v.* Johnson, ib. 206; Aston *v.* Perkes, ib. 231; Osborn *v.* Thompson, ib. 337; Bingham *v.* Stanley, ib. 374; Lambert *v.* Hale, ib. 506; Lees *v.* Hoffstadt, ib. 599; Chapman *v.* Emden, ib. 712; Doe *v.* Rowlands, ib. 734; Ridgway *v.* Ewbank, 2 Moo. & R. 217; Hudson *v.* Brown, 8 C. & P. 774; Soward *v.* Leggett, 7 id. 613; Bowles *v.* Neale, ib. 262; Richardson *v.* Fell, 4 Dowl. 10; Silk *v.* Humphery, 7 C. & P. 14.

[6] [Contributory negligence is generally treated as in the nature of an excuse to be alleged and proved by the defendant: {Holt *v.* Whatley, 51 Ala. 569;} South. P. R.

ing faint traces of a stamp of some kind;[7] or where a failure of consideration is set up by the plaintiff, in an action to recover the money paid;[8] or where the action is founded on a deficiency in the quantity of land sold, and the defendant alleges, in a special plea, that there was no deficiency;[9] the burden of proof is on the party making the allegation, notwithstanding its negative character.

§ 81 *a*. **Sanity.** [(1) In proving the commission of a *crime*, the criminal intent being material, the accused's sanity is, by the orthodox view, a part of the case of the prosecution; and the burden of proving it, in the sense of the risk of non-persuasion, is on the prosecution; the measure of persuasion required being, as other elements of a crime, persuasion beyond a reasonable doubt; and, as an incident of this view, the general presumption of sanity suffices for the prosecution's duty to produce evidence, and the duty of producing evidence of insanity is thrown upon the accused.[1] A variation of this view, held by a few Courts, fixes a mere preponderance of evidence as the

Co. *v.* Tomlinson, Ariz., 33 Pac. 710; {Sanders *v.* Reister, 1 Dak. 151;} Augusta *v.* Hudson, 88 Ga. 599, 606; Balt. Traction Co. *v.* Appel, 80 Md. 603; Lillstrom *v.* R. Co., 53 Minn. 464; Union S. Co. *v.* Conoyer, 41 Nebr. 617; Onverson *v.* Grafton, 5 N. D. 281; Baker *v.* Gas Co., 157 Pa. 593; Stewart *v.* Nashville, 96 Tenn. 50; Gulf C. & S. F. R. Co. *v.* Schieder, 88 Tex. 152; Tex. & P. R. Co. *v.* Volk, 151 U. S. 73; Wash. & G. R. Co. *v.* Tobriner, 147 id. 571; {Snyder *v.* R. Co., 11 W. Va. 14;} Welsh *v.* Argyle, 85 Wis. 307.

Contra, regarding it as a part of the plaintiff's case: North Chic. S. R. Co. *v.* Louis, 138 Ill. 9; Engrer *v.* R. Co., 142 Ind. 618; {Benton *v.* R. Co., 42 Ia. 192; Lane *v.* Crombie, 12 Pick. 177; Murphy *v.* Deane, 101 Mass. 455;} The Charles L. Jeffrey, 5 U. S. App. 370 (for admiralty cases).

In Texas there are two so-called exceptions to the rule: G. C. & S. F. R. Co. *v.* Schieder, *supra*. In Georgia the plaintiff has the burden of showing "either that he was not to blame or that the company was," but this doctrine may refer only to the shifting of the duty of producing evidence: R. Co. *v.* Kenney, 58 Ga. 489; Johnston *v.* R. Co., 95 id. 685.]

[7] Doe *v.* Coombs, 3 Q. B. 687.

[8] Treat *v.* Orono, 13 Shepl. 217.

[9] McCrea *v.* Marshall, 1 La. An. 29.

{In actions upon promissory *notes* or *bills of exchange*, if it be shown that they were stolen, or otherwise fraudulently put in circulation, the burden of proof is on the holder to show that he took them in good faith: Monroe *v.* Cooper, 5 Pick. 412; Worcester Co. Bank *v.* Dorchester, etc. Bank, 10 Cush. 488, 491; Wyer *v.* Dorchester, etc. Bank, 11 id. 52; Bissell *v.* Morgan, ib. 198; Fabens *v.* Tirrill, 15 Law Rep. 44; Perrin *v.* Noyes, 39 Me. 384; Goodman *v.* Harvey, 4 Ad. & El. 870; Arbouin *v.* Anderson, 1 Q. B. 504. But where the action is by the holder of a bank-bill, and the defendant proves it to have been stolen, the plaintiff is not bound to show how he came by the bill, to enable him to recover upon it, but the defendant, to defeat the plaintiff's right to recover upon it, must show that he received it under such circumstances as to prevent the maintenance of this action: Wyer *v.* Dorchester, etc. Bank, *supra;* Solomons *v.* Bank of England, 13 East 135, n.; De la Chaumette *v.* Bank of England, 2 B. & Ad. 385; see *post*, Vol. II, § 172. When goods are obtained from their owner by fraud, the burden of proof is upon one who claims under the fraudulent purchaser to show that he is a *bona fide* purchaser for value: Haskins *v.* Warren, 115 Mass. 514.}

[1] [Jones *v.* People, 23 Colo. 276; State *v.* Lee, 69 Conn. 186; Armstrong *v.* State, 30 Fla. 170, 196; {Hopps *v.* People, 31 Ill. 385;} Hornish *v.* People, 142 id. 620; {State *v.* Crawford, 11 Kan. 32; People *v.* Garbutt, 17 Mich. 9; Cunningham *v.* State, 56 Miss. 269; Com. *v.* Pomeroy, 117 Mass. 143;} Faulkner *v.* Terr., 6 N. M. 464; {State *v.* Pike, 49 N. H. 399; State *v.* Jones, 50 id. 370;} Nino *v.* People, N. Y., 43 N. E. 853; Davis *v.* U. S., 160 U. S. 469; State *v.* Wilner, 40 Wis. 304; see *post*, Vol. III, § 5, and a note in 23 Am. L. Reg. N. S. 21, for other cases.]

measure of persuasion required, instead of persuasion beyond a reasonable doubt.[2] But another view, based on judicial experience in dealing with the issue of insanity in criminal trials, and adopted by an increasing number of Courts, is that the accused has the burden of proving insanity, in the sense that he has the risk of persuading the jury to that effect by a preponderance of evidence, and also, of course, of producing evidence.[3]]

(2) {Where insanity is relied on as a defence to an action on a *contract*, it is treated as a plea in confession and avoidance, and the burden of proof is said to be on the party who alleges the insanity;[4] and in general, when the question of sanity comes up in a civil case, the burden of proof as to sanity is upon the party for whose case the allegation is regarded as necessary; thus, if the guardian of an insane person brings an action to recover the proceeds of a mortgage and note, which was assigned by the insane person while he was insane, the guardian must allege such insanity, and the burden of proof is on him.[5]}

(3) [The burden of proof as to a testator's sanity has been already referred to (*ante*, § 77).]

§ 81 *b*. **Criminal Cases; Alibi; Self-defence; etc.** [It is generally said that in criminal prosecutions the burden of proof is on the prosecution for all the facts that are material to the crime, so that, whether or not a particular fact is one which would in a civil action be of the nature of an affirmative excuse, it is nevertheless in a criminal prosecution a part of the case to be proved by the prosecution.[1] The absence of any affirmative pleadings by the accused, and the general policy of caution in favor of accused persons, seem to have been the theoretical and practical reasons for this result. Nevertheless, some inroads have of recent times been made upon this orthodox principle, and in many jurisdictions it is accepted that the burden of proof may for certain sorts of facts be upon the accused.[2] The absence of affirmative pleadings in defence is no insuperable objection

[2] [*E. g.* in New York.]

[3] [People *v.* Allender, Cal., 48 Pac. 1014; Phelps *v.* Com., Ky., 32 S. W. 470; State *v.* Scott, La. An., 21 So. 271; Clawson *v.* State, 59 N. J. L. 434; Kelch *v.* State, 55 Oh. St. 146; Lynch *v.* Com., 77 Pa. 205; Com. *v.* Berchine, id., 32 Atl. 110; King *v.* State, 91 Tenn. 617, 647.]

[4] {Brown *v.* Brown, 39 Mich. 792. But cf. Myatt *v.* Walker, 44 Ill. 485; Weed *v.* Mutual Life Ins. Co., 70 N. Y. 561; Anderson *v.* Cramer, 11 W. Va. 562; Jarrett *v.* Jarrett, ib. 584; Titlow *v.* Titlow, 54 Pa. St. 216; Ripley *v.* Babcock, 13 Wis. 425; Walcott *v.* Alleyn, Milw. Ec. R. (Ir.) 69; White *v.* Wilson, 13 Ves. 87; Perkins *v.* Perkins, 39 N. H. 163;} [so for a *deed:* see Buckey *v.* Buckey, 38 W. Va. 168; Taylor *v.* Buttrick, 165 Mass. 547.]

[5] {Wright *v.* Wright, 139 Mass. 177.}

[1] {People *v.* McCann, 16 N. Y. 58; Stokes *v.* People, 53 id. 164; Brotherton *v.* People, 75 id. 159; O'Connell *v.* People, 87 id. 377; People *v.* Riordan, 117 id. 73; People *v.* Downs, 123 id. 564; Turner *v.* Com., 86 Pa. 54, 74; Tiffany *v.* Com., 121 id. 179; Lilienthal *v.* U. S., 97 U. S. 266;} [State *v.* Shea, 104 Ia. 724; King *v.* State, 74 Miss. 576; Gravely *v.* State, 38 Nebr. 871; Davis *v.* State, id., 74 N. W. 599; see *post*, Vol. III, §§ 29, 30.]

[2] [It must be remembered that the Court's language may perhaps in some instances really mean only the duty of producing evidence.]

to such a result; and the judicial experience with certain issues on such trials has seemed to these Courts to justify such exceptions; and the fixing of a particular fact on this or that party as a part of his case is in general only a question of sound policy as based on experience (*ante*, § 14 *x*).

(1) A few Courts seem in general to place on the accused the burden of proving any fact in the nature of *excuse* or *mitigation*.[3] (2) A few Courts seem to place upon the accused the burden of showing that he acted in *self-defence*.[4] (3) It is generally conceded that the accused does not have the burden of proving an *alibi*.[5] (4) The disposition of the burden of proof as to *sanity* has been already referred to (*ante*, § 81 *a*).]

§ 81 *c*. **Measure of Persuasion; Proof beyond a Reasonable Doubt.** [The logical notion involved in the term "burden of proof" signifies that the tribunal must be persuaded to believe the affirmation of the burden-bearer before it can be asked to act as desired. But this persuasion or conviction in the mind of the tribunal may have more than one degree or quality of positiveness; and an attempt is made by the law to define the degree of positiveness of persuasion which must exist in order to justify action in the shape of a verdict for the burden-bearer. The attempt to define these qualities of persuasion has great difficulties; and many useless refinements and wordy quibbles have marked the countless and more or less unsuccessful attempts.

In *criminal cases* a rule has grown up that the persuasion must be beyond a reasonable doubt. This distinction seems to have had its origin no earlier than the end of the eighteenth century, and to have been applied at first only in capital cases, and by no means in a fixed phrase, but in various tentative forms. "A clear impression," "upon clear grounds," "satisfied," are the earlier phrases; and then "rational doubt," "rational and well-grounded doubt," "beyond the probability of doubt," and "reasonable doubt" come into use. Then, in Mr. Starkie's classical treatise, "moral certainty, to the exclusion of all reasonable doubt," is given vogue.[1] From time to time, various ill-judged efforts have been made to define more in detail this elusive

[3] [See Appleton *v.* People, Ill., 49 N. E. 708 (under R. S. c. 38, § 155); State *v.* Byrd, N. C., 28 S. E. 353; Com. *v.* Mika, 171 Pa. 273. But see the suggestion in the preceding note; also *post*, Vol. III, §§ 29, 30.]

[4] [See Roden *v.* State, 97 Ala. 54; Boulden *v.* State, 102 id. 78, 83 (but compare Scheerer *v.* Agee, 113 id. 383); State *v.* Barringer, 114 N. C. 840; Meyers *v.* Com., 90 Va. 705; State *v.* Jones, 20 W. Va. 764 (but compare State *v.* Zeigler, 40 id. 593).]

[5] [Pickens *v.* State, 115 Ala. 42; Schultz *v.* Terr., Ariz., 52 Pac. 352; McNamara *v.* People, Colo., 48 Pac. 541; State *v.* Ardvin, 49 La. An. 1145; State *v.* Harvey, 131 Mo. 339; Peyton *v.* State, Nebr., 74 N. W. 597; Borrego *v.* Terr., N. M., 46 Pac. 349; Wright *v.* Terr., Okl., 47 Pac. 1069; State *v.* Thurston, S. D., 73 N. W. 196;] [Com. *v.* Choate, 105 Mass. 452; Binns *v.* State, 46 Ind. 311; Kaufman *v.* State, 49 id. 248; Rudy *v.* Com., 128 Pa. 507; People *v.* Stone, 117 N. Y. 484; State *v.* Sutton, 70 Iowa 268; State *v.* Ward, 61 Vt. 192; State *v.* Cameron, 40 id. 555; State *v.* Kline, 54 Iowa 183; State *v.* Reitz, 83 N. C. 634; People *v.* Fong Ah Sing, 64 Cal. 253; State *v.* Reed, 62 Iowa 40; *contra*, Waters *v.* State, 39 Oh. St. 215.]

[1] [For the historical data above summarized, see an article by Judge May of Boston in 10 Amer. Law Review 642, 656.]

and undefinable state of mind. One that has received frequent sanction and has been quoted innumerable times is that of Chief Justice Shaw of Massachusetts, on the trial of Dr. Webster for the murder of Mr. Parkman:[2] "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 evidence must establish the truth of the fact to a reasonable and moral certainty, — a certainty that convinces and directs the understanding, and satisfies the reason and judgment. . . . This we take to be proof beyond a reasonable doubt."

Many others, in varying forms, convey the same notion in more or less well-chosen words; and each Court has its stores of precedents of instructions approved and disapproved.[3] Nevertheless,

[2] [Com. *v.* Webster, 5 Cush. 302.] {Others are as follows: Gray, C. J., in Com. *v.* Costley, 118 Mass. 1; "Proof 'beyond a reasonable doubt' is not beyond all possible or imaginary doubt, but such proof as precludes every reasonable hypothesis, except that which it tends to support. It is proof to a 'moral certainty,' as distinguished from an absolute certainty. As applied to a judicial trial for crime, the two phrases are synonymous and equivalent, each has been used by eminent judges to explain the other, and each signifies such proof as satisfies the judgment and consciences of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible;" Pollock, C. B., adopting Lord Tenterden's words, in R. *v.* Kohl, London Times, Jan. 12, 1865: "There was no doubt that it had been said that there ought to be certainty; there ought to be the highest certainty that there was in human affairs; and the rule that Lord Tenterden laid down was this, and I pronounce it in his very words: 'The jury should be persuaded of the guilt of the prisoner before they find him guilty to the same extent, and with the same certainty, that they would have in the transaction of their own most important concerns. They ought to have the highest practicable degree of certainty: demonstration was not required, nor was absolute certainty; for that was not attainable in any case whatever. Direct testimony might be always got rid of by the suggestion that the witnesses were perjured; and they never could have absolute, positive certainty. It was idle to speculate as to what might be to one man the most important matter in his life; but there were occasions, — with reference, for instance, to the deepest interests of those whom one loved most dearly; there were interests that might be called in question to require the highest consideration, and all the certainty that could be attained in human affairs. He did not think it necessary to say certainty as to this or that particular matter; but it was the certainty men would require in their own most important concerns in life: and he thought that to hold any other doctrine, or to act on any other view, would be to paralyze the law entirely in its criminal application, and to make it difficult, if not impossible, to have a satisfactory administration of justice.'"}

[3] A few precedents from the various jurisdictions are here given: {Mickle *v.* State, 27 Ala. 20; Tuberville *v.* State, 40 id. 715; McAlpine *v.* State, 47 id. 78; Faulk *v.* State, 52 id. 515;} [Crawford *v.* State, id., 21 So. 214; Walker *v.* State, id., 23 So. 149; Jones *v.* State, Ark., 32 S. W. 81;] {People *v.* Ash, 44 Cal. 288;} [People *v.* Ashmead, id., 50 Pac. 681; Boykin *v.* People, Colo., 45 Pac. 419; Gantling *v.* State, Fla., 23 So. 857;] {Cook *v.* State, 11 Ga. 53; O'Neil *v.* State, 48 Ga. 66;} [Campbell *v.* State, id., 28 S. E. 71;] {Earll *v.* People, 73 Ill. 329;} [Spalding *v.* People, id., 49 N. E. 993; Reynolds *v.* State, Ind., 46 N. E. 31;] {Beavers *v.* State, 58 id. 530; State *v.* Maxwell, 42 Ia. 208; State *v.* Porter, 34 id. 131;} [State *v.* Marshall, id., 74 N. W. 763; Stevens *v.* Com., Ky., 45 S. W. 76; State *v.* Bazile, 58 La. An., 23 So. 8;] {People *v.* Finley, 38 Mich. 482;} [Davis *v.* State, Minn., 70 N. W. 894;] {Alghieri *v.* State, 25 Miss. 584; James *v.* State, 45 id. 572; Browning *v.* State, 33 id. 47;} [Lipscomb *v.* State, id., 23 So. 210; State *v.* Duncan, Mo., 44 S. W. 263;] {Terr. *v.* Owings, 3 Mont. 137;} [State *v.* Clancy, id., 52 Pac. 267; Morgan *v.* State, Nebr., 71 N. W. 788; Whitney *v.* State, id., 73 N. W. 696; Terr. *v.* Padilla, N. M.,

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 rather confusion, or, at the least, unprofitable incomprehension. In practice, these detailed amplifications of the doctrine have usually degenerated into a mere tool for counsel who desire to entrap an unwary judge into forgetfulness of some obscure precedent, or at least to save a cause for a new trial by quibbling upon an appeal over the verbal impropriety of a form of words uttered by the judge or the propriety of a form of words which he declines to utter. "No man can measure with a rule he does not understand; neither can juries determine by rules obscure in themselves and made yet more obscure by attempted definition."[4] The effort to perpetuate and develop these unserviceable definitions is a useless one, and serves to-day chiefly to aid the purposes of the unscrupulous. It should be wholly abandoned.]

§ 81 *d.* **Same: Proof by Preponderance of Evidence.** [In *civil cases* it should be enough to say that the extreme caution and the unusual positiveness of persuasion required in criminal cases does not obtain. But it is customary to go further, and here also to attempt to define in words the quality of persuasion necessary. It is said to be that state of mind in which there is seen to be a "preponderance of evidence" in favor of the demandant's proposition. Here, too, moreover, this simple and suggestive phrase has not been allowed to suffice; and in many precedents sundry other phrases — "satisfied," "convinced," and the like — have been put forward as equivalents and their propriety as a form of words discussed and sanctioned or disapproved.[1]

But the chief topic of controversy has been whether in certain civil cases the measure of persuasion for *criminal cases* should be applied. Policy suggests that the latter test should be strictly confined to its original field, and that there ought to be no attempt to employ it in any civil case.[2] Nevertheless, the effort has been made

46 Pac. 346; People *v.* Barker, N. Y., 47 N. E. 31;] {Com. *v.* Carey, 2 Brewst. 404; Com. *v.* Harman, 4 Pa. St. 269;} [State *v.* Aughtry, S. C., 26 S. E. 619;] {U. S. *v.* Foulke, 6 McLean 349; Miles *v.* U. S., 103 U. S. 304;} [Isaac *v.* U. S., 159 U. S. 487; State *v.* Cushing, Wash., 50 Pac. 412; Emery *v.* State, Wis., 65 N. W. 848.

It is generally said that the doctrine does not apply to specific evidentiary or *subordinate facts*, but only to the general proposition of guilt: Jamison *v.* People, 145 Ill. 357, 380; Williams *v.* People, id., 46 N. E. 749; Hinshaw *v.* State, 147 Ind. 334; State *v.* Glenn, Mont., 41 Pac. 998; Morgan *v.* State, 51 Nebr. 672;] {but see People *v.* Ah Chung, 54 Cal. 398; Com. *v.* Doherty, 137 Mass. 245.}

{For the weight to be given to *circumstantial* evidence, see Stephen, General View of the Criminal Law, 249; Rea *v.* State, 8 Lea 356; State *v.* Norwood, 74 N. C. 247; People *v.* Morrow, 9 Pac. C. L. J. 99; Bowie *v.* Maddox, 29 Ga. 285; Ridley *v.* Ridley, 1 Coldw. 323; Deland *v.* Bank, 111 Ill. 327; Belhaven & Stenton Peerage, L. R. 1 App. Cas. 278; Com. *v.* Read, Me., 1 Cent. L. J. 219.}

[4] [From the article above cited; see its pages for some just remarks upon the doctrine in general.]

[1] [*E. g.* Murphy *v.* Waterhouse, Cal., 45 Pac. 866; French *v.* Day, Me., 36 Atl. 908; Moore *v.* Stone, Tex. Civ. App., 36 S. W. 909; Sigafus *v.* Porter, U. S. App., 84 Fed. 430.]

[2] [See the article in the American Law Review, above referred to.]

(though usually without success) to introduce it in certain sorts of civil cases where an analogy seems to obtain. (1) It is sometimes said that, in general, wherever in a civil case a criminal act is charged as a part of the cases the rule for criminal cases should apply ;[3] but this has been generally repudiated.[4] (2) Nor is such a doctrine better established for individual kinds of cases. It does not apply to an action for a statutory penalty ;[5] nor to a plea of truth to an action for a defamatory charge of crime ;[6] nor to a plea of arson by the insurer in an action on a policy of fire insurance ;[7] nor in an action for support charging the defendant as the father of a bastard ;[8] nor in an action for seduction,[9] nor a proceeding for divorce on the ground of adultery ;[10] nor in an action involving a charge of fraud ;[11] nor in proceedings for contempt.[12] But such a standard, or its equivalent, is applied to measure the proof of the existence and contents of a lost will,[13] and of mutual mistake as ground for reformation of an instrument.[14]]

[3] [*E. g.* Illinois cases cited in Grimes *v.* Hilliary, 150 Ill. 141, 146 ;] {see also Barton *v.* Thompson, 46 Ia. 30 ; Mott *v.* Dawson, ib. 533 ; Polston *v.* See, 54 Mo. 291.}

[4] {Ellis *v.* Burrell, 60 Me. 209 ; Weston *v.* Gravlin, 49 Vt. 507; Munson *v.* Atwood, 30 Coun. 102 ; Mead *v.* Husted, 52 id. 56 ; Jones *v.* Greaves, 26 Oh. St. 2; Robinson *v.* Randall, 82 Ill. 521 ; Bissell *v.* West, 35 Ind. 54; Schmidt *v.* New York, etc. Ins. Co., 1 Gray 529 ; Gordon *v.* Parmelee, 15 id. 413 ; Burr *v.* Willson, 22 Minn. 206 ; New York & B. F. Co. *v.* Moore, 102 N. Y. 667 ; Sprague *v.* Dodge, 95 Am. Dec. 525, and note ;} [Nebraska N. B'k *v.* Johnson, 51 Nebr. 546 ; Brown *v.* Tourtelotte, Colo., 50 Pac. 195 ; see the doctrine criticised in 10 Amer. L. Rev. 642.]

[5] {People *v.* Briggs, 114 N. Y. 64 ; O'Connell *v.* O'Leary, 145 Mass. 311 ; Roberge *v.* Burnham, 124 id. 312 ;} [Sparta *v.* Lewis, 91 Tenn. 370 ; *contra:* U. S. *v.* Shapleigh, 54 Fed. 126.]

[6] [Hearne *v.* De Young, 119 Cal. 670 ; Atlanta Journal *v.* Mayson, 92 Ga. 640 ; Ellis *v.* Burrell, 60 Me. 207 (leading case) ;] {Matthews *v.* Huntley, 9 N. H. 150 ; Folsom *v.* Brown, 25 id. 114 ; Gordon *v.* Parmelee, 15 Gray 413 ; Kincade *v.* Bradshaw, 3 Hawks 63.}

[*Contra:* Ellis *v.* Lindley, 38 Ia. 461; Tucker *v.* Call, 45 Ind. 31 ; Polston *v.* See, 54 Mo. 291. The supposed doctrine *contra* is rested on Chalmers *v.* Shackell, 6 C. & P. 475 ; Willmett *v.* Harmer, 8 id. 695 ; Neeley *v.* Lock, ib. ; Gants *v.* Vinard, 1 Smith Ind. 287; Shortley *v.* Miller, ib. 395 ; see these criticised in 10 Amer. L. Rev. 642.]

[7] [Blackburn *v.* Ins. Co., 116 N. C. 821 ; First Nat'l B'k *v.* Assur. Co., Or., 52 Pac. 1050 (these two citing some fifty cases) ;] {Mutual F. I. Co. *v.* Usaw, 112 Pa. 89 ; Marshall *v.* Ins. Co., 43 Mo. 586 (leading case) ; Schmidt *v.* Ins. Co., 1 Gray 529 ; Wash. Ins. Co. *v.* Wilson, 7 Wis. 169 ; Wightman *v.* Ins. Co., 8 Rob. 442 ; Hoffman *v.* Ins. Co., 1 La. An. 216 ; Scott *v.* Ins. Co., 1 Dill. C. C. 105 ; Howell *v.* Ins. Co., 3 Ins. L. J. 653.}

[A supposed doctrine *contra* is rested on Thurtell *v.* Beaumont, 1 Bing. 339 ; and is accepted in Darling *v.* Banks, 14 Ill. 46 ; McConnells *v.* Ins. Co., 18 id. 228 ; Shultz *v.* Ins. Co., Fla., 1 Ins. L. J. 495 ; see these criticised in 10 Amer. L. Rev. 642.

In some of the cases in the first list above, it is sometimes said that the presumption of innocence applies ; as to this, see *ante*, §§ 34, 35.]

[8] {Knowles *v.* Scribner, 57 Me. 495 (leading case) ; Overlock *v.* Hall, 81 id. 348 ; People *v.* Christman, 66 Ill. 162; Miller *v.* State, 110 Ala. 69 ; Williams *v.* State, 113 id. 58 ; State *v.* Bunker, 7 S. D. 639; Davison *v.* Cruse, 47 Nebr. 829 ;} [Dukehart *v.* Caughman, 36 id. 412.] {*Contra:* State *v.* Rogers, 119 N. C. 793.}

[9] [Nelson *v.* Price, 18 R. I. 539.]

[10] [Lindley *v.* Lindley, 68 Vt. 421.]

[11] [Nelms *v.* Steiner, 113 Ala. 562; and some of the cases in note 4, *supra*. *Contra:* Kansas M. O. M. Ins. Co. *v.* Rammelsberg, 58 Kan. 531 ; Lalone *v.* U. S., U. S., 17 Sup. 74.]

[12] [Drakeford *v.* Adams, 98 Ga. 722.]

[13] [Shelburne *v.* Jachiquin, 1 Bro. Ch. C. 338 ; Fudge *v.* Payne, 86 Va. 306.]

[14] [Davis *v.* Sigourney, 8 Met. 487.]

CHAPTER VII.

LAW AND FACT; JUDGE AND JURY.[1]

§ 81 *e*. Admissibility of Evidence.
§ 81 *f*. Questions of Fact sometimes determined by the Judge.
§ 81 *g*. Questions of Law sometimes determined by the Jury.

§ 81 *e* [49]. **Admissibility of Evidence.** In trials of fact, without the aid of a jury, the question of the admissibility of evidence, strictly speaking, can seldom be raised; since, whatever be the ground of objection, the evidence objected to must, of necessity, be read or heard by the judge, in order to determine its character and value. In such cases, the only question, in effect, is upon the sufficiency and weight of the evidence. But in trials by jury, it is the province of the presiding judge to determine all questions on the admissibility of evidence to the jury; as well as to instruct them in the rules of law, by which it is to be weighed. Whether there be any evidence or not is a question for the judge; whether it is sufficient evidence is a question for the jury.[2] If the decision of the question of admissi-

[1] [On the whole subject of this chapter, the reader should consult the acute and masterly historical and analytical survey by Professor Thayer, in his Preliminary Treatise on the Law of Evidence, ch. 5, pp. 183–262; or his "Law and Fact in Jury Trials," 4 Harv. L. Rev. 147.]

[2] Per Buller, J., in Carpenter *v.* Hayward, Doug. 360. [Here, however, four distinct questions must be kept separate. (*a*) The admissibility of a given piece of evidence is for the judge to determine; this general principle is not disputed; for its application to the various kinds of evidence — competency of witnesses, absence of a hearsay declarant, voluntariness of a confession, mental condition of a dying declarant, etc. — see *post*, *passim*, under the various heads of evidence. It follows (*a'*), on the one hand, that, so far as the admissibility in law depends on some incidental question of fact — absence of a deponent from the jurisdiction, threats applied to obtain a confession, sanity of a witness, etc., — this also is for the judge to determine, before he admits the evidence to the jury: Bartlett *v.* Smith, 11 M. & W. 483; Doe *v.* Davies, 10 Q. B. 314, 323; Gordon *v.* Hadsell, 9 Cush. 511; Semple *v.* Callery, 184 Pa. 95; as stated in the ensuing sentence of the text above; and (*a''*), on the other hand, that in certain kinds of evidence, where the circumstances do not suffice to make the evidence inadmissible but do affect its weight — as in dying declarations, confessions, partly insane witnesses, etc.,— the jury may still, after considering those circumstances, deny to the admitted evidence any weight and in effect reject it; here some uncertainty of judicial opinion sometimes occurs; see *post*, under the various kinds of evidence. (*b*) The weight or probative value of admitted evidence is for the jury, in the sense (*b'*) that there are no rules of law to bind them on the subject (though Courts occasionally attempt to formulate some; see e. g. *post*, § 162), and (*b''*) that the judge's own view of the weight of the evidence is not to be stated to the jury; though this rule (which obtains by Constitution or statute in almost every State, though not in the Federal Courts: Vicksburg R. Co. *v.* Putnam, 118 U. S. 545) is an unfortunate departure from the orthodox common-law rule, and has done much to introduce fruitless quibbles and to impair the general efficacy of jury trial as an instrument of justice. (*c*) As a part of the rules regulating the burden of proof, the party on whom rests for the time being the duty of coming forward with evidence may be required not merely to offer any evidence

bility depends on the decision of other questions of fact, such as the fact of interest, for example, or of the execution of a deed, these preliminary questions of fact are, in the first instance, to be tried by the judge; though he may, at his discretion, take the opinion of the jury upon them. But where the question is mixed, consisting of law and fact, so intimately blended as not to be easily susceptible of separate decision, it is submitted to the jury, who are first instructed by the judge in the principles and rules of law by which they are to be governed in finding a verdict; and these instructions they are bound to follow.[3] If the genuineness of a deed is the fact in question, the preliminary proof of its execution, given before the judge, does not relieve the party offering it from the necessity of proving it to the jury.[4] The judge only decides whether there is, *prima facie*, any reason for sending it at all to the jury.

§ 81 *f*. **Questions of Fact sometimes determined by the Judge.** [It is usually said that questions of fact are for the jury; or in the Latin phrase employed by Coke,[1] *Ad quæstionem facti non respondent judices, ad quæstionem juris non respondent juratores.* But this cannot be taken as a trustworthy guide to the solution of any particular controversy on the subject. "Courts pass upon a vast number of questions of fact that do not get on the record or form any part of the issue. Courts existed before juries; juries came in to perform only their own special office; and the Courts have always continued to retain a multitude of functions which they exercised before ever juries were heard of, in ascertaining whether disputed things be true. In other words, there is not, and never was, any such thing in jury trials as an allotment of all questions of fact to the jury. The jury simply decides some questions of fact. . . . The allotment to the jury of matters of fact, even in the strict sense of fact which is in issue, is not exact. The judges have always answered a multitude of questions of ultimate fact, or facts which form part of the issue."[2] It is therefore of little service to seek for guidance as to what these questions are by defining "law" and "fact;"[3] the inquiry is rather as to the kinds of

whatever but a sufficient amount to be worth considering, before he is regarded as satisfying this rule; in other words, he cannot go to the jury unless his evidence is sufficient, by this test; and it is the judge that applies the test. In this sense, then, the judge may be called upon to rule whether the evidence is sufficient, *i. e.* sufficient to go to the jury; if it is, they then solely determine whether it is sufficient, *i. e.* to convince them; this is treated *ante*, § 14 *w*. (*d*) The ruling of a trial Court on preliminary questions of fact relating to admissibility is often held to be not subject to review, *i. e.* the trial Court is said to have "discretion;" the instances are mentioned under the various heads of evidence.]

[3] 1 Stark. Evid. 510, 519–526; Hutchison *v.* Bowker, 5 M. & W. 535; Williams *v.* Byrne, 2 N. & P. 139; McDonald *v.* Rooke, 2 Bing. N. C. 217; James *v.* Phelps, 11 Ad. & El. 483; s. c. 3 P. & D. 231; Panton *v.* Williams, 2 Q. B. 169; Townsend *v.* State, 2 Blackf. 151; Montgomery *v.* Ohio, 11 Oh. 424. [See § 81 *g*, *post*.]

[4] Ross *v.* Gould, 5 Greenl. 204.

[1] [Isaack *v.* Clark, Rolle, I, 132; 2 Bulstr. 314.]

[2] [Thayer, *ubi supra*, 185, 202.]

[3] [For further discriminations on this point, see Thayer, 189 ff.]

questions of fact which are to be determined by the judge. Moreover, this inquiry in effect concerns the respective division of functions between judge and jury, — a larger subject, and one not so much a part of the law of evidence as of the law of trial-procedure in general; and the matter is thus complicated by other inquiries as to the general powers of the judge in supervising and controlling the jury, — inquiries which must be distinguished from the specific one whether the evidence on a certain point is to be addressed to the judge or to the jury as the functionary immediately concerned with its determination. It is possible here only to indicate the trend of some of the main subjects of controversy or difficulty.

(1) When the question is whether a person has been guilty of *negligence*, *i. e.* whether he has used due care under the circumstances, or has acted as a prudent man would have acted, or whatever the form of phrase may be, the evidence is to be addressed to the jury, and the question is for them to determine. But from this rule must be distinguished three kinds of judicial utterances, closely connected in practice, and superficially though not in truth involving an inconsistency with or a limitation of this principle. (*a*) Where for the kind of case in hand a definite rule of law, more precise and concrete, has been framed for determining the effect of the person's conduct, this rule of law may, in the hands of the judge, conclude the question, and it may cease to be a question of fact for the jury to the extent that the rule of law applies. Thus, a defendant's conduct in carrying a loaded gun on his shoulder in a city street may be ruled by the Court to be "negligence *per se*," or, in a common phrase, he is held to have acted "at peril" of answering for the harmful consequences; so that the question of fact for the jury is merely whether he carried the gun in that way, and the question whether he acted with due care ceases to be a question for them, because it is covered by a specific and concrete rule of law. Similar rules are constantly laid down for various situations, — leaving a horse unhitched in a street, running a train at a speed in excess of a statutory limit, storing gunpowder in a populous quarter, etc. So, also, a concrete rule of this sort may be laid down for a plaintiff whose contributory negligence is pleaded, and it may be ruled that his conduct in thrusting his head out of a railway car-window, or in failing to stop, look, and listen at a railway crossing, is "negligence *per se*." Whether such a rule should be laid down is a question of the detailed substantive law appropriate to the situation; and, wherever such a rule of law appears, the matter ceases, as of course, to that extent, to be a question of fact for the jury.[4] (*a'*) In pursuance of the rules regarding the burden of producing evidence, and of the judicial function thus called into play (*ante*, § 14 *w*), it is in every case for the Court to say whether there was sufficient evidence to go

[4] [See the nature of such rules explained in Holmes, Common Law, 150, 152; 8 Harv. L. Rev. 389.]

to the jury, and thus also in a case of negligence. Thus the Court has constantly, in revising the results of a trial, to ask whether there was any evidence of negligence proper to be left to a jury, and occasionally a more detailed test is attempted for thus exercising this power of revision and determining whether the party has fulfilled the duty of producing sufficient evidence.[5] (*a''*) Another form of utterance, sometimes and properly treated[6] as another way of phrasing the preceding principle, but often treated as if independent of it and as if forming an exception to the first general principle above stated, is that the question of negligence goes to the jury unless the facts are undisputed and fair-minded or reasonable men could draw but one inference from them. So far as this phrase (almost universally used, in one form or another) is intended to mean that the Court would, if the above condition were fulfilled, either declare the evidence of negligence insufficient to go to the jury (if that were the Court's interpretation of the conduct), or set aside, as against the weight of evidence, a verdict finding no negligence and order a new trial or even cause a new verdict to be entered (if that were the Court's interpretation), the phrase is in effect only a more detailed statement of the test to be adopted by the Court in its supervisory right, just alluded to, to say whether there is or is not sufficient evidence for the jury or whether a verdict is or is not against the weight of evidence (*ante*, § 14 *w*). But so far as the phrase is intended to mean that, if the specified condition is fulfilled, the Court will take the question into its own hands and say, as a matter to be decided by the Court itself, that there was or was not negligence, upon facts undisputed and inferences alone conceivable,[7] then the result seems to be in effect an exception to the general principle first above stated, *i. e.* it defines an excepted case in which the question of negligence is to be determined, for that litigation, by the judge and not by the jury. It is often difficult to ascertain what is the precise nature of the principle involved in this phrasing.[8]

[5] [See the citations in the next notes.]

[6] [*E. g.* per Brett, J., in Bridges *v.* R. Co., L. R. 7 H. L. 213.]

[7] [See, for example, an opinion by Brawley, J., in Patton *v.* R. Co., U. S. App., 82 Fed. 979.]

[8] [The use of this phrase, and its associated questions, may be seen in the following cases: Bridges *v.* R. Co., *supra*; {Jackson *v.* R. Co., L. R. 2 C. P. D. 125; Pearson *v.* Cox, ib. 369; Davey *v.* R. Co., L. R. 12 Q. B. D. 70; Pearce *v.* Lansdowne, 69 L. T. R. 316; Metrop. R. Co. *v.* Wright, L. R. 11 App. Cas. 152; Metrop. R. Co. *v.* Jackson, 3 id. 193; Dublin R. Co. *v.* Slattery, ib. 1155}; Herbert *v.* R. Co., Cal., 53 Pac. 651; Stroble *v.* New Albany, 144 Ind. 695; Young *v.* R. Co., 148 id. 54; {Hinckley *v.* R. Co., 120 Mass. 257; Teipel *v.* Hilsendegen, 44 Mich. 461; Penns. R. Co. *v.* Righter, 42 N. J. L. 180; Payne *v.* R. Co., 83 N. Y. 572;} Tillett *v.* R. Co., 118 N. C. 1031; White *v.* R. Co., id., 27 S. E. 1002; Gates *v.* R. Co., 154 Pa. 566; Wash. & G. R. Co. *v.* Tobriner, 147 U. S. 571; Richm. & D. R. Co. *v.* Powers, 149 id. 43; Gardner *v.* R. Co., 150 id. 349, 361; Balt. & O. R. Co. *v.* Griffiths, 159 id. 603; North. P. R. Co. *v.* Peterson, 12 U. S. App. 254; Pyle *v.* Clark, id., 79 Fed. 744; Hanley *v.* Huntington, 37 W. Va. 378; Hart *v.* R. Co., 86 Wis. 483, 490; Morrison *v.* Madison, 96 id. 452.]

(2) The question whether a defendant in a case of *malicious prosecution* had "reasonable and probable cause" for instituting the suit, although it may be in the broader sense a question of fact, has nevertheless been retained in the hands of the Court as a matter for its determination.[9] The Court should properly instruct the jury "in the concrete and not in the abstract," by instructions adapted to cover the possible findings of fact.[10] It is sometimes said that the question is for the judge if the facts are undisputed and are open to but one inference;[11] but this fails to recognize the right of the judge, even where the facts are disputed, to submit instructions appropriate to the possible findings.

(3) There are many other situations in which the issue of reasonableness of conduct presents itself; and in general it is recognized as an issue of fact for the jury.[12] There has been a more or less definite change from an earlier attitude of the Courts when such questions were constantly treated as questions of law, in the sense that the judge determined whether the conduct under all the circumstances was reasonable; and instances of this older treatment are to be found to-day.[13] Moreover, an intermediate form appears, reserving the question for the judge where the facts are undisputed.[14] But from these real variations in the attitude toward the present subject are to be distinguished the instances of the Court's resort to the two other principles already noted in speaking of the question of negligence; (*a*) the question may, by the development of the substantive law, have ceased to be a mere broad question of reasonableness and have become reduced to detailed and concrete rules-of-thumb, — as in several instances in the law of negotiable instruments; here there is a rule of law, more or less definite, and the jury are to that extent limited in their inquiry; (*a'*) the Court's supervisory right, upon the present issue as upon others, to declare that there is not evidence sufficient to go to a jury or that a verdict is against evidence, may be exercised by ordering a nonsuit or setting aside a verdict, without denying the general question to be one of fact for the jury.

(4) The construction of all *written instruments* belongs to the Court. It may become necessary to ascertain the surrounding circumstances that fill out the meaning of the words, as well as any local or commer-

[9] [Panton *v.* Williams, 2 Q. B. 169; Lister *v.* Perryman, L. R. 4 H. L. 521; Schattgen *v.* Holnback, 149 Ill. 646, 652; White *v.* McQueen, 96 Mich. 249, 254; Mahaffy *v.* Byers, 151 Pa. 92; Stewart *v.* Sonneborn, 98 U. S. 187. So also for probable cause for arrest: Kirk *v.* Garrett, 84 Md. 383; Filer *v.* Smith, 96 Mich. 347. For the history of this, see Thayer, *ubi supra*, p. 221.]

[10] [Hess *v.* Oregon Bank, Or., 49 Pac. 803.]

[11] [Diers *v.* Mallon, 46 Nebr. 121; Wass *v.* Stephens, 128 N. Y. 123.]

[12] [*E. g.* Gerdes *v.* I. & F. Co., 124 Mo. 347 (removing highway obstructions); White *v.* Pease, 15 Utah 170 (delivery of goods); Chesterfield *v.* Ratliff, S. C., 30 S. E. 593 (discharging firearms without reasonable excuse).]

[13] [*E. g.* Joyner *v.* Roberts, 114 N. C. 389 (reasonable inquiry by one giving a marriage-license).]

[14] [Comer *v.* Way, 107 Ala. 300; Earnshaw *v.* U. S., 146 U. S. 60, 67.]

cial meanings attached to particular words by usage; and the ascertainment of this is for the jury. But, subject to the amplification or precision of the meaning thus ascertained, it is the duty of the jury to take the construction of the instrument from the Court.[15] Where a contract is entirely oral, or partly in writing and partly oral, it is usually said that its terms, if disputed, are to be tried by the jury as a question of fact,[16] subject of course to instructions as to the legal effect of the words.

(5) On such matters as the Court notices judicially (*ante*, Chapter II), it would seem that the judge's ruling determines the matter, and the jury must take it from him as a decided point, even though it concern something that would otherwise come to them as matter of fact.

(6) In the definition of crime, certain more detailed rules have from time to time been laid down, as rules of law, defining the nature of malice and of the other states of mind which are to be taken as constituting that criminal intent which is one of the elements of the offence. So far as limited by these rules, the question of intent ceases to be one of fact and is one of law.[17] The chief controversy which, in the course of this development, brought into competition and collision the respective functions of judge and jury was the question whether, in a criminal prosecution for libel, the malicious intent was an inference of law to be made from the words published and the averments and innuendoes, as found by the jury and spread upon the record, or whether it remained as an inference of fact to be found by the jury. The practice of the English judges in the eighteenth century had not been entirely consistent in maintaining the former view,[18] and the latter view was finally after much popular agitation sanctioned by the Legislature.[19]]

§ 81 *g*. **Questions of Law sometimes determined by the Jury.** [In only a few instances has it been thought that a matter of the sort commonly termed "law" should be left with the jury for determination. (1) It is more generally held that a foreign law is a matter of

[15] [Neilson *v.* Harford, 8 M. & W. 806; Graham *v.* Sadlier, 165 Ill. 95; Ricketts *v.* Rogers, Nebr., 73 N. W. 946; Spragins *v.* White, 108 N. C. 449; Meeks *v.* Willard, 57 N. J. L. 22; Brown *v.* McGran, 14 Pet. 479; M'Namee *v.* Hunt, U. S. App., 87 Fed. 298.]

[16] [Eureka F. Co. *v.* R. Co., 78 Md. 179, 188; Gassett *v.* Glazier, 165 Mass. 473; see Nash *v.* Classon, 163 Ill. 409.]

[17] [Distinguish here such legal definitions of "malice," etc., from ordinary presumptions affecting the production of evidence; see *ante*, § 18.]

[18] [The arguments and opinions in the great Trial of the Dean of St. Asaph's, 21 How. St. Tr. 946, 968, 978, 1039; 3 T. R. 428 (in which Erskine was of counsel for the defendant, and Lord Mansfield delivered the opinion), contain the data on both sides; the answer of the Judges to the Lords, in 1789, 22 How. St. Tr. 296, 301, finally dealt with the matter.]

[19] [1792; St. 32 G. III, c. 60, known as Fox's Libel Act. For the law in this country, see Thompson on Trials, § 2025. Distinguish here, also, however, the question whether in a civil case there is any evidence upon which a jury might find a libel: see Capital and Counties B'k *v.* Henty, L. R. 7 App. Cas. 741.]

fact, *i. e.* its existence is to be determined by the jury;[1] but the better view is that it should be proved to the judge, who is decidedly the more appropriate person to determine it.[2] (2) The doctrine has obtained in a few jurisdictions that the jury, in dealing with the substantive law applicable to the case, have a legal right to repudiate the instructions of the judge and to determine the law for themselves;[3] but this ill-judged doctrine has only a narrow acceptance.]

[1] [Kline *v.* Baker, 99 Mass. 253 (except for the construction and effect of a written law forming the entire evidence); Gibson *v.* Ins. Co., 144 id. 81 (same); Hancock N. B'k *v.* Ellis, id., 51 N. E. 207 (similar); Charlotte *v.* Chouteau, 25 Mo. 465, 473; 33 id. 194, 200, 201 (same, *semble*).]

[2] [Pickard *v.* Bailey, 26 N. H. 152, 169 (where preliminary to the legality of a document); Lycoming Ins. Co. *v.* Wright, 60 Vt. 522, *semble;* see South Ottawa *v.* Perkins, 94 U. S. 260, 277.]

[3] [For the jurisdictions in which this view is taken, see Thompson on Trials, §§ 2132–2148; for a vindication of its orthodoxy and an examination of the rule in the various jurisdictions, see the dissenting opinion of Gray, J., in Sparf *v.* U. S., 156 U. S. 51; for an examination of its probable origin, see Thayer, *ubi supra*, 253; leading opinions are those of Best, C. J., in Levi *v.* Mylne, 4 Bing. 195; Story, J., in U. S. *v.* Battiste, 2 Sumn. 243; Shaw, C. J., in Com. *v.* Porter, 10 Metc. 263; Doe, J., in State *v.* Hodge, 50 N. H. 510; and the earlier authorities are collected in Mr. Hargrave's note 276, to Co. Lit. 155 *b*.]

CHAPTER VIII.

BEST EVIDENCE PRINCIPLE.

1. *General Principle.*

§ 81 *h*. History and Scope of the Phrase.
§§ 82–84. General Principle.
§ 85. Applications of the Principle.
§ 86. Same: (1) Act required by Law to be in Writing.
§ 87. Same: (2) Same: Act reduced to Writing by the Parties.
§§ 88–90. Same: (3) Contents of Writing to be proved.

2. *Specific Rules included under the Best Evidence Principle.*

§ 97 *a*. Rules covered by the Term "Best Evidence."
§ 97 *b*. (1) Proving the Contents of a Writing.
§ 97 *c*. (2) Testing a Witness by Oath and Cross-examination.
§ 97 *d*. (3) Classes of Witnesses preferred to others.

1. *General Principle.*

§ 81 *h*. **History and Scope of the Phrase.** ["The rule that if one would prove the contents of a writing he must produce the writing itself, or show a legally sufficient reason for not doing it, is often called the 'best evidence rule.' The phrase is an old one. During the latter part of the seventeenth century, and the whole of the eighteenth, while rules of evidence were forming, the judges and text writers were in the habit of laying down two principles, namely, (1) that one must bring the best evidence that he can, and (2) that if he does this it is enough. These principles were the beginnings, in the endeavor to give consistency to the system of evidence before juries. They were never literally enforced, — they were principles and not exact rules; but for a long time they afforded a valuable test. As rules of evidence and exceptions to the rules became more definite, the field for the application of the general principle of the 'best evidence' was narrower. . . . But by this time it was becoming obvious that this 'general rule' was misapplied and over-emphasized."[1] "An old principle which had 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. . . . 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. In-

[1] [Thayer, Cases on Evidence, 726, 732.]

deed, 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." [2] It is in the light of such an explanation that one must peruse the following sections, which represent the general attitude of the first half of the nineteenth century.]

§ 82. **General Principle.** A fourth rule [1] which governs in the production of evidence is that which requires the best evidence of which the case in its nature is susceptible. This rule does not demand the greatest amount of evidence which can possibly be given of any fact; but its design is to prevent the introduction of any which, from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud; for when it is apparent that better evidence is withheld, it is fair to presume that the party had some sinister motive for not producing it, and that, if offered, his design would be frustrated.[2] The rule thus becomes essential to the pure administration of justice. In requiring the production of the best evidence applicable to each particular fact, it is meant that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence can be had. The rule excludes only that evidence which itself indicates the existence of more original sources of information.[3] But where there is no substitution of evidence, but only a selection of weaker, instead of stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed.[4] Thus, a title by deed must be proved by the production of the deed itself, if it is within the power of the party; for this is the best evidence of which the case is susceptible; and its non-production would raise a presumption that it contained some matter of apparent defeasance; but, being produced, the execution of the deed itself may be proved by only one

[2] [Thayer, Preliminary Treatise on Evidence, 495, 496. For a luminous account of the history and scope of the phrase, see chap. 11 of that work.]

[1] [This refers to the author's classification at § 50, *ante*.]

[2] "Falsi presumptio est contra eum, qui testibus probare conatur id quod instrumentis probare potest." Menoch. Consil. 422, n. 125.

[3] [This mode of stating the principle is unserviceable for any practical purpose, and is impossible of consistent application. The "best evidence" notion covers several wholly separate rules, as later explained, and they cannot be subsumed under this general phrase.]

[4] Phil. & Am. on Evid. 438: 1 Phil. Evid. 418; 1 Stark. Evid. 437; Glassford on Evid. 266–278; Tayloe *v.* Riggs, 1 Peters 591, 596; United States *v.* Reyburn, 6 id. 352, 367; Minor *v.* Tillotson, 7 id. 100, 101. [So far as this means that the original of a writing must be produced if available, but if unavailable, there is no preference between different sorts of secondary evidence, it has a certain truth; see *post*, §§ 558 ff.; in any other sense, it is of no service as a guide.]

of the subscribing witnesses, though the other also is at hand.[5] And even the previous examination of a deceased subscribing witness, if admissible on other grounds, may supersede the necessity of calling the survivor.[6] So, in proof or disproof of handwriting, it is not necessary to call the supposed writer himself.[7] And even where it is necessary to prove negatively that an act was done without the consent, or against the will of another, it is not, in general, necessary to call the person whose will or consent is denied.[8]

§ 83. All rules of evidence, however, are adopted for practical purposes in the administration of justice; and must be so applied as to promote the ends for which they were designed. Thus, the rule under consideration is subject to exceptions, where the general convenience requires it. Proof, for example, that an individual has acted notoriously as a public officer, is *prima facie* evidence of his official character, without producing his commission or appointment.[1]

§ 84. This rule naturally leads to the division of evidence into Primary and Secondary. Primary evidence is that which we have just mentioned as the best evidence, or that kind of proof which, under any possible circumstances, affords the greatest certainty of the fact in question: and it is illustrated by the case of a written document; the instrument itself being always regarded as the primary or best possible evidence of its existence and contents. If the execution of an instrument is to be proved, the primary evidence is the testimony of the subscribing witness, if there be one. Until it is shown that the production of the primary evidence is out of the party's power, no other proof of the fact is in general admitted. All evidence falling short of this in its degree is termed secondary. The question, whether evidence is primary or secondary, has reference to the nature of the case in the abstract, and not to the peculiar circumstances under which the party in the particular cause on trial may be placed. It is a distinction of law, and not of fact: referring only to the quality, and not to the strength of the proof. Evidence which carries on its face no indication that better remains behind is not secondary, but primary. And though all information must be traced to its source, if possible, yet if there are several distinct sources of information of the same fact, it is not ordinarily necessary to show that they have all been exhausted, before secondary evidence can be resorted to.[1]

§ 85. **Application of the Principle.** The cases which most fre-

[5] [This illustration shows the fallacy of the above generalization, for the rule that a subscribing witness must be called is itself an instance of the preference of one kind of witness as being superior to another.]

[6] Wright *v.* Tatham, 1 Ad. & El. 3.

[7] Hughes' Case, 2 East P. C. 1002; McGuire's Case, ib.; Rex *v.* Benson, 2 Campb. 508; [see *post*, § 97 *d*.]

[8] R. *v.* Hazy & Collins, 2 C. & P. 458; [see *post*, § 97 *d*.]

[1] [For the authorities on this point, see *post*, § 563 *g*.]

[1] [For the original note at this point, as to whether there are degrees of secondary evidence of the contents of a document, see *post*, § 563 *q*.]

quently call for the application of the rule now under consideration are those which relate to the substitution of oral for written evidence;[1] and they may be arranged into three classes: including in the first class those instruments which the law requires should be in writing; in the second, those contracts which the parties have put in writing; and in the third, all other writings, the existence of which is disputed, and which are material to the issue.[2]

§ 86. **Same: (1) Act required by Law to be in Writing.** In the first place, oral evidence cannot be substituted for any instrument which the law requires to be in writing;[1] such as records, public documents, official examinations, deeds of conveyance of lands, wills other than nuncupative, promises to pay the debt of another, and other writings mentioned in the statute of frauds. In all these cases, the law having required that the evidence of the transaction should be in writing, no other proof can be substituted for that, as long as the writing exists, and is in the power of the party. And where oaths are required to be taken in open court, where a record of the oath is made, or before a particular officer, whose duty is to certify it; or where an appointment to an additional office is required to be made and certified on the back of the party's former commission, — the written evidence must be produced.[2] Even the admission of the fact by a party, unless solemnly made, as a substitute for other proof, does not supersede direct proof of matter of record by which it is sought to affect him;[3] for the record, being produced, may be found irregular and void, and the party might be mistaken.[4] Where, however, the

[1] [This statement is misleading. When the object is to prove the contents of a writing, the question is not whether oral may be substituted for written evidence; but whether any evidence whatever can be given of the writing without producing the thing itself. But when the object is to prove an oral and not a written transaction, the question is not whether oral evidence can be used for either, but whether the oral act, instead of the written one, can be proved at all. The above phrase confuses these wholly distinct questions.]

[2] [A perusal of §§ 305 *a*–305 *g*, *post*, will assist in understanding the distinctions taken in the following sections.]

[1] [This principle is not disputed; but it is not concerned with the present subject. It is a part of the so-called parol-evidence rule, treated *post*, §§ 275 ff. It amounts to this, that if an act, to receive legal effect, is required by law to be done in writing, then an oral or parol act cannot be proved. It is conceded that if the writing is to be proved at all, the rule requiring its production applies; but the question is whether the thing to be proved may be the parol act, not the written act. This question is one of the substantive law, not of evidence. The difficulty usually arises in distinguishing between a writing which thus by law constitutes alone the legal act, and a writing which serves merely as an official record or testimony of an act which is valid though only in parol, *i. e.* of the general sort treated in §§ 483 ff., *post*. But this equally is still a question whether the legal act is, in the eye of the law, the official writing or the conduct recorded by it, — *i. e.* a question of the appropriate substantive law; see the principle explained more fully in § 305 *g*, *post*.]

[2] R. *v.* Hube, Peake's Cas. 132; Bassett *v.* Marshall, 9 Mass. 312; Tripp *v.* Garey, 7 Greenl. 266; 2 Stark. Evid. 570, 571; Dole *v.* Allen, 4 Greenl. 527; {Farnsworth Company *v.* Rand, 65 Me. 19; Poorman *v.* Miller, 44 Cal. 269; Bovee *v.* McLean, 24 Wis. 225; Terrill *v.* Colebrook, 35 Conn. 188; Steele *v.* Steele, 89 Ill. 51.}

[3] [This, however, is usually a real question of the Primariness rule, *i. e.* whether the contents of a document may be proved by the opponent's admission, without production; see *post*, § 563 *k*.]

[4] Scott *v.* Clare, 3 Campb. 236; Jenner *v.* Joliffe, 6 Johns. 9; Welland Canal Co.

record or document appointed by law is not part of the fact to be proved,[5] but is merely a collateral or subsequent memorial of the fact, such as the registry of marriages and births, and the like, it has not this exclusive character, but any other legal proof is admitted.[6]

§ 87. **Same: (2) Act reduced to Writing by the Parties.** In the second place, oral proof cannot be substituted for the written evidence of any contract which the parties have put in writing.[1] Here, the written instrument may be regarded, in some measure, as the ultimate fact to be proved, especially in the cases of negotiable securities; and, in all cases of written contracts, the writing is tacitly agreed upon, by the parties themselves, as the only repository and the appropriate evidence of their agreement. The written contract is not collateral, but is of the very essence of the transaction.[2] If for example, an action is brought for use and occupation of real estate, and it appears by the plaintiff's own showing that there was a written contract of tenancy, he must produce it, or account for its absence; though, if he were to make out a *prima facie* case, without any appearance of a written contract, the burden of producing it, or at least of proving its existence, would be devolved on the defendant.[3] But 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, not-

v. Hathaway, 8 Wend. 480; 1 Leach Cr. C. 349; 2 id. 625, 635; {Fleming *v.* Clark, 12 Allen 191; Michener *v.* Lloyd, 16 N. J. Eq. 38.}

[5] [This form of expression is correct, as compared with the one above used by the author; *i. e.* it is not a question whether the "evidence should be in writing," but whether the act to be proved by the evidence should be in writing.]

[6] Commonwealth *v.* Norcross, 9 Mass. 492; Ellis *v.* Ellis, 11 Mass. 92; Owings *v.* Wyant, 3 H. & McH. 393; 2 Stark. Evid. 571; R. *v.* Allison, R. & R. 109; Reed *v.* Passer, Peake's Cas. 231; {Howser *v.* Com., 51 Pa. St. 332; Gillett *v.* County Commissioners, 18 Kan. 410; Brown *v.* County Commissioners, 63 N. C. 514; Wayland *v.* Ware, 104 Mass. 46.}

[1] [Here, again, we are concerned in truth with a part of the parol-evidence rule, treated *post*, §§ 275 ff.; 305 *e*, *f*. When the parties have made the writing the sole memorial of their act, then nothing remains, as their effective legal act on that subject, but the writing; the question, then, is whether their parol acts have been by their will deprived of legal significance and the writing alone given effect; and this is not a question of the law of evidence, but of what constitutes the sole legal act in question. If it is held that the writing does, then the rule of Primariness of course applies to it.]

[2] [This elusive word "collateral" serves here merely to conceal an application of two distinct principles. (1) When we ask, under the so-called parol-evidence rule whether the parties have covered the whole transaction in a writing, and answer that they have not — as, perhaps, where we allow a tenant to prove, alongside of the written lease, an oral promise by the landlord to open a street, — here it may be said that the written transaction is "collateral" to the oral one, *i. e.* does not supersede it. This is still a question of the parol-evidence rule. (2) But where we wish to prove payment of a note or occupancy of leased land, the question arises whether we are dealing with the contents of a document at all; if we are, it must be produced; but if it can be thought that the act of payment or occupancy does not in itself involve the terms of the note or the lease, then we are not attempting to prove the contents of a writing, but, as it is said, a "collateral" fact. This question arises under the Primariness rule, and is dealt with *post*, § 563 *a*.]

[3] Brewer *v.* Palmer, 3 Esp. 213; confirmed in Ramsbottom *v.* Tunbridge, 2 M. & S. 434; R. *v.* Rawden, 8 B. & C. 708; Strother *v.* Barr, 5 Bing. 136, per Parke, J.

withstanding it appears that the occupancy was under an agreement in writing; for here the writing is only collateral to the fact in question.[4] The same rule applies to every other species of written contract. Thus, where, in a suit for the price of labor performed, it appears that the work was commenced under an agreement in writing, the agreement must be produced; and even if the claim be for extra work, the plaintiff must still produce the written agreement; for it may furnish evidence, not only that the work was over and beyond the original contract, but also of the rate of which it was to be paid for. So, in an indictment for feloniously setting fire to a house, to defraud the insurers, the policy itself is the appropriate evidence of the fact of insurance, and must be produced.[5] And the recorded resolution of a charitable society, under which the plaintiff earned the salary sued for, was on the same principle held indispensably necessary to be produced.[6] The fact that in such cases the writing is in the possession of the adverse party does not change its character: it is still the primary evidence of the contract; and its absence must be accounted for by notice to the other party to produce it, or in some other legal mode, before secondary evidence of its contents can be received.[7]

§ 88. **Same: (3) Contents of Writing to be proved.** In the third place, oral evidence cannot be substituted for any writing, the existence of which is disputed, and which is material either to the issue between the parties, or to the credit of witnesses, and is not merely the memorandum of some other fact.[1] For, by applying the rule to such cases, the Court acquires a knowledge of the whole contents of the instrument, which may have a different effect from the statement of a part. "I have always," said Lord Tenterden, "acted most strictly on the rule, that what is in writing shall only be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments; they may be so easily mistaken, that I think the purposes of justice require the strict enforcement of the rule."[2] Thus, it is not allowed, on cross-examination, in

[4] R. *v.* Inhabitants of Holy Trinity, 7 B. & C. 611; Doe *v.* Harvey, 8 Bing. 239, 241; Spiers *v.* Willison, 4 Cranch 398; Dennett *v.* Crocker, 8 Greenl. 239, 244; {Rayner *v.* Lee, 20 Mich. 384;} [see the explanation in note 2, *ante*.]

[5] R. *v.* Doran, 1 Esp. 127; R. *v.* Gilson, Russ. & Ry. 138; {*contra:* Com. *v.* Goodwin, 122 Mass. 19.}

[6] Whitford *v.* Tutin, 10 Bing. 395; Molton *v.* Harris, 2 Esp. 549.

[7] See further, R. *v.* Rawden, 8 B. & C. 708; Sebree *v.* Dorr, 9 Wheat. 558; Bullock *v.* Koon, 9 Cowen, 30; Mather *v.* Goddard, 7 Conn. 304; Rank *v.* Shewey, 4 Watts 218; Northrup *v.* Jackson, 13 Wend. 86; Vinal *v.* Burrill, 16 Pick. 401, 407, 408; Lanauze *v.* Palmer, 1 M. & M. 31.

[1] [The author seems here to be stating the real rule of Primariness, *i. e.* the simple one that, in proving the contents of a writing, the writing must be produced or accounted for. But the clauses, "the existence of which is disputed," etc., seem an improper limitation, and should be omitted. The phrase "oral evidence cannot be substituted" is not accurate, as already pointed out; oral evidence is not substituted for the writing; the evidence, whether oral or a written copy, is offered to prove the writing's contents; and the rule calls for the writing itself, and not evidence about it.]

[2] Vincent *v.* Cole, 1 M. & M. 258.

the statement of a question to a witness to represent the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without having first shown the letter to the witness, and having asked him whether he wrote that letter;[3] because, if it were otherwise, the cross-examining counsel might put the Court in possession of only a part of the contents of a paper, when a knowledge of the whole was essential, to a right judgment in the cause. If the witness acknowledges the writing of the letter, yet he cannot be questioned as to its contents, but the letter itself must be read.[4] And if a witness being examined in a foreign country, upon interrogatories sent out with a commission for that purpose, should in one of his answers state the contents of a letter which is not produced, that part of the deposition will be suppressed, notwithstanding, he being out of the jurisdiction, there may be no means of compelling him to produce the letter.[5]

§ 89. In cases, however, where the written communication or agreement between the parties is *collateral* to the question in issue, it need not be produced; as, where the writing is a mere proposal, which has not been acted upon;[1] or, where a written memorandum was made of the terms of the contract, which was read in the presence of the parties, but never signed, or proposed to be signed;[2] or, where during an employment under a written contract, a separate verbal order is given;[3] or, where the action is not directly upon the agreement, for non-performance of it, but is in tort, for the conversion or detention of the document itself;[4] or, where the action is for the plaintiff's share of money had and received by the defendant, under a written security for a debt due to them both.[5]

§ 90. But where the writing does not fall within either of the three classes already described, there is no ground for its excluding oral evidence. As, for example, if a written communication be accompanied by a verbal one, to the same effect, the latter may be received as independent evidence,[1] though not to prove the contents of the

[3] So held by all the judges in the Queen's Case, 2 Brod. & Bing. 287; [for this application of the rule, see *post*, § 463.]

[4] The Queen's Case, 2 Brod. & Bing. 287; *post*, § 463.

[5] Steinkeller *v.* Newton, 9 C. & P. 313; [for the authorities on this part of the rule, see *post*, § 56 *e*.]

[1] Ingram *v.* Lea, 2 Campb. 521; Ramsbottom *v.* Tunbridge, 2 M. & S. 434; Stevens *v.* Pinney, 8 Taunt. 327; Doe *v.* Cartwright, 3 B. & A. 326; Wilson *v.* Bowie, 1 C. & P. 8; Hawkins *v.* Ware, 3 B. & C. 690.

[2] Trewhitt *v.* Lambert, 10 Ad. & El. 470.

[3] Reid *v.* Battie, M. & M. 413. [The three preceding illustrations involve the principle of the parol-evidence rule, as explained already, § 87, note 2, (1); the subject is treated more fully *post*, §§ 305 *e*, *f*.]

[4] [For the authorities here, see *post*, § 563 *o*.]

[5] Bayne *v.* Stone, 4 Esp. 13. See Tucker *v.* Welsh, 17 Mass. 165; McFadden *v.* Kingsbury, 11 Wend. 667; Southwick *v.* Stephens, 10 Johns. 443. [The two preceding illustrations involve a different question from that of the first three, *i. e.* the one discussed as (2) in note 2, § 87, *ante*.]

[1] [Rather, evidence of the latter may be received, because the thing proved is independent of the writing, and thus the rule about proving the contents of a writing does not apply: see note 2, (2), § 87, *ante*.]

writing, nor as a substitute for it.[2] Thus, also, the payment of money may be proved by oral testimony, though a receipt be taken;[3] in trover, a verbal demand of the goods is admissible, though a demand in writing was made at the same time;[4] the admission of indebtment is provable by oral testimony, though a written promise to pay was simultaneously given, if the paper be inadmissible for want of a stamp.[5] Such, also, is the case of the examination and confession of a prisoner, taken down in writing by the magistrate, but not signed and certified pursuant to the statutes.[6] And any writing inadmissible for the want of a stamp, or other irregularity, may still be used by the witness who wrote it, or was present at the time, as a memorandum to refresh his own memory, from which alone he is supposed to testify, independently of the written paper.[7] In like manner, in prosecutions for political offences, such as treason, conspiracy, and sedition, the inscription on flags and banners paraded in public, and the contents of resolutions read at a public meeting, may be proved as of the nature of speeches, by oral testimony;[8] and in the case of printed papers, all the impressions are regarded as originals, and are evidence against the person who adopts the printing by taking away copies.[9]

§ 91.[1]

§ 92.[2]

§ 93.[3]

[2] {Cramer *v.* Shriner, 18 Md. 140.}

[3] Rambert *v.* Cohen, 4 Esp. 213; Jacob *v.* Lindsay, 1 East 460; Doe *v.* Cartwright, 3 B. & A. 326; {Kingsbury *v.* Moses, 45 N. H. 222; Davis *v.* Hare, 32 Ark. 386; Wolf *v.* Foster, 13 Kan. 116.} [Here the parol-evidence rule does not prevent, because the receipt is not intended as the sole memorial of the act (*post*, § 305*f*); and the primariness rule does not prevent, because proving the act of payment is not proving the contents of the receipt (*post*, § 563 *n*).]

[4] Smith *v.* Young, 1 Campb. 439; [see note 1, *supra*.]

[5] Singleton *v.* Barrett, 2 Cr. & Jer. 368; [because the attempt to reduce the transaction to writing has failed, and there is no written act legally available.]

[6] Lambe's Case, 2 Leach 625; R. *v.* Chappel, 1 Moo. & R. 395, 396, n.; 2 Phil. Evid. 81, 82; Roscoe's Crim. Evid. 46, 47; [for this principle, see *post*, § 227.]

[7] Dalison *v.* Stark, 4 Esp. 163; Jacob *v.* Lindsay, 1 East 460; Maugham *v.* Hubbard, 8 B. & C. 14; R. *v.* Tarrant, 6 C. & P. 182; R. *v.* Pressly, id. 183; Layer's Case, 16 Howell's St. Tr. 223; [because he is not testifying to the instrument's contents, but is merely using it to aid recollection.]

[8] R. *v.* Hunt, 3 B. & A. 566; Sheridan & Kirwan's Case, 31 Howell's St. Tr. 672. [These two results rest on different considerations; the flag or banner is not produced, because the Primariness rule is said to include only documents in its scope (*post*, § 563 *n*); the resolutions are not produced, because it is the oral utterances that are being proved, and not the writing's contents.]

[9] R. *v.* Watson, 2 Stark. 129, [provided the printed impression, as possessed or posted, is the thing to be proved; see *post*, § 563 *p*.]

[1] [Transferred *post*, as § 563*f*. The following seven sections deal with the specific excuses for not producing the writing itself, and as a part of that subject is also treated by the author *post*, in the chapter on Private Writings, it seems best to place these sections there; the whole subject loses by a separation of the various parts of the rule.]

[2] [Transferred *post*, as § 563 *g*.]

[3] [Transferred *post*, as § 563 *h*.]

§ 94.[4]
§ 95.[5]
§§ 96, 97.[6]

2. *Specific Rules included under the Best Evidence Principle.*

§ 97 *a*. **Rules covered by the Term "Best Evidence."** [In the foregoing sections the treatment of the subject deals with certain discriminations involving in part the parol-evidence rule, which is not here concerned, and in part the specific rule requiring the production of writings, the application and details of which are more fully treated in a later chapter (§§ 557 ff.). In view of the confusion that may be thought to result from this mingled treatment of the best-evidence principle at large, together with the parol-evidence rule, and the specific rule about producing writings, it seems best here to re-state briefly the three sorts of concrete rules which alone can be regarded as the representatives in practice of the "best-evidence" notion. That phrase, as already explained, is of no service as a concrete rule for dealing with a given piece of evidence; it is used to describe loosely the general policy underlying certain concrete rules, which, however, are entirely independent of each other, in history[1] and in theory, and must be discriminated. We may here briefly notice the nature of these rules, and the sense in which it may be said of them that they call for the best evidence. They are of three general sorts.]

§ 97 *b*. **(1) Proving the Contents of a Writing.** [The chief and most common application of the phrase is to the rule that when the contents of a writing are to be proved, the writing itself must be produced, if it can be (*post*, §§ 557 ff.). The "best" evidence is thought of as the writing itself; and it is best in the sense that the inspection of the thing itself is more trustworthy than any evidence about it can be. Perhaps in strictness the thing itself cannot be said to be evidence of itself at all; in the same way that when we look at the sun, we are not taking evidence about the sun's appearance; so that a more proper form of stating the rule would be to say that the writing itself must be produced, in preference to any evidence about it.

The rule raises several distinct sorts of questions. (1) Does the class of things to which it applies include only writings, or does it include other things? If the former only, then how is the line to be drawn between writings and other things? (2) Its scope including only writings, does the rule apply to any reference to writings or only to their contents as a thing to be proved? If the latter only, then it becomes constantly necessary to determine whether in a given case it

[4] [Transferred *post*, as § 563 *i*.]
[5] [Transferred *post*, as § 563 *j*.]
[6] [Transferred *post*, as §§ 563 *k*, 563 *l*.]
[1] [See Thayer, Preliminary Treatise, 498.]

is the contents of the writing that are concerned or merely some accompanying conduct. Here, incidentally, a question under the parol-evidence rule may have to be settled, *i. e.* even though the offeror of the evidence may explicitly attempt to prove conduct or other fact not the writing's contents, yet the reduction of the transaction to writing by the parties' intendment may have superseded the parol transaction and prohibit it from becoming the object of proof. (3) Since it is *the* writing presently in issue which is required by the rule to be produced or accounted for, it is often necessary to consider what is the precise writing desired to be proved under the issue, — as where the state of the issue must be looked to for determining whether a reporter's notes or a printed newspaper impression generally is the objective document, or whether a telegraphic despatch as received or as sent is the objective. (4) The rule itself requires the writing to be produced or accounted for as non-available; and the various situations must be considered in which the law regards the original as unavailable, — loss, possession by the opponent, retention in an official repository, physical impossibility of removal, and the like. (5) Supposing the writing to be accounted for, questions will arise as to the proper sort of evidence of its contents, — whether one kind of copy is preferred to another, whether a copy of a copy is admissible, whether one who has heard the writing read may testify to the contents, and so on; most of which involve no peculiar corollary of the present rule, but are applications of some other general principle of evidence. — Such are the broad features of the rule requiring a writing to be produced or accounted for.]

§ 97 *c*. (2) **Testing a Witness by Oath and Cross-examination.** [Less commonly nowadays, but frequently up to the first half of the nineteenth century, the phrase "best evidence" was applied to include the Hearsay rule,[1] *i. e.* the rule excluding assertions offered to prove the fact asserted, made by persons not speaking on oath and subject to cross-examination (*post*, § 99 *a*). Their testimony on the stand is "best" in the sense that it is not regarded as trustworthy until it has been subjected to the great tests of oath and cross-examination, and particularly the latter. It is thus the "best evidence" in a sense practically very different from that in which the original of a writing is said to be. Here the three chief classes of questions are (1) whether the rule has in a given case been satisfied by oath and adequate cross-examination, (2) whether in certain classes of cases statements are exceptionally received without those tests, and (3) where the line is to be drawn between utterances to which the rule applies — *i. e.* statements of fact used assertively as testimony to the fact — and utterances to which it does not apply, — *i. e.* utterances used in other ways and irrespective of their truth as assertions.]

[1] [*E. g.*, by Lord Hardwicke, in Omichund *v.* Barker, 1 Atk. 45.]

§ 97 *d*. **(3) Classes of Witnesses preferred to others.** [In a third sense, a party may be required to bring the "best evidence" by a rule which requires him to resort first to a certain class of witnesses, assumed by the law to be superior, before he is allowed to resort to others.[1] The rule of this sort having perhaps the most common application was the attesting-witness rule; but it is worth while to note that there are a number of others resting on the same or an analogous principle, especially as they are commonly treated under various separate heads.

(1) The attesting-witness rule (*post*, § 569) is the particular one of this type to which the "best-evidence" phrase was in one of its senses applied. This rule is that, in proving the execution of a document, the attesting witness must be called, if he can be had, before any other can be used. Thus the chief inquiries are (a) how many must be called, and whether they must testify favorably if called, and the like; (b) in what situations they are to be regarded as unavailable, — death, absence from the jurisdiction, illness, and the like; (c) if they are unavailable, what the next grade or step of testimony should be, — the witness' handwriting, or the maker's, or both, and the like; (d) whether there are to be exceptions to the rule where the opponent admits the document's execution, or claims under it, or where it is an ancient document, and the like; (e) what is the scope of the rule as regards the class of documents to which it applies, — whether to all attested documents, or only to those mainly in issue, or only to those required by law to be attested, and the like. Thus, the "best evidence" required by this rule is in no sense the same as that required by the rules of the two preceding sections.

(2) In modern times, in some American jurisdictions, an effort has been made to introduce an analogous rule, binding the prosecution in criminal cases to call all the known and available eye-witnesses of the alleged crime, — in particular, of a homicide;[2] but this attempt, founded apparently on a misunderstood English practice,[3] has received no wide acceptance by the Courts.[4]

(3) Occasionally, in a few other instances,[5] an attempt, usually futile, has been made to treat as preferred witnesses, certain persons who would presumably know more of the matter in hand than other

[1] [This usage, as applied to the attesting-witness rule, was formerly not uncommon: *e. g.* Grose, J., in Stone's Trial, 25 How. St. Tr. 1313.]

[2] [People *v.* Considine, Mich., 63 N. W. 196; People *v.* Resh, id., 65 N. W. 99; People *v.* Hughes, id., 74 N. W. 309; State *v.* Slack, Vt., 38 Atl. 311; State *v.* Metcalf, Mont., 43 Pac. 182.]

[3] [See R. *v.* Vincent, 3 State Tr. N. S. 1037, 1064.]

[4] [See a good opinion in Reyons *v.* State, 33 Tex. Cr. 143; compare State *v.* Harlan, Mo., 32 S. W. 997; Siberry *v.* State, 133 Ind. 677, 685; Carlisle *v.* State, Miss., 19 So. 207; State *v.* Payne, Wash., 39 Pac. 57.]

[5] [Perhaps taking a cue from the extreme ruling of Lord Ellenborough in Williams *v.* East India Co., 3 East 192.]

persons, — for example, the alleged writer of a document,[6] or the owner of goods alleged to have been stolen.[7]

(4) The rule, in some places prevailing, that in prosecutions for bigamy, etc., or actions for criminal conversation, that a "marriage in fact" must be proved, *i. e.* the ceremonial exchange of consent instead of mere cohabitation, seems to involve in effect a rule of a similar sort, viz., that eye-witnesses of an act of exchange of consent are preferred to circumstantial evidence of the exchange of consent.[8]

(5) Certain official reports of testimony delivered are usually thought to be preferred to any other person's account of the same testimony, — in particular, the report of a coroner, or of a magistrate holding a preliminary examination, of the testimony given before him. Here it might be thought that the magistrate's report was in effect adopted by the witness himself, in signing it, as his testimony, and thus superseded his oral utterances, on the principle of the parol evidence rule, but the doctrine seems to apply even where the witness does not sign the report; and since in that case the witness' oral utterance remains the object of the proof, the magistrate's report appears to be in effect a preferred testimony to the terms of the witness' utterance.[9] Moreover, in many Courts the preference is carried further and made absolute, *i. e.* the report is not allowed to be contradicted by other witnesses. The application of this rule to the case of an accused's examination is treated in another chapter (*post*, Confessions, § 227), and accordingly the authorities dealing with the same principle as applied to other witnesses are there referred to.

(6) Certain other official records or reports are apparently preferred in the same way, and sometimes preferred absolutely and exclusively, in the above sense. For example, the enrolled statute, as certified to by the presiding officers of a legislature, the Governor, and the Secretary of State, is by the better doctrine the exclusive evidence of the terms of a statute and the circumstances of its enactment;[10] so also, a sheriff's return is by some Courts regarded as the exclusive evidence, even between strangers to the suit, of the acts done by him, and subject to dispute only on the ground of fraud or the like. But in these instances it is possible to argue that they are not genuine instances of preferred testimony, but are rather instances of one form of the parol-evidence rule, *i. e.* the certificate

[6] [*Ante*, § 82; see McCully *v.* Malcom, 9 Humph. 187; Lefferts *v.* State, 49 N. J. L. 26; also Foulke's Case, 2 Rob. Va. 836.]

[7] [*Ante*, § 82; see Perry *v.* State, Nebr., 63 N. W. 26; Rema *v.* State, id., 72 N. W. 474; State *v.* Morey, 2 Wis. 494; State *v.* Moon, 41 id. 683; Rapalje, Larceny, § 135. For sundry other instances, see Com. *v.* James, 1 Pick. 375; Koster *v.* Reed, 6 B. & C. 19; Sparks *v.* Rawls, 17 Ala. 211; White *v.* Fox, 1 Bibb 369; Bowling *v.* Helm, ib. 88; Domschke *v.* R. Co., N. Y., 42 N. E. 804.]

[8] [See *post*, Vol. II, §§ 49, 461; Vol. III, § 205.]

[9] [See this question of theory further examined *post*, § 305 *g*.]

[10] [*Post*, § 480.]

or the return is not merely testimony of the act done, but is the very act itself; in other words, that for purposes of legal action, the effective thing is the writing alone, and not the conduct purporting to be recorded therein. In any case, whether this be the true view or not, the questions are so involved with the rules of substantive law applicable to the respective situations that it is unprofitable to examine them in a treatise upon evidence.[11]

(7) In many other such instances, however, in which the phrase "best evidence" is often employed, the question is in truth one of substantive law, and not at all one of preferred testimony. It is said, for example, that the record of a Court is the best evidence of its proceedings, as compared with other testimony to the proceedings or with the clerk's minutes or docket-entries; but the truth is that the Court's written record is the proceeding itself, — the only thing which the law will regard as the *acta* of the Court; and so the frequent questions involving this subject are in reality questions of the substantive law as to what constitutes for legal purposes a judicial act.[11] Again, the notary's or magistrate's record of a married woman's acknowledgment of consent to her deed, though often spoken of as the "best evidence," is, as generally treated, not testimony to the act, but, the very act itself and the only thing to which the law will attach legal consequences;[11] though in some jurisdictions its verity may be disputed under certain circumstances, and it then takes its place with the instances just mentioned in (6). Finally, the parol-evidence rule itself, though sometimes associated with the phrase "best evidence," is in truth not a doctrine about preferred testimony, but a doctrine of substantive law specifying what sorts of transactions are to be treated as acts for the purpose of giving them legal effect, *i.e.* what things may be proved at all, and not how they may be proved.[12]]

[11] [See this question of theory further examined *post*, § 305 *g*.]
[12] [*Post*, § 305 *a*.]

CHAPTER IX.

THE HEARSAY RULE.

§§ 98–99 *a*. General Principle.

Hearsay Rule not applicable.

§ 100. Rule applies only to Testimonial Assertions.

§ 101. Words used Evidentially, though not Testimonially.

§ 108. Verbal Acts, or Verbal Parts of an Act.

§ 110. Same: Statements after the Act ended, inadmissible.

§ 110 *a*. Words Material as a Part of the Issue.

§ 98. **General Principle.** The first degree of moral evidence, and that which is most satisfactory to the mind, is afforded by our own senses; this being direct evidence of the highest nature. Where this cannot be had, as is generally the case in the proof of facts by oral testimony, the law requires the next best evidence; namely, the testimony of those who can speak from their own personal knowledge. It is not requisite that the witness should have personal knowledge of the main fact in controversy, for this may not be provable by direct testimony, but only by inference from other facts shown to exist. But it is requisite that, whatever facts the witness may speak to, he should be confined to those lying in his own knowledge, whether they be things said or done, and should not testify from information given by others, however worthy of credit they may be. For it is found indispensable, as a test of truth and to the proper administration of justice, that every living witness should, if possible, be subjected to the ordeal of a cross-examination, that it may appear what were his powers of perception, his opportunities for observation, his attentiveness in observing, the strength of his recollection, and his disposition to speak the truth. But testimony from the relation of third persons, even where the informant is known, cannot be subjected to this test; nor is it often possible to ascertain through whom, or how many persons, the narrative has been transmitted from the original witness of the fact. It is this which constitutes that sort of second-hand evidence termed "hearsay."

§ 99. The term "hearsay" is used with reference to that which is written, as well as to that which is spoken; and, in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests

also, in part, on the veracity and competency of some other person.[1] Hearsay evidence, as thus described, is uniformly held incompetent to establish any specific fact, which, in its nature, is susceptible of being proved by witnesses who can speak from their own knowledge. That this species of testimony supposes something better, which might be adduced in the particular case, is not the sole ground of its exclusion. Its extrinsic weakness, its incompetency to satisfy the mind as to the existence of the fact, and the frauds which may be practised under its cover, combine to support the rule that hearsay evidence is totally inadmissible.[2]

§ 99 *a* [124]. Subject to these qualifications and seeming exceptions [to be later examined,] the general rule of law rejects all hearsay reports of transactions, whether verbal or written, given by persons not produced as witnesses.[1] The principle of this rule is, that such evidence requires credit to be given to a statement made by a person who is not subjected to the ordinary tests enjoined by the law for ascertaining the correctness and completeness of his testimony; namely, that oral testimony should be delivered in the presence of the Court or a magistrate, under the moral and legal sanctions of an oath, and where the moral and intellectual character, the motives and deportment of the witness can be examined, and his capacity and opportunities for observation, and his memory, can be tested by a cross-examination. Such evidence, moreover, as to oral declarations, is very liable to be fallacious, and its value is, therefore, greatly lessened by the probability that the declaration was imperfectly heard, or was misunderstood, or is not accurately remembered, or has been perverted. It is also to be observed, that the persons communicating such evidence are not exposed to the danger of a prosecution for perjury, in which something more than the testimony of one witness is necessary, in order to a conviction; for where the declaration or statement is sworn to have been made when no third person was present, or by a person who is since dead, it is hardly possible to punish the witness, even if his testimony is an entire fabrication.[2] To these reasons may be added considerations of public interest and convenience for rejecting hearsay evidence. The greatly increased expense and the vexation which the adverse party must incur in order to rebut or explain it, the vast consumption of public time thereby occasioned, the multiplication of collateral issues for decision by the jury, and the danger

[1] Phil. Evid. 185.

[2] Per Marshall, C. J., in Mima Queen *v.* Hepburn, 7 Cranch 290, 295, 296; Davis *v.* Wood, 1 Wheat. 6, 8; R. *v.* Eriswell, 3 T. R. 707.

[1] "If," says Mr. Justice Buller, "the first speech were without oath, another oath, that there was such speech, makes it no more than a bare speaking, and so of no value in a court of justice:" Bull. N. P. 294.

[2] Phil. & Am. on Evid. 217; 1 Phil. Evid. 205, 206. See, as to the liability of words to misconstruction, the remarks of Mr. Justice Foster, in his discourse on High Treason, ch. 1, § 7.

of losing sight of the main question and of the justice of the case if this sort of proof were admitted, are considerations of too grave a character to be overlooked by the Court or the Legislature, in determining the question of changing the rule.[3]

[The truth seems to be that, among the preceding reasons for rejecting hearsay assertions, the vital and determinative one is that stated at the beginning of this section, viz., the desirability of testing all testimonial assertions by the oath and by cross-examination. Thus, a favorite passage, found in several works in the last century, is: "It seems agreed that what another has been heard to say is no evidence, because the party was not on oath, also because the party who is affected thereby had not an opportunity of cross-examining;"[4] and the Hearsay rule is constantly expounded as "the general rule of not receiving evidence unless upon oath and with the opportunity for cross-examination;"[5] thus, Swift, C. J., in *Chapman* v. *Chapman*:[6] "It is a general principle in the law of evidence that hearsay from a person not a party to the suit is not admissible; because such person was not under oath and the opposite party had no opportunity to cross-examine;" Ewing, C. J., in *Westfield* v. *Warren*:[7] "[The declarations] were made without oath, in no judicial proceeding, and in the absence of the present parties. . . . They are only the declarations of persons not sworn and not cross-examined. . . . The evidence then is purely of the kind denominated hearsay;" Shaw, C. J., in *Warren* v. *Nichols*:[8] "The general rule is that one person cannot be heard to testify as to what another person has declared in relation to a fact within his knowledge and bearing on the issue. It is the familiar rule which excludes hearsay. The reasons are obvious, and they are two: first, because the averment of fact does not come to the jury sanctioned by the oath of the party on whose knowledge it is supposed to rest; and, secondly, because the party upon whose interests it is brought to bear has no opportunity to cross-examine him on whose supposed knowledge and veracity the truth of the fact depends."[9] The Hearsay rule, then, is encountered whenever a testimonial assertion is offered in evidence without being subjected to oath and cross-

[3] Mima Queen *v.* Hepburn, 7 Cranch 290, 296, per Marshall, C. J.

[4] [Bacon's Abridgm., Evidence, (K); Hawkins, Pl. Cr. II, 596, B. II, c. 46, s. 44; compare Craig *v.* Anglesea, 17 How. St. Tr. 1160.]

[5] [Abbott, C. J., in Doe *v.* Ridgway, 4 B. & Ald. 54.]

[6] [2 Conn. 348.]

[7] [8 N. J. L. 250.]

[8] [6 Metc. 261.]

[9] [See also Coltman and Bosanquet, JJ., in Wright *v.* Tatham, 7 A. & E. 313; Richardson, J., in State *v.* Campbell, 1 Rich. L. 126; Yerger, J., in Lampley *v.* Scott, 24 Miss. 539; Johnson, C. J., in Cornelius *v.* State, 12 Ark. 804; Bartley, C. J., in Simmons *v.* State, 5 Oh. St. 343; Voorhies, J., in State *v.* Brunetto, 13 La. An. 45; Breese, C. J., in Marshall *v.* R. Co., 48 Ill. 476; Kingman, C. J., in State *v.* Medlicott, 9 Kan. 287; being a few other precedents, out of many, in which the reason is stated in similar terms.]

examination.[10] Thus, three distinct groups of questions present themselves in connection with the Hearsay rule, viz.: A. Is the Hearsay rule applicable to the case in hand, *i. e.* is the evidence offered as a testimonial assertion? B. Is there any exception to the Hearsay rule to be made for the evidence offered? C. If the Hearsay rule is applicable, and if no recognized exception covers the case in hand, is the Hearsay rule satisfied, *i. e.* has there been, in fact, an oath and cross-examination? The first of these groups of questions is treated in the ensuing sections 100–114; the second, in sections 114 *a* to 162; the third, in sections 163 to 168.]

Hearsay Rule not Applicable.

§ 100. **Rule applies only to Testimonial Assertions.** Before we proceed any farther in the discussion of this branch of evidence, it will be proper to distinguish more clearly between hearsay evidence and that which is deemed original. For it does not follow, because the writing or words in question are those of a third person, not under oath, that therefore they are to be considered as hearsay. On the contrary it happens, in many cases, that the very fact in controversy is whether such things were written or spoken, and not whether they were true; and, in other cases, such language or statements, whether written or spoken, may be the natural or inseparable concomitants of the principal fact in controversy. In such cases it is obvious that the writings or words are not within the meaning of hearsay, but are original and independent facts, admissible in proof of the issue.

[The term "original," however, as used to distinguish matter not obnoxious to the Hearsay rule, is not the most fortunate, because it has also and chiefly an association with the rule requiring the production of the original of a writing (*ante*, §§ 82 ff.), and because it does not clearly convey the reason of the distinction. The essence of the distinction is between the use of utterances as testimonial assertions and their use other than as testimonial assertions. Thus when the assertion of A that fact *x* exists is offered for the purpose of inducing the tribunal to believe that fact *x* exists because A says that it does, A's utterance is offered testimonially, *i. e.* as if A were a witness to fact *x*, and the Hearsay rule here requires that A's assertion, to be receivable, must be made under oath and subject to cross-examination. But if A's utterance is offered, not as evidence that the fact asserted in it exists — or, as is sometimes and less accurately said, irrespective of the truth of the assertion, — but in some other aspect — for example, as showing that B heard what A

[10] [It is sometimes said that there must also be Confrontation; but Confrontation, so far as it is indispensable, is merely a mode of securing cross-examination; this subject is treated *post*, § 163 ff.]

said, or as being a part of a contractual act, — then it is not obnoxious to the Hearsay rule, and stands or falls according to such other evidential rules as may affect it.

Those utterances, then, to which the Hearsay rule is not applicable, and which may be received so far at least as that rule is concerned, may be grouped roughly into three classes. The principle is in each of these simple and clear enough, though its application in given instances is sometimes difficult. These classes are: 1. Utterances (or words) used evidentially, though not as evidence of a fact asserted in them; 2. Utterances accompanying ambiguous conduct and serving to color and complete it as an act, — sometimes spoken of as "verbal acts;" 3. Utterances material to the case under some one of the issues; this and the preceding class are usually denoted by the term *res gestæ* in one of its uses. These three may be considered in the above order.]

§ 101. **Words used evidentially, though not testimonially.** [Words or utterances, or the fact of the utterance of certain words, may often be evidential indirectly, — usually of the state of mind of a person to whom they are addressed. In this aspect, the truth of any assertion they may contain is immaterial. Thus, Lord Abinger says:[1] "If a man called another a liar, and was knocked down, the plaintiff" in an action for the battery "would not be allowed to prove on the trial of the assault that the defendant was really and in point of fact a liar, because evidence of provocation is admitted for the purpose of showing that the feelings of the party (defendant) were excited;" *i. e.*, the plaintiff's utterance is evidence of the defendant's excited mental condition. Again, the issue being whether an arrest was ordered under reasonable apprehension by the defendant of violence, and evidence being offered that some one had reported to the defendant that the plaintiff was raising a mob, it was objected that "Hearsay is no evidence;" but Mr. J. Gould answered:[2] "We do not take it for granted that it is really so; only that this gentleman, hearing of this, tells the Governor." And in general,] where the question is, whether the party acted prudently, wisely, or in good faith, the information on which he acted, whether true or false, is original and material evidence. This is often illustrated in actions for malicious prosecution;[3] and also in cases of agency and of trusts. So, also, letters and conversation addressed to a person, whose sanity is the fact in question, being connected in evidence with some act done by him, are original evidence to show whether

[1] [Fraser *v.* Berkeley, 7 C. & P. 625.]

[2] [Fabrigas *v.* Mostyn, 20 How. St. Tr. 137.]

[3] [Taylor *v.* Willans, 2 B. & Ad. 845. For the evidential use of such utterances, see *ante*, § 14*p*; see other examples in Redford *v.* Bailey, 1 St. Tr. N. S. 1071, 1174 (information to a magistrate as to danger from a mob); Bacon *v.* Towne, 4 Cush. 240 (malicious prosecution); Taylor *v.* Williams, 2 B. & Ad. 845, 858 (reason for admitting to bail).]

he was insane or not.[4] The replies given to inquiries made at the residence of an absent witness,[5] or at the dwelling-house of a bankrupt, denying that he was at home, are also original evidence.[6] In these and the like cases, it is not necessary to call the persons to whom the inquiries were addressed, since their testimony could add nothing to the credibility of the fact of the denial, which is the only fact that is material. This doctrine applies to all other communications, wherever the fact that such communication was made, and not its truth or falsity, is the point in controversy.[7] Upon the same principle, it is considered that evidence of general reputation, reputed ownership, public rumor, general notoriety, and the like, though composed of the speech of third persons not under oath, is original evidence, and not hearsay (the subject of inquiry being the concurrence of many voices to the same fact), [so far as it is offered, not to prove the fact reputed to be true, but merely the probability that through the reputation, rumor, or other communication a party has become aware of a certain fact if it existed;[8] "whether in fact such information was or was not correct is immaterial for the purpose of determining its admissibility; and hence it is no objection to its admission that it was not given under the sanction of an oath or that the opposite party had not the opportunity of cross-examining the informant; . . . such evidence is admitted merely for the purpose of establishing the utterance of the words, and not their truth."[9] Again, the fact or the time of a conversation may be evidential in identifying an occasion, act, or person, for the purposes of the cause; as where to identify the time of a sale, the fact that A's testimony to it was given at a certain time before a magistrate was admitted;[10] or may be evidential in explaining how an event became fixed in the memory.[11] In the same way, prior inconsistent

[4] Wheeler *v.* Alderson, 3 Hagg. Eccl. 574, 608; Wright *v.* Tatham, 1 Ad. & El. 3, 8; s. c. 7 id. 313; s. c. 4 Bing. N. C. 489; [but merely because all conduct of an alleged insane person is receivable as indirectly, not testimonially, showing the workings of his mind; as, where he has said, "I am the Emperor of America," the statement is not received as evidence of the fact asserted, but merely as circumstantial evidence of his irrationality; this class of evidence is treated *ante*, § 14 *l*.]

[5] [*I. e.*, as evidence of the reasonableness and diligence of the search for him: Spaulding *v.* R. Co., 98 Ia. 205.]

[6] Crosby *v.* Percy, 1 Taunt. 364; Morgan *v.* Morgan, 9 Bing. 359; Sumner *v.* Williams, 5 Mass. 444; Pelletreau *v.* Jackson, 11 Wend. 110, 123, 124; Key *v.* Shaw, 8 Bing. 320; Phelps *v.* Foot, 1 Conn. 387; [this seems rather to belong in the next section.]

[7] Whitehead *v.* Scott, 1 Moo. & R. 2; Shott *v.* Streatfield, ib. 8; 1 Ph. Evid. 188.

[8] Foulkes *v.* Sellway, 3 Esp. 236; Jones *v.* Perry, 2 id. 482; R. *v.* Watson, 2 Stark. 116; Bull. N. P. 296, 297.

[9] [Harrison, J., in Smith *v.* Whittier, 92 Cal. 293; for the uses of this class of evidence, see *ante*, § 14 *p*. For the use of reputation as evidence of the fact reputed, under an exception to the Hearsay rule, see *post*, §§ 128 ff.]

[10] [Com. *v.* Sullivan, 123 Mass. 221; see other instances in Barrows *v.* State, 80 Ga. 194; Earle *v.* Earle, 11 All. 1; Weeks *v.* Lyndon, 54 Vt. 640, 647; People *v.* Mead, 58 Mich. 229; R. *v.* Richardson, 2 Cox Cr. 361; Com. *v.* Piper, 120 Mass. 187.]

[11] Howser *v.* Com., 51 Pa. 341; Cole *v.* R. Co., 105 Mich. 549.]

statements are used to impeach a witness;[12] the process of impeachment, indeed, furnishes numerous illustrations of the principle.[13]]

§ 102.[1]

§§ 103–106.[2]

§ 107.[3]

§ 108. **Verbal Acts, or Verbal Parts of an Act.** There are other declarations which are admitted as original evidence, being distinguished from hearsay by their connection with the principal fact under investigation. The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and, in its turn, becomes the prolific parent of others; and each, during its existence, has its inseparable attributes, and its kindred facts, materially affecting its character, and essential to be known in order to a right understanding of its nature. These surrounding circumstances, constituting parts of the *res gestæ*, may always be shown to the jury, along with the principal fact; and their admissibility is determined by the judge, according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description.[1] The principal points of attention are, whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character.[2] [The true nature of this use of words, however, seems best understood by remembering that many acts, or instances of conduct, have for legal purposes no intrinsic significance, or only an ambiguous one, until we take into consideration the words (or the intention expressed in the words) accompanying them. "Many acts are in themselves of an equivocal nature, and the effect of them depends upon the intention or disposition from which they proceed, which is in general best determined by the expressions accompanying them. Wherever, therefore, the demeanor of a person at a given time becomes the object of inquiry, his expressions, as constituting a part

[12] [See *post*, § 461 *f*.]

[13] [See e. g., *post*, §§ 450, 469 *b*.]

[1] [Transferred *post*, as §§ 162 *a*, 162 *b*; it deals with declarations of mental and physical condition, which form in truth one of the exceptions to the Hearsay rule.]

[2] [Transferred *post*, as §§ 114 *c*–114 *f*; dealing with pedigree-declarations, which also form an exception.]

[3] [Transferred *post*, as § 140 *c*; dealing with habit and repute as evidence of marriage.]

[1] Per Park, J., in Rawson *v.* Haigh, 2 Bing. 104; Ridley *v.* Gyde, 9 id. 349, 352; Pool *v.* Bridges, 4 Pick. 379; Allen *v.* Duncan, 11 id. 309.

[2] Declarations, to become part of the *res gestæ*, "must have been made at the time of the act done, which they are supposed to characterize; and have been well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize with them as obviously to constitute one transaction;" per Hosmer, C. J., in Enos *v.* Tuttle, 3 Conn. 250. And see *In re* Taylor, 9 Paige 611; Carter *v.* Buchannon, 3 Kelley 513; Blood *v.* Rideout, 13 Met. 237; Boyden *v.* Burke, 14 How. 575.

of that demeanor and as indicating his present intent and disposition, cannot properly be rejected in evidence as irrelevant."[3] In the old form, for example, of livery of seisin, "in taking in his hand the deed and the ring of the doore (if it be of an house) or a turffe or twigge (if it be of land), and the feoffee laying his hand on it, the feoffor says to the feoffee, Here I deliver to you seisin of this house or of this land;"[4] here the words are complementary to the manual conduct, and are as essential as the conduct to the total complexion and legal significance of the act. Again, the legal act of payment of money may similarly depend on words for its significance; "a man who owes you ten pounds takes up a handful of silver to that amount and lays it down at a table at which you are sitting; if then by words, or gestures, or any means whatever, addressing himself to you, he intimates it to be his will that you should take up the money and do with it as you please, he is said to have paid you; but if the case was that he laid it down, not for that purpose but for some other — for instance, to count and examine it, meaning to take it up again himself, or leave it for somebody else, — he has not paid you; yet the physical acts exercised upon the pieces of money in question are in both cases the same; till he does express a will to that purpose," there is no payment.[5] Again, the occupation of land is, merely as a physical act, capable of various interpretations, and may need to be completed by words, in order to have legal significance. "What a man says, when he does a thing, shows the nature of his act and is a part of the act; it determines its character and effect; tenancy is a continuance of acts in a certain relation to another, and declarations during the tenancy by a man that he is a tenant and of a particular person may be put as a part of the *res gestæ*,"[6] so far as it is necessary to learn the significance of his act, and assuming that his act of possession is material. Again, "the planting of the hedge in from the line of the land was an equivocal act; it might be interpreted as a dedication to the public or as setting the hedge on the true line; the declarations of E., when he was the owner and in possession of the land, explanatory of his intention in leaving the strip of land open, we think were properly admitted as a part of the *res gestæ*, as accompanying the acts of throwing the land open and keeping it open."[7] Again, where "it became material to determine whether the defendant accepted the lease, . . . this act of taking and reading the instrument was relied on by the plaintiff in support of her case; what the defendant said may have given character to the act, and given it a different meaning from that claimed by the plaintiff; . . . it was a part of the act of taking and reading it."[8]

[3] [Evans, Notes to Pothier, II, 242.]
[4] [Coke upon Litt. 45 *b*.]
[5] [Bentham, Morals and Legislation, c. 18, par. 35, note.]
[6] [Rankin *v.* Tenbrook, 6 Watts 390.]
[7] [Quinn *v.* Eagleston, 108 Ill. 254.]
[8] [Stevens *v.* Miles, 142 Mass. 572.]

From these illustrations, and the judicial language accompanying them, it may be understood that the doctrine is not as indefinite and intangible as is sometimes supposed; the typical case is that of conduct to which it is desired to attach legal significance, but in which there is intrinsically none, until its whole tenor is otherwise made definite; and it is by words accompanying the conduct that this tenor is more fully and precisely defined. The words are not used testimonially; for example, where it is asked whether A's possession is adverse, *i. e.* under claim of ownership, his utterance, "This land is mine; for I bought it of B," is not used as evidence that it is his and that he did buy it of B, but merely as giving to his occupation an adverse complexion and significance. The applications of this principle are numerous. Thus, the accompanying words may be considered in determining whether an act amounted to a gift of personalty;[9] whether an act amounted to a dedication of land for a street;[10] whether an act was done as agent or on personal account;[11] whether credit was given to a buyer as agent or otherwise;[12] whether a payment was made or applied in a certain way or was accepted in full;[13] whether an act of taking amounted to a conversion;[14] whether an act amounted to a revocation of an agent's authority.[15] Perhaps the commonest use is that already above referred to, viz., of words by one in occupation of land, as characterizing his occupation so that it may appear whether it is adverse or not; the utterances not being used "to show the quantum of his estate, but only to explain the nature of his possession;"[16] it follows, as a part of the principle, that there must be a possession to be explained,[17] and that if adverse possession is immaterial in the case, the declarations are inadmissible, so far as the present principle is concerned.[18] It is upon the present principle that deeds, or recitals in deeds, are admitted, when they are made to or by one having possession, to show the extent of the possession claimed, because the area of constructive occupation may thus appear from the terms of the deed;[19] and it is no

[9] [Brooks *v.* Duggan, 149 Mass. 306; Scott *v.* Bank, 140 id. 165; Guinan's Appeal, Conn., 39 Atl. 482; Parret *v.* Craig, N. J. Eq., 38 id. 305.]

[10] [Tait *v.* Hall, 71 Cal. 152; Quinn *v.* Eagleston, 108 Ill. 254; Pittsb. C. C. & St. L. R. Co. *v.* Noftsger, 148 Ind. 101.]

[11] [Allen *v.* Duncan, 11 Pick. 310; Jefferds *v.* Alvard, 151 Mass. 94; Lewis *v.* Burns, 106 Cal. 381; Elkins *v.* Hamilton, 20 Vt. 630.]

[12] [Eastman *v.* Bennett, 6 Wis. 237.]

[13] [Dillard *v.* Scruggs, 36 Ala. 372; Hood *v.* French, 37 Fla. 117; Strange *v.* Donohue, 4 Ind. 328; Brown *v.* Kenyon, 108 id. 283; Rigg *v.* Cook, 9 Ill. 336; Wheeler *v.* Campbell, 68 Vt. 98.]

[14] [Dunbar *v.* McGill, 69 Mich. 297; Frome *v.* Dennis, 45 N. J. L. 520; Ross *v.* White, 60 Vt. 560.]

[15] [Russell *v.* Frisbie, 19 Conn. 209.]

[16] [Doe *v.* Pettett, 5 B. & Ad. 223; McBride *v.* Thompson, 8 Ala. 650; Ogden *v.* Dodge Co., 97 Ga. 461; State *v.* Towle, 62 N. H. 373; Miller *v.* Feenane, 50 N. J. L. 32; Irwin *v.* Patchin, 164 Pa. 51; Webb *v.* Richardson, 42 Vt. 473.]

[17] [Ward *v.* Edge, Ky., 39 S. W. 440; High *v.* Pancake, 42 W. Va. 602.]

[18] [McCleod *v.* Bishop, 110 Ala. 640.]

[19] [Postal Tel. Cable Co. *v.* Brantley, 107 Ala. 683; Dunn *v.* Eaton, 92 Tenn. 743, 751.]

objection that the deed is invalid to pass title, for it none the less shows the extent of land claimed.[20] (From this use of deeds, however, which may be said to be unquestioned, must be distinguished the disputed question whether the making of an old deed or lease may be used as evidence of the possession itself; for though, if possession is shown, the deed or lease may be used to color it and show its extent, yet, if no possession is otherwise shown, there is nothing to be colored or characterized; and the only way of using the document is to hold that the mere act of making it is some slight evidence of possession, because "in the ordinary course of things men do not make leases unless they act on them;"[21] so that the making of the deed or lease becomes evidence of possession, and then also serves to illustrate, under the above principle, the extent of that possession. The doctrine, at any rate, applies only to ancient documents, because other evidence of possession is then hard to obtain; but whether it is also necessary at least to supply other evidence of possession at a later period of time has not been clearly settled.[22]) Again, in trials for sedition, the nature of the assembly, demonstration, riot, or other combined action in which the defendant is charged to have co-operated, will be determined by the conduct of the persons thus acting, and, among other things, by the utterances accompanying their conduct;] thus, in the trial of Lord George Gordon for treason, the cry of the mob who accompanied the prisoner on his enterprise was received in evidence as forming part of the *res gestæ* and showing the character of the principal fact.[23] So, also, where a person enters into land in order to take advantage of a forfeiture, to foreclose a mortgage, to defeat a disseisin,[24] or the like; or changes his actual residence, or domicile, [in which case his declarations of intent of residence, made at the time of moving or settling, are receivable as characterizing the act;[25]] or is upon a journey, or leaves his home, or returns thither, or remains abroad, or secretes himself, [where his

[20] [Waldron *v.* Tuttle, 4 N. H. 371; Bounds *v.* Bounds, 11 Heisk. 318, 324.]

[21] [Lord Blackburn, in Bristow *v.* Cornican, *infra*.]

[22] [See Clarkson *v.* Woodhouse, 3 Doug. 189; 5 T. R. 412; Rogers *v.* Allen, 1 Camp. 309; Doe *v.* Askew, 10 East 520; Doe *v.* Pulman, 3 Q. B. 622; Malcomson *v.* O'Dea, 10 H. L. C. 593; Bristow *v.* Cornican, L. R. 3 App. Cas. 653, 668; Boston *v.* Richardson, 105 Mass. 351; Brown *v.* Kohout, 61 Minn. 113; Baeder *v.* Jennings, 40 Fed. 199. This doctrine must be distinguished from that about the genuineness of ancient documents, treated *post*, § 570. Moreover, declarations concerning land may also be affected by three other principles which must be carefully distinguished, viz.: (1) declarations against interest, *post*, § 152 *c*; (2) declarations about boundaries, *post*, § 140 *a*; (3) admissions by a grantor in possession, *post*, § 189; in the latter place the distinctions between the various principles are more fully explained.]

[23] 21 How. St. Tr. 542; [Redford *v.* Bailey, 1 State Tr. N. S. 1071, 1157.]

[24] Co. Litt. 49 *b*, 245 *b* [see note 4, *supra*]; Robison *v.* Swett, 3 Greenl. 316; 3 Bl. Comm. 174, 175.

[25] [Thorndike *v.* Boston, 1 Metc. 242; Kilburn *v.* Bennett, 3 id. 199; Cole *v.* Cheshire, 1 Gray 444; Wright *v.* Boston, 126 Mass. 164; Brookfield *v.* Warren, 128 id. 288; Pickering *v.* Cambridge, 144 id. 248. But the better view seems to be that such statements are receivable under the exceptions for declarations of a mental state; for later Massachusetts cases taking this view, and for the general principle, see *post*, § 162 *c*.]

conduct is said to have amounted to an act of bankruptcy, *i. e.* an act with intent to evade or defraud his creditors, in which case his declarations accompanying equivocal conduct may be considered;[26] or where he does an act which is said to amount to a revocation of a will — for example, burns, tears, or cancels the document, — his declarations at the time may be helpful in giving complexion to an otherwise equivocal act and determining its legal significance;[27]] or, in fine, does any other act, material to be understood, [and of itself equivocal and depending more or less for its legal significance upon the purpose with which it is done,] his declarations, made at the time of the transaction, and expressive of its character, motive, or object, are regarded as "verbal acts, indicating a present purpose and intention," and are therefore admitted in proof like any other material facts.[28]

§ 109.[1]

§ 110. **Same: Statements after the Act ended, inadmissible.** It is to be observed, that, where declarations offered in evidence are merely narrative of a past occurrence, they cannot be received as proof of the existence of such occurrence. They must be concomitant with the principal act, and so connected with it as to be regarded as the mere result and consequence of the coexisting motives, in order to form a proper criterion for directing the judgment which is to be formed upon the whole conduct.[1] [It is a necessary consequence of the principle as above explained, that declarations made after the equivocal act has ended cannot be regarded as forming a part of it, complementing and interpreting the physical part of the act, and they therefore come as ordinary assertions of a past fact, obnoxious to the Hearsay rule, and not admissible under the present principle. This limitation is frequently applied, — for example, to exclude declarations as to the purpose of money already paid,[2] declarations as to the purpose of a

[26] [Robson *v.* Kemp, 4 Esp. 233; Rawson *v.* Haigh, 9 J. B. Moore 217; Ridley *v.* Gyde, 9 Bing. 349; Smith *v.* Cramer, 1 Bing. N. C. 586; Thomas *v.* Connell, 4 M. & W. 267; Rouch *v.* R. Co., 1 Q. B. 51; Brady *v.* Parker, 67 Ga. 637; Carter *v.* Gregory, 8 Pick. 168; but as the conduct to be interpreted may extend over a considerable period of time — as where the debtor absconds and stays abroad and then returns, — declarations during the continuance of the conduct may still be regarded as accompanying it: Rawson *v.* Haigh, Ridley *v.* Gyde, Rouch *v.* R. Co., *supra*.]

[27] [Powell *v.* Powell, L. R. 1 P. & D. 212; Dan *v.* Brown, 4 Cow. 490; Pickens *v.* Davis, 134 Mass. 257.]

[28] [The original text contained the following sentence: "So upon an inquiry as to the state of mind, sentiments, or dispositions of a person at any particular period, his declarations and conversation are admissible;" but such declarations are more properly regarded as admissible under a distinct exception to the Hearsay rule, and are treated *post*, § 162 *a*. For other kinds of evidence to which the term *res gestæ* is applied, see *post*, § 162 *f* and the subsequent sections.]

[1] [Transferred *post*, as § 152 *c*; dealing with declarations against interest.]

[1] 2 Poth. on Obl. by Evans, pp. 248, 249, App. No. xvi, § 11; Ambrose *v.* Clendon, Cas. temp. Hardw. 254; Doe *v.* Webber, 1 Ad. & El. 733. See also Boyden *v.* Moore, 11 Pick. 362; Walton *v.* Green, 1 C. & P. 621; Reed *v.* Dick, 8 Watts 479; O'Kelly *v.* O'Kelly, 8 Met. 436; Stiles *v.* Western Railroad Corp., ib. 44.

[2] [Thistlethwaite *v.* Thistlethwaite, 132 Ind. 355.]

past act of occupation of land,[3] and declarations as to past acts of the various sorts above instanced.[4, 5]

The use of the term *res gestæ*, as defining or limiting the principle of the present subject and of the next section, is attended with more or less uncertainty in its application by the Courts; and it would be a mistake to convey the impression that the preceding principle is always treated as the doctrine definitely represented by the term *res gestæ*. Not only is this term often applied to that doctrine with a looseness inconsistent with the strict limits of the principle; but it is also constantly applied to a special class of declarations which appear to form a genuine exception to the Hearsay rule,[6] as well as to the class of utterances noted in the next section, and also in a few other senses more or less superficially related. It is enough here to describe the general principle as accepted by careful judicial opinion, irrespective of the nomenclature that may be employed for it or of the various elusive senses of the term *res gestæ*.[7] Whatever the usage as to that phrase may be, and whether it is appropriate in this place or not, the doctrine described in the two preceding sections exists in its own right as a simple deduction from the nature of the Hearsay rule.]

§ 110 *a*. **Words Material as a Part of the Issue.** [There is still another way in which the fact of the utterance of words, and the tenor of the utterance, is admissible without regard to the use of the utterance as evidence of the truth of the thing asserted, viz., where the utterance is, under the issues of substantive law in the case, one of the matters to be proved. The simplest case is that of slander or libel, where the plaintiff's main object of proof is the defamatory utterance, — without any desire on his part, of course, to use the defendant's utterance, or any other evidence, to show the truth of the charge. To such a use of the defendant's words, the Hearsay rule is plainly not applicable. So also the statements, conversations, correspondence, or the like, which go to make up a contractual act, are not excluded by the Hearsay rule, because it is not applicable to them;[1] nor does it apply to statements offered as constituting false

[3] [Swerdferger *v.* Hopkins, 67 Vt. 136; Noyes *v.* Ward, 19 Conn. 250.]

[4] [See Carter *v.* Buchanan, 3 Kelly 513; Nourse *v.* Nourse, 116 Mass. 101; Plumer *v.* French, 22 N. H. 452; Waterman *v.* Whitney, 11 N. Y. 157; Sorenson *v.* Dundas, 42 Wis. 643.]

[5] [The original text here added the following, already dealt with in note 26, *ante*:] On this ground, it has been holden that letters written during absence from home are admissible as original evidence, explanatory of the motive of departure and absence, the departure and absence being regarded as one continuing act: Rawson *v.* Haigh, 2 Bing. 99, 104; Marsh *v.* Davis, 24 Vt. 363; New Milford *v.* Sherman, 21 Conn. 101.

[6] [*Post*, § 162 *f*.]

[7] [The various uses of the term *res gestæ* — more properly, *res gesta*, — and the different principles to which it is applied, have been fully and acutely examined by Professor Thayer, in his articles in 14 Amer. L. Rev. 817, and 15 id. 1, to which the reader is referred.]

[1] [Stoudenmeier *v.* Wilson, 29 Ala. 564; Nave *v.* Tucker, 70 Ind. 17; Long-Bell L. Co. *v.* Thomas, Ind. Terr., 40 S. W. 773; Fredin *v.* Richards, 66 Minn. 46.]

representations;[2] nor to a statement required by law to be made as a part of the foundation of one's right, — for example, a notice sent, or a certificate or affidavit constituting a "proof of death" of an insured,[3] or a claim of invention of a patented article,[4] or a statement of the ground of arrest, made to the arrested person in accordance with statute;[5] nor to a writing constituting the performance of a contract;[6] nor to a reputation provable as a part of a criminal offence;[7] nor, in short, to any remarks, declarations, writings, or utterances, which are material as a part of the issue and are not offered as evidence of the truth of the utterance.[8] The declarations of co-conspirators, agents, partners, in short, of all persons whose admissions are receivable against a party, are also regarded as not excluded by the Hearsay rule.

The term *res gestæ* is also used, not only in reference to the preceding kinds of utterances, but also to matters not consisting in words, written or spoken, — as, where the absence of street-lamps at a crossing was said to be part of the *res gestæ;*[9] but in this usage there is of course, properly speaking, no reference to or application of the Hearsay rule.]

§§ 111–114.[1]

[2] [Howard *v.* Ins. Co., 4 Den. 508 (affidavit of an insured).]

[3] [Railway P. & F. C. Assoc. *v.* Robinson, 147 Ill. 138, 157; Foster *v.* F. & C. Co., Wis., 75 N. W. 69.]

[4] [Phila. & T. R. Co. *v.* Simpson, 14 Pet. 462.]

[5] [Com. *v.* Robinson, 165 Mass. 426.]

[6] [Ross *v.* Brusie, 70 Cal. 466.]

[7] [See this use of reputation treated *ante*, § 14 *d*.]

[8] [An odd example is found in Ellis *v.* Thompson, 93 Hun 606, where the defendant contracted to produce a play if it had "reasonable success;" the plaintiff was allowed to show that the journals had spoken favorably of it and that audiences had applauded it; *i. e.* the statements of the public were a part of its "success."]

[9] [Jefferson *v.* Chapman, 127 Ill. 438.]

[1] [Transferred *post*, as §§ 184 *a*–184 *d*; they deal with declarations of co-conspirators, agents, and partners, and seem more properly to belong in the chapter on Admissions; their treatment is there omitted, but it is under the principles of that chapter that they are received in evidence. They seem to have been placed here merely because the term *res gestæ* is frequently used to express the scope of the agent's business within which his declarations must be made in order to be available against his principal.]

CHAPTER X.

EXCEPTIONS TO THE HEARSAY RULE: DECLARATIONS IN PEDIGREE CASES (OR, DECLARATIONS ABOUT FAMILY HISTORY).

§ 114 *a*. General Principle of the Exceptions to the Hearsay Rule.

Declarations in Pedigree Cases.

§ 114 *b*. Necessity for this Evidence; Death.

§ 114 *c*. Whose Declarations are receivable.

§ 114 *d*. Form of the Declaration.

§ 114 *e*. *Post litem motam;* No Interest to deceive.

§ 114 *f*. Kind of Fact that may be the Subject of the Declaration.

§ 114 *g*. Kind of Litigation in which such Declarations are receivable.

§ 114 *a*. **General Principle of the Exceptions to the Hearsay Rule.** [The essential principle of the hearsay rule (as explained *ante*, §§ 99 *a*–100) is that, for the purpose of securing the trustworthiness of testimonial assertions and of affording the opportunity to test the credit of the witness, all testimonial assertions must be made in Court under oath and subject to cross-examination. But, in the application of this rule, there are a number of recognized exceptions, by which testimonial assertions are received though not made under oath and subject to cross-examination. Roughly speaking, two general notions underlie these exceptions, and these two notions are suggested by the principle of the rule itself. The first of these is that of necessity; *i. e.* the situation in which it is no longer possible to subject the person to oath and cross-examination, so that if his statements are to be had at all, they must be had without applying these securities for trustworthiness.[1] The typical instance of the sort is the death of the proposed declarant; and the question is constantly presented, under several of the exceptions, whether absence from the jurisdiction, insanity, or the like, is to be assimilated to the case of death, — in other words, whether, as a general principle, the unavailability of the witness is a ground for applying the exception to the rule. In one exception (statements made under official duty) the public inconvenience of summoning officials from their duties to repeated attendance in court is recognized as a sufficient ground of exception; in others (reputation, in certain cases, and declarations of a mental or physical condition), the difficulty, not of having the particular person in court, but of getting better evidence in general, is regarded as sufficient. But, though there is thus

[Tilghman, C. J., in Garwood *v.* Dennis, 4 Binn. 328: "It is objected that, however impressive the declaration of a man of character may be, yet the law admits the word of no man in evidence without oath. The general rule certainly is so; but subject to relaxation in cases of necessity or extreme inconvenience."]

no generally accepted and uniform principle, and no consistency of principle, even within each exception, still there is this general notion that, for the exception to exist at all, there must be some kind of a necessity for the reception of hearsay-assertions.

The second notion is that, even though a necessity exists for relaxing the Hearsay rule, nevertheless this is not to be done unless there is, in the particular class of declarations offered, some circumstantial guarantee of trustworthiness which shall — in some degree, at least — supply the tests of oath and cross-examination otherwise required.[2] Thus, in the exception for dying declarations, it is the impressive situation of the declarant; in the exception for declarations against interest, it is the improbability of making such a statement if it were not believed true; in the exception for official statements, it is the oath of office, and perhaps other things; in the case of reputation, it is the probability that in certain matters the community's means of knowledge and repeated discussion will sift out something worth consideration; and so on for the other exceptions. Here, again, no general uniformity of principle must be looked for, nor any careful consistency within each exception; yet the general notion may be seen more or less plainly throughout the exceptions.

A third principle may also be traced through the various exceptions, though there is in it nothing peculiar to the Hearsay rule; it is merely that the person whose assertions are received testimonially must not lack the testimonial qualifications of knowledge and the like (*post*, Chap. XXIV). A person speaking extra-judicially should at least possess the simple and fundamental qualifications of a person testifying infra-judicially. This principle, again, receives no consistent application; but it serves as a natural explanation of many details and qualifications of the exceptions which might otherwise seem unaccountable.

At the same time, it would be improper to leave the impression that the general notions above outlined could be taken as in any sense working rules or practical guides in the solution of a given problem under the Hearsay exceptions. Those exceptions arose at different times, were established by different lines of precedents, and were developed according to considerations peculiar to each one; and it is perhaps under the circumstances a matter of surprise that any common notions at all could be found to underlie them. Such generalized suggestions have been repeatedly made in judicial opinion;[3] but nevertheless, as a matter of precedent, each exception exists in and by itself, and must be dealt with according to its own precedents. The generalizations above set forth have been referred

[2] [Loomis, J., in Southwest S. D. *v.* Williams, 48 Conn. 507: "The law does not dispense with the sanction of an oath and the test of cross-examination as a prerequisite for the admission of verbal testimony, unless it discovers in the nature of the case some other sanction or test deemed equivalent for ascertaining the truth."]

[3] [The two passages just quoted in the preceding notes are merely taken from many that exist.]

to merely because it would be a mistake to suppose that the exceptions are maintained as purely arbitrary creatures of tradition, and because such general notions as judicial opinion has sanctioned are likely to be of service in employing and developing the exceptions in cases not already settled by precedent.]

Exception for Declarations in Pedigree Cases (or, Declarations about Family History).

§ 114 *b*. **Necessity for this Evidence; Death.** [As a preliminary to the admission of declarations by a member of a family, or of reputation in the family, a necessity for resorting to such evidence must first appear. As to declarations by an *individual member*, his death is a sufficient ground; though there is some authority for the notion that if other members of the family are living and available, the deceased's statement is inadmissible;[1] but this seems unsound. It is usually intimated that death is the only ground for admission;[2] and of course where the declarant is alive and available, the declarations are inadmissible. As to *family reputation*, it is perhaps not necessary to show that every member of the immediate family is deceased; but it is usual to exclude such reputation where the matters are of recent occurrence and some of the family appear to be available,[3] — at any rate where the reputation is in the form of a family Bible-entry and the entrant himself is still available.[4]]

§ 114 *c* [103].[1] **Whose Declarations are receivable.** [A sound general principle, for determining whose declarations are receivable, was laid down by Lord Eldon:[2] "The tradition must be from persons having such a connection with the party to whom it relates that it is natural and likely from their domestic habits and connections that they are speaking the truth, and that they could not be mistaken." But this principle has not generally been carried out to its full extent.] It was long unsettled, whether any and what

[1] [Covert *v.* Hertzog, 4 Pa. St. 146; White *v.* Strother, 11 Ala. 724.
Contra: Crauford *v.* Blackburn, 17 Md. 54; and such is the general implication running through the cases.]

[2] [*Contra, semble*, Campbell *v.* Wilson, 23 Tex. 252, for absence from the jurisdiction.]

[3] [See Harland *v.* Eastman, 107 Ill. 538; Campbell *v.* Wilson, *supra;* Hurlburt's Estate, 68 Vt. 366.
Contra, for one testifying to his own age: Cherry *v.* State, 68 Ala. 30.]

[4] [People *v.* Mayne, 118 Cal. 516; Leggett *v.* Boyd, 3 Wend. 379; Robinson *v.* Blakely, 4 Rich. L. 588.]

[1] [The first two sentences of this section, in the original text, which treated the whole exception under *res gestæ*, are as follows: "To this head may be referred much of the evidence sometimes termed 'hearsay,' which is admitted in cases of *pedigree*. The principal question, in these cases, is that of the parentage or descent of the individual; and, in order to ascertain this fact, it is material to know how he was acknowledged and treated by those who were interested in him, or sustained towards him any relations of blood or affinity."]

[2] [Whitelocke *v.* Baker, 13 Ves. 514.]

kind of relation must have subsisted between the person speaking and the person whose pedigree was in question; and there are reported cases in which the declarations of servants, and even of neighbors and friends, have been admitted. But it is now settled, that the law resorts to hearsay evidence in cases of pedigree, upon the ground of the interest of the declarants in the person from whom the descent is made out, and their consequent interest in knowing the connections of the family. The rule of admission is, therefore, restricted to the declarations of deceased persons who were related by blood or marriage to the person, and, therefore, interested in the succession in question;[3] and general repute in the family, proved by the testimony of a surviving member of it, has been considered as falling within the rule.[4] [As to the scope of the relationship, it may be said, first, that among blood relatives no line seems to be drawn because of remoteness; secondly, the declarations of a husband as to his wife's family,[5] and of a wife as to her husband's family,[6] are receivable; and thirdly, that the declarations of any person connected by marriage only would probably be received, if he appeared to have had opportunities of information.[7] It is of course necessary that the declarant's family membership be first shown; but 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;[8] 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 shown to belong to A's family is competent to speak; the circumstance that the estate to be claimed is in A's or in B's family being immaterial.[9] It has been held that declarations as to a son's illegitimacy, by a member of the father's family, are inadmissible, because the son does not legally belong to that family;[10] but it seems improper to

[3] Vowles *v.* Young, 13 Ves. 140, 147; Goodright *v.* Moss, Cowp. 591, 594, as expounded by Lord Eldon in Whitelocke *v.* Baker, 13 Ves. 514; Johnson *v.* Lawson, 2 Bing. 86; Monkton *v.* Attorney-General, 2 Russ. & My. 147, 156; Crease *v.* Barrett, 1 Cr. M. & R. 919, 928; Casey *v.* O'Shaunessy, 7 Jur. 1140; Gregory *v.* Baugh, 4 Rand. 611; Jewell *v.* Jewell, 1 How. S. C. 231; s. c. 17 Peters, 213; Kaywood *v.* Barnett, 3 Dev. & Bat. 91; Jackson *v.* Browner, 18 Johns. 37; Chapman *v.* Chapman, 2 Conn. 347; Waldron *v.* Tuttle, 4 N. H. 371.

[4] Doe *v.* Griffin, 15 East 293. There is no valid objection to such evidence, because it is hearsay upon hearsay, provided all the declarations are within the family; thus, the declarations of a deceased lady, as to what had been stated to her by her husband in his lifetime, were admitted: Doe *v.* Randall, 2 M. & P. 20; Monkton *v.* Att'y-Gen'l, 2 Russ. & My. 165; Bull. N. P. 295; Elliott *v.* Piersoll, 1 Pet. 328, 337.

[5] [Vowles *v.* Young, *supra;* Doe *v.* Harvey, 1 Ry. & Mo. 297; Jewell *v.* Jewell, 1 How. 231.]

[6] [Shrewsbury Peerage Case, 7 H. L. C. 22; Doe *v.* Randall, 2 Moo. & P. 25.]

[7] [Doe *v.* Randall, *supra;* People *v.* Ins. Co., 25 Wend. 209. *Contra:* Turner *v.* King, 98 Ky. 253.]

[8] [Dunlop *v.* Servas, 5 U. C. Q. B. 288; Blackburn *v.* Crawfords, 3 Wall. 9.]

[9] [Monkton *v.* Att'y-Gen'l, 2 Russ. & My. 147; Sitler *v.* Gehr, 105 Pa. 592; see Robb's Estate, 37 S. C. 19, 22, 33, 36.]

[10] [Crispin *v.* Doglioni, 3 Sw. & Tr. 44; Flora *v.* Anderson, 75 Fed. 217, 234.]

apply to the present evidential principle a mere rule of inheritance which has no real bearing; and the better view is that such declarations are admissible.[11] Testimony to one's own age may be regarded as admissible exceptionally from a witness who speaks from knowledge not acquired by personal observation (*post*, § 430 *k*); but it may also be regarded as in effect testimony to the family reputation, the reputation being admissible under the present exception.[12] It has been said above that the line has been drawn at relatives or family-members, and that therefore declarations by other persons, however intimate and well-situated for obtaining accurate information, are inadmissible; and this seems to be the law in England;[13] but this strictness is a matter of fairly modern establishment;[14] and on principle there seems to be no reason for drawing an inflexible line. Accordingly, in Canada[15] and in the United States, declarations or reputation from intimate acquaintances have by several Courts been thought admissible;[16] and reputation in the neighborhood, or among acquaintances generally, has often been considered admissible under local conditions.[17] This was apparently the practice in England in the last century;[18] it has always been conceded to be the law in proof of marriage;[19] and it was in the times of slavery generally received in proof of ancestry, on an issue of freedom or slavery; and a liberal treatment of the principle seems not improper.[20] At the same time, reputation or declarations from persons not shown to have opportunities of knowing, or mere rumor, or the like untrustworthy report,[21] should be excluded.]

[11] [Goodright *v.* Moss, 2 Cowp. 594; Murray *v.* Milner, L. R. 12 Ch. D. 849; Jackson *v.* Jackson, 80 Md. 176; Ford *v.* Ford, 7 Humph. 98.
In Northrop *v.* Hale, 76 Me. 312, declarations in the mother's family were held admissible.]

[12] [Cherry *v.* State, 68 Ala. 30; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 185; Com. *v.* Hollis, Mass., 49 N. E. 632; Houlton *v.* Manteuffel, 51 Minn. 185; State *v.* Marshall, 137 Mo. 463, *semble;* State *v.* Best, 108 N. C. 749; Watson *v.* Brewster, 1 Pa. St. 383.]

[13] [Johnson *v.* Lawson, 2 Bing. 86 (housekeeper twenty-four years in the family); Casey *v.* O'Shaughnessy, 7 Jur. 1140 (Catholic priest); Polini *v.* Gray, L. R. 12 Ch. D. 426 (intimate friends).]

[14] [In Walker *v.* Wingfield, 18 Ves. 443, 446, Lord Eldon said it had not yet been decided.]

[15] [Doe *v.* Auldjo, 5 U. C. Q. B. 175 (body-servant who had gone abroad with his master).]

[16] [Wilson *v.* Brownlee, 24 Ark. 589; Cuddy *v.* Brown, 78 Ill. 418; Jackson *v.* Cooley, 8 Johns. 130. *Contra:* Flora *v.* Anderson, 75 Fed. 217, 222, *semble;* Hurlburt's Estate, 68 Vt. 366.]

[17] [Kelly *v.* McGuire, 15 Ark. 605; Ringhouse *v.* Keener, 49 Ill. 471; Birney *v.* Hann, 3 A. K. Marsh. 326; Jackson *v.* Etz, 5 Cow. 319; Arents *v.* R. Co., N. Y., 50 N. E. 422; Ewell *v.* State, 6 Yerg. 372; Flowers *v.* Haralson, ib. 496 (leading case); Carter *v.* Montgomery, 2 Tenn. Ch. 227. *Contra:* De Haven *v.* De Haven, 77 Ind. 239.]

[18] [Craig *v.* Anglesea, 17 How. St. Tr. 1166,, 1179, 1181; Morewood *v.* Wood, 14 East 330, note.]

[19] [See *post*, § 140 *c*.]

[20] [The pedigree of a dog has been received: Citizens' R. T. Co. *v.* Dew, Tenn., 45 S. W. 790.]

[21] [Wilson *v.* Brownlee, 24 Ark. 589; Gould *v.* Smith, 35 Me. 513; Greenfield *v.*

§ 114 *d* [104, 105]. **Form of the Declaration.**[1] [The assertion may come, as already noticed, either from an individual member of the family, or from the family in general, that is, as the reputation or accepted opinion in the family. The form of the statement is immaterial; and it may of course come in a great variety of forms.] Thus, an entry by a deceased parent or other relative, made in a Bible, family missal, or any other book, or in any document or paper, stating the fact and date of the birth, marriage, or death of a child, or other relative, is regarded as a declaration of such parent or relative in a matter of pedigree.[2] So, also, the correspondence of deceased members of the family, recitals in family deeds, such as marriage settlements, descriptions in wills, and other solemn acts, are original evidence in all cases, where the oral declarations of the parties are admissible.[3] In regard to recitals of pedigree in bills and answers in Chancery, a distinction has been taken between those facts which are not in dispute and those which are in controversy; the former being admitted, and the latter excluded.[4] Recitals in deeds, other than family deeds, are also admitted, when corroborated by long and peaceable possession according to the deed.[5] Inscriptions on tombstones and other funeral monuments, engravings on rings, inscriptions on family portraits, charts, or pedigrees, and the like, are also admissible, as original evidence of the same fact. Those which are proved to have been made by or under the direction of a deceased relative are admitted as his declarations. But if they have been publicly exhibited and were well known to the family, the publicity of them supplies the defect of proof in not showing that they were declarations of [specified] deceased members of the family; and they are admitted on the ground of tacit and common assent; it is presumed, that the relatives of the family would not permit an inscription without foundation to remain; and that a person would not wear a ring with an error on it;[6] [so that where

Camden, 74 id. 61; Jackson *v.* Browner, 18 Johns. 39; Conn. M. L. Ins. Co. *v.* Schenck, 94 U. S. 98.]

[1] [The first two sentences of this section in the original text deal with other parts of the subject, and appear at the beginning of the later sections, 114 *f* and 114 *g*.]

[2] [Perth Peerage Case, 2 H. L. C. 876 (document hung on the wall); People *v.* Slater, 119 Cal. 620 (family Bible).]

[3] Bull. N. P. 233; Neal *v.* Wilding, 2 Stark. 1151, per Wright, J.; Doe *v.* E. of Pembroke, 11 East 504; Whitelocke *v.* Baker, 13 Ves. 514; Elliott *v.* Piersoll, 1 Pet. 328; 1 Ph. Evid. 216, 217, and peerage cases there cited. In two recent cases, the recitals in the deeds were held admissible only against the parties to the deeds; but in neither of those cases was the party proved to have been related to those whose pedigree was recited. In Fort *v.* Clarke, 1 Russ. 601, the grantors recited the death of the sons of John Cormick, tenants in tail male, and declared themselves heirs of the bodies of his daughters, who were devisees in remainder; and in Slaney *v.* Wade, 1 Mylne & Craig, 338, the grantor was a mere trustee of the estate, not related to the parties; see also Jackson *v.* Cooley, 8 Johns. 128; Jackson *v.* Russell, 4 Wend. 543; Keller *v.* Nutz, 5 S. & R. 251.

[4] Phil. & Am. on Evid. 231, 232, and the authorities there cited; [see the next section for this distinction of *ante litem motam*.]

[5] Stokes *v.* Dawes, 4 Mason, 268; [but this rests on a peculiar principle of its own: see *ante*, § 23, note.]

[6] Per Lord Erskine, in Vowels *v.* Young, 13 Ves. 144; Monkton *v.* Attorney-

the chart, Bible, or other document is put in as representing the tacit family opinion by reason of its public exposure in the family, it is therefore immaterial who wrote or printed it, nor need the writing be authenticated other than by the fact of its exposure in the family;[7] and conversely, where such a document, for example, an entry in a family Bible, is put in as the statement of an individual member, by proving the handwriting, it is unnecessary to connect it with the family as a whole by showing a public exposure in the family.[8]] Mural and other funeral inscriptions are provable by copies, or other secondary evidence, as has been already shown.[9] Their value, as evidence, depends much on the authority under which they were set up, and the distance of time between their erection and the events they commemorate.[10] Under this head may be mentioned family conduct, such as the tacit recognition of relationship, and the disposition and devolution of property, as admissible evidence from which the opinion and belief of the family may be inferred, resting ultimately on the same basis as evidence of family tradition. Thus, it was remarked by Mansfield, C. J., in the Berkeley Peerage Case, that "if the father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate;[11] and Mr. Justice Ashhurst, in another case, remarked that the circumstance of the son's taking the name of the person with whom his mother, at the time of his birth, lived in a state of adultery, which name he and his descendants ever afterwards retained, "was a very strong family recognition of his illegitimacy."[12] So, the declarations of a person, since deceased, that he was going to visit his relatives at such a place, have been held admissible to show that the family had relatives there;[13] [and the fact that a person's marriage had never been heard of in the family is in effect a family reputation that he was not married.[14]]

§ 114 *e*. **Post litem motam; No Interest to deceive.** [Declarations made during the course of a legal controversy are to be regarded as lacking in the guarantees of trustworthiness; it is generally conceded that declarations made *post litem motam* are inadmissible.[1] To have

General, 2 Russ. & My. 147; Kidney *v.* Cockburn, id. 167; Camoys Peerage, 6 Cl. & Fin. 789.

[7] [Hubbard *v.* Lees, L. R. 1 Exch. 258; People *v.* Ratz, 115 Cal. 132; Jones *v.* Jones, 45 Md. 160; Weaver *v.* Leiman, 52 id. 719; North Brookfield *v.* Warren, 16 Gray 174; Eastman *v.* Martin, 19 N. H. 157; Union Ins. Co. *v.* Pollard, 94 Va. 146. *Contra*, but quite misunderstanding the principle: Supreme Council *v.* Conklin, N. J. L., 38 Atl. 659; State *v.* Hairston, N. C., 28 S. E. 492.]

[8] [Monkton *v.* Attorney-General, 2 Russ. & My. 163.]

[9] *Supra*, § 94; [transferred *post*, as § 563 *i*.]

[10] Some remarkable mistakes of fact in such inscriptions are mentioned in 1 Phil Evid. 222.

[11] 4 Camph. 416; [Murray *v.* Milner, L. R. 12 Ch. D. 845; Goodright *v.* Moss, Cowper 594.]

[12] Goodright *v.* Saul, 4 T. R. 356.

[13] Rishton *v.* Nesbitt, 2 Moo. & R. 554.

[14] [Doe *v.* Griffin, 15 East 294.]

[1] [Berkeley Peerage Case, 4 Camp. 413; Freeman *v.* Phillipps, 4 M. & S. 397;

this effect, the dispute must have been upon the very point in controversy, though there is room for much latitude in applying this limitation.[2] On the other hand, it is immaterial whether litigation had actually begun, if the controversy existed.[3] Furthermore, besides the qualification as to declarations *post litem motam*, it is also usually said that the declarant must at the time have no interest to misrepresent;[4] yet the mere possibility of a bias or desire to misrepresent is not sufficient,[5] and, in particular, the mere fact that a statement or entry is made with a view to perpetuating evidence should not exclude it.[6]]

§ 114*f*. **Kind of Fact that may be the Subject of the Declaration.** The term "pedigree" embraces not only descent and relationship, but also the facts of birth, marriage, and death, and the times when these events happened. [There was at one time some doubt whether the place of such an event was equally included;[1] but it is now generally and properly accepted that this kind of fact also may be the subject of the declaration;[2] as well as, in general, any notable fact in the life of a member of the family or in the family history which might well be supposed to be known to the members in general;[3] for the principle applies equally well to such facts.]

Monkton *v.* Att'y-Gen'l, 2 Russ. & My. 160; Chapman *v.* Chapman, 2 Conn. 349; Collins *v.* Grantham, 12 Ind. 444; People *v.* Ins. Co., 25 Wend. 210; Morgan *v.* Purnell, 4 Hawks 97; {Hodges *v.* Hodges, 106 N. C. 374.} Some judges have doubted the need of this restriction: Graham, B., in Berkeley Peerage Case, *supra;* Boudereau *v.* Montgomery, 4 Wash. C. C. 190.]

[2] [See Gee *v.* Ward, 7 E. & B. 511; Shedden *v.* Patrick, 2 Sw. & Tr. 170, 188; Freeman *v.* Phillipps, *supra;* People *v.* Ins. Co., *supra;* Elliott *v.* Peirsol, 1 Pet. 337.]

[3] [Monkton *v.* Att'y-Gen'l, *supra;* Butler *v.* Mountgarret, 6 Ir. C. L. 94; 6 H. L. C. 641. It was once suggested that the time when the state of facts began over which the controversy later arose should be the time after which declarations should be incompetent: Walker *v.* Beauchamp, 6 C. & P. 561; but this is unsound, and has been frequently repudiated: Reilly *v.* Fitzgerald, 6 Ir. Eq. 344; Butler *v.* Mountgarret, 6 Ir. C. L. 107, per Pigot, C. B.; Slaney *v.* Wade, 7 Sim. 615; Shedden *v.* Patrick, 2 Sw. & Tr. 170, 187.]

[4] [The phrasing differs: see Monkton *v.* Att'y-Gen'l, *supra;* Reilly *v.* Fitzgerald, *supra;* Plant *v.* Taylor, 7 H. & N. 237; Chapman *v.* Chapman, 2 Conn. 349; Waldron *v.* Tuttle, 4 N. H. 378; Byers *v.* Wallace, 87 Tex. 503 (declarant the sole heir of the one of whose relationship he spoke).]

[5] [Doe *v.* Davies, 10 Q. B. 325; People *v.* Ins. Co., 25 Wend. 215; Shields *v.* Boucher, 2 Russ. & M. 147.]

[6] [Berkeley Peerage Case, 4 Camp. 418; Goodright *v.* Moss, Cowp. 594, *semble;* Gee *v.* Ward, 7 E. & B. 511; People *v.* Ins. Co., *supra*, per Cowen, J.; *contra*, *semble*, Chapman *v.* Chapman, 2 Conn. 349.]

[1] [The doubt seems to have been based on R. *v.* Erith, which however was really concerned with the topic of the next section.]

[2] [Shields *v.* Boucher, 1 De G. & Sm. 53 (leading case); Doe *v.* Griffin, 15 East 293; Att'y-Gen'l *v.* Kohler, 9 H. L. C. 686; Rishton *v.* Nesbitt, 2 Mo. & Rob. 554; Wise *v.* Wynn, 69 Miss. 592; Jackson *v.* Boucham, 15 Johns. 227; Carter *v.* Montgomery, 2 Tenn. Ch. 229; Story *v.* Saunders, 8 Humph. 667, *semble;* Byers *v.* Wallace, 87 Tex. 503; *contra*, usually taking the supposed authority of R. *v.* Erith: Wilmington *v.* Burlington, 4 Pick. 175; Independence *v.* Pompton, 4 Halst. 212; Brooks *v.* Clay, 3 A. K. Marsh. 550; Tyler *v.* Flanders, 57 N. H. 624.]

[3] [Rishton *v.* Nesbitt, 2 Mo. & Rob. 554 (existence of relatives in a town); Att'y-Gen'l *v.* Kohler, 9 H. L. C. 686 (trade, enlistment in the army, running away from home, etc.); Fraser *v.* Jennison, 42 Mich. 206, 214, 235 (that two brothers immigrated together); Jackson *v.* Boucham, 15 Johns. 227 (death in war); Byers *v.* Wallace, 87

§ 114 *g*. **Kind of Litigation in which such Declarations are receivable.** These facts, therefore, may be proved in the manner above mentioned, in all cases where they occur incidentally, and in relation to pedigree,[1] [*i. e.*, only in litigation where the issue upon which the evidence is offered involves a question of descent, "from what parents the child has derived its birth,"[2] — chiefly, therefore, in inheritance cases. This, at least, was the original English practice,[3] since confirmed and followed in that country,[4] as well as in some American jurisdictions.[5] But, as a matter of principle, it is difficult to see how this arbitrary limitation can be supported. If a statement of the present sort is to be regarded as sufficiently trustworthy, at the time of making it, to be worth considering in evidence, it must be equally trustworthy whether, by the turn of chance, the litigation in which it subsequently becomes useful is an action of ejectment for land, or a plea of infancy to a promissory note, or a suit for the amount of a life-insurance policy, or a prosecution for rape upon one under the age of consent, or any other kind of proceeding, civil or criminal. "If this evidence is admissible to prove such facts at all, it is equally so in all cases where they become legitimate subjects of judicial inquiry and investigation."[6] Accordingly, such is the view now taken in the majority of American jurisdictions.[7]]

Tex. 503 (removal, enlistment in the army); Du Pont *v.* Davis, 30 Wis. 178 (death by an explosion).

Excluded: Crane *v.* Reeder, 21 Mich. 83 (existence of heirs); Jackson *v.* Etz, 5 Cow. 319 (finding and burial of body); People *v.* Koerner, 154 N. Y. 355 (insanity).]

[1] [This sentence, in the author's first edition of the work, stood as follows: "These facts, therefore, may be proved in the manner above-mentioned;" but in the second edition, the above concluding clause was added; but the unmodified statement is responsible, as Professor Thayer has pointed out (Cases on Evidence, 408, note) in part for some American rulings applying the doctrine without the limitation discussed in this section.]

[2] [R. *v.* Erith, 8 East 539; another phrasing is: "a case in which the controversy between the parties was whether or not a certain line of genealogy could be established:" Haines *v.* Guthrie, *infra*.]

[3] [R. *v.* Erith, *supra*.]

[4] [Figg *v.* Wedderburne, 11 L. J. Q. B. 46, *semble;* Haines *v.* Guthrie, L. R. 13 Q. B. D. 818.]

[5] [People *v.* Mayne, 118 Cal. 516, *semble;* Union *v.* Plainfield, 39 Conn. 564; State *v.* Marshall, 137 Mo. 463; Westfield *v.* Warren, 8 N. J. L. 251; Eisenlord *v.* Clum, 126 N. Y. 552; Conn. Mut. L. Ins. Co. *v.* Schenck, 94 U. S. 598.]

[6] [Bigelow, C. J., in North Brookfield *v.* Warren, *infra*.]

[7] [Cherry *v.* State, 68 Ala. 30 (selling liquor to a minor); Wilson *v.* Brownlee, 24 Ark. 589 (action on a note; plea, death of a joint payee); South. L. Ins. Co. *v.* Wilkinson, 53 Ga. 547 (insurance policy); Collins *v.* Grantham, 12 Ind. 444 (plea of infancy); Greenleaf *v.* R. Co., 30 Ia. 302 (death by negligence); North Brookfield *v.* Warren, 16 Gray 175 (pauper settlement); Fraser *v.* Jennison, 42 Mich. 206, 235 (will-contest); Lamoreaux *v.* Att'y-Gen'l, 89 id. 146 (*quo warranto* against a sheriff); Houlton *v.* Manteuffel, 51 Minn. 185 (plea of infancy); Carskadden *v.* Poorman, 10 Watts 84 (penalty for marrying a minor); Watson *v.* Brewster, 1 Pa. St. 383 (plea of infancy); Ford *v.* Ford, 7 Humphr. 98 (testator's sanity); Swink *v.* French, 11 Lea 79 (replication of infancy); Masons *v.* Fuller, 45 Vt. 30 (bastardy complaint); Du Pont *v.* Davis, 30 Wis. 178 (non-joinder of party).]

CHAPTER XI.

EXCEPTIONS TO THE HEARSAY RULE: REGULAR ENTRIES IN THE COURSE OF BUSINESS.

§ 120 *a*. Regular Entries made in the Course of Business.
§ 120 *b*. Parties' Shopbooks; History of the Exception.
§ 120 *c*. Same: Rules for Use of Parties' Shopbook Entries.

[An exception to the Hearsay rule exists for regular entries made in the course of business; but there are two distinct branches to this exception, one concerned with such entries in general, and the other with entries by a party in his own shopbooks, and it is necessary to treat them separately.]

§ 115–120.[1]

§ 120 *a*. **Regular Entries made in the Course of Business.** [It is indispensable, for the use of these statements, that the entrant be unavailable as a witness. Death is usually spoken of as the condition on which they may be used; and death is certainly sufficient. Absence from the jurisdiction should equally suffice.[1] On the same principle, insanity[2] and illness hindering the presence of the witness[3] should equally suffice; and in general "the ground is the impossibility of obtaining the testimony, and the cause of such impossibility seems immaterial."[4]

That which gives trustworthiness to such statements, and affords a reason for receiving them as an exception to the rule, is the habit and system of making the entries as a part of the ordinary and regular course of business, removing the ordinary motives for untruth

[1] Transferred to Appendix II; the treatment in the original text obscures the subject by considering it under the *res gestæ* principle, as well as by failing to distinguish carefully the principle of the exception for official statements (*post*, § 162 *m*), and the exception for declarations against interest (*post*, §§ 147 ff.); nor is the distinction between parties' books and other entries clearly expounded.

[1] Elliott *v.* Dycke, 78 Ala. 157; McDonald *v.* Carnes, 90 id. 148; Railway Co. *v.* Henderson, 57 Ark. 402; Bartholomew *v.* Farwell, 41 Conn. 109; Culver *v.* Marks, 122 Ind. 565; Karr *v.* Stivers, 34 Ia. 125; North Bank *v.* Abbot, 13 Pick. 471; Sterrett *v.* Bull, 1 Binn. 237; Rigby *v.* Logan, 45 S. C. 651; Fennerstein's Champagne, 3 Wall. 149, *semble*. *Contra*: Cooper *v.* Marsden, 1 Esp. 1; Browning *v.* Flanagin, 22 N. J. L. 567, 572; Wilbur *v.* Selden, 6 Cow. 163; Little R. G. Co. *v.* Dallas Co., 30 U. S. App. 55.

[2] Union Bank *v.* Knapp, 3 Pick. 109.

[3] *Contra*, *semble*: Taylor *v.* R. Co., 80 Ia. 135.

[4] Shaw, C. J., in North Bank *v.* Abbot, *supra*.

and adding certain safeguards for correctness.[5] The entry, then, must have been made in the course of business, *i. e.* as a part of the regular work of one's livelihood or profession; this permits the use of entries by one sending orders or bills,[6] by a notary recording protests,[7] a cashier sending notice of non-payment,[8] a marine inspector certifying to a vessel's condition,[9] an attorney keeping a book of proceedings,[10] an asylum-officer keeping a weather-record;[11] records of baptism or marriage by priests or ministers are properly admissible[12] (though not so treated in England.[13]) The entry should also be one of a class made more or less regularly; for example, a single entry made in a book that had been laid aside for ten years would be rejected.[14] The entry must be fairly contemporaneous with the event recorded;[15] though no precise time can be fixed as a limit. It is commonly said that the entrant must have no motive to misrepresent;[16] though this limitation seems elusive in its application. In this country the statements must be in writing; but in England an oral regular report is admissible.[17] On the other hand, in England, an additional limitation, not existing in this country, obtains, in that the declarant must have been under a duty to some superior to make the statement, — a duty to do the thing recorded,[18] to record or otherwise report it,[19] and to report it at the time.[20] The entry, in any case, must be produced in its original form, if it can be, in accordance with the principle of Primariness, *post*, § 563 *a*.[21] The entry, moreover, must be of a fact within the personal knowledge of the declarant;[22] and on

[5] Tindal, C. J., in Poole *v.* Dicas, 1 Bing. N. C. 649; Parker, C. J., in Welsh *v.* Barrett, 15 Mass. 380; Swayne, J., in Fennerstein's Champagne, 3 Wall. 149.

[6] R. *v.* Cope, 7 C. & P. 726; Champneys *v.* Peck, 1 Stark. 326.

[7] Halliday *v.* Martinet, 20 Johns. 172.

[8] Nichols *v.* Goldsmith, 7 Wend. 161.

[9] Perkins *v.* Augusta Co., 10 Gray 324.

[10] Leland *v.* Cameron, 31 N. Y. 121; Fisher *v.* Mayor, 67 id. 77.
For log-books, see *post*, Vol. III, §§ 428, 431.

[11] De Armond *v.* Neasmith, 32 Mich. 233.

[12] Huntly *v.* Comstock, 2 Root 99; Whitcher *v.* McLaughlin, 115 Mass. 169; Kennedy *v.* Doyle, 10 All. 161; Hyam *v.* Edwards, 1 Dall. 2; Clark *v.* Trinity Church, 5 W. & S. 268. *Contra:* Royal S. G. F. *v.* McDonald, N. J., 35 Atl. 1061.
Statutes often expressly provide for admission; *e. g.* Ala. Code 1897, § 1811; Mich. How. St. § 6222; Penns. Pep. & L. Dig. Evidence, 43, 45, 47. Moreover, they are often admissible as official statements: *post*, §§ 162 *m*, 484.

[13] Whittuck *v.* Waters, 4 C. & P. 375; Davis *v.* Lloyd, 1 C. & K. 275.

[14] Kibbe *v.* Bancroft, 77 Ill. 19.

[15] Champneys *v.* Peck, 1 Stark. 326; Ray *v.* Castle, 79 N. C. 580.

[16] Poole *v.* Dicas, 1 Bing. N. C. 649; Polini *v.* Gray, 12 Ch. D. 430; Lord *v.* Moore, 37 Me. 220.

[17] Lord Campbell, in Sussex Peerage Case, 11 Cl. & F. 113; R. *v.* Buckley, 13 Cox Cr. 293.

[18] Smith *v.* Blakey, L. R. 2 Q. B. 332; Polini *v.* Gray, L. R. 12 Ch. D. 431; Lyell *v.* Kennedy, 35 W. R. 725.

[19] Chambers *v.* Bernasconi, 1 C. & J. 451; 1 C. M. & R. 347; Smith *v.* Blakey, Polini *v.* Gray, *supra;* Trotter *v.* McLean, L. R. 13 Ch. D. 579; Massey *v.* Allen, ib. 558; Lyell *v.* Kennedy, *supra.*

[20] Smith *v.* Blakey, Polini *v.* Gray, *supra.*

[21] Herring *v.* Levy, 4 Mart. N. S. 386; Holmes *v.* Marden, 12 Pick. 171; Rigby *v.* Logan, 45 S. C. 651; Burton *v.* Driggs, 20 Wall. 135.

[22] Avery *v.* Avery, 49 Ala. 195; McDonald *v.* Carnes, 90 id. 148; New J. Z. & I.

this principle a record of baptism cannot be treated as evidence of the date of birth,[23] though it is evidence of the person's being alive,[24] which may sometimes be material under the issues. The difficult situation arises, in the application of this part of the principle, where two persons have co-operated in the entry, one having personal knowledge and reporting to the other, and the other writing down the transaction thus reported; the typical cases being that of a salesman and entry-clerk or book-keeper and that of a workman and a foreman recording the work reported. Where both such persons are brought to the stand, no question of a hearsay exception arises; and it will be seen later (*post*, § 439 *b*) that, upon the principle of using a past recollection, the combined testimony of the two should suffice to admit the entry. But where one of them — usually the salesman, workman, or other person having personal knowledge — does not appear as a witness, the entry can be received if at all, only under the present exception. That it should be so receivable seems proper, on principle, as well as for reasons of practical convenience; for (apart from the English doctrine admitting oral reports, *supra*) if the salesman, etc., has made a regular report in the course of business, which has not taken written shape, it seems not to be essential whether it is he or another who gives it that written shape, and accordingly an entry, verified by the person making it, of a regular oral report by a person not now available would seem admissible. The cases represent various attitudes on the part of the Courts. Some Courts are willing to receive such entries where the person making them verifies their correctness on the stand and the original observer — salesman, etc. — is dead or otherwise unavailable.[25] Other Courts go even further, and admit them without accounting for the original observer, on the sound consideration that it is practically impossible in mercantile conditions to trace and procure every one of the many individuals who reported the transactions.[26] On the other hand, some Courts refuse to receive such entries even though the original observer is dead or otherwise unavailable;[27] while others merely exclude them in a given case because he is absent and not accounted for.[28] A

Co. *v.* L. Z. & I. Co., 59 N. J. L. 189; Conn. M. L. Ins. Co. *v.* Schwenk, 94 U. S. 598 (entry of age of member by lodge-secretary, excluded).

[23] Doe *v.* Bray, 8 B. & C. 815; R. *v.* N. Petherton, 5 id. 508. But on peculiar grounds a register was admitted to show illegitimacy in Gleinster *v.* Harding, L. R. 29 Ch. D. 991.

[24] Durfee *v.* Abbott, 61 Mich. 476. This use was ignored in Royal S. G. F. *v.* McDonald, N. J., 35 Atl. 1061.

[25] Stanley *v.* Wilkerson, 63 Ark. 556; Amer. S. Co. *v.* Pauly, 38 U. S. App. 254.

[26] Fielder *v.* Collier, 13 Ga. 499 (leading case); Schaefer *v.* R. Co., 66 Ga. 39; Chisholm *v.* Machine Co., 160 Ill. 101; Donovan *v.* R. Co., 158 Mass. 450; Nelson *v.* Bank, 32 U. S. App. 554 (leading case); North. P. R. Co. *v.* Keyes, id., 91 Fed. 47; U. S. *v.* Cross, 20 D. C. 379; Dohmen *v.* Ins. Co., 96 Wis. 38.

[27] Stettauer *v.* White, 98 Ill. 77; Kent *v.* Garvin, 1 Gray 150; Chicago L. Co. *v.* Hewitt, U. S. App., 64 Fed. 314.

[28] Swan *v.* Thurman, Mich., 70 N. W. 1023; Tingley *v.* Land Co., 9 Wash. 34, 42;

similar question arises in connection with parties' shopbooks (*post*, § 120 *b*).]

§ 120 *b*. **Parties' Shopbooks; History of the Exception.** [In order to understand the present condition of the law, it is necessary to notice briefly the historical relation of the two forms of the exception, this and the preceding one. First, we have in England, as early as the 1600s, a custom to receive the shopbooks of "divers men of trades and handicraftsmen" in evidence of "the particulars and certainty of the wares 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 books uncrossed and any way discharged" and still suing for the claim; moreover, the whole proceeding was also disparaged 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,[1] after reciting these considerations, forbade this use of shopbooks "in any action for any money due for wares hereafter to be delivered or for work hereafter to be done," except (1) within one year after the delivery of the wares or the doing of the work, (2) where a bill of debt existed, (3) "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 the exclusion complete, by refusing to recognize these books at all, after the expiration of the year.[2] In the lower Courts, where the jurisdiction was limited to small claims, the use of these books continued;[3] and a recent Rule of Court has re-introduced the use (to an extent somewhat indefinite) in the upper Courts.[4] But, for the purposes of the development of the law, there ceased to be for two centuries any recognition in England of this branch of the exception. But, before the end of the century of the above statute, the entries of a deceased clerk (even a clerk of a party) began to be admitted, on considerations of necessity, as an exception to the Hearsay rule. It was distinctly understood that their use, though affording some concession to parties, was a different thing from the use of books kept by a living party himself. *Price* v. *Lord Torrington* is the case most frequently taken as the landmark of the rule, but the usage is earlier than that case.[5] The attitude

White *v.* Wilkinson, 12 La. An. 360; Clough *v.* Little, 3 Rich. 353; Thomson *v.* Porter, 4 Strobh. Eq. 65; The Norma, U. S. App., 68 Fed. 509.

Where the absent person himself had no personal knowledge, the entry is of course inadmissible: Penns. Co. *v.* McCaffrey, Ill., 50 N. E. 713.

[1] St. 7 Jac. I, c. 12; continued in 3 Car. I, c. 4, § 22; 16 Car. I, c. 4; Rev. St. I, 691.

[2] Crouch *v.* Drury, 1 Keble 27; Smart *v.* Williams, Comb. 247; Glynn *v.* Bank, 2 Ves. 38; Lefebure *v.* Worden, ib. 54; Sikes *v.* Marshall, 2 Esp. 705.

[3] Thayer, Cases on Evidence, 471; see pp. 471, 506, 516, for a full collection of the historical material.

[4] Rules of Court, 1883, Ord. 33, r. 3; Ord. 30, r. 7.

[5] Pitman *v.* Maddox, 1 Ld. R. 732; Price *v.* Lord Torrington, 2 id. 873; Sir Biby Lake's Case, Theory of Evidence, 93; Glynn *v.* Bank, Lefebure *v.* Worden, *supra*.

of the Courts may be gathered from the following passage in *Lefebure* v. *Worden*: "So far the Courts of justice have gone (and that was going a good way, and perhaps broke in upon the original strict rules of evidence) that where there was such evidence [entries] by a servant known in transacting the business, as in a goldsmith's shop by a cashier or bookkeeper, such entry, supported on the oath of that servant that he used to make entries from time to time and that he made them truly, has been read. Further, where that servant, agent, or bookkeeper has been dead, if there is proof that he was the servant or agent usually employed in such business, was intrusted to make such entries by his master, [and] that it was the course of trade, — on proof that he was dead and that it was his handwriting, such entry has been read (which was Sir Biby Lake's case). And that was going a great way; for there it might be objected that such entry was the same as if made by the master himself; yet by reason of the difficulty of making proof in cases of this kind, the Court has gone so far." The admission thus covered only the books of a clerk of a party. But already there were instances foreshadowing a wider principle;[6] and finally, in *Doe* v. *Turford*,[7] the matter was placed on a firm footing; and the general scope of the exception was understood as covering all entries made "by a person, since deceased, in the ordinary course of his business," — whether a person wholly unconnected with the parties, or the clerk of a party, or a party himself; and it is this general exception that has been examined in the preceding section.

Meantime, in the United States, the English statute of 1609, or a similar one, 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 elsewhere, the use of parties' account-books was limited, but still authorized by statutes; a special action of "book-debt" was in some places given. In New York and New Jersey, the use seems clearly traceable to Dutch practice,[8] which, however, did not vary in essentials from the English. The usage in the United States, though accompanied by strict limitations, continued to survive in spite of the repudiation of such evidence in England. It is to be noted that it was put upon the footing of a Hearsay exception, based, like so many others (*ante*, § 114 *a*), on the notion of necessity, *i. e.* the incompetence of the party as a witness, and the impossibility in certain classes of transactions of

[6] Smart *v.* Williams, Comb. 247; Woodnoth *v.* Lord Cobham, Bunbury 180; Sutton *v.* Gregory, Peake Add. Cas. 150.

[7] 3 B. & Ad. 890.

[8] Mr. J. Daly, in "History of the Court of Common Pleas," 1 E. D. Smith, xxx. This connection is not mentioned by Professor Thayer, in his notes on this subject: Cases on Evidence, 5. It is not improbable that the original English usage, before the statute of James, was introduced, like so many other things in the 1500s, by the Dutch immigrants to England.

obtaining any other evidence, and its principles were developed, not arbitrarily, but according to the requirements of this principle.

At this time no other exception of the sort seems 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 shopbooks. But a knowledge of *Price* v. *Lord Torrington* seems to have been brought about by the English decisions of *Pritt* v. *Fairclough*[9] and *Hagedorn* v. *Reid*;[10] and two well-considered cases, following these, established on a firm footing the general principle of admitting regular entries by deceased persons, — the cases of *Welsh* v. *Barrett*[11] and *Nicholls* v. *Webb*,[12] in which the general exception was recognized quite independently of the use of parties' shop-books. Such were the stages by which the two branches of the exception reached their present status in England and the United States. It remains to examine the rules attending the use of parties' shopbooks, — historically the earlier branch, but now, as will be seen, without any reason for further existence.]

§ 120 *c*. **Same: Rules for Use of Parties' Shopbook Entries.** [It has already been said that the foundation of the shopbook exception in the United States was a necessity, resting in two circumstances, — first, the incompetency of the party to take the stand as a witness, and secondly, the conditions of early mercantile and industrial life, which left the party generally without other evidence than his own statements in the books. These considerations, often judicially declared,[1] lead to certain limitations in the use of such entries. The party must have had no clerk; for if he had, the necessity fails.[2] The entry must not be for a cash payment or loan, because other evidence would usually exist; though the reason is sometimes given that a cash payment is not usually a part of the regular business transactions.[3] The entry must not be of goods

[9] 1812, 3 Camp. 305.

[10] 1813, ib. 377.

[11] 1819, 15 Mass. 380.

[12] 1823, 8 Wheat. 326. There were one or two earlier cases, such as Clarke *v.* Magruder, 2 H. & J. 77, 1807, and Sterrett *v.* Bull, 1 Binn. 237; but the above two served chiefly as precedents.

[1] Shippen, P., in Poultney *v.* Ross, 1 Dall. 238; Parker, C. J., in Faxon *v.* Hollis, 13 Mass. 427; Hitchcock, J., in Cram *v.* Spear, 8 Hamm. 497; Simpson, C. J., in Bramin *v.* Force, 12 B. Monr. 508; Devens, J., in Pratt *v.* White, 132 Mass. 477.

[2] Vosburgh *v.* Thayer, 12 Johns. 461; Dunn *v.* Whitney, 10 Me. 14; Ruggles *v.* Gatton, 50 Ill. 416; Watrous *v.* Cunningham, 71 Cal. 32.

[3] *Excluded:* Juniata Bank *v.* Brown, 5 S. & R. 231; Brannin *v.* Force, 12 B. Monr. 509; Smith *v.* Rentz, 131 N. Y. 169; Ruggles *v.* Gatton, 50 Ill. 416; Maine *v.* Harper, 4 All. 115; Richardson *v.* Emery, 23 N. H. 223; Kotwitz *v.* Wright, 37 Tex. 83; Snell *v.* Eckerson, 8 Ia. 284; U. S. Bank *v.* Burson, 90 id. 191; Shaffer *v.* McCracken, ib. 578; Inslee *v.* Prall, 23 N. J. L. 463 (leading case); Hauser *v.* Leviness, id., 41 Atl. 725. *Admitted:* if in fact a part of the regular course of business: Ganahl *v.* Shore, 24 Ga. 24 (leading case); Wilson *v.* Wilson, 1 Halst. 99; Cram *v.* Spear, 8 Hamm. 497; Veiths *v.* Hagge, 8 Ia. 187; Cargill *v.* Atwood, 18 R. I. 303; Peck *v.* Pierce, 63 Conn. 310; Gleason *v.* Kinney, 65 Vt. 560.

In Massachusetts and New Hampshire the amount of a cash entry must not exceed 40*s*. ($6.66): Burns *v.* Fay, 14 Pick. 12; Rich *v.* Eldredge, 42 N. H. 158.

delivered to a third person but charging the defendant as guarantor, because the other person's testimony can be had.[4] The entry is not admissible to prove the terms of a special contract, because some other writing would usually exist,[5] nor to prove an item of goods so large that other evidence must have existed;[6] and it has sometimes been thought that the party's occupation was such that other evidence will always be accessible and his books be unnecessary.[7] At the same time, these limitations being reduced to fixed rules, the fact that in a given case other testimony happens to be accessible does not exclude an otherwise admissible entry, nor *vice versa*.[8]

But, besides the necessity for resorting to such entries, there are limitations designed to secure their trustworthiness, — limitations not dissimilar in principle from those of the other branch of the exception, but much more rigorous and detailed. The occupation of the party must be such as involves the regular keeping of books;[9] thus, the books of a physician,[10] and a printer,[11] have been admitted, but not of a pedler.[12] Any form of book is sufficient, provided it is regularly kept;[13] the fact that it is in ledger-form does not exclude it,[14] nor does it matter what the material is.[15] The entry or item must be, not a casual one — *e. g.* of an article not usually dealt in or at the end of a book already finished — but one of a regular series;[16] it must not be a condensed entry covering many transactions, as, for example, three months' services in one item.[17] Not merely regularity, but contemporaneousness is required; but "the entry need not be made

[4] Poultney *v.* Ross, 1 Dall. 238; Juniata Bank *v.* Brown, 5 S. & R. 231; Green *v.* Pratt, 11 Conn. 205; Kaiser *v.* Alexander, 144 Mass. 78; Black *v.* Fizer, 66 Tenn. 50.

[5] Leach *v.* Shepard, 5 Vt. 368; Danser *v.* Boyle, 16 N. J. L. 395; Nickle *v.* Baldwin, 4 W. & S. 290; Ward's Estate, 73 Mich. 225; Hazer *v.* Streich, 92 Wis. 505.

[6] Corr *v.* Sellers, 100 Pa. 170.

[7] So of a schoolmaster: Pelzer *v.* Cranston, 2 McC. 128. *Contra*, for an attorney: Codman *v.* Caldwell, 31 Me. 561; Wells *v.* Hatch, 43 N. H. 248, *semble*.

[8] Peck *v.* Abbe, 11 Conn. 210; Eastman *v.* Moulton, 3 N. H. 156; Mathes *v.* Robinson, 8 Met. 271; Sickles *v.* Mather, 20 Wend. 75. *Contra:* Neville *v.* Northcutt, 47 Tenn. 296.

[9] Ganahl *v.* Shore, 24 Ga. 17.

[10] Spence *v.* Sanders, 1 Bay 119.

[11] Thomas *v.* Dyott, 1 Nott & McC. 186.

[12] Thayer *v.* Deen, 2 Hill S. C. 677.

[13] Thus, a set of separate books for different enterprises was excluded in Richardson *v.* Emery, 23 N. H. 223; a mere memorandum-book was excluded in Costello *v.* Crowell, 139 Mass. 592. See other examples in Riley *v.* Boehm, 167 id. 183; Countryman *v.* Bunker, 101 Mich. 218; Fulton's Estate, 178 Pa. 78; Barley *v.* Byrd, Va., 28 S. E. 329; Hay *v.* Peterson, Wyo., 45 Pac. 1073; Diggins' Estate, 68 Vt. 198.

[14] Coggswell *v.* Dolliver, 2 Mass. 221; Wells *v.* Hatch, 43 N. H. 248; Hoover *v.* Gehr, 62 Pa. 136; but see note 25, *infra*.

[15] Kendall *v.* Field, 14 Me. 30 (shingle); Taylor *v.* Tucker, 1 Kelly 231 (slips of paper).

[16] Beach *v.* Mills, 5 Conn. 496; Davis *v.* Sanford, 9 All. 216; Stuckslager *v.* Neel, 123 Pa. 60.

[17] Henshaw *v.* Davis, 5 Cush. 146; Bassett *v.* Spofford, 11 N. H. 267; Carr *v.* Sellers, 100 Pa. 171; Pratt *v.* White, 132 Mass. 477; Baldridge *v.* Penland, 68 Tex. 441; Woolsey *v.* Bohn, 41 Minn. 238; Cargill *v.* Atwood, 18 R. I. 303.

exactly at the time of the occurrence; it suffices if it be within a reasonable time; the law fixes no precise instant when the entry should be made."[18] The entries must bear an honest appearance;[19] and some testimony must be given that the party has the reputation of keeping correct and honest books.[20] The entry must be the original one, not a copy, in accordance with the rule of Primariness (*post*, § 563 *a*); but it is often difficult to determine whether a book made up from temporary memoranda should be treated as in effect the original one; thus, a ledger made up from slate-entries,[21] a book made from memoranda chalked on a butcher-cart,[22] a book from pencil-entries on sheets of paper,[23] has been treated as an original; while a journal-book copied from a blotter,[24] a ledger made up from sale-slips,[25] has been excluded as not an original. The entry may be in any kind of character or mark capable of being interpreted.[26] It is usually said that the book cannot be used to show, by the absence of an entry, that no such transaction occurred,[27] though this seems questionable. The entrant must have personal knowledge of the transaction entered.[28] Where the party-entrant enters according to the report of another person, — salesman, porter, etc., — the entry is receivable if the latter person is called as a witness to the transaction.[29] That the latter person must be called is sometimes maintained;[30] but it would seem (according to the principles explained *ante*, § 120 *a*) that if he cannot be obtained, either because of his death or because of practical inconvenience, the entry may nevertheless be received.[31]

[18] Sergeant, J., in Jones *v.* Long, 3 Watts 326; Bigelow, J., in Barker *v.* Haskell, 9 Cush. 221. See instances of various times in Landis *v.* Turner, 14 Cal. 575; Yearsley's Appeal, 48 Pa. 535; Rumsey *v.* Telephone Co., 49 N. J. L. 325.

[19] Cogswell *v.* Dolliver, 2 Mass. 221; Pratt *v.* White, 132 id. 477; Caldwell *v.* McDermit, 17 Cal. 466; Gutherless *v.* Ripley, 98 Ia. 290; Levine *v.* Ins. Co., 66 Minn. 138.

[20] Vosburgh *v.* Thayer, 12 Johns. 461; Patrick *v.* Jack, 82 Ill. 82; Watrous *v.* Cunningham, 71 Cal. 32; Atkinson *v.* Burt, Ark., 46 S. W. 986; Webster *v.* Lumber Co., 101 Cal. 326; Seventh D. A. P. A. *v.* Fisher, 95 Mich. 274.

[21] Faxon *v.* Hollis, 13 Mass. 427.

[22] Smith *v.* Sanford, 12 Pick. 140.

[23] Plummer *v.* Mercantile Co., 23 Colo. 190. For additional instances, see Barker *v.* Haskell, 9 Cush. 218; Kent *v.* Garvin, 1 Gray 148; Miller *v.* Shay, 145 Mass. 162; Levine *v.* Ins. Co., 66 Minn. 138.

[24] Breinig *v.* Metzler, 23 Pa. 159.

[25] Way *v.* Cross, 95 Ia. 258. For other examples, see Bentley *v.* Ward, 116 Mass. 337; Rumsey *v.* Telephone Co., 49 N. J. L. 325; Woolsey *v.* Bohn, 41 Minn. 239.

[26] Miller *v.* Shay, 145 Mass. 162; Marsh *v.* Case, 30 Wis. 531; Barton *v.* Dundas, 24 U. C. Q. B. 275.

[27] Alexander *v.* Smoot, 13 Ired. 462; Morse *v.* Potter, 4 Gray 292; Riley *v.* Boehm, 167 Mass. 183; Shaffer *v.* McCracken, 90 Ia. 578, *semble*; Lawhorn *v.* Carter, 11 Bush 10. *Contra:* Peck *v.* Pierce, 63 Conn. 310, 314.

[28] Union Electric Co. *v.* Theatre Co., 18 Wash. 213 (based on newspaper reports; excluded).

[29] Harwood *v.* Mulry, 8 Gray 250; Smith *v.* Sanford, 12 Pick. 140; Miller *v.* Shay, 145 Mass. 163; Hoover *v.* Gehr, 62 Pa. 138; Clough *v.* Little, 2 Rich. L. 353; Thomson *v.* Porter, 4 Strobh. Eq. 65.

[30] Kent *v.* Garvin, 1 Gray 150.

[31] See the authorities cited *ante*, § 120 *a*, the analogy of which would probably be

The suppletory or verifying oath of the party was allowed and required (except in New York and New Jersey[32]), by which he took the stand to identify the books and swear to their correctness.[33] This oath, however (which could be dispensed with if the party were dead or insane[34] or out of the jurisdiction), was not regarded as making the party a witness; it was merely a preliminary or cautionary guarantee, and in effect related back to the time of the entries.[35] Moreover, the theory that the party was not testifying on the stand as a witness, and that the books were merely hearsay evidence and the party still incompetent as a witness, was further carried out in connection with the disqualification by interest of the surviving party to a transaction (*post*, § 333 *b*); for on the one hand, though the survivor himself as party be disqualified, nevertheless his books may be offered against the deceased person's representative;[36] and, on the other hand, the use of the deceased person's books by his representative is not such a testifying as amounts to a waiver of the disqualification and entitles the survivor to take the stand against the books.[37]

The basis of this branch of the exception, as has been seen, was the supposed necessity for resort to such evidence, the party being unable to take the stand in his own behalf as a witness. It would follow, on principle, that since the abolition of parties' incompetency (*post*, § 328 *c*) this necessity no longer exists, because the party can now take the stand and testify, using the books, if he pleases, as a record of past recollection (*post*, § 439 *b*). At the present day, then, the true view is that the special Hearsay exception in favor of parties' books has disappeared, and that the party should use them only by taking the stand and adopting them as records of past recollection,— a result preferable in practice as well as principle, because the party is thus subjected as he should be to cross-examination on the subject of the entries, and because they can thus be used without the rigorous and detailed limitations above described. This view, however, has as yet found full acceptance in a few Courts only.[38] It must be

accepted by the Courts. In the following cases of party's books it was held not necessary to produce the original observer: Morris *v.* Briggs, 3 Cush. 343; Jones *v.* Long, 3 Watts 326.

[32] Conklin *v.* Stamler, 8 Abb. Pr. 395.

[33] Roche *v.* Ware, 71 Cal. 379; Neville *v.* Northcutt, 47 Tenn. 296; Marsh *v.* Case, 30 Wis. 531.

[34] Holbrook *v.* Gay, 6 Cush. 216.

[35] Little *v.* Wyatt, 14 N. H. 26.

[36] Dysart *v.* Furrow, 90 Ia. 59; Anthony *v.* Stinson, 4 Kan. 220; Cargill *v.* Atwood, 18 R. I. 303.

[37] Kelton *v.* Hill, 58 Me. 116; Sheehan *v.* Hennessey, 65 N. H. 101; Roche *v.* Ware, 71 Cal. 378, *semble*. See Dismukes *v.* Tolson, 67 Ala. 386.

[38] Well expounded in Conklin *v.* Stamler, 8 Abb. Pr. 400; Nichols *v.* Haynes, 78 Pa. 176; Stuckslager *v.* Neel, 123 id. 61; Bishnell *v.* Simpson, 119 Cal. 658.

In the following cases the books are treated, more or less explicitly, from this point of view: Dismukes *v.* Tolson, 67 Ala. 386; Hancock *v.* Kelly, 81 id. 378; Bolling *v.* Fannin, 97 id. 619; Roche *v.* Ware, 71 Cal. 378; Wolcott *v.* Heath, 78 Ill. 434; Field *v.* Thompson, 119 Mass. 151; Montague *v.* Dougan, 68 Mich. 220; Culver *v.* Lumber Co., 53 Minn. 360, 365; Anchor Milling Co. *v.* Walsh, 108 Mo. 284; Walser *v.* Wear,

added that in some States statutes have been passed, apparently attempting to modify the present branch of the exception by enlarging it to include parties' books kept by a clerk;[39] but the phrasing of these statutes is usually such that their precise object and effect is not easy to ascertain.]

141 id. 443; Swain *v.* Cheney, 41 N. H. 237; St. Paul F. & M. I. Co. *v.* Gotthelf, 35 Nebr. 351, 356; Price *v.* Garland, 3 N. M. 290; Rumsey *v.* Telephone Co., 49 N. J. L. 326; see Byerts *v.* Robinson, N. M., 54 Pac. 932.

[39] *E. g.* Ill. Rev. St. c. 51, § 3.

CHAPTER XII.

EXCEPTIONS TO THE HEARSAY RULE: REPUTATION ON MATTERS OF PUBLIC OR GENERAL INTEREST.

1. *Reputation as to Matters involving Property-rights and the like.*

§ 128. General Principle.

§§ 128 *a*, 129. Reputation must come from a Competent Source.

§ 130. Rights must be ancient, and Declarant dead.

§§ 131–133. Reputation must be *ante litem motam*.

§§ 135, 136. Interest as a Member of the Community does not exclude.

§ 137. Matters of Private Interest.

§ 138. Particular Facts.

§ 138 *a*. Reputation as to Private Boundaries; American Doctrine.

§ 139. Vehicle of the Reputation; Individual Declarations, Maps, Leases, Verdicts, etc.

§ 140. Immaterial whether for or against a Public Right.

§ 140 *a*. American Doctrine as to Individual Declarations about Private Boundaries.

2. *Reputation as Evidence of other Matters.*

§ 140 *b*. Character, Insanity, Solvency, etc.

§ 140 *c*. Marriage.

§§ 121, 122.[1]
§ 123.[2]
§ 124.[3]
§ 125.[4]
§ 126.[5]
§ 127.[6]

[There is a general doctrine about the use of reputation as evidence of matters of public or general interest, — by which is meant chiefly matters connected with property-rights, franchises, customary privileges, and the like. There are also sundry uses of reputation as hearsay evidence, resting upon the same general notion, but dealt with in wholly separate lines of precedents, — reputation to prove character, solvency, etc.]

1. *Matters involving Property-rights and the like.*

§ 128. **General Principle.**[1] The terms "public" and "general" are sometimes used as synonymous, meaning merely that which con-

[1] [Transferred *post*, as §§ 152 *a*, 152 *b*.]
[2] [Transferred to Appendix II.]
[3] [Transferred *ante*, as § 99 *a*.]
[4] [Transferred to Appendix II.]
[5] [Transferred to Appendix II; the subject is dealt with *post*, § 462.]
[6] [Transferred to Appendix II.]
[1] [The first sentence in the original text is: "And first, as to matters of public or general interest."]

cerns a multitude of persons.[2] But, in regard to the admissibility of hearsay testimony, a distinction has been taken between them; the term "public" being strictly applied to that which concerns all the citizens, and every member of the State; and the term "general" being referred to a lesser, though still a large, portion of the community. In matters of public interest, all persons must be presumed conversant, on the principle that individuals are presumed to be conversant in their own affairs; and, as common rights are naturally talked of in the community, what is thus dropped in conversation may be presumed to be true.[3] It is the prevailing current of assertion that is resorted to as evidence, for it is to this that every member of the community is supposed to be privy, and to contribute his share. Evidence of common reputation is, therefore, received in regard to public facts (a claim of highway, or a right of ferry, for example), on ground somewhat similar to that on which public documents, not judicial, are admitted; namely, the interest which all have in their truth, and the consequent probability that they are true.[4]

§ 128 *a*. **Reputation must come from a Competent Source.** In these matters, in which all are concerned, reputation from any one appears to be receivable; but of course it is almost worthless, unless it comes from persons who are shown to have some means of knowledge;[1] such as, in the case of a highway, by living in the neighborhood: but the want of such proof of their connection with the subject in question affects the value only, and not the admissibility, of the evidence. On the contrary, where the fact in controversy is one in which all the members of the community have not an interest, but those only who live in a particular district, or adventure in a particular enterprise, or the like, hearsay from persons wholly unconnected with the place or business would not only be of no value, but altogether inadmissible.[2]

[2] Weeks *v.* Sparke, 1 M. & S. 690, per Bayley, J.

[3] Morewood *v.* Wood, 14 East 329 n., per Ld. Kenyon; Weeks *v.* Sparke, 1 M. & S. 686, per Ld. Ellenborough; Berkeley Peerage Case, 4 Campb. 416, per Mansfield, C. J.

[4] [The best expositions of the principle are those by Coltman, J., in Wright *v.* Tatham, 7 A. & E. 358; Alderson, B., in s. c. on appeal, 5 Cl. & F. 720; Lord Campbell, C. J., in R. *v.* Bedfordshire, 4 E. & B. 535; and Loomis, J., in Southwest School District *v.* Williams, 48 Conn. 507. — especially the last two opinions. The principle has been applied to admit reputation to prove street lines (Ralston *v.* Miller, 3 Rand. 49), county lines (Cox *v.* State, 41 Tex. 4), and road lines (State *v.* Vale Mills, 63 N. H. 4); but to exclude it as evidence of possession of a house (Hall *v.* Mayo, 97 Mass. 417; Boston Water Power Co. *v.* Hanlon, 132 id. 483), the existence of a schoolhouse (Southwest S. D. *v.* Williams, *supra*), and a sheriff's exemption from executing criminals (R. *v.* Antrobus, 2 A. & E. 793).]

[1] [This language is quoted from the opinion of Parke, B., in Crease *v.* Barrett, *infra;* but it must be regarded as misleading; for in any case it would seem that the reputation must come from a region or community having some concern with the right in question; that the right regards a highway, for example, would not justify the use of a reputation in a community remote from the highway, even though in theory all persons had the right to use the highway.]

[2] Crease *v.* Barrett, 1 Cr. M. & R. 929, per Parke, B.

§ 129. Thus, in an action of trespass *quare clausum fregit*, where the defendant pleaded in bar a prescriptive right of common in the *locus in quo*, and the plaintiff replied, prescribing the right of his messuage to use the same ground for tillage with corn until the harvest was ended, traversing the defendant's prescription; it appearing that many persons beside the defendant had a right of common there, evidence of reputation, as to the plaintiff's right, was held admissible, provided it were derived from persons conversant with the neighborhood.[1] But where the question was, whether the city of Chester anciently formed part of the county palatine, an ancient document, purporting to be a decree of certain law officers and dignitaries of the crown, not having authority as a court, was held inadmissible evidence on the ground of reputation, they having, from their situations, no peculiar knowledge of the fact.[2] And, on the other hand, where the question was, whether Nottingham Castle was within the hundred of Broxtowe, certain ancient orders, made by the justices at the quarter-sessions for the county, in which the castle was described as being within that hundred, were held admissible evidence of reputation; the justices, though not proved to be residents within the county or hundred, being presumed, from the nature and character of their offices alone, to have sufficient acquaintance with the subject to which their declarations related.[3] Thus it appears that competent knowledge in the declarant is, in all cases, an essential prerequisite to the admission of his testimony; and that though all the citizens are presumed to have that knowledge, in some degree, where the matter is of public concernment, yet, in other matters, of interest to many persons, some particular evidence of such knowledge is required.[4]

§ 130. **Rights must be ancient and Declarant dead.** It is to be observed, that the exception we are now considering is admitted only in the case of ancient rights, and in respect to the declarations of persons supposed to be dead.[1] It is required by the nature of the rights in question; their origin being generally antecedent to the time of legal memory, and incapable of direct proof by living witnesses, both from this fact, and also from the undefined generality of their nature.[2] It has been held, that, where the nature of the

[1] Weeks *v.* Sparke, 1 M. & S. 679, 688, per Le Blanc, J.

[2] Rogers *v.* Wood, 2 Barn. & Ad. 245.

[3] Duke of Newcastle *v.* Broxtowe, 4 Barn. & Ad. 273.

[4] [See other examples in Beaufort *v.* Smith, 4 Exch. 467; Daniel *v.* Wilkin, 7 id. 437; McKinnon *v.* Bliss, 21 N. Y. 218.]

[1] Moseley *v.* Davies, 11 Price 162; R. *v.* Milton, 1 Car. & Kir. 58; Davis *v.* Fuller, 12 Vt. 178.

[2] [McKinnon *v.* Bliss, 21 N. Y. 218; Porter *v.* Warner, 2 Root 23; Smith *v.* Nowells, 2 Litt. 160; Harriman *v.* Brown, 8 Leigh 707. Therefore, the matter itself must be an "ancient" one: Daggett *v.* Willey, 6 Fla. 511; Gallagher *v.* R. Co., 67 Cal. 15 (construing § 1936); and the reputation must be an "ancient" one: Shutte *v.* Thompson, 15 Wall. 161; and if a map is the vehicle of reputation, it must be an old one: Adams *v.* Stanyan, 24 N. H. 412; and if the declaration of an individual is the vehicle,

case admits it, a foundation for the reception of hearsay evidence, in matters of public and general interest, should first be laid by proving acts of enjoyment within the period of living memory.[3] But this doctrine has since been overruled; and it is now held, that such proof is not an essential condition of the reception of evidence of reputation, but is only material as it affects its value when received.[4] Where the nature of the subject does not admit of proof of acts of enjoyment, it is obvious that proof of reputation alone is sufficient. So, where a right or custom is established by documentary evidence, no proof is necessary of any particular instance of its exercise; for, if it were otherwise, and no instance were to happen within the memory of man, the right or custom would be totally destroyed.[5] In the case of a private right, however, where proof of particular instances of its exercise has first been given, evidence of reputation has sometimes been admitted in confirmation of the actual enjoyment; but it is never allowed against it.[6]

§ 131. **Reputation must be ante litem motam.** Another important qualification of the exception we have been considering, by which evidence of reputation or common fame is admitted, is, that the declaration so received must have been made before any controversy arose touching the matter to which it relates; or, as it is usually expressed, *ante litem motam.*[1] The ground on which such evidence is admitted at all is, that the declarations "are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth."[2] But no man is presumed to be thus indifferent in regard to matters in actual controversy: for, when the contest has begun, people generally take

he must be deceased: R. *v.* Milton, *supra.* The same principle excludes modern histories or other works offered as evidence of modern matters: Whiton *v.* Ins. Co., 109 Mass. 31; Morris *v.* Lessees, 7 Pet. 558.]

[3] Per Buller, J., in Morewood *v.* Wood, 14 East 330, n.; per Le Blanc, J., in Weeks *v.* Sparke, 1 M. & S. 688, 689.

[4] Crease *v.* Barrett, 1 Cromp. Mees. & Rosc. 919, 930. See also acc. Curzon *v.* Lomax, 5 Esp. 60, per Ld. Ellenborough; Steele *v.* Prickett, 2 Stark. 463, 466, per Abbott, C. J.; Ratcliffe *v.* Chapman, 4 Leon. 242, as explained by Grose, J., in Beebe *v.* Parker, 5 T. R. 32.

[5] Beebe *v.* Parker, 5 T. R. 26, 32; Doe *v.* Sisson, 12 East 62; Steele *v.* Prickett, 2 Stark. 463, 466. A single act, undisturbed, has been held sufficient evidence of a custom, the Court refusing to set aside a verdict finding a custom upon such evidence alone: Roe *v.* Jeffery, 2 M. & S. 92; Doe *v.* Mason, 3 Wils. 63.

[6] White *v.* Lisle, 4 Mad. 214, 225. See Morewood *v.* Wood, 14 East 330, n., per Buller, J.; Weeks *v.* Sparke, 1 M. & S. 690, per Bayley, J.; Rogers *v.* Allen, 1 Campb. 309; Richards *v.* Bassett, 10 B. & C. 662, 663, per Littledale, J.

[1] [Nicholls *v.* Parker, 14 East 331, n.; Newcastle *v.* Broxtowe, 4 B. & Ad. 279; Adams *v.* Stanyan, 24 N. H. 412; Clark *v.* Hills, 67 Tex. 152. In the precedents, except four, cited in the ensuing three sections, the Pedigree exception was the subject of discussion; so that the cases, as precedents, are hardly applicable to the present exception; for the *post litem motam* limitation, as developed for the Pedigree exception, see *ante*, § 114 *e.*]

[2] Per Ld. Eldon, in Whitelocke *v.* Baker, 13 Ves. 514; R. *v.* Cotton, 3 Campb. 444, 446, per Dampier, J.

part on the one side or the other; their minds are in a ferment; and, if they are disposed to speak the truth, facts are seen by them through a false medium. To avoid, therefore, the mischiefs which would otherwise result, all *ex parte* declarations, even though made upon oath, referring to a date subsequent to the beginning of the controversy, are rejected.[3] This rule of evidence was familiar in the Roman law; but the term *lis mota* was there applied strictly to the commencement of the action, and was not referred to an earlier period of the controversy.[4] But in our law the term *lis* is taken in the classical and larger sense of *controversy;* and by *lis mota* is understood the commencement of the controversy, and not the commencement of the suit.[5] The commencement of the controversy has been further defined by Mr. Baron Alderson, in a case of pedigree, to be "the arising of that state of facts on which the claim is founded, without anything more."[6]

§ 132. The *lis mota*, in the sense of our law, carries with it the further idea of a controversy upon the same particular subject in issue. For, if the matter under discussion at the time of trial was not in controversy at the time to which the declarations offered in evidence relate, they are admissible, notwithstanding a controversy did then exist upon some other branch of the same general subject. The value of general reputation, as evidence of the true state of facts, depends upon its being the concurrent belief of minds unbiassed and in a situation favorable to a knowledge of the truth, and referring to a period when this fountain of evidence was not rendered turbid by agitation. But the discussion of other topics, however similar in their general nature, at the time referred to, does not necessarily lead to the inference that the particular point in issue was also controverted, and, therefore, is not deemed sufficient to exclude the sort of proof we are now considering. Thus, where, in a suit between a copyholder and the lord of the manor, the point in controversy was, whether the customary fine, payable upon the renewal of a life-lease, was to be assessed by the jury of the lord's court, or by the reasonable discretion of the lord himself; depositions taken for the plaintiff, in an ancient suit by a copyholder against a former lord of the manor, where the controversy was upon the copyholder's right to be admitted at all, and not upon the

[3] The Berkeley Peerage Case, 4 Campb. 401, 409, 412, 413; Monkton *v.* Attorney-General, 2 Russ. & My. 160, 161; Richards *v.* Bassett, 10 B. & C. 657.

[4] "Lis est, ut primum in jus, vel in judicium ventum est; antequam in judicium veniatur, controversia est, non lis." Cujac. Opera Posth. tom. v, col. 193, B, and col. 162, D. "Lis inchoata est ordinata per libellum, et satisdationem, licet non sit lis contestata." Corpus Juris, Glossatum, tom. i, col. 553, ad. Dig. lib. iv, tit. 6, l. 12. "Lis mota censetur, etiamsi solus actor egerit." Calv. Lex. verb. Lis Mota.

[5] Per Mansfield, C. J., in the Berkeley Peerage Case, 4 Campb. 417; Monkton *v.* Attorney-General, 2 Russ. & My. 161.

[6] Walker *v.* Countess of Beauchamp, 6 C. & P. 552, 561. But see Reilly *v.* Fitzgerald, 1 Drury (Ir.) 122, where this is questioned; [and it has been generally repudiated; see *ante*, § 114 *c*.]

terms of admission, in which depositions the customary fine was mentioned as to be assessed by the lord or his steward, were held admissible evidence of what was then understood to be the undisputed custom.[1] In this case, it was observed by one of the learned judges that "the distinction had been correctly taken, that, where the *lis mota* was on the very point, the declarations of persons would not be evidence; because you cannot be sure, that in admitting the depositions of witnesses, selected and brought forward on a particular side of the question, who embark, to a certain degree, with the feelings and prejudices belonging to that particular side, you are drawing evidence from perfectly unpolluted sources. But where the point in controversy is foreign to that which was before controverted, there never has been a *lis mota*, and consequently the objection does not apply."

§ 133. Declarations made after the controversy has originated are excluded, even though proof is offered that the existence of the controversy was not known to the declarant. The question of his ignorance or knowledge of this fact is one which the Courts will not try: partly because of the danger of an erroneous decision of the principal fact by the jury, from the raising of too many collateral issues, thereby introducing great confusion into the cause; and partly from the fruitlessness of the inquiry, it being from its very nature impossible, in most cases, to prove that the existence of the controversy was not known. The declarant, in these cases, is always absent, and generally dead. The light afforded by his declarations is at best extremely feeble, and far from being certain; and if introduced, with the proof on both sides, in regard to his knowledge of the controversy, it would induce darkness and confusion, perilling the decision without the probability of any compensating good to the parties. It is therefore excluded, as more likely to prove injurious than beneficial.[1]

§ 134.[2]

§ 135. **Interest as a Member of the Community does not exclude.** Where evidence of reputation is admitted, in cases of public or general interest, it is not necessary that the witness should be able to specify from whom he heard the declarations. For that, in much the greater number of cases, would be impossible; as the names of persons long since dead, by whom declarations upon topics of common repute have at some time or other been made, are mostly forgotten.[1] And, if the declarant is known, and appears to have stood *in pari casu* with the party offering his declarations in evidence,

[1] Freeman *v.* Phillipps, 4 M. & S. 486, 497; Elliott *v.* Peirsol, 1 Peters 328, 337.

[1] Berkeley Peerage Case, 4 Campb. 417, per Mansfield, C. J.

[2] [Transferred to Appendix II.; it deals peculiarly with the Pedigree exception, already treated *ante*, § 114 *c*.]

[1] Moseley *v.* Davies, 11 Price 162, 174, per Richards, C. B.; Harwood *v.* Sims, Wightw. 112.

so that he could not, if living, have been personally examined as a witness to the fact of which he speaks, this is no valid objection to the admissibility of his declarations. The reason is, the absence of opportunity and motive to consult his interest, at the time of speaking. Whatever secret wish or bias he may have had in the matter, there was, at that time, no excited interest called forth in his breast, or, at least, no means were afforded of promoting, nor danger incurred of injuring, any interest of his own; nor could any such be the necessary result of his declarations; whereas, on a trial in itself and of necessity directly affecting his interest, there is a double objection to admitting his evidence, in the concurrence both of the temptation of interest and the excitement of the *lis mota*.[2]

§ 136. Indeed the rejection of the evidence of reputation, in cases of public or general interest, because it may have come from persons *in pari casu* with the party offering it, would be inconsistent with the qualification of the rule which has already been mentioned; namely, that the statement thus admitted must appear to have been made by persons having competent knowledge of the subject.[1] Without such knowledge, the testimony is worthless. In matters of public right, all persons are presumed to possess that degree of knowledge which serves to give some weight to their declarations respecting them, because all have a common interest. But in subjects interesting to a comparatively small portion of the community, as a city or parish, a foundation for admitting evidence of reputation, or the declarations of ancient and deceased persons, must first be laid, by showing that, from their situation, they probably were conversant with the matter of which they were speaking.[2]

§ 137. **Matters of Private Interest.** The probable want of competent knowledge in the declarant is the reason generally assigned for rejecting evidence of reputation or common fame, in matters of mere private right. "Evidence of reputation, upon general points, is receivable," said Lord Kenyon, "because, all mankind being interested therein, it is natural to suppose that they may be conversant with the subjects, and that they should discourse together about them, having all the same means of information. But how can this apply to private titles, either with regard to particular customs, or private prescriptions? How is it possible for strangers

[2] Moseley *v.* Davies, 11 Price 179, per Graham, B.; Deacle *v.* Hancock, 13 id. 236, 237; Nicholls *v.* Parker, 14 East 331, n.; Harwood *v.* Sims, Wightw. 112; Freeman *v.* Phillipps, 4 M. & S. 486, 491, cited and approved by Lyndhurst, C. B., in Davies *v.* Morgan, 1 C. & J. 593, 594; Monkton *v.* Attorney-General, 2 Russ. & My. 159, 160, per Ld. Ch. Brougham; Reed *v.* Jackson, 1 East 355, 357; Chapman *v.* Cowlan, 13 id. 10.

[1] *Supra*, §§ 128, 129.

[2] Weeks *v.* Sparke, 1 M. & S. 679, 686, 690; Doe d. Molesworth *v.* Sleeman, 1 New Pr. Cas. 170; Morewood *v.* Wood, 14 East 327, n.; Crease *v.* Barrett, 1 Cr. M. & Ros. 929; Duke of Newcastle *v.* Broxtowe, 4 B. & Ad. 273; Rogers *v.* Wood, 2 B. & Ad. 245; [see *ante*, § 128 *a*, note 1.]

to know anything of what concerns only private titles?"[1] The case of prescriptive rights has sometimes been mentioned as an exception; but it is believed, that, where evidence of reputation has been admitted in such cases, it will be found that the right was one in which many persons were equally interested. The weight of authority, as well as the reason of the rule, seems alike to forbid the admission of this kind of evidence, except in cases of a public or *quasi* public nature.[2] [But it is immaterial, in proving boundaries, that the main issue is the location of a private boundary, provided the evidence deals with a public boundary, — as where by establishing the public boundary it will thereby be possible to prove the private boundary by showing their coincidence through other evidence.[3]]

§ 138. **Particular Facts.** This principle may serve to explain and reconcile what is said in the books respecting the admissibility of reputation, in regard to particular facts. Upon general points, as we have seen, such evidence is receivable, because of the general interest which the community have in them; but particular facts of a private nature, not being notorious, may be misrepresented or misunderstood, and may have been connected with other facts, by which, if known, their effect might be limited or explained. Reputation as to the existence of such particular facts is, therefore, rejected.[1] But, if the particular fact is proved *aliunde*, evidence of

[1] Morewood *v.* Wood, 14 East 329, n., per Ld. Kenyon; 1 Stark. Evid. 30, 31; Clothier *v.* Chapman, 14 East 331, n.; Reed *v.* Jackson, 1 id. 357; Outram *v.* Morewood, 5 T. R. 121, 123; Weeks *v.* Sparke, 1 M. & S. 679.

[2] Ellicott *v.* Pearl, 10 Peters 412; Richards *v.* Bassett, 10 B. & C. 657, 662, 663, per Littledale J.; *supra*, § 130. The following are cases of a *quasi* public nature; though they are usually, but, on the foregoing principles, erroneously, cited in favor of the admissibility of evidence of reputation in cases of mere private right: Bishop of Meath *v.* Lord Belfield, Bull. N. P. 295, where the question was, who presented the former incumbent of a parish, — a fact interesting to all the parishioners; Price *v.* Littlewood, 3 Campb. 288, where an old entry in the vestry-book, by the churchwardens, showing by what persons certain parts of the church were repaired, in consideration of their occupancy of pews, was admitted, to show title to a pew in one under whom the plaintiff claimed; Barnes *v.* Mawson, 1 M. & S. 77, which was a question of boundary between two large districts of a manor called the Old and New Lands; Anscomb *v.* Shore, 1 Taunt. 261, where the right of common prescribed for was claimed by all the inhabitants of Hampton; Blackett *v.* Lowes, 2 M. & S. 494, 500, where the question was as to the general usage of all the tenants of manor, the defendant being one, to cut certain woods; Brett *v.* Beales, 1 Mood. & Malk. 416, which was a claim of ancient tolls belonging to the corporation of Cambridge; White *v.* Lisle, 4 Madd. Ch. 214, 224, 225, where evidence of reputation, in regard to a *parochial modus*, was held admissible, because "a class or district of persons were concerned;" but denied in regard to a *farm modus*, because none but the occupant of the farm was concerned. In Davies *v.* Lewis, 2 Chitty 535, the declarations offered in evidence were clearly admissible, as being those of tenants in possession, stating under whom they held.

[3] [Thomas *v.* Jenkins, 6 A. & E. 525; Abington *v.* N. Bridgewater, 23 Pick. 174; Drury *v.* Midland R. Co., 127 Mass. 581; Mullaney *v.* Duffy, 145 Ill. 559, 564.]

[1] [But this form of expression, though not uncommon, is perhaps misleading; for *e. g.* the place of a given boundary line may conceivably be termed a "particular fact." What is meant is that the reputation must be as to the existence of the custom or right in the abstract, and not as to particular occasions of its exercise; *e. g.* that a customary duty existed for the townspeople to pay a fee at a certain toll-gate, but not

general reputation may be received to qualify and explain it. Thus, in a suit for tithes where a parochial modus of sixpence per acre was set up, it was conceded that evidence of reputation of the payment of that sum for one piece of land would not be admissible; but it was held that such evidence would be admissible to the fact that it had always been customary to pay that sum for all the lands in the parish.[2] And where the question on the record was whether a turnpike was within the limits of a certain town, evidence of general reputation was admitted to show that the bounds of the town extended as far as a certain close, but not that formerly there were houses, where none then stood; the latter being a particular fact, in which the public had no interest.[3] So, where, upon an information against the sheriff of the county of Chester, for not executing a death-warrant, the question was whether the sheriff of the county or the sheriffs of the city were to execute sentence of death, traditionary evidence that the sheriffs of the county had always been exempted from the performance of that duty was rejected, it being a private question between two individuals; the public having an interest only that execution be done, and not in the person by whom it was performed.[4] The question of the admissibility of this sort of evidence seems, therefore, to turn upon the nature of the reputed fact, whether it was interesting to one party only or to many. If it were of a public or general nature, it falls within the exception we are now considering, by which hearsay evidence, under the restrictions already mentioned, is admitted. But if it had no connection with the exercise of any public right, nor the discharge of any public duty, nor with any other matter of general interest, it falls within the general rule by which hearsay evidence is excluded.[5]

§ 138 *a* [145]. **Reputation as to Private Boundaries; American Doctrine.** Under this head may be mentioned the case of ancient boundaries; in proof of which, it has sometimes been said that traditionary evidence is admissible from the nature and necessity of

that John Doe paid the fee at a certain time. It is thus correctly phrased by Peake, Evidence, 13: "A witness may be permitted to state what he has heard from dead persons respecting the reputation of the right; but not to state facts of the exercise of it which the dead persons said they had seen;" the reason being that a sound reputation may well grow up about the right; in general, but not about a single act of its exercise. Add the following cases: Nicholls *v.* Parker, 14 East 331, note; Ellicott *v.* Pearl, 10 Pet. 437; Cherry *v.* Boyd, Litt. Sel. Cas. 8.]

[2] Harwood *v.* Sims, Wightw. 122, more fully reported and explained in Moseley *v.* Davies, 11 Price 162, 169–172; Chatfield *v.* Fryer, 1 id. 253; Wells *v.* Jesus College, 7 C. & P. 284; Leathes *v.* Newitt, 4 Price 355.

[3] Ireland *v.* Powell, Salop Spr. Ass. 1802, per Chambre, J.; Peake's Evid. 13, 14 (Norris's edit. p. 27).

[4] R. *v.* Antrobus, 2 Ad. & El. 788, 794.

[5] White *v.* Lisle, 4 Madd. Ch. 214, 224, 225; Bishop of Meath *v.* Lord Belfield, 1 Wils. 215; Bull. N. P. 295; Weeks *v.* Sparke, 1 M. & S. 679; Withnell *v.* Gartham, 1 Esp. 322; Doe *v.* Thomas, 14 East 323; Phil. & Am. on Evid. 258; 1 Stark. Evid. 34, 35; Outram *v.* Morewood, 5 T. R. 121, 123; R. *v.* Eriswell, 3 id. 709, per Grose, J.; [see R. *v.* Berger, 1894, 1 Q. B. 823.]

the case. But, if the principles already discussed in regard to the admission of hearsay are sound, it will be difficult to sustain an exception in favor of such evidence merely as applying to boundary, where the fact is particular, and not of public or general, interest. Accordingly, though evidence of reputation is received, in regard to the boundaries of parishes, manors, and the like, which are of public interest, and generally of remote antiquity, yet, by the weight of authority [in England] and upon better reason, such evidence is held to be inadmissible for the purpose of proving the boundary of a private estate, when such boundary is not identical with another of a public or *quasi* public nature.[1] [But the correctness of this application of the principle may well be questioned; for if such evidence may be received to show customs and boundaries of a manor, boundaries of a parish, and tithe-duties, the principle may well cover other property-rights in which a number of persons are interested, whether the right in substantive law be called a public or a private one. In *Weeks* v. *Sparke*[2] the argument was accepted that the (for this purpose) arbitrary distinction between "public" and "private" rights should be repudiated, and a flexible test be applied in each case.[3] This might have led ultimately to the admission of reputation-evidence for private-property matters; but the case in this aspect was practically repudiated by Baron Parke in 1850,[4] and subsequent English practice checked further advances. But the earlier English practice[5] had clearly been to admit reputation-evidence of private titles, and it is therefore natural to find that on questions of private boundaries rep-

[1] Ph. & Am. on Evid. 255, 256; *supra*, § 137; Thomas *v.* Jenkins, 1 N. & P. 588; Reed *v.* Jackson, 1 East 355, 357, per Ld. Kenyon; Doe *v.* Thomas, 14 East 323; Morewood *v.* Wood, id. 327, n.; Outram *v.* Morewood, 5 T. R. 121, 123, per Ld. Kenyon; Nichols *v.* Parker, and Clothier *v.* Chapman, in 14 East 331, n.; Weeks *v.* Sparke, 1 M. & S. 688, 689; Dunraven *v.* Llewellyn, 15 Q. B. 791, Exch. Ch.; Cherry *v.* Boyd, Litt. Sel. Cas. 8, 9; 1 Phil. Evid. 182 (3d Lond. ed.), cited and approved by Tilghman, C. J., in Buchanan *v.* Moore, 10 S. & R. 281. In the passage thus cited, the learned author limits the admissibility of this kind of evidence to questions of a public or general nature; including a right of common by custom; which he observes, "is, strictly speaking, a private right; but it is a *general* right, and *therefore*, so far as regards the admissibility of this species of evidence, has been *considered as public, because it affects a large number of occupiers within a district.*" *Supra*, §§ 128, 137; Gresley on Evid. 220, 221. And more recently, in England, it has been decided, upon full consideration, that traditionary evidence, respecting rights not of a public nature, is inadmissible: Dunraven *v.* Llewellyn, 15 Q. B. 791; [R. *v.* Bedfordshire, 4 E. & B. 535.

The original text added the following sentence, merely repeating what has been said before: "Where the question is of such general nature, whether it be of boundary or of right of common by custom, or the like, evidence of reputation is admitted only under the qualifications already stated, requiring competent knowledge in the declarants, or persons from whom the information is derived, and that they be persons free from particular and direct interest at the time, and are since deceased."]

[2] [1 M. & S. 690; 1813.]

[3] [Bayley, J.: "I take it that where the term 'public right' is used, it does not mean 'public' in the literal sense, but is synonymous with 'general,' — that is, what concerns a multitude of persons."]

[4] [Dunraven *v.* Llewellyn, *supra*.]

[5] [As pointed out by Professor Thayer: Cases on Evidence, 421, note.]

utation was in the United States freely admitted in the early cases.[6] Later, when the English cases of the 1800s became known to our judges, and the question was argued on its merits as a matter of principle, the decision was reached — in harmony with the conditions of life at the time — that the principle would under certain circumstances admit reputation-evidence of the landmarks of private title.] The admission of traditionary evidence, in cases of [private] boundary, occurs more frequently in the United States than in England. By far the greatest portion of our territory was originally surveyed in large masses or tracts, owned either by the State, or by the United States, or by one, or a company of proprietors; under whose authority these tracts were again surveyed and divided into lots suitable for single farms, by lines crossing the whole tract, and serving as the common boundary of very many farm-lots lying on each side of it. So that it is hardly possible, in such cases, to prove the original boundaries of one farm, without affecting the common boundary of many; and thus in trials of this sort, the question is similar, in principle, to that of the boundaries of a manor, and therefore traditionary evidence is freely admitted.[7] [But it must be noted that this

[6] [Dane's Abridgment, III, 397.]

[7] Such was the case of Boardman *v.* Reed, 6 Peters 328, where the premises in question, being a tract of eight thousand acres, were part of a large connection of surveys made together, and containing between fifty and one hundred thousand acres of land; and it is to such tracts, interesting to very many persons, that the remarks of Mr. Justice M'Lean, in that case (p. 341), are to be applied. In Conn *v.* Penn, 1 Pet. C. C. 496, the tract whose boundaries were in controversy was called the manor of Springetsbury, and contained seventy thousand acres, in which a great number of individuals had severally become interested. In Doe d. Taylor *v.* Roe, 4 Hawks 116, traditionary evidence was admitted in regard to Earl Granville's line, which was of many miles in extent, and afterwards constituted the boundary between counties, as well as private estates. In Ralston *v.* Miller, 3 Randolph 44, the question was upon the boundaries of a street in the city of Richmond; concerning which kind of boundaries it was said, that ancient reputation and possession were entitled to infinitely more respect, in deciding upon the boundaries of the lots, than any experimental surveys. In several American cases, which have sometimes been cited in favor of the admissibility of traditionary evidence of boundary, even though it consisted of particular facts, and in cases of merely private concern, the evidence was clearly admissible on other grounds, either as part of the original *res gestæ*, or as the declaration of a party in possession, explanatory of the nature and extent of his claim. In this class may be ranked the cases of Caufman *v.* Congregation of Cedar Spring, 6 Binn. 59; Sturgeon *v.* Waugh, 2 Yeates 476; Jackson d. McDonald, *v.* McCall, 10 Johns. 377; Hamilton *v.* Menor, 2 S. & R. 70; Higley *v.* Bidwell, 9 Conn. 477; Hall *v.* Giddings, 2 Harr. & Johns. 112; Redding *v.* McCubbin, 1 Har. & McHen. 368. In Wooster *v.* Butler, 13 Conn. 309, it was said by Church, J., that traditionary evidence was receivable in Connecticut, to prove the boundaries of land between individual proprietors. But this dictum was not called for in the case; for the question was, whether there had anciently been a highway over a certain tract of upland; which being a subject of common and general interest, was clearly within the rule. It has, however, subsequently been settled as a point of local law in that State, that such evidence is admissible to prove private boundaries: Kinney *v.* Farnsworth, 17 Conn. 355, 363. In Pennsylvania, reputation and hearsay are held entitled to respect, in a question of boundary, where from lapse of time there is great difficulty in proving the existence of the original landmarks: Nieman *v.* Ward, 1 Watts & Serg. 68. In Den d. Tate *v.* Southard, 1 Hawks 45, the question was, whether the lines of the surrounding tracts of land, if made for those tracts alone, and not for the tract in dispute, might be shown by reputation to be the "known and visible boundaries" of the latter tract, within

doctrine in practice is accepted as applying only to evidence of boundaries. It cannot be said that the fact of title [8] or of occupation [9] can be so evidenced.]

§ 139. **Vehicle of the Reputation; Individual Declarations, Maps, Leases, Verdicts, etc.** [The exception we are dealing with exists only for reputation, *i. e.* the community opinion; what is offered must be in effect a reputation, not the mere assertion of an individual. But reputation is made up of and often learned through the assertions of individuals; and hence it is necessary to distinguish between assertions involving merely the assertor's individual credit and assertions involving a community-reputation. Though in form the reputation may be merely what deceased persons have been heard to say about a custom or right, yet it ought to come from them in effect as a statement of the reputation. The common form of question to the witness was: "What have you heard old men, now deceased, say as to the reputation on this subject?" And the sayings thus received must be, in effect, "I understand the general acceptance of the custom by the community to be so-and-so," not "I know the custom to be so-and-so." An individual declaration must thus appear to be "the result of a received reputation;" [1] and the individual declarant is thus merely the mouth-piece of the reputation. Thus, testimony that R., now deceased, had planted a willow in a certain spot to show a road-boundary was rejected; "he does not assert that he has heard old men say what was the public road; but he plants a tree and asserts that the boundary of the road is at that point; it is the mere allegation of a fact by an individual; that is, he knew it to be so from what he had observed and not from reputation." [2] Conversely, whatever form the evidence takes, it is receivable if it involves and implies a reputation. For instance, the official return of an assembly

the fair meaning of those words in the statute of North Carolina, of 1791, c. 15. [To these may be added, admitting reputation of private boundary: Shook *v.* Pate, 50 Ala. 92; Taylor *v.* Fomby, id., 22 So. 910; Morton *v.* Folger, 15 Cal. 279; Daggett *v.* Willey, 6 Fla. 511; Smith *v.* Prewit, 2 A. K. Marsh. 158; Smith *v.* Nowells, 2 Litt. 160; Holbrook *v.* Debo, 99 Ill. 385; Thoen *v.* Roche, 57 Minn. 135 (here for U. S. survey-lines only); Shepherd *v.* Thompson, 4 N. H. 215; Curtis *v.* Aaronson, 49 N. J. L. 78; McKinnon *v.* Bliss, 21 N. Y. 218; Taylor *v.* Shufford, 4 Hawks 132; Shaffer *v.* Gaynor, 117 N. C. 15; Strand *v.* Springfield, 28 Tex. 166; Clark *v.* Hills, 67 id. 152, *semble;* Clement *v.* Packer, 125 U. S. 321; Harriman *v.* Brown, 8 Leigh 708. The leading opinions are those in Harriman *v.* Brown, Morton *v.* Folger, McKinnon *v.* Bliss, and Curtis *v.* Aaronson. The doctrine does not obtain in Maine and Massachusetts: Chapman *v.* Twitchell, 37 Me. 62; Hall *v.* Mayo, 97 Mass. 417; Long *v.* Colton, 116 id. 416.]

[8] [Moore *v.* Jones, 13 Ala. 303; Goodson *v.* Brothers, 111 id. 589.]

[9] [*Contra:* Vernon Irrig. Co. *v.* Los Angeles, 106 Cal. 237 (ancient claim and actual control by a city); Jackson *v.* Miller, 6 Wend. 228; Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633, 732 (that a lot of land was commonly known as "Smith's Lot" or "The Duke's Farm.").]

[1] [Wood, B., in Moseley *v.* Davies, 11 Price 180.]

[2] [R. *v.* Bliss, 7 A. & E. 550. See other instances in Davies *v.* Morgan, 1 C. & J. 590; Drinkwater *v.* Porter, 2 C. & K. 182; Carnaroon *v.* Villebois, 13 M. & W. 332; Bender *v.* Pitzer, 27 Pa. 335.]

of the homage (or tenants of a manor), rehearsing customs, fees, etc., might be equivalent to a reputation among the tenants.[3] The principle[4]] applies to documentary and all other kinds of proof denominated hearsay. If the matter in controversy is ancient, and not susceptible of better evidence, any proof in the nature of traditionary declarations is receivable, whether it be oral or written; subject to the qualifications we have stated. Thus, deeds, leases, and other private documents, have been admitted as declaratory of the public matters recited in them.[5] Maps, also, showing the boundaries of towns and parishes, are admissible, if it appear that they have been made by persons having adequate knowledge;[6] [so also an ancient survey.[7] Where the matter to be proved is of the sort of facts which we call "history," the same mode of proof is available in the shape of historical treatises of general acceptance.[8] The history must fairly involve a matter of general interest,[9] and the matter must be ancient.[10]] Verdicts, also, are receivable evidence of reputation, in questions of public or general interest; thus, for example, where a public right of way was in question, the plaintiff was allowed to show a verdict rendered in his own favor, against a defendant in another suit, in which the same right of way was in issue; but Lord Kenyon observed, that such evidence was, perhaps, not entitled to much weight, and certainly was not conclusive; the circumstance, that the verdict was *post litem*

[3] [Beebee *v.* Parker, 5 T. R. 14.]

[4] [The following sentence here began the section in the original text: "Hitherto we have mentioned oral declarations, as the medium of proving traditionary reputation in matters of public and general interest. *The principle*, however, upon which these are admitted."

[5] Curzon *v.* Lomax, 5 Esp. 60; Brett *v.* Beales, 1 M. & M. 416; Plaxtan *v.* Dare, 10 B. & C. 17; Clarkson *v.* Woodhouse, 5 T. R. 412, n.; s. c. 3 Doug. 189; Barnes *v.* Mawson, 1 M. & S. 77, 78; Coombs *v.* Coether, 1 M. & M. 398; Beebe *v.* Parker, 5 T. R. 26; Freeman *v.* Phillipps, 4 M. & S. 486; Crease *v.* Barrett, 1 Cr. Mees. & Ros. 923; Denn *v.* Spray, 1 T. R. 466; Bullen *v.* Michel, 4 Dow 298; Taylor *v.* Cook, 8 Price 650; [White *v.* Lisle, 4 Madd. 223; Sasser *v.* Herring, 3 Dev. L. 342.]

[6] 1 Phil. Evid. 250, 251; Alcock *v.* Cooke, 2 Moore & Payne 625; s. c. 5 Bing. 340; Noyes *v.* Ward, 19 Conn. 250; [Ross *v.* Rhoads, 15 Pa. St. 163; Penny Pot Landing *v.* Philadelphia, 16 id. 79; Whitehouse *v.* Bickford, 9 Foster 471; Daniel *v.* Wilkin, 7 Exch. 429; 8 id. 156;] [R. *v.* Milton, 1 C. & K. 62; Adams *v.* Stanyan, 24 N. H. 411; Drury *v.* R. Co., 127 Mass. 581; Taylor *v.* McGonigle, Cal., 52 Pac. 159. But it does not seem that knowledge is necessary in the sense of knowledge of the boundaries, etc.; for the map, etc., is received as representing the accepted belief of the community using it, and it is therefore in strictness immaterial not only whether the maker knew the facts, but even who the maker was.]

[7] [Bullen *v.* Michel, *supra;* Adams *v.* Stanyan, *supra;* Smith *v.* Brownlow, L. R. 2 Eq. 252.]

[8] [The earlier precedents are: St. Katherine's Hospital, 1 Ventr. 151; Brounker *v.* Atkyns, Skinner, 14; Steyner *v.* Droitwich, ib. 623, 1 Salk. 281; Buller, Nisi Prius, 248.]

[9] [Morris *v.* Lessees, 7 Pet. 558; Bogardus *v.* Trinity Church, 4 Sandf. Ch. 724; McKinnon *v.* Bliss, 21 N. Y. 216. Other American precedents are: Hadfield *v.* Jameson, 2 Munf. 53, 71; Com. *v.* Alburger, 1 Whart. 469; Baird *v.* Rice, 63 Pa. 489, 496. It has been held, perhaps too narrowly, that county-histories are not admissible: Evans *v.* Getting, 6 C. & P. 586; McKinnon *v.* Bliss, *supra;* Roe *v.* Strong, 107 N. Y. 356.]

[10] [*Ante*, § 130.]

motam, does not affect its admissibility.[11] [But in truth this use of verdicts has to-day no justification under the Reputation-exception. Their acceptance up to the early part of this century was merely "a relic of the time when a jury's verdict was a conclusion upon their own knowledge."[12] A verdict did once represent the reputation of the neighborhood.[13] But in the modern practice a jury's verdict cannot be regarded as in any true sense a vehicle of reputation. The anomaly began to be perceived in the middle of the century,[14] and we find it now treated, not as entering under this exception for reputation, but as a verbal act, *i. e.* as an act of possession in the course of the exercise of a prescriptive right by the people of the neighborhood.[15] It should be added, that under the older doctrine, the decree or order of a judge was sometimes treated as admissible, as representing reputation in the same way as a verdict.[16]]

§ 140. **Immaterial whether for or against a Public Right.** It is further to be observed, that reputation is evidence as well against a public right as in its favor. Accordingly, where the question was, whether a landing-place was public or private property, reputation, from the declaration of ancient deceased persons, that it was the private landing-place of the party and his ancestors, was held admissible; the learned judge remarking, that there was no distinction between the evidence of reputation to establish and to disparage a public right.[1]

§ 140 *a*. **American Doctrine as to Individual Declarations about Private Boundaries.** [We have already seen (§ 139) that the spirit and principle of the present exception, in its orthodox form, sanctions only the use of reputation, as trustworthy because representing the net result of general investigation and discussion by the community; and that declarations of deceased individuals are receivable only in so far as they are in effect the vehicle of such reputation. In this country, however, a further step has been taken and virtually a new and distinct exception created, by receiving also declarations of deceased individuals, quite irrespective of any bearing on reputation, and purely on the individual credit of the declarant. This doctrine,

[11] Reed *v.* Jackson, 1 East 355, 357; Bull. N. P. 233; City of London *v.* Clerke, Carth. 181; Rhodes *v.* Ainsworth, 1 B. & Ald. 87, 89, per Holroyd, J.; Lancum *v.* Lovell, 9 Bing. 465, 469; Cort *v.* Birkbeck, 1 Doug. 218, 222, per Lord Mansfield; Case of the Manchester Mills, 1 Doug. 221, n.; Berry *v.* Banner, Peake 156; Biddulph *v.* Ather, 2 Wils. 23; Brisco *v.* Lomax, 3 N. & P. 308; Evans *v.* Rees, 2 P. & D. 627; s. c. 10 Ad. & El. 151.

[12] [Thayer, Cases on Evidence, 422.]

[13] [Alderson, B., in Pim *v.* Curell, 6 M. & W. 254: "That was when the jury was summoned *de vicineto*, and their functions were less limited than at present."]

[14] [Brisco *v.* Lomax, 8 A. & E. 211 ("a sort of reputation, if I may so term it").]

[15] [Neill *v.* Duke of Devonshire, 8 App. Cas. 147; see *ante*, § 108.]

[16] [Duke of Newcastle *v.* Broxtowe, 4 B. & Ad. 279; Laybourn *v.* Crisp, 4 M. & W. 326; Duke of Devonshire *v.* Neill, L. R. Ir. 2 Exch. 153. *Excluded:* Rogers *v.* Wood, 2 B. & Ad. 256; Evans *v.* Rees, 10 A. & E. 155 (arbitrator).]

[1] Drinkwater *v.* Porter, 7 C. & P. 181; R. *v.* Sutton, 3 N. & P. 569; [Russell *v.* Stocking, 8 Conn. 240.]

as commonly phrased, admits "the declarations of a person deceased, who appeared to have had means of knowledge and no interest in making the declarations, upon a question of boundary, even in a case of private right." [1] Historically this doctrine seems to have three sources: (1) In some of the Southern States, the reputation-exception, as stated in early English and American treatises, was misunderstood or deliberately expanded, and was made to justify the reception of individual statements resting on the declarant's credit; (2) in Massachusetts, the *res gestæ* doctrine (*ante*, § 108; *post*, § 162*f*) was regarded as covering such statements; (3) in New Hampshire, and perhaps elsewhere, the custom of periodical perambulations of town boundaries (brought over from England) was recognized as one form of reputation evidence, and then statements of individuals, particularly of surveyors, were taken as being of equal value with these perambulations.[2] From these diverse origins arose a rule which found a vindication in the conditions of the time.[3] As to its limitations: first, the declarant must be deceased; [4] though perhaps other

[1] [Smith *v.* Powers, 15 N. H. 563.]

[2] [Lawrence *v.* Haynes, 5 N. H. 36, seems to show this line of development. On the subject of perambulations, the original text contained the following section, numbered 146: —

"In this connection may be mentioned the subject of *perambulations*. The writ *de perambulatione facienda* lies at common law, when two lords are in doubt as to the limits of their lordships, villas, etc., and by consent appear in Chancery, and agree that a perambulation be made between them. Their consent being enrolled in Chancery, a writ is directed to the sheriff to make the perambulation, by the oaths of a jury of twelve knights, and to set up the bounds and limits, in certainty, between the parties. 5 Com. Dig. 732, Pleader, 3, G; F. N. B. [133] D; 1 Story on Eq. Jurisp. § 611. See also Stat. 13 Geo. III, c. 81, § 14; Stat. 41 Geo. III, c. 81, § 14; Stat. 58 Geo. III, c. 45, § 16. These proceedings and the return are evidence against the parties and all others in privity with them, on grounds hereafter to be considered. But the perambulation consists not only of this higher written evidence, but also of the acts of the persons making it, and their assistants, such as marking boundaries, setting up monuments, and the like, including their declarations respecting such acts, made during the transactions. Evidence of what these persons were heard to say upon such occasions is always received; not, however, as hearsay, and under any supposed exception in favor of questions of ancient boundary, but as part of the *res gestæ*, and explanatory of the acts themselves, done in the course of the ambit. Weeks *v.* Sparke, 1 M. & S. 687, per Ld. Ellenborough; *supra*, § 108; Ellicott *v.* Pearl, 1 McLean 211. Indeed, in the case of such extensive domains as lordships, they being matters of general interest, traditionary evidence of common fame seems also admissible on the other grounds which have been previously discussed. The writ *de perambulatione facienda* is not known to have been adopted in practice in the United States; but in several of the States, remedies somewhat similar in principle have been provided by statutes. In some of the States, provision is only made for a periodical perambulation of the boundaries of towns by the selectmen: LL. Maine Rev. 1840, c. 5; LL. N. H. 1842, c. 37; Mass. Rev. Stats. c. 15; LL. Conn. Rev. 1849, tit. 3, c. 7; or, for a definite settlement of controversies respecting them, by the public surveyor, as in New York, Rev. Code, pt. i. c. 8, tit. 6. In others the remedy is extended to the boundaries of private estates: see Elmer's Digest, pp. 98, 99, 315, 316; New Jersey, Rev. St. 1846, tit. 22, c. 12; Virginia, Rev. Code, 1819, vol. i, pp. 358, 359. A very complete summary remedy, in all cases of disputed boundary, is provided in the statutes of Delaware, Revision of 1829, pp. 80, 81, tit. Boundaries, III. To perambulations made under any of these statutes, the principles stated in the text, it is conceived, will apply."]

[3] [The policy is vindicated in Scoggin *v.* Dalrymple, 7 Jones L. 46; Wood *v.* Willard, 37 Vt. 387.]

[4] [This is said in almost every case.]

cases of non-availability would be recognized. Next, the declarant must have had no interest to misrepresent;[5] and for this reason declarations by an owner about his own boundaries are usually excluded.[6] The declarant must appear to have had knowledge, or fair means of knowledge, of the boundary he speaks of;[7] a surveyor is the typical instance of a qualified declarant. Such are the limitations of the rule as generally accepted.[8] But in a few States (following a Massachusetts peculiarity of long standing[9]) the additional limitation obtains that the declarant must have been at the time on the land and engaged in pointing out the boundaries mentioned.[10] Moreover, in the Massachusetts variation of the rule, the further peculiarity exists that the declarant must have been in possession as owner, *e. g.* a mere surveyor's statement is excluded.[11]

From declarations of the above sort should be distinguished the use, under other principles, of declarations against proprietary interest,[12] of declarations by one in possession coloring an act of prescriptive occupation,[13] and admissions by a grantor or other predecessor while in possession.[14]]

[5] [Smith *v.* Forrest, 49 N. H. 239; Lawrence *v.* Tennant, 64 id. 540; Bethea *v.* Byrd, 95 N. C. 310; Spear *v.* Coate, 3 McCord 229; Wood *v.* Willard, *supra;* Powers *v.* Silsby, 41 id. 291; Child *v.* Kingsbury, 46 id. 53; Harriman *v.* Brown, 8 Leigh 713; Hill *v.* Proctor, 10 W. Va. 84.]

[6] [Porter *v.* Warner, 2 Root 23; Ware *v.* Brookhouse, 7 Gray 454; Morrill *v.* Titcomb, 8 All. 100; Shepherd *v.* Thompson, 4 N. H. 215; Sasser *v.* Herring, 3 Dev. L. 342; Halstead *v.* Mullen, 93 N. C. 252; State *v.* Crocker, 49 S. C. 242; Tucker *v.* Smith, 68 Tex. 478; Scaife *v.* Land Co., U. S. App., 90 Fed. 238; Evarts *v.* Young, 52 Vt. 334. *Contra:* Robinson *v.* Dewhurst, 25 U. S. App. 345; High *v.* Pancake, W. Va., 26 S. E. 536.]

[7] [Good statements are to be found in Harriman *v.* Brown, 8 Leigh 713; Clements *v.* Kyles, 13 Gratt. 478; Bender *v.* Pitzer, 27 Pa. 335; Wood *v.* Willard, 37 Vt. 387; Smith *v.* Forrest, 49 N. H. 237. To these add: Morton *v.* Folger, 15 Cal. 279; Tucker *v.* Smith, 68 Tex. 478; Hunnicutt *v.* Peyton, 102 U. S. 364; Robinson *v.* Dewhurst, 25 U. S. App. 345; Powers *v.* Sibley, 41 Vt. 291; Hadley *v.* Howe, 46 id. 142; Hill *v.* Proctor, 10 W. Va. 84.]

[8] [Additional cases adopting it are as follows: 1 Harr. & McH. 84, 230, 368, 531; 4 id. 156; Caufman *v.* Cedar Spring, 6 Binn. 62; Hamilton *v.* Menor, 2 S. & R. 73; Spear *v.* Coate, 3 McCord 229; Beard *v.* Talbot, Cooke 142; Stroud *v.* Springfield, 28 Tex. 666; Hurt *v.* Evans, 49 id. 316; Tucker *v.* Smith, 68 id. 478; Martin *v.* Curtis, 68 Vt. 397.]

[9] [Van Deusen *v.* Turner, 12 Pick. 532; Daggett *v.* Shaw, 5 Metc. 226; Bartlett *v.* Emerson, 7 Gray 175; Ware *v.* Brookhouse, ib. 454; Flagg *v.* Mason, 8 id. 556; Whitney *v.* Bacon, 9 id. 206; Morrill *v.* Titcomb, 8 All. 100; Long *v.* Colton, 116 Mass. 414; Peck *v.* Clark, 142 id. 440. The ruling in Whitman *v.* Shaw, 166 id. 451, seems to rest on other grounds.]

[10] [Royal *v.* Chandler, 81 Me. 119; Curtis *v.* Aaronson, 49 N. J. L. 77; Bender *v.* Pitzer, 27 Pa. 335; Kennedy *v.* Lubold, 88 id. 255; Kramer *v.* Goodlander, 98 id. 369. By a misunderstanding of the Texas rule, this was also required in Hunnicutt *v.* Peyton, 102 U. S. 364; later Federal rulings leave the matter doubtful: Clement *v.* Packer, 125 U. S. 325; Ayers *v.* Watson, 137 id. 596; Robinson *v.* Dewhurst, *supra.* This limitation, after once prevailing, has been repudiated in New Hampshire and Vermont: Smith *v.* Forrest, 49 N. H. 237; Powers *v.* Silsby, 41 Vt. 291.]

[11] [Daggett *v.* Shaw, Peck *v.* Clark, Curtis *v.* Aaronson, *supra;* Royal *v.* Chandler, 83 Me. 152.]

[12] [*Post*, § 152 *c*.]

[13] [*Ante*, § 108.]

[14] [*Post*, § 189; where these distinctions and their consequences are more fully pointed out.]

2. *Reputation as Evidence of other Matters.*

§ 140 *b*. **Character, Insanity, Solvency, etc.** [Quite apart, as a matter of precedent, from the preceding doctrine, is a use of reputation as evidence — by way of exception to the Hearsay rule — of sundry matters, not connected in precedent, and not systematically covered by any general principle, and yet illustrating the same general notion as to the conditions under which reputation is admitted. In these instances, reputation, when admitted at all, is received because the matter is of the sort likely to be ascertainable by numbers of people and likely to be discussed by the community in general, and because there is, in one way or another, a lack of other evidence equally good or better, and therefore, in some sense, a necessity for resorting to reputation. Such is the broad but unformulated notion which will subsume and account for most of these unconnected doctrines about the use of reputation.[1]

Character is a matter which has long been accustomed to be evidenced by reputation. The limitations applicable are more conveniently discussed in another place (*post*, § 461 *d*).[2] *Insanity* is generally held not to be provable in this way.[3] *Insolvency*, or solvency, is by the better rule regarded as provable by reputation.[4] A partnership is usually said not to be provable by reputation;[5] but the question in such cases is generally rather one of substantive law, as to the effect of a holding-out as partners. The use of a *house* for purposes of *prostitution* is allowed by many Courts to be evidenced by the reputation of the house;[6] but here the nature of the offence may be such that the reputation may be admissible as a part of the issue (*ante*, § 14 *d*).]

[1] [For reputation as a part of the issue, or as evidence of notice and the like, see *ante*, §§ 14 *c*, 14 *d*, 14 *p*.]

[2] [For reputation as evidence of an animal's disposition, see Whittier *v.* Franklin, 46 N. H. 23; McMillan *v.* Davis, 66 N. C. 539.]

[3] [People *v.* Pico, 62 Cal. 53; State *v.* Hoyt, 47 Conn. 539; Foster *v.* Brooks, 6 Ga. 290 (leading case); Yeates *v.* Reed, 4 Blackf. 463, 466; Walker *v.* State, 102 Ind. 507; Ashcraft *v.* De Armond, 44 Ia. 233; Barker *v.* Pope, 91 N. C. 168; State *v.* Coley, 114 id. 879; Yanke *v.* State, 51 Wis. 469.]

[4] [Lawson *v.* Orear, 7 Ala. 786 (leading case); McNeill *v.* Arnold, 22 Ark. 482, *semble;* Hayes *v.* Wells, 34 Md. 518; West *v.* Bank, 54 Minn. 466; Hahn *v.* Penney, 60 id. 487; State *v.* Cochran, 2 Dev. 65; Hard *v.* Brown, 18 Vt. 97; Noyes *v.* Brown, 32 id. 430; Bank *v.* Rutland, 33 id. 430.

Contra: Branch Bank *v.* Porter, 5 Ala. 736; Price *v.* Mazange, 31 id. 701, 708; Bliss *v.* Johnson, 162 Mass. 323. See Holten *v.* Board, 55 Ind. 199.

Distinguish the use of reputation, not to prove insolveney, but to show notice of it by one to whom the reputation would have been known; *ante*, § 14 *p*.]

[5] [Knard *v.* Hill, 102 Ala. 570; Sinclair *v.* Wood, 3 Cal. 98; Grafton Bank *v.* Moore, 13 N. H. 99; Inglebright *v.* Hammond, 19 Oh. 343; Farmers' Bank *v.* Saling, Or., 54 Pac. 190; Bowen *v.* Rutherford, 60 Ill. 41.]

[6] [Hogan *v.* State, 76 Ga. 82; Egan *v.* Gordon, 65 Minn. 505; State *v.* Hendricks, 15 Mont. 194 (if corroborated); State *v.* McDowell, Dudley 349 (leading case).

Contra; Wooster *v.* State, 55 Ala. 221; State *v.* Hand, 7 Ia. 411; Shaffer *v.* State, Md., 39 Atl. 313 (until St. 1892, c. 522); Overstreet *v.* State, 3 How. Miss. 329; Handy *v.* State, 63 Miss. 208; State *v.* Foley, 45 N. H. 466; Nelson *v.* Terr., Okl., 49 Pac. 920; Barker *v.* Com., 90 Va. 820; State *v.* Plant, 67 Vt. 454.]

§ 140 *c* [107]. **Marriage.** It is frequently said, that general reputation is admissible to prove the fact of the marriage of the parties alluded to, even in ordinary cases, where pedigree is not in question. In one case, indeed, such evidence was, after verdict, held sufficient, *prima facie*, to warrant the jury in finding the fact of marriage, the adverse party not having cross-examined the witness, nor controverted the fact by proof.[1] But the evidence produced in the other cases cited in support of this position cannot properly be called hearsay evidence, but was strictly and truly original evidence of facts from which the marriage might well be inferred; such as evidence of the parties being received into society as man and wife, and being visited by respectable families in the neighborhood, and of their attending church and public places together as such, and otherwise demeaning themselves in public, and addressing each other as persons actually married.[2] [Such evidence is commonly spoken of as "habite and repute," and is in principle of two distinct sorts. The conduct of friends and neighbors in treating the couple as married persons is a form of reputation, and is received, therefore, as an exception to the Hearsay rule, in evidence of the fact of marriage, either of a marriage publicly solemnized, as required by the law of England, or of a marriage-consent otherwise exchanged, as sufficient by the law of Scotland and most American jurisdictions. The conduct of the couple themselves towards each other, in publicly treating each other as man and wife, is a habit or conduct which enters as circumstantial evidence of a marriage, either by prior public solemnization or by privately exchanged consent.[3] In any case it cannot properly be said that the "habite and repute" are a form of marriage; and in neither case can it properly be said that the habit or the repute is "original" evidence, the one being in strictness circumstantial evidence and the other being hearsay evidence exceptionally received.]

§§ 141–144.[1]

§ 145.[2]

§ 146.[3]

[1] Evans *v.* Morgan, 2 C. & J. 453; *post*, Vol. II, § 461.

[2] 1 Phil. Evid. 234, 235; Hervey *v.* Hervey, 2 W. Bl. 877; Birt *v.* Barlow, Doug. 171, 174; Read *v.* Passer, 1 Esp. 213; Leader *v.* Barry, id. 353; Doe *v.* Fleming, 4 Bing. 266; Smith *v.* Smith, 1 Phillim. 294; Hammick *v.* Bronson, 5 Day 290, 293; *In re* Taylor, 9 Paige 611; [Murray *v.* Milner, L. R. 12 Ch. Div. 845; Lyle *v.* Ellwood, L. R. 19 Eq. 106; Goodman *v.* Goodman, 28 L. J. Ch. 745; Hoggan *v.* Craigie, 1 McL. & Rob. 942; Breadalbane Case, L. R. 1 H. L. Sc. 182; Clayton *v.* Wardell, 4 N. Y. 230;] [Jackson *v.* Jackson, 80 Md. 176. For the necessity of other evidence than reputation in cases of bigamy, adultery, etc., see Vol. II, §§ 49, 461, 462; III, § 205.]

[3] [See the exposition by Lord Cranworth, in the Breadalbane Case, L. R. 1 H. L. Sc. 199.]

[1] [Transferred *post*, to § 575 *b*; they deal with the authentication of ancient documents and with the use of ancient documents as evidence of possession, and do not involve the Hearsay rule.]

[2] [Transferred *ante*, as § 138 *a*; dealing with reputation as to boundaries.]

[3] [Transferred *ante*, as § 140 *a*, note 2; dealing with perambulations.]

CHAPTER XIII.

EXCEPTIONS TO THE HEARSAY RULE: DECLARATIONS AGAINST INTEREST.

§§ 147–149. General Principle.
§ 150. Facts against Pecuniary Interest; In general.
§ 151. Same: Preponderance of Interest.
§ 152. Same: Statement admissible for all Facts contained in it.
§ 152 *a*, *b*. Same: Indorsements of Payment of Debt barred by Limitation.
§ 152 *c*. Facts against Proprietary Interest.
§ 152 *d*. Facts against other than a Pecuniary or Proprietary Interest.
§ 153. Competency of Declarant.
§ 154. Authentication of Entries by Agents, Stewards, etc.
§ 155. Vicar's Books.

§ 147. **General Principle.** [Another exception to the Hearsay rule admits the declaration of a deceased person stating a fact against the interest of the declarant.[1]] This class [of statements] embraces not only entries in books, but all other declarations or statements of facts, whether verbal or in writing,[2] and whether they were made at the time of the fact declared or at a subsequent day.[3] But, to render them admissible, it must appear that the declarant

[1] [The beginning of this section in the original text, which in its classification and theory is unsound and misleading, was as follows]: "A third exception to the rule, rejecting hearsay evidence, is allowed in the case of declarations and entries made by persons since deceased, and against the interest of the persons making them, at the time when they were made. We have already seen, that declarations of third persons, admitted in evidence, are of two classes: one of which consists of written entries, made in the course of official duty or of professional employment; where the entry is one of a number of facts which are ordinarily and usually connected with each other, so that the proof of one affords a presumption that the others have taken place; and, therefore, a fair and regular entry, such as usually accompanies facts similar to those of which it speaks, and apparently contemporaneous with them, is received as original presumptive evidence of those facts. And, the entry itself being original evidence, it is of no importance, as regards its admissibility, whether the person making it be yet living or dead. But declarations of the other class, of which we are now to speak, are *secondary* evidence, and are received only in consequence of the death of the person making them."

[2] [In Massachusetts, peculiarly, a statement against pecuniary interest must be in writing, and furthermore must be in the shape of an account-entry or formal document; Framingham Mfg. Co. *v.* Barnard, 2 Pick. 532; Lawrence *v.* Kimball, 1 Metc. 527; but statements against proprietary interest are not thus limited: Marcy *v.* Stone, 8 Cush. 9; Stearns *v.* Hendersass, 9 id. 502; Currier *v.* Gale, 14 Gray 504.]

[3] Ivat *v.* Finch, 1 Taunt. 141; Doe *v.* Jones, 1 Campb. 367; Davies *v.* Pierce, 2 T. R. 53, and Holloway *v.* Raikes, there cited; Doe *v.* Williams, Cowp. 621; Peaceable *v.* Watson, 4 Taunt. 16; Stanley *v.* White, 14 East 332, 341, per Ld. Ellenborough; Haddow *v.* Parry, 3 Taunt. 303; Goss *v.* Watlington, 3 Brod. & Bing. 132; Strode *v.* Winchester, 1 Dick. 397; Barker *v.* Ray, 2 Russ. 63, 76, and cases in p. 67, n.; Warren *v.* Greenville, 2 Str. 1129; s. c. 2 Burr. 1071, 1072; Doe *v.* Turford, 3 B. & Ad. 898, per Parke, J.; Harrison *v.* Blades, 3 Campb. 457; Manning *v.* Lechmere, 1 Atk. 453.

is deceased;[4] that he possessed competent knowledge of the facts, or that it was his duty to know them; and that the declarations were at variance with his interest.[5] When these circumstances concur, the evidence is received, leaving its weight and value to be determined by other considerations.

§ 148. The ground upon which this evidence is received, is the extreme improbability of its falsehood. The regard which men usually pay to their own interest is deemed a sufficient security, both that the declarations were not made under any mistake of fact or want of information on the part of the declarant, if he had the requisite means of knowledge, and that the matter declared is true. The apprehension of fraud in the statement is rendered still more improbable from the circumstance, that it is not receivable in evidence until after the death of the declarant; and that it is always competent for the party against whom such declarations are adduced to point out any sinister motive for making them. It is true, that the ordinary and highest tests of the fidelity, accuracy, and completeness of judicial evidence are here wanting: but their place is, in some measure, supplied by the circumstances of the declarant; and the inconveniences resulting from the exclusion of evidence, having such guarantees for its accuracy in fact, and for its freedom from fraud, are deemed much greater, in general, than any which would probably be experienced from its admission.[1]

§ 149. In some cases, the Courts seem to have admitted this evidence, without requiring proof of adverse interest in the declarant; while in others stress is laid on the fact, that such interest had already appeared, *aliunde*, in the course of the trial. In one case it was argued, upon the authorities cited, that it was not material that the declarant ever had any actual interest, contrary to his declaration; but this position was not sustained by the Court.[1] In many other cases, where the evidence consisted of entries in books of account and the like, they seem to have been clearly admissible as entries made in the ordinary course of business or duty, or parts

[4] [Other causes of non-availability than death might well be recognized, but they are usually not. *Illness* should suffice (*contra:* Harrison *v.* Blades, 3 Camp. 458), as well as *insanity* (Mahaska *v.* Ingalls, 16 Ia. 81, *semble;* Jones *v.* Henry, 84 N. C. 324), *absence* from the jurisdiction (Shearman *v.* Atkins, 4 Pick. 293; *contra:* Stephen *v.* Gwenap, 1 Moo. & R. 120; Mahaska *v.* Ingalls, *supra*, *semble;* Gerapulo *v.* Wieler, 10 C. B. 690, 696 (doubting)), and *incompetency* through interest (Pugh *v.* McRae, 2 Ala. 394; Dwight *v.* Brown, 9 Conn. 93; Fitch *v.* Chapman, 10 id. 11: *contra:* Burton *v.* Scott, 3 Rand. 409).]

[5] Short *v.* Lee, 2 Jac. & Walk. 464, 488, per Sir Thomas Plumer, M. R.; Doe *v.* Robson, 15 East 32, 34; Higham *v.* Ridgway, 10 id. 109, per Ld. Ellenborough; Middleton *v.* Melton, 10 B. & C. 317, 327, per Parke, J.; R. *v.* Worth, 4 Q. B. 137, per Ld. Denman; 2 Smith's Lead. Cas. 193, n., and cases there cited; Spargo *v.* Brown, 9 B. & C. 935.

[1] Phil. & Am. on Evid. 307, 308; 1 Phil. Evid. 293, 294; Gresley on Evid. 221. [Good statements of the reason will be found in opinions by Fitzgibbon, L. J., in Lalor *v.* Lalor, 4 L. R. Ir. 681; Rogers, J., in Gibblehouse *v.* Strong, 3 Rawle 437.]

[1] Barker *v.* Ray, 2 Russ. 63, 67, 68, cases cited in note; ib. p. 76.

of the *res gestæ*, and therefore as original and not secondary evidence; though the fact that they were made against the interest of the person making them was also adverted to. But in regard to declarations in general, not being entries or acts of the last-mentioned character, and which are admissible only on the ground of having been made contrary to the interest of the declarant, the weight of authority, as well as the principle of the exception we are considering, seem plainly to require that such adverse interest should appear, either in the nature of the case or from extraneous proof.[2, 3]

§ 150. **Facts against Pecuniary Interest; In general.** Though the exception we are now considering is, as we have just seen, extended to declarations of any kind, yet it is much more frequently exemplified in documentary evidence, and particularly in entries in books of account. Where these are books of collectors of taxes, stewards, bailiffs, or receivers, subject to the inspection of others, and in which the first entry is generally of money received, charging the party making it, they are, doubtless, within the principle of the exception.[1] But it has been extended still farther, to include entries in private books also, though retained within the custody of their owners: their liability to be produced on notice, in trials, being deemed sufficient security against fraud; and the entry not being admissible, unless it charges the party making it with the receipt of money on account of a third person, or acknowledges the payment of money due to himself; in either of which cases it would be evidence against him, and therefore is considered as sufficiently against his interest to bring it within this exception.[2] The entry of a mere memorandum of an agreement is not sufficient;[3] thus, where the settlement of a pauper was attempted to be proved by showing a contract of hiring and service, the books of his deceased master, containing minutes of his contracts with his servants, entered at the

[2] Higham *v.* Ridgway, 10 East 109; Warren *v.* Greenville, 2 Str. 1129, expounded by Lord Mansfield, in 2 Burr. 1071, 1072; Gleadow *v.* Atkin, 3 Tyrwh. 302, 303; 1 C. & M. 423, 424; Short *v.* Lee, 2 Jac. & W. 489; Marks *v.* Lahee, 3 Bing. N. C. 408, 420, per Parke, J.; Barker *v.* Ray, 2 Russ. 63, 76.

[The doubt dealt with in the above sentences no longer exists. At one time the distinction between the present class of statements and regular entries (*ante*, § 120 *a*) was not definitely made, and there was an occasional suggestion of a broad principle that statements by a person merely having "no interest to falsify" (*e. g.* in Roe *v.* Rawlings, 7 East 290) were admissible; but by the third decade of the 1800s it was clearly settled that, for the purposes of the present exception, the fact stated must distinctly be against the declarant's interest.]

[3] [For the last sentence of this section, see *post*, § 151, note.]

[1] Barry *v.* Bebbington, 4 T. R. 514; Goss *v.* Watlington, 3 Brod. & Bing. 132; Middleton *v.* Melton, 10 B. & C. 317; Stead *v.* Heaton, 4 T. R. 669; Short *v.* Lee, 2 Jac. & W. 464; Whitnash *v.* George, 8 B. & C. 556; Dean, etc. of Ely *v.* Caldecott, 7 Bing. 433; Marks *v.* Lahee, 3 Bing. N. C. 408; Wynne *v.* Tyrwhitt, 4 B. & Ald. 376; De Rutzen *v.* Farr, 4 Ad. & El. 53; 2 Smith's Lead. Cas. 193, note; Plaxton *v.* Dare, 10 B. & C. 17, 19; Doe *v.* Cartwright, Ry. & M. 62.

[2] Warren *v.* Greenville, 2 Str. 1029; s. c. 2 Burr. 1071, 1072; Higham *v.* Ridgway, 10 East 109; Middleton *v.* Melton, 10 B. & C. 317.

[3] [Or, rather, of a conditional obligation to pay.]

time of contracting with them, and of subsequent payments of their wages, were held inadmissible; for the entries were not made against the writer's interest, for he would not be liable unless the service were performed, nor were they made in the course of his duty or employment.[4] [But it would seem that the existence of a contract or agreement, even though a conditional one, is a fact against interest, for the liability to pay is none the less a liability, and most contracts are more or less subject to contingent or conditional exonerations.[5] In general, the interest or burden involved in the fact stated must be a positive one and of such importance as would naturally be present to the mind of the declarant.[6] A given fact may or may not be against interest according to the attendant circumstances; for example, that one is a partner may or may not be against interest according to the state of the firm's assets.[7]]

§ 151. **Same: Preponderance of Interest.** [Where, along with the disserving interest, there is also a more or less palpable interest to be served by the fact entered, the question arises whether the interests are to be balanced and the entry admitted if the disserving interest preponderates, or whether the mere coexistence of the self-serving interest shall in no case suffice to exclude. The former view is the one generally accepted.[1] A common instance of this question is the case of a merchant's entry of payment (thus against interest) which at the same stroke has recorded (in favor of interest) his claim leading to the payment; and, conversely, an agent's debit and credit account in which the receipts creating liability are equalled or exceeded by the credits in his favor; in other words,] where the entry is itself the only evidence of the charge, of which it shows the subsequent liquidation; its admission has been strongly opposed, on the ground, that, taken together, it is no longer a declaration of

[4] R. *v.* Worth, 4 Q. B. 132.

[5] [The following more or less conditional obligations have been held to be against interest: White *v.* Chouteau, 10 Barb. 209 (reimbursing a surety); People *v.* Blakeley, 4 Park. Cr. 185 (note); Hosford *v.* Roe, 47 Minn. 247 (ante-nuptial agreement as to dower). *Contra:* Moehn *v.* Moehn, Ia., 75 N. W. 520 (by an indorser, that the note was not paid).]

[6] [Examples: Smith *v.* Blakey, L. R. 2 Q. B. 326 (letter stating the arrival of goods in declarant's charge, excluded); Tate *v.* Tate, 75 Va. 532 (memorandum of receipt of goods as gratuitous bailee, excluded).]

[7] [See Raines *v.* Raines, 30 Ala. 428; Humes *v.* O'Bryan, 74 id. 79.]

[1] [Short *v.* Lee, 2 Jac. & W. 477, 489 (where an entry of money received by a proctor and member of a college of vicars involved his interest as a member in establishing the right to collect dues, while his interest as collector was to the contrary, the latter being held to preponderate); Clark *v.* Wilmot, 1 Y. & C. 54, 2 id. 259, note; Ganton *v.* Size, 22 U. C. Q. B. 483; Confed. L. Ass. *v.* O'Donnell, 13 Can. Sup. 225; Freeman *v.* Brewster, 93 Ga. 648; see Massey *v.* Allen, L. R. 13 Ch. D. 562.

Taking the other view: Jessel, M. R., in Taylor *v.* Witham, L. R. 3 Ch. D. 605; Raines *v.* Raines, 30 Ala. 428. The author's text in § 149 contained the following, on this point:] And it seems not to be sufficient, that, in one or more points of view, a declaration may be against interest, if it appears, upon the whole, that the interest of the declarant would be rather promoted than impaired by the declaration: Phil. & Am. on Evid. 320; 1 Phil. Evid. 305, 306; Short *v.* Lee, 2 Jac. & W. 464.

the party against his interest, and may be a declaration ultimately in his own favor.[2] This point was raised in the cases of *Higham* v. *Ridgway*,[3] where an entry was simply marked as *paid* in the margin; and of *Rowe* v. *Brenton*, which was a debtor and creditor account, in a toller's books, of the money received for tolls, and paid over. But in neither of these cases was the objection sustained. In the former, indeed, there was evidence *aliunde*, that the service charged had been performed; but Lord Ellenborough, though he afterwards adverted to this fact, as a corroborating circumstance, first laid down the general doctrine that "the evidence was properly admitted, upon the broad principle on which receivers' books have been admitted." But in the latter case there was no such proof; and Lord Tenterden observed, that almost all the accounts which were produced were accounts on both sides, and that the objection would go to the very root of that sort of evidence. Upon these authorities, the admissibility of such entries may perhaps be considered as established.[4] And it is observable, in corroboration of their admissibility, that in most, if not all, of the cases, they appear to have been made in the ordinary course of business or of duty, and therefore were parts of the *res gestæ*.[5]

§ 152. **Same: Statement admissible for all Facts contained in it.** It has also been questioned, whether the entry is to be received in evidence of matters which, though forming part of the declaration, were not in themselves against the interest of the declarant. This objection goes not only to collateral and independent facts, but to the class of entries mentioned in the preceding section, and would seem to be overruled by those decisions. [The leading case is *Higham* v. *Ridgway*,[1] in which an entry of services rendered as man-midwife, followed by a note "pd. 25th Octr, 1768" was admitted to show the date of the child's birth; Lord Ellenborough said: "It is idle to say that the word *paid* only shall be admitted in evidence without the context, which explains to what it refers. . . . By reference to the ledger, the entry there was virtually incorporated with and made a part of the other entry, of which it is explanatory."] But the point was solemnly argued in a later case, where it was adjudged that though, if the point were now for the first time to be decided, it would seem more reasonable to hold that the memorandum of a receipt of payment was admissible only to the extent of proving that a payment had been made, and the account on which it had been made, giving it the effect only of verbal proof of the same payment;

[2] [Doe *v.* Vowles, 1 Moo. & R. 261.]

[3] [But this case seems to involve rather the question of the next section.]

[4] Rowe *v.* Brenton, 3 Man. & R. 267; 2 Smith's Lead. Cas. 196, note; Williams *v.* Geaves, 8 C. & P. 592; [R. *v.* Worth, 4 Q. B. 134; Taylor *v.* Witham, L. R. 3 Ch. D. 605.]

[5] [This consideration does not affect the question.]

[1] [10 East 109.]

yet, that the authorities had gone beyond that limit, and the entry of a payment against the interest of the party making it had been held to have the effect of proving the truth of other statements contained in the same entry, and connected with it. Accordingly, in that case, where three persons made a joint and several promissory note, and a partial payment was made by one which was indorsed upon the note in these terms, "Received of W. D. the sum of £280, on account of the within note, *the* £300" (which was the amount of the note) "having been originally advanced to E. H.," for which payment an action was brought by the party paying, as surety, against E. H., as the principal debtor; it was held, upon the authority of *Higham* v. *Ridgway*, and of *Doe* v. *Robson*, that the indorsement, the creditor being dead, was admissible in evidence of the whole statement contained in it; and, consequently, that it was *prima facie* proof, not only of the payment of the money, but of the person who was the principal debtor, for whose account it was paid; leaving its effect to be determined by the jury.[2] [The test for determining what statements shall be regarded as "virtually incorporated with" or "knit up with or involved in" the statement against interest has been variously phrased in these rulings. But in any case entries made at a separate and subsequent occasion, when a former entry was complete, cannot be regarded as brought in by the former.[3]]

§ 152 *a* [121]. **Same: Indorsements of Payment of Debt barred by Limitation.** The evidence of indebtment, afforded by the indorsement of the payment of interest or a partial payment of the principal, on the back of a bond or other security, seems to fall within the principle we are now considering, more naturally than any other; though it is generally classed with entries made against the interest of the party.[1] The main fact to be proved in the cases, where this evidence has been admitted, was the continued existence of the debt, notwithstanding the lapse of time since its creation was such as either to raise the presumption of payment, or to bring the case within the operation of the statute of limitations. This fact was sought to be proved by the acknowledgment of the debt by the debtor himself; and this acknowledgment was proved by his having actually paid part of the money due. It is the usual, ordinary, and well-known course of business, that partial payments are forthwith indorsed on the back of the security, the indorsement thus becoming part of the *res gestæ*.[1] Wherever, therefore, an indorsement is

[2] Davies *v.* Humphreys, 6 M. & W. 153, 166; Stead *v.* Heaton, 4 T. R. 669; Roe *v.* Rawlings, 7 East 279; Marks *v.* Lahee, 3 Bing. N. C. 408; Percival *v.* Nauson, 7 Exch. 1; [Doe *v.* Cartwright, Ry. & M. 62; R. *v.* Birmingham, 1 B. & S. 763; Smith *v.* Blakey, L. R. 2 Q. B. 326; R. *v.* Exeter, L. R. 4 Q. B. 344.]

[3] [See examples in Doe *v.* Tyler, 4 Moo. & P. 381; Knight *v.* Waterford, 4 Y. & C. 294; Doe *v.* Beviss, 7 C. B. 504.]

[1] [This was said by the author with reference to the *res gestæ* doctrine, under which in these two sections the present subject was treated in the original text. The *res gestæ* doctrine is not connected with the present subject.]

shown to have been made at the time it bears date (which will be inferred from its face, in the absence of opposing circumstances), the presumption naturally arising is, that the money mentioned in it was paid at that time. If the date is at a period after the demand became stale, or affected by the statute of limitations, the interest of the creditor to fabricate it would be so strong as to countervail the presumption of payment, and require the aid of some other proof; and the case would be the same if the indorsement bore a date within that period, the instrument itself being otherwise subject to the bar arising from lapse of time. Hence the inquiry which is usually made in such cases, namely, whether the indorsement, when made, was against the interest of the party making it, that is, of the creditor; which, in other language, is only inquiring whether it was made while his remedy was not yet impaired by lapse of time.[2] The time when the indorsement was made is a fact to be settled by the jury; and to this end the writing must be laid before them. If there is no evidence to the contrary, the presumption is that the indorsement was made at the time it purports to bear date; and the burden of proving the date to be false lies on the other party.[3] If the indorsement does not purport to be made contemporaneously with the receipt of the money, it is inadmissible as part of the *res gestæ*.

§ 152 *b* [122]. This doctrine has been very much considered in the discussions which have repeatedly been had upon the case of *Searle* v. *Barrington*.[1] In that case the bond was given in 1697, and was not sued until after the death of the obligee, upon whose estate administration was granted in 1723. The obligor died in 1710; the obligee probably survived him, but it did not appear how long. To repel the presumption of payment, arising from the lapse

[2] Turner *v.* Crisp, 2 Stra. 827; Rose *v.* Bryant, 2 Campb. 321; Glynn *v.* Bank of England, 2 Ves. 38, 43; Whitney *v.* Bigelow, 4 Pick. 110; Roseboom *v.* Billington, 17 Johns. 182; Gibson *v.* Peebles, 2 McCord 418; {Clap *v.* Ingersoll, 2 Fairf. 83; Coffin *v.* Bucknam, 3 id. 471; Beatty *v.* Clement, 12 La. An. 82;} [Addams *v.* Seitzinger, 1 W. & S. 243; Allegheny *v.* Nelson, 25 Pa. 334; Bland *v.* Warren, 65 N. C. 373. The best expositions of the principle are found in Rose *v.* Bryant and Addams *v.* Seitzinger.]

[3] Smith *v.* Battens, 1 Moo. & R. 343. See also Hunt *v.* Massey, 5 B. & Ad. 902; Baker *v.* Milburn, 2 M. & W. 853; Sinclair *v.* Baggaley, 4 M. & W. 312; Anderson *v.* Weston, 6 Bing. N. C. 296; Nicholls *v.* Webb, 8 Wheat. 326; 12 S. & R. 49, 87; 16 S. & R. 89, 91.

[1] There were two successive actions on the same bond between these parties. The first is reported in 8 Stra. 826, 2 Mod. 278, and 2 Ld. Raym. 1370; and was tried before Pratt, C. J., who refused to admit the indorsement, and nonsuited the plaintiff; but, on a motion to set the nonsuit aside, the three other judges were of opinion that the evidence ought to have been left to the jury, the indorsement in such cases being according to the usual course of business, and perhaps in this case made with the privity of the obligor; but on another ground the motion was denied. Afterwards another action was brought, which was tried before Lord Raymond, C. J., who admitted the evidence of the indorsement; but to which the defendant filed a bill of exceptions. This judgment was affirmed on error in the Exchequer Chamber, and again in the House of Lords: see 2 Stra. 827; 3 Bro. P. C. 593. The first case is most fully reported in 8 Mod. 278.

of time, the plaintiff offered in evidence two indorsements, made upon the bond by the obligee himself, bearing date in 1699 and in 1707, and purporting that the interest due at those respective dates had been then paid by the obligor. And it appears that other evidence was also offered, showing the time when the indorsements were actually made.[2] The indorsements thus proved to have been made at the times when they purported to have been made, were, upon solemn argument, held admissible evidence, both by the judges in the Exchequer Chamber, and by the House of Lords. The grounds of these decisions are not stated in any of the reports: but it may be presumed that the reasoning on the side of the prevailing party was approved, namely, that the indorsement being made at the time it purported to bear date, and being according to the usual and ordinary course of business in such cases, and which it was not for the interest of the obligee at that time to make, was entitled to be considered by the jury; and that from it, in the absence of opposing proof, the fact of actual payment of the interest might be inferred. This doctrine has been recognized and confirmed by subsequent decisions.[3] [But this use of such indorsements has in some jurisdictions been forbidden by the Legislature, — not by way of repudiating the principle of the present exception, but because of the possibility of the false ante-dating of the indorsement, by which it may be made to appear to be against interest when in truth it was not.[4]]

§ 152 *c* [109]. **Facts against Proprietary Interest.** In regard to the declarations of persons in possession of land, explanatory of the character of their possession, there has been some difference of opinion; but it is now well settled, that declarations in disparagement of the title of the declarant are admissible as original evidence. Possession is *prima facie* evidence of seisin in fee-simple;

[2] This fact was stated by Bayley, B., as the result of his own research. See 1 Cr. & M. 421. So it was understood to be, and so stated, by Lord Hardwicke, in 2 Ves. 43. It may have constituted the "other circumstantial evidence," mentioned in Mr. Brown's report, 3 Bro. P. C. 594; which he literally transcribed from the case, as drawn up by Messrs. Lutwyche and Fazakerley, of counsel for the original plaintiff, for argument in the House of Lords. See a folio volume of original printed briefs, marked "Cases in Parliament, 1728 to 1731," p. 529, in the Law Library of Harvard University, in which this case is stated more at large than in any book of Reports.

[3] Bosworth *v.* Cotchett, Dom. Proc. May 6, 1824; Phil. & Am. on Evid. 348; Gleadow *v.* Atkin, 1 Cr. & M. 410; Anderson *v.* Weston, 6 Bing. N. C. 296; 2 Smith's Lead. Cas. 197; Addams *v.* Seitzinger, 1 Watts & Serg. 243; [and cases *supra*, in § 152 *a*, notes 2, 3.]

[4] [*E. g.* Lord Tenterden's Act, 9 Geo. IV, c. 14, § 3; Maine, R. S. 1883, c. 81, § 100; Mass., P. S. c. 197, § 16; Ill. R. S. c. 83, § 16. These statutes, however, do not usually do more than forbid the use of the indorsement as showing an acknowledgment by the debtor sufficient to take the debt out of the statute of limitations; thus its use as showing a part-payment rebutting the presumption of payment by lapse of time may still be allowable. Moreover, some statutes apply only to certain kinds of instruments, as bonds.

The use of an entry in parties' account-books for the above purpose is sometimes repudiated: Hancock *v.* Cook, 18 Pick. 32;] {Oberg *v.* Breen, 50 N. J. L. 145; Libby *v.* Brown, 78 Me. 493.}

and the declaration of the possessor, that he is tenant to another, it is said, makes most strongly against his own interest, and therefore is admissible.[1] [A declaration by one raising a loan under a will that his estate was a life-interest under the will has been admitted to show the existence of the will;[2] and a wife's declaration as to the existence of a will of her husband by which she profited less than by his intestacy;[3] but not a declaration by a person that he had executed or revoked a will of his own.[4,5] But the declarations thus usable must be distinguished from certain other kinds of statements, admissible on very different principles, yet having a superficial analogy in that they are declarations about land. (1) If the issue involves prescriptive title and adverse possession, declarations by the possessor may be received, under the verbal-act doctrine (*ante*, § 108) as coloring his possession; but here it is not necessary that the declarant be dead. (2) The admissions of a grantor, or other predecessor in title, as to the nature of his title, may be used against those claiming under him (*post*, § 189);[6] but here the peculiar limitations about admissions apply. (3) Declarations about boundaries, by deceased persons (and, in some States, only by persons in possession) are admitted under a variation of the rule about reputation as to boundaries (*ante*, § 140 *a*). All these

[1] Peaceable *v.* Watson, 4 Taunt. 16, 17, per Mansfield, C. J.; West Cambridge *v.* Lexington, 2 Pick. 536, per Putnam, J.; Little *v.* Libby, 2 Greenl. 242; Doe *v.* Pettett, 5 B. & Ald. 223; Carne *v.* Nicoll, 1 Bing. N. C. 430; per Lyndhurst, C. B., in Chambers *v.* Bernasconi, 1 Cromp. & Jer. 457; Smith *v.* Martin, 17 Conn. 399; [Walker *v.* Broadstock, 1 Esp. 458; Doe *v.* Rickarby, 5 id. 4; Baron De Bode's Case, 8 Q. B. 243; Doe *v.* Langfield, 16 M. & W. 513; R. *v.* Birmingham, 1 B. & S. 763; Smith *v.* Blakey, L. R. 2 Q. B. 326; Pike *v.* Hayes, 14 N. H. 20; Rand *v.* Dodge, 17 id. 359; Perkins *v.* Towle, 59 id. 584; Melvin *v.* Bullard, 82 N. C. 37; R. *v.* Birmingham contains a good opinion.]

[2] [Sly *v.* Sly, L. R. 2 P. D. 91.]

[3] [Flood *v.* Russell, 29 L. R. Ir. 96.]

[4] [Horsford *v.* Rowe, 47 Minn. 247. For other examples see Crease *v.* Barrett, 1 C. M. & R. 931; Allegheny *v.* Nelson, 25 Pa. 334; Turner *v.* Tyson, 49 Ga. 165; Swerdferger *v.* Hopkins, 67 Vt. 136; Hollis *v.* Sales, Ga., 29 S. E. 482.]

[5] [The original text here contains the following passage: "But no reason is perceived why every declaration accompanying the act of possession, whether in disparagement of the claimant's title, or otherwise qualifying his possession, if made in good faith, should not be received as part of the *res gestæ;* leaving its effect to be governed by other rules of evidence: Davies *v.* Pierce, 2 T. R. 53; Doe *v.* Rickarby, 5 Esp. 4; Doe *v.* Payne, 1 Stark. 86; 2 Poth. on Obl. 254, App. No. xvi, § 11; Rankin *v.* Tenbrook, 6 Watts 388, 390, per Huston, J.; Doe *v.* Pettett, 5 B. & Ald. 223; Reed *v.* Dickey, 1 Watts 152; Walker *v.* Broadstock, 1 Esp. 458; Doe *v.* Austin, 9 Bing. 41; Doe *v.* Jones, 1 Campb. 367; Jackson *v.* Bard, 4 Johns. 230, 234; Weidman *v.* Kohr, 4 S. & R. 174; Gibblehouse *v.* Stong, 3 Rawle 437; Norton *v.* Pettibone, 7 Conn. 319; Snelgrove *v.* Martin, 2 McCord 241, 243; Doe d. Majoribanks *v.* Green, 1 Gow 227; Carne *v.* Nicoll, 1 Bing. N. C. 430; Davis *v.* Campbell, 1 Iredell 482; Crane *v.* Marshall, 4 Shepl. 27; Adams *v.* French, 2 N. H. 387; Treat *v.* Strickland, 9 Shepl. 234; Blake *v.* White, 13 N. H. 267; Doe *v.* Langfield, 16 M. & W. 497; Baron de Bode's Case, 8 Q. B. 243, 244; Abney *v.* Kingsland, 10 Ala. 355; Daggett *v.* Shaw, 5 Met. 223; Stark *v.* Boswell, 6 Hill N. Y. 405; Pike *v.* Hayes, 14 N. H. 19; Smith *v.* Powers, 15 id. 546, 563." But the author here seems to be referring to a totally different principle, or perhaps to two, as explained in the ensuing text above.]

[6] [See § 189 for a fuller explanation of these distinctions and their consequences.]

rest on principles different from that of the present exception, though occasionally care is not taken in judicial opinions to observe the distinctions.[7]]

§ 152 *d*. **Facts against other than Pecuniary or Proprietary Interest.** [Historically, two series of precedents long existed, the one admitting entries charging the declarant with the receipt of money, — stewards' books, vicars' tithe-books, etc.,[1] — the other receiving declarations in disparagement of the declarant's title.[2] In the first part of the 1800s, a principle, derived from these precedents, began to be broadly stated that all statements of facts against one's interest were receivable.[3] There was no reason why this broad principle should not have been carried out and applied to facts of every sort distinctly against interest. But in 1844, the House of Lords, in a case in which the precedents were hardly considered,[4] imposed an arbitrary limitation upon the exception. It was restricted to statements of facts against either pecuniary or proprietary interest.[5] The chief kind of statement thus excluded is a statement of a fact against penal interest; *e. g.* a statement by a clergyman that he has performed a marriage-ceremony which would subject him to a prosecution.[6] In particular, there is thus excluded a confession, by a deceased person, of the commission of a crime, offered in favor of the person now charged with the crime.[7] Both principle and policy seem to condemn any such singular result, which must be thought repellant to the sense of justice; and it is highly unfortunate that it has ever been sanctioned.

[7] [See § 189 for a fuller explanation of these distinctions and their consequences.]

[1] [*E. g.* Manning *v.* Lechmere, 1 Atk. 453; 1737.]

[2] [*E. g.* Davies *v.* Pierce, 2 T. R. 54; 1787.]

[3] [*E. g.* Lord Ellenborough, in Higham *v.* Ridgway, 10 East 109: "the broad principle . . . that the entry made was in prejudice of the party making it;" Bayley, B., in Middleton *v.* Melton, 10 B. & C. 317: "It is a general principle of evidence" to receive statements "made against their interest."]

[4] [The precise question had been ruled the other way in a case not considered: Standen *v.* Standen, Peake 32. Powell *v.* Harper, 5 C. & P. 590, is also *contra*.]

[5] [Sussex Peerage Case, 11 Cl. & F. 109; followed in Davis *v.* Lloyd, 1 C. & K. 276; Papendick *v.* Bridgewater, 5 E. & B. 180; and treated as law, at least *obiter*, by most American Courts.]

[6] [Sussex Peerage Case, *supra*.]

[7] [Smith *v.* State, 9 Ala. 995; Snow *v.* State, 58 id. 375; West *v.* State, 76 id. 99; Welsh *v.* State, 96 id. 92; People *v.* Hall, 94 Cal. 595; Delk *v.* State, 99 Ga. 667; Lowry *v.* State, 100 id. 574; Hank *v.* State, 148 Ind. 238; Davis *v.* Com., Ky. App., 23 S. W. 585; State *v.* West, 45 La. An. 928; Pike *v.* Crehore, 40 Me. 503, 511; Com. *v.* Chabbock, 1 Mass. 144; Com. *v.* Densmore, 12 All 537; People *v.* Stevens, 47 Mich. 411; Helm *v.* State, 67 Miss. 572; State *v.* Duncan, 116 Mo. 288, 311; State *v.* Hack, 118 id. 92, 98; State *v.* May, 4 Dev. L. 332; State *v.* Duncan, 6 Ired. 239; State *v.* White, 68 N. C. 158; State *v.* Haynes, 71 id. 79, 84; State *v.* Bishop, 73 id. 44; State *v.* Fletcher, 24 Or. 295, 300. *Contra*, admitting the statement: Masons' F. A. A. *v.* Riley, Ark., 45 S. W. 684; Coleman *v.* Frazier, 4 Rich. L. 152; and Goldthwaite, J., diss., in Smith *v.* State, *supra*. It must be noted that in a great number of the first series of cases above, the declarant was not shown to be deceased or otherwise unavailable, and for this reason (as illustrated in R. *v.* Turner, 1 Lew. Cr. C. 119) these rulings may be sustained, and should not operate as precedents in favor of an arbitrary limitation excluding confessions of a person deceased or otherwise unavailable as a witness.]

This limitation (to facts against pecuniary or proprietary interest) will operate also to exclude, here and there, other statements of facts against sundry kinds of interest, which might in some instances well be admitted.[8]]

§ 153. **Competency of Declarant.** In order to render declarations against interest admissible, it is not necessary that the declarant should have been competent, if living, to testify to the facts contained in the declaration;[1] the evidence being admitted on the broad ground, that the declaration was against the interest of the party making it, in the nature of a confession, and, on that account, so probably true as to justify its reception. For the same reason, it does not seem necessary that the fact should have been stated on the personal knowledge of the declarant.[2] Neither is it material whether the same fact is or is not provable by other witnesses who are still living.[3] Whether their testimony, if produced, might be more satisfactory, or its non-production, if attainable, might go to diminish the weight of the declarations, are considerations for the jury, and do not affect the rule of law.

§ 154. **Authentication of Entries by Agents, Stewards, etc.** But where the evidence consists of entries made by persons acting for others, in the capacity of agents, stewards, or receivers, some proof of such agency is generally required previous to their admission. The handwriting, after thirty years, need not be proved.[1] In regard to the proof of official character, a distinction has been taken between public and private offices, to the effect that, where the office is public and must exist, it may always be presumed that a person who acts in it has been regularly appointed; but that, where it is merely private, some preliminary evidence must be adduced of the existence of the office, and of the appointment of the agent or incumbent.[2] Where the entry, by an agent, charges himself in the first

[8] [*Excluded:* Farrell *v.* Weitz, 160 Mass. 288 (statement of paternity by a deceased person, not received for the defendant on a bastardy charge); Lucas *v.* U. S., U. S., 16 Sup. 1168 (that the declarant did not belong to the Choctaw Nation).

Admitted: Ross *v.* McQuiston, 45 Ia. 147 (testator's declaration, when sane, that he had not been sane for twenty years); Walker *v.* Brantree, Kan., 52 Pac. 80 (by plaintiff's husband, a railway engineer, killed in an accident, that he could have avoided it).]

[1] Doe *v.* Robson, 15 East 32; Short *v.* Lee, 2 Jac. & W. 464, 489; Gleadow *v.* Atkins, 1 Cr. & M. 410; Middleton *v.* Melton, 10 B. & C. 317, 326; Bosworth *v.* Crotchet, Ph. & Am. on Evid. 348, n. [This may be true only so far as it means that the declarant may be one who would have been disqualified by interest; otherwise, it is unsound; for it is constantly stated that the declarant must be one "having a competent knowledge or whose duty it was to know" (Short *v.* Lee, *supra*), "having peculiar means of knowledge" (Gleadow *v.* Atkins, *supra*), having "a competency to know it" (Doe *v.* Robson, *supra*). Declarations by one not having personal knowledge were rejected in Bird *v.* Hueston, 10 Oh. St. 428; Arbuckle *v.* Templeton, 65 Vt. 205.]

[2] Crease *v.* Barrett, 1 Cr. M. & R. 919; [but subject to the qualifications of the preceding note.]

[3] Middleton *v.* Melton, 10 B. & C. 327, per Parke, J.; Barry *v.* Bebbington, 4 T. R. 514.

[1] Wynne *v.* Tyrwhitt, 4 B. & Ald. 376.

[2] Short *v.* Lee, 2 Jac. & W. 464, 468.

instance, that fact has been deemed sufficient proof of his agency;[3] but where it was made by one styling himself clerk to a steward, that alone was considered not sufficient to prove the receipt, by either of them, of the money therein mentioned.[4] Yet, where ancient books contain strong internal evidence of their actually being receivers' or agents' books, they may, on that ground alone, be submitted to the jury.[5] Upon the general question, how far mere antiquity in the entry will avail as preliminary proof of the character of the declarant or party making the entry, and how far the circumstances which are necessary to make a document evidence must be proved *aliunde*, and cannot be gathered from the document itself, the law does not seem perfectly settled.[6] But where the transaction is ancient, and the document charging the party with the receipt of money is apparently genuine and fair, and comes from the proper repository, it seems admissible, upon the general principles already discussed in treating of this exception.[7]

§ 155. **Vicars' Books.** There is another class of entries admissible in evidence which sometimes has been regarded as anomalous, and at others has been deemed to fall within the principle of the present exception to the general rule; namely, the private books of a deceased rector or vicar, or of an ecclesiastical corporation aggregate, containing entries of the receipt of ecclesiastical dues, when admitted in favor of their successors, or of parties claiming the same under the interest as the maker of the entries. Sir Thomas Plumer, in a case before him,[1] said: "It is admitted, that the entries of a rector or vicar are evidence for or against his successors. It is too late to argue upon that rule, or upon what gave rise to it; whether

[3] Doe *v.* Stacey, 6 C. & P. 139.

[4] De Rutzen *v.* Farr, 4 Ad. & El. 53; and see Doe *v.* Wittcomb, 15 Jur. 778.

[5] Doe *v.* Lord Geo. Thynne, 10 East 206, 210. [Where the body of the book or entry is shown to be in the purporting person's handwriting, no signature need be appended: Barry *v.* Babbington, 4 T. R. 514; Dwight *v.* Brown, 9 Conn. 93.]

[6] In one case, where the point at issue was the existence of a custom for the exclusion of foreign cordwainers from a certain town, an entry in the corporation books, signed by one acknowledging himself not a freeman, or free of the corporation, and promising to pay a fine assessed on him for breach of the custom; and another entry, signed by two others, stating that they had distrained and appraised nine pairs of shoes from another person, for a similar offence, — were severally held inadmissible, without previously offering some evidence to show by whom the entries were subscribed, and in what situation the several parties actually stood; although the latest of the entries was more than a hundred years old: Davies *v.* Morgan, 1 Cr. & Jer. 587, 590, 593, per Ld. Lyndhurst, C. B. In another case, which was a bill for tithes, against which a modus was alleged in defence, a receipt of more than fifty years old was offered, to prove a money payment therein mentioned to have been received for a prescription rent in lieu of tithes; but it was held inadmissible, without also showing who the parties were, and in what character they stood: Manby *v.* Curtis, 1 Price 225, per Thompson, C. B., Graham, B., and Richards, B.; Wood, B., *dissentiente*.

[7] See Phil. & Am. on Evid. 331, n. (2); 1 Phil. Evid. 316, n. (6), and cases there cited; Fenwick *v.* Read, 6 Madd. 8, per Sir J. Leach, Vice-Ch.; Bertie *v.* Beaumont, 2 Price 307; Bishop of Meath *v.* Marquess of Winchester, 3 Bing. N. C. 183, 203; [*post*, § 575 *b*.]

[1] Short *v.* Lee, 2 Jac. & W. 477, 478.

it was the *cursus Scaccarii*, the protection of the clergy, or the peculiar nature of property in tithes. It is now the settled law of the land. It is not to be presumed that a person, having a temporary interest only, will insert a falsehood in his book from which he can derive no advantage. Lord Kenyon has said, that the rule is an exception; and it is so: for no other proprietor can make evidence for those who claim under him, or for those who claim in the same right and stand in the same predicament. But it has been the settled law, as to tithes, as far back as our research can reach. We must, therefore, set out from this as a *datum;* and we must not make comparisons between this and other corporations. No corporation sole, except a rector or vicar, can make evidence for his successor." But the strong presumption that a person, having a temporary interest only, will not insert in his books a falsehood, from which he can derive no advantage, which evidently and justly had so much weight in the mind of that learned judge, would seem to bring these books within the principle on which entries made, either in the course of duty or against interest, are admitted. And it has been accordingly remarked, by a writer of the first authority in this branch of the law, that after it has been determined that evidence may be admitted of receipts of payment, entered in private books by persons who are neither obliged to keep such books nor to account to others for the money received, it does not seem any infringement of principle to admit these books of rectors and vicars. For the entries cannot be used by those who made them; and there is no legal privity between them and their successors. The strong leaning, on their part, in favor of the church, is nothing more, in legal consideration, than the leaning of every declarant in favor of his own interest, affecting the weight of the evidence, but not its admissibility. General observations have occasionally been made respecting these books, which may seem to authorize the admission of any kind of statement contained in them. But such books are not admissible, except where the entries contain receipts of money or ecclesiastical dues, or are otherwise apparently prejudicial to the interests of the makers, in the manner in which entries are so considered in analogous cases.[2] And proof will be required, as in other cases, that the writer had authority to receive the money stated, and is actually dead; and that the document came out of the proper custody.[3]

[2] Phil. & Am. on Evid. 322, 323, and cases in notes (2) and (3); 1 Phil. Evid. 308, notes (1), (2); Ward *v.* Pomfret, 5 Sim. 475.

[3] Gresley on Evid. 223, 224; Carrington *v.* Jones, 2 Sim. & Stu. 135, 140; Perigal *v.* Nicholson, 1 Wightw. 63.

CHAPTER XIV.

EXCEPTIONS TO THE HEARSAY RULE: DYING DECLARATIONS.

§ 156. In general.
§ 156 *a*. Limitations as to Kind of Issue, Person declaring, and Subject of Declaration.
§ 157. Competency of Declarant; Religious Belief.
§ 158. Consciousness of Impending Death.
§ 159. Testimonial Aspect of the Declarations.
§ 159 *a*. Same: Substance only required.
§ 159 *b*. Same: Declarations by Signs.
§ 161. Same: Declarations in Writing.
§ 161 *a*. Same: Impeaching and corroborating the Declarant.
§ 161 *b*. Admissibility a Question for the Court.
§ 161 *c*. Sundries.
§ 162. Weight of Declarations.

§ 156. **In general.** A fourth exception to the rule rejecting hearsay evidence is allowed in the case of dying declarations. The general principle on which this species of evidence is admitted was stated by Lord Chief Baron Eyre to be this, — that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced, by the most powerful considerations, to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath in a court of justice.[1]

§ 156 *a*. **Limitations as to Kind of Issue, Person declaring, and Subject of Declaration.** It was at one time held, by respectable authorities, that this general principle warranted the admission of dying declarations in all cases, civil and criminal;[1] but it is now

[1] R. *v.* Woodcock, 2 Leach's Cr. Cas. 256, 567; Drummond's Case, 1 id. 378. The rule of the Roman civil law was the same: "Morti proximum, sive moribundum, non præsumendum est mentiri, nec esse immemorem salutis æternæ; licet non præsumatur *semper* dicere verum." Mascard. De Probat. Concl. 1080. In the earliest reported case on this subject, the evidence was admitted without objection, and apparently on this general ground: R. *v.* Reason, 6 State Tr. 195, 201; [16 How. St. Tr. 24. Lord Mohun's Trial, 12 How. St. Tr. 967, 975, 987, in 1696, is a still earlier instance; and the principle had already been referred to by the great dramatist himself, in King John, V, 4: —

> Melun: "Have I not hideous death within my view,
> Retaining but a quantity of life,
> Which bleeds away even as a form of wax
> Resolveth from his figure 'gainst the fire?
> What in the world should make me now deceive,
> Since I must lose the use of all deceit?
> Why should I then be false, since it is true
> That I must die here, and live hence by truth?"

Serjeant Philips had used in Raleigh's Trial, 2 How. St. Tr. 18, the phrase: "Nemo moriturus præsumitur mentiri."]

[1] [This was apparently the original practice; Lord Mohun's Trial, *supra;* Chute, *arguendo*, in Omichund *v.* Barker, 1 Atk. 38; Douglas Peerage Case, 2 Hargr. Coll.

well settled that they are admissible, as such, only in cases of homicide, "where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations."[2] [(1) As to the *issue*, (a) the declaration is not admissible in a civil case;[3] (b) it is admissible in no other criminal case than a prosecution for homicide;[4] even where death is incidentally alleged or involved, as in the case of a prosecution for procuring an abortion;[5] (c) the death which is the subject of the charge must be the *death of the declarant*.[6] (2) The *subject of the declaration* must be the circumstances attending or leading up to the death for which the prosecution is instituted; for example, the declaration of a husband, killed by the wife's paramour, that he had found them in adultery, has been admitted;[7] while the deceased's declarations as to a prior threat by the defendant have been excluded.[8] (4) On the other hand, the declaration is not excluded by

Jurid. 387, 389, 397; Wright *v.* Littler, 3 Burr. 1244; Anon., cited 6 East 195, approved in 1 Camp. 210; McNally, Evidence, 381, 386; Swift, Evidence, 125.] But the distinction between civil and criminal cases was advanced by counsel as early as 1743, in the Anglesea case, 17 How. St. Tr. 1161. The real occasion for the change of view seems to have been the misunderstood passage in Mr. Serjeant East's Pleas of the Crown, I, 353, in 1803.]

[2] R. *v.* Mead, 2 B. & C. 605; in this case the prisoner had been convicted of perjury and moved for a new trial, because convicted against the weight of evidence; after which he shot the prosecutor. Upon showing cause against the rule, the counsel for the prosecution offered the dying declarations of the prosecutor relative to the fact of perjury; but the evidence was adjudged inadmissible.

[3] [Stobart *v.* Dryden, 1 M. & W. 615; Daily *v.* R. Co., 32 Conn. 357; Wooten *v.* Wilkins, 39 Ga. 223; E. T. V. & G. R. Co. *v.* Maloy, 77 id. 237; Duling *v.* Johnson, 32 Ind. 155; Thayer *v.* Lombard, 165 Mass. 174; Brownell *v.* R. Co., 47 Mo. 245; Jackson *v.* Knitfen, 2 Johns. 36; Wilson *v.* Boerem, 15 id. 286; Barfield *v.* Britt, 2 Jones L. 43.]

[4] [R. *v.* Hutchinson, 2 B. & C. 608, note (abortion); R. *v.* Mead, ib. 605 (perjury); R. *v.* Lloyd, 4 C. & P. 233 (robbery); Johnson *v.* State, 50 Ala. 459 (rape); State *v.* Barker, 28 Oh. St. 583; Hudson *v.* State, 3 Coldw. 359 (robbery); Crookham *v.* State, 5 W. Va. 514 (assault with intent to kill).]

[5] [R. *v.* Hutchinson, *supra;* R. *v.* Hind, 8 Cox Cr. 300; Com. *v.* Homer, 153 Mass. 344; People *v.* Davis, 56 N. Y. 95; State *v.* Harper, 35 Oh. St. 78; Railing *v.* Com., 110 Pa. 103; *contra* (but in part because of statutory peculiarities): Montgomery *v.* State, 80 Ind. 345; State *v.* Pearce, 56 Minn. 226, 233; State *v.* Dickinson, 41 Wis. 308. Statute has in this respect abolished this arbitrary limitation in at least two States: Mass. St. 1889, c. 100; Thayer *v.* Lombard, 165 Mass. 174; N. Y. St. 1875, c. 352.]

[6] [*Excluded:* Mora *v.* People, 19 Colo. 255 (accomplice); State *v.* Bohan, 15 Kan. 418 (murder of T. W.; declarations of W. A., shot at the same time); Brown *v.* Com., 73 Pa. 329 (murder of husband; declarations of wife killed about the same time); Poteete *v.* State, 9 Baxt. 270 (declarations of another killed in the same affray): Radford *v.* State, 33 Tex. Cr. 520 (like Brown *v.* Com.); *contra*, admitting them: R. *v.* Baker, 2 Moo. & R. 53 (declarations of another poisoned at the same time); State *v.* Wilson, 23 La. An. 559 (declarations of another shot at the same time); State *v.* Terrell, 12 Rich. L. 329 (like R. *v.* Baker). There is of course no reason whatever in this limitation.]

[7] [Wilkerson *v.* State, 91 Ga. 729, 739.]

[8] [State *v.* Moody, 18 Wash. 165; other examples are as follows: Ben *v.* State, 37 Ala. 105; Reynolds *v.* State, 68 id. 506; People *v.* Fong Ah Sing, 54 Cal. 253; People *v.* Taylor, 59 id. 648; People *v.* Wong Chney, 117 id. 624; Perry *v.* State, Ga., 30 S. E. 903; Leiber *v.* Com., 9 Bush 13; Peoples *v.* Com., 87 Ky. 500; State *v.* Petsch, 43 S. C. 132.]

the circumstance that there are eye-witnesses to the deed, or other testimony;[9] or that the fact of the killing is conceded by the accused.[10]] The reasons for thus restricting it may be, that the credit is not in all cases due to the declarations of a dying person: for his body may have survived the powers of his mind; or his recollection, if his senses are not impaired, may not be perfect; or, for the sake of ease, and to be rid of the importunity and annoyance of those around him, he may say, or seem to say, whatever they may choose to suggest.[11] These, or the like considerations, have been regarded as counterbalancing the force of the general principle above stated; leaving this exception to stand only upon the ground of the public necessity of preserving the lives of the community by bringing manslayers to justice. For it often happens, that there is no third person present to be an eye-witness to the fact; and the usual witness in other cases of felony, namely, the party injured, is himself destroyed.[12] But, in thus restricting the evidence of dying declarations to cases of trial for homicide of the declarant, it should be observed that this applies only to declarations offered on the sole ground that they were made *in extremis;* for where they constitute part of the *res gestæ*, or come within the exception of declarations against interest, or the like, they are admissible as in other cases, irrespective of the fact that the declarant was under apprehension of death.

§ 157. **Competency of Declarant; Religious Belief.** The persons whose declarations are thus admitted are considered as standing in the same situation as if they were sworn; the danger of impending death being equivalent to the sanction of an oath. It follows, therefore, that where the declarant, if living, would have been incompetent to testify, by reason of infamy, or the like, his dying declarations are inadmissible.[1] And, as an oath derives the value of its sanction from the religious sense of the party's accountability to his Maker, and the deep impression that he is soon to render to Him the final account, wherever it appears that the declarant was incapable of this religious sense of accountability, whether from infidelity, imbecility of mind, or tender age, the declarations are alike inadmissible.[2] [But where theological belief has by statute been made no longer an essential for taking the oath (*post*, § 370 *a*), the

[9] [Reynolds *v.* State, 68 Ala. 506; Payne *v.* State, 61 Miss. 163; Donnelly *v.* State, 26 N. J. L. 627; Com. *v.* Roddy, 184 Pa. 274.]

[10] [State *v.* Saunders, 14 Or. 305; *contra*, Saylor *v.* Com., 97 Ky. 184.]

[11] Jackson *v.* Kniffen, 2 Johns. 31, 35, per Livingston, J.

[12] 1 East P. C. 353. [There is no consistent ground of policy to justify these limitations, and they have often been criticised judicially: Taylor, C. J., in McFarland *v.* Shaw, 2 N. C. Law Repos. 105; Davies, J., in Caujolle *v.* Ferrié, 23 N. Y. 94; McCoy, J., in Wooten *v.* Wilkins, 39 Ga. 223.]

[1] R. *v.* Drummond, 1 Leach's Cr. Cas. 378; [State *v.* Baldwin, Wash., 45 Pac. 650.]

[2] R. *v.* Pike, 3 C. & P. 598; R. *v.* Perkins, 9 id. 395; 2 Mood. Cr. C. 135; 2 Russell on Crimes, 688.

declarant's belief is from that point of view immaterial.[3] However, apart from the capacity to take an oath, it may be thought that the dying declarations of one who has no belief in a future state of rewards and punishments are lacking in their distinctive sanction, and should be excluded.[4] If, on the other hand, the mere instinctive physical dread and revulsion of the moment is the real sanction, then the belief is of no consequence.[5] Again, profane cursing in the last moments may indicate such a reckless and revengeful state of mind as is inconsistent with trustworthy statements.[6]] As the testimony of an accomplice is admissible against his fellows, the dying declarations of a *particeps criminis* in an act which resulted in his own death are admissible against one indicted for the same murder.[7]

§ 158. **Consciousness of Impending Death.** It is essential to the admissibility of these declarations, and is a preliminary fact, to be proved by the party offering them in evidence, that they were made under a sense of impending death. But it is not necessary that they should be stated, at the time, to be so made; it is enough, if it satisfactorily appears, in any mode, that they were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to, in order to ascertain the state of the declarant's mind.[1] The length of time which elapsed between the declaration and the death of the declarant furnishes no rule for the admission or rejection of the evidence; though, in the absence of better testimony, it may serve as one of the exponents of the deceased's belief, that his dissolution was or was not impending; it is the impression of almost immediate dissolution, and not the rapid succession of death in point of fact, that renders the testimony admissible.[2] Therefore, where it appears

[3] [People *v.* Sanford, 43 Cal. 34; State *v.* Elliott, 45 Ia. 489; State *v.* Ah Lee, 8 Or. 218; Carver *v.* U. S., 164 U. S. 694, *semble;* see Hill *v.* State, 694 Miss. 440; Goodall *v.* State, 1 Or. 335.]

[4] [R. *v.* Pike, 3 C. & P. 598; Tracy *v.* People, 97 Ill. 105; Donnelly *v.* State, 26 N. J. L. 507, 620. The preceding cases do not seem to notice this consideration.]

[5] [Nesbit *v.* State, 43 Ga. 249, *semble.*]

[6] [Tracy *v.* People, 97 Ill. 105; Phillipps, Evidence, 7th Eng. ed. 236.]

[7] Tinekler's Case, 1 East Pl. Cr. 354.

[1] R. *v.* Woodcock, 2 Leach's Cr. Cas. 567; John's Case, 1 East P. C. 357, 358; R. *v.* Bonner, 6 C. & P. 386; R. *v.* Van Butchell, 3 id. 631; R. *v.* Mosley, 1 Moody's Cr. Cas. 97; R. *v.* Spilsbury, 7 C. & P. 187, per Coleridge, J.; R. *v.* Perkins, 2 Mood. Cr. Cas. 135; Montgomery *v.* State, 11 Oh. 424; Dunn *v.* State, 2 Ark. 229; Com. *v.* M'Pike, 3 Cush. 181; R. *v.* Mooney, 5 Cox Cr. C. 318; [Lester *v.* State, 37 Fla. 382; Com. *v.* Matthews, 89 Ky. 292; State *v.* Jones, 47 La. An. 1524; Bell *v.* State, 72 Miss. 507; State *v.* Evans, 124 Mo. 397; State *v.* Fletcher, 24 Or. 295; Mattox *v.* U. S., 146 U. S. 140, 151. This does not seem ever to have been denied, except in R. *v.* Morgan, 14 Cox Cr. 337, which was hardly a distinct decision.]

[2] In Woodcock's Case, 2 Leach's Cr. Cas. 563, the declarations were made forty-eight hours before death; in Tinekler's Case, 1 East P. C. 354, some of them were made ten days before death; and in R. *v.* Mosley, 1 Mood. Cr. Cas. 97, they were made eleven

that the deceased, at the time of the declaration, had any expectation or hope of recovery, however slight it may have been, and though death actually ensued in an hour afterwards, the declaration is inadmissible.[3] On the other hand, a belief that he will not recover is not in itself sufficient, unless there be also the prospect of "almost immediate dissolution."[4] [Whether the declarant was, in fact, in the proper state of mind, as thus defined, ought to be left to the determination of the trial Court; and this is done in a few jurisdictions.[5]

A repetition of the statement at a time when the required condition of mind has ceased to exist is not admissible;[6] and, conversely, a statement made when this condition does not exist may become admissible by being later reaffirmed and adopted when the condition does exist.[7]]

§ 159. **Testimonial Aspect of the Declarations.** The declarations of the deceased are admissible only to those things to which he would have been competent to testify if sworn in the cause; [*i. e.*, "whatever would disqualify a witness would make such declarations incompetent testimony,"[1] and, conversely, "whatever may be stated by a witness under oath is admissible in evidence as dying declarations."[2] Thus, the declarant may not have been in a position to have personal observation of the facts stated;[3] or his mental faculties may have been so impaired by the injury that his memory or his

days before death; and were all received. See also R. *v.* Howell, 1 Denis. Cr. Cas. 1; R. *v.* Bonner, 6 C. & P. 386 (three days before death); Smith *v.* State, 9 Humph. 9; Logan *v.* State, id. 24; [R. *v.* Reaney, 7 Cox Cr. 212; Com. *v.* Roberts, 108 Mass. 301; Jones *v.* State, 71 Ind. 74; Boulden *v.* State, 102 Ala. 78 (two months' survival); State *v.* Craine, 120 N. C. 601 (five months' survival); Moore *v.* State, 96 Tenn. 209.]

[3] So ruled in Welborn's Case, 1 East P. C. 358, 359; R. *v.* Christie, 2 Russ. on Crimes, 685; R. *v.* Hayward, 6 C. & P. 157, 160; R. *v.* Crockett, 4 id. 544; R. *v.* Fagent, 7 id. 238. [The test has been variously phrased; "no hope of recovery," "a settled expectation of death," "an undoubting belief in death," are among the most common. The cases, though numerous, are usually of no service as precedents, for they depend chiefly on the circumstances of each instance; additional illustrative rulings, phrasing the principle, are: People *v.* Sanchez, 24 Cal. 4; Morgan *v.* State, 31 Ind. 99; Donnelly *v.* State, 26 N. J. L. 618; Digby *v.* People, 113 Ill. 125. Asking for a physician does not necessarily indicate no hope of recovery: R. *v.* Howell, 1 Den. Cr. C. 1; McQueen *v.* State, 103 Ala. 12; State *v.* Evans, 124 Mo. 397; *contra:* Matherly *v.* Com., Ky., 19 S. W. 977.]

[4] Such was the language of Hullock, B., in R. *v.* Van Butchell, 3 C. & P. 629, 631. *Accord:* Woodcock's Case, 2 Leach Cr. Cas. 567, per Ld. C. B. Eyre; R. *v.* Bonner, 6 C. & P. 386; Com. *v.* King, 2 Virg. Cas. 78; Com. *v.* Gibson, id. 111; Com. *v.* Vass, 3 Leigh 786; State *v.* Poll, 1 Hawks 442; R. *v.* Perkins, 9 C. & P. 395; s. c. 2 Mood. Cr. Cas. 135; R. *v.* Ashton, 2 Lewin's Cr. Cas. 147; [R. *v.* Jenkins, L. R. 1 C. C. R. 193; U. S. *v.* Schneider, 21 D. C. 381, 404; State *v.* Welsor, 117 Mo. 570, 579.]

[5] [Com. *v.* Bishop, 165 Mass. 148; Basye *v.* State, 45 Nebr. 261.]

[6] [Carver *v.* U. S., 160 U. S. 553.]

[7] [Johnson *v.* State, 104 Ala. 241; State *v.* Evans, 124 Mo. 397.]

[1] [Donnelly *v.* State, 26 N. J. L. 620. For infamy and capacity to take the oath, see *ante*, § 157.]

[2] [Whitley *v.* State, 38 Ga. 70; but subject, of course, to the limitations of § 156 *a*, *ante*.]

[3] [Jones *v.* State, 52 Ark. 347 (where the declarant could not have seen who shot him); Com. *v.* Roddy, 184 Pa. 274.]

intelligence was too questionable.[4]] They must, therefore, in general, speak to facts only, and not to mere matters of opinion;[5] and must be confined to what is relevant to the issue. It[6] is not necessary, however, that the examination of the deceased should be conducted after the manner of interrogating a witness in the cause; though any departure from this mode may affect the validity and credibility of the declarations; therefore, it is no objection to their admissibility that they were made in answer to leading questions, or obtained by pressing and earnest solicitation.[7] But whatever the statement may be, it must be complete in itself; for, if the declarations appear to have been intended by the dying man to be connected with and qualified by other statements, which he is prevented by any cause from making, they will not be received.[8]

§ 159 *a* [161 *a*]. **Same: Substance only required.** It has been held that the substance of the declarations may be given in evidence, if the witness is not able to state the precise language used.[1, 2]

§ 159 *b* [161 *b*]. **Same: Declarations by Signs.** The testimony here spoken of may be given as well by signs as by words; thus, where one, being at the point of death and conscious of her situation, but unable to articulate by reason of the wounds she had received, was asked to say whether the prisoner was the person who had inflicted the wounds, and, if so, to squeeze the hand of the interrogator, and she thereupon squeezed his hand, it was held that

[4] [Mockabee *v.* Com., 78 Ky. 379; Brown *v.* State, 32 Miss. 448; Lipscomb *v.* State, id., 23 So. 210; State *v.* Reed, 137 Mo. 125.]

[5] [This ill-considered passage, invoking the much-abused Opinion rule (*post*, § 441 *b*), has led to a number of quibbling rulings excluding that against which there is no real objection. "He killed me for nothing" has been excluded: Jones *v.* Com., Ky., 46 S. W. 217; Powers *v.* State, 74 Miss. 777; *contra:* Sullivan *v.* State, 102 Ala. 135, 142. "He shot me down like a dog" or "a rabbit" has been solemnly declared admissible: White *v.* State, 100 Ga. 659; State *v.* Saunders, 14 Or. 305; State *v.* Kessler, 15 Utah 142; and "he murdered me" or "butchered me:" State *v.* Mace, 118 N. C. 1244; State *v.* Gile, 8 Wash. 12, 22. Other examples will be found in Berry *v.* State, 63 Ark. 382; Whitley *v.* State, 38 Ga. 70; Kearney *v.* State, 101 id. 803; Binns *v.* State, 46 Ind. 311; Lane *v.* State, id., 51 N. E. 1056; State *v.* Nettlebush, 20 Ia. 257; Collins *v.* Com., 12 Bush 272; Com. *v.* Matthews, 87 Ky. 293; State *v.* Ashworth, 50 La. An., 23 So. 270; Payne *v.* State, 61 Miss. 163; Lipscomb *v.* State, id., 23 So. 210; People *v.* Shaw, 63 N. Y. 40; Brotherton *v.* People, 75 id. 159; State *v.* Williams, 67 N. C. 15; Wroe *v.* State, 20 Oh. St. 469; State *v.* Foot You, 24 Or. 61, 75; State *v.* Carrington, 15 Utah 480.]

[6] [For the original intervening sentence, about either side using the declaration, see *post*, § 161 *c*.]

[7] R. *v.* Fagent, 7 C. & P. 238; Com. *v.* Vass, 3 Leigh 786; R. *v.* Reason *et al.*, 1 Stra. 499; R. *v.* Woodcock, 2 Leach Cr. Cas. 563; [People *v.* Sanchez, 24 Cal. 26; Mattox *v.* U. S., 146 U. S. 152; People *v.* Knapp, 26 Mich. 116; State *v.* Ashworth, 50 La. An., 23 So. 270.]

[8] Com. *v.* Vass, 3 Leigh 787; [State *v.* Nettlebush, 20 Ia. 260; State *v.* Ashworth, *supra;* State *v.* Patterson, 45 Vt. 313 (best statement); Jackson *v.* Com., 19 Gratt. 668.

[1] Montgomery *v.* State, 11 Oh. 424; Ward *v.* State, 8 Blackf. 101; [Nelmes *v.* State, 13 Sm. & M. 505. If only a part is given, the opponent may call for the remainder: Mattox *v.* U. S., 146 U. S. 152.]

[2] [The original text here repeats about leading questions what has just been said.]

this evidence was admissible and proper for the consideration of the jury.[1]

§ 160.[1]

§ 161. **Same: Declarations in Writing.** [Two or three questions, involving different principles, here arise.

(1) That the declaration in writing was written by another person is of itself no objection.[1] But the writing cannot be put in as the declarant's statement unless it has been read over and assented to by him;[2] though it can be used by the writer as a record of his recollection (*post*, § 439 *b*) of the oral statements of the declarant.

(2) Whether the written report of the deceased's oral statements *must* be put in is a different question.] If the statement of the deceased was committed to writing and signed by him, at the time it was made, it has been held essential that the writing should be produced, if existing;[3] and that neither a copy, nor parol evidence of the declarations, could be admitted to supply the omission. [But if the writing has not been signed nor assented to by the deceased, but is merely a written note by an auditor, there can be no propriety in requiring its production in preference to other testimony of the oral statements.[4] Assuming, however, that in a given case it is the written report which it is desired to use, the document must be produced or accounted for, according to the general principle of Primariness (*post*, § 563 *a*).] But where the declarations had been repeated at different times, at one of which they were made under oath, and informally reduced to writing by a witness, and at the others they were not, it was held that the latter might be proved by parol, if the other could not be produced.[5]

[1] Com. *v.* Casey, 11 Cush. 417; s. c. 6 Monthly Law Rep. p. 203; [Godfrey *v.* State, 31 Ala. 323 (nodding the head to questions; excluded on the facts); Mockabee *v.* Com., 78 Ky. 382; see Luby *v.* Com., 12 Bush 6; Wagoner *v.* Terr., Ariz., 51 Pac. 145.]

[1] [Transferred *post*, as § 161 *b*.]

[1] [Perry *v.* State, Ga., 30 S. E. 903; nor need the writing contain the exact spoken words: State *v.* Baldwin, 15 Wash. 15.]

[2] [State *v.* Fraunburg, 40 Ia. 557; State *v.* Parham, 48 La. An. 1309, *semble*. His signature, however, is not essential: State *v.* Carrington, 15 Utah 480.]

[3] R. *v.* Gay, 7 C. & P. 230; Trowter's Case, P. 8 Geo. I, B. R. 12 Vin. Abr. 118, 119; Leach *v.* Simpson *et al.*, 1 Law & Eq. 58; 5 M. & W. 309; 7 Dowl. P. C. 513; s. c. 3 Jur. 654; [Anderson *v.* State, 79 Ala. 8; Boulden *v.* State, 102 id. 78, 84; Collier *v.* State, 20 Ark. 36; State *v.* Sullivan, 51 Ia. 146; Saylor *v.* Com., 97 Ky. 184; Allison *v.* Com., 99 Pa. 33; King *v.* State, 91 Tenn. 617, 650. But this seems unsound; the principle which prefers the written report of an oral statement applies only where the reporter is an official charged with the duty of taking down testimony (*ante*, §§ 97 *d*, 227); and here the oral declarations and the signed written ones are two distinct declarations, and no principle requires the preferred use of the written one: Com. *v.* Haney, 127 Mass. 458; State *v.* Whitson, 111 N. C. 695; Beets *v.* State, Meigs 106, *semble*.]

[4] [*Contra:* Epperson *v.* State, 5 Lea 291, 297.]

[5] R. *v.* Reason, 1 Str. 499, 500; [16 How. St. Tr. 33 (leading case). The qualification of the last clause is unsound, and is not borne out by the case cited; oral statements made at a separate time may be proved without regard to producing or accounting for a separate written one: Collier *v.* State, 20 Ark. 36, 44; Dunn *v.* People, 172 Ill. 582; Lane *v.* State, Ind., 51 N. E. 1056; State *v.* Carrington, 15 Utah 480.]

(3) If the deposition of the deceased has been taken under any of the statutes on that subject, and is inadmissible, as such, for want of compliance with some of the legal formalities, it seems it may still be treated as a dying declaration, if made *in extremis*.[6]

§ 161 *a*. **Same: Impeaching and corroborating the Declarant.** [The declarations are offered as testimony, and it is proper that the declarant should be impeachable, so far as may be, like other witnesses, — for example, by proof of bad character,[1] by conviction of felony,[2] or by prior inconsistent statements.[3] So, also, he may be corroborated, according to the distinctions applicable in the particular jurisdiction (*post*, § 469 *b*), by prior consistent statements.[4]]

§ 161 *b* [160]. **Admissibility is a Question for the Court.** The circumstances under which the declarations were made are to be shown to the judge; it being his province, and not that of the jury, to determine whether they are admissible. In Woodcock's case, the whole subject seems to have been left to the jury, under the direction of the Court, as a mixed question of law and fact; but subsequently it has always been held a question exclusively for the consideration of the Court, being placed on the same ground with the preliminary proof of documents, and of the competency of witnesses, which is always addressed to the Court.[1] But, after the evidence is admitted, its credibility is entirely within the province of the jury, who, of course, are at liberty to weigh all the circumstances under which the declarations were made, including those already proved to the judge, and to give the testimony only such credit as, upon the whole, they may think it deserves.[2]

[6] R. *v.* Woodcock, 2 Leach Cr. Cas. 563; R. *v.* Callaghan, McNally's Evid. 385.

[1] [Lester *v.* State, 37 Fla. 382; Redd *v.* State, 99 Ga. 210; Perry *v.* State, id., 30 S. E. 903; Carver *v.* U. S., 164 U. S. 694.]

[2] [State *v.* Baldwin, 15 Wash. 15.]

[3] [As this question is affected by the rule about first asking the witness, the authorities are collected *post*, § 462.]

[4] [State *v.* Blackburn, 80 N. C. 478; even before impeachment: People *v.* Glenn, 10 N. C. 32; State *v.* Craine, 120 id. 601.]

[1] Said, per Ld. Ellenborough, in R. *v.* Hucks, 1 Stark. 521, 523, to have been so resolved by all the judges, in a case proposed to them: Welborn's Case, 1 East P. C. 360; John's Case, id. 358; R. *v.* Van Butchell, 3 C. & P. 629; R. *v.* Bonner, 6 id. 386; R. *v.* Spilsbury, 7 id. 187, 190; State *v.* Poll, 1 Hawks 444; Com. *v.* Murray, 2 Ashm. 41; Com. *v.* Williams, id. 69; Hill's Case, 2 Gratt. 594; McDaniel *v.* State, 8 Sm. & M. 401; [State *v.* Sexton, Mo., 48 S. W. 452; Com. *v.* Bishop, Mass., 42 N. E. 560;] {State *v.* Frazier, 1 Houst. Cr. 176; Kehoe *v.* Com., 85 Pa. 127.}

[2] 2 Stark. Evid. 263; Phil. & Am. on Evid. 304; Ross *v.* Gould, 5 Greenl. 204; Vass's Case, 3 Leigh 794; [Com. *v.* Brewer, Mass., 42 N. E. 92.] See also the remarks of Mr. Evans, 2 Poth. on Oblig. 256 (294), App. No. 16, who thinks that the jury should be directed, previous to considering the effect of the evidence, to determine: 1st, Whether the deceased was really in such circumstances, or used such expressions, from which the apprehension in question was inferred; 2d, Whether the inference deduced from such circumstances or expressions is correct; 3d, Whether the deceased did make the declarations alleged against the accused; and 4th, Whether those declarations are to be admitted, as sincere and accurate. {But in Georgia the question of a consciousness of impending death is left to the jury: Jackson *v.* State, 56 Ga. 235; Dumas *v.* State, 62 Ga. 58. It is considered good practice to have the witnesses examined by the Court out of hearing of the jury, thus avoiding any bias which might be

§ 161 *c.* **Sundries.** The right to offer the declarations in evidence is not restricted to the side of the prosecutor; they are equally admissible in favor of the party charged with the death.[1] [That the use of dying declarations is no violation of the constitutional provision requiring the confrontation of the accused, in criminal cases, with the witnesses against him is explained in another place (*post*, § 163 *f*).]

§ 162. **Weight of Declarations.** Though these declarations, when deliberately made, under a solemn and religious sense of impending dissolution, and concerning circumstances, in respect of which the deceased was not likely to have been mistaken, are entitled to great weight, if precisely identified, yet it is always to be recollected that the accused has not the power of cross-examination, — a power quite as essential to the eliciting of all the truth, as the obligation of an oath can be; and that where the witness has not a deep and strong sense of accountability to his Maker, and an enlightened conscience, the passion of anger and feelings of revenge may, as they have not unfrequently been found to do, affect the truth and accuracy of his statements, especially as the salutary and restraining fear of punishment for perjury is in such cases withdrawn. And it is further to be considered, that the particulars of the violence to which the deceased has spoken were in general likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed, and leading both to mistakes as to the identity of persons, and to the omission of facts essentially important to the completeness and truth of the narrative.[1]

produced in their minds by the statements, and which might be difficult to remove. This was done in Swisher *v.* Com., 26 Gratt. 963; cf. Bull's Case, 14 id. 613. In Johnson *v.* State, 47 Ala. 9, the evidence was heard by the judge in the presence of the jury, who were cautioned not to regard it in forming their verdict. So in People *v.* Smith, 104 N. Y. 493, it was held that the necessary preliminary examination might, in the discretion of the Court, be conducted in the presence of the jury; but during the trial of that preliminary issue the jury are merely in the attitude of spectators; they have no concern with it, and should be so instructed by the Court. Whether the judge will hear evidence in rebuttal is not clear. It has been held in Delaware that he would not; that the evidence was admissible when the State has made a *prima facie* case: State *v.* Cornish, 5 Harr. Del. 502; State *v.* Frazier, 1 Houst. Cr. Cas. 176. When it is before the jury, however, no direction by the judge as to its force is allowed: State *v.* McCanon, 51 Mo. 160.]

[1] [Moore *v.* State, 12 Ala. 767; State *v.* Saunders, 14 Or. 304; Mattox *v.* U. S., 146 U. S. 151. *Contra, semble:* R. *v.* Scaife, 1 Moo. & R. 552, 2 Lew. Cr. C. 150; People *v.* McLaughlin, 44 Cal. 435.]

[1] Phil. & Am. on Evid. 305, 306; 1 Phil. Evid. 292; 2 Johns. 35, 36, per Livingston, J.; see also Mr. Evans's observations on the great caution to be observed in the use of this kind of evidence, in 2 Poth. Obl. 255 (293); 2 Stark. Evid. 263; see also R. *v.* Ashton, 2 Lewin Cr. Cas. 147, per Alderson, B.; [People *v.* Kraft, 148 N. Y. 631.]

CHAPTER XV.

EXCEPTIONS TO THE HEARSAY RULE: DECLARATIONS OF A MENTAL OR PHYSICAL CONDITION; SPONTANEOUS DECLARATIONS; LEARNED TREATISES AND TABLES; REGULAR COMMERCIAL PUBLICATIONS; OFFICIAL STATEMENTS; SUNDRY APPLICATIONS OF THE RULE.

Declarations of a Mental or Physical Condition.

§ 162 *a*. General Principle.
§ 162 *b*. Statements of Pain and Suffering.
§ 162 *c*. Statements of Design, Plan, Intent.
§ 162 *d*. Statements of Reason, Motive, Feeling, Emotion.
§ 162 *e*. Statements by a Testator.

Spontaneous Declarations (Res Gestæ).

§ 162 *f*. General Principle.
§ 162 *g*. Limits of the Principle.
§ 162 *h*. Sundry Doctrines; Complaint of Rape; Charge by Seduced Woman; Complaint after Robbery.

Learned Treatises and Statistical Tables.

§ 162 *i*. Exception generally denied.
§ 162 *j*. Partial Forms of Recognition.
§ 162 *k*. Application of the Prohibition

Regular Commercial Publications.

§ 162 *l*. Reports of Market Prices; Reports of Legal Decisions; etc.

Official Statements.

§ 162 *m*. General Principle.
§ 162 *n*. Application of the Principle.

Sundry Applications of the Hearsay Rule.

§ 162 *o*. View by Jury; Testimony at a View; Juror's Private Knowledge.
§ 162 *p*. Interpreter; Counsel; *Ex parte* Experiments.

[In the following remaining exceptions to the Hearsay rule, the only common circumstance is that the death of the person, or other reason for unavailability, need not be shown.]

Declarations of a Mental or Physical Condition.

§ 162 *a* [102]. **General Principle.**[1] Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof of its existence; and whether they were real or feigned is for the jury to determine. [In the words of L. J. Mellish:[2] "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." This use of such statements is often spoken of as admissible under the *res gestæ*

[1] [The original section has been subdivided into several.]
[2] [Sugden *v.* St. Leonards, L. R. 1 P. D. 154.]

notion,[3] or as "original" evidence, *i. e.* not an exception to the Hearsay rule. But this seems clearly unsound. There is one sort of evidence of mental condition which is in truth merely indirect or circumstantial, and therefore not subject to the Hearsay rule, *e. g.* where the sharpening of a knife on the morning before a homicide is taken as evidence of a design to kill, or where the repeated infliction of blows indicates malice, or where running away is taken as indicating fear. But where a distinct assertion, in the form of words, predicating a mental state, is offered, — as, "I have a pain in my side," or "I have the intention of going out of town," or "I do this for such-and-such a reason," — this language is no less an assertion of the existence of a fact than is an assertion of any other sort of fact; in the neat phrase of L. J. Bowen:[4] "The state of a man's mind is as much a fact as the state of his digestion;" and therefore such assertions, being taken on the credit of the declarant as testimonial evidence of the fact asserted, are met by the Hearsay rule (on the principle explained *ante*, § 99 *a*). To admit them, then, is to make an exception to the Hearsay rule.

The different kinds of facts that may be the subject of such assertions may be roughly grouped as follows: (1) Assertions of pain, or other physical condition; (2) assertions of plan, design, intention; (3) assertions of feeling, emotion, motive, reason; (4) sundry assertions by a testator.]

§ 162 *b*. **Statements of Pain and Suffering.** The representation by a sick person of the nature, symptoms, and effects of the malady under which he is laboring at the time, are received as original evidence;[1] if made to a medical attendant, they are of greater weight as evidence; but, if made to any other person, they are not on that account rejected.[2] [As to this, certain discriminations must be made. (1) Statements as to the circumstances of an injury (as, that the person was knocked down by a horse), or the nature of the injury (as, that a leg was broken), are not within the exception, which covers only statements of an internal condition.[3] On the same principle, statements of past sufferings or symptoms are ex-

[3] [*Ante*, § 108; this was the treatment by the author, and the paragraph was originally placed in that chapter.]

[4] [In Edgington *v.* Fitzmaurice, L. R. 29 Ch. D. 459.]

[1] [Not as "original" evidence; see the explanation above.]

[2] Aveson *v.* Lord Kinnaird, 6 East 188; 1 Ph. Evid. 191; Grey *v.* Young, Harp. 38; Gilchrist *v.* Bale, 8 Watts 355. [The principle is well expounded in Phillips *v.* Kelly, 29 Ala. 628; Hyatt *v.* Adams, 16 Mich. 200; State *v.* Gedicke, 43 N. J. L. 88.]

[3] [State *v.* Dart, 29 Conn. 153; Ill. Cent. R. Co. *v.* Sutton, 42 Ill. 438; Carthage T. Co. *v.* Andrews, 102 Ind. 144; C. C. C. & I. R. Co. *v.* Newell, 104 id. 269; Bacon *v.* Charlton, 7 Cush. 568; Morrissey *v.* Ingham, 111 Mass. 65; Merkle *v.* Bennington, 58 Mich. 160; Dundas *v.* Lansing, 75 id. 499; People *v.* Foglesong, id., 74 N. W. 730; Rogers *v.* Crain, 30 Tex. 284; Newman *v.* Dodson, 61 id. 95; Earl *v.* Tupper, 42 Vt. 284; McKeigne *v.* Janesville, 68 Wis. 57. This limitation is constantly mentioned. Hawks *v.* Chester, Vt., 40 Atl. 727 ("I am terribly hurt") seems to transgress it.]

cluded; the exception applies only to statements of a present condition.[4] (2) Such are the orthodox and correct limitations of the rule. But, in consequence of the obscure and much misunderstood language of an often cited case,[5] a certain additional distinction as to statements to a physician has grown up in some jurisdictions, though it is applied with very different results. At one extreme are a few jurisdictions, following the lead of Massachusetts,[6] using this distinction to enlarge the exception, *i.e.* admitting even statements of past suffering and symptoms if they were made to a physician.[7] At the other extreme are a few jurisdictions using the distinction to limit the scope of the exception, *i. e.* not admitting even assertions of present pain unless made to a physician. This narrow limitation, unsound upon precedent, principle, and policy, originated in a modern New York ruling,[8] and has since been copied by other Courts not appreciating the heterodox nature of the New York variation;[9] but it must be noted that screams and exclamations of anguish are discriminated as not excluded by this limitation.[10] The limitation has been expressly repudiated by several Courts.[11] (3) As the

[4] [Rowland *v.* Walker, 18 Ala. 749; Stone *v.* Watson, 37 id. 288; Powell *v.* State, 101 Ga. 9; Atch. T. & S. F. R. Co. *v.* Frazier, 27 Kan. 463; Grand R. & I. R. Co. *v.* Huntley, 38 Mich. 543; Girard *v.* Kalamazoo, 92 id. 610; Towle *v.* Blake, 48 N. H. 96; Lush *v.* McDaniel, 13 Ired. 487; Wheeler *v.* R. Co., Tex., 43 S. W. 876; State *v.* Fournier, Vt., 35 Atl. 178.]

[5] [Barber *v.* Merriam, 11 All. 322.]

[6] [Barber *v.* Merriam, *supra*, apparently meant to take this view; such is the present interpretation in that jurisdiction: Roosa *v.* Loan Co., 132 Mass. 439. But, oddly, this extension does not cover statements as to the circumstances of the injury.]

[7] [People *v.* Shattuck, 109 Cal. 673; C. C. C. & I. R. Co. *v.* Newell, 104 Ind. 264; Omberg *v.* Mut. Assoc., Ky., 40 S. W. 909; State *v.* Gedicke, 43 N. J. L. 88. This extension, though in any case not orthodox, has been expressly repudiated by some Courts: Rowland *v.* R. Co., 63 Conn. 415; Dundas *v.* Lansing, 75 Mich. 503; Webber *v.* R. Co., 67 Minn. 155; Williams *v.* R. Co., 68 id. 55.]

[8] [No such limitation originally obtained: Caldwell *v.* Murphy, 11 N. Y. 419; Teachout *v.* People, 41 id. 13, and intervening cases. Then, two years later, it appeared in Reed *v.* R. Co., 45 id. 579, based partly on a not unnatural misunderstanding of Barber *v.* Merriam, *supra*, partly on the unsound reason that the abolition of parties' incompetency rendered such statements unnecessary, — a reason which forgets that the scope of the exception is not confined to parties, and which in any case does not justify a distinction as to physicians. The later New York cases are: Hagenlocher *v.* R. Co., 99 id. 136; Roche *v.* R. Co., 105 id. 294; Davidson *v.* Cornell, 132 id. 237; Link *v.* Sheldon, 136 id. 1, 9.]

[9] [Wilson *v.* Granby, 47 Conn. 76; Atl. S. R. Co. *v.* Walker, 93 Ga. 462; Broyles *v.* Prisock, 97 id. 643, 25 S. E. 388; S. F. & W. R. Co. *v.* Wainwright, 99 id. 255, 25 S. E. 622; Firkins *v.* R. Co., 61 Minn. 31; Williams *v.* R. Co., 68 id. 55; Quaife *v.* R. Co., 48 Wis. 524; Tebo *v.* Augusta, 90 id. 405; Keller *v.* Gilman, 93 id. 9; Curran *v.* Stange Co., id., 74 N. W. 377. In Illinois the recent decisions have looked in several directions: Globe A. I. Co. *v.* Gerisch, 163 Ill. 625; West Chic. S. R. Co. *v.* Carr, 170 id. 478, 48 N. E. 992; West Chic. S. R. Co. *v.* Kennelly, 170 id. 508, 48 N. E. 996 (dated the same day as the preceding one); Springfield R. Co. *v.* Hoeffner, id., 51 N. E. 884.]

[10] [Cases in the preceding two notes; see the criticism of Canty, J., diss., in Williams *v.* R. Co., *supra*.]

[11] [Hancock Co. *v.* Leggett, 114 Ind. 547; Chic. S. L. & P. R. Co. *v.* Spilker, 134 id. 380, 392; Clevel. C. C. & S. L. R. Co. *v.* Prewitt, ib. 557; Louisv. N. A. & C. R. Co. *v.* Miller, 141 id. 533, 559; North. P. R. Co. *v.* Urlin, 158 U. S. 273; Balt. & O. R. Co. *v.* Rambo, 16 U. S. App. 277; Bagley *v.* Mason, 69 Vt. 175; Brown *v.* Mt. Holly, ib.

thought of possible litigation commonly suggests itself to an injured person not long after the time of injury received, and as it seems impracticable to draw any real line of distinction between the contemplation of litigation and the beginning of process, it seems hardly feasible to apply the distinction of *post litem motam* to the present exception; and such was the view of the earlier rulings.[12] But in several jurisdictions the principle has been introduced to a certain extent. In some, it is said that statements made during a consultation, not for medical assistance, but in preparation for the trial, are to be excluded.[13] In others, it is said that the mere fact of *lis mota* does not exclude, but that the statement will be rejected according to the circumstances of the case, — a better form of rule.[14]]

§ 162 *c*. **Statements of Design, Plan, Intent.** [The existence of a person's design or plan to do a thing is relevant circumstantially to show that he ultimately did it (*ante*, § 14 *k*). The presence of the design or plan may be evidenced circumstantially by conduct (*ante*, §§ 14 *m*, 14 *q*); but the person's assertion of a present design or plan, when made in a natural way and not under circumstances of suspicion, is admissible under the present exception. The *res gestæ* notion (*ante*, § 108) is often put forward, but improperly, as the justification of this; for the reason already explained (*ante*, § 162 *a*) such statements must be regarded as admissible by virtue of the present exception.[1] They are generally treated as admissible; [2] though a few Courts are found to exclude them, usually through a misapplication

364. The above question of the hearsay use of statements to a physician must be distinguished from (a) asking the physician's reasons for his opinion, (b) excluding a physician's testimony to the injury because based entirely on information from the patient and not on personal observation: *post*, § 430 *l*.]

[12] [Clevel. C. C. & I. R. Co. *v.* Newell, 104 Ind. 271; Hatch *v.* Fuller, 131 Mass. 574; Towle *v.* Blake, 48 N. H. 96; Norris *v.* Haverhill, 65 id. 89; Matteson *v.* R. Co., 35 N. Y. 491; Bagley *v.* Mason, 69 Vt. 175.]

[13] [Darrigan *v.* R. Co., 52 Conn. 291, 309; Lambertson *v.* Traction Co., N. J. L., 38 Atl. 683 (qualified); Del. L. & W. R. Co. *v.* Roalefs, 28 U. S. App. 569; Stewart *v.* Everts, 76 Wis. 42; Abbot *v.* Heath, 84 id. 320; Stone *v.* R. Co., 88 id. 98, 105; Keller *v.* Gilman, 93 id. 9.]

[14] [Ill. C. R. Co. *v.* Sutton, 42 Ill. 440; Grand Rapids & I. R. Co. *v.* Huntley, 38 Mich. 544; Kans. C. F. S. & M. R. Co. *v.* Stoner, 10 U. S. App. 209. The later Michigan cases look the same way, but are not uniform: Jones *v.* Portland, 88 Mich. 600; Heddle *v.* R. Co., id., 70 N. W. 1096; Strudgeon *v.* Sand Beach, 107 id. 496; Will *v.* Mendon, 108 id. 251; McKormick *v.* West Bay City, 110 id. 265; Butts *v.* Eaton Rapids, id., 74 N. W. 872.]

[1] [See the principle expounded in Com. *v.* Trefethen, 157 Mass. 185; Mut. L. Ins. Co. *v.* Hillmon, 145 U. S. 622; and particularly by Start, C. J., in State *v.* Hayward, 62 Minn. 474.]

[2] [Threats to commit a crime are the commonest instance, and are always admitted so far as the present principle is concerned; for the relevancy of the design, see *ante*, § 14 *k*. Threats to commit suicide are another not uncommon instance: Com. *v.* Trefethen, *supra*; Hale *v.* Ins. Co., 65 Minn. 548; Rens *v.* Relief Ass'n, Wis., 75 N. W. 991; *contra*: Siebert *v.* People, 142 Ill. 585; State *v.* Punshon, 124 Mo. 448, 457; for the circumstantial aspect of this evidence, see *ante*, § 14 *r*. Other examples are as follows: Cowper's Trial, 13 How. St. Tr. 1170 (intention to lodge at a place); R. *v.* Buckley, 13 Cox Cr. 294; Denver & R. G. R. Co. *v.* Spencer, Colo., 52 Pac. 211 (to go to a place); State *v.* Smith, 49 Conn. 380 (to make an arrest); Riggs *v.* Powell, 142 Ill. 453 (to provide for a wife); Timmons *v.* Timmons, 3 Ind. 250 (to be absent); Grimes *v.*

of the *res gestæ* principle.[3] Statements of intent, where the intent becomes material in determining a person's domicile, are sometimes treated as admissible by virtue of the *res gestæ* or verbal-act doctrine;[4] but it is perhaps better to regard them as governed by the present exception.[5] Statements of intent accompanying an alleged crime are usually admitted according to the *res gestæ* doctrine.[6]]

§ 162 *d*. **Statements of Reason, Motive, Feeling, Emotion.** [These are equally included under the general principle, and are admissible so far as they appear to be natural and sincere. For example, where the reason or motive for the departure of certain workmen was a part of the plaintiff's case, the statements of the workmen to the superintendent, when leaving, as to their reason for it, were admitted;[1] so also, in an action upon a false representation, the person's declaration, when sending goods, that he sent them in reliance upon the representation was admitted.[2] So also statements describing one's fear,[3] belief,[4] cheerful or melancholy feelings or the like,[5] physical disgust,[6] hostility or affection, and the like.[7] On this prin-

State, 68 id. 193 (to go to a place); Walling *v.* Com., Ky., 38 S. W. 428 (to spend the night at a place); Inness *v.* R. Co., 168 Mass. 433 (to take a train); King *v.* McCarthy, 54 Minn. 190 (to be absent); State *v.* Hayward, 62 id. 474 (to meet the defendant); Carroll *v.* State, 22 Tenn. 321 (to go to a place); Hamby *v.* State, 36 Tex. 523 (to search for the defendant); State *v.* Howard, 32 Vt. 404 (to go to a place); State *v.* Dickinson, 41 Wis. 307 (same); U. S. *v.* Craig, 4 Wash. C. C. 729 (to go and get bail); Mut. L. Ins. Co. *v.* Hillmon, *supra* (to go to a place); Hunter *v.* State, 40 N. J. L. 5 (to go with the defendant); Lake S. R. Co. *v.* Herrick, 49 Oh. 25 (to go to a place).]

[3] [R. *v.* Petcherini, 7 Cox Cr. 82; R. *v.* Wainwright, 13 id. 171; Chic. & E. I. R. Co. *v.* Chancellor, 165 Ill. 438; Hank *v.* State, 148 Ind. 238; Com. *v.* Gray, Ky., 30 S. W. 1015; Schultz *v.* Schultz, Mich., 71 N. W. 854; State *v.* Wood, 53 N. H. 494; Mack *v.* Porter, 25 U. S. App. 595; McBride *v.* Com., Va., 30 S. E. 454.]

[4] [See *ante*, § 108; *post*, § 162*f*.]

[5] [Viles *v.* Waltham, 157 Mass. 542 (leading case); Gorham *v.* Canton, 5 Greenl. 267; Kreitz *v.* Behrensmayer, 125 Ill. 141, 196; Etna *v.* Brewer, 78 Me. 377; Watson *v.* Simpson, 8 La. An. 337; Chase *v.* Chase, 66 N. H. 588; *Exp.* Blumer, 27 Tex. 743; Chambers *v.* Prince, 75 Fed. 176.]

[6] [R. *v.* Petcherini, 7 Cox Cr. 81; Carr *v.* State, 33 Ark. 103; Comfort *v.* People, 54 Ill. 406; State *v.* Walker, 77 Me. 169; Garber *v.* State, 44 Tenn. 169; Little *v.* State, 75 Tex. 322; Mack *v.* State, 48 Wis. 280.]

[1] [Elmer *v.* Fessenden, 151 Mass. 161.]

[2] [Fellowes *v.* Williamson, Moo. & M. 307. For other examples, see Tilk *v.* Parsons, 2 C. & P. 202; Skinner *v.* Shew, 1894, 2 Ch. 581, 593; Mobile R. Co. *v.* Ashcraft, 48 Ala. 31; Rives *v.* Lamar, 94 Ga. 186; Steketee *v.* Kimm, 48 Mich. 322; Hadley *v.* Carter, 8 N. H. 42; Hine *v.* R. Co., 149 N. Y. 154; McCracken *v.* West, 17 Oh. 16, 24; Acad. of M. Co. *v.* Davidson, 85 Wis. 129, 136.]

[3] [Redford *v.* Birley, 1 State Tr. N. s. 1071, 1238, 1244 (expressions of alarm at a mob); R. *v.* Vincent, 9 C. & P. 275; Com. *v.* Crowley, 165 Mass. 569.]

[4] [Hathaway's Trial, 14 How. St. Tr. 653.]

[5] Cowper's Trial, 13 How. St. Tr. 1165; State *v.* Baldwin, 36 Kan. 10; see other instances, *ante*, § 14 *r*.]

[6] [Kearney *v.* Farrell, 28 Conn. 320; Gloystine *v.* Com., Ky., 33 S. W. 824.]

[7] [*E. g.* in the ordinary case of a witness' expressions used to discredit him: Day *v.* Stickney, 14 All. 258; see the subject discussed *post*, § 450.

A good deal of the evidence commonly resorted to in proving the above sorts of mental conditions is of course circumstantial evidence from conduct and indirect inference from language, and there is therefore no need to invoke an exception to the Hearsay rule; see, *e. g.*, DuBost *v.* Beresford, 2 Camp. 511; Chase *v.* Lowell, 151 Mass. 422; Blake *v.* Damon, 103 id. 209.]

ciple,] in actions for criminal conversation, it being material to ascertain upon what terms the husband and wife lived together before the seduction, [or in any other case in which the feelings of either toward the other is material,] their language and deportment towards each other, their correspondence together, and their conversations and correspondence with third persons, are original evidence.[8] [Such letters and other statements are admissible "because credit is given to her for having acted with sincerity at the time; and her letters are receivable to show the state of her affections before her elopement, being written at a moment when she had no purpose to answer in writing them."[9]] But to guard against the abuse of this rule, it has been held, that, before the letters of the wife can be received, it must be proved that they were written prior to any misconduct on her part, and when there existed no ground for imputing collusion.[10] If written after an attempt of the defendant to accomplish the crime, the letters are inadmissible.[11] Nor are the dates of the wife's letters to the husband received as sufficient evidence of the time when they were written, in order to rebut a charge of cruelty on his part; because of the danger of collusion.[12]

§ 162 *e*. **Statements by a Testator.** [The admissibility of statements by a testator is a matter of much apparent confusion among the precedents, not so much because of numerous oppositions of policy, but because different principles, not in themselves related, may be brought to bear according to the varying nature of the declaration and of the thing desired to be evidenced by it. A convenient division, for the purpose of examining the different questions, may be made according as the issue involves (1) the contents, or the fact of execution or of non-execution or of an act of revoca-

[8] Trelawney *v.* Colman, 2 Stark. 191; s. c. 1 Barn. & Ald. 90; Willis *v.* Bernard, 8 Bing. 376; Elsam *v.* Fancett, 2 Esp. 562; Winter *v.* Wroot, 1 Moo. & R. 404; Gilchrist *v.* Bale, 8 Watts 355; Thompson *v.* Trevanion, Skin. 402; [Jones *v.* Thompson, 6 C. & P. 415; Wilton *v.* Webster, 7 id. 198. But they are not always "original" evidence.]

[9] [Pollock, *arguendo*, in Wright *v.* Tatham, 5 Cl. & F. 683. Other instances are as follows: Long *v.* Booe, 106 Ala. 570; Laurence *v.* Laurence, 164 Ill. 367; Pettit *v.* State, 135 Ind. 393, 415; Puth *v.* Zimbleman, 99 Ia. 641; Collins *v.* Stephenson, 8 Gray 440; Jacobs *v.* Whitcomb, 10 Cush. 257; Dalton *v.* Dregge, 99 Mich. 250; McKenzie *v.* Lautenschlager, id., 71 N. W. 489; Lockwood *v.* Lockwood, 67 Minn. 476; Cattison *v.* Cattison, 22 Pa. 277; Glass *v.* Bennett, 89 Tenn. 482; Gaines *v.* Relf, 12 How. 535; Rudd *v.* Rounds, 64 Vt. 432, 439; Beach *v.* Brown, Wash., 55 Pac. 46; Horner *v.* Yance, 93 Wis. 352.]

[10] Edwards *v.* Crock, 4 Esp. 39; Trelawney *v.* Colman, 1 Barn. &. Ald. 90; 1 Phil. Evid. 190.

[11] Wilton *v.* Webster, 7 C. & P. 198.

[12] Houliston *v.* Smythe, 2 C. & P. 22; Trelawney *v.* Colman, 1 Barn. & Ald. 90.

[The original text contains the following: "In prosecutions for *rape*, too, where the party injured is a witness, it is material to show that she made complaint of the injury while it was yet recent. Proof of such complaint, therefore, is original evidence; but the statement of details and circumstances is excluded, it being no legal proof of their truth." But this subject is treated more at length, *post*, §§ 162 *h*, 469 *c*.]

tion, (2) the intent to revoke, (3) undue influence or fraud, (4) sundry other matters.

(1) *Ante-testamentary* declarations (*i. e.* of an intention or plan to make a will, or a will of certain contents, or to alter one) involve two principles: first, the principle of relevancy, *i. e.* that an intention to do an act is some evidence that it was done;[1] secondly, the admissibility, under the present exception to the Hearsay rule, of the testator's statements of intention as evidence of the fact of the intention (the principle of § 162 *c*, *ante*); the propriety of thus using them is conceded.[2] *Post-testamentary* statements (*i. e.* as to the fact of execution or non-execution or revocation or as to the contents) may be looked at in more than one way. (*a*) If we treat them simply as assertions of a past act of the above sort, there is no established exception to admit them, and they fall under the ban of the Hearsay rule, like other extra-judicial assertions, and are excluded.[3] But a number of Courts have thought it not impolitic to make a special exception for such statements, and to admit them in spite of the Hearsay rule.[4] (*b*) But it is possible to admit them without breaking into the Hearsay rule. It may be said that the testator's declarations are evidence of his state of mind, *i. e.* his belief, either as indirect evidence or as assertions admissible under the present exception; and that then, by a second step, his belief is circumstantial evidence, retrospectively, of his having done or not done the act in question, *e. g.* his belief that he destroyed a will is evidence that he did destroy it. This mode of treating the statements was adopted by Mr. J. Hannen, in *Keen* v. *Keen*[5] and later in *Sugden* v. *St. Leonards*;[6] and has apparently also been

[1] [Treated *ante*, § 14 *k*; such an intention is here regarded as relevant.]

[2] [The cases are the same as in § 14 *k*, *ante*.]

[3] [Staines *v.* Stewart, 2 Sw. & Tr. 329; Doe *v.* Palmer, 16 Q. B. 747; Quick *v.* Quick, 3 Sw. & Tr. 442; Mellish, L. J., dissenting on this point, in Sugden *v.* St. Leonards, L. R. 1 P. D. 154 (leading opinion); Henry *v.* Hall, 106 Ala. 84; Mercer *v.* Mackin, 14 Bush 441; Collins *v.* Elliott, 1 H. & J. 1; Wells *v.* Wells, Mo., 45 S. W. 1095; Boylan *v.* Meeker, 28 N. J. L. 276 (leading opinion); Gordon's Will, 50 N. J. Eq. 397, 424; Dan *v.* Brown, 4 Cow. 290; Jackson *v.* Betts, 6 id. 382; Grant *v.* Grant, 1 Sandf. Ch. 235.]

[4] [The following cases proceed more or less clearly upon this ground: Cockburn, C. J., and Jessel, M. R., in Sugden *v.* St. Leonards, L. R. 1 P. D. 225, 154 (leading opinions); Goods of Sykes, L. R. 3 P. & D. 27; Harris *v.* Knight, L. R. 15 P. D. 174; Patterson *v.* Hickey, 32 Ga. 159; McDonald *v.* McDonald, 142 Ind. 55; Scott *v.* Hawk, Ia., 75 N. W. 368; Lambie's Estate, 97 Mich. 49, 57; Beadles *v.* Alexander, 9 Baxt. 604; Smiley *v.* Gambill, 39 Tenn. 164; Tynan *v.* Pasehal, 27 Tex. 300.

The recent cases in this country usually purport to follow Sugden *v.* St. Leonards. But whether that case is law in England, in the sense of establishing any principle, has been left open in the House of Lords: Woodward *v.* Goulstone, L. R. 11 App. Cas. 469; moreover, its effect is sometimes misapprehended, as explained in note 6, *post*.]

[5] [L. R. 3 P. & D. 107.]

[6] [L. R. 1 P. D. 203. It had previously appeared in Patten *v.* Poulton, 4 Jur. N. S. 341; Whitely *v.* King, 10 id. 1079; see *ante*, § 14 *s*, for analogies. It will now be understood why Sugden *v.* St. Leonards can hardly be cited indiscriminately in

the foundation of a number of American cases admitting such statements.[7]

(2) Where the fact of destruction or cancellation is admitted, and the accompanying intent is material to determine whether the act amounted to revocation, the testator's state of mind before and after the act is some evidence of his state of mind at the time of it (under the principle of § 14 *l*, *ante*), and hence his declarations, before and after, evidencing his state of mind at the time of making them are admissible.[8]

(3) Where undue influence or fraud is the issue, three uses of the evidence present themselves. (*a*) The testator's utterances, offered as direct assertions that a will made by him was obtained by undue influence, are obnoxious to the Hearsay rule, and therefore inadmissible;[9] though in a few jurisdictions a special exception for this purpose (analogous to that suggested by some judges in *Sugden* v. *St. Leonards*) is recognized.[10] (*b*) The utterances may be offered either as indirect evidence of the testator's condition of mind — weakness, susceptibility to importunities, and the like — or as declarations of a state of mind (under the present exception) — assertions of affection or dislike, etc., — and are thus admissible; his condition of mind, intelligence and strength of purpose, feelings towards this or that person, being all circumstances which bear on the fact of undue influence; the propriety of this use is universally recognized.[11]

favor of the reception of post-testamentary declarations; for the opinions of Hannen, J., Jessel, M. R., Cockburn, C. J., and Mellish, L. J., represent at least three distinct attitudes towards such evidence. For this reason the following cases, purporting merely to approve that case, leave undecided the question of principle: *Re* Ball, 25 L. R. Ir. 557; Flood *v.* Russell, 29 id. 97; Behrens *v.* Behrens, 47 Oh. St. 332.]

[7] [McBeth *v.* McBeth, 11 Ala. 602 (leading opinion); *Re* Johnson's Will, 40 Conn. 587; Steele *v.* Price, 5 B. Monr. 63; Callagan *v.* Burns, 57 Me. 458 (leading opinion); *Re* Page, 118 Ill. 581; Valentine's Will, 93 Wis. 45; Steinke's Will, id., 70 N. W. 61. This doctrine has been expressly discussed and repudiated in Boylan *v.* Meeker, 26 N. J. L. 276; but apparently not elsewhere.]

[8] [Pickens *v.* Davis, 133 Mass. 257; Lane *v.* Moore, 151 id. 90; Betts *v.* Jackson, 6 Wend. 188; see Patterson *v.* Hickey, 32 Ga. 159; Lawyer *v.* Smith, 8 Mich. 860.]

[9] [Jackson *v.* Kniffen, 2 Johns. 33 (leading case); Shailer *v.* Bumstead, 99 Mass. 122 (leading case); Calkins *v.* Calkins, 112 Cal. 296; Kaufman's Estate, 117 id. 288; Comstock *v.* Hadlyme, 8 Conn. 263; Mallery *v.* Young, Ga., 22 S. E. 142; Gwin *v.* Gwin, Ida., 48 Pac. 295; Reynolds *v.* Adams, 90 Ill. 147; Kirkpatrick *v.* Jenkins, Ky., 33 S. W. 830, *semble;* Gibson *v.* Gibson, 24 Mo. 236; Doherty *v.* Gilmore, 136 id. 414; Waterman *v.* Whitney, 11 N. Y. 157 (leading case); Marx *v.* McGlynn, 88 id. 374; Moritz *v.* Brough, 16 S. & R. 403; Hoshauer *v.* Hoshauer, 26 Pa. 404; Kaufman *v.* Caughman, 49 S. C. 159; Kennedy *v.* Upshaw, 64 Tex. 417.]

[10] [Reel *v.* Reel, 1 Hawks 268 (leading case); Howell *v.* Barden, 3 Dev. 442; Beadles *v.* Alexander, 9 Baxt. 604; Linch *v.* Linch, 69 Tenn. 529.]

[11] [Quick *v.* Quick, 3 Sw. & Tr. 442; Dennis *v.* Weeks, 51 Ga. 32; Bates *v.* Bates, 27 Ia. 113; Hollingsworth's Will, 58 id. 527; Stephenson *v.* Stephenson, 62 id. 165; Parsons *v.* Parsons, 66 id. 757; Muir *v.* Miller, 72 id. 590; Goldthorp's Estate, 94 id. 336; Clark *v.* Turner, 69 N. W. 843; Rambler *v.* Tryon, 7 S. & R. 93; Herster *v.* Herster, 122 Pa. 239; Johnson *v.* Brown, 51 Tex. 80; Robinson *v.* Hutchinson, 26 Vt. 46; Jackman's Will, 26 Wis. 122, 130; Bryant *v.* Pierce, 95 id. 331; and cases in the last preceding note but one.]

(*c*) Again, the question whether a will was made under undue influence is, in one aspect, a question whether the testamentary intentions and wishes represented in it are the normal ones of the testator, or whether, relatively to his known usual and constant state of mind, they are abnormal. It thus becomes important to learn what was the normal condition of his affections, wishes, and testamentary intentions, for the purpose of establishing this standard of normality. As evidence of these affections, intentions, etc. — either by circumstantial inference or under the present exception for declarations of a state of mind, — his utterances at various times before or after execution (including expressions of affection or the opposite, previous wills or statements of intention, etc.) may be resorted to. This use of such evidence is also universally accepted.[12]

(4) Where the question is whether the testator signed the will understanding its contents (usually where fraud is charged), the fact of his previous or subsequent understanding or ignorance of its terms, as evidenced by his utterances, is evidence as to his understanding or ignorance at the time.[13]

Spontaneous Declarations.

§ 162 *f.* **General Principle.** [The use of utterances to which the Hearsay rule is not applicable, and the employment of the term *res gestæ* for some kinds of such utterances, has already been explained (*ante*, §§ 100–110 *a*). It was there noticed that the Hearsay rule, excluding assertions used as direct testimonial evidence of the fact asserted, does not apply to (1) words used circumstantially as evidence, *e. g.* of notice conveyed to the person addressed, and the like, (2) words uttered at the time of doing an equivocal act — *e. g.* the occupation of land — and forming a part of the total conduct which determines the legal significance of the act, (3) words the utterance of which is a fact forming part of the issue, *e. g.* the words of a contract or a slander. To the last two sorts the term *res gestæ*, it was noticed, is often applied. There is a fourth class of statements,

[12] [Hughes *v.* Hughes, 31 Ala. 524 (leading case); Denison's Appeal, 29 Conn. 402; Duffield *v.* Morris, 2 Harringt. 375; Williamson *v.* Nebers, 14 Ga. 311; Taylor *v.* Pegram, 151 Ill. 106, 115; Harp *v.* Parr, 168 id. 459; Goodbar *v.* Lidikay, 136 Ind. 1, 8; Dye *v.* Young, 44 Ia. 435; Mooney *v.* Olsen, 22 Kan. 78 (leading case); Griffith *v.* Diffenderfer, 50 Md. 482; Barlow *v.* Waters, Ky., 28 S. W. 785; Shailer *v.* Bumsted, 99 Mass. 122 (leading case); Renaud *v.* Pageot, 102 Mich. 568; Bush *v.* Delano, id., 71 N. W. 628; Sheehan *v.* Kearney, Miss., 21 So. 41; Pancoast *v.* Graham, 15 N. J. Eq. 309; McRae *v.* Malloy, 93 N. C. 159; Irish *v.* Smith, 8 S. & R. 579; Neel *v.* Potter, 40 Pa. 483; Perret *v.* Perret, 184 id. 131; Gardner *v.* Frieze, 16 R. I. 641; Kaufman *v.* Caughman, 49 S. C. 159; Peery *v.* Peery, 94 Tenn. 328; Kerr *v.* Lunsford, 31 W. Va. 659.]

[13] [Howe *v.* Howe, 99 Mass. 98 (deed); Nelson's Will, 141 N. Y. 152, 157; Patton *v.* Allison, 7 Humph. 335; Maxwell *v.* Hill, 89 Tenn. 595; Barney's Will, Vt., 40 Atl. 1027.]

usually referred to in connection with the term *res gestæ*, which, however, seem not to be legitimately embraced by any variety of that principle, but to form by themselves a separate exception to the Hearsay rule. The typical case is a statement or exclamation by an injured person, immediately after the injury, as to the circumstances of the injury, or by one present at an affray, a collision, or any other exciting occasion, as to the circumstances of it as observed by him. That these ordinarily cannot be accounted for under the first or the third of the above classes of utterances, as utterances to which the Hearsay rule does not in principle apply, seems clear. That they cannot usually be placed in the second of the above classes seems also true; because in that class there is by hypothesis an equivocal act which needs to be colored and completed in legal significance by the words of the actor accompanying it — as, the occupation of land, the handing over of money, the tearing up of a will, — and this fundamental requisite is in the class of cases here concerned not present. Moreover, in general, to say that an utterance is not admissible because the Hearsay rule is not applicable — *i. e.* because the utterance is used, not as an assertion to prove the truth of the fact asserted, but independently of the truth of the utterance as an assertion — is to concede that the Hearsay rule does apply to the present class of cases, because the assertion is used as testimonial evidence of the fact asserted, — as, where the injured person declares who assaulted him or whether the locomotive-bell was rung, or where the bystander at an affray calls out that the defendant shot first. Since, then, such assertions are a genuine instance of using a hearsay assertion testimonially, and since it is universally accepted that they are admissible under certain limitations, it seems proper to treat them frankly as the subject of a real and separate exception to the Hearsay rule. The earlier cases were inclined to deal with them as somehow connected with and admissible under the second class above-mentioned — utterances accompanying an act — and therefore as so-called "original" evidence, *i. e.* to which the Hearsay rule was not applicable;[1] and this attitude is of course still constantly found. But a number of Courts recognize, more or less distinctly, that the conventional term *res gestæ* affords no satisfactory explanation, and that the present class of assertions may better be treated as forming a genuine exception to the Hearsay rule; the following passage illustrates this: Barrows, J., in *State* v. *Wagner*,[2] admitting outcries naming an as-

[1] [*E. g.* Upham, J., in Hadley *v.* Carter, 8 N. H. 42: "Where the declarations of an individual are so connected with his acts as to derive a degree of credit from such connection, independently of the declaration, the declaration becomes part of the transaction;" see other instances in Cornelius *v.* State, 12 Ark. 805; Mitchum *v.* State, 11 Ga. 621; Hart *v.* Powell, 18 id. 639.

The early English instances are Thompson *v.* Trevanion, Skinner 402; Aveson *v.* Kinnaird, 6 East 193; R. *v.* Foster, 6 C. & P. 325; but it is hard to found any general principle upon their language.]

[2] [61 Me. 195.]

sailant: "We think that the precise ground upon which their admission should be placed in a case like this is substantially the same as that upon which dying declarations are admissible [*i. e.* necessity and trustworthiness.] . . . No one can doubt that the exclamations of these two women embodied the truth as it appeared to each; and that the cries of alarm and supplication uttered by any and all human beings under similar circumstances would express their perceptions of existing facts as truly as if backed by all the oaths known in Christendom. . . . We merely say that, whatever force is given to dying declarations as the utterances of those who on account of their peculiar situation may be relied on to tell the exact truth as it appears to them, must needs be accorded also to the exclamations of mortal terror caused by a deadly assault." [3]]

§ 162 *g.* **Limits of the Principle.** [The willingness to receive these statements, as an exception to the Hearsay rule, rests on the notion that the circumstances of the occasion so excite and control the mind of the speaker that his statements are natural and spontaneous, and therefore sincere and trustworthy; thus, Lacombe, J., says, charging a jury, in *U. S.* v. *King*:[1] "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 the principle applies only to a statement] 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." They must thus be "spontaneous," [2] "impulsive," [3] "instinctive," [4] "generated by an excited feeling which extends without break or let-down from the moment of the event they illustrate." [5]

It follows that they must have been made during or *shortly after* the time of the occurrence which has inspired them; that is, only "at a time so near as reasonably to preclude the idea of deliberate

[3] [Other leading cases phrasing the general doctrine and emphasizing the use of such statements as assertions given trustworthiness by the circumstances are as follows: Insurance Co. *v.* Mosley, 8 Wall. 397; Brownell *v.* R. Co., 47 Mo. 246; Harriman *v.* Stowe, 57 id. 93; McLeod *v.* Gunther, 80 Ky. 405; Augusta Factory *v.* Barnes, 72 Ga. 226; L. R. R. Co. *v.* Leverett, 48 Ark. 343; Louisv. N. A. & C. R. Co. *v.* Buck, 116 Ind. 576.]

[1] [34 Fed. 314.]

[2] [Nisbet, J., in Mitchum *v.* State, *supra;* Somerville, J., in Dismukes *v.* State, 83 Ala. 289; Cooley, C. J., in Merkle *v.* Bennington, 58 Mich. 163; Black, J., in Leahey *v.* R. Co., 97 Mo. 172.]

[3] [Thacher, J., in Scaggs *v.* State, 8 Sm. & M. 724.]

[4] [Stiness, J., in State *v.* Murphy, 16 R. I. 528.]

[5] [Smith, J., in Carr *v.* State, 43 Ark. 104.]

design,"[6] or, in the words of Lord Holt, in the earliest precedent, constantly quoted, "immediate upon the hurt received, and before that she had time to devise or contrive anything for her own advantage."[7] It is therefore properly a question to be determined anew in each case whether the circumstances were such that the statements could be regarded as of the spontaneous nature intended by the above phrasings;[8] and in the application of the principle other cases can be of little or no service as precedents. The circumstances in each new case may be so different that the period of time which, in the case of other declarations admitted or excluded, has elapsed between the occurrence and the utterance can be no guide for the ruling in another instance.[9]

One or two supposed limitations, sometimes put forward, are due to the association of this exception with the verbal-act or *res gestæ* doctrine, already referred to. (1) It is sometimes said that the utterances of a bystander — *i. e.* not the person assaulted in an affray nor the passenger or the engineer in a railway collision, but a mere spectator not a participant — are inadmissible.[10] This would be proper according to the verbal-act doctrine, which assumes an equivocal act and admits the utterances of the actor as giving it fuller significance; and only the actor's utterances would thus be admissible. But the limitation has no place in the present exception; the utterances of any person within the influence of the exciting circumstances should be admissible.[11] (2) Declarations genuinely coming

[6] [Nisbet, J., in Mitchum *v.* State, *supra;* the language of the opinion in this case is perhaps more quoted (often without acknowledgment) than any other American case.]

[7] [Thompson *v.* Trevanion, Skinner 402. Other useful phrasings will be found in Hill's Case, 2 Gratt. 604; Scaggs *v.* State, *supra;* Waldele *v.* R. Co., 95 N. Y. 274; Galveston *v.* Barbour, 62 Tex. 176; Merkle *v.* Bennington, *supra;* State *v.* Murphy, *supra.*]

[8] [Kennedy *v.* R. Co., 130 N. Y. 656; State *v.* Ramsey, 48 La. An. 1407.]

[9] [A few recent examples from the various jurisdictions, in addition to the foregoing leading cases, are given in the following list: Burton *v.* State, Ala., 23 So. 729; Appleton *v.* State, 61 Ark. 590; Lissak *v.* Crocker Est. Co., 119 Cal. 442; State *v.* Bradnack, 69 Conn. 212; Sullivan *v.* State, 101 Ga. 800; Chic. W. D. R. Co. *v.* Becker, 128 Ill. 548; Globe A. I. Co. *v.* Gerisch, 163 id. 625; Parker *v.* State, 136 Ind. 284, 290; Smith *v.* Dawley, 92 Ia. 312; Walker *v.* O'Connell, Kan., 52 Pac. 894; Hughes *v.* Com., Ky., 41 S. W. 294; State *v.* Desroches, 48 La. An. 428; Eastman *v.* R. Co., 165 Mass. 342; M. & O. R. Co. *v.* Stinson, 74 Miss. 453; State *v.* Thompson, 132 Mo. 301, State *v.* Pugh, 16 Mont. 343; Collins *v.* State, 46 Nebr. 37; Trenton R. Co. *v.* Cooper, N. J., 37 Atl. 730; Penn. R. Co. *v.* Lyons, 129 Pa. 121; State *v.* Arnold, 47 S. C. 9; Tex. & P. R. Co. *v.* Robertson, 82 Tex. 660; Gowen *v.* Bush, 40 U. S. App. 349; People *v.* Kessler, 13 Utah 69; State *v.* Badger, 69 Vt. 216; Steinhofer *v.* R. Co. 92 Wis. 123.]

[10] [Flynn *v.* State, 43 Ark. 293; Stroud *v.* Com., Ky., 19 S. W. 976; State *v.* Ramsey, 48 La. An. 1407; Felska *v.* R. Co., 152 N. Y. 339; Ganaway *v.* Dram. Ass'n, Utah, 53 Pac. 830.]

[11] [See instances in Mobile R. Co. *v.* Ashcraft, 48 Ala. 31; Hartnett *v.* McMahan, 168 Mass. 3; Hitchcock *v.* Burgett, 38 Mich. 505; State *v.* Walker, 78 Mo. 386; State *v.* Kaiser, 124 id. 651; State *v.* Duncan, 116 id. 288, 292, 310; State *v.* Sexton, id. 48 S. W. 452; State *v.* Biggerstaff, 17 Mont. 510; Castner *v.* Sliker, 33 N. J. L. 97; Coll. *v.* Transit Co., 180 Pa. 618; Mo. P. R. Co. *v.* Collier, 62 Tex. 320.]

under the verbal-act doctrine must accompany it, *i. e.* must be strictly contemporaneous with it, because by hypothesis they form a part of the total conduct constituting the act. Some of the earlier cases in this country, frequently cited,[12] seem to have carried this requirement more or less strictly into the present exception; and the English case of *R.* v. *Bedingfield*,[13] in which statements made by one running out of a house immediately after her throat was cut were excluded, apparently was decided on this principle; "it was not something said while something was being done, but something said after something done." But after many judicial efforts to free the use of the present sort of evidence from this limitation, it is now generally accepted (as pointed out above) that, for the present purpose, the statements need not be contemporaneous with the occurrence; they must merely be so nearly after it that there is no reasonable likelihood that there was time to contrive or deliberate. Under the genuine verbal-act doctrine (*ante*, § 108), no such extension of time is allowed.[14]]

§ 162 *h*. **Sundry Doctrines; Complaint of Rape; Charge by Seduced Woman; Complaint after Robbery.** [It seems best to note here certain uses of hearsay statements which, though historically having little or no connection with the precedents of the foregoing sections, seem to be justifiable, if at all, only under the present exception.

(1) Complaint by the woman after an alleged rape. To show that the charge made by the woman against a defendant accused of rape is not recently contrived, and to negative the inference that might be drawn from her supposed silence without complaint, the fact that she did complain freshly after the alleged act is admitted in evidence, and the terms of her complaint are in most jurisdictions also received as corroborating her present story. But all this enters as affecting her testimony as a witness, and the limitations under which it may be done are worked out from that point of view, and are explained *post*, § 469 *e*. It is a different question whether, irrespective of the bearing of such evidence in corroboration of a witness, the terms of the statement may be received, *i. e.* virtually as an exception to the Hearsay rule; though the *res gestæ* notion is frequently referred to. The matter remained long in controversy, even after *Brazier's Case*;[1] but was finally settled, by a series

[12] [*E. g.* Com. *v.* McPike, 3 Cush. 184; Com. *v.* Hackett, 2 All. 136.]

[13] [14 Cox Cr. C. 341. A long controversy arose over this case, and it has usually been thought to be erroneously decided; see the article "Bedingfield's Case," by Professor J. B. Thayer, in 14 Amer. L. Rev. 817; 15 id. 1.]

[14] [It may also be noted that statements by an employee after an accident, raising the question of the use of an agent's admissions as against his principal, are sometimes discussed in terms of *res gestæ*, without distinguishing between that question and the present one; *e. g.* the majority's opinion in Vicksburg R. Co. *v.* O'Brien, 119 U. S. 99.

For a full and acute exposition of the various questions connected with *res gestæ*, see further the article of Professor Thayer above referred to.]

[1] [East Pl. Cr. I, 443.]

of Nisi Prius rulings, against the admission of such statements.[2] In this country, a few Courts receive the detailed statement apparently as an exception to the Hearsay rule, though with some reference to the *res gestæ* phrase.[3] But by far the greater number refuse to accept the detailed statement in any way except in corroboration of the woman as a witness.[4]

(2) It was formerly provided by statute in some of the older States that the mother of a bastard child might be competent as a witness, in spite of her interest, in a bastardy proceeding, provided she had been constant in her accusation, by having charged as the father of her child, during the time of travail, the same person now charged. Such utterances, however, though resting in part for their support as evidence upon the principle of the present subject,[5] are now treated as admissible, if at all, from the point of view of corroborating a witness.[6]

(3) Perhaps upon the analogy of the two preceding instances, a doctrine has grown up in at least one Court that the terms of a complaint made by the person robbed, shortly after the robbery, are admissible;[7] but it is elsewhere usually repudiated.[8]]

Learned Treatises and Statistical Tables.

§ 162 *i*. **Exception generally denied.** [There is much to be said for admitting, as an exception to the Hearsay rule, learned treatises, in particular, technical scientific works, as evidence of the facts of science therein stated, under proper safeguards calculated to prevent the abuse of such evidence.[1] But ever since *Collier* v. *Simpson*,[2] it has been commonly accepted that no such general exception exists, either in England[3] or in this country.[4] In at least two

[2] [R. *v.* Clarke, 2 Stark. 242; R. *v.* Walker, 2 Moo. & R. 212; R. *v.* Megson, 9 C. & P. 420; R. *v.* Alexander, 2 Cr. & D. 126; R. *v.* Osborne, 1 Car. & M. 622; R. *v.* Nicholas, 2 C. & K. 246; R. *v.* Eyre, 2 F. & F. 579; R. *v.* Wood, 14 Cox Cr. 46; R. *v.* Lillyman, 1896, 2 Q. B. 167.]

[3] [State *v.* Kinney, 44 Conn. 156; McMurrin *v.* Rigby, 80 Ia. 325; People *v.* Lynch, 29 Mich. 279; People *v.* Brown, 53 id. 531; People *v.* Gage, 62 id. 271; People *v.* Glover, 71 id. 303; People *v.* Hicks, 98 id. 86; People *v.* Duncan, 104 id. 460 (the last two cases limiting the earlier ones); State *v.* Fitzsimon, 18 R. I. 236.]

[4] [See the authorities collected *post*, § 469 *c*.]

[5] [See the language in Maxwell *v.* Hardy, 8 Pick. 560.]

[6] [See *post*, § 469 *c*.]

[7] [People *v.* Morrigan, 29 Mich. 5; Lambert *v.* People, ib. 71; Driscoll *v.* People, 47 id. 416; People *v.* Simpson, 48 id. 479; People *v.* Hicks, 98 id. 86 (restricting the rule).]

[8] [Bolling *v.* State, 98 Ala. 80; People *v.* McCrea, 32 Cal. 98; Brooks *v.* State, 96 Ga. 353; Shoecraft *v.* State, 137 Ind. 433; Jones *v.* Com., 86 Va. 743.]

[1] [See the reasons *pro* and *con* examined by the present editor in an article "Scientific Books in Evidence," in 26 Amer. L. Rev. 390; but not all the language of the article would now be endorsed by him.]

[2] [5 C. & P. 73. The practice before that time seems to have been unsettled; see Cowper's Trial, 13 How. St. Tr. 1163.]

[3] [R. *v.* Crouch, 1 Cox Cr. 94; R. *v.* Taylor, 13 id. 78.]

[4] [Brown *v.* Sheppard, 13 U. C. Q. B. 179; People *v.* Wheeler, 60 Cal. 584; Gal-

jurisdictions, however, such a general exception has been established.[5]]

§ 162 *j*. **Partial Forms of Recognition.** [Nevertheless, there are several sorts of evidence, more or less generally conceded to be admissible, whose admission must be regarded as a partial recognition of the principle. (1) Treatises on Anglo-American law by writers of accepted standing, whether English[1] or American, may be used as evidence of the law. Treatises by reputed authors on foreign law have also often been employed,[2] though it has been required in the House of Lords that they be presented through and indorsed by an expert witness.[3] (2) Certain tables of mathematical calculation, in general acceptance, have always been regarded as admissible, — in particular, almanacs,[4] and standard tables of mortality and an-

lagher *v.* R. Co., 67 id. 17; Johnston *v.* R. Co., 95 Ga. 685; North C. R. M. Co. *v.* Monka, 107 Ill. 341; Bloomington *v.* Schrock, 110 id. 221; Epps *v.* State, 102 Ind. 550; State *v.* Baldwin, 36 Kan. 17; Ware *v.* Ware, 8 Me. 57; Ashworth *v.* Kittredge, 12 Cush. 195; Washburn *v.* Cuddihy, 8 Gray 431; Com. *v.* Sturtivant, 117 Mass. 139; Com. *v.* Brown, 121 id. 81; Com. *v.* Marzynski, 149 id. 72; People *v.* Hall, 48 Mich. 490; People *v.* Millard, 53 id. 75; People *v.* Vanderhoof, 71 id. 179; Payson *v.* Everett, 12 Minn. 219; Tucker *v.* McDonald, 60 Miss. 470; Dole *v.* Johnson, 50 N. H. 456; New J. Z. & I. Co. *v.* L. Z. & I. Co., 59 N. J. 189; Melvin *v.* Easly, 1 Jones L. 388; Huffman *v.* Click, 77 N. C. 57; State *v.* O'Brien, 7 R. I. 338; State *v.* Sexton, S. D., 72 N. W. 84; Fowler *v.* Lewis, 25 Tex. 381; Davis *v.* U. S., 165 U. S. 373, *semble;* Union P. R. Co. *v.* Yates, U. S. App., 79 Fed. 584; Stilling *v.* Thorp, 54 Wis. 534; Kreuziger *v.* R. Co., 73 id. 160.]

[5] [*Iowa:* Bowman *v.* Woods, 1 G. Gr. 445; Brodhead *v.* Wiltse, 35 Ia. 429 (under the Code); Crawford *v.* Williams, 48 id. 249; Worden *v.* R. Co., 76 id. 314; Burg *v.* R. Co., 90 id. 106, 114; *Nebraska:* Sioux C. & P. R. Co. *v.* Finlayson, 16 Nebr. 587 (under Code § 342); *Alabama:* Stoudenmeier *v.* Williamson, 29 Ala. 567; Merkle *v.* State, 37 id. 41; Bales *v.* State, 63 id. 38. But a similar Code provision in California is construed as embodying only the exception (*ante*, § 139) for reputation on matters of general interest: People *v.* Wheeler, 60 Cal. 582; Gallagher *v.* R. Co., 67 id. 17; and a similar interpretation has recently been attempted for the Iowa and Nebraska Codes: Bixby *v.* Bridge Co., Ia., 75 N. W. 182; Union P. R. Co. *v.* Yates, U. S. App., 79 Fed. 584; Van Skike *v.* Potter, Nebr., 73 N. W. 295. The exception formerly existed in Wisconsin: Luning *v.* State, 1 Chand. 185; Ripon *v.* Bittel, 30 Wis. 619; see later cases *ante*, note 4.]

[1] [The Pawashick, 2 Low. 148; the theory of judicial notice (*ante*, Chap. II), and of refreshing the judicial memory, is here sometimes invoked in justification.]

[2] [Lord Ellenborough, C. J., in Picton's Trial, 30 How. St. Tr. 483, 492, 511, 514; Lord Stowell, in Dalrymple *v.* Dalrymple, 2 Hagg. Cons. 81; Abbott, C. J., in Lacon *v.* Higgins, 3 Stark. 178, *semble;* Baron de Bode's Case, 8 Q. B. 254; Breadalbane *v.* Chandos, 2 Myl. & Cr. 727, 741; Nelson *v.* Bridport, 8 Beav. 529; Bremer *v.* Freeman, 10 Moore 306; Rice *v.* Gunn, 4 Ont. 589. *Excluded:* R. *v.* Crouch, 1 Cox Cr. 94; Perth Peerage Case, 2 H. L. C. 874.]

[3] [Sussex Peerage Case, 11 Cl. & F. 113. From the above matters are to be distinguished (1) the use of official printed copies of foreign statutes: *post*, § 489; (2) the use of reports of judicial decisions: *post*, § 489; (3) the propriety of allowing counsel to read law-books to the jury: see State *v.* Fitzgerald, 130 Mo. 407.]

[4] [Theory of Evidence (1739), ch. 5, pl. 104: "The almanack is a sufficient evidence to prove a day Sunday;" R. *v.* Dyer, 6 Mod. 41; Brough *v.* Perkins, ib. 81; Tutton *v.* Darke, 5 H. & N. 649; Allman *v.* Owen, 31 Ala. 141; People *v.* Chee Kee, 61 Cal. 404; State *v.* Morris, 47 Conn. 180; Munshower *v.* State, 55 Md. 24; Wilson *v.* Van Leer, 127 Pa. 378. No requirement that the almanac shall be a standard one seems to be made. The theory of judicial notice is sometimes invoked; but it is one thing to notice the day of the week or the time of moonrise without proof, and another thing to resort to the almanac as evidence of it. For an interesting examination of the history of the use of the almanac, see Thayer, Preliminary Treatise on Evidence, 291.]

nuities;[5] but sundry others have also been admitted, such as millwrights' tables,[6] tables of weights and currency,[7] engineering tabulations and statistics.[8] (3) There is an exception of undefined extent, allowing the resort to dictionaries and grammars for learning the meaning of words and perhaps for other matters of literary usage.[9] Dictionaries are often cited in judicial opinions;[10] and Courts are frequently found supporting their views by citations of the very treatises of science which they would not have allowed to be quoted from below the bench.[11]]

§ 162 *k*. **Application of the Prohibition.** [(1) The expert witness is by some Courts allowed to cite professional writers, either by specific quotation or by reference to professional opinion as corroborating him;[1] but this is in strictness a violation of principle,[2] though much to be recommended. (2) It has been thought by some Courts that an expert witness may be discredited by reading an opposite opinion from a professional treatise or by being asked whether opposing views have not been laid down by writers or whether he agrees with certain opposing opinions then read;[3] but this is in effect introducing the treatise in evidence; and it is generally held that it cannot be done, except that where a witness has referred to a treatise, or to writers generally, as agreeing with him, the treatises may be shown not to agree with him, just as any other

[5] [Rowley *v.* R. Co., L. R. 8 Exch. 226; Birm. M. R. Co. *v.* Wilmer, 97 Ala. 165, 170; A. M. R. Co. *v.* Griffith, 63 Ark. 491; Townsend *v.* Briggs, 99 Cal. 481; Central R. Co. *v.* Richards, 62 Ga. 307; Richm. & D. R. Co. *v.* Garner, 91 id. 27; Columbus *v.* Sims, 94 id. 483; M. D. & S. R. Co. *v.* Moore, 99 id. 229; Joliet *v.* Blower, 155 Ill. 414; Donaldson *v.* R. Co., 18 Ia. 291; McDonald *v.* R. Co., 26 id. 140; Coates *v.* R. Co., 62 id. 491; Worden *v.* R. Co., 76 id. 314; Krueger *v.* Sylvester, 100 id. 647; Lancaster *v.* Laucaster, 78 Ky. 200; Louisv. & N. R. Co. *v.* Kelly, id., 38 S.W. 852; Nelson *v.* R. Co., 104 Mich. 582, *semble*; O'Mellia *v.* R. Co., 115 Mo. 205, 222; Friend *v.* Ingersoll, 39 Nebr. 717, 724; Camden *v.* Williams, N. J. L., 40 Atl. 633; Schell *v.* Plumb, 55 N. Y. 598; Sauter *v.* R. Co., 66 id. 54; People *v.* Ins. Co., 78 id. 128; Campbell *v.* York, 172 Pa. 205; Railroad Co. *v.* Ayres, 84 Tenn. 729; Vicksburg R. Co. *v.* Putnam, 118 U. S. 554; Mills *v.* Catlin, 22 Vt. 107; McKeigue *v.* Janesville, 68 Wis. 58.

Distinguish those cases in which life-tables are excluded because the results of the calculations therein are not material to the issue.]

[6] [Garwood *v.* R. Co., 45 Hun 129.]

[7] [Gallagher *v.* R. Co., 67 Cal. 16, *semble*.]

[8] [West. Ass. Co. *v.* Mohlman Co., U. S. App., 83 Fed. 811, where Lacombe, J., lays down a broad principle.

Other analogous instances are as follows: Hatcher *v.* Dunn, Ia., 66 N. W. 905 (thermometer used in gauging oils, admitted); Payson *v.* Everett, 12 Minn. 219 (bank-note detectors, excluded).]

[9] [Answer of the Judges, 22 How. St. Tr. 302; Darby *v.* Ousley, 1 H. & N. 8.]

[10] [*E. g.* Dantzler *v.* D. C. & I. Co., 101 Ala. 309, 314, as one instance from many.]

[11] [*E. g.* Sinnott *v.* Colombet, 107 Cal. 187; Smith *v.* State, 23 Ga. 306; Washburn *v.* Cuddihy, 8 Gray 431; Garbutt *v.* People, 17 Mich. 9, 17; Steenerson *v.* R. Co., Minn., 72 N. W. 713.]

[1] [Carter *v.* State, 2 Ind. 619; State *v.* Baldwin, 36 Kan. 17.]

[2] [People *v.* Millard, 53 Mich. 76; Fox *v.* Peninsular Works, 84 id. 681.]

[3] [Hess *v.* Lowrey, 122 Ind. 233; Louisv. N. A. & C. R. Co. *v.* Howell, 147 id. 266; Williams *v.* Nally, Ky., 46 S. W. 874; State *v.* Wood, 53 N. H. 495; Byers *v.* R. Co., 94 Tenn. 345.]

assertion by a witness may be disproved.[4] (3) That counsel should read a treatise to the jury in argument would of course be in effect to use the treatise in evidence; this is allowed in one jurisdiction;[5] in a few others it is said to be allowable only in "illustration" of the argument;[6] but elsewhere it is generally repudiated.[7]]

Regular Commercial Publications.

§ 162 *l*. **Reports of Market Prices; Reports of Legal Decisions; etc.** [A few instances are recognized in which regular publications recording current transactions or proceedings in some commercial or professional branch, and generally accepted and trusted by the trade or profession, are admitted to show the facts thus reported. There is no general principle expressly recognized as uniting the instances; but practical convenience and the accepted trustworthiness of the reports has been regarded as sufficient justification.[1]

(1) A number of Courts, constantly increasing, receive the reports of market prices as published in trade journals or ordinary newspapers commonly resorted to for such information, or in price-current lists by wholesale dealers generally recognized as trustworthy. The doctrine dates from the cases of *Clicquot's Champagne*[2] and *Sisson* v. *R. Co.*,[3] and, with more or less variation of phrasing, has received wide recognition.[4]

[4] [Nelson *v.* Bridport, 8 Beav. 537, *semble;* Conn. M. L. Ins. Co. *v.* Ellis, 89 Ill. 519; Bloomington *v.* Schrock, 110 id. 222 (leading case); Davis *v.* State, 38 Md. 36; Pinney *v.* Cahill, 48 Mich. 587 (leading case); Marshall *v.* Brown, 50 id. 150; People *v.* Vanderhoof, 71 id. 179; Hall *v.* Murdock, id., 72 N. W. 150; New J. Z. & I. Co. *v.* L. Z. & I. Co., 59 N. J. L. 189; Ripon *v.* Bittel, 30 Wis. 619; Knoll *v.* State, 55 id. 256.]

[5] [State *v.* Hoyt, 46 Conn. 337.]

[6] [Yoe *v.* People, 49 Ill. 412, *semble;* Cory *v.* Silcox, 6 Ind. 40; Harvey *v.* State, 40 id. 518; Baldwin *v.* Bricker, 86 id. 223; State *v.* O'Neil, 51 Kan. 651, 674; Legg *v.* Drake, 1 Oh. St. 288; Wade *v.* De Witt, 20 Tex. 400.]

[7] [R. *v.* Crouch, 1 Cox Cr. 94; R. *v.* Taylor, 13 id. 77 (yet it was done by Serjeant Shee, in Palmer's Trial, Annual Register, 1856, p. 471); People *v.* Wheeler, 60 Cal. 4; Ashworth *v.* Kittredge, 12 Cush. 195; Com. *v.* Wilson, 1 Gray 338; Washburn *v.* Cuddihy, 8 id. 431; People *v.* Hall, 48 Mich. 490; Marshall *v.* Brown, 50 id. 150; People *v.* Millard, 53 id. 77; Melviu *v.* Easly, 1 Jones L. 388; Huffman *v.* Chick, 77 N. C. 56; State *v.* Rogers, 112 id. 874; Byers *v.* R. Co., 94 Tenn. 345, *semble;* Boyle *v.* State, 57 Wis. 480.]

[1] [These instances are to be distinguished from the exception for regular entries in the course of business (*ante*, § 120 *a*), for there the declarant must be a specified person, while here the reporter may be anonymous, and there he must be deceased or otherwise unavailable, while here he need not be accounted for.]

[2] [3 Wall. 141; 1865.]

[3] [14 Mich. 496; opinion by Mr. J. Cooley.]

[4] [Ala. Code 1897, § 1810; Tyson *v.* Chestnut, Ala., 21 So. 73; Nash *v.* Classon, 163 Ill. 409, *semble;* Wash. Ice Co. *v.* Webster, 68 Me. 463, *semble;* Munshower *v.* State, 55 Md. 24, *semble;* Clevel. & T. R. Co. *v.* Perkins, 17 Mich. 296; Peter *v.* Thickstun, 51 Mich. 594; Aulls *v.* Young, 98 id. 231; Harrison *v.* Glover, 72 N. Y. 454, *semble;* Fennerstein's Champagne, 3 Wall. 147.

In the following cases the principle was recognized, but the particular document was regarded as untrustworthy: Willard *v.* Mellor, 19 Colo. 534; Golson *v.* Ebert, 52 Mo. 260, 270; Whelan *v.* Lynch, 60 N. Y. 474; Fairley *v.* Smith, 87 N. C. 371.

Distinguish the question whether a witness who has merely read price-quotations is qualified to testify to prices: *post*, § 430 *n.*]

(2) The use of printed reports of judicial decisions, both domestic and foreign, has usually been sanctioned,[5] without the enunciation of any distinct theory; it would seem that the present principle covers such cases.

(3) In a few other instances documents accepted in a trade or profession as trustworthy, and compiled in the regular course of business by competent persons to be acted upon by others, have been received.[6]]

Official Statements.

§ 162 *m*. **General Principle.** [An exception which in practice is by far the commonest in its employment is the exception admitting statements made by officials in pursuance of official duty. The necessity (*ante*, § 114 *a*) for the allowance of such an exception is found, not in the death of the declarant, but in the practically unendurable inconvenience of summoning public officers from their posts on the innumerable occasions when their official doings or records are to be proved in litigation. The guarantee of trustworthiness (*ante*, § 114 *a*) justifying the exception is usually said to be the official oath of duty;[1] but an additional reason and requirement is in England said to be the publicity of the document, which ensures the probability of the correction of possible errors by the public who have access to it and the subjective incentive on the part of the official to state correctly that which the public's inspection would detect as false if he recorded falsely.[2] The latter reason, as accepted in England, limits the common-law scope of the principle in its appli-

[5] [Stayner *v.* Burgesses, 12 Mod. 86; Gage *v.* Bulkeley, Ridgw. t. Hardw. 276; Inge *v.* Murphy, 10 Ala. 885, 895; Cal. C. C. P. §§ 1902, 1963; Stanford *v.* Priest, 27 Ga. 243, 247; Kingsley *v.* Kingsley, 20 Ill. 202; Pen. & K. R. Co. *v.* Bartlett, 12 Gray 244 (under statute); Cragin *v.* Lamkin, 7 All. 396; Ames *v.* McCamber, 124 Mass. 85; Charlotte *v.* Chouteau, 33 Mo. 201; Kennard *v.* Kennard, 63 N. H. 308; State *v.* Moy Looke, 7 Or. 57; Latimer *v.* Elgin, 4 Dess. 32; So. Car. Gen. St. c. 86, s. 2218; The Pawashick, 2 Low. 148; Mackay *v.* Easton, 19 Wall. 632. *Contra:* Gardner *v.* Lewis, 7 Gill 394 (admitted by consent in Balt. & O. R. Co. *v.* Glenn, 28 Md. 323); Barbour *v.* Archer, 2 A. K. Marsh. 9; *undecided:* Territt *v.* Woodruff, 19 Vt. 182; State *v.* Abbey, 29 id. 60, 65.

Of course the judges who refuse to accord an evidential standing to such reports do nevertheless, like other judges, resort to them habitually for information as to precedents in deciding their cases.

Distinguish the use of official printed copies of statutes and decisions (*post*, § 489); the question above discussed arises only for reports published unofficially.]

[6] [Hart *v.* Walker, 100 Mich. 406, 410 (weather records kept at an asylum); Slocovich *v.* Ins. Co., 108 N. Y. 62, *semble* (the American Lloyd's and other shipping registers, to show the condition, capacity, age, and value of ships); Ill. Rev. St. c. 116, s. 29; St. 1887, p. 261 (abstracts of title, made by competent persons in the regular course of business, to show the contents of records of title destroyed by fire; applied in Richley *v.* Farrell, 69 Ill. 264; Converse *v.* Wood, 142 id. 132; Chic. & A. R. Co. *v.* Keegan, 152 id. 413; similar statutes exist elsewhere); Pittsb. C. C. & St. L. R. Co. *v.* Sheppard, 56 Oh. 68 (American Trotting Association's annual reports, to show the speed-records of a horse).]

[1] [R. *v.* Aickles, 1 Leach Cr. L. 436 (leading case); Doe *v.* France, 15 Q. B. 758.]

[2] [Merrick *v.* Wakley, 8 A. & E. 170; Sturla *v.* Freccia, L. R. 5 App. Cas. 623.]

cation,[3] but it has rarely been advanced in this country;[4] and seems, indeed, to be a modern innovation in England.[5]]

§ 162 *n.* **Application of the Principle.** [In applying this principle, certain simple and generally accepted limitations prevail. There must be an official duty to make the record, report, or entry in question. This duty may be expressly provided for by statute or ordinance, or it may be implied from the nature and functions of the office. One of the questions, for example, that arose at common law was whether the official custodian of a record had an implied authority to certify the correctness of copies of them so as to justify the receipt of the certified copies in evidence. The statement must be made on the personal knowledge of the officer (or his subordinates), though this limitation is liberally construed.

The application of this principle in practice is constantly found united with the application of two other principles; viz. (1) the exemption from the production in Court of the original of a public document, involving the rule of Primariness (*post*, §§ 563 *a*, ff. (2) the presumption of authenticity of certain official signatures and seals appended to official records and to official statements used under the present exception. Moreover, statutes which regulate the use of public documents in evidence very often apply two or more of these principles at the same time, — as where certified copies of an official register are declared admissible; *i. e.*, the original need not be produced, and the hearsay certificate of the custodian is made admissible. The various questions arising under these combined principles are discussed *post*, Chapters XXVIII, XXIX; and merely the general principle of the present exception has been explained here, in order to exhibit its connection with the other exceptions.]

Sundry Applications of the Hearsay Rule.

[Sundry instances, of not uncommon occurrence, may now be examined, in which the question may be raised whether the Hearsay rule applies, and if so, whether an exception is to be made to it.]

§ 162 *o.* **View by Jury; Testimony at a View; Juror's Private Knowledge.** [The Hearsay rule may be here invoked in at least five aspects. (1) The ancient custom, dictated by practical necessity and sanctioned by experience, of appointing "showers" either selected by the judge or agreed upon by the parties, to attend the jury at a view and point out the places and things referred to in the testimony at the trial, is strictly not hearsay; because each shower is sworn to his duty, and because either a shower is appointed for each

[3] [Cases in the preceding note.]

[4] [It has been recognized, however, in Evanston *v.* Gunn, 99 U. S. 660; Cushing *v.* R. Co., 143 Mass. 78.]

[5] [Compare the language of Parke, B., in Doe *v.* Arkwright, 2 A. & E. 183.]

side (in which case he is virtually a representative of the party) or he is an official of the Court, — sheriff, or the like (in which case he is no more to be regarded as testifying than is the judge when, in the orthodox but unfortunately now with us nearly everywhere discarded practice, he sums up the evidence for the jury). Be this as it may, the pointing out by the showers has long been settled to be a proper proceeding at a view, and no hearsay.[1]

(2) But at the view no information is to be received by the jury from any other persons than the showers, for this would clearly be receiving hearsay testimony, *i. e.* statements without oath and cross-examination.[2]

(3) Where one or more members of the jury go privately and without authority from the Court to the place in controversy and examine it, this is equally improper, even though no person there speaks to them about the subject of the trial; though this seems not to involve hearsay, but to be a violation of the rule against unauthorized views (*ante*, § 13 *i*).

(4) Does the Hearsay rule — *i. e.* as involving the right of cross-examination, and incidentally of confrontation, of witnesses (*post*, § 163 *f*) — require that in criminal cases (where the Constitution secures the right and therefore overrides any statutes regulating views) the defendant should be present at a view? The requirement of confrontation (as explained *post*, § 163 *f*) implies merely that the party shall have the opportunity of cross-examining witnesses; and a view by the jury (as explained *ante*, § 13 *j*) is not the consultation of witnesses but merely the inspection of the thing itself which is the subject of the controversy; so that the constitutional principle cannot properly apply to render improper a view at which the accused is not present. This is the result reached by the better judicial opinion; but there are Courts which take the contrary view.[3]

[1] [This was decided in Gage *v.* Smith, Godb. 209 (1614); Goodtitle *v.* Clark, Barnes 457 (1747); see the propriety recognized in Garcia *v.* State, 34 Fla. 311, 332; People *v.* Milner, Cal., 54 Pac. 833; and cases in the next notes. People *v.* Green, 53 Cal. 60, partly *contra*, seems unsound. For the form of the showers' oath and the order appointing them, see 1 Burr. 252, 258; R. *v.* Whalley, 2 Cox Cr. 231.]

[2] [This is unquestioned; see examples of its application in Erwin *v.* Bulla, 29 Ind. 95; Conrad *v.* State, 144 id. 290; Stockwell *v.* R. Co., 43 Ia. 470; Hayward *v.* Knapp, 22 Minn. 5; People *v.* Johnson, 110 N. Y. 134, 143; People *v.* Gallo, 149 id. 106, 115; State *v.* Perry, N. C., 27 S. E. 997; Hays *v.* Terr., Okl., 54 Pac. 300; Sasse *v.* State, 68 Wis. 530.

Statutes sometimes make an exception for an inquest of damages for land-taking, which becomes virtually a trial out of doors; *e. g.* Tenn. Code 1858, s. 1337, Code 1896, § 1856.]

[3] [Certain qualified and intermediate forms of opinion are found (for instance, that the accused's absence is not an objection if he has waived attendance), and space does not suffice to analyze each ruling: Benton *v.* State, 30 Ark. 328, 345; People *v.* Bonney, 19 Cal. 426, 445; People *v.* Bush, 68 id. 623; Shular *v.* State, 105 Ind. 289, 293 (leading case *pro*); State *v.* Adams, 20 Kan. 311, 323; Rutherford *v.* Com., 78 Ky. 639; State *v.* Bertin, 24 La. An. 46; Foster *v.* State, 70 Miss. 755, 765 (leading case *contra*); Carroll *v.* State, 5 Nebr. 31; People *v.* Thorn, N. Y., 50 N. E. 947; Hays *v.* Terr., Okl., 54 Pac. 300; State *v.* Ah Lee, 8 Or. 214; State *v.* Moran, 15 id. 262,

(5) A juror may not communicate to his fellows or otherwise use his private knowledge, for this would be in effect to admit testimony not subjected to oath and cross-examination. But those general and unquestionable truths, which the jury may assume, just as the judge judicially notices certain notorious facts without evidence (*ante*, § 6 *c*), do not involve the use of the juror's testimony in this sense.[4]]

§ 162 *p*. **Interpreter; Counsel; Ex parte Experiments.** [(1) The interpretation of the words of a witness testifying in a foreign language, by one who is sworn in court and translates the testimony to the tribunal, is not obnoxious to the Hearsay rule, because both the original witness and the interpreter are under oath and subject to cross-examination.[1] Where a witness is offered to testify to statements (*e. g.* admissions) of another person spoken in a language not understood by him but translated for him by an interpreter, he is not qualified, because he does not speak from personal knowledge (*post*, § 430 *j*); it may be that the person thus speaking may be regarded as having made the interpreter his agent for the purpose of speaking his words, in which case, if the person is a party, they are admissible as translated.[2]

(2) The assertion of facts in argument by counsel, not as merely stating the result of the evidence given, but as stating upon his own credit a fact not dealt with in the evidence, is in effect testimony, and is obnoxious to the Hearsay rule, as not being made upon oath and subject to cross-examination;[3] as also his statement of what could be proved by a witness not called.[4] But the line is sometimes hard to draw between the improper assertion of facts directly bearing on the case, and the legitimate use in argument, or in illustration of a process of reasoning, of matters whose truth is not material or is generally conceded, — as where instances are cited of erroneous verdicts on circumstantial evidence.[5]

276; State *v.* Chee Gong, 17 id. 635; Com. *v.* Van Horn, Pa., 41 Atl. 469; Sasse *v.* State, 68 Wis. 530.

For other questions as to views in criminal cases, see *ante*, §§ 13 *i*, 13 *j*.]

[4] [Parks *v.* Boston, 15 Pick. 198, 209; Washburn *v.* R. Co., 59 Wis. 364, 371; see other examples of the distinction between the two, in the chapter on Judicial Notice, *ante*, § 6 *c*.]

[1] [That an interpreter of former testimony must be called as a witness or accounted for in the usual way, see Schearer *v.* Harber, 36 Ind. 541; People *v.* Lee Fat, 54 Cal. 529; People *v.* Ah Yute, 56 id. 120; People *v.* Sierp, 116 id. 249.]

[2] [Fabrigas *v.* Mostyn, 20 How. St. Tr. 123; Camerlin *v.* Palmer Co., 10 All. 541; Com. *v.* Vose, 157 Mass. 393.

For interpretation as a mode of rendering a witness' testimony intelligible, see *post*, § 439 *c*.]

[3] [Dunmore *v.* State, 115 Ala. 69; Bell *v.* State, 100 Ga. 78; Cluck *v.* State, 40 Ind. 263, 271; Davis *v.* Brown, Ky., 36 S. W. 534; State *v.* Lingle, 128 Mo. 528; Cutler *v.* Skeels, 69 Vt. 154; State *v.* Bokien, 14 Wash. 403.]

[4] [Sullivan *v.* State, 66 Ala. 51; Mullen *v.* Ins. Co., 182 Pa. 150; Pringle *v.* Miller, 111 Mich. 663.

Distinguish the use, by statute, of the alleged testimony of an uncalled witness, where the opponent, to avoid postponement of the trial, has admitted that the witness would so testify.]

[5] [For examples of the judicial treatment of these things, see Sullivan *v.* State, 66 Ala.

(3) It has of late been objected, in several instances, that an examination of a place or person, or an experiment tried, or a diagram made, by a witness *ex parte*, *i. e.* without notice to the opponent, is improper, and renders testimony based upon it inadmissible. This, of course, is a misunderstanding of the Hearsay rule and the principle of confrontation (*post*, §§ 163, 163 *f*). The witness afterwards testifies in court, subject to cross-examination, and testimony thus given cannot be thought of as *ex parte*. The objection has always been repudiated.[6]]

51 (leading opinion); State *v.* O'Neil, 51 Kan. 651, 657, 674; State *v.* Pancoast, 5 N. D. 516; State *v.* Moore, Or., 48 Pac. 468 (leading opinion); *Re* McCabe, Vt., 40 Atl. 52; Brown *v.* Swineford, 44 Wis. 281, 291; and an article on "License of Speech of Counsel," by Irving Browne, Esq., in "The Green Bag," V, 539, and preceding numbers.]

[6] [*Inspection:* State *v.* Leabo, 89 Mo. 247, 253 (leading opinion); State *v.* Brooks, 92 id. 542, 579; State *v.* Morris, 84 N. C. 756, 760; Lipes *v.* State, 15 Lea 125; Miss. & T. R. Co. *v.* Ayres, 16 id. 725; Moore *v.* State, 96 Tenn. 209; Day *v.* U. S., U. S. App., 87 Fed. 125.

Diagrams and models: Aug. & S. R. Co. *v.* Daly, 68 Ga. 234; State *v.* Whitacre, 98 N. C. 753.

Experiments: Burg *v.* R. Co., 90 Ia. 106, 118 (leading opinion).]

CHAPTER XVI.

THE HEARSAY RULE SATISFIED; TESTIMONY BY DEPOSITION AND TESTIMONY AT A FORMER TRIAL.

§ 163. In general.
§ 163 *a*. Opportunity of Cross-examination: (1) Testimony at a Former Trial.
§ 163 *b*. Same: (2) Depositions *de bene esse*.
§ 163 *c*. Same: (3) Depositions *in perpetuam memoriam*.
§ 163 *d*. Same: (4) Testimony at Present Trial.
§ 163 *e*. Same: Incomplete Cross-examination.
§ 163 *f*. Confrontation; General Principle.
§ 163 *g*. Same: Decease, Absence, Illness, etc., of Witness; (*a*) Testimony at a Former Trial.
§ 163 *h*. Same: (*b*) Depositions.
§ 163 *i*. Same: Witness Present in Court, or otherwise Available.
§ 165. Proving the Substance of Former Testimony.
§ 166. Mode of proving Former Testimony.

§ 163. **In general.**[1] The chief reasons for the exclusion of hearsay evidence are the want of the sanction of an oath, and of any opportunity to cross-examine the witness. But where the testimony was given under oath, in a judicial proceeding, in which the adverse litigant was a party and where he had the power to cross-examine, and was legally called upon so to do, the great and ordinary test of truth being no longer wanting, the testimony so given is admitted, after the decease of the witness, in any subsequent suit between the same parties.[2] It is also received, if the witness, though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is insane, or sick, and unable to testify, or has been summoned, but appears to have been kept away by the adverse party.[3] But testimony thus offered is open to all the objections which might be taken if the witness were personally present.[4]

[1] [The first few sentences are transferred to Appendix II.]

[2] Bull. N. P. 239, 242; Mayor of Doncaster *v.* Day, 3 Taunt. 262; Glass *v.* Beach, 5 Vt. 172; Lightner *v.* Wike, 4 S. & R. 203.

[3] Bull. N. P. 239, 243; 1 Stark. Evid. 264; 12 Vin. Abr. 107, A, b, 31; Godb. 326; R. *v.* Eriswell, 3 T. R. 707, 721, per Ld. Kenyon. Upon the question whether this kind of evidence is admissible in any other contingency except the death of the witness, there is some discrepancy among the American authorities; [see the ensuing sections.]

[4] Wright *v.* Tatham, 1 Ad. & El. 3, 21. Thus, where the witness at the former trial was called by the defendant, but was interested on the side of the plaintiff, and the latter, at the second trial, offers to prove his former testimony, the defendant may object to the competency of the evidence, on the ground of interest: Crary *v.* Sprague, 12 Wend. 41. And if the witness gave a written deposition in the cause, but afterwards testified orally in court, parol evidence may be given of what he testified *viva voce*, notwithstanding the existence of the deposition: Todd *v.* E. of Winchelsea, 3 C. & P. 387.

[The principles leading to the results thus summarized must now be examined more in detail. The general principle for which the Hearsay rule stands is (as already explained, *ante*, § 99 *a*) that no testimonial assertion is receivable, which has not been made in court under the fundamental tests or securities of oath, cross-examination, and confrontation. The requirements of the first are examined in another place (*post*, § 364 *a*); but its application does not affect our present subject, because wherever there has been cross-examination there has been an oath, and hence, if the requirement of cross-examination has been satisfied, that of the oath has also been. It remains then to inquire what sorts of testimonial assertions are receivable, not as exceptions to the Hearsay rule, but because they have satisfied the fundamental tests of truth which the Hearsay rule imposes, — cross-examination and confrontation.[5] The two inquiries that thus arise, when we ask whether the Hearsay rule is satisfied by testimony offered, are: —

A. Has the opportunity of cross-examination been had? B. Has there been confrontation? We proceed now with the former.

We may here distinguish four situations in which the principle may require to be applied: (1) Testimony at a former trial; (2) Depositions *de bene;* (3) Depositions *in perpetuam memoriam;* (4) Testimony at the present trial.]

§ 163 *a*. **Opportunity of Cross-examination: (1) Testimony at a Former Trial.** [In the first place the *nature of the tribunal* before whom the trial was had, and its ordinary mode of procedure, must be such that the test of cross-examination was available; and conversely, if it was available, then the particular character or name of the tribunal is immaterial, and the principle is satisfied. On this principle, testimony has been excluded which was taken before bankruptcy-commissioners,[1] barrack-commissioners,[2] or a marine hull-inspector;[3] it has been received when taken before land-commissioners[4] or a justice of the peace;[5] the test being whether the opponent had the opportunity of cross-examination.[6] Testimony taken before arbitrators may thus be admissible.[7] Testimony at a

[5] [Mitchell, J., in Minneap. Mill Co. *v.* R. Co., 51 Minn. 304, 315: "The admission of the testimony of a witness on a former trial is frequently inaccurately spoken of as an exception to the rule against the admission of hearsay evidence. The chief objections to hearsay evidence are the want of the sanction of an oath and of any opportunity to cross-examine; neither of which applies to testimony given on a former trial."]

[1] [Eade *v.* Lingood, 1 Atk. 203.]

[2] [Att'y-Gen'l *v.* Davison, McCl. & Y. 167.]

[3] [Louisville Ins. Co. *v.* Monarch, 99 Ky. 578.]

[4] [Jackson *v.* Bailey, 2 Johns. 20.]

[5] [Harris *v.* State, 73 Ala. 497.]

[6] [See other examples in Cox *v.* Pearce, 7 Johns. 298; Com. *v.* Ricketson, 5 Metc. 427.]

[7] [Orr *v.* Hadley, 36 N. H. 580; White *v.* Bisbing, 1 Yeates 400; Bailey *v.* Woods, 7 N. H. 372; McAdam *v.* Stilwell, 13 Pa. 96. *Contra:* Jessup *v.* Cook, 1 Halst. 438.]

coroner's inquest does not usually fulfil this requirement.[8] Testimony before a committing magistrate, or other officer holding a preliminary inquiry into crime, must satisfy the same test.[9]

Furthermore, there is not an adequate opportunity for cross-examination unless on the former occasion of litigation the issues and the parties were substantially the same as in the present case.[10] As to the *issues*, the material inquiry is whether the present topic was then a subject of investigation; *e. g.* if the then litigation concerned Blackacre and the present case concerns Whiteacre, but the controversy in both is whether John Doe is Richard Roe's heir, the rule is satisfied;[11] but if, though the same act of taking is involved, the charge is in one case larceny of a horse, and in the other larceny of a wagon, the rule might not be regarded as satisfied.[12] The application of the principle will depend chiefly on the circumstances of each case.[13] As to the *parties*, all that is essential is that the present opponent should have had a fair opportunity of cross-examination;[14] consequently, a change of parties which does not effect such a loss does not prevent the use of the testimony, — as, for example, a change by which one of the opponents is omitted or by which a merely nominal party is added; and the principle also admits the testimony where the parties, though not the same, are so privy in

[8] [Originally there seems to have been a traditional exception for this case: Lord Morley's Case, Kelyng 55. But this anomaly was removed in England by St. 11 & 12 Vict., c. 42; and it has not been recognized as a part of the common law in this country: People *v.* Restell, 2 Hill N. Y. 297; State *v.* Campbell, 1 Rich. L. 125; State *v.* Houser, 26 Mo. 436; McLain *v.* Com., 99 Pa. 97; State *v.* Campbell, 29 S. C. 225; Sylvester *v.* State, 71 Ala. 24; Meyers *v.* State, 33 Tex. Cr. 204, 216. *Contra*: State *v.* McNeil, 33 La. An. 1333.]

[9] [R. *v.* Paine, 5 Mod. 165; Woodcock's Case, Leach Cr. L., 4th ed., 500; R. *v.* Eriswell, 3 T. R. 707 (leading case); R. *v.* Smith, Holt N. P. 615; R. & R. 340; R. *v.* Forbes, Holt N. P. 599; R. *v.* Arnold, 8 C. & P. 621; St. 11–12 Vict., c. 42; 30–31 Vict., c. 35, s. 61; R. *v.* Beeston, 6 Cox Cr. 430; R. *v.* Peltier, 4 Low. Can. 22; State *v.* McNamara, Ark., 30 S. W. 762; Robinson *v.* State, 68 Ga. 833; Smith *v.* State, 72 id. 115; People *v.* Restell, 2 Hill N. Y. 300; Howser *v.* Com., 51 Pa. 338; State *v.* Hill, 2 Hill S. C. 609; U. S. *v.* Macomb, 5 McLean 286; Pooler *v.* State, 97 Wis. 627.]

[10] [For ordinary applications of the principle, giving the above reasons, see Lane *v.* Brainerd, 30 Conn. 579; Warren *v.* Nichols, 6 Metc. 261 (leading case); Bailey *v.* Woods, 17 N. H. 372; Bradley *v.* Myrick, 91 N. Y. 295; State *v.* DeWitt, 2 Jones L. 284; Summons *v.* State, 5 Oh. St. 343 (leading case).]

[11] [Alderson, B., in Doe *v.* Foster, 1 A. & B. 791, note.]

[12] [Davis *v.* State, 17 Ala. 357.]

[13] [See other examples in Bath *v.* Bathersea, 5 Mod. 9; Brown *v.* White, 24 Weekly Rep. 456; R. *v.* Smith, R. & R. 339; R. *v.* Dilmore, 6 Cox Cr. 52; R. *v.* Lee, 4 F. & F. 63; R. *v.* Beeston, 6 Cox Cr. 425 (leading case); R. *v.* Williams, 12 id. 101; R. *v.* Castro (Tichborne Case), Charge of Chief Justice, II, 305; Holman *v.* Bank, 12 Ala. 408; People *v.* Brennan, Cal., 53 Pac. 1098; Oliver *v.* R. Co., Ky., 32 S. W. 759; Mabe *v.* Mabe, N. C., 29 S. E. 843; Watkins *v.* U. S., Okl., 50 Pac. 88; Jones *v.* Wood, 16 Pa. 43.]

[14] [The principle is set forth in Goodright *v.* Moss, Cowper 592; Gilbert, Evidence, 68; Wright *v.* Tatham, 1 A. & E. (leading case): Orr *v.* Hadley, 36 N. H. 580; Jackson *v.* Bailey, 2 Johns. 20; Harper *v.* Burrow, 6 Ired. 33; Watson *v.* Gilday, 11 S. & R. 342.]

interest — as, where one was an executor or perhaps a grantor — that the same motive and need for cross-examination existed.[15]]

§ 163 *b*. **Same: (2) Depositions de bene esse.** ["If the witness be examined *de bene esse*, and before the coming in of the answer, the defendant not being in contempt, the witness die, yet his deposition shall not be read, because the opposite party had not the power of cross-examination; and the rule of the common law is strict in this, that no evidence shall be admitted but what is or might have been under examination of both parties."[1] This principle of the common law has almost invariably been carried out in the statutes which have in the present century given to the common-law Courts the machinery for taking depositions which was formerly possessed by the Court of Chancery;[2] so that the power of cross-examination (usually secured by a notice to the opponent of the time and place of taking the deposition) is still generally and properly recognized.[3] The express statutory provisions usually declare the means of enforcing the principle; and only a few general problems need here be noticed. Where two or more depositions are appointed by one party for the same, there is no opportunity for cross-examination of both; and the better view is that the opponent has an election to attend either, and thus that the deposition which he does not attend should be excluded, but that a failure to attend either is a waiver of objection to both, and that if he, in fact, attends both, both are admissible.[4] In general, the time of notice required is regulated by statute, but usually a reasonable time is the requirement.[5] The

[15] [The circumstances of each precedent vary more or less; see Hulin *v.* Powell, 3 C. & K. 323; Llanover *v.* Homfray, L. R. 19 Ch. D. 229; Clealand *v.* Huie, 18 Ala. 347; Goodlett *v.* Kelly, 74 id. 219; Wells *v.* Mge. Co., 109 id. 430; Smith *v.* Keyser, 115 id. 455; Lyons *v.* Marcher, 119 Cal. 382; McDonald *v.* Cutter, id., 52 Pac. 120; Hughes *v.* Clark, 67 Ga. 23; Hutchings *v.* Corgan, 57 Ill. 71; Ind. & St. L. R. Co. *v.* Stout, 53 Ind. 158; Brown *v.* Zachary, 102 Ia. 433; State *v.* Smith, ib. 656; Krueger *v.* Sylvester, 100 id. 647; Mitchell *v.* Mitchell, 1 Gill 66, 83; Yale *v.* Comstock, 112 Mass. 268; Jackson *v.* Lawson, 15 Johns. 544; Jackson *v.* Crissey, 3 Wend. 253; Wright *v.* Cumpsty, 41 Pa. 111; Mathews *v.* Colburn, 1 Strobh. 269; Smith *v.* Hawley, 8 S. D. 363; Salmer *v.* Lathrop, id., 72 N. W. 570; P. W. & B. R. Co. *v.* Howard, 13 How. 335.

The ruling in Seeley *v.* Star Co., 71 Fed. 554, excluding a deposition taken in a suit in a State Court with the same parties and issues, but offered in the Federal Court where the suit had been re-instituted, seems unsound.]

[1] [Buller, Nisi Prius, 240.]

[2] [The present English practice, allowing some flexibility, is regulated by the Rules of Court, 1883, Ord. 37, 38.]

[3] [For the Federal practice see U. S. R. S. §§ 863, 866; *Ex parte* Fisk, 113 U. S. 725; St. 1892, c. 14; Gould & Tucker's Notes to the above sections. The State statutes almost invariably make the same requirement.]

[4] [See Hankinson *v.* Lombard, 25 Ill. 573; Evans *v.* Rothschild, 54 Kan. 747; Cross *v.* Cross, Ky., 41 S. W. 272; Collins *v.* Richart, 14 Bush 625; Cole *v.* Hall, 131 Mass. 90 (leading case); Scammon *v.* Scammon, 33 N. H. 60; Hays' Appeal, 91 Pa. 268; Blair *v.* Bank, 11 Humph. 88; Faut *v.* Miller, 17 Gratt. 226; Latham *v.* Latham, 30 id. 340; Wytheville B. & I. Co. *v.* Teiger, 90 Va. 277; Kimpton *v.* Glover, 41 Vt. 284.]

[5] [See, for example, Drosdowski *v.* Chosen Friends, Mich., 72 N. W. 169; Amer. E. N. B'k *v.* First N. B'k, U. S. App., 82 Fed. 961.]

opportunity to attend and cross-examine is all that is necessary, and if it is not availed of, the principle has still been satisfied;[6] and, on the other hand, the whole object of the notice being the opportunity to cross-examine, the deposition is receivable if there was actually a cross-examination or an attendance for it, even though the notice was formally defective.[7] "It is evident that, as there can be no cross-examination, a voluntary *affidavit* is no evidence between strangers;"[8] and this principle is of frequent application.[9] In various interlocutory proceedings, however, by which nothing is decided by way of adjudication, it is customary to receive affidavits; and, furthermore, in a few instances, where speedy and convenient means of proving an incidental and not usually disputable matter — as, the proof of publication of a notice by affidavit of the newspaper-publisher — statutory exceptions have been made.[10]]

§ 163 *c*. **Same: (3) Depositions in perpetuam memoriam.** [The same principle is applied in taking depositions for use in future possible litigation, though its application is less effective, because not all the parties in interest may be reached by notice at the time.[1] Statutes usually provide for notice to be given so far as possible.[1]]

§ 163 *d*. **Same: (4) Testimony at Present Trial.** [The same principle applies to testimony given orally at the trial in hand. Where the witness refuses to be cross-examined, his testimony in chief should be struck out;[1] so also where in any other way by the fault of the witness or the party offering him the opportunity of cross-examination is lost,[2] or if at the instance of the party offering him there is a postponement of the cross-examination, and the witness dies or falls ill in the interval.[3] Where the death or illness intervenes immediately after the direct examination, the same result should in strictness follow; but the rulings are not harmonious.[4]

[6] [Moore *v.* Triplett, Va., 23 S. E. 69.]

[7] [Talbott *v.* Bradford, 2 Bibb 316; Ryan *v.* People, 21 Colo. 119. For the case of *incomplete cross-examination*, see § 163 *e*, *post.*]

[8] [Buller, Nisi Prius, 241.]

[9] [Pickering *v.* Townsend, Ala., 23 So. 703; Becker *v.* Quigg, 54 Ill. 390; Hudson *v.* Appleton, 87 Ia. 605; Democrat P. Co. *v.* Lewis, 90 id. 304; Patterson *v.* Fagan, 38 Mo. 70, 82; Supreme Lodge *v.* Jaggers, N. J. L., 40 Atl. 783; Allen *v.* U. S., 28 Ct. Cl. 141, 145; Viles *v.* Moulton, 13 Vt. 510.

There is a single traditional exception for foreign parish-register copies in Pennsylvania: Kingston *v.* Lesley, 16 S. & R. 387.]

[10] [See, *e. g.*, Ala. Code 1897, § 1866; Cal. C. C. P. § 2010; Va. Code 1887, sec. 2358; Kettering *v.* Jacksonville, 50 Ill. 39. When parties were disqualified to testify, a party's affidavit of the loss of a document, in order to admit secondary evidence, was received in most jurisdictions; but this anomaly is now obsolete, except where preserved by statute: see Becker *v.* Quigg, 54 Ill. 390.]

[1] [See U. S. R. S. § 866; Green *v.* Compagnia, 82 Fed. 490, 495; Patterson *v.* Fagan, 38 Mo. 70, 79.]

[1] [Smith *v.* Griffith, 3 Hill N. Y. 338; State *v.* McNinch, 12 S. C. 95.]

[2] [See the cases in the next notes.]

[3] [Sperry *v.* Moore, 42 Mich. 361; see Clements *v.* Benjamin, 12 Johns. 299.]

[4] [See R. *v.* Hagan, 1 Jebb Cr. C. 127 (leading case): R. *v.* Hyde, 3 Cox Cr. 90, Fuller *v.* Rice, 4 Gray 343; Lewis *v.* Ins. Co., 10 id. 511; People *v.* Pope, 108 Mich. 361; Forrest *v.* Kissam, 7 Hill 470; People *v.* Cole, 43 N. Y. 513; Sturm *v.* Ins. Co., 63 id. 87; Hewlett *v.* Wood, 67 id. 396; Pringle *v.* Pringle, 59 Pa. 290.]

Where there is no cross-examination because the opponent does not choose to employ it, the direct testimony is of course received, because all that the principle requires is that there should have been an opportunity of cross-examination.[5]]

§ 163 *e*. **Same: Incomplete Cross-examination.** [It would seem that if a witness falls ill or dies during the cross-examination, the direct testimony should not be struck out if there has been cross-examination on substantially all material points.[1] If he refuses cross-examination on certain points, the refusal might justify striking out the corresponding portion or perhaps all of his direct testimony.[2] In the case of *depositions*, the mere failure to answer one cross-interrogatory should not of itself exclude the deposition; but the deliberate refusal to answer one or more interrogatories may, under the circumstances, justify the Court in treating the deposition as *ex parte* and inadmissible.[3]]

§ 163 *f*. **Confrontation; General Principle.** [The notion of confrontation is that the witness shall be now in court at the time of testifying and in the presence of the tribunal and the opponent. The purposes of this are two, one a chief and vital one, the other a minor and dispensable one. (a) The chief purpose of confrontation is to secure the opportunity for cross-examination; this has been repeatedly pointed out in judicial opinion;[1] so that if the opportunity of cross-examination has been secured, the function and test of confrontation is also accomplished; confrontation being merely the dramatic preliminary to cross-examination. (b) The second and minor purpose is that the tribunal may have before it the deportment and appearance of the witness while testifying.[2] But the latter purpose is so much a subordinate and incidental one that no vital importance is attached to it; consequently, if it cannot be had, it is dispensed with, provided the chief purpose, cross-examination, has been attained. So far as confrontation is concerned, then, the only question is whether it can be had under the circumstances of the case; if it can be, it must be; if not, it may be dispensed with.

[5] [Cazenove *v.* Vaughan, 1 M. & S. 6; Bradley *v.* Myrick, 91 N. Y. 296.]

[1] [Fuller *v.* Rice, 4 Gray 343.]

[2] [See McElhannon *v.* State, 99 Ga. 672; Heath *v.* Waters, 40 Mich. 471.]

[3] [See McCleskey *v.* Leadbetter, 1 Ga. 551; Schaefer *v.* R. Co., 66 id. 39; Savage *v.* Blanchard, 20 Pick. 167 (leading case); Stratford *v.* Ames, 8 All. 577; McMahon *v.* Davidson, 12 Minn. 357, 367; Bird *v.* Halsy, 87 Fed. 671; Hadra *v.* Bank, 9 Utah 412, 414; *post*, Vol. III, § 351.

The effect of an amendment of pleadings, or the like, in rendering a deposition imperfect, depends on the facts of each case; see Anderson *v.* Bank, 6 N. D. 497; First Nat'l Bank *v.* Wirebach, 106 Pa. 44.]

[1] [Fenwick's Trial, 13 How. St. Tr. 591; Duke of Dorset *v.* Girdler, Finch's Prec. Ch. 531; Com. *v.* Richards, 18 Pick. 437; Davis *v.* State, 17 Ala. 356; Summons *v.* State, 5 Oh. St. 341; U. S. *v.* Reynolds, 1 Utah 322; People *v.* Fish, 125 N. Y. 150; Woodward, J., in Howser *v.* Com., 51 Pa. 337: "Confronting witnesses . . . means cross-examination in the presence of the accused."]

[2] [Le Baron *v.* Crombie, 14 Mass. 235; State *v.* O'Blenis, 24 Mo. 421; People *v.* Sligh, 48 Mich. 56.]

But is it true, under the *constitutional sanction* for confrontation in criminal cases, that confrontation, if it cannot now be had, may be dispensed with? The Federal Constitution, and those of most States, provide that the accused is entitled "to be confronted with the witnesses against him," or "to meet face to face the witnesses against him." The argument has often been made that this provision excludes all testimony not delivered *viva voce* at the time of the trial in question. This argument, though wholly unsound, has in a few instances been sanctioned by Courts with the effect of excluding depositions and testimony at a former trial;[3] but it is usually and properly repudiated, not only for depositions and testimony at a former trial,[4] but also for other testimonial assertions receivable by way of exception to the Hearsay rule, such as dying declarations,[5] reputation,[6] official certificates,[7] and the like. But it is desirable to appreciate the true reason for repudiating the argument. It has sometimes been said,[8] in doing so, that the witness who reports the former testimony, etc., is, in fact, brought face to face with the accused, and hence the rule is satisfied. But this is fallacious; the deceased deponent or former witness or dying declarant is equally a witness, though speaking extra-judicially, and as to him the accused is not now confronted.[9] The real answer is a different one. First, the main object of confrontation — to secure the opportunity of cross-examination, as above explained — has, in fact, been accomplished; at the taking of the deposition or the former trial the accused had the power of cross-examination, and that is what the Constitution entitles him to; in short, he has had the promised confrontation.[10] Secondly, the constitutional clause purported merely

[3] [Finn *v.* Com., 5 Rand. 708; State *v.* Lee, 13 Mont. 248; Watkins *v.* U. S., Okl., 50 Pac. 88; Cline *v.* U. S., 36 Tex. Cr. 320.]

[4] [Vaughan *v.* State, 58 Ark. 353, 370; State *v.* McNamara, id., 30 S. W. 762 (Woodruff *v.* State, 61 id. 157, seems inconsistent); People *v.* Chin Hane, 108 Cal. 597; People *v.* Sierp, 116 id. 249; People *v.* Cady, 117 id. 10; Ryan *v.* People, 21 Colo. 119; State *v.* Oliver, 2 Houst. 589; Williams *v.* State, 19 Ga. 403; Gillespie *v.* People, Ill., 52 N. E. 250; State *v.* Fitzgerald, 63 Ia. 272 (compare State *v.* Olds, id., 76 N. W. 641); Com. *v.* Richards, 18 Pick. 437; People *v.* Sligh, 48 Mich. 54; People *v.* Case, 105 id. 92; Woodsides *v.* State, 2 How. Miss. 665; State *v.* McO'Blenis, 24 Mo. 416 (leading case); State *v.* Byers, 16 Mont. 565; Summons *v.* State, 5 Oh. St. 344 (leading case); Robbins *v.* State, 8 id. 163; Brown *v.* Com., 73 Pa. 325; Anthony *v.* State, Meigs 265; Kendrick *v.* State, 10 Humph. 484; Baxter *v.* State, 15 Lea 660; U. S. *v.* Macomb, 5 McLean 286; Robertson *v.* Baldwin, 165 U. S. 275; State *v.* Cushing, 17 Wash. 544.]

[5] [People *v.* Glenn, 10 Cal. 36; Campbell *v.* State, 11 Ga. 374; State *v.* Nash, 7 Ia. 377; Walston *v.* Com., 16 B. Monr. 34; State *v.* Brunetto, 13 La. An. 45; Com. *v.* Carey, 12 Cush. 246; Lambeth *v.* State, 23 Miss. 322, 357 (leading case); People *v.* Corey, N. Y., 51 N. E. 1024; State *v.* Tilghman, 11 Ired. 554; State *v.* Saunders, 14 Or. 305; State *v.* Kindle, 47 Oh. St. 361; State *v.* Murphy, 16 R. I. 533; Burrell *v.* State, 18 Tex. 731; Miller *v.* State, 25 Wis. 386.]

[6] [State *v.* Waldron, 16 R. I. 194.]

[7] [State *v.* Behrman, 114 N. C. 797, 804; Reeves *v.* State, 7 Coldw. 96, 108; *contra*, State *v.* Reidel, 26 Ia. 430, 436.]

[8] [*E. g.* by Smith, J., in Woodside *v.* State, 2 How. Miss. 665; Lumpkin, J., in Campbell *v.* State, 11 Ga. 374.]

[9] [Napton, J., in State *v.* Houser, 26 Mo. 437.]

[10] [Smith, J., in Woodsides *v.* State, *supra*; Hooker, J., in People *v.* Case, 105 Mich. 92.]

to adopt the general principle of the Hearsay rule, that there must be confrontation, *i. e.* the power of cross-examination, for infra-judicial witnesses; but it did not purport to enumerate all the exceptions and limitations to that principle. There were then a number of well-established exceptions, and there might be others in the future; the Constitution indorsed the general principle, subject to these exceptions; merely naming and describing it sufficiently to indicate the principle intended, — just as the brief constitutional sanction for trial by jury did not attempt to enumerate the classes of cases to which that form of trial was appropriate nor the precise procedure involved in it, and has always been construed as not absolute and universal in effect, but as subject to the limitations and unessential variations understood to accompany that institution.[11] Thirdly (perhaps only as another aspect of the preceding reason), the constitutional requirement is limited to the mode of taking testimony at the trial; it does not prescribe what kinds of testimony shall be given infra-judicially, but only what mode of procedure — *i. e.* not a secret or *ex parte* examination — shall be followed for such testimony as by the ordinary and existing law of evidence is required to be given infra-judicially.[12] — Such is the better reasoning accepted by most Courts as here applicable. It follows that the constitutional requirement of confrontation is not violated by dispensing with the actual presence of the witness at the trial, if he has already been subject to cross-examination, or if his assertions are received under some recognized exception to the Hearsay rule.

The general principle, therefore, should be that in all cases where the party has without his own fault or concurrence irrecoverably lost the power of producing the witness again,[13] he should be dispensed from doing so, if there is at hand his testimony already subjected to cross-examination; and this general notion underlies all the cases of dispensation. But it is not rationally and consistently applied. As a matter of precedent, it is therefore necessary to examine the specific ways in which a witness' presence may become impossible; and, furthermore, the precedents often differ (though they should not) according as the cross-examined testimony is offered in the shape of testimony at a former trial (including in-

[11] [Lumpkin, J., in Campbell *v.* State, 11 Ga. 374; Leonard, J., in State *v.* McO'Blenis, 24 Mo. 416; Brown, J., in Robertson *v.* Baldwin, U. S., 17 Sup. 326.]

[12] [Putnam, J., in Com. *v.* Richards, 18 Pick. 437; Simpson, J., in Walston *v.* Com., 16 B. Monr. 35; Bartley, C. J., in Summons *v.* State, 5 Oh. St. 341.]

[13] [This phrase is reproduced from § 168, *post*. Compare the following passage. Green, J., in Wells *v.* Ins. Co., Pa., 40 Atl. 802: "The cause of the subsequently accruing incompetency is not material. It may arise from absence, from sickness, from interest, from death, or from a newly-created statutory incompetency; but the principle controlling them all is that, if at the time the deposition or testimony was taken, the witness was competent, it may be given in evidence after the incompetency had arisen. Such is the sense of all the modern decisions, and we think the conclusion reasonable and just."]

quests and preliminary examinations) or of a deposition. The matter is regulated by statute in some jurisdictions.]

§ 163*g*. **Same: Decease, Absence, Illness, etc., of Witness; (1) Testimony at a Former Trial.** [The *death* of the witness has always, and as of course, been considered as sufficient to allow the use of his former testimony.[1] The *absence* of the witness *from the jurisdiction*, out of reach of the Court's process, ought also to be sufficient, and is so treated by the great majority of Courts;[2] mere absence, however, may not be sufficient, and it is usually said that a residence or an absence for a prolonged or uncertain time is necessary.[3] A few Courts do not recognize at all this cause for non-production;[4] a few others deny it for criminal cases;[5] neither position is sound. *Inability to find* the witness is an equally sufficient reason for non-production, by the better opinion,[6] though there are contrary precedents;[7] the sufficiency of the search is usually and properly left to the trial Court's discretion. Absence through *the opponent's procurement* should of course be a sufficient reason for non-

[1] [This is mentioned in almost all of the cases in the ensuing notes; see also Gilbert, Evidence, 60; Lord Morley's Case, Kelyng 55; Fry *v.* Wood, 1 Atk. 444; R. *v.* Castro (Tichborne Case), Charge of Chief Justice, II, 305; St. Louis I. M. & S. R. Co. *v.* Sweet, 60 Ark. 550; People *v.* Douglass, 100 Cal. 1, 5; Lewis *v.* Rowlo, 93 Mich. 475; State *v.* George, 60 Minn. 503; Carrico *v.* R. Co., 39 W. Va. 86.

A few modern Courts, misunderstanding the constitutional bearings of the question, have refused to acknowledge this or any other cause for non-production: Watkins *v.* State, Okl., 50 Pac. 88; State *v.* Lee, 13 Mont. 248; Cline *v.* State, 36 Tex. Cr. 320; Finn *v.* Com., 5 Rand. 708.]

[2] [Fry *v.* Wood, 1 Atk. 445; Roe *v.* Jones, 3 Low. Can. 58; Sutor *v.* McLean, 18 U. C. Q. B. 492; Mims *v.* Sturtevant, 36 Ala. 64; Marler *v.* State, 67 id. 64; Thompson *v.* State, 106 id. 67; Lowery *v.* State, 98 id. 45, 50; Mitchell *v.* State, 114 id. 1; McMunn *v.* State, 113 id. 86, *semble;* Dennis *v.* State, id., 23 So. 1002; Hurley *v.* State, 29 Ark. 23; Dolan *v.* State, 40 id. 61; Vaughan *v.* State, 58 id. 353, 370; State *v.* McNamara, id., 30 S. W. 762; People *v.* Devine, 46 Cal. 48; Benson *v.* Shotwell, 103 id. 163; People *v.* Cady, 117 id. 10; Cassady *v.* Trustees, 105 Ill. 567, *semble;* Spaulding *v.* R. Co., 98 Ia. 205; Reynolds *v.* Powers, 96 Ky. 481; Louisville Water Co. *v.* Upton, id., 36 S. W. 520; State *v.* Madison, 50 La. An., 23 So. 622; Rogers *v.* Raborg, 2 G. & J. 60; Howard *v.* Patrick, 38 Mich. 799; Minneap. M. Co. *v.* R. Co., 51 Minn. 304, 314; King *v.* McCarthy, 54 id. 190, 195; Hill *v.* Winston, id., 75 N. W. 1030; Omaha S. R. Co. *v.* Elkins, 39 Nebr. 480; Lowe *v.* Vaughn, 48 id. 651; Ord *v.* Nash, id., 69 N. W. 964; Magill *v.* Kauffman, 4 S. & R. 317; Forney *v.* Hallagher, 11 id. 203; Giberson *v.* Mills Co., Pa., 41 Atl. 525; Chic. S. P. M. & O. R. Co. *v.* Myers, U. S. App., 80 Fed. 361.]

[3] [See the preceding cases. It is not necessary to try and take the witness' deposition or secure his voluntary personal attendance: Minn. M. Co. *v.* R. Co., 51 Minn. 304, 315; *contra:* Shisser *v.* Burlington, 47 Ia. 302; Chic. S. P. M. & O. R. Co. *v.* Myers, *supra.*]

[4] [Berney *v.* Mitchell, 34 N. J. L. 341; Crary *v.* Sprague, 12 Wend. 45.]

[5] [Pittiman *v.* State, 92 Ga. 480; State *v.* Hauser, 26 Mo. 439; People *v.* Newman, 5 Hill 296; Finn *v.* Com., 5 Rand. 708.]

[6] [Oates' Trial, 16 How. St. Tr. 1235; Godbolt 236; Gilbert, Evidence, 60; Buller, Nisi Prius, 239; Thompson *v.* State, 106 Ala. 67; Mitchell *v.* State, 114 id. 1; Shackelford *v.* State, 33 Ark. 539; Sneed *v.* State, 47 id. 186; Vaughan *v.* State, 58 id. 353, 370; Harwood *v.* State, 63 id. 130; A. & S. R. Co. *v.* Randall, 85 Ga. 302, 314; State *v.* White, 46 La. An. 1273; State *v.* Timberlake, 50 id., 23 So. 276; Seitz *v.* Seitz, 170 Pa. 71, *semble.*]

[7] [Lord Morley's Case, Kelyng 55; R. *v.* Hagan, 8 C. & P. 169; R. *v.* Scaife, 8 Q. B. 243; Crary *v.* Sprague, 12 Wend. 45.]

production.[8] *Illness*, by causing inability to attend, has the same effect.[9] The phrase usually employed as a test is "so ill as to be unable to travel;" the application of the principle should be left to the trial Court's discretion;[10] but the phrasing differs in different statutes and decisions.[11] *Insanity* equally renders the witness unavailable;[12] as well as *loss of memory* by disease or old age,[13] or by mere lapse of time.[14] *Blindness* may render a witness unavailable for certain kinds of testimony.[15] Disqualification, since the former trial, by reason of *interest*, infamy, or other disqualification, should be sufficient.[16]]

§ 163 *h*. **Same: (2) Depositions.** [The same general principle applies here as in the preceding sort of testimony; a deposition taken subject to cross-examination should be receivable if the deponent is at the time of trial not available as a witness. But the general necessity of empowering Courts of common law, by statute, to authorize the taking of depositions, has led customarily to the express statutory declaration of the cases in which the deposition may be admitted;[1] and reference must thus be had chiefly to the terms of the local statutes.[2] The following brief summary deals only with the judicial decisions.

The *death* of the witness is the typical and recognized instance of unavailability, and admits the deposition.[3] *Absence from the juris-*

[8] [Harrison's Trial, 12 How. St. Tr. 851; U. S. *v.* Reynolds, 1 Utah 322, 98 U. S. 158. *Contra*, for an accused person, Bergen *v.* People, 17 Ill. 427.]

[9] [Lord Morley's Case, Kelyng 55; Try *v.* Wood, 1 Atk. 445; R. *v.* Savage, 5 C. & P. 143; Rogers *v.* Roborg, 2 G. & J. 60; Howard *v.* Patrick, 38 Mich. 799; Emig *v.* Diehl, 76 Pa. 373; McLain *v.* Com., 99 id. 97 (not decided as to criminal cases); Perrin *v.* Wells, 155 id. 300. *Contra:* Doe *v.* Evans, 3 C. & P. 221; Com. *v.* McKenna, 158 Mass. 207 (for criminal cases).]

[10] [Thornton *v.* Britton, 144 Pa. 130.]

[11] [See R. *v.* Farrell, 12 Cox Cr. 606; R. *v.* Thompson, 13 id. 182; R. *v.* Heesom, 14 id. 42; R. *v.* Wellings, L. R. 3 Q. B. D. 428; Miller *v.* Russell, 7 Mart. N. S. 268; Berney *v.* Mitchell, 34 N. J. L. 341.]

[12] [R. *v.* Eriswell, 3 T. R. 707; Morler *v.* State, 67 Ala. 62; Thompson *v.* State, 106 id. 67; 17 So. 512; Cook *v.* Stout, 47 Ill. 531; Walkup *v.* Com., Ky., 20 S. W. 221; Whitaker *v.* Marsh, 62 N. H. 478.]

[13] [Cent. R. Co. *v.* Murray, 97 Ga. 326; Emig *v.* Diehl, 76 Pa. 373; Rothrock *v.* Gallagher, 91 id. 112; Drayton *v.* Wells, 1 Nott & M. 247.]

[14] [Jack *v.* Woods, 26 Pa. 378, *semble*. *Contra:* Robinson *v.* Gilman, 34 N. H. 297; Velott *v.* Lewis, 102 Pa. 326; Drayton *v.* Wells, *supra*.]

[15] [Houston *v.* Blythe, 60 Tex. 509.]

[16] [Gosse *v.* Tracy, 2 Vern. 699; Haws *v.* Hand, 2 Atk. 615; Redd *v.* State, Ark., 47 S. W. 119; Evans *v.* Reed, 78 Pa. 415, 84 id. 254; Pratt *v.* Patterson, 81 id. 114; Walbridge *v.* Knipper, 96 id. 50; Galbraith *v.* Zimmerman, 100 id. 374. *Contra:* Baker *v.* Fairfax, 1 Str. 101; LeBaron *v.* Crombie, 14 Mass. 235.

For imprisonment as a convict, see State *v.* Conway, 56 Kan. 682.]

[1] [The conditions of granting permission to take a deposition must be distinguished from the conditions on which it will be received; the latter (the present subject) will usually be somewhat different from the former; but the latter is not always regulated by the statute.]

[2] [The English statutes have been numerous. Those of present importance are St. 30–31 Vict., c. 35, § 6; Rules of Court, 1883. Ord. 37, r. 18; construed in Burton *v.* Railway, 35 W. R. 536; Nadin *v.* Bassett, L. R. 25 Ch. D. 21. The Federal Statute is U. S. R. S. § 866; for its construction, see Gould & Tucker's Notes on the Revised Statutes; also St. 1892. c. 14; Mulcahey *v.* R. Co., 69 Fed. 172.]

[3] [Gilbert, Evidence, 64; Ward *v.* Sykes, Ridgw. 193; Price *v.* Bridgman, Dick.

diction is also a recognized ground for admission;[4] but statutes often prescribe a smaller district, — as, without the county,[5] or more than one hundred miles distant.[6] A residence without the district at the time of taking the deposition is usually presumed to continue at the time of offering it.[7] *Inability to find* the witness may also be sufficient for admission.[8] *Illness*, or other physical cause preventing attendance, will suffice;[9] the phrasing of this ground for non-attendance varying much in precedents and statutes. *Insanity* also suffices,[10] as well as *disqualification* by interest or the like.[11]]

§ 163 *i*. **Same: Witness present in Court or otherwise available.** [The whole notion of taking depositions is that they are a provision in advance for obtaining testimony from one who will not be available at the time of the trial, *i. e.*, in the traditional phrase, they are taken *de bene esse*, conditionally. If the witness is in fact available at the time of the trial, the principle of confrontation requires that he should be examined *viva voce* on the stand. This principle is constantly vindicated;[1] nevertheless, a few Courts, forgetting the essentially conditional nature of a deposition, admit it even though the witness is present in court or otherwise available.[2] There are, however, two classes of statutes which expressly or impliedly sanction this, viz., the Federal statute authorizing depositions by *dedimus*

144. This ground is mentioned in most of the cases in the ensuing notes. A few modern Courts, misunderstanding the constitutional question (*ante*, § 163 *f*), do not admit a deposition, against the accused or in a criminal case, under any circumstances: Woodruff *v.* State, 61 Ark. 157, *semble;* Watkins *v.* U. S., Okl., 50 Pac. 88.]

[4] [Altham *v.* Anglesea, 11 Mod. 212; Ward *v.* Sykes, Ridgw. 193; Birt *v.* White, Dick. 473; Falconer *v.* Hanson, 1 Camp. 172; Robinson *v.* Markis, 2 Moo. & R. 376; Cunningham *v.* Cunningham, N. C., 28 S. E. 525; Carpenter *v.* Groff, 5 S. & R. 165; Johnson *v.* Sargent, 42 Vt. 195; Hoopes *v.* De Vaughn, 43 W. Va. 447. *Contra*, for criminal cases: State *v.* Tomblin, 57 Kan. 841; State *v.* Humason, 5 Wash. 499.]

[5] [See, *e. g.*, Gardner *v.* Meeker, 169 Ill. 40.]

[6] [See the Federal statute, cited *supra*.]

[7] Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604, 616; Pettibone *v.* Derringer, 4 Wash. C. C. 215; [Kaufman *v.* Caughman, 49 S. C. 159; Hennessy *v.* Ins. Co., 8 Wash. 91.

But the magistrate's certificate appended to the deposition is not always made evidence of the necessary facts: see Atkinson *v.* Nash, 56 Minn. 472; Littlehale *v.* Dix, 11 Cush. 365.]

[8] [Pettibone *v.* Derringer, *supra;* Burton *v.* State, 107 Ala. 68.]

[9] [Lilly's Pract. Reg. II, 703; Altham *v.* Anglesea, 11 Mod. 212; Palmer *v.* Aylesbury, 15 Ves. Jr. 176; Avery *v.* Woodruff, 1 Root 76; Hanley *v.* Banks, Okl., 51 Pac. 662; Whitesell *v.* Crave, 8 W. & S. 372; Johnson *v.* Sargent, 42 Vt. 195.]

[10] [R. *v.* Marshall, Car. & M. 147.]

[11] [Brown *v.* Greenly, Dick. 504; Sabine *v.* Strong, 6 Metc. 277; Wells *v.* Ins. Co., Pa., 40 Atl. 802. *Contra:* Irwin *v.* Reed, 4 Yeates 512; Chess *v.* Chess, 17 S. & R. 412.]

[1] [Mobile Life Ins. Co. *v.* Walker, 58 Ala. 290; Humes *v.* O'Bryan, 78 id. 77; Neilson *v.* R. Co., 67 Conn. 466; Dunn *v.* Dunn, 11 Mich. 292 (leading case); Schmitz *v.* R. Co., 119 Mo. 256, 271; Benjamin *v.* R. Co., 133 id. 274; Barber Co. *v.* Ullman, 137 id. 543; Gerhauser *v.* Ins. Co., 7 Nev. 189.

So also for a *party* offering his own deposition: State *v.* Oliver, 55 Kan. 711; Moore *v.* Palmer, 14 Wash. 134.]

[2] [West. & A. R. Co. *v.* Bussey, 95 Ga. 584 (leading case); Bradley *v.* Geiselman, 17 Ill. 571; Frink *v.* Potter, ib. 408; Edmonson *v.* R. Co., Ky., 46 S. W. 681; Phenix *v.* Baldwin, 14 Wend. 62, *semble.*]

potestatem,[3] and some State statutes, usually dealing with the deposition of an opposing party.[4] Moreover, the principle of course does not apply where the deposition is offered to contradict the deponent himself on the stand.[5]]

§ 164.[1]

§ 165. **Proving the Substance of Former Testimony.** It was formerly held, that the person called to prove what a deceased witness testified on a former trial must be required to repeat his precise words, and that testimony merely to the effect of them was inadmissible.[1] But this strictness is not now insisted upon, in proof of the crime of perjury;[2] and it has been well remarked, that to insist upon it in other cases goes in effect to exclude this sort of evidence altogether, or to admit it only where, in most cases, the particularity and minuteness of the witness' narrative, and the exactness with which he undertakes to repeat every word of the deceased's testimony, ought to excite just doubts of his own honesty, and of the truth of his evidence. It seems, therefore, to be generally considered sufficient, if the witness is able to state the substance of what was sworn on the former trial.[3] But he must state, in substance, the whole of what was said on the particular subject which he is called to prove; if he can state only what was said on that subject by the deceased, on his examination in chief, without also giving the substance of what he said upon it in his cross-examination, it is inadmissible.[4]

[3] [Patapsco Ins. Co. *v.* Southgate, 5 Pet. 616; Sergeant *v.* Biddle, 4 Wheat. 511; Jones *v.* R. Co., 3 Sawyer, 527.]

[4] [*E. g.* Adams *v.* Weaver, 117 Cal. 42.]

[5] [People *v.* Hawley, 111 Cal. 78.]

[1] [Transferred to Appendix II.]

[1] 4 T. R. 290; said, per Ld. Kenyon, to have been so "agreed on all hands," upon an offer to prove what Ld. Palmerston had testified. So held, also, by Washington, J., in U. S. *v.* Wood, 3 Wash. C. C. 440; 1 Phil. Evid. 200 (215), 3d ed.; Foster *v.* Shaw, 7 Serg. & R. 163. per Duncan, J.; Wilbur *v.* Selden, 6 Cowen 165; Ephraims *v.* Murdoch, 7 Blackf. 10.

[2] R. *v.* Rowley, 1 Mood. Cr. Cas. 111.

[3] See Cornell *v.* Green, 10 Serg. & R. 14, 16, where this point is briefly but powerfully discussed by Mr. Justice Gibson. See also Miles *v.* O'Hara, 4 Binn. 108; Caton *v.* Lenox, 5 Randolph 31, 36; R. *v.* Rowley, 1 Mood. Cr. C. 111; Chess *v.* Chess, 17 Serg. & R. 409, 411, 412; Jackson *v.* Bailey, 2 Johns. 17; 2 Russ. on Crimes, 638 [683], (3d Am. ed.); Sloan *v.* Somers, 1 Spencer 66; Garrott *v.* Johnson, 11 G. & J. 173; Canney's Case, 9 Law Rep. 408; State *v.* Hooker, 17 Vt. 658; Gildersleeve *v.* Caraway, 10 Ala. 260; Gould *v.* Crawford, 2 Barr 89; Wagers *v.* Dickey, 17 Ohio 439.

[4] Wolf *v.* Wyeth, 11 Serg. & R. 149; Gildersleeve *v.* Caraway, 10 Ala. 260. [The last two sentences seem to represent the law everywhere to-day, except in Massachusetts, where the early adoption of the rule requiring the precise words still hampers the Court; the following list includes only late citations from the various jurisdictions: Thompson *v.* State, Ala., 17 So. 685; Vaughan *v.* State, 58 Ark. 353, 378; People *v.* Murphy, 45 Cal. 137, 145; Mitchell *v.* State, 71 Ga. 128; Mineral P. R. Co. *v.* Keep, 22 Ill. 20; Bass *v.* State, 136 Ind. 165; State *v.* Fitzgerald, 63 Ia. 271; Solomon R. Co. *v.* Jones, 34 Kan. 461; Bush *v.* Com., 80 Ky. 247; Lime Rock Bank *v.* Hewett, 52 Me. 531; Black *v.* Woodrow, 39 Md. 194, 220; Costigan *v.* Lunt, 127 Mass. 354; Fisher *v.* Kyle, 27 Mich. 455; Scoville *v.* R. Co., 94 Mo. 87; Twohig *v.* Leamer,

§ 166. **Mode of proving Former Testimony.** What the deceased witness testified may be proved by any person who will swear from his own memory; or by notes taken by any person who will swear to their accuracy.[1] [When notes are used, the principles of §§ 439 *b*, 439 *c*, *post*, are applicable; *i. e.*, either the witness by referring to the notes revives an actual recollection, or else he has no present recollection, but adopts the notes as a record of past recollection made at or about the time. The use of stenographic notes usually involves the latter principle.[2] But the offer of the mere notes themselves, whether purporting to be by a stenographer[3] or only by an attorney or clerk,[4] is the offer of a hearsay report of the testimony, and is improper; even the notes of a court stenographer stand on no better footing;[5] unless they can be brought within the exception (*ante*, § 162 *m*) for official statements, as by a statute or a rule of Court expressly declaring the notes of the official stenographer to be receivable under the principle of that exception.[6] The testimony may also be proved,] perhaps, from the necessity of the case, by the judge's own notes, where both actions are tried before the same judge; for, in such case, it seems the judge, from his position, as well as from other considerations, cannot be a witness.[7] But, except in this case of necessity, if it be admitted as such, the better opinion is, that the judge's notes are not legal evidence of what a witness testified before him; for they are no part of the record, nor is it his official duty to take them, nor have they the sanction of his oath to their accuracy or completeness.[8] But in Chancery, when a

48 Nebr. 247; Young *v.* Dearborn, 22 N. H. 372; Sloan *v.* Somers, 20 N. J. L. 66; Trimmer *v.* Trimmer, 90 N. Y. 676; Ballenger *v.* Barnes, 3 Dev. 460, 465; Bine *v.* Carver, 73 N. C. 264; Summons *v.* State, 5 Oh. St. 325, 352; Hepler *v.* Bank, 97 Pa. 420; State *v.* Jones, 29 S. C. 229; Wade *v.* State, 7 Baxt. 80; Parks *v.* Caudle, 58 Tex. 220; Bennett *v.* State, 32 Tex. Cr. 216; Ruch *v.* Rock Island, 97 U. S. 693; Earl *v.* Tupper, 45 Vt. 284; Caton *v.* Lenox, 5 Rand. 31, 39; Emery *v.* State, 92 Wis. 146.]

[1] Mayor of Doncaster *v.* Day, 3 Taunt. 262; Chess *v.* Chess, 17 Serg. & R. 409; {Hutchings *v.* Corgan, 59 Ill. 70 (juror); Wade *v.* State, 7 Baxt. 80 (magistrate); Ruch *v.* Rock Island, 97 U. S. 693; People *v.* Murphy, 45 Cal. 137; Yale *v.* Comstock, 112 Mass. 267.}

[2] [*E. g.* in State *v.* Bartmess, Or., 54 Pac. 167.]

[3] [Morris *v.* Hammerle, 40 Mo. 489; Bedford *v.* R. Co., Wash., 46 Pac. 650.]

[4] [Jenkins *v.* State, Ala., 17 So. 182; Waters *v.* Waters, 35 Md. 539.]

[5] [Hardeman *v.* English, 79 Ga. 387, 390; Herrick *v.* Swomley, 56 Md. 4; Toohey *v.* Plummer, 69 Mich. 345; Jackson *v.* State, 81 Wis. 127.]

[6] [Grieve *v.* R. Co., 104 Ia. 659; Susque. M. F. I. Co. *v.* Mardorf, 152 Pa. 22; Woodward *v.* Heist, 180 Pa. 161.]

[7] Glassford on Evid. 602; Tait on Evid. 432; R. *v.* Gazard, 8 C. & P. 595; *infra*, § 249.

[8] Miles *v.* O'Hara, 4 Binn. 108; Foster *v.* Shaw, 7 Serg. & R. 156; *Ex parte* Learmouth, 6 Madd. 113; R. *v.* Plummer, 8 Jur. 922, per Gurney, B.; Livingston *v.* Cox, 8 Watts & Serg. 61; Courts expressly disclaim any power to compel the production of a judge's notes: Scougull *v.* Campbell, 1 Chitty 283; Graham *v.* Bowham, ib. 284, n.; and if an application is made to amend a verdict by the judge's notes, it can be made only to the judge himself before whom the trial was had: ib., 2 Tidd's Pr. 770, 933. Where a party, on a new trial being granted, procured, at great expense, copies of a shorthand writer's notes of the evidence given at the former trial, for the amount

new trial is ordered of an issue sent out of Chancery to a Court of common law, and it is suggested that some of the witnesses in the former trial are of advanced age, an order may be made, that, in the event of their death or inability to attend, their testimony may be read from the judge's notes.[9] [The use of a bill of exceptions, embodying testimony at the trial, has usually been repudiated, chiefly, perhaps, because only selected fragments are thus embodied, and not the whole; for apart from this consideration, it would seem that the signing of the bill by the parties would suffice as an admission of the terms of the testimony.[10] The reduction to writing by the magistrate at a preliminary hearing, or by the coroner, of testimony given before him by the accused or other witnesses is usually expressly declared admissible by statute as an official report of the testimony.[11]]

§§ 167, 168.[1]

of which he claimed allowance in the final taxation of costs; the claim was disallowed, except for so much as would have been the expense of waiting on the judge, or his clerk, for a copy of his notes; on the ground that the latter would have sufficed: Crease *v.* Barrett, 1 Tyrw. & Grang. 112. But this decision is not conceived to affect the question, whether the judge's notes would have been admissible before another judge, if objected to. In R. *v.* Bird, 5 Cox C. C. 11, 2 Eng. Law & Eq. 444, the notes of the judge, before whom a former indictment had been tried, were admitted without objection, for the purpose of showing what beatings were proved at that trial, in order to support the plea of *autrefois acquit*. In New Brunswick, a judge's notes have been held admissible, though objected to, on the ground that they were taken under the sanction of an oath, and that such has been the practice: Doe *v.* Murray, 1 Allen N. B. 216. But in a recent case in England, on a trial for perjury, the notes of the judge, before whom the false evidence was given, being offered in proof of that part of the case, Talfourd, J., refused to admit them; observing, that "a judge's notes stood in no other position than anybody else's notes. They could only be used to refresh the memory of the party taking them. It was no doubt unusual to produce the judge as a witness, and would be highly inconvenient to do so; but that did not make his notes evidence:" R. *v.* Child, 5 Cox C. C. 197, 203. [The more modern rulings are clear that a judge's notes are not receivable, since it is not a part of his duty to make such a report: Leach *v.* Simpson, 5 M. & W. 311; Schafer *v.* Schafer, 93 Ind. 588; Webster *v.* Colden, 55 Me. 171; Wilson *v.* Wilson, 38 Wis. 228; Zitske *v.* Goldberg, 38 id. 229. *Contra: Ex parte* Gillebrand, L. R. 10 Ch. App. 52, *semble;* Doe d. Lonchester *v.* Murray, *supra.*]

[9] Hargrave *v.* Hargrave, 10 Jur. 957.

[10] [*Excluded:* St. Louis I. M. & S. R. Co. *v.* Sweet, 60 Ark. 550; Roth *v.* Smith, 54 Ill. 432; Ill. C. R. Co. *v.* Ashline, 171 id. 313; Boyd *v.* Bank, 25 Ia. 257 (leading case); Breitenwischer *v.* Clough, Mich., 74 N. W. 507. *Admitted:* Bank *v.* Lacy, 1 T. B. Monr. 7; Boner *v.* Com., Ky., 40 S. W. 700 (but not in criminal cases);] {Coughlin *v.* Haenssler, 50 Mo. 126;} [Wilson *v.* Noonan, 35 Wis. 343.]

[11] [For the necessity of producing this report of the magistrate, in preference to any other witness to the testimony, see *ante*, § 97 *d*, *post*, § 227.]

[1] [Transferred to Appendix II.]

CHAPTER XVII.

ADMISSIONS.

1. *In General.*

§ 169. General Principle.
§ 170. Admissions and Confessions distinguished.
§ 170 *a*. Party need not be asked before proving an Admission.

2. *Persons whose Statements are receivable as Admissions.*

§ 171. Parties to the Record.
§§ 172, 173. Same: Nominal Parties.
§ 174. Same: Joint Promisors; Parties in a Testamentary Cause; etc.
§ 175. Same: Town Corporators.
§ 176. Same: Mere Community of Interest not enough.
§ 177. Same: Interest must first be shown.
§ 178. Same: Answers of Parties in Chancery.
§ 179. Same: Interest must exist at Time of Admission made.
§§ 180, 181. Persons not Parties to the Record; In general.
§§ 182-184. Same: Referees; Appointees; Interpreters.
§ 184 *a*. Same: Conspirators.
§ 184 *b*. Same: Partners.
§§ 184 *c*, 184 *d*. Same: Agents.
§ 185. Same: Husband and Wife.
§ 186. Same: Attorneys of Record; Pleadings.
§§ 187, 188. Same: Principal and Surety.
§ 189. Same: Privity of Estate; Ancestor or Grantor during Ownership.
§ 190. Same: Vendor or Assignor of Personalty.
§ 191. Party or Privy need not be called.

3. *What Kinds of Conduct or Utterances amount to an Admission.*

§ 192. Offers of Compromise.
§ 193. Statements made under Constraint.
§ 194. Statements made incidentally or in unrelated Transactions.
§ 195. Assuming a Character.
§ 195 *a*. Conduct: (1) Falsehood and Fraud; Manufacturing and destroying Evidence.
§ 195 *b*. Same: (2) Failure to produce Evidence.
§ 195 *c*. Same: (3) Failure to produce Documents.
§ 195 *d*. Same: (4) Repairs and Precautions after an Injury.
§ 196. Same: (5) Sundry Kinds of Conduct.
§§ 197, 198. Same: (6) Failure to repudiate another's Assertion; Statements made in a Party's Presence.
§ 199. Same: (7) Possession of Documents; Unanswered Letters; Books of a Society or Corporation.

4. *Sundry Limitations.*

§ 200. Weight and Value of Admissions.
§ 201. Explanations; Putting in the whole of a Conversation, Document, or Correspondence.
§ 201 *a*. Same: Other Modes.
§ 202. Admissions based on Hearsay.
§ 203. Parol Admissions of Title or of Contents of Documents.

5. *Conclusive Admissions (Estoppel; Judicial Waiver).*

§ 204. Admissions as Estoppels between Parties.
§ 205. Judicial Admissions.
§ 206. Same: Admissions by Mistake.
§§ 207-210. Admissions acted upon, as giving rise to Estoppels.
§ 211. Admissions in Deeds.
§ 212. Non-judicial Admissions, not conclusive.

1. *In General.*

§ 169. **General Principle.** Under the head of exception to the rule rejecting hearsay evidence, it has been usual to treat of admissions

and confessions by the party, considering them as declarations against his interest, and therefore probably true. But in regard to many admissions, and especially those implied from conduct and assumed character, it cannot be supposed that the party, at the time of the principal declaration or act done, believed himself to be speaking or acting against his own interest; but often the contrary.[1] Such evidence seems, therefore, more properly admissible as a substitute for the ordinary and legal proof, either in virtue of the direct consent and waiver of the party, as in the case of explicit and solemn admissions; or on grounds of public policy and convenience, as in the case of those implied from assumed character, acquiescence, or conduct.[2] It is in this light that confessions and admissions are regarded by the Roman law, as is stated by Mascardus. "Illud igitur in primis, ut hinc potissimum exordiar, non est ignorandum, quod etsi confessioni inter probationum species locum in præsentia tribuerimus; cuncti tamen fere Dd. unanimes sunt arbitrati, ipsam potius esse ab onere probandi relevationem quam proprie probationem."[3] [But the theory that an admission is something that is substituted for and serves in place of evidence is open to the objection that it is not founded on the facts of the law; for the party's extra-judicial admissions simply go to the jury with other evidence, and do not by any means relieve the other party from producing evidence or allow him to take for granted the fact referred to in the admission. The truth seems to be that under the term "admission" are included two things, wholly distinct in evidential theory and effect. (1) A deliberate and formal waiver, made usually in court or by writing preparatory to trial, by the party or his attorney, by conceding for the purposes of the trial the truth of some alleged fact, has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted and the other party need offer no evidence to prove it. This is what is commonly termed a solemn — *i. e.* ceremonial or formal — or judicial admission, and is in truth, as above suggested, a substitute for evidence, in that it does away with the need for evidence. These are later referred to in §§ 186, 192, and 205. (2) Statements by a party, other than these, are also termed admissions; but there is nothing in their nature which entitles us to say that they are explainable only as made against the person's interest. The simple and broad rule for receiving them is, in the language of Chief Baron Pollock, that "if a party has chosen

[1] [This notion that an admission is something said against the interest of the party (analogous to the principle of the Hearsay exception, *ante*, Chap. XIII) has been very common; *e. g.* the language of Eyre, C. J., in Hardy's Trial, 24 How. St. Tr. 1093; Evans, J., in Robinson *v.* Blakely, 4 Rich. 588. But, as the author suggests, the theory fails for the simple reason that an admission is receivable even though the party spoke, not against his interest, but in favor of it, as is generally conceded.]

[2] See *supra*, § 27.

[3] Mascard. De Probat. vol. i, Quæst. 7, n. 1, 10, 11; Menochius, De Præsump. lib. 1, Quæs. 62, n. 6; Alciatus, De Præsump. pars 2, n. 4.

to talk about a particular matter, his statement is evidence against himself;"[4] and the theory of their use seems to be that they are to a party what prior inconsistent statements are to a witness (*post*, § 444), viz., a means of discrediting his present claim by showing that he has at other times made a smaller or otherwise different claim. If a witness says on the stand that he saw the plaintiff give the defendant one hundred dollars, a prior statement of his that he saw fifty dollars given discredits his present testimony, in that both statements cannot be true, and at one time or the other the witness has apparently erred. In a similar way, a plaintiff's statement at a prior time that he lent the defendant fifty dollars throws discredit on his present claim in the pleadings that he lent one hundred dollars. The evidential weight of the inconsistency may be greater if his prior statement was against his interest — as, if he declared that he never lent any money at all, — but that is not essential to its admissibility; so that, in the end, the purpose and effect of using admissions of this sort is simply to set a prior statement of the party against the statement now advanced by him in pleadings or through his witnesses, and thus discredit the present claim by its inconsistency with the former one.

Admissions are often spoken of as "binding," and admissions rejected are likewise referred to as "not binding." This term, however, has no application whatever to the second sort above mentioned; these go to the jury like the inconsistent statements of a witness, and the party is not prevented from continuing to dispute their truth in any way he may.[5] They never "bind" in the sense that he is held as a matter of law to the fact thus stated. That term does apply, however, to solemn admissions (the first sort above named), which the party cannot retract or dispute; and it applies to the estoppels, miscalled admissions, which are treated in the later sections of this chapter, but are, after all, like contracts, acts carrying legal consequences in the substantive law, and not evidential data.] Many admissions, however, being made by third persons,[6] are receivable on mixed grounds; partly as belonging to the *res gestæ*, partly as made against the interest of the person making them, and partly because of some privity with him against whom they are offered in evidence. The whole subject, therefore, properly falls under consideration in this connection.

§ 170. **Admissions and Confessions distinguished.** In our law, the term "admission" is usually applied to civil transactions, and to those matters of fact, in criminal cases, which do not involve criminal intent; the term "confession" being generally restricted to ac-

[4] [Darby *v.* Ouseley, 1 H. & N. 1.]

[5] [See § 212, *post*.]

[6] [There are, properly speaking, no admissions by third persons; inconsistent statements by others than the party or a witness are received as admissions only because the other person is regarded as representing or identified with the party.]

knowledgments of guilt.[1] We shall therefore treat them separately, beginning with admissions. The rules of evidence are in both cases the same.[2] Thus, in the trial of Lord Melville, charged, among other things, with criminal misapplication of moneys, received from the Exchequer, the admission of his agent and authorized receiver was held sufficient proof of the fact of his receiving the public money; but not admissible to establish the charge of any criminal misapplication of it. The law was thus stated by Lord Chancellor Erskine: "This first step in the proof" (namely, the receipt of the money) "must advance by evidence applicable alike to civil as to criminal cases; for a fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence; but it is a totally different question, in the consideration of criminal as distinguished from civil justice, how the noble person now on trial may be affected by the fact when so established. The receipt by the paymaster would in itself involve him civilly, but could by no possibility convict him of a crime."[3]

§ 170 *a*. **Party need not be asked before proving an Admission.** [The resemblance between an admission, as used against a party, and a prior inconsistent statement, as used against a witness, has frequently been availed of by counsel to justify a demand that the rule applicable to this mode of discrediting a witness[1] be applied also in the case of a party, at least when he is also a witness, viz., the rule that, for fairness' sake, the person to be discredited must first be asked whether he made such a statement. There are two reasons why this rule does not apply to a party; in the first place, parties became competent and compellable to testify only within the last half-century, and until that time it was impossible to put such a question to a party; so that the use of admissions was long and firmly established without any such preliminary condition (which, indeed, even for witnesses is no older than 1820); in the second place, the party is presumably in attendance throughout the trial, while the witness frequently or usually departs after giving his testimony, so that for the witness it is a matter of fairness to put the inquiry before it is too late to obtain an explanation from him, while for the party there is no such palpable need. That the inquiry need not be made of a party is generally accepted.[2]]

[1] [The accused in a criminal case may make admissions, just as a party in a civil case, *i. e.* by saying things inconsistent with the present points of his proof. Admissions, in the sense of inconsistencies, are not peculiar to civil cases. But a direct assertion by an accused of the truth of the charge against him is specifically termed a confession; and for the use of this, certain special limitations obtain, as treated in the next chapter.]

[2] [For admissions, but not for confessions; see the preceding note.]

[3] 29 How. St. Tr. 764.

[1] [*Post*, § 461 *f*.]

[2] [Andrews *v.* Askey, 8 C. & P. 7; Day, Common Law Procedure Acts, 4th ed., 277; Collins *v.* Mack, 31 Ark. 694; Rose *v.* Otis, 18 Colo. 59; State *v.* Brown, Houst. Del., 40 Atl. 938; Belt *v.* State, Ga., 29 S. E. 451; Coffin *v.* Bradbury, Ida., 35 Pac.

2. *Persons whose Statements are receivable as Admissions.*

§ 171. **Parties to the Record.** We shall first consider the person whose admissions may be received. And here the general doctrine is, that the declarations of a party to the record, or of one identified in interest with him, are, as against such party, admissible in evidence.[1] If they proceed from a stranger, and cannot be brought home to the party, they are inadmissible, unless upon some of the other grounds already considered. Thus, the admissions of a payee of a negotiable promissory note, not overdue when negotiated, cannot be received in an action by the indorsee against the maker, to impeach the consideration, there being no identity of interest between him and the plaintiff.[2]

§ 172. **Same: Nominal Parties.** This general rule, admitting the declarations of a party to the record in evidence, applies to all cases where the party has any interest in the suit, whether others are joint parties on the same side with him or not, and howsoever the interest may appear, and whatever may be its relative amount.[1] But where the party sues alone, and has no interest in the matter, his name being used, of necessity, by one to whom he has assigned all his interest in the subject of the suit, though it is agreed that he cannot be permitted, by his acts or admissions, to disparage the title of his innocent assignee or vendee, yet the books are not so clearly agreed in the mode of restraining him. That Chancery will always protect

715, 722; Buck *v.* Maddock, 167 Ill. 219; Eddings *v.* Brown, Ind. Ter., 38 S. W. 1110; State *v.* Forsythe, 99 Ia. 1; South K. R. Co. *v.* Painter, 53 Kan. 414; Kirk *v.* Garrett, 84 Md. 383; Brubaker *v.* Taylor, 76 Pac. 87; State *v.* Freeman, 43 S. C. 105; Hart *v.* Pratt, Wash., 53 Pac. 711.]

[1] Spargo *v.* Brown, 9 B. & C. 935, per Bayley, J. In the Court of Chancery, in England, evidence is not received of admissions or declarations of the parties, which are not put in issue by the pleadings, and which there was not, therefore, any opportunity of explaining or disproving: Copland *v.* Toulmin, 7 Cl. & Fin. 350, 373; Austin *v.* Chamber, 6 id. 1; Attwood *v.* Small, ib. 234. But in the United States this rule has not been adopted; and it is deemed sufficient if the proposition to be established is stated in the bill, without stating the particular kind of evidence by which it is to be proved: see Smith *v.* Burnham, 2 Sumn. 612; Brandon *v.* Cabiness, 10 Ala. 156; Story, Equity Plead. 265 *a*, and n. (1), where this subject is fully discussed. And in England, the rule has recently been qualified, so far as to admit a written admission by the defendant of his liability to the plaintiff, in the matter of the pending suit: Malcolm *v.* Scott, 3 Hare 63; MeMahon *v.* Burchell, 1 Coop. Cas. temp. Cottenham 475; 7 Law Rev. 209; see the cases collected by Mr. Cooper in his note appended to that case.

[2] Barough *v.* White, 4 B. & C. 325; Bristol *v.* Dann, 12 Wend 142. [All these questions, dealt with in the immediately following sections, as to the classes of persons whose statements can be used as if the party himself were responsible for them, are hardly questions of the law of evidence; their solution, at any rate, depends chiefly on the substantive law determining the legal relations of such persons to the party.]

[1] Bauerman *v.* Radenius, 7 T. R. 663; s. c. 2 Esp. 653. In this case the consignees brought an action in the name of the consignor against the ship-master, for a damage to the goods, occasioned by his negligence; and without supposing some interest to remain in the consignor, the action could not be maintained. It was on this ground that Lawrence, J., placed the decision; see also Norden *v.* Williamson, 1 Taunt. 378; Mandeville *v.* Welch, 5 Wheat. 283, 286; Dan *et al. v.* Brown, 4 Cowen, 483, 492.

the assignee, either by injunction or otherwise, is very certain; and formerly this was the course uniformly pursued; the admissions of a party to the record, at common law, being received against him in all cases. But, in later times, the interests of an assignee, suing in the name of his assignor, have also, to a considerable extent, been protected, in the courts of common law, against the effect of any acts or admissions of the latter to his prejudice. A familiar example of this sort is that of a receipt in full, given by the assignor, being nominal plaintiff, to the debtor, after the assignment; which the assignee is permitted to impeach and avoid, in a suit at law, by showing the previous assignment.[2]

§ 173. But a distinction has been taken between such admissions as these which are given in evidence to the jury under the general issue, and are therefore open to explanation and controlling proof, and those in more solemn form, such as releases which are specially pleaded and operate by way of estoppel; in which latter cases it has been held, that, if the release of the nominal plaintiff is pleaded in bar, the Courts of law, sitting in bank, will administer equitable relief, by setting aside the plea on motion; but that, if issue is taken on the matter pleaded, such act or admission of the nominal plaintiff must be allowed its effect at law to the same extent as if he were the real plaintiff in the suit.[1] The American Courts, however, do not recognize this distinction; but, where a release from the nominal plaintiff is pleaded in bar, a prior assignment of the cause of action, with notice thereof to the defendant, and an averment that the suit is prosecuted by the assignee for his own benefit, is held a good replication.[2] Nor is the nominal plaintiff permitted by the entry of a *retraxit*, or in any other manner, injuriously to affect the rights of his assignee in a suit at law.[3]

[2] Henderson *et al.* *v.* Wild, 2 Campb. 561. Lord Ellenborough, in a previous case of the same kind, thought himself not at liberty, sitting at Nisi Prius, to overrule the defence: Alner *v.* George, 1 Campb. 392; Frear *v.* Evertson, 20 Johns. 142; see also Payne *v.* Rogers, Doug. 407; Winch *v.* Keeley, 1 T. R. 619; Cockshot *v.* Bennett, 2 id. 763; Lane *v.* Chandler, 3 Smith 77, 83; Skaife *v.* Jackson. 3 B. & C. 421; Appleton *v.* Boyd, 7 Mass. 131; Tiermen *v.* Jackson, 5 Peters 580; Sargeant *v.* Sargeant, 3 Washb. 371; Head *v.* Shaver, 9 Ala. 791.

[1] Alner *v.* George, 1 Campb. 395, per Ld. Ellenborough; Gibson *v.* Winter, 5 B. & Ad. 96; Craib *v.* D'Aeth, 7 T. R. 670, n. (*b*); Legh *v.* Legh, 1 B. & P. 447; Anon., 1 Salk. 260; Payne *v.* Rogers, Doug. 407; Skaife *v.* Jackson, 3 B. & C. 421.

[2] Mandeville *v.* Welch, 5 Wheat. 277, 283; Andrews *v.* Beecker, 1 Johns. Cas. 411; Raymond *v.* Squire, 11 Johns. 47; Littlefield *v.* Storey, 3 id. 425; Dawson *v.* Coles, 16 id. 51; Kimball *v.* Huntington, 10 Wend. 675; Owings *v.* Low, 5 Gill & Johns. 134.

[3] Welch *v.* Mandeville, 1 Wheat. 233: "By the common law, *choses in action* were not assignable except to the crown. The civil law considers them as, strictly speaking, not assignable; but, by the invention of a fiction, the Roman jurisconsults contrived to attain this object. The creditor who wished to transfer his right of action to another person, constituted him his attorney, or *procurator in rem suam* as it was called, and it was stipulated that the action should be brought in the name of the assignor, but for the benefit and at the expense of the assignee. Pothier de Vente, No. 550. After notice to the debtor, this assignment operated a complete cession of the debt, and invalidated a payment to any other person than the assignee, or a release

§ 174. **Same: Joint Promisors; Parties in a Testamentary Cause; etc.** Though the admissions of a party to the record are generally receivable in evidence against him, yet, where there are several parties on the same side, the admissions of one are not admitted to affect the others, who may happen to be joined with him, unless there is some joint interest of privity in design between them;[1] although the admissions may, in proper cases, be received against the person who made them. Thus, in an action against joint makers of a note, if one suffers judgment by default, his signature must still be proved against the other.[2] And even where there is a joint interest, a release, executed by one of several plaintiffs, will, in a clear case of fraud, be set aside in a court of law.[3] But in the absence of fraud, if the parties have a joint interest in the matter in suit, whether as plaintiffs or defendants, an admission made by one is, in general, evidence against all.[4] They stand to each other,

from any other person than him: ib. 110, 554; Code Napoléon, liv. 3, tit. 6; De la Vente, c. 8, § 1690. The Court of Chancery, imitating, in its usual spirit, the civil law in this particular, disregarded the rigid strictness of the common law, and protected the rights of the assignee of *choses in action*. This liberality was at last adopted by the Courts of common law, who now consider an assignment of a *chose in action* as substantially valid, only preserving, in certain cases, the form of an action commenced in the name of the assignor, the beneficial interest and control of the suit being, however, considered as completely vested in the assignee, as *procurator in rem suam*. See Master Miller, 4 T. R. 340; Andrews *v.* Beecker, 1 Johns. Cas. 411; Bates *v.* New York Insurance Company, 3 id. 242; Wardell *v.* Eden, 1 Johns. 532, *in notis;* Carver *v.* Tracy, 3 id. 427; Raymond *v.* Squire, 11 id. 47; Van Vechten *v.* Graves, 4 id. 406; Weston *v.* Barker, 12 id. 276;" see the reporter's note to 1 Wheat. 237. But where the nominal plaintiff was constituted, by the party in interest, his agent for negotiating the contract, and it is expressly made with him alone, he is treated, in an action upon such contract, in all respects as a party to the cause; and any defence against him is a defence, in that action, against the *cestui que trust*, suing in his name. Therefore, where a broker, in whose name a policy of insurance under seal was effected, brought an action of covenant thereon, to which payment was pleaded; it was held that payment of the amount of loss to the broker, by allowing him credit in account for that sum, against a balance for premiums due from him to the defendants, was a good payment, as between the plaintiff on the record and the defendants, and, therefore, an answer to the action: Gibson *v.* Winter *et al.*, 5 B. & Ad. 96. This case, however, may, with equal and perhaps greater propriety, be referred to the law of agency; see Richardson *v.* Anderson, 1 Campb. 43, n.; Story on Agency, §§ 413, 429–434.

[1] Dan *v.* Brown, 4 Cowen 483, 492; R. *v.* Hardwick, 11 East 578, 589, per Le Blanc, J.; Whitcomb *v.* Whiting, 2 Doug. 652.

[2] Gray *v.* Palmer, 1 Esp. 135; see also Shirreff *v.* Wilks, 1 East 48.

[3] Jones *v.* Herbert, 7 Taunt. 421; Loring *v.* Brackett, 3 Pick. 403; Skaife *v.* Jackson, 3 B. & C. 421; Henderson *v.* Wild, 2 Campb. 561.

[4] Such was the doctrine laid down by Ld. Mansfield in Whitcomb *v.* Whiting, 2 Doug. 652. Its propriety, and the extent of its application, have been much discussed and sometimes questioned; but it seems now to be clearly established: see Perham *v.* Raynal, 2 Bing. 306; Burleigh *v.* Stott, 8 B. & C. 36; Wyatt *v.* Hodson, 8 Bing. 309; Brandram *v.* Wharton, 1 B. & Ald. 467; Holme *v.* Green, 1 Stark. 488. See also, accordingly, White *v.* Hale, 3 Pick. 291; Martin *v.* Root, 17 Mass. 222; Hunt *v.* Bridgham, 2 Pick. 581; Frye *v.* Barker, 4 id. 382; Beitz *v.* Fuller, 1 McCord 541; Johnson *v.* Beardslee, 15 Johns. 3; Bound *v.* Lathrop, 4 Conn. 336; Coit *v.* Tracy, 8 id. 268, 276, 277; Getchell *v.* Heald, 7 Greenl. 26; Owings *v.* Low, 5 Gill & Johns. 144; Patterson *v.* Choate, 7 Wend. 441; McIntire *v.* Oliver, 2 Hawks 209; Cady *v.* Shepherd, 11 Pick. 400; Van Reimsdyk *v.* Kane, 1 Gall. 635, 636; Bell *v.* Morrison, 1 Peters 351; {Barrick *v.* Austin, 21 Barb. 241; Camp *v.* Dill, 27 Ala. 553; Derby *v.* Rounds, 53 Cal. 659.} But the admis-

in this respect, in a relation similar to that of existing copartners. Thus, also, the act of making a partial payment within six years, by one of several joint makers of a promissory note, takes it out of the statute of limitations.[5] And where several were both legatees and executors in a will, and also appellees in a question upon the probate of the will, the admission of one of them, as to facts which took place at the time of making the will, showing that the testatrix was imposed upon, was held receivable in evidence against the validity of the will.[6] And where two were bound in a single bill, the admission of one was held good against both defendants.[7]

§ 175. **Same: Town Corporators.** In settlement cases, it has long

sion must be distinctly made by a party still liable upon the note; otherwise it will not be binding against the others; therefore, a payment appropriated, by the election of the creditor only, to the debt in question, is not a sufficient admission of that debt, for this purpose: Holme *v.* Green, *ubi sup.* Neither is a payment received under a dividend of the effects of a bankrupt promisor: Brandram *v.* Wharton, *ubi sup.* In this last case, the opposing decision in Jackson *v.* Fairbank, 2 H. Bl. 340, was considered and strongly disapproved; but it was afterwards cited by Holroyd, J., as a valid decision, in Burleigh *v.* Stott, 8 B. & C. 36. {More recent cases, both in this country and in England, have denied that, from the mere fact of part payment, the jury are authorized to infer a promise to pay the rest: Davies *v.* Edwards, 6 Eng. L. & Eq. 550; s. c. 15 Jur. 1014, where Jackson *v.* Fairbank and Brandram *v.* Wharton are said not to have been well considered; see now St. 19 & 20 Vict., c. 97; Jackson *v.* Woolley, 8 E. & B. 784; Smith *v.* Westmoreland, 12 S. & M. 663; Davidson *v.* Harrisson, 33 Miss. 41; Roscoe *v.* Hale, 7 Gray 274; Stoddard *v.* Doane, id. 387; and note to Bradfield *v.* Tupper, 7 Eng. L. & Eq. 541; see Shoemaker *v.* Benedict, 1 Ker. (N. Y.) 176; Coleman *v.* Fobes, 22 Pa. 156; Bush *v.* Stowell, 71 Pa. St. 208; Angell on Limitations, 6th ed., §§ 240, 260, where the subject, both as to payments and admissions, is fully treated, and the authorities are collected.} The admission where one of the promisors is dead, to take the case out of the statute of limitations against him, must have been made in his lifetime: Burleigh *v.* Stott, *supra;* Slatter *v.* Lawson, 1 B. & Ad. 396; and by a party originally liable, Atkins *v.* Tredgold, 2 B. & C. 23. This effect of the admission of indebtment, by one of several joint promisors, as to cases barred by the statute of limitations, when it is merely a verbal admission, without part payment, is now restricted in England, to the party making the admission, by Stat. 9 George IV, c. 14 (Lord Tenterden's Act). So in Massachusetts, by Gen Stat., c. 155, §§ 14, 16; and in Vermont, Rev. Stat., c. 58, §§ 23, 27. The application of this doctrine to partners, after the dissolution of the partnership, has already been considered: § 112, n. (*d*), [transferred *post*, as § 184 *b*.] Whether a written acknowledgment, made by one of several partners, stands upon different ground from that of a similar admission by one of several joint contractors, is an open question: Clark *v.* Alexander, 8 Jur. 496, 498; see *post*, Vol. II, §§ 441, 444; Pierce *v.* Wood, 3 Foster 520.

[5] Burleigh *v.* Stott, 8 B. & C. 36; Munderson *v.* Reeve, 2 Stark. Evid. 484; Wyatt *v.* Hodson, 8 Bing. 309; Chippendale *v.* Thurston, 4 C. & P. 98; s. c. 1 M. & M. 411; Pease *v.* Hirst, 10 B. & C. 122. But it must be distinctly shown to be a payment on account of the particular debt: Holme *v.* Green, 1 Stark. 488.

[6] Atkins *v.* Sanger, 1 Pick. 192; see also Jackson *v.* Vail, 7 Wend. 125; Osgood *v.* Manhattan Co., 3 Cowen 612; {Milton *v.* Hunter, 13 Bush 163; Robinson *v.* Hutchinson, 31 Vt. 443; *contra*, unless there is a joint interest: Hayes *v.* Burkam, 51 Ind. 130; Forney *v.* Ferrell, 4 W. Va. 730; La Bau *v.* Vanderbilt, 3 Redf. 384; Clark *v.* Morrison, 25 Pa. St. 453; Shailer *v.* Bumstead, 99 Mass. 112; Osgood *v.* Manhattan Co., 3 Cow. 612: Thompson *v.* Thompson, 13 Ohio St. 358; and *post*, § 176, n. 7; } [Roller *v.* Kling, Ind., 49 N. E. 948; undecided: Von de Veld *v.* Judy, Mo., 44 S. W. 1117.]

[7] Lowe *v.* Boteler, 4 Har. & McHen. 346; Vicary's Case, 1 Gilbert, Evid., by Lofft, p. 59, n.

been held that declarations by rated parishioners are evidence against the parish; for they are parties to the cause, though the nominal parties to the appeal be church-wardens and overseers of the poor of the parish.[1] The same principle is now applied in England to all other prosecutions against towns and parishes, in respect to the declarations of ratable inhabitants, they being substantially parties to the record.[2] Nor is it necessary first to call the inhabitant, and show that he refuses to be examined, in order to admit his declarations.[3] And the same principle would seem to apply to the inhabitants of towns, counties, or other territorial political divisions of this country, who sue and are prosecuted as inhabitants, *eo nomine*, and are termed *quasi* corporations. Being parties personally liable, their declarations are admissible, though the value of the evidence may, from circumstances, be exceedingly light.[4]

§ 176. **Same: Mere Community of Interest not enough.** It is a joint interest, and not a mere community of interest, that renders such admissions receivable. Therefore the admissions of one executor are not received, to take a case out of the statute of limitations as against his co-executor.[1] Nor is an acknowledgment of indebtment by one executor admissible against his co-executor, to establish the original demand.[2] The admission of the receipt of money, by one of several trustees, is not received to charge the other trustees.[3] Nor is there such joint interest between a surviving promisor, and

[1] R. *v.* Inhabitants of Hardwick, 11 East 579.

[2] R. *v.* Adderbury, 5 Q. B. 187.

[3] R. *v.* Inhabitants of Whitley Lower, 1 M. & S. 637; R. *v.* Inhabitants of Woburn, 10 East 395.

[4] 11 East 586, per Ld. Ellenborough; 2 Stark. Evid. 580. The statutes rendering *quasi* corporators competent witnesses (see 54 Geo. III, c. 170; 3 & 4 Vict., c. 25) are not understood as interfering with the rule of evidence respecting admissions: Phil. & Am. on Evid. 395 and n. (2); 1 Phil. Evid. 375, n. (2). [For interest as disqualifying a corporator, and its abolition, see *post*, § 331, and the preceding sections.] {Note by Judge Redfield: "We believe the practice is not general, in the American States, to admit the declarations of the members of a corporation, as evidence against the corporation itself. And it seems to us, that upon principle they are clearly inadmissible. There is no rule of law better settled than that the admission of a shareholder will not bind the corporation. Nor will the admission of a director or agent of a private corporation bind the company, except as a part of the *res gestæ*. And it will make no difference that the action is in the corporate name of the president and directors; that does not make them parties in person. And we see no more reason why the admission of the inhabitants of a town or parish should bind the municipality, because the action happens to be in form in the name of such inhabitants, than that all the admissions or declarations of the people at large should be evidence against the public prosecutor in criminal proceedings, when they are instituted in the name of The People, which we believe would be regarded as an absurdity by every one. We conclude, therefore, that in no such case can the admission or declaration of a corporator be fairly regarded as evidence against the corporation. Watertown *v.* Cowen, 4 Paige 510; Burlington *v.* Calais, 1 Vt. 385; Low *v.* Perkins, 10 id. 532."}

[1] Tullock *v.* Dunn, R. & M. 416. *Quære*, and see Hammon *v.* Huntley, 4 Cowen, 493. But the declarations of an executor or administrator are admissible against him, in any suit by or against him in that character: Faunce *v.* Gray, 21 Pick. 243.

[2] Hammon *v.* Huntley, 4 Cowen 493; James *v.* Hackley, 16 Johns. 277; Forsyth *v.* Ganson, 5 Wend. 558.

[3] Davies *v.* Ridge, 3 Esp. 101.

the executor of his co-promisor, as to make the act or admission of the one sufficient to bind the other.[4] Neither will the admission of one who was joint promisor with a *feme sole* be received to charge her husband, after the marriage, in an action against them all, upon a plea of the statute of limitations.[5] For the same reason, namely, the absence of a joint interest, the admissions of one tenant in common are not receivable against his co-tenant, though both are parties on the same side in the suit.[6] Nor are the admissions of one of several devisees or legatees admissible to impeach the validity of the will where they may affect others not in privity with him.[7] Neither are the admissions of one defendant evidence against the other, in an action on the case for the mere negligence of both.[8]

§ 177. **Same: Interest must first be shown.** It is obvious that an apparent joint interest is not sufficient to render the admissions of one party receivable against his companions where the reality of that interest is the point in controversy. A foundation must first be laid, by showing, *prima facie*, that a joint interest exists. Therefore, in an action against several joint makers of a promissory note, the execution of which was the point in issue, the admission of his signature only by one defendant was held not sufficient to entitle the plaintiff to recover against him and the others, though theirs had been proved; the point to be proved against all being a joint promise by all.[1] And where it is sought to charge several as partners, an admission of the fact of partnership by one is not receivable in evidence against any of the others, to prove the partnership. It is only after the partnership is shown to exist, by proof satisfactory to the judge, that the admission of one of the parties is received, in order to affect the others.[2] If they sue upon a promise to them as

[4] Atkins *v.* Tredgold, 2 B. & C. 23; Slater *v.* Lawson, 1 B. & Ad. 396; Slaymaker *v.* Gundacker's Ex'r, 10 Serg. & R. 75; Hathaway *v.* Haskell, 9 Pick. 42.

[5] Pittam *v.* Foster, 1 B. & C. 248.

[6] Dan *v.* Brown, 4 Cowen 483, 492; and see Smith *v.* Vincent, 15 Conn. 1; [*contra*, on the facts, St. Louis, O. H. & C. R. Co. *v.* Fowler, 142 Mo. 670.]

[7] Hauberger *v.* Root, 6 Watts & Serg. 431; [see *ante*, § 174.]

[8] Daniels *v.* Potter, 1 M. & M. 501; *supra*, § 111. Neither is there such privity among the members of a board of public officers, as to make the admissions of one binding on all: Lockwood *v.* Smith, 5 Day 309. Nor among several indorsers of a promissory note: Slaymaker *v.* Gundacker's Ex'r, 10 Serg. & R. 75. Nor between executors and heirs or devisors: Osgood *v.* Manhattan Co., 3 Cowen 612; {nor between infant and guardian *ad litem:* Chipman *v.* R. Co., 12 Utah 68.}

[1] Gray *v.* Palmer, 1 Esp. 135.

[2] Nicholls *v.* Dowding, 1 Stark. 81; Grant *v.* Jackson, Peake's Cas. 204; Burgess *v.* Lane, 3 Greenl. 165; Grafton Bank *v.* Moore, 13 N. H. 99; see Latham *v.* Kennisto, ib. 203; Whitney *v.* Ferris, 10 Johns. 66; Wood *v.* Braddick, 1 Taunt. 104; Sangster *v.* Mazzarredo, 1 Stark. 161; Van Reimsdyk *v.* Kane, 1 Gall. 635; Harris *v.* Wilson, 7 Wend. 57; Bucknam *v.* Barnum, 15 Conn. 68; {Allcott *v.* Strong, 9 Cush. 323; Dutton *v.* Woodman, ib. 255; Rich *v.* Flanders, 39 N. H. 304; Campbell *v.* Hastings, 29 Ark. 512; Cowan *v.* Kinney, 33 Ohio St. 422; *ante*, § 112, n. (*a*) [transferred as § 184 *b*, *post*]; see Vol. II, § 484, *post;* but when A and B are sued as partners, if A admits that he is a partner with B, and B admits that he is a partner with A, it is evidence of partnership as to both; and it makes no difference which declaration is offered first: Edwards *v.* Tracy, 62 Pa. St. 374. [For the case of an agent, as affected by this principle, see *post*, § 184 *c*.]

partners, the admission of one is evidence against all, even though it goes to a denial of the joint right of action, the partnership being conclusively admitted by the form of action.[3]

§ 178. **Same: Answers of Parties in Chancery.** In general, the answer of one defendant in Chancery cannot be read in evidence against his co-defendant; the reason being, that, as there is no issue between them, there can have been no opportunity for cross-examination.[1] But this rule does not apply to cases where the other defendant claims through him whose answer is offered in evidence; nor to cases where they have a joint interest, either as partners or otherwise, in the transaction.[2] Wherever the confession of any party would be good evidence against another, in such case his answer, *a fortiori*, may be read against the latter.[3]

§ 179. **Same: Interest must exist at Time of Admission made.** The admissions which are thus receivable in evidence must, as we have seen, be those of a person having at the time some interest in the matter afterwards in controversy in the suit to which he is a party. The admissions, therefore, of a guardian, or of an executor or administrator, made before he was completely clothed with that trust, or of a *prochein amy*, made before the commencement of the suit, cannot be received, either against the ward or infant in the one case, or against himself, as the representative of heirs, devisees, and creditors, in the other;[1] though it may bind the person himself, when he is afterwards a party, *suo jure*, in another action. A solemn admission, however, made in good faith, in a pending suit, for the purpose of that trial only, is governed by other considerations. Thus, the plea of *nolo contendere*, in a criminal case, is an admission for that trial only. One object of it is to prevent the proceedings being used in any other place; and therefore it is held

[3] Lucas *v.* De La Cour, 1 M. & S. 249.

[1] Jones *v.* Turberville, 2 Ves. Jr. 11; Morse *v.* Royal, 12 Ves. 355, 360; Leeds *v.* Marine Ins. Co. of Alexandria, 2 Wheat. 380; Gresley on Eq. Evid. 24; Field *v.* Holland, 6 Cranch 8; Clark's Ex'rs *v.* Van Riemsdyk, 9 id. 153; Van Riemsdyk *v.* Kane, 1 Gall. 630; Parker *v.* Morrell, 12 Jur. 253; 2 C. & K. 599; Morris *v.* Nixon, 1 How. S. C. 118; {McElroy *v.* Ludlum, 32 N. J. Eq. 828; *post*, Vol. III, §§ 274–277.}

[2] Field *v.* Holland, 6 Cranch 8, 24; Clark's Ex'rs *v.* Van Riemsdyk, 9 id. 153, 156; Osborn *v.* United States Bank, 9 Wheat. 738, 832; Christie *v.* Bishop, 1 Barb. Ch. 105, 116.

[3] Van Riemsdyk *v.* Kane, 1 Gall. 630, 635.

[1] Webb *v.* Smith, R. & M. 106; Fraser *v.* Marsh, 2 Stark. 41; Cowling *v.* Ely, id. 366; Plant *v.* McEwen, 4 Conn. 544. So, the admissions of one, before he became assignee of a bankrupt, are not receivable against him, where suing as assignee: Fenwick *v.* Thornton, 1 M. & M. 51; {Legge *v.* Edmonds, 25 L. J. Ch. 125; Metters *v.* Brown, 32 L. J. Ex. 140; the ruling to the contrary by Tindal, C. J., in Smith *v.* Morgan, 2 M. & Rob. 259, seems to be regarded as unsound in England.} Nor is the statement of one partner admissible against the others, in regard to matters which were transacted before he became a partner in the house, and in which he had no interest prior to that time: Catt *v.* Howard, 3 Stark. 3. In trover by an infant suing by his guardian, the statements of the guardian, tending to show that the property was in fact his own, are admissible against the plaintiff, as being the declarations of a party to the record. Tenney *v.* Evans, 14 N. H. 343; *post*, § 180, n.; [but not if made after guardianship ended: Freeman *v.* Brewster, 93 Ga. 648.]

inadmissible in a civil action against the same party.[2] So, the answer of the guardian of an infant defendant in Chancery can never be read against the infant in another suit; for its office was only to bring the infant into court and make him a party.[3] But it may be used against the guardian, when he afterwards is a party in his private capacity; for it is his own admission upon oath.[4] Neither can the admission of a married woman, answering jointly with her husband, be afterwards read against her, it being considered as the answer of the husband alone.[5]

§ 180. **Persons not Parties to the Record: In general.** We are next to consider the admissions of persons who are not parties to the record, but yet are interested in the subject-matter of the suit. The law, in regard to this source of evidence, looks chiefly to the real parties in interest, and gives to their admissions the same weight as though they were parties to the record. Thus the admissions of the *cestui que trust* of a bond;[1] those of the persons interested in a policy effected in another's name, for their benefit;[2] those of the ship-owners, in an action by the master for freight;[3] those of the indemnifying creditor, in an action against the sheriff;[4] those of the deputy-sheriff, in an action against the high-sheriff for the misconduct of the deputy;[5] are all receivable against the party mak-

[2] Guild *v.* Lee, 3 Law Reporter, p. 433. So, an admission in one plea cannot be called in aid of the issue in another: Stracy *v.* Blake, 3 M. & W. 168; Jones *v.* Flint, 2 P. & D. 594; Gould on Pleading, 432, 433; Mr. Rand's note to Jackson *v.* Stetson, 15 Mass. 58.

[3] Eggleston *v.* Speke, *alias* Petit, 3 Mod. 258, 259; Hawkins *v.* Luscombe, 2 Swanst. 392, cases cited in note (*a*); Story on Eq. Pl. 668; Gresley on Eq. Evid. 24, 323; Mills *v.* Dennis, 3 Johns. C. 367.

[4] Beasley *v.* Magrath, 2 Sch. & Lefr. 34; Gresley on Eq. Evid. 323.

[5] Hodgson *v.* Merest, 9 Price 563; Elston *v.* Wood, 2 My. & K. 678.

[1] Hanson *v.* Parker, 1 Wils. 257; see also Harrison *v.* Vallance, 1 Bing. 45. But the declarations of the *cestui que trust* are admissible, only so far as his interest and that of the trustee are identical: Doe *v.* Wainwright, 3 Nev. & P. 598. And the nature of his interest must be shown, even though it be admitted that he is a *cestui que trust*: May *v.* Taylor, 6 M. & Gr. 261.

[2] Bell *v.* Ansley, 16 East 141, 143; [or of the insured, as against the beneficiary: Thomas *v.* Grand Lodge, Cal., 41 Pac. 882; F. M. L. Ass'n *v.* Winn, 96 Tenn. 224; see Bicknell, Mutual Benefit Societies, § 325.]

[3] Smith *v.* Lyon, 3 Campb. 465.

[4] Dowden *v.* Fowle, 4 Campb. 38; Dyke *v.* Aldridge, cited 7 T. R. 665; 11 East 584; Young *v.* Smith, 6 Esp. 121; Harwood *v.* Keys, 1 M. & Rob. 204; Proctor *v.* Lainson, 7 C. & P. 629.

[5] The admissions of an under-sheriff are not receivable in evidence against the sheriff, unless they tend to charge himself, he being the real party in the cause; he is not regarded as the general officer of the sheriff, to all intents: Snowball *v.* Goodricke, 4 B. & Ad. 541; though the admissibility of his declarations has sometimes been placed on that ground: Drake *v.* Sykes, 7 T. R. 113. At other times they have been received on the ground, that, being liable over to the sheriff, he is the real party to the suit: Yabsley *v.* Doble, 1 Ld. Raym. 190. And where the sheriff has taken a general bond of indemnity from the under-officer, and has given him notice of the pendency of the suit, and required him to defend it, the latter is in fact the real party in interest, whenever the sheriff is sued for his default; and his admissions are clearly receivable, on principle, when made against himself. It has elsewhere been said, that the declarations of an under-sheriff are evidence to charge the sheriff, only where his acts might be given in evidence to charge him; and then, rather as acts than as declarations, the

ing them. And, in general, the admissions of any party represented by another are receivable in evidence against his representatives.[6] But here, also, it is to be observed, that the declarations or admissions must have been made while the party making them had some interest in the matter; and they are receivable in evidence only so far as his own interests are concerned. Thus, the declaration of a bankrupt, made before his bankruptcy, is good evidence to charge his estate with a debt; but not so if it was made afterwards.[7] While the declarant is the only party in interest, no harm can possibly result from giving full effect to his admissions. He may be supposed best to know the extent of his own rights, and to be least of all disposed to concede away any that actually belonged to him. But an admission, made after other persons have acquired separate rights in the same subject-matter, cannot be received to disparage their title, however it may affect that of the declarant himself. This most just and equitable doctrine will be found to apply not only to admissions made by bankrupts and insolvents, but to the case of vendor and vendee, payee and indorsee, grantor and grantee, and, generally, to be the pervading doctrine in all cases of rights acquired in good faith, previous to the time of making the admissions in question.[8]

§ 181. In some cases, the admissions of third persons, strangers to the suit, are receivable. This arises when the issue is substantially upon the mutual rights of such persons at a particular time; in which case the practice is to let in such evidence in general as would be legally admissible in an action between the parties themselves. Thus, in an action against the sheriff for an escape, the debtor's acknowledgment of the debt, being sufficient to charge him

declarations being considered as part of the *res gestæ*: Wheeler *v.* Hambright, 9 Serg. & R. 396, 397; see Scott *v.* Marshall, 2 Cr. & Jer. 238; Jacobs *v.* Humphrey, 2 Cr. & M. 413; s. c. 4 Tyrw. 272. But whenever a person is bound by the record, he is, for all purposes of evidence, the party in interest, and, as such, his admissions are receivable against him, both of the facts it recites, and of the amount of damages, in all cases where, being liable over to the nominal defendant, he has been notified of the suit, and required to defend it: Clark's Ex'rs *v.* Carrington, 7 Cranch 322; Hamilton *v.* Cutts, 4 Mass. 349; Tyler *v.* Ulmer, 12 id. 166; Duffield *v.* Scott, 3 T. R. 374; Kip *v.* Brigham, 6 Johns. 158; 7 Johns. 168; Bender *v.* Fromberger, 4 Dall. 436; see also Carlisle *v.* Garland, 7 Bing. 298; North *v.* Miles, 1 Campb. 389; Bowsher *v.* Calley, ib. 391, n.; Underhill *v.* Wilson, 6 Bing. 697; Bond *v.* Ward, 1 Nott & McCord 201; Carmack *v.* Com., 5 Binn. 184; Sloman *v.* Herne, 2 Esp. 695; Williams *v.* Bridges, 2 Stark. 42; Savage *v.* Balch, 8 Greenl. 27.

[6] Stark. Evid. 26; North *v.* Miles, 1 Campb. 390; [for the case of the deceased's admissions, in an action by the representative for his death, see Baird *v.* Baird, 145 N. Y. 659; 40 N. E. 222; Camden & A. R. Co. *v.* Williams, N. J. L., 40 Atl. 634;]Stern *v.* R. Co., Phila., 7 Leg. Gaz. 223; [the deceased's admissions are of course not admissible in a prosecution for murder: Shields *v.* State, Ind., 49 N. E. 351.]

[7] Bateman *v.* Bailey, 5 T. R. 513; Smith *v.* Simmes, 1 Esp. 330; Deady *v.* Harrison, 1 Stark. 60.

[8] Bartlet *v.* Delprat, 4 Mass. 702, 708; Clarke *v.* Waite, 12 id. 439; Bridge *v.* Eggleston, 14 id. 245, 250, 251; Phœnix *v.* Ingraham, 5 Johns. 412; Packer *v.* Gonsalus, 1 Serg. & R. 526; Patton *v.* Goldsborough, 9 id. 47; Babb *v.* Clemson, 12 id. 328; [see *post*, §§ 189, 190.]

in the original action, is sufficient, as against the sheriff, to support the averment in the declaration that the party escaping was so indebted.[1] So, an admission of joint liability by a third person has been held sufficient evidence, on the part of the defendant, to support a plea in abatement for the non-joinder of such person as defendant in the suit; it being admissible in an action against him for the same cause.[2] And the admissions of a bankrupt, made before the act of bankruptcy, are receivable in proof of the petitioning creditor's debt. His declarations, made after the act of bankruptcy, though admissible against himself, form an exception to this rule, because of the intervening rights of creditors, and the danger of fraud.[3]

§ 182. **Same: Referees; Appointees; Interpreters.** The admissions of a third person are also receivable in evidence, against the party who has expressly referred another to him for information, in regard to an uncertain or disputed matter. In such cases, the party is bound by the declarations of the persons referred to, in the same manner, and to the same extent, as if they were made by himself.[1] Thus, upon a plea of *plene administravit*, where the executors wrote to the plaintiff, that, if she wished for further information in regard to the assets, she should apply to a certain merchant in the city, they were held bound by the replies of the merchant to her inquiries upon that subject.[2] So, in assumpsit for goods sold, where the fact of the delivery of them by the carman was disputed, and the defendant said: "If he will say that he did deliver the goods, I will pay for them," he was held bound by the affirmative reply of the carman.[3]

§ 183. This principle extends to the case of an interpreter whose statements of what the party says are treated as identical with those of the party himself; and therefore may be proved by any person who heard them, without calling the interpreter.[1]

[1] Sloman *v.* Herne, 2 Esp. 695; Williams *v.* Bridges, 2 Stark. 42; Kempland *v.* Macauley, Peake's Cas. 65.

[2] Clay *v.* Langslow, 1 M. & M. 45; *sed quære*, and see *infra*, § 395.

[3] Hoare *v.* Coryton, 4 Taunt. 560; 2 Rose 158; Robson *v.* Kemp, 4 Esp. 234; Watts *v.* Thorpe, 1 Campb. 376; Smallcombe *v.* Bruges, McClel. 45; s. c. 13 Price 136; Taylor *v.* Kinloch, 1 Stark. 175; 2 id. 594; Jarrett *v.* Leonard, 2 M. & S. 265. The *dictum* of Lord Kenyon, in Dowton *v.* Cross, 1 Esp. 168, that the admissions of a bankrupt, made after the act of bankruptcy, but before the commission issued, are receivable, is contradicted in 13 Price 153, 154, and overruled by that and the other cases above cited; see also Bernasconi *v.* Farebrother, 3 B. & Ad. 372; [Milburn *v.* Phillips, 136 Ind. 680, 695.]

[1] {Wehle *v.* Spelman, 1 Hun 634; Turner *v.* Yates, 16 How. 14; Allen *v.* Killinger, 8 Wall. 480; Chapman *v.* Twitchell, 37 Me. 59; Chadsey *v.* Greene, 24 Conn. 562; [R. *v.* Mallory, 15 Cox Cr. 456.]

[2] Williams *v.* Innes, 1 Campb. 364.

[3] Daniel *v.* Pitt, 1 Campb. 866, n.; s. c. 6 Esp. 74; Brock *v.* Kent, ib.; Burt *v.* Palmer, 5 id. 145; Hood *v.* Reeve, 3 C. & P. 532; {but if a third person is referred to simply to furnish information as to certain facts, his statements as to other facts or his opinions are inadmissible: Lambert *v.* People, 6 Abb. (N. Y.) N. Cas. 181.}

[1] Fabrigas *v.* Mostyn, 11 St. Tr. 171; [see for other authorities, *ante*, § 162*p*;

§ 184. Whether the answer of a person thus referred to is conclusive against the party does not seem to have been settled. Where the plaintiff had offered to rest his claim upon the defendant's affidavit, which was accordingly taken, Lord Kenyon held, that he was conclusively bound, even though the affidavit had been false; and he added, that to make such a proposition and afterwards to recede from it was *mala fides;* but that, besides that, it might be turned to very improper purposes, such as to entrap the witness, or to find out how far the party's evidence would go in support of his case.[1] But in a later case, where the question was upon the identity of a horse, in the defendant's possession, with one lost by the plaintiff, and the plaintiff had said, that, if the defendant would take his oath that the horse was his, he should keep him, and he made oath accordingly, Lord Tenterden observed, that, considering the loose manner in which the evidence had been given he would not receive it as conclusive; but that it was a circumstance on which he should not fail to remark to the jury.[2] And certainly the opinion of Lord Tenterden, indicated by what fell from him in this case, more perfectly harmonizes with other parts of the law, especially as it is opposed to any further extension of the doctrine of estoppels, which sometimes precludes the investigation of truth. The purposes of justice and policy are sufficiently answered, by throwing the burden of proof on the opposing party, as in a case of an award, and holding him bound, unless he impeaches the test referred to by clear proof of fraud or mistake.[3]

§ 184 *a* [111]. **Same: Conspirators.** The same principles apply to the acts and declarations of one of a company of conspirators, in regard to the common design as affecting his fellows.[1] Here a foundation must first be laid by proof sufficient in the opinion of the judge to establish *prima facie* the fact of conspiracy between

post, § 439 *e*.] The cases of the reference of a disputed liability to the opinion of legal counsel, and of a disputed fact regarding a mine to a miner's jury, have been treated as falling under this head; the decisions being held binding as to the answers of persons referred to. How far the circumstance, that if treated as awards, being in writing, they would have been void for want of a stamp, may have led the learned judges to consider them in another light, does not appear: Sybray *v.* White, 1 M. & W. 435; {Price *v.* Hollis, 1 M. & S. 105; Downs *v.* Cooper, 2 Q. B. 256.} But in this country, where no stamp is required, they would more naturally be regarded as awards upon parol submissions, and therefore conclusive, unless impeached for causes recognized in the law of awards.

[1] Stevens *v.* Thacker, Peake's Cas. 187; Lloyd *v.* Willan, 1 Esp. 178; Delesline *v.* Greenland, 1 Bay 458, acc., where the oath of a third person was referred to. See Reg. *v.* Moreau, 36 Leg. Obs. 69; 11 Ad. & El. 1028, as to the admissibility of an award as an admission of the party.

[2] Garnet *v.* Ball, 3 Stark. 160.

[3] Whitehead *v.* Tattersall, 1 Ad. & El. 491.

[1] [This section was orginally placed by the author in the chapter *ante*, under the *res gestæ* principle. — The principle involved is fundamentally one of the substantive criminal and civil law, — under what circumstances a defendant is to be held responsible for the acts of a co-actor. Incidentally, the same principle determines what statements of a co-actor may be offered as admissions against the defendant.]

the parties, or proper to be laid before the jury as tending to establish such fact.

The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all; and is therefore original evidence against each of them. It makes no difference at what time any one entered into the conspiracy. Every one who does enter into a common purpose or design is generally deemed, in law, a party to every act which had before been done by the others and a party to every act which may afterwards be done by any of the others in furtherance of such common design.[2] Sometimes, for the sake of convenience, the acts or declarations of one are admitted in evidence before sufficient proof is given of the conspiracy; the prosecutor undertaking to furnish such proof in a subsequent stage of the cause. But this rests in the discretion of the judge, and is not permitted, except under particular and urgent circumstances; lest the jury should be misled to infer the fact itself of the conspiracy from the declarations of strangers.[3] And here, also, care must be taken that the acts and declarations, thus admitted, be those only which were made and done during the pendency of the criminal enterprise, and in

[2] [This general principle is not disputed; and the controversies usually arise merely upon its application to the circumstances of each case. There are two chief things to be considered in thus applying it to the facts, (1) whether a common purpose and co-operation between the persons has been sufficiently shown on the circumstances, and (2) whether the acts and admissions in question were made during the continuance of that purpose and co-operation. This is often a difficult question to determine, but it depends almost wholly on the facts of each case, and one ruling is usually of little service as a precedent in another case. The following leading English cases will illustrate the orthodox phrasing of the test, and cases from various American jurisdictions are added: [R. *v.* Stone, 25 How. St. Tr. 1271; R. *v.* Watson, 32 id. 7, 359; R. *v.* Brandreth, ib. 852;] R. *v.* Hardy, 24 id. 451; Nicholls *v.* Dowding, 1 Stark. 81; R. *v.* Hunt, 3 B. & Ald. 5, 66; Daniels *v.* Potter, 1 M. & M. 501; [The Queen's Case, 2 B. & B. 303; R. *v.* O'Connell, 5 State Tr. N. S. 1, 244, 262, 276, 678, 699, 710; Hunter *v.* State, 112 Ala. 77; Everage *v.* State, 113 id. 102; People *v.* Oldham, 111 Cal. 648; State *v.* Thompson, 69 Conn. 720; Spies *v.* People (anarchist case), 122 Ill. 1;] {Reid *v.* Louisiana State Lottery, 29 La. An. 388; Smith *v.* Tarbox, 70 Me. 127;} Com. *v.* Crowninshield, 10 Pick. 497; [Com. *v.* Hunton, 168 Mass. 130; Nicolay *v.* Mallery, 62 Minn. 119;] {Street *v.* State, 43 Miss. 1; Garrard *v.* State, 50 id. 147;} [Hart *v.* Hicks, 129 Mo. 99;] {Jacobs *v.* Shorey, 48 N. H. 100;} [Coburn *v.* Storer, id., 36 Atl. 607; Borrego *v.* Terr., N. M., 46 Pac. 349;] {Ormsby *v.* People, 53 N. Y. 472;} [People *v.* Peckens, 153 id. 576; State *v.* Turner, 119 N. C. 841; State *v.* Tice, 30 Or. 457; State *v.* Rice, 49 S. C. 418; Wiehl *v.* Robertson, 97 Tenn. 458; McKenzie *v.* State, 32 Tex. Cr. 568, 577;] American Fur Co. *v.* U. S., 2 Pet. 363, 365; {U. S. *v.* McKee, 3 Dill. 546;} [Clune *v.* U. S., 159 U. S. 590; Wiborg *v.* U. S., 163 id. 632; State *v.* Cram, 67 Vt. 650; State *v.* McCann, 16 Wash. 249;] {Ellis *v.* Dempsey, 4 W. Va. 126;} [see *post*, Vol. III, § 92.

That the acts offered may have been done, as above said, before the defendant joined the conspiracy, if he adopted their conduct by joining, see illustrations in R. *v.* Frost, 4 State Tr. N. S. 85, 229, 244; R. *v.* Cuffey, 7 id. 467, 476.]

[3] [See instances of this question arising in People *v.* Van Horn, 119 Cal. 323; State *v.* Thompson, 69 Conn. 720;] {Hamilton *v.* People, 29 Mich. 195;} [State *v.* May, 142 Mo. 135; State *v.* Moore, Or., 48 Pac. 468.]

furtherance of its objects. If they took place at a subsequent period, and are, therefore, merely narrative of past occurrences, they are, as we have just seen, to be rejected.[4] The term "acts" includes written correspondence, and other papers relative to the main design; but whether it includes unpublished writings upon abstract questions, though of a kindred nature, has been doubted.[5] Where conversations are proved, the effect of the evidence will depend on other circumstances, such as the fact and degree of the prisoner's attention to it, and his assent or disapproval.[6] [Where the declarant is also a joint-defendant, but no common purpose can be shown, his admissions are receivable as against himself only, the jury being cautioned not to use them against the others.[7, 8]]

§ 184 *b* [112]. **Same: Partners.** This doctrine extends to all cases of partnership. Wherever any number of persons associate themselves in the joint prosecution of a common enterprise or design, conferring on the collective body the attribute of individuality by mutual compact, as in commercial partnerships and similar cases, the act or declaration of each member, in furtherance of the common object of the association, is the act of all. By the very act of association, each one is constituted the agent of all.[1] While the being thus created exists, it speaks and acts only by the several members; and, of course, when that existence ceases by the dissolution of the firm, the act of an individual member ceases to have that effect; binding himself alone, except so far as by the articles of association

[4] R. *v.* Hardy, *supra;* {People *v.* English, 52 Cal. 212; State *v.* Ah Tom, 8 Nev. 213; U. S. *v.* Hartwell, 3 Cliff. C. C. 221; State *v.* Larkin, 49 N. H. 39; Card *v.* State, 109 Ind. 418; People *v.* McQuade, 110 N. Y. 284; State *v.* Jackson, 29 La. An. 354; Reid *v.* Louisiana State Lottery, ib. 388; State *v.* Duncan, 64 Mo. 262; Phillips *v.* State, 6 Tex. App. 364; [State *v.* Rogers, 54 Kan. 683; Twyman *v.* Com., Ky., 33 S. W. 409; State *v.* Magone, Or., 51 Pac. 452; Wagner *v.* Aulenbach, 170 Pa. 495; Logan *v.* U. S., 144 U. S. 263, 309; Brown *v.* U. S., 150 id. 93, 98.] The acts and declarations of conspirators in their endeavors to avoid the consequences of their crime, *i. e.* detection, pursuit, and arrest, are considered as part of the original criminal design: Kelley *v.* People, 55 N. Y. 565; *contra*, People *v.* Stanley, 47 Cal. 113.} [That the declarant has been acquitted is immaterial: Holt *v.* State, Tex. Cr., 46 S. W. 829.]

[5] Foster, Discourse, 198; R. *v.* Watson, 2 Stark. 116, 141–147.

[6] R. *v.* Hardy, 24 How. St. Tr. 703, per Eyre, C. J.; {R. *v.* Blake, 6 Q. B. 126.}

[7] [State *v.* Thibodeaux, 48 La. An. 600; Com. *v.* Bishop, 165 Mass. 148; State *v.* Collins, N. C., 128 S. E. 520; Ball *v.* U. S., U. S., 16 Sup. 1192.]

[8] [For the use of co-defendant's *confessions*, see *post*, § 233.]

[1] Sandilands *v.* Marsh, 2 B. & Ald. 673, 678, 679; Wood *v.* Braddick, 1 Taunt. 104, and Petherick *v.* Turner *et al.*, there cited; R. *v.* Hardwick, 11 East 578, 589; Van Reimsdyk *v.* Kane, 1 Gall. 630, 635; Nichols *v.* Dowding, 1 Stark. 81; Hodempyl *v.* Vingerhoed, Chitty on Bills, 618, n. (2); Coit *v.* Tracy, 8 Conn. 268; [see Smith *v.* Lanier, 101 Ga. 137; Hester *v.* Smith, 5 Wyo. 291;] {Scull's Appeal, 115 Pa. 141; Pierce *v.* Roberts, 57 Conn. 40. The admissions of a deceased partner are receivable in an action against his representative: Clark's Ex'rs *v.* Van Reimsdyk, 9 Cranch 153; McElroy *v.* Ludlum, 32 N. J. Eq. 828. The partnership must in any case first be proved, like the authority of an agent, otherwise than by the alleged admissions: Cowan *v.* Kinney, 33 Oh. St. 422; Abbott *v.* Pearson, 130 Mass. 191; Dutton *v.* Woodman, 8 Cush. 255; Alcott *v.* Strong, id. 323; Henry *v.* Willard, 73 N. C. 36;} [Walker *v.* Hatry, 152 Pa. 1, 10.]

or of dissolution it may have been otherwise agreed.[2] An admission, however, by one partner, made after the dissolution, in regard to business of the firm, previously transacted, has been held to be binding on the firm.[3]

[2] Bell *v.* Morrison, 1 Peters 371 ; Burton *v.* Issitt, 5 B. & Ald. 267.

[3] This doctriue was extended by Lord Brougham, to the admission of payment to the partner after the dissolution : Pritchard *v.* Draper, 1 Russ. & M. 191, 199, 200. See Wood *v.* Braddick, 1 Taunt. 104 ; Whitcomb *v.* Whiting, 2 Doug. 652 ; approved in McIntire *v.* Oliver, 2 Hawks 209 ; Beitz *v.* Fuller, 1 McCord 541 ; Cady *v.* Shepherd, 11 Pick. 400 ; Van Reimsdyk *v.* Kane, 1 Gall. 635, 636. See also Parker *v.* Merrill, 6 Greenl. 41 ; Martin *v.* Root, 17 Mass. 223, 227 ; Vinal *v.* Burrill, 16 Pick. 401 ; Lefavour *v.* Yandes, 2 Blackf. 240 ; Bridge *v.* Gray, 14 Pick. 55 ; Gay *v.* Bowen, 8 Met. 100 ; Mann *v.* Locke, 11 N. H. 246, to the same point. In New York, a different doctrine is established : Walden *v.* Sherburne, 15 Johns. 409 ; Hopkins *v.* Banks, 7 Cowen 650 ; Clark *v.* Gleason, 9 id. 57 ; Baker *v.* Stackpole, ib. 420 ; {Van Keuren *v.* Parmelee, 2 Comst. 523 ;} so in Louisiana : Lambeth *v.* Vawter, 6 Rob. La. 127. See also, in support of the text, Lacy *v.* M'Neile, 4 Dowl. & Ry. 7. {Compare Davies *v.* Edwards, 2 Russ. 153 ; Gilligan *v.* Tebbetts, 33 Me. 360 ; Drumright *v.* Philpot, 16 Ga. 424 ; Loomis *v.* Loomis, 26 Vt. 198.} Whether the acknowledgment of a debt by a partner, after dissolution of the partnership, will be sufficient to take the case out of the statute of limitations, and revive the remedy against the others, has been very much controverted in this country ; and the authorities to the point are conflicting. In England, it is now settled by Lord Tenterden's Act (9 Geo. IV, c. 14) that such acknowledgment, or new promise, independent of the fact of part payment, shall not have such effect, except against the party making it. This provision has been adopted in the laws of some of the United States. And it has since been holden in England, where a debt was originally contracted with a partnership, and more than six years afterwards, but within six years before action brought, the partnership having been dissolved, one partner made a partial payment in respect of the debt, — that this barred the operation of the statute of limitations ; although the jury found that he made the payment by concert with the plaintiffs, in the jaws of bankruptcy, and in fraud of his late partners : Goddard *v.* Ingram, 3 Q. B. 839. The American cases seem to have turned mainly on the question, whether the admission of the existing indebtment amounted to the making of a new contract, or not. The Courts which have viewed it as virtually a new contract have held that the acknowledgment of the debt by one partner after the dissolntion of partnership was not admissible against his copartner. This side of the question was argued by Mr. Justice Story, with his accustomed ability, in delivering the judgment of the Court in Bell *v.* Morrison, 1 Peters 367 *et seq.*

It is to be observed, that in this opinion the Court were not unanimous ; and that the learned judge declares that the majority were " principally, though not exclusively, influenced by the course of decisions in Kentucky," where the action arose. A similar view of the question has been taken by the Courts of Pennsylvania, both before and since the decision of Bell *v.* Morrison ; Levy *v.* Cadet, 17 Serg. & R. 127 ; Searight *v.* Craighead, 1 Pa. 135 ; and it has been followed by the Courts of Indiana : Yandes *v.* Lefavour, 2 Blackf. 371. Other judges have viewed such admissions not as going to create a new contract, but as mere acknowledgments of the continued existence of a debt previously created, thereby repelling the presumption of payment, resulting from lapse of time, and thus taking the case out of the operation of the statute of limitations ; to this effect are White *v.* Hale, 3 Pick. 291 ; Martin *v.* Root, 17 Mass. 222, 227 ; Cady *v.* Shepherd, 11 Pick. 400 ; Vinal *v.* Burrill, 16 id. 401 ; Bridge *v.* Gray, 14 id. 61 ; Patterson *v.* Choate, 7 Wend. 441 ; Hopkins *v.* Banks, 7 Cowen 650 ; Austin *v.* Bostwick, 9 Conn. 496 ; Greenleaf *v.* Quincy, 3 Fairf. 11 ; McIntire *v.* Oliver, 2 Hawks 209 ; Ward *v.* Howell, 5 Har. & Johns. 60 ; Fisher *v.* Tucker, 1 McCord Ch. 175 ; Wheelock *v.* Doolittle, 18 Vt. 440. In some of the cases a distinction is strongly taken between admissions which go to establish the original existence of the debt, and those which only show that it has never been paid, but still remains in its original force ; and it is held, that before the admission of a partner, made after the dissolution, can be received, the debt must first be proved *aliunde:* see Owings *v.* Low, 5 Gill & Johns. 134, 144 ; Smith *v.* Ludlow, 6 Johns. 267 ; Patterson *v.* Choate, 7 Wend. 441, 445 ; Ward *v.* Howell, Fisher *v.* Tucker, Hopkins *v.* Banks, Vinal *v.* Burrill, *ubi supra ;* Shelton *v.* Cocke, 3 Munf. 197. In Austin *v.* Bostwick, the partner making the admission had become insolvent ; but this was held to make no difference, as to the ad-

§ 184 *c* [113]. **Same: Agents.** A kindred principle governs in regard to the declarations of agents. The principal constitutes the agent his representative, in the transaction of certain business; whatever, therefore, the agent does, in the lawful prosecution of that business, is the act of the principal whom he represents. And, "where the acts of the agent will bind the principal, there his representations, declarations, and admissions, respecting the subject-matter, will also bind him, if made at the same time, and constituting part of the *res gestæ*."[1] They are of the nature of original evidence, and not of hearsay; the representation or statement of the agent, in such cases, being the ultimate fact to be proved, and not an admission of some other fact.[2] But, it must be remembered, that the admission of the agent cannot always be assimilated to the admission of the principal. The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency in regard to a transaction then depending *et dum fervet opus*. It is because it is a verbal act, and part of the *res gestæ*,[3] that it is admissible at all; and, therefore, it is not necessary to call the agent himself to prove it;[4] but, wherever what he did is admissible in evidence, there it is competent to prove what he said about the act while he was doing it;[5] and it follows, that,

missibility of his declaration. A distinction has always been taken between admissions by a partner after the dissolution, but before the statute of limitations has attached to the debt, and those made afterwards; the former being held receivable, and the latter not: Fisher *v.* Tucker, 1 McCord Ch. 175; and see Scales *v.* Jacob, 3 Bing. 638; Gardner *v.* M'Mahon, 3 Q. B. 566. See further on the general doctrine, *ante*, § 174 n. In all cases where the admission, whether of a partner or other joint contractor, is received against his companions, it must have been made in good faith: Coit *v.* Tracy, 8 Conn. 268; see also Chardon *v.* Oliphant, 2 Mills Const. 685; cited in Collyer on Partn. 236, n. (2d Am. ed.). It may not be useless to observe that Bell *v.* Morrison was cited and distinguished, partly as founded on the local law of Kentucky, in Parker *v.* Merrill, 6 Greenl. 47, 48; and in Greenleaf *v.* Quincy, 3 Fairf. 11; and that it was not cited in the cases of Patterson *v.* Choate, Austin *v.* Bostwick, Cady *v.* Shepherd, Vinal *v.* Burrill, and Yandes *v.* Lefavour, though these were decided subsequent to its publication.

[1] Story on Agency, §§ 134–137.

[2] 1 Phil. Evid. 381. [This is so if the statement by the agent is to be used contractually; but if it is offered as a mere admission, then like other admissions it is mere evidence.]

[3] [In the sense that it is done during the continuance of the authority; it is admissible because the agent represents the principal; it is not hearsay, because no admissions are hearsay in the strict sense (*ante*, § 169); for the discriminations as to the term *res gestæ*, see *ante*, §§ 100–110 *a*; 162 *f*.]

[4] Doe *v.* Hawkins, 2 Q. B. 212; Saunicre *v.* Wode, 3 Harrison 299.

[5] Garth *v.* Howard, 8 Bing. 451; Fairlie *v.* Hastings, 10 Ves. 123, 127; Mechanics' Bank of Alexandria *v.* Bank of Columbia, 5 Wheat. 336, 337; Langhorn *v.* Allnutt, 4 Taunt. 519, per Gibbs, J.; Hannay *v.* Stewart, 6 Watts 487, 489; Stockton *v.* Demuth, 7 id. 39; Story on Agency, 126, 129, n. (2); Woods *v.* Banks, 14 N. H. 101; Cooley *v.* Norton, 4 Cush. 93. In a case of libel for damages, occasioned by collision of ships, it was held that the admission of the master of the ship proceeded against might well be articulated in the libel: The Manchester, 1 W. Rob. 62; but it does not appear, in the report, whether the admission was made at the time of the occurrence or not. The question has been discussed, whether there is any substantial distinction

where his right to act in the particular matter in question has ceased, the principal can no longer be affected by his declarations, they being mere hearsay.[6] [The question depends, in effect, upon the authority to be attributed to the agent in the specific case, and this will depend on the nature of the business with reference to the degree of responsibility and authority attributable to the particular person.[7]]

between a written entry and an oral declaration by an agent of the fact of his having received a particular rent for his employer. The case was one of a sub-agent, employed by a steward to collect rents, and the declaration offered in evidence was, "M. N. paid me the half-year's rent, and here it is." Its admissibility was argued, both as a declaration against interest, and also, as made in the course of discharging a duty; and the Court inclined to admit it, but took time for advisement: Fursdom *v.* Clogg, 10 M. & W. 572; see also R. *v.* Hall, 8 C. & P. 358; Allen *v.* Denstone, ib. 760; Lawrence *v.* Thatcher, 6 id. 669; Bank of Monroe *v.* Field, 2 Hill 445; Doe *v.* Hawkins, 2 Q. B. 212. Whether the declaration or admission of the agent made in regard to a transaction already past, but while his agency for similar objects still continues, will bind the principal, does not appear to have been expressly decided; but the weight of authority is in the negative; see the observations of Tindal, C. J., in Garth *v.* Howard, *supra*; see also Mortimer *v.* M'Callan, 6 M. & W. 58, 69, 73; Haven *v.* Brown, 7 Greenl. 421, 424; Thallhimer *v.* Brinckerhoff, 4 Wend. 394; City Bank of Baltimore *v.* Bateman, 7 Har. & Johns. 104; Stewartson *v.* Watts, 8 Watts 392; Betham *v.* Benson, Gow 45, 48, n.; Baring *v.* Clark, 19 Pick. 220; Parker *v.* Green, 8 Met. 142, 143; Plumer *v.* Briscoe, 12 Jur. 351; 11 Q. B. 46. Where the fraudulent representations of the vendor are set up in defence of an action for the price of land, the defence may be maintained by proof of such representations by the vendor's agent who effected the sale; but it is not competent to inquire as to his motives or inducements for making them: Hammatt *v.* Emerson, 14 Shepl. 308.

[6] Reynolds *v.* Rowley, 3 Rob. La. 201; Stiles *v.* Western Railroad Co., 8 Met. 44.

[7] [For admissions as to *negligent conduct* and the like, see the following cases: {Durkee *v.* R. Co., 69 Cal. 534; Griffin *v.* R. Co., 26 Ga. 111;} South. R. Co. *v.* Kinchen, id., 29 S. E. 816; Penns. R. Co. *v.* Bridge Co., 170 Ill. 645; Atch. T. & S. F. R. Co. *v.* Osborn, 58 Kan. 768; Atch. T. & S. F. R. Co. *v.* Cattle Co., id., 52 Pac. 71; Louisv. & N. R. Co. *v.* Ellis, 97 Ky. 330; Graddy *v.* R. Co., id., 43 S. W. 468; C. & O. R. Co. *v.* Smith, id., 39 S. W. 832: East T. T. Co. *v.* Simms, 99 id. 404; {Morse *v.* R. Co., 6 Gray 450; Robinson *v.* R. Co., 7 id. 92;} Gilmore *v.* Paper Co., 169 Mass. 471; Ablard *v.* R. Co., 104 Mich. 147; {Luby *v.* R. Co., 17 N. Y. 131;} Williams *v.* Tel. Co., 116 N. C. 558; Giberson *v.* Mills Co., 174 Pa. 369; {Oil C. F. S. Co. *v.* Boundy, 122 id. 460; Erie & W. V. R. Co. *v.* Smith, 125 id. 264; Charleston R. Co. *v.* Blake, 12 Rich. L. 634;} Houston E. & W. T. R. Co. *v.* Campbell, Tex., 45 S. W. 2; Louisv. & N. R. Co. *v.* Stewart, 9 U. S. App. 564; Linderberg *v.* Min. Co., 9 Utah 163; Rensch *v.* Cold Storage Co., 91 Va. 534.

For admissions in *insurance* claims, see Schoep *v.* Ins. Co., 104 Ia. 354; {Ins. Co. *v.* Woodruff, 2 Dutch. 541;} Albert *v.* Ins. Co., N. C., 30 S. E. 327; Wicktorwitz *v.* Ins. Co., Or., 51 Pac. 75.

For recent instances in sundry classes of agencies, see the following: Postal C. C. Co. *v.* LeNoir, 107 Ala. 640; Postal C. C. Co. *v.* Brantley, ib. 683; Georgia H. I. Co. *v.* Warten, 113 id. 479; Ames Ironworks *v.* Pulley Co., 63 Ark. 87; Hewes *v.* Fruit Co., 106 Cal. 441; Mutter *v.* Lime Co., id., 42 Pac. 1068; McGowan *v.* McDonald, 111 id. 57; Hearne *v.* DeYoung, 119 id. 670; Builders' Co. *v.* Cox, 68 Conn. 380; {Newton Mfg. Co. *v.* White, 53 Ga. 395; Mich. C. R. Co. *v.* Carrow, 73 Ill. 348;} Treager *v.* Mining Co., 142 Ind. 164; Waite *v.* High, 96 Ia. 742; Irlbeck *v.* Bierl, 101 id. 240; Metrop. N. B'k *v.* Com. St. B'k, 104 id. 682; {Sivenson *v.* Aultman, 14 Kan. 273;} Cherokee Co. *v.* Dickson, 55 id. 62; First N. B'k *v.* Marshall, 56 id. 441; {Burnham *v.* Ellis, 39 Me. 319; Dorne *v.* S. M. Co., 11 Cush. 205;} Geary *v.* Stevenson, 169 Mass. 23; Andrews *v.* Mining Co., Mich., 72 N. W. 242; Nostrum *v.* Halliday, 39 Nebr. 828; N. P. Lumber Co. *v.* W. S. M. L. & M. Co., 29 Or. 219; First N. B'k *v.* Linn Co. B'k, 30 id. 296; Hunt. R. Co. *v.* Decker, 82 Pa. 119; School F. Co. *v.* Warsaw, S. D., 122 id. 500; Estey *v.* Birmbaum, 9 S. D. 174; Nelson *v.* Bank, 32 U. S. App. 554; Moyle *v.* Congr. Soc., Utah, 50 Pac. 806;] {Stiles *v.* Danville, 42 Vt. 282.}

§ 184 *d* [114]. It is to be observed, that the rule admitting the declarations of the agent is founded upon the legal identity of the agent and the principal; and therefore they bind only so far as there is authority to make them; [and this authority, therefore, must be shown other than by the extra-judicial statements of the supposed agent, which are receivable as admissions only on the assumption that the declarant's agency is independently proved.[1]] Where this authority is derived by implication from authority to do a certain act, the declarations of the agent, to be admissible, must be part of the *res gestæ*.[2] An authority to make an admission is not necessarily to be implied from an authority previously given in respect to the thing to which the admission relates.[3] Thus it has been held,[4] that the declarations of the bailee of a bond, intrusted to him by the defendant, were not admissible in proof of the execution of the bond by the bailor, nor of any other agreements between the plaintiff and defendant respecting the subject. The *res gestæ* consisted in the fact of the bailment, and its nature; and on these points only were the declarations of the agent identified with those of the principal. As to any other facts in the knowledge of the agent, he must be called to testify, like any other witness.[5]

§ 185. **Same: Husband and Wife.** The admissions of the wife will bind the husband, only where she has authority to make them.[1] This authority does not result, by mere operation of law, from the relation of husband and wife; but is a question of fact, to be found by the jury, as in other cases of agency; for though this relation is

[1] {Cent. Penn. Teleph. Co. *v.* Thompson, 112 Pa. St. 131; Francis *v.* Edwards, 77 N. C. 271; Galbreath *v.* Cole, 61 Ala. 139; Central Branch U. P. R. R. Co. *v.* Butman, 22 Kan. 639; Mussey *v.* Beecher, 3 Cush. 517; Brigham *v.* Peters, 1 Gray 145; Trustees, etc. *v.* Bledsoe, 5 Ind. 133; Corbin *v.* Adams, 6 Cush. 93; Printup *v.* Mitchell, 17 Ga. 558; Covington, etc. R. R. Co. *v.* Ingles, 15 B. Mon. 637; Tuttle *v.* Brown, 4 Gray 457, 460;} [Abel *v.* Jarratt, 100 Ga. 732; Amer. Expr. Co. *v.* Landford, Ind. Terr., 46 S. W. 182; Nowell *v.* Chipman, Mass., 49 N. E. 631; Wicktorwitz *v.* Ins. Co., Or., 51 Pac. 75; Union G. & T. Co. *v.* Robinson, U. S. App., 79 Fed. 420. The alleged agent may of course be a witness on the stand to prove his authority, because it is immaterial by whom the preliminary fact of agency is proved: Amer. Exp. Co. *v.* Lankford, Wicktorwitz *v.* Ins. Co., *supra*. Moreover, the declarations are also admissible, without such preliminary proof, as showing at least that the person purported to act as agent, the agency being proved later: Nowell *v.* Chipman, *supra*.]

[2] [Translate this: "act authorized to be done."]

[3] Phil. & Am. on Evid. 402. As to the evidence of authority inferred from circumstances, see Story on Agency, §§ 87–106, 259, 260.

[4] Fairlie *v.* Hastings, 10 Ves. 123.

[5] Maesters *v.* Abraham, 1 Esp. 375 (Day's ed.), and note (1); Story on Agency, §§ 135–143; Johnson *v.* Ward, 6 Esp. 47.

[1] Emerson *v.* Blomden, 1 Esp. 142; Anderson *v* Sanderson, 2 Stark. 204; Carey *v.* Adkins, 4 Campb. 92; {State *v.* Jaeger, 66 Mo. 173; Goodrich *v.* Tracy, 43 Vt. 314; Hunt *v.* Strew, 33 Mich. 85; Butler *v.* Price, 115 Mass. 578; Deck *v.* Johnson, 1 Abb. (N. Y.) App. Dec. 497;} [Broderick *v.* Higginson, 169 Mass. 482; People *v.* Knapp, 42 Mich. 269.] In Walton *v.* Green, 1 C. & P. 621, which was an action for necessaries furnished to the wife, the defence being that she was turned out of doors for adultery, the husband was permitted to prove her confessions of the fact, just previous to his turning her away; but this was contemporary with the transaction of which it formed a part.

peculiar in its circumstances, from its close intimacy and its very nature, yet it is not peculiar in its principles. As the wife is seldom expressly constituted the agent of the husband, the cases on this subject are almost universally those of implied authority, turning upon the degree in which the husband permitted the wife to participate, either in the transaction of his affairs in general, or in the particular matter in question. Where he sues for her wages, the fact that she earned them does not authorize her to bind him by her admissions of payment;[2] nor can her declarations affect him, where he sues with her in her right; for in these, and similar cases, the right is his own, though acquired through her instrumentality.[3] But in regard to the inference of her agency from circumstances, the question has been left to the jury with great latitude, both as to the fact of agency and the time of the admissions. Thus, it has been held competent for them to infer authority in her to accept a notice and direction, in regard to a particular transaction in her husband's trade, from the circumstance of her being seen twice in his counting-room, appearing to conduct his business relating to that transaction, and once giving orders to the foreman.[4] And in an action against the husband, for goods furnished to the wife, while in the country, where she was occasionally visited by him, her letter to the plaintiff, admitting the debt, and apologizing for the non-payment, though written several years after the transaction, was held by Lord Ellenborough sufficient to take the case out of the statute of limitations.[5] [On the same principle, an actual agency must be shown to render the statements of a husband admissible against the wife.[6]]

§ 186. **Same: Attorneys of Record; Pleadings.** (1) (*a*) The admissions of attorneys of record bind their clients, in all matters relating to the progress and trial of the cause; but, to this end, they must be distinct and formal, or such as are termed solemn admissions,[1] made for the express purpose of alleviating the stringency of some rule of practice, or of dispensing with the formal proof of some fact at

[2] Hall *v.* Hill, 2 Str. 1094. An authority to the wife to conduct the ordinary business of the shop in her husband's absence does not authorize her to bind him by an admission, in regard to the tenancy or the rent of the shop: Meredith *v.* Footner, 11 M. & W. 202.

[3] Alban *v.* Pritchett, 6 T. R. 680; Kelly *v.* Small, 2 Esp. 716; Denn *v.* White, 7 T. R. 112, as to her admission of a trespass; Hodgkinson *v.* Fletcher, 4 Campb. 70. Neither are his admissions, as to facts respecting her property, which happened before the marriage, receivable after his death, to affect the rights of the surviving wife: Smith *v.* Scudder, 11 Serg. & R. 325.

[4] Plimmer *v.* Sells, 3 Nev. & M. 422; and see Riley *v.* Suydam, 4 Barb. 222.

[5] Gregory *v.* Parker, 1 Campb. 394; Palethorp *v.* Furnish, 2 Esp. 511, n. See also Clifford *v.* Burton, 1 Bing. 199; s. c. 8 Moore 16; Petty *v.* Anderson, 3 Bing. 170; Cotes *v.* Davis, 1 Campb. 485.

[6] {Deck *v.* Johnson, 1 Abb. App. Dec. 497;} [Broderick *v.* Higginson, 169 Mass. 482; LeMaster *v.* Dickson, Tex., 45 S. W. 1; see Hughes *v.* Canal Co., 176 Pa. 254. For admissions by a husband in possession of goods said to be his wife's, see Coldwater N. B'k *v.* Buggie, Mich., 75 N. W. 1057; Lehmann *v.* Chapel, Minn., 73 N. W. 402; Boynton *v.* Miller, Mo., 46 S. W. 754.]

[1] [*Post*, § 205.]

the trial; in such cases, they are in general conclusive; and may be given in evidence; even upon a new trial.[2] (*b*) But other admissions, which are mere matters of conversation with an attorney, though they relate to the facts in controversy, cannot be received in evidence against his client; the reason of the distinction is found in the nature and extent of the authority given; the attorney being constituted for the management of the cause in court, and for nothing more.[3] If the admission is made before suit, it is equally binding, provided it appear that the attorney was already retained to appear in the cause.[4] But in the absence of any evidence of retainer at that time in the cause, there must be some other proof of authority to make the admission.[5] Where the attorney is already constituted in the cause, admissions made by his managing clerk or his agent are received as his own.[6]

(2) It seems that pleadings, whether in equity or at common law, are not to be treated as positive allegations of the truth of the facts therein stated, for all purposes; but only as statements of the case of the party, to be admitted or denied by the opposite side, and, if denied, to be proved, and ultimately to be submitted to judicial decision.[7] {This is sometimes enacted by statute[8] and sometimes is arrived at by decisions of Court, pleadings being regarded, so far as the suits in which they are filed are concerned, as mere formulas for the solution of the case, and to limit and make definite the issues to be tried by the jury. Any attempt, therefore, to comment upon

[2] Doe *v.* Bird, 7 C. & P. 6; Langley *v.* Lord Oxford, 1 M. & W. 508; {Colledge *v.* Horn, 3 Bing. 119;} [Luther *v.* Clay, 100 Ga. 236, *semble;* Central B. Co. *v.* Lowell, 15 Gray 106, 128; Prestwood *v.* Watson, Ala., 20 So. 600. *Contra:* {Perry *v.* Mfg. Co., 40 Conn. 313;} Luther *v.* Clay, Ga., 28 S. E. 46; King *v.* Shepard, id., 30 S. E. 634; Pearl *v.* Allen, 1 Tyl. 4. It is usually a question of implied intention in each case. But it is only as to their binding effect that the difference of opinion exists; it is generally conceded that they may be used as ordinary admissions. But in any case they do not prevent the opposite party from putting in his evidence if he chooses, in spite of this waiver of proof: Com. *v.* Miller, 3 Cush. 243, 250; Com. *v.* Costello, 120 Mass. 358, 369; Stetson's Will, id., 44 N. E. 1085; Whiteside *v.* Loney, id., 50 N. E. 930 (in Court's discretion); Dunning *v.* R. Co., Me., 39 Atl. 352. As to the kind of statement that amounts to such a binding waiver, see Rosenbaum *v.* State, 33 Ala. 361; Thompson *v.* Thompson, 9 Ind. 323; Lake E. & W. R. Co. *v.* Rooker, Ind. App., 41 N. E. 470; Mahoney *v.* Hardware Co., Mont., 48 Pac. 545; Smith *v.* Olsen, Tex., 46 S. W. 631. It need not be signed: Prestwood *v.* Watson, *supra.* For the Court's discretion to relieve for mistake, see *post,* § 206.]

[3] Young *v.* Wright, 1 Campb. 139, 141; Parkins *v.* Hawkshaw, 2 Stark. 239; Elton *v.* Larkins, 1 M. & Rob. 196; Doe *v.* Bird, 7 C. & P. 6; Doe *v.* Richards, 2 C. & K. 216; Watson *v.* King, 3 C. B. 608.

[4] Marshall *v.* Cliff, 4 Campb. 133.

[5] Wagstaff *v.* Wilson, 4 B. & Ad. 339; {Lord *v.* Bigelow, 124 Mass. 185.}

[6] Taylor *v.* Willans, 2 B. & Ad. 845, 856; Standage *v.* Creighton, 5 C. & P. 406; Taylor *v.* Foster, 2 id. 195; Griffiths *v.* Williams, 1 T. R. 710; Truslove *v.* Burton, 9 Moore 64. As to the extent of certain admissions, see Holt *v.* Squire, Ry. & M. 282; Marshall *v.* Cliff, 4 Campb. 133. The admission of the due execution of a deed does not preclude the party from taking advantage of a variance: Goldie *v.* Shuttleworth, 1 Campb. 70.

[7] Boileau *v.* Rutlin, 2 Exch. 665.

[8] {*E. g.* Mass. Pub. St. c. 167, § 75.}

them in argument, as for instance, to compare an original declaration, or answer, with an amended form of the same, so as to draw an inference to the discredit of the party filing them, is inadmissible.}[9]

(3) {The question how far statements made by a party to a suit in *pleadings* filed by him or his attorney *in previous cases* are admissible in evidence against him is not one free from doubt. The test which seems most satisfactory to apply is the inquiry whether, under the circumstances, the party against whom the admissions are offered can fairly be supposed to have had personal knowledge of making of the admissions in the pleadings at the time the pleadings were drawn or filed. If the pleadings are signed and filed by the attorney, without apparently being brought to the party's attention, it is generally held that such pleadings are not evidence in another case against the party.[10] And pleadings which are general and formal in their nature, not containing specific allegations of fact, and which are signed by the attorney and are not shown to have been specially brought to the attention of the party in whose behalf they were made, are not receivable in other cases as admissions of the party for whom they are filed;[11] the presumption being that the pleading is not known to the party in whose behalf it was filed. But if the pleadings are shown to have been drawn by the express direction of the party in whose behalf they are filed, and any statements of fact therein contained to have been inserted by his direction or with his assent, the pleadings are admissions of the facts therein contained as against such a party in subsequent cases.[12] There are *dicta* in several States that a pleading, even though signed by the attorney, is presumed to be known to the party in whose behalf it is made, and is to be regarded as an admission of the facts therein stated.[13] But this is not the better rule. The true rule is that formal allegations are presumed to be made by the attorney on general instructions and

[9] [Miles *v.* Woodward, 115 Cal. 308;] {Phillips *v.* Smith, 110 Mass. 61; Taft *v.* Fiske, 140 id. 250; Blackington *v.* Johnson, 126 id. 21; Lyons *v.* Ward, 124 id. 365.} [*Contra*, allowing their use as evidence: O'Connor's Estate, 118 Cal. 69; Leach *v.* Hill, 97 Ia. 81; Ludwig *v.* Blackshere, 102 id. 366; {Anderson *v.* McPike, 86 Mo. 301;} Walser *v.* Wear, 141 id. 443; Woodworth *v.* Thompson, 44 Nebr. 311; Lee *v.* Heath, N. J., 39 Atl. 729; Kilpatrick Co. *v.* Box, 13 Utah 494; Lindner *v.* Ins. Co., 93 Wis. 526; see State *v.* Bowe, 61 Me. 176.]

[10] {Marianski *v.* Cairns, 1 Macq. Sc. 212; Dennie *v.* Williams, 135 Mass. 28; Wilkins *v.* Stidger, 22 Cal. 239; Harrison *v.* Baker, 5 Litt. 250; Elting *v.* Scott, 2 Johns. 157; Meade *v.* Black, 22 Wis. 232; Tabb *v.* Cabell, 17 Gratt. 160; Hobson *v.* Ogden, 16 Kan. 388;} [Solari *v.* Snow, 101 Cal. 387; Rockland *v.* Farnsworth, 89 Me. 481; Farr *v.* Rouillard, Mass., 52 N. E. 443.]

[11] {Delaware County *v.* Diebold Safe Co., 133 U. S. 487; Combs *v.* Hodge, 21 How. 397; Pope *v.* Allis, 115 U. S. 363; Dennie *v.* Williams, *supra.*}

[12] {Birchard *v.* Booth, 4 Wis. 67; Wilkins *v.* Stidger, 22 Cal. 239; Brown *v.* Jewett, 120 Mass. 215; Nichols *v.* Jones, 32 Mo. App. 664; Murphy *v.* St. Louis Type Foundry, 29 id. 545; and see cases *supra.*}

[13] {Coward *v.* Clauton, 79 Cal. 29; Rich *v.* Minneapolis, 40 Minn. 84; Vogel *v.* Osborne, 32 id. 167; Murphy *v.* St. Louis Type Foundry, *supra;* Bailey *v.* O'Bannon, 28 Mo. App. 46;} [see Gardner *v.* Meeker, 169 Ill. 40; Jones *v.* Howard, 3 All. 24; O'Riley *v.* Clampet, 53 Minn. 539; Lee *v.* R. Co., Wis., 77 N. W. 714; and see a few other cases, *post*, § 195.]

without the personal knowledge of the client; but particular and specific allegations of matters of action or defence, which cannot be presumed to have been made under the general authority of the attorney, but under specific instructions to him from the client, are competent evidence against the client.[14] If the pleadings in question were sworn to by the party in whose behalf they were filed, this fact is evidence that they were drawn with his knowledge of the facts therein stated and consequently admissible against him in other cases.[15] Similarly, an answer of the trustee in a trustee suit may be admissible against the trustee filing it in a subsequent suit.[16] So, answers of a party to interrogatories filed in the ordinary mode of practice are competent evidence against the party making the answers in a subsequent suit.[17] The fact that the pleadings offered in evidence were made in a suit in another State does not affect their admissibility.[18] Admissions of fact made in a law brief for the purposes of arguing the case before the law court, are not under ordinary circumstances admissions of those facts which bind the attorney or party making them, though if the statements therein appear to be made from directions of the client and from his personal knowledge they may have the effect of admissions.[19]} [Subsequent conduct of the party, by abandoning the proceedings or otherwise recognizing the justice of the opponent's case, may amount to an admission.[20]]

§ 187. **Same: Principal and Surety.** We are next to consider the admissions of a principal, as evidence in an action against the surety, upon his collateral undertaking. In the cases on this subject the main inquiry has been, whether the declarations of the principal were made during the transaction of the business for which the surety was bound, so as to become part of the *res gestæ*. If so, they have been held admissible; otherwise not. The surety is considered as bound only for the actual conduct of the party, and not for whatever he might say he had done; and therefore is entitled to proof of his conduct by original evidence, where it can be had; excluding all declarations of the principal, made subsequent to the act to which they relate, and out of the course of his official duty.[1] Thus, where one guaranteed the payment for such goods as the plaintiffs

[14] {Dennie *v.* Williams, *supra;* Johnson *v.* Russell, 144 Mass. 409.}
[15] {Cook *v.* Barr, 44 N. Y. 156; Murphy *v.* St. Louis Type Foundry, *supra.*}
[16] {Eaton *v.* Teleg. Co., 68 Me. 63.}
[17] {Williams *v.* Cheney, 3 Gray 215; Judd *v.* Gibbs, ib. 539. See also Church *v.* Shelton, 2 Curtis C. C. 271; State *v.* Littlefield, 3 R. I. 124.}
[18] {Buzard *v.* McAnulty, 77 Tex. 445.}
[19] {Wood *v.* Graves, 144 Mass. 365.
[20] [Malcolmson *v.* O'Dea, 10 H. L. C. 593;] White *v.* Merrill, 82 Cal. 14.}
[1] {Lee *v.* Brown, 21 Kan. 458; Pollard *v.* Louisville, etc. R. R. Co., 7 Bush 597; White *v.* German Nat'l Bank, 9 Heisk. 475; Hatch *v.* Elkins, 65 N. Y. 489; Tenth Nat'l Bank *v.* Darragh, 3 Thomp. & C. 138; Chelmsford Company *v.* Demarest, 7 Gray 1; see Union Savings Association *v.* Edwards, 47 Mo. 445;} [Singer Mfg. Co. *v.* Reynolds, 168 Mass. 588.] {The admission of the *surety*, however, is good against both: Chapel *v.* Washburn, 11 Ind. 393.}

should send to another, in the way of their trade, it was held, that the admissions of the principal debtor, that he had received goods, made after the time of their supposed delivery, were not receivable in evidence against the surety.[2] So, if one becomes surety in a bond, conditioned for the faithful conduct of another as clerk, or collector, it is held, that, in an action on the bond against the surety, confessions of embezzlement made by the principal after his dismissal, are not admissible, in evidence;[3] though, with regard to entries made in the course of his duty, it is otherwise.[4] A judgment, also, rendered against the principal, may be admitted as evidence, of that fact, in an action against the surety.[5] On the other hand, upon the same general ground, it has been held, that, where the surety confides to the principal the power of making a contract, he confides to him the power of furnishing evidence of the contract; and that, if the contract is made by parol, subsequent declarations of the principal are admissible in evidence, though not conclusive. Thus, where a husband and wife agreed, by articles, to live separate, and C, as trustee and surety for the wife, covenanted to pay the husband a sum of money, upon his delivering to the wife a carriage and horses for her separate use, it was held, in an action by the husband for the money, that the wife's admissions of the receipt by her of the carriage and horses, were admissible.[6] So, where A guaranteed the performance of any contract that B might make with C, the admissions and declarations of B were held admissible against A, to prove the contract.[7]

§ 188. But where the surety, being sued for the default of the principal, gives him notice of the pendency of the suit, and requests him to defend it; if judgment goes against the surety, the record is conclusive evidence for him, in a subsequent action against the principal for indemnity; for the principal has thus virtually become party to it. It would seem, therefore, that in such case the declarations of the principal, as we have heretofore seen, become admissible, even though they operate against the surety.[1]

§ 189. **Same: Privity of Estate; Ancestor or Grantor during Ownership.** The admissions of one person are also evidence against another, in respect of privity between them. The term "privity"

[2] Evans *v.* Beattie, 5 Esp. 26; Bacon *v.* Chesney, 1 Stark. 192; Longenecker *v.* Hyde, 6 Binn. 1.

[3] Smith *v.* Whittingham, 6 C. & P. 78; see also Goss *v.* Watlington, 3 Brod. & Bing. 132; Cutler *v.* Newlin, Manning's Digest, N. P. 137, per Holroyd, J., in 1819; Dawes *v.* Shedd, 15 Mass. 6, 9; Foxcroft *v.* Nevins, 4 Greenl. 72; Hayes *v.* Seaver, 7 id. 237; Respublica *v.* Davis, 3 Yeates 128; Hotchkiss *v.* Lyon, 2 Blackf. 222; Shelby *v.* Governor, etc., id. 289; Beall *v.* Beck, 3 Har. & McHen. 242.

[4] Whitnash *v.* George, 8 B. & C. 556; Middleton *v.* Melton, 10 B. & C. 317; McGahey *v.* Alston, 2 M. & W. 213, 214.

[5] Drummond *v.* Prestman, 12 Wheat. 515.

[6] Fenner *v.* Lewis, 10 Johns. 38.

[7] Meade *v.* McDowell, 5 Binn. 195.

[1] See *supra*, § 180, n. 8, and cases there cited.

denotes mutual or successive relationship to the same rights of property; and privies are distributed into several classes, according to the manner of this relationship. Thus, there are privies in estate, as donor and donee, lessor and lessee, and joint-tenants; privies in blood, as heir and ancestor, and co-parceners; privies in representation, as executors and testator, administrators and intestate; privies in law, where the law, without privity of blood or estate, casts the land upon another, as by escheat. All these are more generally classed into privies in estate, privies in blood, and privies in law.[1] The ground upon which admissions bind those in privity with the party making them is, that they are identified in interest; and, of course, the rule extends no farther than this identity. The cases of co-parceners and joint-tenants are assimilated to those of joint-promisors, partners and others having a joint interest, which have already been considered.[2] In other cases, where the party, by his admissions, has qualified his own right, and another claims to succeed him as heir, executor, or the like, he succeeds only to the right, as thus qualified, at the time when his title commenced; and the admissions are receivable in evidence against the representative in the same manner as they would have been against the party represented.[3] Thus, the declarations of the ancestor, that he held the land as the tenant of a third person, are admissible to show the seisin of that person, in an action brought by him against the heir for the land.[4] Thus also, where the defendant in a real action relied on a long possession, he has been permitted, in proof of the adverse character of the possession, to give in evidence the declarations of one under whom the plaintiff claimed, that he had sold the land to the person under whom the defendant claimed.[5] And the declarations of an intestate are admissible against his administrator, or any other claiming in his right.[6]

[1] Co. Lit. 271 *a;* Carver *v.* Jackson, 4 Peters 1, 83; Wood's Inst. L. L. Eng. 236; Tomlin's Law Dict. s. v. *Privies.* But the admissions of executors and administrators are not receivable against their co-executors or co-administrators: Elwood *v.* Deifendorf, 5 Barb. S. C. 498. Other divisions have been recognized; namely, privity in tenure between landlord and tenant; privity in contract alone, or the relation between lessor and lessee, or heir and tenant in dower, or by the curtesy, by the covenants of the latter, after he has assigned his term to a stranger; privity in estate alone, between the lessee and the grantee of the reversion; and privity in both estate and contract, as between lessor and lessee, etc., but these are foreign from our present purpose; see Walker's Case, 3 Co. 23; Beverley's Case, 4 Co. 123, 124; *supra,* §§ 19, 20, 23, 24.

[2] *Supra,* §§ 174, 180.

[3] {Alexander *v.* Caldwell, 55 Ala. 517; Pickering *v.* Reynolds, 119 Mass. 111; Hayden *v.* Stone, 121 id. 413; Rawson *v.* Plaisted, 151 id. 73; Anderson *v.* Kent, 14 Kan. 207; Roelke *v.* Andrews, 26 Wis. 311; Dodge *v.* Freedman's Saving, etc. Company, 93 U. S. 379;} [Williams *v.* Harter, Cal., 53 Pac. 405; McCurtain *v.* Grady, Ind. Terr., 38 S. W. 65; Levi *v.* Gardner, S. C., 30 S. E. 617; Henderson *v.* Wanamaker, U. S. App., 79 Fed. 736; Rensens *v.* Lawson, 91 Va. 226.]

[4] Doe *v.* Pettet, 5 B. & Ald. 223; 2 Poth. on Obl. by Evans, p. 254.

[5] Brattle Street Church *v.* Bullard, 2 Met. 363; and see Padgett *v.* Lawrence, 10 Paige, 170; Dorsey *v.* Dorsey, 3 H. & J. 410; Clary *v.* Grimes, 12 G. & J. 31.

[6] Smith *v.* Smith, 3 Bing. N. C. 29; Ivat *v.* Finch, 1 Taunt. 141; {McFadden *v.*

{The admissions must be made while the title to the property in question is in the declarant; they therefore cannot affect a title subsequently acquired,[7] nor are they admissible if made after the declarant has parted with his interest in the property;[8] unless there is proof of some fraudulent scheme between the grantor and grantee, *e. g.* to defraud creditors.[9]} [It follows that the declarant, if at the time owner or claimant, need not have been in possession;[10] and, conversely, that his being in possession after the title conveyed does not make his declaration competent as an admission.[11]] The declarations, also, of the former occupant of a messuage, in respect of which the present occupant claimed a right of common, because of vicinage, are admissible evidence in disparagement of the right, they being made during his occupancy; and on the same principle, other contemporaneous declarations of occupiers have been admitted, as evidence of the nature and extent of their title, against those claiming in privity of estate.[12] Any admission by a landlord in a prior lease,

Ellmaker, 52 Cal. 348; Foote *v.* Beecher, 78 N. Y. 155; Lewis *v.* Adams, 61 Ga. 559; Eckert *v.* Triplett, 48 Ind. 174; Mueller *v.* Rebhan. 94 Ill. 142; Platner *v.* Platner, 78 N. Y. 90; Fellows *v.* Smith, 130 Mass. 378;} [compare the notes to §§ 174, 176, 179, *ante*.]

[7] {Stockwell *v.* Blamey, 129 Mass. 312; Noyes *v.* Merrill, 108 id. 396; Hutchins *v.* Hutchins, 98 N. Y. 64; Houston *v.* McCluny, 8 W. Va. 135.}

[8] {Pringle *v.* Pringle, 59 Pa. St. 281; Chadwick *v.* Fonner, 69 N. Y. 404; Randegger *v.* Ehrhardt, 51 Ill. 101; Bentley *v.* O'Bryan, 111 id. 53; Hills *v.* Ludwig, 46 Oh. St. 373; Carpenter *v.* Carpenter, 8 Bush 283; Taylor *v.* Webb, 54 Miss. 36; Howell *v.* Howell, 47 Ga. 492;} [Ord *v.* Ord, 99 Cal. 523; Bowden *v.* Achor, 95 Ga. 243; Miller *v.* Miller, 155 Ill. 284; Shea *v.* Murphy, 164 id. 614; Robbins *v.* Spencer, 140 Ind. 483; Neuffer *v.* Moehn, 96 Ia. 731; Vyn *v.* Keppel, 108 Mich. 244; Kurtz *v.* R. Co., 61 Minn. 18; Consol. T. L. Co. *v.* Pien, 44 Nebr. 887; Jones *v.* Jones, 137 N. Y. 610, 614; Arnegaard *v.* Arnegaard, N. D., 75 N. W. 797; Josephi *v.* Furnish, 27 Or. 260; Matteson *v.* Hartman, 91 Wis. 485.]

[9] {Hartman *v.* Diller, 62 Pa. St. 37; Boyd *v.* Jones, 60 Mo. 454; Pier *v.* Duff, 63 Pa. St. 59; Hutchings *v.* Castle, 48 Cal. 152; Cuyler *v.* McCartney, 33 Barb. 165; Holbrook *v.* Holbrook, 113 Mass. 75;} [Higgins *v.* Spahr, 145 Ind. 167; Toms *v.* Whitmore, Wyo., 44 Pac. 56.]

[10] [Fry *v.* Stowers, 92 Va. 13.]

[11] [Emmons *v.* Barton, 109 Cal. 662; Hart *v.* Randolph, 142 Ill. 521, 525.]

[12] Walker *v.* Broadstock, 1 Esp. 458; Doe *v.* Austin, 9 Bing. 41; Davies *v.* Pierce, 2 T. R. 53; Doe *v.* Rickarby, 5 Esp. 4; Doe *v.* Jones, 1 Campb. 367. [As to this, see the discriminations pointed out *post*, in the text.] Ancient maps, books of survey, etc., though mere private documents, are frequently admissible on this ground, where there is a privity in estate between the former proprietor, under whose direction they were made, and the present claimant, against whom they are offered: Bull. N. P. 283; Bridgman *v.* Jennings, 1 Ld. Raym. 734. So, as to receipts for rent, by a former grantor, under whom both parties claimed: Doe *v.* Seaton, 2 Ad. & El. 171. See also Doe *v.* Cole, 6 C. & P. 359, that a letter written by a former vicar, respecting the property of the vicarage, is evidence against his successor, in an ejectment for the same property, in right of his vicarage. The receipts, also, of a vicar's lessee, it seems, are admissible against the vicar, in proof of a modus, by reason of the privity between them: Jones *v.* Carrington, 1 C. & P. 329, 330, n.; Maddison *v.* Nuttal, 6 Bing. 226. So, the answer of a former rector: De Whelpdale *v.* Milburn, 5 Price, 485. An answer in Chancery is also admissible in evidence against any person actually claiming under the party who put it in; and it has been held *prima facie* evidence against persons generally reputed to claim under him, at least so far as to call upon them to show another title from a stranger: Earl of Sussex *v.* Temple, 1 Ld. Raym. 310; Countess of Dartmouth *v.* Roberts, 16 East 334, 339, 340. So, of other declarations of the former party

which is relative to the matter in issue, and concerns the estate, has also been held admissible in evidence against a lessee who claims by a subsequent title.[13]

[The truth seems to be that several distinct principles, dealing with declarations about land, are apt to be confused and their respective limitations interchanged and misused. (1) As regards admissions, the statements of a prior person under whom title is claimed to be derived are receivable against the successor so claiming, on the theory that there is sufficient identity of interest to render the statements of the former equally receivable with the admissions of the latter himself. Consequently, it is only statements made during the existence of that interest that can be received; and the predecessor's declarations before title acquired (or claimed to be acquired) or after title parted with, are not receivable. That the statements are against interest, or in the common phrase, "in disparagement of title," is not essential, for these or for other admissions (*ante*, § 169). Moreover, that the declarant was or was not in actual possession of the land is immaterial. The usual limitations of admissions apply, that they can be employed only against the successor in claim. (2) To be distinguished from this is that kind of admission which is given the force of a contractual estoppel, *i.e.*, the question whether a recital in a deed by a predecessor concludes the successor and is not to be disputed by him. This involves the distinct principle of substantive law as to estoppel by deed (*ante*, § 23). (3) Still concerning the same kind of statement, but raising a wholly different question, is the use of recitals in old deeds as hearsay evidence of the contents of former lost deeds. If these are admissible, they may be used by any one, irrespective of whether they are offered against a successor in title; they may even be used by that successor himself.[14] (4) Under the Hearsay exception for declarations against proprietary interest (*ante*, § 152 *c*), statements in disparagement of title may be received. The marked differences between this principle and that of admissions are that it is broader, in that the statements may be offered in evidence by or against any one, and that it is narrower, in that the declarant must be deceased and he must have been speaking distinctly against his interest. (5) Still dealing with Hearsay exceptions, we have two American variations admitting declarations as to boundaries (treated *ante*, § 140 *a*); by one of these, obtaining generally, the declarant must not have been an interested party (as, an owner), and he need not have been

in possession, which would have been good against himself, and were made while he was in possession: Jackson *v.* Bard, 4 Johns. 230, 234; Norton *v.* Pettibone, 7 Conn. 319; Weidman *v.* Kohr, 4 Serg. & R. 174; [Adams *v.* Davidson, 10 N. Y. App. 309; Downs *v.* Belden, 46 Vt. 674; Gedney *v.* Logan, 79 N. C. 214.]

[13] Crease *v.* Barrett, 1 C. M. & R. 919, 932.

[14] [The opinion of Story, J., in Carver *v.* Jackson, *ante*, § 23, lucidly explains this.]

in possession; by the other, in vogue in a few Atlantic jurisdictions, he must have been on the land and he must have been an owner. (6) Further, and not with any reference either to admissions or to a Hearsay exception, the declarations of a person in occupation of land are receivable as coloring the act of his occupation and giving it or not the character of an adverse possession. Such declarations, because verbal parts of acts, are not obnoxious to the Hearsay rule (*ante*, § 108). But, obviously the strict limitation to the use of such evidence is that it is available only in an action where the offeror of the evidence is claiming title by prescription and wishes to prove that his predecessor's occupation was adverse. Moreover, here he may use in his own favor the utterances of his own predecessor; while statements offered as admissions can be offered only as against one claiming under the declarant. (7) On the same principle, a deed or lease made by a predecessor in possession is an act which helps to color the possession as adverse, inasmuch as the grantor is seen to be claiming ownership. In this, and the preceding class of evidence, moreover, possession by the declarant is absolutely essential. (8) The question may then arise whether the mere act of making a deed or lease is not some evidence of possession, since persons out of possession do not usually make them (*ante*, § 108); this is a question of circumstantial evidence, and is not in principle connected with, though often in fact incidental to, the preceding sort of evidence. — All these principles are simple enough in themselves, and distinct enough from each other as general principles; but it is easy to see how it has happened that Courts, in applying them to the various superficially related sorts of declarations about land, have not always enforced the appropriate limitations and have in many instances interchanged and misapplied limitations in such a way as to make the precedents difficult to disentangle.]

§ 190. **Same: Vendor or Assignor of Personalty.** The same principle holds in regard to admissions made by the assignor of a personal contract or chattel, previous to the assignment, while he remained the sole proprietor, and where the assignee must recover through the title of the assignor, and succeeds only to that title as it stood at the time of its transfer; in such case, he is bound [1] by the previous admissions of the assignor, in disparagement of his own apparent title.[2] But this is true only where there is an identity of

[1] [Not "bound," unless a case of estoppel is presented; the assignor's statements are merely receivable as evidence.]

[2] {Downs *v.* Belden, 46 Vt. 674; Keystone Manufacturing Co. *v.* Johnson, 50 Iowa 142; Benson *v.* Lundy, 52 id. 265; Many *v.* Jagger, 1 Blatchf. C. C. 372, 376; Campbell *v.* Coon, 51 Ind. 76; Magee *v.* Raiguel, 64 Pa. St. 110; Alger *v.* Andrews, 47 Vt. 238;} [Ogden *v.* Dodge Co., 97 Ga. 461; Milling *v.* Hillenbrand, 156 Ill. 310; Muncey *v.* Ins. Office, 109 Mich. 542; Burl. N. B'k *v.* Beard, 55 Kan. 773; Frick *v.* Reynolds, Okl., 52 Pac. 391; Anderson *v.* White, 18 Wash. 658. Where the fraudulent intent of a conveyance is in issue, the grantor or mortgagor being deemed to have the same interest as the grantee, his statements as to his own intent to defraud should

interest between the assignor and assignee; and such identity is deemed to exist not only where the latter is expressly the mere agent and representative of the former, but also where the assignee has acquired a title with actual notice of the true state of that of the assignor, as qualified by the admissions in question, or where he has purchased a demand already stale, or otherwise infected with circumstances of suspicion.[3] Thus, the declarations of a former holder of a promissory note, negotiated before it was overdue, showing that it was given without consideration, though made while he held the note, are not admissible against the indorsee; for, as was subsequently observed by Parke, J., "the right of a person, holding by a good title, is not to be cut down by the acknowledgment of a former holder that he had no title."[4] But, in an action by the indorsee of a bill or note dishonored before it was negotiated, the declarations of the indorser, made while the interest was in him, are admissible in evidence for the defendant,[5] {but not when made before or after his interest existed, except where the transfer is conditioned to be void on the payment of a less sum than the note's face.[6]}

§ 191. **Party or Privy need not be called.** These admissions by third persons, as they derive their value and legal force from the relation of the party making them to the property in question, and are taken as parts of the *res gestæ*, may be proved by any competent witness who heard them, without calling the party by whom they were made. The question is, whether he made the admission, and not merely whether the fact is as he admitted it to be. Its truth,

be admissible, though not as to the grantee's intent, but sometimes this distinction is lost sight of, and the former's statements are wholly excluded; for cases on both sides, see Banning *v.* Marleau, Cal., 53 Pac. 692; Claflin *v.* Ballanee, 91 Ga. 411, 418; Thomas *v.* McDonald, 102 Ia. 564; McDonald *v.* Bowman, 40 Nebr. 269; Grimes D. G. Co. *v.* Malcolm, 19 U. S. App. 229. It would seem to follow, on the above theory, that the vendor's admissions, *e. g.* as to receipt of full consideration, would not be receivable against the assignee in bankruptcy: Bicknell *v.* Mellett, 160 Mass. 328; see *ante*, § 26.]

[3] Harrison *v.* Vallanee, 1 Bing. 45; Bayley on Bills, by Phillips & Sewall, pp. 502, 503, and notes (2d Am. ed.); Gibblehouse *v.* Stong, 3 Rawle 437; Hatch *v.* Dennis, 1 Fairf. 244; Snelgrove *v.* Martin, 2 McCord 241, 243.

[4] Barough *v.* White, 4 B. & C. 325, explained in Woolway *v.* Rowe, 1 Ad. & El. 114, 116; Shaw *v.* Broom, 4 D. & R. 730; Smith *v.* De Wruitz, Ry. & M. 212; Beauchamp *v.* Parry, 1 B. & Ad. 89; Hackett *v.* Martin, 8 Greenl. 77; Parker *v.* Grout, 11 Mass. 157, n.; Jones *v.* Witter, 13 id. 304; Dunn *v.* Snell, 15 id. 481; Paige *v.* Cagwin, 7 Hill N. Y. 361. In Connecticut, it seems to have been held otherwise: Johnson *v.* Blackman, 11 Conn. 342; Woodruff *v.* Westeott, 12 id. 134. So in Vermont: Sargeant *v.* Sargeant, 18 Vt. 371.

[5] Bayley on Bills, 502, 503, and notes (2d Am. ed. by Phillips & Sewall); Pocock *v.* Billings, Ry. & M. 127. See also Story on Bills, § 220; Chitty on Bills, 650 (8th ed.); Hatch *v.* Dennis, 1 Fairf. 249; Shirley *v.* Todd, 9 Greenl. 83.

[6] {Bond *v.* Fitzpatrick, 4 Gray 89, 92; Sylvester *v.* Crapo, 15 Pick. 92; Fisher *v.* True, 38 Me. 534; McLanathan *v.* Patten, 39 id. 142; Scammon *v.* Scammon, 33 N. H. 52, 58; Criddle *v.* Criddle, 21 Mo. 522; see Jermain *v.* Denniston, 6 N. Y. Ct. App. 276; Boot *v.* Sweezey, 8 id. 276; Tousley *v.* Barry, 16 id. 497; and compare Carpenter *v.* Hollister, 13 Vt. 552; Miller *v.* Bingham, 29 id. 82; Alger *v.* Andrews, 47 id. 238 (pledge); Harrison *v.* Vallace, 1 Bing. 45; Shaw *v.* Broom, 4 Dow. & Ry. 730; Pocock *v.* Billing, 2 Bing. 269.}

where the admission is not conclusive (and it seldom is so), may be controverted by other testimony; even by calling the party himself, when competent; but it is not necessary to produce him, his declarations, when admissible at all, being admissible as original evidence, and not as hearsay.[1]

3. *What Kinds of Conduct or Utterances amount to an Admission.*

§ 192. **Offers of Compromise.** We are next to consider the time and circumstances of the admission. And here it is to be observed that confidential overtures of pacification, and any other offers or propositions between litigating parties, expressly stated to be made without prejudice, are excluded on grounds of public policy.[1] For, without this protective rule, it would often be difficult to take any step towards an amicable compromise or adjustment. A distinction is taken between the admission of particular facts and an offer of a sum of money to buy peace. For, as Lord Mansfield observed, it must be permitted to men to buy their peace without prejudice to them, if the offer should not succeed; and such offers are made to stop litigation, without regard to the question whether anything is due or not. If, therefore, the defendant, being sued for £100, should offer the plaintiff £20, this is not admissible in evidence, for it is irrelevant to the issue; it neither admits nor ascertains any debt; and is no more than saying, he would give £20 to be rid of the action;[2] [so that the true reason for excluding an offer of compromise seems to be, not any consideration of public policy, nor any respect accorded to a confidential communication, but the impossibility of attributing to such an offer the real quality of an admission; in other words, "it is money paid to buy peace and stop a complaint;"[3] "the offer which a man makes under such circumstances does not represent his judgment of what he ought to receive at the end of litigation, but

[1] *Supra*, §§ 101, 113, 114, and cases there cited; Clark *v.* Hougham, 2 B. & C. 149; Mountstephen *v.* Brooke, 3 B. & Ald. 141; Woolway *v.* Rowe, 1 Ad. & El. 114; Payson *v.* Good, 3 Kerr 272; {Miller *v.* Wood, 44 Vt. 378;} [for the theory of admissions, and the reason why the party need not be called as required by the Hearsay rule, see *ante*, § 169.]

[1] Cory *v.* Bretton, 4 C. & P. 462; Healey *v.* Thatcher, 8 id. 388; Jardine *v.* Sheridan, 2 C. & K. 24; {Jones *v.* Foxall, 15 Beav. 338; Williams *v.* State, 52 Ala. 411; Barker *v.* Bushnell, 75 Ill. 220; Payne *v.* 42d St. R. R. Co., 40 N. Y. Super. Ct. 8; Durgin *v.* Somers, 117 Mass. 56; Draper *v.* Hatfield, 124 id. 53; Gay *v.* Bates, 99 id. 263; Daniels *v.* Woonsocket, 11 R. I. 4; Strong *v.* Stewart, 9 Heisk. 137;} [Feibelman *v.* Assur. Co., 108 Ala. 180; Louisv. N. A. & C. R. Co. *v.* Wright, 115 Ind. 378, 390; Kassing *v.* Walter, Ia., 65 N. W. 832; Houdeck *v.* Ins. Co., 102 id. 303; State *v.* Wright, 48 La. An. 1525; Pelton *v.* Schmidt, 104 Mich. 345; Callen *v.* Rose, 47 Nebr. 638; Wright *v.* Morse, id., 73 N. W. 211; Hanover F. I. Co. *v.* Stoddard, id., 73 N. W. 291; Tennant *v.* Dudley, 144 N. Y. 504; State *v.* Jefferson, 6 Ired. 307.]

[2] Bull. N. P. 236; Gregory *v.* Howard, 3 Esp. 113, Ld. Kenyon; Marsh *v.* Gold, 2 Pick. 290; Gerrish *v.* Sweetzer, 4 id. 374, 377; Wayman *v.* Hilliard, 7 Bing. 101; Cumming *v.* French, 2 Campb. 106, n.; Glassford on Evid. p. 336; see Molyneaux *v.* Collier, 13 Ga. 406.

[3] [L. C. Cottenham, in Tennant *v.* Hamilton, 5 Cl. & F. 133.]

what he is willing to take and avoid it."[4]] But, in order to exclude distinct admissions of facts, it must appear either that they were expressly made without prejudice, or, at least, that they were made under the faith of a pending treaty, and into which the party might have been led by the confidence of a compromise taking place.[5] But, if the admission be of a collateral or indifferent fact, such as the handwriting of the party, capable of easy proof by other means, and not connected with the merits of the cause, it is receivable, though made under a pending treaty.[6] It is the condition, tacit or express, that no advantage shall be taken of the admission, it being made with a view to, and in furtherance of, an amicable adjustment, that operates to exclude it. But, if it is an independent admission of a fact, merely because it is a fact, it will be received;[7] and even an offer of a sum, by way of compromise of a claim tacitly admitted, is receivable, unless accompanied with a caution that the offer is confidential.[8]

§ 193. **Statements made under Constraint.** In regard to admissions made under circumstances of constraint, a distinction is taken between civil and criminal cases; and it has been considered, that, on the trial of civil actions, admissions are receivable in evidence, provided the compulsion under which they are given is legal, and the party was not imposed upon or under duress. Thus, in the trial of *Collett* v. *Lord Keith*, for taking the plaintiff's ship, the testimony

[4] [Start, J., in Neal *v.* Thornton, 67 Vt. 221.]

[5] {Campan *v.* Dubois, 39 Mich. 274; White *v.* S. S. Co., 102 N. Y. 662; *contra:* West *v.* Smith, 101 U. S. 263; Lofts *v.* Hudson, 2 M. & R. 481–484.}

[6] Waldridge *v.* Kennison, 1 Esp. 143, per Lord Kenyon. The American Courts have gone farther, and held, that evidence of the admission of any independent fact is receivable, though made during a treaty of compromise. See Mount *v.* Bogert, Anthon's Rep. 259, per Thompson, C. J.; Murray *v.* Coster, 4 Cowen 635; Fuller *v.* Hampton, 5 Conn. 416, 426; Sanborn *v.* Neilson, 4 N. H. 501, 508, 509; Delogny *v.* Rentoul, 2 Martin 175; Marvin *v.* Richmond, 3 Den. 58; Cole *v.* Cole, 33 Me. 542. Lord Kenyon afterwards relaxed his own rule, saying that in future he should receive evidence of all admissions, such as the party would be obliged to make in answer to a bill in equity; rejecting none but such as are merely concessions for the sake of making peace and getting rid of a suit. Slack *v.* Buchanan, Peake's Cas. 5, 6; Tait on Evid. p. 293. A letter written by the adverse party, "without prejudice," is inadmissible: Healey *v.* Thacher, 8 C. & P. 388; [Paddock *v.* Forrester, 3 Scott N. S. 715, 732; Home Ins. Co. *v.* Wareh. Co., 93 U. S. 527, 548.]

[7] {Central Branch U. P. R. R. Co. *v.* Butman, 22 Kan. 639; Louisville, New Alb. & Chic. R. R. Co. *v.* Wright, 115 Ind. 390; Binford *v.* Young, 115 Ind. 176; Doon *v.* Rarey, 49 Vt. 293; Plummer *v.* Currier, 52 N. H. 282; Bartlett *v.* Tarbox, 1 Abb. App. Dec. 120; Snow *v.* Batchelder, 8 Cush. 513;} [Kutcher *v.* Love, 19 Colo. 542; Rose *v.* Rose, 109 Cal. 544.]

[8] Wallace *v.* Small, 1 M. & M. 446; Watts *v.* Lawson, id. 447, n.; Dickinson *v.* Dickinson, 9 Met. 471; Thomson *v.* Austen, 2 Dowl. & Ry. 358 (in this case Bayley, J., remarked that the essence of an offer to compromise was, that the party making it was willing to submit to a sacrifice, and to make a concession); Hartford Bridge Co. *v.* Granger, 4 Conn. 148; Gerrish *v.* Sweetser, 4 Pick. 374, 377; Murray *v.* Coster, 4 Cowen 617, 635; {Brice *v.* Bauer, 108 N. Y. 433.} Admissions made before an arbitrator are receivable in a subsequent trial of the cause, the reference having proved ineffectual: Slack *v.* Buchanan, Peake's Cas. 1. See also Gregory *v.* Howard, 3 Esp. 113; Collier *v.* Nokes, 2 C. & K. 1012 (offer received simply as one step in proof of actual compromise).

of the defendant, given as a witness in an action between other parties, in which he admitted the taking of the ship, was allowed to be proved against him; though it appeared that, in giving his evidence, when he was proceeding to state his reasons for taking the ship, Lord Kenyon had stopped him by saying it was unnecessary for him to vindicate his conduct.[1] The rule extends also to answers voluntarily given to questions improperly asked, and to which the witness might successfully have objected. So, the voluntary answers of a bankrupt before the commissioners are evidence in a subsequent action against the party himself, though he might have demurred to the questions, or the whole examination was irregular,[2] unless it was obtained by imposition or duress.[3]

§ 194. **Statements made incidentally or in unrelated Transactions.** There is no difference, in regard to the admissibility of this sort of evidence, between direct admissions and those which are incidental or made in some other connection or involved in the admission of some other fact. Thus, where, in an action against the acceptor of a bill, his attorney gave notice to the plaintiff to produce at the trial all papers, etc., which had been received by him relating to a certain bill of exchange (describing it), which "was accepted by the said defendant;" this was held *prima facie* evidence, by admission that he accepted the bill.[1] So, in an action by the assignees of a bankrupt, against an auctioneer, to recover the proceeds of sales of a bankrupt's goods, the defendant's advertisement of the sale, in which he described the goods as "the property of D., a bankrupt," was held a conclusive admission of the fact of bankruptcy, and that the defendant was acting under his assignees.[2] So, also, an undertaking by an attorney, "to appear for T. and R. joint owners of the sloop 'Arundel,'" was held sufficient *prima facie* evidence of ownership.[3]

§ 195. **Assuming a Character.** Other admissions are implied from

[1] Collett *v.* Lord Keith, 4 Esp. 212, per Le Blanc, J., who remarked, that the manner in which the evidence had been obtained might be matter of observation to the jury; but that, if what was said bore in any way on the issue, he was bound to receive it as evidence of the fact itself: {Newhall *v.* Jenkins, 2 Gray 562;} [McGahan *v.* Crawford, 47 S. C. 566, *semble.*] See also Milward *v.* Forbes, 4 Esp. 171.

[2] Stockfleth *v.* De Tastet, 4 Campb. 10; Smith *v.* Beadnell, 1 id. 30. If the commission has been perverted to improper purposes, the remedy is by an application to have the examination taken from the files and cancelled: 4 Campb. 11, per Ld. Ellenborough; Milward *v.* Forbes, 4 Esp. 171; 2 Stark. Evid. 22.

[3] Robson *v.* Alexander, 1 Moore & P. 448; Tucker *v.* Barrow, 7 B. & C. 623; [for this subject, see under Confessions, *post*, § 224, and more fully in Appendix III.]

[1] Holt *v.* Squire, Ry. & M. 282.

[2] Maltby *v.* Christie, 1 Esp. 342, as expounded by Lord Ellenborough, in Rankin *v.* Horner, 16 East 193.

[3] Marshall *v.* Cliff, 4 Campb. 133, per Ld. Ellenborough. [So, also, the defendant's authority to L. being in issue, a claim made by the defendant as L.'s principal against a third person is admissible: Beattyville Coal Co. *v.* Hoskins, Ky., 44 S. W. 363. A party's own account-book may be used as admissions by him: German N. B'k *v.* Leonard, 40 Nebr. 676 (though not in an action on an account stated: Sterling L. Co. *v.* Stinson, 41 id. 368).] {Compare Lloyd *v.* Lynch, 28 Pa. 419; Baker *v.* Mfg. Co., 122 id. 363; Foster *v.* Beals, 21 N. Y. Ct. App. 247.}

assumed character, language, and conduct, which, though heretofore adverted to,[1] may deserve further consideration in this place. Where the existence of any domestic, social, or official relation is in issue, it is quite clear that any recognition, in fact, of that relation, is *prima facie* evidence against the person making such recognition, that the relation exists.[2] This general rule is more frequently applied against a person who has thus recognized the character or office of another; but it is conceived to embrace, in its principle, any representations or language in regard to himself. Thus, where one has assumed to act in an official character, this is an admission of his appointment or title to the office, so far as to render him liable, even criminally, for misconduct or neglect in such office.[3] So, where one has recognized the official character of another by treating with him in such character, or otherwise, this is at least *prima facie* evidence of his title, against the party thus recognizing it.[4] So, the allegations in the declaration or pleadings in a suit at law have been held 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.[5]

[1] *Supra*, § 27.

[2] Dickinson *v.* Coward, 1 B. & Ald. 677, 679, per Ld. Ellenborough; Radford q. t. *v.* McIntosh, 3 T. R. 632.

[3] Bevan *v.* Williams, 3 T. R. 635, per Ld. Mansfield, in an action against a clergyman, for non-residence; R. *v.* Gardner, 2 Campb. 513, against a military officer, for returning false musters; R. *v.* Kerne, 2 St. Tr. 957, 960; R. *v.* Brommick, id. 961, 962; R. *v.* Atkins, id. 964, which were indictments for high treason, being popish priests, and remaining forty days within the kingdom; R. *v.* Borrett, 6 C. & P. 124; an indictment against a letter-carrier, for embezzlement; Trowbridge *v.* Baker, 1 Cowen 251, against a toll-gatherer, for penalties; Lister *v.* Priestly, Wightw. 67, against a collector, for penalties. See also Cross *v.* Kaye, 6 T. R. 663; Lipscombe *v.* Holmes, 2 Campb. 441; Radford *v.* McIntosh, 3 T. R 632.

[4] Peacock *v.* Harris, 10 East 104, by a renter of turnpike tolls, for arrearages of tolls due; Radford *v.* McIntosh, 3 T. R. 632, by a farmer-general of the post-horse duties, against a letter of horses, for certain statute penalties; Pritchard *v.* Walker, 3 C. & P. 212, by the clerk of the trustees of a turnpike road, against one of the trustees; Dickinson *v.* Coward, 1 B. & A. 677, by the assignee of a bankrupt, against a debtor, who had made the assignee a partial payment. In Berryman *v.* Wise, 4 T. R. 366, which was an action by an attorney for slander, in charging him with swindling, and threatening to have him struck off the roll of attorneys, the Court held that this threat imported an admission that the plaintiff was an attorney: Cummin *v.* Smith, 2 Serg. & R. 440. But see Smith *v.* Taylor, 1 New R. 196, in which the learned judges were equally divided upon a point somewhat similar, in the case of a physician; but, in the former case, the *roll* of attorneys was expressly mentioned, while in the latter, the plaintiff was merely spoken of as "Doctor S.," and the defendant had been employed as his apothecary. If, however, the slander relates to the want of qualification, it was held by Mansfield, C. J., that the plaintiff must prove it; but not where it was confined to mere misconduct: 1 New R. 207. See to this point, Moises *v.* Thornton, 8 T. R. 303; Collins *v.* Carnegie, 1 Ad. & El. 695, 703, per Ld. Denman, C. J. See further, Divoll *v.* Leadbetter, 4 Pick. 220; Crofton *v.* Poole, 1 B. & Ad. 568; R. *v.* Barnes, 1 Stark. 243; Phil. & Am. on Evid. 369, 370, 371; 1 Phil. Evid. 351, 352.

[5] Tiley *v.* Cowling, 1 Ld. Raym. 744; s. c. Bull. N. P. 243; see Robison *v.* Swett, 3 Greenl. 316; Wells *v.* Compton, 3 Rob. La. 171; Parsons *v.* Copeland, 33 Me. 370;

§ 195 *a*. **Conduct; (1) Falsehood and Fraud; Manufacturing and Destroying Evidence.** [In general, a party's conduct, so far as it indicates his own belief in the weakness of his cause, may be used against him as an admission; subject, of course, to any explanations he may be able to make removing that significance from his conduct. In particular, "falsehood is a badge of fraud, and a case which is sought to be supported by means of deception may *prima facie*, until the contrary be shown, be taken to be a bad and dishonest case;"[1] and this applies equally to civil and to criminal cases.[2] So also the attempt to manufacture evidence, as by the subornation of witnesses, "is in the nature of and implies an admission that he has no right to recover if the case was tried on the evidence as it exists."[3] So also the attempt to suppress evidence, by intimidating or removing witnesses, is admissible as having "a tendency to show consciousness in him of title in the opponent."[4] Concealing or destroying evidential material is likewise admissible;[5] in particular, the destruction (spoliation) of documents, as evidence of an admission that their contents are as alleged by the opponent.[6] That the fraudulent conduct was in connection with other litigation does not necessarily exclude it;[7] and that it was that of a third person does not exclude it if the party can be shown to have authorized or connived at it; although the doctrines of implied agency are sometimes here invoked, and no test is uniformly accepted.[8] The party

{Williams *v.* Cheney, 3 Gray (Mass.), 215; Judd *v.* Gibbs, id. 539; see Church *v.* Shelton, 2 Curt. C. C. 271; State *v.* Littlefield, 3 R. I. 124;} [the subject is treated more fully *ante*, § 186. For judicial admissions as conclusive, see *post*, § 205.]

[1] [Charge of Cockburn, C. J., in R. *v.* Castro (Tichborne Trial), I, 813.]

[2] [Jones *v.* State, 59 Ark. 417; Walker *v.* State, 49 Ala. 398; Levison *v.* State, 54 id. 519, 527; State *v.* Reinhart, Cal., 38 Pac. 825; Hinshaw *v.* State, 147 Ind. 334; State *v.* Reed, 62 Me. 145; People *v.* Arnold, 43 Mich. 303; Coleman *v.* People, 58 N. Y. 556; U. S. *v.* Randall, Deady 524, 542; Wilson *v.* U. S., 162 U. S. 613; Dickerson *v.* State, 48 Wis. 288, 293.]

[3] [Chic. C. R. Co. *v.* McMahon, 103 Ill. 485; see good statements in Moriarty *v.* R. Co., L. R. 5 Q. B. 319; Egan *v.* Bowker, 5 All. 452; other instances in Hastings *v.* Stetson, 130 Mass. 76; Lynch *v.* Coffin, 131 id. 311; Com. *v.* Wallace, 123 id. 400; People *v.* Mason, 29 Mich. 31, 39; State *v.* Brown, 76 N. C. 222; Allen *v.* U. S., 164 U. S. 492.]

[4] [Mounteney, B., in Annesley *v.* Anglesea, 17 How. St. Tr. 1217, the most celebrated and interesting case of its sort in our annals; see also good statements in Com. *v.* Webster, 5 Cush. 295, 316; Green *v.* Woodbury, 48 Vt. 6; other instances in Liles *v.* State, 30 Ala. 24; Levison *v.* State, 54 id. 519, 528; People *v.* Chin Hane, 108 Cal. 597; State *v.* Hogan, 67 Conn. 581; State *v.* Hudson, 50 Ia. 157; State *v.* Barron, 37 Vt. 57; Snell *v.* Bray, 56 Wis. 156.]

[5] [State *v.* Bruce, 74 Me. 72; Com. *v.* Hall, 4 All. 306; Com. *v.* Wallace, 123 Mass. 400; Com. *v.* Daily, 133 id. 577; Com. *v.* Sullivan, 156 id. 487; Com. *v.* Welch, 163 id. 372; State *v.* Dickson, 78 Mo. 438, 448.]

[6] [Barker *v.* Ray, 2 Russ. 63, 73; Jessel, M. R., in Lacey *v.* Hill, L. R. 4 Ch. D. 543; Downing *v.* Plate, 90 Ill. 268, 272; Lambie's Estate, 97 Mich. 49, 55; Botts *v.* Wood, 56 Miss. 136; Little *v.* Marsh, 2 Ired. Eq. 18, 27; Lucas *v.* Brooks, 23 La. An. 117; State *v.* Chamberlain, 89 Mo. 129; McReynolds *v.* McCord, 6 Watts 288. For the presumptive effect of spoliation, see *ante*, § 37.]

[7] [*E. g.* Ga. R. & B. Co. *v.* Lybrend, 99 Ga. 421; Com. *v.* Sacket, 22 Pick. 394; State *v.* Staples, 47 N. H. 113.]

[8] [See Evans, Notes to Pothier, II, 225; The Queen's Case, 2 B. & B. 302; Martin

may, of course, explain away the apparent significance of his conduct.[9]]

§ 195 *b*. **Same; (2) Failure to produce Evidence.** ["If the opposite party has it in his power to rebut it by evidence, and yet offers none, then we have something like an admission that the presumption is just."[1] There are several ways in which this failure to produce evidence may be suggested as amounting to an admission that no evidence of the supposed sort can be had. (1) In the first place, the failure to produce a particular witness may under certain circumstances allow the inference that his testimony would be unfavorable. The witness must be one whose testimony would presumably be valuable or superior to those already called;[2] he must not be one who would clearly be prejudiced;[3] he must be within the knowledge and power of the party to produce;[4] he must not be one equally available for production by the opposite party (for since the opponent wishes to argue that the testimony would be unfavorable if produced, it is then a simple matter to put the witness on the stand; otherwise, the argument tells just as much against the opponent),[5] and a witness in court is of course equally so available;[6] and the party must have knowledge that the witness would be needed.[7] Subject to these limitations, the doctrine is universally conceded that the failure to call such a witness may be an admission that his testimony would be unfavorable.[8] This doctrine has been applied to the failure to call

v. State, 28 Ala. 71; Winchell *v.* Edwards, 57 Ill. 41, 48; Chic. C. R. Co. *v.* McMahon, 103 id. 485; Com. *v.* Locke, 145 Mass. 401; Com. *v.* McHugh, 147 id. 401; Com. *v.* Downey, 148 id. 14; Com. *v.* Gillon, ib. 15; Matthews *v.* Lumber Co., Mich., 67 N. W. 1008; Green *v.* Woodbury, 48 Vt. 5. As to fraudulent action by a prosecuting officer, see Com. *v.* Ryan, 134 Mass. 223.]

[9] [Lynch *v.* Coffin, 131 Mass. 311; Homer *v.* Everett, 91 N. Y. 641, 646; see Com. *v.* Goodwin, 14 Gray 55.]

[1] [Best, J., in R. *v.* Burdett, 4 B. & Ad. 122. The leading historical utterances are found in Armory *v.* Delamirie, 1 Stra. 505 (chimney-sweeper's jewel); Roe *v.* Harvey, 4 Burr. 2484, 2489.]

[2] [Stone, C. J., in Carter *v.* Chambers, 79 Ala. 223, 241; Haynes *v.* McRae, 101 id. 318; People *v.* Dole, Cal., 51 Pac. 945.]

[3] [State *v.* Cousins, 58 Ia. 250; Com. *v.* McCabe, 163 Mass. 98; Robinson *v.* Woodford, 37 W. Va. 377, 391.]

[4] [People *v.* Sharp, 107 N. Y. 427, 463; State *v.* Fitzgerald, 68 Vt. 125.]

[5] [Nelms *v.* Steiner, 113 Ala. 562; Scovill *v.* Baldwin, 27 Conn. 316; State *v.* Rosier, 55 Ia. 517; State *v.* Cousins, 58 id. 250. This was disregarded in Fonda *v.* R. Co., Minn., 74 N. W. 166.]

[6] [Crawford *v.* State, 112 Ala. 1, 23; Bates *v.* Morris, 101 id. 282; Arbuckle *v.* Templeton, 65 Vt. 205, 211; disregarded in West. & A. R. Co. *v.* Morrison, Ga., 29 S. E. 104.]

[7] [Graves *v.* U. S., 150 U. S. 118.]

[8] [Canning's Trial, 19 How. St. Tr. 312; Bond's Trial, 27 id. 605; R. *v.* Labouchere, 14 Cox Cr. 419, 432; Vaughton *v.* R. Co., 12 id. 580, 588; Tracy Peerage Case, 10 Cl. & F. 154, 180, 189; Throckmorton *v.* Chapman, 65 Conn. 441, 454; Leslie *v.* State, 35 Fla. 171; Hinshaw *v.* State, 147 Ind. 334; Union Bank *v.* Stone, 50 Me. 595 (leading opinion by Appleton, J.); Com. *v.* Clark, 14 Gray 367; Whitney *v.* Bailey, 4 All. 173, 175; {Lothrop *v.* Adams, 133 id. 477; Lynch *v.* Peabody, 137 id. 93; Com. *v.* Haskell, 140 id. 128;} Com. *v.* McCabe, 163 id. 102; Wallace *v.* Harris, 32 Mich. 380, 394; People *v.* Gordon, 40 id. 716; Ruppe *v.* Steinbach, 48 id. 465; State *v.* Degonia, 69 Mo. 485; People *v.* Doyle, 21 N. Y. 578; Fowler *v.* Sergeant,

a consulted expert,[9] to the failure to use[10] and even the failure to try and take[11] a deposition; but it can hardly be applied to a failure to call a privileged witness.[12] (2) The party's own failure to testify may equally be given this significance. It is proper to do so in a civil case, the party not being privileged;[13] and this applies equally to the party's refusal to submit to a medical examination.[14] In a criminal prosecution, however, the accused is privileged, and, as a part of that privilege, no inference is to be drawn from his availing himself of it.[15] But from this must be distinguished his failure by other evidence to rebut the evidence on a given point where it is apparently in his power to produce such evidence without waiving his privilege; this of course tells against him.[16] This, again, both in civil and in criminal cases, must be distinguished from that inaction which consists in merely requiring the opponent to sustain his burden of proof; this should raise no such inference.[17] Furthermore, the accused's good character is presumed; hence his failure to offer evidence of it raises no inference that it is bad.[18] Again, an unsuccessful attempt to prove an alibi is in itself no ground of inference as to the alibi's falseness; it is the fabrication of alibi-evidence that alone has such significance.[19] (3) Finally, the inference suggested by the conduct of the party may always be explained away by him, if possible, — as by showing that the witness is ill or has fled the country, or the like.[20]]

1 Pa. 355; Rice *v.* Com., 102 id. 408; Steamship Ville du Havre, 7 Ben. 328; U. S. *v.* Schindler, 18 Blatch. 227; The Fred M. Laurence, 15 Fed. 635; Kirby *v.* Tallmadge, 160 U. S. 379; The Joseph B. Thomas, 81 Fed. 578.]

[9] [McKim *v.* Foley, Mass., 49 N. E. 625.]

[10] [Learned *v.* Hall, 133 id. 417.]

[11] [Leslie *v.* State, 35 Fla. 171; but not to a failure to test a machine's alleged defects: U. S. Sugar R. *v.* Allis Co., 9 U. S. App. 550.]

[12] [See Wentworth *v.* Lloyd, 10 H. L. C. 589; People *v.* Hovey, 92 N. Y. 554; State *v.* Hatcher, Or., 44 Pac. 584; Knowles *v.* People, 15 Mich. 408.]

[13] [Taylor *v.* Willans, 2 B. & Ad. 856; Tufts *v.* Hatheway, 4 Allen N. B. 62; Throckmorton *v.* Chapman, 65 Conn. 441; McDonough *v.* O'Neil, 113 Mass. 92; Brown *v.* Schock, 77 Pa. 471, 478; Kirby *v.* Tallmadge, 160 U. S. 379; Hefflebower *v.* Dietrick, 7 W. Va. 16, 23.]

[14] [Durgin *v.* Danville, 47 Vt. 95, 105; and cases cited *post*, § 469 *m*, where the question of a civil party's privilege thus to refuse is treated.]

[15] [See the authorities *post*, § 469 *e*, where this privilege is discussed.]

[16] [Com. *v.* Webster, 5 Cush. 295, 316; State *v.* Hinkle, 6 Ia. 385;] {Com. *v.* Brownell, 145 Mass. 319.} [*Contra:* People *v.* Streuber, Cal., 53 Pac. 918.]

[17] [State *v.* Carr, 25 La. An. 407; Brill *v.* Car Co., 80 Fed. 909.]

[18] [Fletcher *v.* State, 49 Ind. 134; State *v.* Northrup, 48 Ia. 584; State *v.* Upham, 38 Me. 261 (overruling a prior case; but see State *v.* Tozier, 49 id. 404); Olive *v.* State, 11 Nebr. 1, 29; People *v.* White, 24 Wend. 524, 546, 554, 560, 573, 584 (overruling People *v.* Vane, 12 id. 82); People *v.* Bodine, 1 Den. 281, 314; State *v.* O'Neal, 7 Ired. 251; State *v.* Sanders, 84 N. C. 729; Com. *v.* Weber, 167 Pa. 153; State *v.* Ford, 3 Strobh. 522, *semble*.]

[19] [Toler *v.* State, 16 Oh. St. 585 (leading opinion); Porter *v.* State, 55 Ala. 107; Kilgore *v.* State, 74 id. 8; People *v.* Malaspina, 57 Cal. 628; White *v.* State, 31 Ind. 262; Turner *v.* Com., 86 Pa. 54, 72. But distinguish this from failing to account for his whereabouts, and from producing alibi-evidence as an afterthought; *e. g.* Gordon *v.* People, 33 N. Y. 501; Dean's Case, 32 Gratt. 912, 925.]

[20] [Com. *v.* Costello, 119 Mass. 214; Learned *v.* Hall, 123 id. 417; Com. *v.* McCabe,

§ 195 *c*. **Same: (3) Failure to produce Documents.** [A common application of the foregoing principle is to a party's failure to produce a document asked for by the opponent. The inference from such a failure is to an admission by the party that its contents are in fact as alleged by the opponent.[1] In a few jurisdictions it has been said that the inference cannot arise from the mere non-production on demand, but that it may be used to help out such slight evidence as the opponent may offer.[2]]

§ 195 *d*. **Same: (4) Repairs and Precautions after an Injury.** [It has often been urged by counsel that, after an injury has occurred, the making of repairs or the taking of other precautions or the discharge of the employee concerned is to be taken as an admission by the party so doing that there was negligence or other culpable conduct. The answers to this suggestion are two: first, that such conduct is equally open to the interpretation that the party, though he does not believe the place or thing culpably defective or dangerous, still wishes, in the light of what has occurred, to make it safe even beyond what the law requires of him, or, put in another way, in the notable epigram of Baron Bramwell, "it would be to hold that because the world gets wiser as it gets older, therefore it was foolish before;" secondly, to admit such evidence would be to discourage all endeavor to improve existing conditions, or, in the words of Mr. J. Elliott, to put a penalty upon conscientious persons.[1] The use of such evidence is now generally repudiated, and a few earlier cases favoring it have been in some jurisdictions overruled.[2] For

163 id. 98; Rumrill *v.* Ash, 169 id. 341; Hall *v.* Austin, Minn., 75 N. W. 1121; Pease *v.* Smith, 61 N. Y. 477, 482; Hoard *v.* State, 15 Lea 321; W. M. W. & N. R. Co. *v.* Duncan, 88 Tex. 611; Durgin *v.* Danville, 47 Vt. 95, 105.]

[1] [Roe *v.* Harvey, 4 Burr. 2484, 2489; R. *v.* Smith, 3 id. 1475; James *v.* Biou, 2 Sim. & St. 600, 606; Curlewis *v.* Corfield, 1 Q. B. 814; Sutton *v.* Davenport, 27 L. J. C. P. 54; Att'y-Gen'l *v.* Dean, 24 Beav. 679, 706; Leese *v.* Clark, 29 Cal. 664; Crescent C. I. Co. *v.* Ermann, 36 La. An. 841; Emerson *v.* Fisk, 6 Greenl. 200; Tobin *v.* Shaw, 45 Me. 331, 349; Davie *v.* Jones, 68 id. 393; Thayer *v.* Ins. Co., 10 Pick. 326; {Eldridge *v.* Hawley, 116 Mass. 410;} Page *v.* Stevens, 23 Mich. 357; State *v.* Simons, 17 N. H. 83; Cross *v.* Bell, 34 id. 82; Jackson *v.* M'Vey, 18 Johns. 331; Life & Fire Ins. Co. *v.* Ins. Co., 7 Wend. 31; Connell *v.* McLaughlin, 28 Or. 230; Schreyer *v.* Mills Co., id., 43 Pac. 719; Wishart *v.* Downey, 15 S. & R. 77; Frick *v.* Barbour, 64 Pa. 120; Hanson *v.* Eustace, 2 How. 653; Clifton *v.* U. S., 4 id. 242; U. S. *v.* Flemming, 18 Fed. 907, 916; Runkle *v.* Burnham, 153 U. S. 216, 225; McIntyre *v.* Min. Co., Utah, 53 Pac. 1124.

For the effect of non-production as creating a presumption, see *ante*, § 37.]

[2] [See cases *supra* in 7 Wend., 34 N. H., 2 How.]

[1] [See excellent explanations by Bramwell, B., in Hart *v.* R. Co., Coleridge, C. J., in Beever *v.* Hanson; Mitchell, J., in Morse *v.* R. Co.; Loomis, J., in Nailey *v.* Carpet Co.; Coleman, J., in Louisv. & N. R. Co. *v.* Malone; Elliott, J., in Terre H. & I. R. Co. *v.* Clem.]

[2] [The overruled cases in Indiana, Minnesota, and New Hampshire are not given in this list: *Excluded:* Hart *v.* R. Co., 21 L. T. R. N. S. 261; Beever *v.* Hanson, cited in 73 N. Y. 473, note, as from 25 L. J., but not there to be found; Louisv. & N. R. Co. *v.* Malone, 109 Ala. 509; Sappenfield *v.* R. Co., 91 Cal. 48, 61; Turner *v.* Hearst, 115 id. 394; Anson *v.* Evans, 19 Colo. 274 (but see Kans. P. R. Co. *v.* Miller, 2 id. 442, 468); Nailey *v.* Carpet Co., 51 Conn. 524; Warren *v.* Wright, 103 Ill. 298; Hodges *v.* Percival, 132 id. 53; Bloomington *v.* Legg, 151 id. 9, 15; Lafayette *v.* Weaver,

the same reason, the fact that the party is insured against accidents is not receivable for this purpose.[3] It must be noted, however, that acts of repair or any other acts of dominion over the place or thing are receivable as an admission that the person has or claims control over it.[4]]

§ 196. **Same: (5) Sundry Kinds of Conduct.** Admissions implied from the conduct of the party are governed by the same principles. Thus the suppression of documents is an admission that their contents are deemed unfavorable to the party suppressing them.[1] The entry of a charge to a particular person, in a tradesman's book, or the making out of a bill of parcels in his name, is an admission that they were furnished on his credit.[2] The omission of a claim by an insolvent, in a schedule of the debts due to him, is an admission that it is not due.[3] Payment of money is an admission against the payer that the receiver is the proper person to receive it, but not against the receiver that the payer was the person who was bound to pay it; for the party receiving payment of a just demand may well assume, without inquiry, that the person tendering the money was the person legally bound to pay it.[4] Acting as a bankrupt, under a commission of bankruptcy, is an admission that it was duly issued.[5] Asking time for the payment of a note or bill is an admission of the

92 Ind. 477; Terre H. & I. R. Co. *v.* Clem, 123 id. 15; Sievers *v.* P. B. & L. Co., id., 50 N. E. 877; Taylor *v.* R. Co., Ky., 41 S. W. 551; Wash. C. & A. T. Co. *v.* Case, 80 Md. 36; Menard *v.* R. Co., 150 Mass. 386; Shinners *v.* Locks, 154 id. 168; Downey *v.* Sawyer, 157 id. 418; McGuerty *v.* Hale, 161 id. 51; Chalmers *v.* Mfg. Co., 164 id. 532; Dacey *v.* R. Co., 168 id. 479; Fulton Works *v.* Kimball, 52 Mich. 146; Lombar *v.* East Tawas, 86 id. 14; Noble *v.* R. Co., 98 id. 249; Morse *v.* R. Co., 30 Minn. 465; Day *v.* Lumber Co., 54 id. 523; Hammargren *v.* St. Paul, 67 id. 6; Ely *v.* R. Co., 77 Mo. 34; Aldrich *v.* R. Co., N. H., 29 Atl. 408; Reed *v.* R. Co., 45 N. Y. 575; Dougan *v.* Champlain Co., 56 N. Y. 1, 8; Baird *v.* Daly, 68 id. 547; Dale *v.* R. Co., 73 id. 468; Sewell *v.* Cohoes, 75 id. 45, 54; Corcoran *v.* Peekskill, 108 id. 151; Gulf C. & S. F. R. Co. *v.* McGowan, 73 Tex. 355; Miss P. R. Co. *v.* Hennessey, 75 id. 155; Columbia R. Co. *v.* Hawthorne, 144 U. S. 202 (in effect discrediting Osborne *v.* Detroit, 36 Fed. 36); Richardson *v.* W. & R. T. Co., 6 Vt. 496, 504; Christenscn *v.* U. T. Line, 6 Wash. 75, 83; Bell *v.* W. C. S. Co., 8 id. 27; Green *v.* Water Co., Wis., 77 N. W. 722.

Admitted: Hemmi *v.* R. Co., 102 Ia. 25 (compare Cramer *v.* Burlington, 45 id. 627; Hudson *v.* R. Co., 59 id. 581; Coates *v.* R. Co., 62 id. 491); St. J. & D. C. R. Co. *v.* Chase, 11 Kan. 47, 56; Atch. T. & S. F. R. Co. *v.* Retford, 18 id. 245; Emporia *v.* Schmidling, 33 id. 485 (for limited purpose); St. L. S. F. R. Co. *v.* Weaver, 35 id. 412, 432; Pa. R. Co. *v.* Henderson, 51 Pa. 315; W. C. & P. R. Co. *v.* McElwee, 67 id. 311; McKee *v.* Bidwell, 74 id. 218; Lederman *v.* R. Co., 165 id. 118 (for limited purpose); Jenkins *v.* Irrig. Co., 13 Utah 100.

Undecided: Farley *v.* C. B. & V. Co., 51 S. C. 222.]

[3] [Anderson *v.* Duckworth, 162 Mass. 251; Sawyer *v.* Shoe Co., Vt., 38 Atl. 311. For the use of this fact as showing bias, etc., see *post*, § 450.]

[4] [Lafayette *v.* Weaver, 92 Ind. 477; Manderschid *v.* Dubuque, 29 Ia. 73; Readman *v.* Conway, 126 Mass. 374; Sewell *v.* Cohoes, 75 N. Y. 45, 54.]

[1] James *v.* Biou, 2 Sim. & Stu. 600, 606; Owen *v.* Flack, id. 606. [This subject has just been fully treated in §§ 195 *a* and 195 *c*.]

[2] Storr *v.* Scott, 6 C. & P. 241; Thomson *v.* Davenport, 9 B. & C. 78, 86, 90, 91; [see note to § 194.]

[3] Nicholls *v.* Downes, 1 M. & Rob. 13; Hart *v.* Newman, 3 Campb. 13. See also Tilghman *v.* Fisher, 9 Watts 441.

[4] James *v.* Biou, 2 Sim. & Stu. 600, 606; Chapman *v.* Beard, 3 Anstr. 942.

[5] Like *v.* Howe, 6 Esp. 20; Clarke *v.* Clarke, ib. 61.

holder's title, and of the signature of the party requesting the favor; and the indorsement or acceptance of a note or bill is an admission of the truth of all the facts which are recited in it.[6]

§ 197. **Same: (6) Failure to repudiate another's Assertion; Statements made in Party's Presence.** Admissions may also be implied from the acquiescence of the party. But acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party.[1] And whether it is acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or the language fully understood by the party, before any inference can be drawn from his passiveness or silence. The circumstances, too, must be not only such as afforded him an opportunity to act or to speak, but such also as would properly and naturally call for some action or reply, from men similarly situated.[2] To affect a party with the statements of others, on the ground of his implied admission of their truth by silent acquiescence, it is not enough that they were made in his presence; for, if they were given in evidence in a judicial proceeding, he is not at liberty to interpose when and how he pleases, though a party.[3] [Yet, in civil cases, where the party could take the stand in denial, his failure to do so (not his mere failure to interrupt during others' testimony) might be construed against him.[4] That the accused is in custody when the statements are made to him does not of itself render it unnatural for him to deny what he considers false.[5]] Where a landlord quietly suffers a

[6] Helmsley *v.* Loader, 2 Campb. 450; Critchlow *v.* Parry, ib. 182; Wilkinson *v.* Lutwidge, 1 Stra. 648; Robinson *v.* Yarrow, 7 Taunt. 455; Taylor *v.* Croker, 4 Esp. 187; Bass *v.* Clive, 4 M. & S. 13. See further, Bayley on Bills, by Phillips & Sewall, pp. 496–506; Phil. & Am. on Evid. 383, n. (2); 1 Phil. Evid. 364, n. (1), and cases there cited. [Failure to sue in one's own State may be commented on: Merritt *v.* R. Co., 162 Mass. 326.]

[1] Allen *v.* McKeen, 1 Sumn. 314; Carter *v.* Bennett, 4 Fla. 340.

[2] [Thus, no inference could be drawn where he was not within hearing (Josephi *v.* Furnish, 27 Or. 260), or unconscious from an injury (Dean *v.* State, 105 Ala. 21; People *v.* Koerner, 154 N. Y. 355; Gowen *v.* Bush, 40 U. S. App. 349), or unacquainted with the language used:] {Wright *v.* Maseras, 56 Barb. 521.}

[See sundry instances of the principle applied in the following cases: {People *v.* Driscoll, 107 N. Y. 424; Com. *v.* Harvey, 1 Gray 487, 489; Boston & W. R. R. Corp. *v.* Dana, ib. 83, 104; Com. *v.* Kenney, 12 Met. 235; Brainard *v.* Buck, 25 Vt. 573; Corser *v.* Paul, 41 N. H. 24; Wilkins *v.* Stidger, 22 Cal. 231; Abercrombie *v.* Allen, 29 Ala. 281; Rolfe *v.* Rolfe, 10 Ga. 143; Mattocks *v.* Lyman, 16 Vt. 113; Vail *v.* Strong, 10 id. 457; Gale *v.* Lincoln, 11 id. 152; Higgins *v.* Dellinger, 22 Mo. 397; Drury *v.* Hervey, 126 Mass. 519; Hackett *v.* Callender, 32 Vt. 97;} Bob *v.* State, 32 Ala. 565; Peck *v.* Ryan, 110 id. 336; People *v.* McCrea, 32 Cal. 98; People *v.* Ah Yute, 53 id. 613; People *v.* Young, 108 id. 8; Ware *v.* State, 96 Ga. 349; Springer *v.* Byram, 137 Ind. 15, 25; Com. *v.* McCabe, 163 Mass. 98; People *v.* Fowler, 104 Mich. 449; State *v.* Hill, 134 Mo. 663; M'Kee *v.* People, 36 N. Y. 113; State *v.* Kemp, 87 N. C. 540; State *v.* Magoon, 68 Vt. 289; Fry *v.* Stowers, 92 Va. 13.]

[3] Melen *v.* Andrews, 1 M. & M. 336; [Bell *v.* State, 93 Ga. 557; Collier *v.* Dick, La. An., 18 So. 522.] See also Allen *v.* McKeen, 1 Sumn. 313, 314, 317; Jones *v.* Morrell, 1 Car. & Kir. 266; Neile *v.* Jakle, 2 id. 709; Peele *v.* Merch. Ins. Co., 3 Mason 81; Hudson *v.* Harrison, 3 Brod. & Bing. 97.

[4] [See Simpson *v.* Robinson, 12 Q. B. 512; Connell *v.* McNett, 109 Mich. 329.]

[5] [See instances on both sides in {R. *v.* Bartlett, 7 C. & P. 832; R. *v.* Appleby,

tenant to expend money in making alterations and improvements on the premises, it is evidence of his consent to the alterations.[6] If the tenant personally receives notice to quit at a particular day, without objection, it is an admission that his tenancy expires on that day.[7] Thus, also among merchants, it is regarded as the allowance of an account rendered, if it is not objected to, without unnecessary delay.[8] A trader being inquired for, and hearing himself denied, may thereby commit an act of bankruptcy.[9] And, generally, where one knowingly avails himself of another's acts, done for his benefit, this will be held an admission of his obligation to pay a reasonable compensation.[10]

§ 198 [199].[1] But, in regard to admissions inferred from acquiescence in the verbal statements of others, the maxim, *Qui tacet consentire videtur*, is to be applied with careful discrimination. "Nothing," it is said, "can be more dangerous than this kind of evidence. It should always be received with caution; and never ought to be received at all, unless the evidence is of direct declarations of that kind which naturally calls for contradiction; some assertion made to the party with respect to his right, which, by his silence, he acquiesces in."[2] A distinction has accordingly been taken between declarations made by a party interested and a stranger; and it has been held that, while what one party declares to the other, without contradiction, is admissible evidence, what is said by a third person may not be so. It may be impertinent, and best rebuked by silence; but if it receives a reply, the reply is evidence. Therefore, what the magistrate, before whom the assault and battery was investigated, said to the parties, was held inadmissible, in a subsequent civil action for the same assault.[3] If the

3 Stark. 33; Com. *v.* Walker, 13 All. 570; Com. *v.* Kenney, 12 Metc. 235; Noonan *v.* State, 9 Miss. 562; Kelly *v.* People, 55 N. Y. 565; State *v.* Murray, 126 Mo. 611; State *v.* Foley, id., 46 S. W. 733; Green *v.* State, 97 Tenn. 50; People *v.* Kessler, 13 Utah 69; State *v.* McCullum, 18 Wash. 394.]

[6] Doe *v.* Allen, 3 Taunt. 78, 80; Doe *v.* Pye, 1 Esp. 366; Neale *v.* Parkin, ib. 229; see also Stanley *v.* White, 14 East 332.

[7] Doe *v.* Biggs, 2 Taunt. 109; Thomas *v.* Thomas, 2 Campb. 647; Doe *v.* Forster, 13 East 405; Oakapple *v.* Copous, 4 T. R. 361; Doe *v.* Woombwell, 2 Camph. 559.

[8] Sherman *v.* Sherman, 2 Vern. 276. Hutchins, Ld. Com., mentioned "a second or third post," as the ultimate period of objection. But Lord Hardwicke said, that if the person to whom it was sent kept the account "for any length of time, without making any objection," it became a stated account: Willis *v.* Jernegan, 2 Atk. 252. See also Freeland *v.* Heron, 7 Cranch 147, 151; Murray *v.* Toland, 3 Johns. Ch. 575; Tickel *v.* Short, 2 Ves. 239; [Peck *v.* Ryan, 110 Ala. 336; Pabst B. Co. *v.* Lueders, 107 Mich. 41; see § 212, *post*.]

[9] Key *v.* Shaw, 8 Bing. 320.

[10] Morris *v.* Burdett, 1 Campb. 218, where a candidate made use of the hustings erected for an election; Abbot *v.* Inhabitants of Hermon, 7 Greenl. 118, where a schoolhouse was used by the school district; Hayden *v.* Inhabitants of Madison, ib. 76, a case of partial payment for making a road.

[1] [Interchanged with the next section.]

[2] 14 Serg. & R. 393, per Duncan, C. J.; 2 C. & P. 193, per Best, C. J. And see McClenkan *v.* McMillan, 6 Barr 366, where this maxim is expounded and applied. See also Com. *v.* Call, 21 Pick. 515.

[3] Child *v.* Grace, 2 C. & P. 193; [see the preceding section.]

declarations are those of third persons, the circumstances must be such as called on the party to interfere, or at least such as would not render it impertinent in him to do so. Therefore, where, in a real action upon a view of the premises by a jury, one of the chain-bearers was the owner of a neighboring close, respecting the bounds of which the litigating parties had much altercation, their declarations in his presence were held not to be admissible against him, in a subsequent action respecting his own close.[4] But the silence of the party, even where the declarations are addressed to himself, is worth very little as evidence, where he has no means of knowing the truth or falsehood of the statement.[5]

§ 199 [198].[1] **Same: (7) Possession of Documents; Unanswered Letters; Books of a Society or Corporation.** The possession of documents, also, or the fact of constant access to them, sometimes affords ground for affecting parties with an implied admission of the statements contained in them. Thus, the rules of a club, contained in a book kept by the proper officer, and accessible to the members;[1] charges against a club, entered by the servants of the house, in a book kept for that purpose, open in the club-room;[2] the possession of letters,[3] and the like, — are circumstances from which admissions

[4] Moore *v.* Smith, 14 Serg. & R. 388; [see Larry *v.* Sherburne, 2 Allen 35; Hildreth *v.* Martin, 3 id. 371; Fenno *v.* Weston, 31 Vt. 345.] Where A and B were charged with a joint felony, what A stated before the examining magistrate, respecting B's participation in the crime, is not admissible evidence against B: R. *v.* Appleby, 3 Stark. 33. Nor is a deposition, given in the person's presence in a cause to which he was not a party, admissible against him: Melen *v.* Andrews, 1 M. & M. 336; [see the preceding section.] See also Fairlie *v.* Denton, 3 C. & P. 103, per Lord Tenterden; Tait on Evidence, p. 293. So in the Roman law, "Confessio facta seu præsumpta ex taciturnitate in aliquo judicio, non nocebit in alio:" Mascardus De Probat. vol. i, concl. 348, n. 31.

[5] Hayslep *v.* Gymer, 1 Ad. & El. 162, 165, per Parke, J. See further on the subject of tacit admissions, State *v.* Rawls, 2 Nott & McCord 331; Batturs *v.* Sellers, 5 Harr. & J. 117, 119.

[1] Raggett *v.* Musgrave, 2 C. & P. 556.

[2] Alderson *v.* Clay, 1 Stark. 405; Wiltzie *v.* Adamson, 1 Phil. Evid. 357. Daily entries in a book, constantly open to the party's inspection, are admissions against him of the matters therein stated: Alderson *v.* Clay, 1 Stark. 405; Wiltzie *v.* Adamson, 1 Phil. Evid. 357; see further, Coe *v.* Hutton, 1 Serg. & R. 398; McBride *v.* Watts, 1 McCord, 384; Corps *v.* Robinson, 2 Wash. C. C. 338; [it may depend upon circumstances: see Cheney *v.* Cheney, 162 Mass. 591.] So, the members of a company are chargeable with knowledge of the entries in their books, made by their agent in the course of his business, and with their true meaning, as understood by the agent: Allen *v.* Coit, 6 Hill N. Y. 318; [Anderson *v.* Life Ass'n, 171 Ill. 40; see San Pedro L. Co. *v.* Reynolds, Cal., 53 Pac. 410.]

[3] Hewitt *v.* Piggott, 5 C. & P. 75; R. *v.* Watson, 2 Stark. 140; Horne Tooke's Case, 25 How. St. Tr. 120. But the possession of unanswered letters seems not to be of itself evidence of acquiescence in their contents: Fairlee *v.* Denton, 3 C. & P. 103; R. *v.* Plumer, R. & R. 264. [There is, however, some difference of opinion on this point, and it should perhaps depend chiefly on the circumstances of each case whether a reply in denial would have been natural had the party thought the contents false; see Com. *v.* Jeffries, 7 All. 548; Com. *v.* Eastman, 1 Cush. 189; Fenno *v.* Weston, 31 Vt. 345; Leonard *v.* Tillotson, 97 N. Y. 8 (leading case); Talcott *v.* Harris, 93 id. 567; Waring *v.* U. S. Tel. Co., 44 How. N. Y. 69; s. c. 4 Daly 233; Fairlie *v.* Denton, 3 C. & P. 103; Richards *v.* Frankum, 9 id. 221;] Hulett's Estate, 66 Minn. 327; State *v.* Howell, N. J. L., 38 Atl. 748; Razor *v.* Razor, 149 Ill. 621; Wiedemann

by acquiescence may be inferred. Upon the same ground, the shipping list at Lloyd's, stating the time of a vessel's sailing, is held to be *prima facie* evidence against an underwriter, as to what it contains.[4]

4. *Sundry Limitations.*

§ 200. **Weight and Value of Admissions.** With respect to all verbal admissions, it may be observed that they ought to be received with great caution. The evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake; the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say.[1] But where the admission is deliberately made

v. Walpole, 1891, 2 Q. B. 534.] {But if the person receiving a letter does reply to it, and in his reply refers to the letter he has received, he makes the original letter evidence against him as to the facts referred to, so far as is necessary in order to understand the reply: Trischet *v.* Hamilton Ins. Co., 14 Gray 456; Dutton *v.* Woodman, 9 Cush. 262; Fearing *v.* Kimball, 4 Allen 125; Gaskill *v.* Skene, 14 Q. B. 664;} [see *post*, § 201, note 14.]

[For the wholly different question, whether possession of a document shows *knowledge* of its contents, see *ante*, § 14 *p.*]

[4] Mackintosh *v.* Marshall, 11 M. & W. 116.

[1] Earle *v.* Picken, 5 C. & P. 542, n., per Parke, J.; Rex *v.* Simons, 6 id. 540, per Alderson, B.; Williams *v.* Williams, 1 Hagg. Consist. 304, per Sir William Scott; Hope *v.* Evans, 1 Sm. & M. Ch. 195. Alciatus expresses the sense of the civilians to the same effect, where, after speaking of the weight of judicial admissions, "propter majorem certitudinem, quam in se habet," he adds: "Quæ ratio non habet locum, quando ista confessio probaretur per testes; imo est *minus certa cæteris probationibus*," etc. Alciat. de Præsump. Pars Secund. Col. 682, n. 6. See *supra*, §§ 96, 97; 2 Poth. on Obl. by Evans, App. No. 16, § 13; Malin *v.* Malin, 1 Wend. 625, 652; Lench *v.* Lench, 10 Ves. 517, 518, cited with approbation in 6 Johns. Ch. 412, and in Smith *v.* Burnham, 3 Sumn. 438; Stone *v.* Ramsey, 4 Monroe 236, 239; Myers *v.* Baker, Hardin 544, 549; Perry *v.* Gerbeau, 5 Martin N. S. 18, 19; Law *v.* Merrills, 6 Wend. 268, 277; {Saveland *v.* Green, 40 Wis. 431; Mauro *v.* Platt, 62 Ill. 450. "In a somewhat extended experience of jury trials, we have been compelled to the conclusion that the most unreliable of all evidence is that of the oral admissions of the party, and especially where they purport to have been made during the pendency of the action, or after the parties were in a state of controversy. It is not uncommon for different witnesses of the same conversation to give precisely opposite accounts of it; and in some instances it will appear that the witness deposes to the statements of one party as coming from the other, and it is not very uncommon to find witnesses of the best intentions repeating the declarations of the party in his own favor as the fullest admissions of the utter falsity of his claim. When we reflect upon the inaccuracy of many witnesses, in their original comprehension of a conversation, their extreme liability to mingle subsequent facts and occurrences with the original transactions, and the impossibility of recollecting the precise terms used by the party, or of translating them by exact equivalents, we must conclude there is no substantial reliance upon this class of testimony. The fact, too, that in the final trial of open questions of fact, both sides are largely supported by evidence of this character, in the majority of instances, must lead all cautious triers of fact greatly to distrust its reliability:" Judge Redfield's addendum to this section in the twelfth edition. But the value of the confession is wholly a matter for the jury: Com. *v.* Galligan, 113 Mass. 202.} See also Smith *v.* Burnham, 3 Sumn. 435, 438, 439; Cleavland *v.* Burton, 11 Vt. 138; Stephens *v.* Vroman, 18 Barb. 250; Printup *v.* Mitchell, 17 Ga. 558.

and precisely identified, the evidence it affords is often of the most satisfactory nature.[2]

§ 201. **Explanations; Putting in the whole of a Conversation, Document, or Correspondence.** We are next to consider the effect of admissions, when proved. And here it is first to be observed, that the whole admission is to be taken together; for though some part of it may contain matter favorable to the party, and the object is only to ascertain that which he has conceded against himself, for it is to this only that the reason for admitting his own declarations applies, namely, the great probability that they are true; yet, unless the whole is received and considered, the true meaning and import of the part which is good evidence against him cannot be ascertained.[1] [This general principle, however, raises two sorts of questions: first, whether the party offering the admission *must*, as a preliminary condition, put in the whole, or other parts, of the conversation, document, etc.; secondly, whether the party whose statement it is *may* afterwards, by way of explanation, put in the remainder, or other parts, or other statements. (*a*) It does not seem to be generally required that the party offering the admission *must* put in at the same time any more than that which he desires to use, — whether a speech or conversation,[2] or a writing;[3] and so far as the portion of it allowed to be given is concerned, the substance is sufficient, without the precise words, whether of an oral statement[4] or a lost writing.[5] As to a letter forming part of a correspondence, it does not seem usual to require the preceding letters to be put in, unless they are expressly referred to in the one offered.[6] For an answer in Chancery or a deposition, it used to be said that the whole

[2] Rigg *v.* Curgenven, 2 Wils. 395, 399; Glassford on Evid. 326; Com. *v.* Knapp, 9 Pick. 507, 508, per Putnam, J.

[1] [For general statements of this principle, see Erskine's celebrated argument in Stockdale's Trial, 22 How. St. Tr. 257 (where he employs Algernon Sidney's famous illustration of the charge of libel against a publisher of the Bible for printing "[The fool hath said in his heart,] There is no God"); Abbott, C. J., in the Queen's Case, 2 B. & B. 287; Abbott, C. J., in Thomson *v.* Austen, 2 Dowl. & R. 361; Wilson, J., in Johnson *v.* Powers, 40 Vt. 611.]

[2] [Eaton's Trial, 23 How. St. Tr. 1030; R. *v.* O'Connell, 5 State Tr. N. S. 1, 196; People *v.* Daniels, Cal., 38 Pac. 720; People *v.* Dice, id., 52 Pac. 477; State *v.* Vallery, La. An., 16 So. 745; State *v.* Daniel, 49 id., 22 So. 415; State *v.* Cowan, 7 Ired. 239. The rulings are not uniform.]

[3] [Cornish's Trial, 11 How. St. Tr. 423; Sizer *v.* Burt, 4 Den. 426. But it will depend much upon the facts, whether sufficient has been given: see Coxe *v.* England, 65 Pa. 212, 223; Bank *v.* Brown, Dudley 62.]

[4] [R. *v.* Edmonds, 1 State Tr. N. S. 785, 820; Teague *v.* Williams, 7 Ala. 844; Hewitt *v.* Clark, 91 Ill. 608; Kittredge *v.* Russell, 114 Mass. 68; Chambers *v.* Hill, 34 Mich. 524; Maxwell *v.* Warner, 11 N. H. 569 (leading case); Eaton *v.* Rice, 8 id. 380; Kingsbury *v.* Moses, 45 id. 222; Norton *v.* Parsons, Vt., 32 Atl. 481; Fertig *v.* State, Wis., 75 N. W. 960. Distinguish the effect of the Opinion rule, *post*, § 441 *b*.]

[5] [Hardy's Trial, 24 How. St. Tr. 681; Edwards *v.* Rives, Fla., 17 So. 416; Clark *v.* Houghton, 12 Gray 44; Bell *v.* Young, 3 Grant 175; Maxted *v.* Fowler, 94 Mich. 111; Tayloe *v.* Riggs, 1 Pet. 599.]

[6] [See Watson *v.* Moore, 1 C. & K. 626; Barnes *v.* Trust Co., Ill., 48 N. E. 31; Stone *v.* Sanborn, 104 Mass. 319; Coats *v.* Gregory, 10 Ind. 345; Hayward R. Co. *v.* Duncklee, 30 Vt. 29, 39.]

must be put in,[7] and perhaps this would still be required.[8] (*b*) For the party against whom the admission is offered, it used to be said that he *may*, by way of explanation, put in the whole of the specified conversation or other oral statement,[9] or writing,[10] or answer in Chancery,[11] provided only that it dealt with the same subject. But this broad allowance has been repudiated in England and in some other jurisdictions, and it is now better said that the party wishing to explain may put in only so much as is necessary for his purpose, *i. e.* to qualify or explain the portion put in against him.[12] Where a series of letters in a correspondence, or of entries in an account-book, are involved, it is sometimes difficult to draw the line between those which are in effect a part of the same statement and those which are not;[13] but it seems that so far as the letter or oral statement put in as an admission was written or made in reply, or contains within it a reference to a remark or letter from the party offering it, the anterior statement may be put in evidence.[14]] But though the whole of what he said at the same time, and relating to the same subject, must be given in evidence,[15] yet it does not follow that all the parts of the statement are to be regarded as equally worthy of credit; but it is for the jury to consider, under all the circumstances, how much of the whole statement they deem worthy of belief, including as well the facts asserted by the party in his own favor, as those making against him.[16]

[7] [Gilbert, Evidence, 50.]

[8] [See Perkins *v.* Adams, 5 Metc. 46; Hamilton *v.* People, 29 Mich. 197; South. R. Co. *v.* Hubbard, Ala., 22 So. 541; and the practice in cross-examining witnesses as to their written statements, *post*, § 463.]

[9] [The Queen's Case, 2 B. & B. 297; R. *v.* O'Connell, 5 State Tr. N. S. 1, 239; Frazier *v.* State, 42 Ark. 72; Cal. C. C. P. § 1854; Thalheim *v.* State, Fla., 20 So. 938; Gough *v.* St. John, 16 Wend. 646; see Drake *v.* State, Ala., 20 So. 450; State *v.* Cowan, 7 Ired. 241; Pinney's Trial, 3 State Tr. N. S. 11, 464; R. *v.* Martin, 6 id. 925, 928. For the corresponding rule as to a witness' inconsistent statements, see *post*, § 462 *b*.]

[10] [Grattan *v.* Ins. Co., 92 N. Y. 284; see Robinson *v.* Cutter, 163 Mass. 377.]

[11] [Bath *v.* Battersea, 5 Mod. 9; Roe *v.* Ferrars, 2 B. & P. 542; see Roberts *v.* Tennell, 3 T. B. Monr. 247; Duncan *v.* Gibbs, 1 Yerg. 256;] {Gildersleeve *v.* Mahoney, 5 Duer 383.}

[12] [Prince *v.* Samo, 7 A. & E. 627; Hathaway *v.* Tinkham, 148 Mass. 85, *semble;* Silberry *v.* State, Ind., 39 N. E. 937; *Re* Chamberlain, 140 N. Y. 390;] {see Moore *v.* Wright, 90 Ill. 470; Darby *v.* Ouseley, 1 H. & N. 1.}

[13] [See Catt *v.* Howard, 3 Stark. 6; Sturge *v.* Buchanan, 10 A. & E. 598;] Roe *v.* Day, 7 C. & P. 705.

[14] [See *ante*, § 199, note 3; Hartman Steel Co. *v.* Hoag, 104 Ia. 269; Trischet *v.* Ins. Co., 14 Gray 457;] Watson *v.* Moore, 1 C. & K. 626; {Pennell *v.* Meyer, 2 M. & Rob. 98.}

[15] [Not "must" be but "may" be; the author is apparently dealing with the second sort of question above.]

[16] Smith *v.* Blandy, Ry. & M. 257, per Best, J.; Cray *v.* Halls, *ib. cit.* per Abbott, C. J.; Bermon *v.* Woodbridge, 2 Doug. 788; R. *v.* Clewes, 4 C. & P. 221, per Littledale, J.; McClenkan *v.* McMillan, 6 Barr 366; Mattocks *v.* Lyman, 18 Vt. 98; Wilson *v.* Calvert, 8 Ala. 757; Yarborough *v.* Moss, 9 Ala. 382; Dorlon *v.* Douglass, 6 Barb. S. C. 451; {Enders *v.* Sternbergh, 2 Abb. App. Dec. 31.} A similar rule prevails in Chancery: Gresley on Evid. 13. See also the Queen's Case, 2 Brod. &

§ 201 *a*. **Same: Other Modes.** [The party against whom the admission is offered may also explain it away, so far as possible, in any other way,[1] — as, by showing that it was said with a different intent or meaning, or without personal knowledge, or the like.[2] But he will not be allowed to show that he at other times said the contrary.[3]]

§ 202. **Admissions based on Hearsay.** Where the admission, whether oral or in writing, contains matters stated as mere hearsay, it has been made a question whether such matters of hearsay are to be received in evidence. Mr. Justice Chambre, in the case of an answer in Chancery, read against the party in a subsequent suit at law, thought that portion of it not admissible; "for," he added, "it appears to me, that, where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answer, and that he does not thereby admit as evidence all the facts which may happen to have been stated by way of hearsay only in the course of the answer to a bill filed for a discovery."[1] But where the answer is offered as the admission of the party against whom it is read, it seems reasonable that the whole admission should be read to the jury, for the purpose of showing under what impressions that admission was made, though some parts of it be only stated from hearsay and belief. And what may or may not be read, as the context of the admission, depends not upon the grammatical structure, but upon the sense and connection in fact. But whether the party, against whom the answer is read, is entitled to have such parts of it as are not expressly sworn to left to the jury as evidence, however slight, of any fact, does not yet appear to have been expressly decided.[2]

§ 203. **Parol Admissions of Title or of Contents of Documents.** It is further to be observed on this head, that the parol admission of a party, made *en pais*, is competent evidence only of those facts

Bing. 298, per Abbott, C. J.; Randle *v.* Blackburn, 5 Taunt. 245; Thomson *v.* Austen, 2 D. & R. 358; Fletcher *v.* Froggatt, 2 C. & P. 569; Yates *v.* Carnsew, 3 C. & P. 99, per Lord Tenterden; Cooper *v.* Smith, 15 East 103, 107; Whitwell *v.* Wyer, 11 Mass. 6, 10; Garey *v.* Nicholson, 24 Wend. 350; Kelsey *v.* Bush, 2 Hill 440.

[1] See Watson *v.* Moore, 1 C. & K. 626; {Pennell *v.* Meyer, 2 M. & Rob. 98;} [Trischt *v.* Ins. Co., 14 Gray 457; Hartman Steel Co. *v.* Hoag, 104 Ia. 269.]

[2] See Reay *v.* Richardson, 2 C. M. & R. 422; [Reid *v.* Warner, 17 Low. Can. 487 Smith *v.* Giffard, 33 Ala. 172; Yates *v.* Shaw, 24 Ill. 369; Smith *v.* Mayfield, 163 id. 447; Janvrin *v.* Fogg, 49 N. H. 346; Kolmes *v.* W. R. E. Co., R. I., 38 Atl. 946. But see Sutter *v.* Rose, 169 Ill. 66.]

[3] {Baxter *v.* Knowles, 12 All. 114; Pickering *v.* Reynolds, 119 id. 111; Royal *v.* Chandler, 79 Me. 265; *post*, § 209, note 4.} [Yet there is some reason for using such statements under some circumstances, as pointed out by Brackenridge, J., in Garwood *v.* Dennis, 4 Binn. 314, 333, 339. Compare the principle for similar statements by a witness, *post*, § 469 *b*.]

[1] Roe *v.* Ferrars, 2 B. & P. 548; {see Stephens *v.* Vrooman, 16 N. Y. 301; Shaddock *v.* Clifton, 22 Wis. 115; Chapman *v.* R. Co., 26 id. 295.}

[2] 2 Bos. & Pul. 548, n.; Gresley on Evid. 13.

which may lawfully be established by parol evidence; it cannot be received either to contradict documentary proof, or to supply the place of existing evidence by matter of record. Thus, a written receipt of money from one as the agent of a corporation, or even an express admission of indebtment to the corporation itself, is not competent proof of the legal authority and capacity of the corporation to act as such.[1] Nor is a parol admission of having been discharged under an insolvent act sufficient proof of that fact, without the production of the record.[2] The reasons on which this rule is founded having been already stated, it is unnecessary to consider them further in this place.[3] The rule, however, does not go to the utter exclusion of parol admissions of this nature, but only to their effect; for in general, as was observed by Mr. Justice Parke,[4] what a party says is evidence against himself, whether it relate to the contents of a written instrument, or anything else. Therefore, in replevin of goods distrained, the admissions of the plaintiff have been received, to show the terms upon which he held the premises, though he held under an agreement in writing, which was not produced.[5] Nor does the rule affect the admissibility of such evidence as secondary proof, after showing the loss of the instrument in question.

5. *Conclusive Admissions (Estoppel; Judicial Waiver).*

§ 204. **Admissions as Estoppels between Parties.** With regard, then, to the conclusiveness of admissions, it is first to be considered, that the genius and policy of the law favor the investigation of truth by all expedient and convenient methods; and that the doctrine of estoppels, by which further investigation is precluded, being an exception to the general rule, founded on convenience, and for the prevention of fraud, is not to be extended beyond the reasons on which it is founded.[1] It is also to be observed that estoppels bind only parties and privies, and not strangers. Hence it follows, that though a stranger may often show matters in evidence, which parties or privies might have specially pleaded by way of estoppel, yet, in his case, it is only matter of evidence to be considered by the jury.[2]

[1] Welland Canal Co. *v.* Hathaway, 8 Wend. 480; National Bank of St. Charles *v.* De Bernales, 1 C. & P. 569; Jenner *v.* Joliffe, 6 Johns. 9.

[2] Scott *v.* Clare, 3 Campb. 236; Summarsett *v.* Adamson, 1 Bing. 73, per Parke, J.

[3] See *supra*, §§ 96, 97; [transferred *post*, as §§ 563 *i*, *j*.]

[4] In Earle *v.* Pick·n, 5 C. & P. 542; Newhall *v.* Holt, 6 M. & W. 662; Slatterie *v.* Pooley, ib. 664; Pritchard *v.* Bagshawe, 11 Common Bench 459.

[5] Howard *v.* Smith, 3 Scott N. R. 574.

[1] See *supra*, §§ 22–26; [the whole subject of estoppels is one of substantive law, not of evidence.]

[2] This subject was very clearly illustrated by Mr. Justice Bayley, in delivering the judgment of the Court, in Heane *v.* Rogers, 9 B. & C. 577, 586. It was an action of trover, brought by a person against whom a commission of bankruptcy had issued, against his assignees, to recover the value of goods, which, as assignees, they had sold; and it appeared that he had assisted the assignees, by giving directions as to the sale

It is, however, in such cases, material to consider whether the admission is made independently, and because it is true, or is merely conventional, entered into between the parties from other causes than a conviction of its truth and only as a convenient assumption for the particular purpose in hand. For in the latter case it may be doubtful whether a stranger can give it in evidence at all.[3] Verbal admissions, as such, do not seem capable, in general, of being pleaded as estoppels, even between parties or privies; but if, being unexplained or avoided in evidence, the jury should wholly disregard them, the remedy would be by setting aside the verdict. And when they are held conclusive, they are rendered effectually so by not permitting the party to give any evidence against them. Parol or verbal admissions, which have been held conclusive against the party, seem for the most part to be those on the faith of which a court of justice has been led to adopt a particular course of proceeding, or on which another person has been induced to alter his condition.[4] To these may be added a few cases of fraud and crime, and some admissions on oath, which will be considered hereafter, where the party is estopped on other grounds.

of the goods; and that, after the issuing of the commission, he gave notice to the lessors of a farm which he held that he had become bankrupt, and was willing to give up the lease, which the lessors thereupon accepted, and took possession of the premises. And the question was, whether he was precluded, by this surrender, from disputing the commission in the present suit. On this point the language of the learned judge was as follows: "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 omissions 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." The earlier cases fall within the principle above laid down. In Clarke *v.* Clarke, 6 Esp. 61, the bankrupt was not permitted to call that sale a conversion, which he himself had procured and sanctioned; in Like *v.* Howe, 6 Esp. 20, he was precluded from contesting the title of persons to be assignees, whom he by his conduct had procured to become so; and the last case on this subject, Watson *v.* Wace, 5 B. & C. 153, is distinguishable from the present, because Wace, one of the defendants, was the person from whose suit the plaintiff had been discharged, and therefore, perhaps, he might be estopped with respect to that person by his conduct towards him. See also Welland Canal Co. *v.* Hathaway, 8 Wend. 483; Jennings *v.* Whittaker, 4 Monroe 50; Grant *v.* Jackson, Peake's Cas. 203; Ashmore *v.* Hardy, 7 C. & P. 501; Carter *v.* Bennett, 4 Fla. 343.

[3] Phil. & Am. on Evid. 388; 1 Phil. Evid. 368. In Slaney *v.* Wade, 1 Myl. & Cr. 338, and Fort *v.* Clarke, 1 Russ. 601, 604, the recitals in certain deeds were held inadmissible, in favor of strangers, as evidence of pedigree. But it is to be noted that the parties to those deeds were strangers to the persons whose pedigree they undertook to recite.

[4] Phil. & Am. on Evid. 378; 1 Phil. Evid. 360. The general doctrine of estoppels is thus stated by Lord Denman: "Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time:" Pickard *v.* Sears, 6 Ad. & El. 469, 474. The whole doctrine is ably discussed by Mr. Smith, and by Messrs. Hare and Wallace in their notes to the case of Trevivan *v.* Lawrence. See 2 Smith's Leading Cases, pp. 430–479 (Am. ed.); [see 1 Curtis C. C. 136, 144; Zuchtmann *v.* Roberts, 109 Mass. 54.]

§ 205. **Judicial Admissions.** Judicial admissions, or those made in court by the party's attorney, generally appear either of record, as in pleading,[1] or in the solemn admission of the attorney, made for the purpose of being used as a substitute for the regular legal evidence of the fact at the trial,[1] or in a case stated for the opinion of the Court. Both these have been already considered in the preceding pages. There is still another class of judicial admissions, made by the payment of money into court, upon a rule granted for that purpose. Here, it is obvious, the defendant conclusively admits that he owes the amount thus tendered in payment;[2] that it is due for the cause mentioned in the declaration;[3] that the plaintiff is entitled to claim it in the character in which he sues;[4] that the Court has jurisdiction of the matter;[5] that the contract described is rightly set forth, and was duly executed;[6] that it has been broken in the manner and to the extent declared;[7] and if it was a case of goods sold by sample, that they agreed with the sample.[8] In other words, the payment of money into court admits conclusively every fact which the plaintiff would be obliged to prove in order to recover that money.[9] But it admits nothing beyond that. If, therefore, the contract is illegal, or invalid, the payment of money into court gives it no validity; and if the payment is general, and there are several counts, or contracts, some of which are legal and others not, the Court will apply it to the former.[10] So, if there are two inconsistent counts, on the latter of which the money is paid into court, which is taken out by the plaintiff, the defendant is not entitled to show this to the jury, in order to negative any allegation in the first count.[11] The service of a summons to show cause why the party should not be permitted to pay a certain sum into court, and *a fortiori*, the entry of a rule or order for that purpose, is also an admission that so much is due.[12]

[1] See *ante*, § 186.

[2] Blackburn *v.* Scholes, 2 Campb. 341; Rucker *v.* Palsgrave, 1 id. 558; s. c. 1 Taunt. 419; Boyden *v.* Moore, 5 Mass. 365, 369.

[3] Seaton *v.* Benedict, 5 Bing. 28, 32; Bennett *v.* Francis, 2 B. & P. 550; Jones *v.* Hoar, 5 Pick. 285; Huntington *v.* American Bank, 6 Pick. 340.

[4] Lipscombe *v.* Holmes, 2 Campb. 441.

[5] Miller *v.* Williams, 5 Esp. 19, 21.

[6] Gutteridge *v.* Smith, 2 H. Bl. 374; Israel *v.* Benjamin, 3 Campb. 40; Middleton *v.* Brewer, Peake's Cas. 15; Randall *v.* Lynch, 2 Campb. 352, 357; Cox *v.* Brain, 3 Taunt. 95.

[7] Dyer *v.* Ashton, 1 B. & C. 3.

[8] Leggett *v.* Cooper, 2 Stark. 103.

[9] Dyer *v.* Ashton, 1 B. & C. 3; Stapleton *v.* Nowell, 6 M. & W. 9; Archer *v.* English, 2 Scott N. S. 156; Archer *v.* Walker, 9 Dowl. 2L. And see Story *v.* Finnis, 3 Eng. L. & Eq. 548, 6 Exch. 123; Schreger *v.* Carden, 16 Jur. 568; {Bacon *v.* Charlton, 7 Cush. 581; Hubbard *v.* Knous, 7 Cush. 556, 559; Kingham *v.* Robins, 5 M. & W. 94; Archer *v.* English, 1 M. & G. 873.}

[10] Ribbans *v.* Crickett, 1 B. & P. 264; Hitchcock *v.* Tyson, 2 Esp. 481, n.

[11] Gould *v.* Oliver, 2 M. & Gr. 208, 233, 234; Montgomery *v.* Richardson, 5 C. & P. 247.

[12] Williamson *v.* Henley, 6 Bing. 299.

§ 206. **Same: Admissions by Mistake.** It is only necessary here to add, that where judicial admissions have been made improvidently, and by mistake, the Court will, in its discretion, relieve the party from the consequences of his error, by ordering a repleader, or by discharging the case stated, or the rule, or agreement, if made in court.[1] Agreements made out of court, between attorneys, concerning the course of proceedings in court, are equally under its control, in effect, by means of its coercive power over the attorney in all matters relating to professional character and conduct. But, in all these admissions, unless a clear case of mistake is made out, entitling the party to relief, he is held to the admission; which the Court will proceed to act upon, not as truth in the abstract, but as a formula for the solution of the particular problem before it, namely, the case in judgment, without injury to the general administration of justice.[2]

§ 207. **Admissions acted upon, as giving rise to Estoppels.** Admissions, whether of law or of fact, which have been acted upon by others, are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced.[1] It is of no importance whether they were made in express language to the person himself, or implied from the open and general conduct of the party. For, in the latter case, the implied declaration may be considered as addressed to every one in particular, who may have occasion to act upon it. In such cases the party is estopped, on grounds of public policy and good faith, from repudiating his own representations.[2] This rule is familiarly illustrated by the case of a man cohabiting with a woman, and treating her in the face of the world as his wife, to whom in fact he is not married. Here, though he thereby acquires no rights against others, yet they may against

[1] "Non fatetur, qui errat, nisi jus ignoravit." Dig. lib. 42, tit. 2, l. 2. "Si vero per errorem fuerit facta ipsa confessio (scil. ab advocato), clienti concessum est, errore probato, usque ad sententiam revocare." Mascard. De Probat. vol. i, Qnæst. 7, n. 63; id. n. 19–22; id. vol. i, Concl. 348, per tot. See Kohn *v.* Marsh, 3 Rob. La. 48. The principle on which a party is relieved against judicial admissions made improvidently and by mistake, is equally applicable to admissions *en pais*. Accordingly, where a legal liability was thus admitted, it was held that the jury were at liberty to consider all the circumstances, and the mistaken view under which it was made; that the party might show that the admission made by him arose from a mistake as to the law; and that he was not estopped by such admission, unless the other party had been induced by it to alter his condition: Newton *v.* Belcher, 13 Jur. 253; 18 Law J. Q. B. 53; 12 Q. B. 921; Newton *v.* Liddiard, ib. 925; Solomon *v.* Solomon, 2 Kelly 18.

[2] See Gresley on Evid. in Equity, pp. 349–358. The Roman law was administered in the same spirit. "Si is, cum quo Lege Aquilia agitur, confessus est servum occidisse, licet non occiderit, si tamen occisus sit homo, ex confesso tenetur." Dig. lib. 42, tit. 2, l. 4; id. l. 6. See also Van Leeuwen's Comm. b. 5, ch. 21; Everhardi Concil. 155, n. 3; "Confessus pro judicato est:" Dig. *ubi sup.* l. 1.

[1] See *supra*, § 27; Commercial Bank of Natchez *v.* King, 3 Rob. La. 243; Kinney *v.* Farnsworth, 17 Conn. 355; Newton *v.* Belcher, 13 Jur. 253; 12 Q. B. 921; Newton *v.* Liddiard, ib. 925; {but see Hackett *v.* Callender, 32 Vt. 99.}

[2] See *supra*, §§ 195, 196; Quick *v.* Staines, 1 B. & P. 293; Graves *v.* Key, 3 B. & Ad. 318; Straton *v.* Rastall, 2 T. R. 366; Wyatt *v.* Lord Hertford, 3 East 147.

him; and, therefore, if she is supplied with goods during such cohabitation, and the reputed husband is sued for them, he will not be permitted to disprove or deny the marriage.[3] So, if the lands of such woman are taken in execution for the reputed husband's debt, as his own freehold in her right, he is estopped, by the relation *de facto* of husband and wife, from saying that he held them as her servant.[4] So, if a party has taken advantage of, or voluntarily acted under, the bankrupt or insolvent laws, he shall not be permitted, as against persons, parties to the same proceedings, to deny their regularity.[5] So, also, where one knowingly permits his name to be used as one of the parties in a trading firm, under such circumstances of publicity as to satisfy a jury that a stranger knew it, and believed him to be a partner, he is liable to such stranger in all transactions in which the latter engaged, and gave credit upon the faith of his being such partner.[6] On the same principle it is, that, where one has assumed to act in an official or professional character, it is conclusive evidence against him that he possesses that character, even to the rendering him subject to the penalties attached to it.[7] So, also, a tenant who has paid rent, and acted as such, is not permitted to set up a superior title of a third person against his lessor, in bar of an ejectment brought by him; for he derived the possession from him as his tenant, and shall not be received to repudiate that relation.[8] But this rule does not preclude the tenant, who did not receive the possession from the adverse party, but has only attorned or paid rent to him, from showing that this was done by mistake.[9] This doctrine is also applied to the relation of bailor and bailee, the cases being in principle the same;[10] and also to that of principal

[3] Watson *v.* Threlkeld, 2 Esp. 637; Robinson *v.* Nahorr, 1 Campb. 245; Munro *v.* De Chemant, 4 id. 216; Ryan *v.* Sams, 12 Q. B. 460; *supra*, § 27. But where such representation has not been acted upon, namely, in other transactions of the supposed husband or wife, they are competent witnesses for each other: Batthews *v.* Galindo, 4 Bing. 610; Wells *v.* Fletcher, 5 C. & P. 12; Tufts *v.* Hayes, 5 N. H. 452.

[4] Divoll *v.* Leadbetter, 4 Pick. 220.

[5] Like *v.* Howe, 6 Esp. 20; Clarke *v.* Clarke, ib. 61; Goldie *v.* Gunston, 4 Campb. 381; Watson *v.* Wace, 5 B. & C. 153, explained in Heane *v.* Rogers, 9 B. & C. 587; Mercer *v.* Wise, 3 Esp. 219; Harmar *v.* Davis, 7 Taunt. 577; Flower *v.* Herbert, 2 Ves. 326.

[6] Per Parke, J., in Dickinson *v.* Valpy, 10 B. & C. 128, 140, 141; Fox *v.* Clifton, 6 Bing. 779, 794, per Tindal, C. J. See also Kell *v.* Nainby, 10 B. & C. 20; Guidon *v.* Robson, 2 Campb. 302.

[7] See *supra*, § 195, and cases cited in note.

[8] Doe *v.* Pegge, 1 T. R. 759, n., per Lord Mansfield; Cooke *v.* Loxley, 5 id. 4; Hodson *v.* Sharpe, 10 East 350, 352, 353, per Lord Ellenborough; Phipps *v.* Seulthorpe, 1 B. & Ald. 50, 53; Cornish *v.* Searell, 8 B. & C. 471, per Bayley, J.; Doe *v.* Smythe, 4 M. & S. 347; Doe *v.* Austin, 9 Bing. 41; Fleming *v.* Gooding, 10 id. 549; Jackson *v.* Reynolds, 1 Caines 444; Jackson *v.* Scissam, 3 Johns. 499, 504; Jackson *v.* Dobbin, ib. 223; Jackson *v.* Smith, 7 Cowen 717; Jackson *v.* Spear, 7 Wend. 401. See 1 Phil. on Evid. 107; {Dolby *v.* Iles, 11 A. & E. 335.} [See other authorities, *ante*, § 25.]

[9] Williams *v.* Bartholomew, 1 B. & P. 326; Rogers *v.* Pitcher, 6 Taunt. 202, 208.

[10] Gosling *v.* Birnie, 7 Bing. 339; Phillips *v.* Hall, 8 Wend. 610; Drown *v.* Smith, 3 N. H. 299; Eastman *v.* Tuttle, 1 Cowen 248; McNeil *v.* Philip, 1 McCord 392; Hawes *v.* Watson, 2 B. & C. 540; Stonard *v.* Dunkin, 2 Campb. 344; Chapman *v.*

and agent.[11] Thus, where goods in the possession of a debtor were attached as his goods, whereas they were the goods of another person, who received them of the sheriff, in bailment for safe custody, as the goods of the debtor, without giving any notice of his own title, the debtor then possessing other goods, which might have been attached, it was held that the bailee was estopped to set up his own title in bar of an action by the sheriff for the goods.[12] The acceptance of a bill of exchange is also deemed a conclusive admission, against the acceptor, of the genuineness of the signature of the drawer, though not of the indorsers, and of the authority of the agent, where it was drawn by procuration, as well as of the legal capacity of the preceding parties to make the contract. The indorsement, also, of a bill of exchange, or promissory note, is a conclusive admission of the genuineness of the preceding signatures, as well as of the authority of the agent, in cases of procuration, and of the capacity of the parties. So, the assignment of a replevin bond by the sheriff is an admission of its due execution and validity as a bond.[13] So, where land has been dedicated to public use, and enjoyed as such, and private rights have been acquired with reference to it, the original owner is precluded from revoking it.[14] And these admissions may be pleaded by way of estoppel *en pais*.[15]

§ 208. It makes no difference in the operation of this rule, whether the thing admitted was true or false: it being the fact that it has been acted upon that renders it conclusive. Thus, where two brokers, instructed to effect insurance, wrote in reply that they had got two policies effected, which was false: in an action of trover

Searle, 3 Pick. 38, 44; Dixon *v.* Hamond, 2 B. & Ald. 310; Jewett *v.* Torrey, 11 Mass. 219; Lyman *v.* Lyman, id. 317; Story on Bailments, § 102; Kieran *v.* Sandars, 6 Ad. & El. 515. But where the bailor was but a trustee, and is no longer liable over to the *cestui que trust*, a delivery to the latter is a good defence for the bailee against the bailor. This principle is familiarly applied to the case of goods attached by the sheriff, and delivered for safe keeping to a person who delivers them over to the debtor. After the lien of the sheriff is dissolved, he can have no action against his bailee: Whittier *v.* Smith, 11 Mass. 211; Cooper *v.* Mowry, 16 Mass. 8; Jenney *v.* Rodman, ib. 464. So, if the goods did not belong to the debtor, and the bailee has delivered them to the true owner: Learned *v.* Bryant, 13 Mass. 224; Fisher *v.* Bartleft, 8 Greenl. 122. Ogle *v.* Atkinson, 5 Taunt. 759, which seems to contradict the text, has been overruled, as to this point, by Gosling *v.* Birnie, *supra*. See also Story on Agency, § 217, n.

[11] Story on Agency, § 217, and cases there cited. The agent, however, is not estopped to set up the *jus tertii* in any case where the title of the principal was acquired by fraud; and the same principle seems to apply to other cases of bailment: Hardman *v.* Willcock, 9 Bing. 382, n.

[12] Dewey *v.* Field, 4 Met. 381. See also Pitt *v.* Chappelow, 8 M. & W. 616; Sanderson *v.* Collman, 4 Scott N. R. 638; Heane *v.* Rogers, 9 B. & C. 577; Dezell *v.* Odell, 3 Hill 215.

[13] Scott *v.* Waithman, 3 Stark. 168; Barnes *v.* Lucas, Ry. & M. 234; Plumer *v.* Briscoe, 12 Jur. 351.

[14] Cincinnati *v.* White, 6 Pet. 439; Hobbs *v.* Lowell, 19 Pick. 405.

[15] Story on Bills of Exchange, §§ 262, 263; Sanderson *v.* Collman, 4 Scott N. R. 638; Pitt *v.* Chappelow, 8 M. & W. 616; Taylor *v.* Croker, 4 Esp. 187; Drayton *v.* Dale, 2 B. & C. 293; Haley *v.* Lane, 2 Atk. 181; Bass *v.* Clive, 4 M. & S. 13; *supra*, §§ 195, 196, 197; Weakly *v.* Bell, 9 Watts 273.

against them by the assured for the two policies, Lord Mansfield held them estopped to deny the existence of the policies, and said he should consider them as the actual insurers.[1] This principle has also been applied to the case of a sheriff, who falsely returned that he had taken bail.[2]

§ 209. On the other hand, verbal admissions which have not been acted upon, and which the party may controvert, without any breach of good faith or evasion of public justice, though admissible in evidence, are not held conclusive against him. Of this sort is the admission that his trade was a nuisance, by one indicted for setting it up in another place;[1] the admission by the defendant, in an action for criminal conversation, that the female in question was the wife of the plaintiff;[2] the omission by an insolvent, in his schedule of debts, of a particular claim, which he afterwards sought to enforce by suit.[3] In these, and the like cases, no wrong is done to the other party by receiving any legal evidence showing that the admission was erroneous, and leaving the whole evidence, including the admission, to be weighed by the jury.[4]

§ 210. In some other cases, connected with the administration of public justice and of government, the admission is held conclusive, on grounds of public policy. Thus, in an action on the statute against bribery, it was held that a man who had given money to another for his vote should not be admitted to say that such other person had no right to vote.[1] So, one who has officiously intermeddled with the goods of another, recently deceased, is, in favor of creditors, estopped to deny that he is executor.[2] Thus, also, where a ship-owner, whose ship had been seized as forfeited for breach of the revenue laws, applied to the Secretary of the Treasury for a remission of forfeiture, on the ground that it was incurred by

[1] Harding *v.* Carter, Park on Ins. p. 4. See also Salem *v.* Williams, 8 Wend. 483; s. c. 9 id. 147; Chapman *v.* Searle, 3 Pick. 38, 44; Hall *v.* White, 3 C. & P. 136; Den *v.* Oliver, 3 Hawks 479; Doe *v.* Lambly, 2 Esp. 635; 1 B. & A. 650, per Lord Ellenborough; Price *v.* Harwood, 3 Campb. 108 Stables *v.* Eley, 1 C. & P. 614; Howard *v.* Tucker, 1 B. & Ad. 712. If it is a case of innocent mistake, still, if it has been acted upon by another, it is conclusive in his favor; as, where the supposed maker of a forged note innocently paid it to a *bona fide* holder, he shall be estopped to recover back the money: Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 27.

[2] Simmons *v.* Bradford, 15 Mass. 82; Eaton *v.* Ogier, 2 Greenl. 46.

[1] R. *v.* Neville, Peake's Cas. 91.

[2] Morris *v.* Miller, 4 Burr. 2057, further explained in 2 Wils. 399, 1 Doug. 174, and Bull. N. P. 28.

[3] Nicholls *v.* Downes, 1 Mood. & R. 13; Hart *v.* Newman, 3 Campb. 13.

[4] {But the effect of an admission cannot be rebutted by evidence that different statements were made at other times: Clark *v.* Huffaker, 26 Mo. 264; Jones *v.* State, 13 Tex. 168; Hunt *v.* Roylance, 11 Cush. 117; *ante*, § 201 *a*, note 3.}

[1] Combe *v.* Pitt, 3 Burr. 1586, 1590; Rigg *v.* Curgenven, 2 Wils. 395.

[2] Reade's Case, 5 Co. 33, 34; Toller's Law of Ex'rs, 37–41; see also Quick *v.* Staines, 1 B. & P. 293. Where the owners of a stage-coach took up more passengers than were allowed by statute, and an injury was laid to have arisen from overloading, the excess beyond the statute number was held by Lord Ellenborough to be conclusive evidence that the accident arose from that cause: Israel *v.* Clark, 4 Esp. 259.

the master ignorantly, and without fraud, and, upon making oath to the application, in the usual course, the ship was given up, he was not permitted afterwards to gainsay it, and prove the misconduct of the master, in an action by the latter against the owner, for his wages, on the same voyage, even by showing that the fraud had subsequently come to his knowledge.[3] The mere fact that an admission was made under oath does not seem alone to render it conclusive against the party, but it adds vastly to the weight of the testimony, throwing upon him the burden of showing that it was a case of clear and innocent mistake. Thus, in a prosecution under the game laws, proof of the defendant's oath, taken under the income act, that the yearly value of his estates was less than £100, was held not quite conclusive against him, though very strong evidence of the fact.[4] And even the defendant's belief of a fact, sworn to in an answer in Chancery, is admissible at law, as evidence against him of the fact, though not conclusive.[5]

§ 211. **Admissions in Deeds.** Admissions in deeds have already been considered, in regard to parties and privies,[1] between whom they are generally conclusive; and when not technically so, they are entitled to great weight from the solemnity of their nature. But when offered in evidence by a stranger, or, as it seems, even by a party against a stranger, the adverse party is not estopped, but may repel their effect in the same manner as though they were only parol admissions.[2]

§ 212. **Non-judicial Admissions, not conclusive.** Other admissions, though in writing, not having been acted upon by another to his prejudice, nor falling within the reasons before mentioned for estopping the party to gainsay them, are not conclusive against him, but are left at large, to be weighed with other evidence by the jury.

[3] Freeman *v.* Walker, 6 Greenl. 68. But a sworn entry at the custom-house or certain premises, as being rented by A, B, and C, as partners, for the sale of beer, though conclusive in favor of the crown, is not conclusive evidence of the partnership, in a civil suit, in favor of a stranger: Ellis *v.* Watson, 2 Stark. 453. The difference between this case and that in the text may be, that in the latter the party gained an advantage to himself, which was not the case in the entry of partnership: it being only incidental to the principal object; namely, the designation of a place where an excisable commodity was sold.

[4] R. *v.* Clarke, 8 T. R. 220. It is observable that the matter sworn to was rather a matter of judgment than of certainty in fact. But in Thornes *v.* White, 1 Tyrwh. & Grang. 110, the party had sworn positively to matter of fact in his own knowledge; but it was held not conclusive in law against him, though deserving of much weight with the jury; and see Carter *v.* Bennett, 4 Fla. 343.

[5] Doe *v.* Steel, 3 Campb. 115. Answers in Chancery are always admissible at law against the party, but do not seem to be held strictly conclusive, merely because they are sworn to. See Bull. N. P. 236, 237; 1 Stark. Evid. 284; Cameron *v.* Lightfoot, 2 W. Bl. 1190; Grant *v.* Jackson, Peake's Cas. 203; Studdy *v.* Sanders, 2 D. & R. 347; De Whelpdale *v.* Milburn, 5 Price 485.

[1] *Supra*, §§ 22–24, 189, 204. But if the deed has not been delivered, that party is not conclusively bound: Robinson *v.* Cushman, 2 Denio 149; {Bulley *v.* Bulley, L. R. 9 Ch. 739.}

[2] Bowman *v.* Rostron, 2 Ad. & El. 295, n.: Woodward *v.* Larking, 3 Esp. 286; Mayor of Carlisle *v.* Blamire, 8 East 487, 492, 493.

Of this sort are receipts, or mere acknowledgments, given for goods or money whether on separate papers, or indorsed on deeds or on negotiable securities;[1] adjustment of a loss, on a policy of insurance, made without full knowledge of all the circumstances, or under a mistake of fact, or under any other invalidating circumstances;[2] and accounts rendered, such as an attorney's bill,[3] and the like. So, of a bill in Chancery, which is evidence against the plaintiff of the admissions it contains, though very feeble evidence, so far as it may be taken as the suggestion of counsel.[4]

[1] Skaife *v.* Jackson, 3 B. & C. 421; Graves *v.* Key, 3 B. & Ad. 313; Straton *v.* Rastall, 2 T. R. 366; Fairmaner *v.* Budd, 7 Bing. 574; Lampon *v.* Corke, 5 B. & Ald. 606, 611, per Holroyd, J.; Harden *v.* Gordon, 2 Mason 541, 561; Fuller *v.* Crittenden, 9 Conn. 401; Ensign *v.* Webster, 1 Johns. Cas. 145; Putnam *v.* Lewis, 8 Johns. 389; Stackpole *v.* Arnold, 11 Mass. 27; Tucker *v.* Maxwell, ib. 143; Wilkinson *v.* Scott, 17 id. 249; [*post*, § 305 *e*.]

[2] Reyner *v.* Hall, 4 Taunt. 725; Shepherd *v.* Chewter, 1 Campb. 274, 276, note by the reporter; Adams *v.* Sanders, 1 M. & M. 373; Christian *v.* Coombe, 2 Esp. 489; Bilbie *v.* Lumley, 2 East 469; Elting *v.* Scott, 2 Johns. 157.

[3] Lovebridge *v.* Botham, 1 B. & P. 49.

[4] Bull. N. P. 235; Doe *v.* Sybourn, 7 T. R. 3. See [*ante*, § 186;] *post*, vol. iii, § 276.

CHAPTER XVIII.

CONFESSIONS.

1. *In general.*

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§§ 214, 215. Weight of Confessions.

2. *Confessions as Sufficient Evidence for Conviction.*

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§ 233. Confessions of other Persons; Conspirators.
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1. *In general.*

§ 213. **What is a Confession.** The only remaining topic, under the general head of admissions, is that of confessions of guilt in criminal prosecutions, which we now propose to consider. It has already been observed that the rules of evidence, in regard to the voluntary admissions of the party, are the same in criminal as in civil cases. But, as this applies only to admissions brought home to the party, it is obvious that the whole subject of admissions made by agents and third persons, together with a portion of that of implied admissions, can of course have very little direct application to confessions of crime or of guilty intention. In treating this subject, however, we shall follow the convenient course pursued by other writers, distributing this branch of evidence into two classes; namely, first, the direct confessions of guilt; and, secondly, the indirect confessions,[1] or those which, in civil cases, are usually termed "implied admissions." [The term "confession," as indicating a statement subjected to peculiar rules for its use in criminal cases, seems in strictness to include only what in common usage the

[1] [By this term the author seems to describe that conduct (flight, fabrication of evidence, etc.) which indicates consciousness of guilt (treated *ante*, § 14 *p*), and that conduct (silence, etc.) which is equivalent to an admission or assertion of some incidental fact (treated *ante*, §§ 195 *a*–198).]

term implies, namely, a direct assertion by the accused person of the doing of the act charged as a crime. It is for this sort of a statement that the particular ensuing rules of caution and limitation are intended, — the rule requiring some sort of corroboration, the rule requiring freedom from the inducement of hope or fear, and the like. It would seem to follow that these limiting rules about confessions do not apply to conduct or statements of the accused, when offered against him, other than those of the above sort. In particular they do not apply (1) to assertions of innocence, assertions of an alibi, or other exculpatory assertions about incidental facts, when offered in court in contradiction of the accused's testimony (on the principle of § 461 *f*, *post*) or as indicating by their falsity a fabrication significant of consciousness of guilt (on the principle of § 14 *p*, *ante*);[2] nor do they apply to admissions of incidental or evidential circumstances which may be used against the accused just as the statements of any party, inconsistent with his present contention, may be used against him (*ante*, § 169).[3] Nevertheless, statements of these two sorts, though apparently never deliberately asserted by any Court to come within the rules of confessions, are by some Courts not uncommonly treated as though the limiting rules about confessions were applicable.[4]]

§ 214. **Weight of Confessions.** But here, also, as we have before remarked in regard to admissions,[1] the evidence of verbal confessions of guilt is to be received with great caution. For, besides the danger of mistake, from the misapprehension of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, it should be recollected that the mind of the prisoner himself is oppressed by the calamity of his situation, and that he is often influenced by motives of hope or fear to make an

[2] [This discrimination is noticed in Swift, Evidence (1810), 133; Pentecost *v.* State, 107 Ala. 81; People *v.* Strong, 30 Cal. 157; People *v.* Parton, 49 id. 637; People *v.* Reinhart, id., 38 Pac. 825 (useful opinion); People *v.* Hickman, 113 id. 80; People *v.* Ashmead, 118 id. 508; People *v.* Ammermann, ib. 23; Mora *v.* People, 19 Colo. 255; Lee *v.* State, Ga., 29 S. E. 264; Powell *v.* State, 101 id. 9; State *v.* Gilman, 51 Me. 225; State *v.* Cadotte, 17 Mont. 315; Taylor *v.* State, 37 Nebr. 788; State *v.* Porter, Or., 49 Pac. 964 (useful opinion); State *v.* Broughton, 7 Ired. 96, 101; State *v.* Vaigneur, 5 Rich. L. 402, *semble;* State *v.* Munson, 7 Wash. 239, *semble.* The Texas rulings seem to vacillate; see {Haynie *v.* State, 2 Tex. App. 168; Taylor *v.* State, 3 id. 387; Marshall *v.* State, 5 id. 273;} Ferguson *v.* State, 31 Tex. Cr. 93; Bailey *v.* State, id., 49 S. W. 100.]

[3] [Crossfield's Trial, 26 How. St. Tr. 215 (leading case); People *v.* Miller, Cal., 54 Pac. 523; Shaw *v.* State, Ga., 29 S. E. 477; Ballew *v.* U. S., 160 U. S. 187;] {State *v.* Knowles, 48 Ia. 590.}

[4] [A signal instance of this error is found in Bram *v.* U. S., 168 U. S. 532, where the accused's exculpatory assertion that B. could not have seen the accused, and that he thought B. committed the crime, was treated as a confession.

The author of this volume, in another section, had added the following note: "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: R. *v.* Tyler, 1 C. & P. 129; R. *v.* Enoch, 5 id. 539."]

[1] *Supra*, § 200.

untrue confession.[2] The zeal, too, which so generally prevails, to detect offenders, especially in cases of aggravated guilt, and the strong disposition, in the persons engaged in pursuit of evidence, to rely on slight grounds of suspicion, which are exaggerated into sufficient proof, together with the character of the persons necessarily called as witnesses, in cases of secret and atrocious crime, all tend to impair the value of this kind of evidence, and sometimes lead to its rejection, where, in civil actions, it would have been received.[3] The weighty observation of Mr. Justice Foster is also to be kept in mind, that "this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence, by which the proof of plain facts may be, and often is, confronted."

§ 215. Subject to these cautions in receiving and weighing them it is generally agreed that deliberate confessions of guilt are among the most effectual proofs in the law.[1] Their value depends on the supposition that they are deliberate and voluntary, and on the pre-

[2] Hawk. P. C. b. 2, c. 46, § 3, n. (2); McNally's Evid. 42, 43, 44; Vaughan *v.* Hann, 6 B. Monr. 341. Of this character was the remarkable case of the two Boorns, convicted in the Supreme Court of Vermont, in Bennington County, in September term, 1819, of the murder of Russell Colvin, May 10, 1812; this case, of which there is a report in the Law Library of Harvard University, is critically examined in a learned and elaborate article in the North American Review, vol. x, pp. 418–429. For other cases of false confessions, see Wills on Circumstantial Evidence, p. 88; Phil. & Am. on Evid. 419; 1 Phil. Evid. 397, n.; Warickshall's Case, 1 Leach Cr. Cas. 299, n.; 1 Chitty's Crim. Law, p. 85; 1 Dickins, Just. 629, n.; Joy on Confessions, etc., pp. 100–109.

The civilians placed little reliance on naked confessions of guilt, not corroborated by other testimony. Carpzovius, after citing the opinions of Severus to that effect, and enumerating the various kinds of misery which tempt its wretched victims to this mode of suicide, adds: "Quorum omnium ex his fontibus contra se emissa pronunciatio, non tam delicti confessione firmati quam vox *doloris*, vel *insanientis* oratio est." B. Carpzov. Pract. Rerum Criminal. Pars III, Quæst. 114, p. 160. The just value of these instances of false confessions of crime has been happily stated by one of the most accomplished of modern jurists, and is best expressed in his own language: "Whilst such anomalous cases ought to render Courts and juries, at all times, extremely watchful of every fact attendant on confessions of guilt, the cases should never be invoked, or so urged by the accused's counsel, as to invalidate indiscriminately all confessions put to the jury, thus repudiating those salutary distinctions which the Court, in the judicious exercise of its duty, shall be enabled to make. Such a use of these anomalies, which should be regarded as mere exceptions, and which should speak only in the voice of warning, is no less unprofessional than impolitic; and should be regarded as offensive to the intelligence both of the Court and jury. . . . Confessions and circumstantial evidence are entitled to a known and fixed standing in the law; and while it behooves students and lawyers to examine and carefully weigh their just force, and, as far as practicable, to define their proper limits, the advocate should never be induced, by professional zeal or a less worthy motive, to argue against their existence, be they respectively invoked, either in favor of or against the accused:" Hoffman's Course of Legal Study, vol. i, pp. 367, 368; see also The (London) Law Magazine, N. S. vol. iv, p. 317. [For the real reasons why confessions are often to be regarded as untrustworthy, and why, on the contrary, they are often spoken of as the highest evidence, see an article by the present editor, on Confessions, in the American Law Review, May–June, 1899.]

[3] Foster's Disc. p. 243. See also Lench *v.* Lench, 10 Ves. 518; Smith *v.* Burnham, 3 Sumn. 438.

[1] Dig. lib. 42, tit. 2, De Confess.; Van Leeuwen's Comm. b. 5, c. 21, § 1; 2 Poth. on Obl. (by Evans), App. Num. xvi, § 13; 1 Gilb. Evid. by Lofft, 216; Hawk. P. C. b. 2, c. 46, § 3, n. (1); Mortimer *v.* Mortimer, 2 Hagg. Conn. 315; Harris *v.* Harris, 2 Hagg. Eccl. 409; {see further State *v.* Brown, 48 Ia. 382: Com. *v.* Sanborn, 116 Mass. 61.}

sumption that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience.[2] Such confessions, so made by a prisoner, to any person, at any moment of time, and at any place, subsequent to the perpetration of the crime, and previous to his examination before the magistrate, are at common law received in evidence as among proofs of guilt.[3] Confessions, too, like admissions, may be inferred from the conduct of the prisoner, and from his silent acquiescence in the statements of others, respecting himself, and made in his presence; provided they were not made under circumstances which prevented him from replying to them.[4] The degree of credit due to them is to be estimated by the jury under the circumstances of each case.[5] Confessions made before the examining magistrate, or during imprisonment, are affected by additional considerations.

Confessions as Sufficient Evidence for Conviction.

§ 216. **Judicial Confessions; Plea of Guilty.** Confessions are divided into two classes, [with reference to their sufficiency in evidence for a conviction,] namely, judicial and extrajudicial. Judicial confessions are those which are made before the magistrate, or in court, in the due course of legal proceedings; and it is essential that they be made of the free will of the party, and with full and perfect knowledge of the nature and consequences of the confession. Of this kind are the preliminary examinations, taken in writing by the magistrate, pursuant to statutes; and the plea of "guilty" made in open court to an indictment. Either of these is sufficient to found a conviction, even if to be followed by sentence of death, they being deliberately made, under the deepest solemnities, with the advice of counsel, and the protecting caution and oversight of the judge.[1] Such was the rule of the Roman law: "Confessos in jure, pro judicatis haberi placet;" and it may be deemed a rule of univer-

[2] [For an examination of these apparently inconsistent views as to the weight of confessions, see the article by the present editor in the American Law Review, above referred to.]

[3] Lambe's Case, 2 Leach Cr. Cas. 625, 629, per Grose, J.; Warickshall's Case, 1 id. 298; McNally's Evid. 42, 47.

[4] *Supra*, § 197; R. *v.* Bartlett, 7 C. & P. 832; R. *v.* Smithies, 5 id. 332; R. *v.* Appleby, 3 Stark. 33; Joy on Confessions, etc., 77–80; Jones *v.* Morrell, 1 Car. & Kir. 266; {State *v.* Smith, 30 La. An. Pt. I, 457; Campbell *v.* State, 55 Ala. 80; Kelley *v.* State, 55 N. Y. 565; *supra*, § 197; see Drumright *v.* State, 29 Ga. 430; People *v.* McCrea, 32 Cal. 98; Lawson *v.* State, 20 Ala. 65; State *v.* Flanagin, 25 Ark. 92.} [But note the distinctions already mentioned in § 213.]

[5] Coon *v.* State, 13 Sm. & M. 246; McCann *v.* State, ib. 471; [for the jury's use of the confession, see *post*, § 219 *b*.]

[1] [Staundford Pl. Cr. b. 2, c. 51; Hale Pl. Cr., Emlyn's ed. 225; Hawkins Pl. Cr. b. 2, c. 31, sects. 1–3; Att'y-Gen'l *v.* Mico, Hardres 139; such a confession must not "proceed from fear, menace, or duress."] {It is of course also admissible in evidence: Com. *v.* Brown, 150 Mass. 330.}

sal jurisprudence.[2] Extrajudicial confessions are those which are made by the party elsewhere than [in pleading] before a magistrate, or in court; this term embracing not only explicit and express confessions of crime, but all those admissions of the accused from which guilt may be implied. All confessions of this kind are receivable in evidence, being proved like other facts, to be weighed by the jury.

§ 217. **Extrajudicial Confessions; Proof of Corpus Delicti as Corroboration.** Whether extrajudicial confessions uncorroborated by any other proof of the *corpus delicti* are of themselves sufficient to found a conviction of the prisoner, has been gravely doubted. In the Roman law, such naked confessions amounted only to a *semiplena probatio*, upon which alone no judgment could be founded; and at most the party could only in proper cases be put to the torture. But if voluntarily made, in the presence of the injured party, or if reiterated at different times in his absence, and persisted in, they were received as plenary proof.[1] In each of the English cases usually cited in favor of the sufficiency of this evidence, there was some corroborating circumstance.[2] In the United States, the prisoner's confession, when the *corpus delicti* is not otherwise proved, has been held insufficient for his conviction; and this opinion certainly best accords with the humanity of the criminal code, and with the great degree of caution applied in receiving and weighing the evi-

[2] Cod. Lib. 7, tit. 59; 1 Poth. on Obl. part 4, c. 3, § 1, n. 798; Van Leeuwen's Comm. b. 5, c. 21, § 2; Mascard. De Probat. vol. i, Concl. 344; *supra*, § 179.

[1] N. Everhard. Concil. xix, 8, lxxii, 5, cxxxi, 1, clxv, 1, 2, 3, clxxxvi, 2, 3, 11; Mascard. De Probat. vol. 1, Concl. 347, 349; Van Leeuwen's Comm. b. 5, c. 21, §§ 4, 5; B. Carpzov. Practic. Rerum Criminal. Pars II, Quæst. n. 8.

[2] Wheeling's Case, 1 Leach Cr. Cas. 349, n., seems to be an exception; but it is too briefly reported to be relied on; it is in these words: "But in the case of *John Wheeling*, tried before Lord Kenyon, at the Summer Assizes at Salisbury, 1789, it was determined that a prisoner may be convicted on his own confession, when proved by legal testimony, though it is totally uncorroborated by any other evidence." But in Eldridge's Case, Russ. & Ry. 440, who was indicted for the larceny of a horse, the beast was found in his possession, and he had sold it for £12, after asking £35, which last was its fair value. In the case of Falkner and Bond, ib. 481, the person robbed was called upon his recognizance, and it was proved that one of the prisoners had endeavored to send a message to him to keep him from appearing. In White's Case, ib. 508, there was strong circumstantial evidence, both of the larceny of the oats from the prosecutor's stable, and of the prisoner's guilt; part of which evidence was also given in Tippet's Case, ib. 509, who was indicted for the same larceny; and there was the additional proof, that he was an under-hostler in the same stable. And in all these cases, except that of Falkner and Bond, the confessions were solemnly made before the examining magistrate, and taken down in due form of law. In the case of Falkner and Bond, the confessions were repeated, once to the officer who apprehended them, and afterwards on hearing the depositions read over, which contained the charge. In Stone's Case, Dyer, 215, pl. 50, which is a brief note, it does not appear that the *corpus delicti* was not otherwise proved; on the contrary, the natural inference from the report is, that it was. In Francia's Case, 6 State Tr. 58, [15 How. St. Tr. 920,] there was much corroborative evidence; but the prisoner was acquitted; and the opinion of the judges went only to the sufficiency of the confession solemnly made, upon the arraignment of the party for high treason, and this only upon the particular language of the statutes of Edw. VI. See Foster, Disc. pp. 240–242. [In R. *v.* Unkles, Ir. R. 8 C. L. 50, and R. *v.* Sullivan, 16 Cox Cr. 347, 380, the doctrine of R. *v.* Wheeling, *supra*, is approved.]

dence of confessions in other cases, and it seems countenanced by approved writers on this branch of the law.[3]

§ 217 *a* [235]. **Confessions of Treason.** It was formerly doubted whether the confession of the prisoner, indicted for high treason, could be received in evidence, unless it were made upon his arraignment, in open court, and in answer to the indictment; the statutes on this subject requiring the testimony of two witnesses to some overt act of treason.[1] But it was afterwards settled, and it is now agreed, that though, by those statutes, no confession could operate conclusively, and without other proof, to convict the party of treason, unless it were judicially made in open court upon the arraignment, yet that, in all cases, the confession of a criminal might be given in evidence against him; and that in cases of treason, if such confession be proved by two witnesses, it is proper evidence to be left to a jury.[2] And, in regard to collateral facts which do not conduce to the proof of any overt acts of treason, they may be proved as at common law by any evidence competent in other criminal cases.[3]

3. *Construction of Confessions.*

§ 218. **Confession to be taken as a Whole.** In the proof of confessions, as in the case of admissions in civil cases, the whole of what the prisoner said on the subject, at the time of making the confession, should be taken together.[1] This rule is the dictate of

[3] Guild's Case, 5 Halst. 163, 185; Long's Case, 1 Hayw. 524 (455); Hawk. P. C. b. 2, c. 46, § 18; {Com. *v.* Tarr, 4 Allen 315; People *v.* Porter, 2 Parker C. R. 14; People *v.* Hennessey, 15 Wend. 147; Ruloff *v.* People, 18 N. Y. 179; Bergen *v.* People, 17 Ill. 426; Brown *v.* State, 32 Miss. 433; State *v.* German, 54 Mo. 526; State *v.* Keeler, 28 Iowa 553; State *v.* Feltes, 51 id. 495; Priest *v.* State, 10 Neb. 393; Johnson *v.* State, 59 Ala. 37; Cunningham *v.* Com., 9 Bush 149 (by statute);} [People *v.* Jones, Cal., 55 Pac. 698; Dugan *v.* Com., Ky., 43 S. W. 418; Davis *v.* State, Ga., 32 S. E. 158. It seems that the general notion is merely that of securing some corroboration before convicting, and that, on the one hand, other evidence merely of the *corpus delicti* will suffice, and, on the other hand, other evidence not necessarily directed towards the *corpus delicti* will equally suffice; see Bergen *v.* People, 17 Ill. 426, and the other cases *supra;* Bartley *v.* People, 156 Ill. 234.]

[1] Foster's Disc. 1, § 8, pp. 232–244; 1 East's P. C. 131–133. Under the Stat. 1 Ed. VI, c. 12, and 5 Ed. VI, c. 11, requiring two witnesses to convict of treason, it has been held sufficient if one witness prove one overt act, and another prove another, if both acts conduce to the perpetration of the same species of treason charged upon the prisoner: Lord Stafford's Case, T. Raym. 407; 3 St. Tr. 204, 205; 1 East's P. C. 129; 1 Burr's Trial 196.

[2] Francia's Trial, 1 East's P. C. 133–135. [But this seems not to have been the effect of Francia's Trial, which looked rather in the opposite direction. In Willis' Trial, 15 How. St. Tr. 623, however, the above view was taken; yet the question (which turned on the interpretation of St. 7 Wm. III, c. 3), remained unsettled in Foster's time: Discourse, *supra*, 241, and in East's time: East, Pl. Cr. I, 132. The controversy is more fully explained in an article by the present editor on Confessions, in the American Law Review, May–June, 1899.]

[3] Smith's Case, Fost. Disc. p. 242; East's Pl. Cr. I, 130. See *post*, §§ 254, 255.

[1] The evidence must be confined to his confessions in regard to the particular offence of which he is indicted; if it relates to another and distinct crime, it is inadmissible: R. *v.* Butler, 2 Car. & Kir. 221.

reason, as well as of humanity. The prisoner is supposed to have stated a proposition respecting his own connection with the crime; but it is not reasonable to assume that the entire proposition, with all its limitations, was contained in one sentence, or in any particular number of sentences, excluding all other parts of the conversation. As in other cases the meaning and intent of the parties are collected from the whole writing taken together, and all the instruments, executed at one time by the parties, and relating to the same matter, are equally resorted to for that purpose, so here. [This principle, in its application, has several detailed consequences. (1) The prosecution must put in the whole of the accused's statement, including the portions favorable to himself as well as those unfavorable.[2] But this does not prevent the use of statements which are separate in themselves though not forming all the accused's utterances,[3] nor of such fragments of a connected statement as were alone heard or remembered by the witness.[4] Moreover, the witness need not be able to give the exact words, provided he can give the substance.[5]] (2) If one part of a conversation is relied on, as proof of a confession of the crime, the prisoner has a right to lay before the Court the whole of what was said in that conversation; not being confined to so much only as is explanatory of the part already proved against him, but being permitted to give evidence of all that was said upon that occasion, relative to the subject-matter in issue;[6] for, as has been already observed respecting admissions,[7] unless the whole is received and considered, the true meaning and import of the part which is good evidence against him cannot be ascertained. (3) But if, after the whole statement of the prisoner is given in evidence, the prosecutor can contradict any part of it, he is at liberty to do so; and then the whole testimony is left to the jury for their consideration, precisely as in other cases, where one part of the evidence is contradictory to another;[8] for it is not to be supposed that all the parts of a confession are entitled to equal

[2] [Hawkins, Pl. Cr. II, c. 46, s. 36; R. *v.* Jones, 2 C. & P. 629; R. *v.* Bowen, 3 id. 603; R. *v.* Higgins, ib. 603; R. *v.* Steptoe, 4 id. 397; R. *v.* Clewes, ib. 221; Chambers *v.* State, 26 Ala. 63; Corbett *v.* State, 31 id. 341; Eiland *v.* State, 52 id. 335 (but see Webb *v.* State, 100 id. 47); Coon *v.* State, 13 Sm. & M. 249; McCann *v.* State, ib. 498; Bower *v.* State, 5 Mo. 382; State *v.* Carlisle, 57 id. 106; {State *v.* Worthington, 64 N. C. 594; State *v.* Mahon, 32 Vt. 244;} Brown's Case, 9 Leigh 633; Griswold *v.* State, 24 Wis. 148.]

[3] [State *v.* Cowan, 7 Ired. 239; Com. *v.* Pitsinger, 110 Mass. 101.]

[4] [State *v.* Madison, 47 La. An. 30; State *v.* Covington, 2 Bail. 569; State *v.* Gossett, 9 Rich. 428; Shifflet's Case, 14 Gratt. 652;] {Levison *v.* State, 54 Ala. 520; but compare Berry *v.* Com., 10 Bush 15; People *v.* Gelabert, 39 Cal. 663.}

[5] [Brister *v.* State, 26 Ala. 107, 127; State *v.* Desroches, 48 La. An. 428; Berry *v.* Com., 10 Bush 17.]

[6] Per Lord C. J. Abbott, in The Queen's Case, 2 Brod. & Bing. 297, 298; R. *v.* Paine, 5 Mod. 165; Hawk. P. C. b. 2, c. 46, § 5; R. *v.* Jones, 2 C. & P. 629; R. *v.* Higgins, 3 id. 603; R. *v.* Hearne, 4 id. 215; R. *v.* Clewes, ib. 221; R. *v.* Steptoe, ib. 397; Brown's Case, 9 Leigh 633; [State *v.* Jones, 47 La. An. 1524.]

[7] *Supra*, § 201, and cases there cited.

[8] R. *v.* Jones, 2 C. & P. 629.

credit. The jury may believe that part which charges the prisoner, and reject that which is in his favor, if they see sufficient grounds for so doing.[9] If what he said in his own favor is not contradicted by evidence offered by the prosecutor, nor improbable in itself, it will naturally be believed by the jury; but they are not bound to give weight to it on that account, but are at liberty to judge of it like other evidence, by all the circumstances of the case. (4) And if the confession implicates other persons by name, yet it must be proved as it was made, not omitting the names;[10] but the judge will instruct the jury, that it is not evidence against any but the prisoner who made it.[11]

4. *Admissibility of Confessions.*

§ 219. **General Principle.** Before any confession can be received in evidence in a criminal case, it must be shown that it was voluntary.[1] "A free and voluntary confession," said Eyre, C. B.,[2] "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."[3]

[9] R. *v.* Higgins, 3 C. & P. 603; R. *v.* Steptoe, 4 id. 397; R. *v.* Clewes, ib. 221; Respublica *v.* McCarty, 2 Dall. 86, 88; Bower *v.* State, 5 Mo. 364; *supra*, § 201; State *v.* West, 1 Houst. Cr. C. 371; Eiland *v.* State, 52 Ala. 322; Griswold *v.* State, 24 Wis. 144; State *v.* Mahon, 32 Vt. 241; [compare Myers *v.* State, 97 Ga. 76.]

[10] R. *v.* Hearne, 4 C. & P. 215; R. *v.* Clewes, ib. 221 (per Littledale, J., who said he had considered this point very much, and was of opinion that the names ought not to be left out; it may be added, that the credit to be given to the confession may depend much on the probability that the persons named were likely to engage in such a transaction); see also R. *v.* Fletcher, ib. 250. The point was decided in the same way in R. *v.* Walkley, 6 id. 175, by Gurney, B., who said it had been much considered by the judges; Mr. Justice Parke thought otherwise: Barstow's Case, Lewin Cr. Cas. 110. [Agreeing with R. *v.* Clewes are State *v.* Donelon, 45 La. An. 744; State *v.* Fournier, Vt., 35 Atl. 178.]

[11] [On the principle of § 233, *post*.]

[1] [At this point the author inserted the following sentence, apparently out of place: "The course of practice is, to inquire of the witness whether the prisoner had been told that it would be better for him to confess, or worse for him if he did not confess, or whether language to that effect had been addressed to him: 1 Phil. on Evid. 401; 2 East Pl. Cr. 659." No cases are cited; and it seems incorrect to say that the "course of practice" involved this usual inquiry. Whether such a communication to the accused makes the confession inadmissible is another question, treated *post*, § 220.]

[2] Warickshall's Case, 1 Leach Cr. Cas. 299; McNally's Evid. 47; Knapp's Case, 10 Pick. 489, 490; Chabbock's Case, 1 Mass. 144.

[3] In Scotland, this distinction between voluntary confessions and those which have been extorted by fear or elicited by promises is not recognized, but all confessions, obtained in either mode, are admissible at the discretion of the judge. In strong cases of undue influence, the course is to reject them; otherwise, the credibility of the evidence is left to the jury; see Alison's Criminal Law of Scotland, pp. 581, 582.

[For the history of this limitation as to voluntary confessions, see the article in the American Law Review, already referred to.]

§ 219 *a*. **Tests in applying the Principle.** The material inquiry, therefore, is, whether the confession has been obtained by the influence of hope or fear, applied by a third person to the prisoner's mind. [But this, after all, is merely one of several tests or rules which have been employed as representing a general principle underlying these differently phrased tests. "The foundation of all rules upon this subject rests upon an anxiety to exclude confessions that are probably not true; and therefore to exclude those that are not voluntary because such are probably untrue."[1] "The ground," said Chief Justice Shaw,[2] "on which confessions made by a party accused, under promises of favor or threats of injury, are excluded as incompetent is not because any wrong is done to the accused in using them, but because he may be induced, by the pressure of hope or fear, to admit facts unfavorable to him, without regard to their truth, in order to obtain the promised relief or avoid the threatened danger; and therefore admissions so obtained have no just and legitimate tendency to prove the facts admitted." Lord Campbell, C. J., says:[3] "It is a trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary; but this only means that it shall not be induced by improper threats or promises, because under such circumstances the party may have been influenced to say that which is not true, and the supposed confession cannot be safely acted on."[4] This being the general underlying principle — the risk of a false confession of guilt, under the inducement of powerful considerations, — various tests or rules of thumb have obtained more or less currency in the application of the principle to the different kinds of influences that have operated to induce the confession.

(1) The only sound and satisfactory test, judged by the above principle, is one which has unfortunately found only infrequent use. "The only proper question is, whether the inducement held out to the prisoner was calculated to make his confession an untrue one."[5] "The controlling inquiry[6] is whether there had been any threat of such a nature that from fear of it the prisoner was likely to have told an untruth. If so, the confession should not be admitted. Its exclusion rests on the connection with the inducement; they stand to each other in the relation of cause and effect. If it is apparent that no such connection exists, there is no reason for the exclusion of the evidence."[7]

[1] [Withers, J., in State *v.* Vaigneur, 5 Rich. L. 400; see, in accord, the first sentence of § 231, *post*.]

[2] [Com. *v.* Morey, 1 Gray 462.]

[3] [Scott's Case, 1 Dears. & B. 58.]

[4] [So also Cooley, J., in People *v.* Wolcott, 51 Mich. 615; Bleckley, C. J., in Cornwall *v.* State, 113 N. C. 277, 283; and many other judges.]

[5] [Coleridge, J., in R. *v.* Thomas, 7 C. & P. 346; so also R. *v.* Holmes, 1 C. & K. 248; R. *v.* Hornbrook, 1 Cox Cr. 54; R. *v.* Garner, 1 Den. Cr. C. 331, Erle, J.; R. *v.* Reason, 12 Cox Cr. 229; Joy, Confessions, 13.]

[6] [Haralson, J., in Beckham *v.* State, 100 Ala. 15, 17.]

[7] [So also Williams *v.* State, 63 Ark. 527 ("whether there has been any threat or

(2) It is much more common to state the test without any reference to the probability of the inducement's causing an untrue confession of guilt, *i. e.* to state that a confession is inadmissible if made under the influence of a promise or a threat, or (taking the subjective point of view to express a similar notion) if it is made through fear (of harm threatened) or through hope (of benefit promised); and this has been distinctly taken by many Courts to include any sort of threat or promise whatever.[8]

(3) Another test, quite as early, historically, and quite as common as the preceding one, is whether the confession was "voluntary." But this phrase is so indefinite that it is of little service in itself, and is usually found in combination with the preceding one, called in as a subordinate test.[9] It is the least satisfactory one, not only for this reason, but also because it is inaccurate (since inadmissible confessions made under the hope of reward are still in strictness voluntary), and, further, because it tends misleadingly to suggest some connection between the present doctrine and the privilege against self-crimination (*post*, § 469 *d*).[10]

Such being the three chief forms of test for confessions, it remains to notice the application of them to various specific inducements under which confessions have been made. The spirit of extreme caution and liberality towards accused persons has resulted in many rulings not to be defended upon principle; but the tendency in most courts to-day is towards repudiating the most extreme of these rulings of the first half of the nineteenth century, and to approximate toward the use of the first above-mentioned and only correct test.

But first as to the respective functions of judge and jury in applying the test.]

§ 219 *b*. **Judge and Jury.** The evidence to this point, being in its nature preliminary, is addressed to the judge, who admits the proof of the confession to the jury, or rejects it, as he may or may not find it to have been drawn from the prisoner, by the application of those motives.[1] [It is sometimes said that even when the confession is

promise of such a nature that the prisoner would be likely to tell an untruth from the fear of the threat or hope of profit from the promise"); Fife *v.* Com., 29 Pa. 437; U. S. *v.* Stone, 8 Fed. 232, 241, 256; Young *v.* State, 68 Ala. 575.]

[8] [R. *v.* Moore, 2 Den. Cr. C. 525; State *v.* Long, Haywood 455; Bonner *v.* State, 55 Ala. 245.]

[9] [*E. g.* Thompson's Case, 1 Leach Cr. C. (4th ed.) 293; R. *v.* Fennell, 7 Q. B. D. 150; R. *v.* Thompson, 1893, 2 Q. B. 17; State *v.* Jones, 54 Mo. 479.]

[10] [The express statement, in Bram *v.* U. S., 168 U. S. 532, that the constitutional amendment embodying that privilege "was but a crystallization of the doctrine as to confessions" is simply without any foundation whatever, either in history, policy, or principle. If proof were needed, it is found in the circumstances, (1) that the lines of precedents are wholly distinct, (2) that the privilege applies to witnesses as such, while confessions are concerned only with the party-defendant, (3) that a statement may be not privileged and yet inadmissible as a confession, and *vice versa*, (4) that a statement obtained by violating the privilege may still be used against a person other than the privileged one. The fallacy was long ago exploded by Mr. J. Seldon, in Hendrickson *v.* People, 10 N. Y. 33, and People *v.* McMahon, 15 id. 386; see also the exposition *post*, in Appendix III.

[1] Boyd *v.* State, 2 Humphreys 39; R. *v.* Martin, 1 Armstr. Macartn. & Ogle 197;

admitted, the jury may still reject it if it appears not voluntary;[2] but this seems erroneous; for the jury have nothing to do with this preliminary question of admissibility; and if the confession is once left to them, they may reject it because they do not believe it, but not because it is not voluntary.[3]] This matter resting wholly in the discretion of the judge, upon all the circumstances of the case,[4] it is difficult to lay down particular rules *a priori*, for the government of that discretion. The rule of law, applicable to all cases, only demands that the confession shall have been made voluntarily, without the appliances of hope or fear by any other person; and whether it was so made or not is for him to determine, upon consideration of the age, situation, and character of the prisoner, and the circumstances under which it was made.[5] Language addressed by others, and sufficient to overcome the mind of one, may have no effect upon that of another; a consideration which may serve to reconcile some contradictory decisions, where the principal facts appear similar in the reports, but the lesser circumstances, though often very material in such preliminary inquiries, are omitted. But it cannot be denied that this rule has been sometimes extended quite too far, and been applied to cases where there could be no reason to suppose that the inducement had any influence upon the mind of the prisoner.[6]

State *v.* Grant, 9 Shepl. 171; U. S. *v.* Nott, 1 McLean 499; State *v.* Harman, 3 Harringt. 567; {Brown *v.* State, 91 Ill. 506; Johnson *v.* State, 59 Ala. 37; Wade *v.* State, 7 Baxt. (Tenn.) 80; Chabbock's Case, 1 Mass. 144; Com. *v.* Taylor, 5 Cush. 606; Com. *v.* Morey, 1 Gray 461 (but compare Com. *v.* Piper, 120 Mass. 185; Com. *v.* Smith, 119 id. 305; Com. *v.* Cullen, 111 id. 436; Com. *v.* Cuffee, 108 id. 285); Com. *v.* Culver, 126 id. 464;} [Redd *v.* State, 69 Ala. 260; State *v.* Duncan, 64 Mo. 265; Rufer *v.* State, 25 Oh. St. 469; Fife *v.* Com., 29 Pa. 437; State *v.* Gossett, 9 Rich. 435; Cain *v.* State, 18 Tex. 390; Smith's Case, 10 Gratt. 737; Dugan *v.* Com., Ky., 43 S. W. 418; U. S. *v.* Stone, 8 Fed. 256 (leading case).]

[2] [Garrard *v.* State, 50 Miss. 152; Hamlin *v.* State, Tex. Cr., 47 S. W. 656; Com. *v.* Bond, 170 Mass. 41; Wilson *v.* U. S., 162 U. S. 613;] {People *v.* Howes, 81 Mich. 396; People *v.* Swetland, 77 id. 53; People *v.* Barker, 60 id. 277; Thomas *v.* State, 84 Ga. 618; Carr *v.* State, ib. 250.}

[3] [Burton *v.* State, 107 Ala. 108 (leading case); Holland *v.* State, 39 Fla. 178. But it would seem that if the existence of the improper inducement is doubtful as a question of fact, the confession may be left to the jury to determine this preliminary question: Com. *v.* Preece, 140 Mass. 276; Com. *v.* Burroughs, 162 id. 513; Burdge *v.* State, 53 Oh. 512.]

[4] [No Court goes so far as this; but a few Courts declare the finding of the facts of the inducement to be determinable by the trial Court: Holland *v.* State, 39 Fla. 178; State *v.* Vann, 82 N. C. 632; while a few Courts use certain general terms, hardly significant in practice, about the trial Court's discretion: see Williams *v.* State, 63 Ark. 527; State *v.* Willis, Conn., 41 Atl. 820; Bartley *v.* People, 156 Ill. 234; Roesel *v.* State, N. J. L., 41 Atl. 408; State *v.* Cannon, 49 S. C. 550.]

[5] McNally's Evid. 43; Nute's Case, 6 Petersdorf's Abr. 82; Knapp's Case, 10 Pick. 496; U. S. *v.* Nott, 1 McLean 499; *supra*, § 49; Guild's Case, 5 Halst. 175, 180; Drew's Case, 8 C. & P. 140; R. *v.* Thomas, 7 id. 345; R. *v.* Court, ib. 486.

[6] Parke, B., in R. *v.* Baldry, 16 Jur. 599, 2 Den. Cr. C. 441. "By the law of England, in order to render a confession admissible in evidence, it must be perfectly voluntary; and there is no doubt that any inducement, in the nature of a promise or of a threat, held out by a person in authority, vitiates a confession. The decisions to that effect have gone a long way. Whether it would not have been better to have left the

[As to where the burden of proof lies, the orthodox rule prescribes that the prosecution shall show the confession not to have been improperly obtained by the person receiving it,[7] and it has even been held that an improper inducement from any other person must be negatived.[8] But in England the modern doctrine seems to be that improper inducements need to be negatived only where a doubt has been raised as to their existence;[9] and the best rule, obtaining in only a few jurisdictions, is that the defendant must show that an improper inducement was applied to obtain the confession.[10]]

§ 220. **Various Specific Inducements.** The rule under consideration has been illustrated in a variety of cases. Thus, where the prosecutor said to the prisoner, "Unless you give me a more satisfactory account, I will take you before a magistrate," evidence of the confession thereupon made was rejected.[1] It was also rejected, where the language used by the prosecutor was, "If you will tell me where my goods are, I will be favorable to you;"[2] where the constable who arrested the prisoner said, "It is of no use for you to deny it, for there are the man and boy who will swear they saw you do it;"[3] where the prosecutor said, "He only wanted his money, and if the prisoner gave him that he might go to the devil, if he pleased;"[4] and where he said he should be obliged to the prisoner, if he would tell all he knew about it, adding, "If you will not, of course we can do nothing," meaning nothing for the prisoner.[5] So where the prisoner's superior officer in the police said to him, "Now be cautious in the answers you give me to the questions I am going to put to you about this watch;" the confession was held inadmissible.[6] There is more difficulty in ascertaining what is such a

whole to go to the jury, it is now too late to inquire; but I think there has been too much tenderness towards prisoners in this matter. I confess 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, that the rule has been extended quite too far, and that justice and common sense have too frequently been sacrificed at the shrine of mercy;" {see State *v.* Grant, 22 Me. 171; Com. *v.* Morey, 1 Gray 461; Fife *v.* Com., 29 Pa. St. 429; Spears *v.* Ohio, 2 Oh. St. 583.}

[7] [Thompson's Case, 1 Leach Cr. C. 3d ed. 328, *semble;* R. *v.* Warringham, 2 Den. Cr. C. 447; Bonner *v.* State, 55 Ala. 245; Hopt *v.* Utah, 110 U. S. 587;] {Nicholson *v.* State, 38 Md. 140; People *v.* Soto, 49 Cal. 69; Thompson's Case, 20 Gratt. 724; Johnson *v.* State, 30 La. An. 881; State *v.* Garvey, 28 id. 925; Barnes *v.* State, 36 Tex. 356.}

[8] [State *v.* Garvey, 28 La. An. 925.]

[9] [R. *v.* Thompson, 1893, 2 Q. B. 12, 18.]

[10] [Com. *v.* Culver, 126 Mass. 464; Rufer *v.* State, 25 Oh. St. 469;] see R. *v.* Garner, 2 C. & K. 920. [Where a written confession denies the existence of any improper inducement, the same result would follow: Hauk *v.* State, 148 Ind. 238.

[1] Thompson's Case, 1 Leach Cr. Cas. 325. See also Com. *v.* Harman, 5 Barr 269; State *v.* Cowan, 7 Ired. 239.

[2] Cass's Case, 1 Leach Cr. Cas. 328, n.; Boyd *v.* State, 2 Humph. 39.

[3] R. *v.* Mills, 6 C. & P. 146.

[4] R. *v.* Jones, Russ. & Ry. 152. See also Griffin's Case, ib. 151.

[5] R. *v.* Partridge, 7 C. & P. 551. See also Guild's Case, 5 Halst. 163.

[6] R. *v.* Fleming, 1 Armst. Macartn. & Ogle 330. But where the examining magis-

threat, as will exclude a confession; though the principle is equally clear, that a confession induced by threats is not voluntary, and therefore cannot be received.[7] [On principle, the advice by any person, "You had better tell the truth," or its equivalent, cannot possibly vitiate the confession, since it does not tend to produce a false statement; and to this effect is the modern weight of authority.[8] But advice that "You had better confess," *i. e.* irrespective of actual guilt, has generally been held an improper inducement.[9] Confessions made under threats of physical violence — as where the accused is in the hands of a mob — are inadmissible;[10] so also a confession obtained by promise of pardon.[11] Indefinite promises of favorable legal action stopping short of complete immunity are usually treated as affording an improper inducement;[12] as also a promise not to arrest.[13] A statement that "what you say will be used for you" is no longer regarded as vitiating the confession.[14]]

§ 220 *a*. It is extremely difficult to reconcile these and similar cases with the spirit of the rule, as expounded by Chief Baron Eyre, whose language is quoted in a preceding section. The difference is between confessions made voluntarily, and those "forced from the

trate said to the prisoner, "Be sure you say nothing but the truth, or it will be taken against you, and may be given in evidence against you at your trial," the statement thereupon made was held admissible: R. *v.* Holmes, 1 C. & K. 248; S. P. R. *v.* Attwood, 5 Cox C. C. 322.

[7] Thornton's Case, 1 Mood. Cr. Cas. 27; Long's Case, 6 C. & P. 179; Roscoe's Crim. Evid. 34; Dillon's Case, 4 Dall. 116. Where the prisoner's superior in the post-office said to the prisoner's wife, while her husband was in custody for opening and detaining a letter, "Do not be frightened; I hope nothing will happen to your husband beyond the loss of his situation;" the prisoner's subsequent confession was rejected, it appearing that the wife might have communicated this to the prisoner: R. *v.* Harding, 1 Armst. Macartn. & Ogle 340.

[8] [R. *v.* Court, 7 C. & P. 486 (leading case); R. *v.* Hewett, Carr. & M. 534; R. *v.* Moore, 2 Den. Cr. C. 523, Erle, J.; R. *v.* Jarvis, L. R. 1 C. C. R. 96; R. *v.* Reeve, ib. 362; Aaron *v.* State, 37 Ala. 106; King *v.* State, 40 id. 321 (leading case); State *v.* Potter, 18 Conn. 178, *semble*; Rafe *v.* State, 20 Ga. 62; Valentine *v.* State, 77 id. 472; Nicholson *v.* State, 38 Md. 153; Com. *v.* Tuckerman, 10 Gray 191; Com. *v.* Mitchell, 117 Mass. 432; Com. *v.* Smith, 119 id. 307; State *v.* Staley, 14 Minn. 111; State *v.* Anderson, 96 Mo. 249; State *v.* Gossett, 9 Rich. 428; State *v.* Kirby, 1 Strobh. 155; State *v.* Carr, 37 Vt. 192.

Contra: R. *v.* Enoch, 5 C. & P. 539; R. *v.* Garner, 1 Den. Cr. C. 329; R. *v.* Bate, 11 Cox Cr. 686; R. *v.* Dogherty, 13 id. 23; R. *v.* Fennell, 7 Q. B. D. 147; People *v.* Thompson, 84 Cal. 605; State *v.* York, 37 N. H. 175; State *v.* Whitfield, 70 N. C. 356; Com. *v.* Harman, 4 Pa. St. 269.]

[9] [R. *v.* Kingston, 4 C. & P. 387; R. *v.* Shepherd, 7 id. 579; R. *v.* Thomas, 6 id. 353; R. *v.* Warringham, 2 Den. Cr. C. 447; R. *v.* Coley, 10 Cox Cr. 536; Banks *v.* State, 84 Ala. 430; Green *v.* State, 88 Ga. 516; Com. *v.* Nott, 135 Mass. 269; State *v.* Brockman, 46 Mo. 569; Vaughan's Case, 17 Gratt. 580.]

[10] [Miller *v.* People, 39 Ill. 457; Barnes *v.* State, 36 Tex. 356.]

[11] [R. *v.* Gillis, 11 Cox Cr. 69; Com. *v.* Knapp, 9 Pick. 499; State *v.* Johnson, 30 La. An. 881.]

[12] R. *v.* Cooper, 5 C. & P. 535; R. *v.* Mansfield, 14 Cox Cr. 639; Porter *v.* State, 55 Ala. 101; Austine *v.* People, 51 Ill. 238; People *v.* Wolcott, 51 Mich. 614; Boyd *v.* State, 2 Humph. 40.]

[13] [R. *v.* Luckhurst, 6 Cox Cr. 243; Beery *v.* U. S., 2 Colo. 189, 203.]

[14] [R. *v.* Baldry, 2 Den. Cr. C. 430, repudiating earlier rulings; Roesel *v.* State, N. J. L., 41 Atl. 408.]

mind by the flattery of hope, or by the torture of fear." If the party has made his own calculation of the advantages to be derived from confessing, and thereupon has confessed the crime, there is no reason to say that it is not a voluntary confession. It seems that, in order to exclude a confession, the motive of hope or fear must be directly applied by a third person, and must be sufficient, in the judgment of the Court, so far to overcome the mind of the prisoner as to render the confession unworthy of credit.[1]

§ 220 *b*. **Confessions induced by Spiritual Exhortations, by Trick, etc.** Though it is necessary to the admissibility of a confession that it should have been voluntarily made, that is, that it should have been made, as before shown, without the appliances of hope or fear from persons having authority, yet it is not necessary that it should have been the prisoner's own spontaneous act. It will be received, though it were induced by spiritual exhortations, whether of a clergyman,[1] or of any other person;[2] by a solemn promise of secrecy, even confirmed by an oath;[3] or by reason of the prisoner's having been made drunken;[4] or by a promise of some collateral benefit or boon, no hope or favor being held out in respect to the criminal charge against him;[5] or by any deception practised on the prisoner, or false representation made to him for that purpose, provided there is no reason to suppose that the inducement held out was calculated to produce any untrue confession, which is the main point to be considered.[6] So, a confession is admissible, though it is elicited by

[1] See R. *v.* Baldry, 16 Jur. 599, 2 Den. Cr. C. 430, where this subject was very fully discussed, and the true principle recognized, as above quoted from Ch. Baron Eyre.

[1] R. *v.* Gilham, 1 Mood. Cr. Cas. 186, more fully reported in Joy on Confessions, 52–56; Com. *v.* Drake, 15 Mass. 161; [see R. *v.* Radford, 1 Mood. Cr. C. 197.] In the Roman law it is otherwise; penitential confessions to the priest being encouraged, for the relief of the conscience, and the priest being bound to secrecy by the peril of punishment. "Confessio coram sacerdote, in pœnitentia facta, non probat in judicio; *quia censetur facta coram Deo;* imo, si sacerdos eam enunciat, incidit in pœnam:" Mascardus, De Probat. vol. i, Concl. 377. It was lawful, however, for the priest to testify in such cases to the fact that the party had made a penitential confession to him, as the Church requires, and that he had enjoined penance upon him; and, with the express consent of the penitent, he might lawfully testify to the substance of the confession itself: Ib. See *post*, § 247, as to the privilege in such a case.

[2] R. *v.* Wild, 1 Mood. Cr. Cas. 452; R. *v.* Court, 7 C. & P. 486; Joy on Confessions, 49, 51; [R. *v.* Gibney, Jebb Cr. C. 15; R. *v.* Hodgson, 1 Mood. Cr. C. 203; R. *v.* Sleeman, 6 Cox Cr. 245.]

[3] R. *v.* Shaw, 6 C. & P. 372; Com. *v.* Knapp, 9 Pick. 496, 500–510; [State *v.* Darnell, 1 Houst. Cr. C. 322.] So, if it was overheard, whether said to himself or to another: R. *v.* Simons, 6 C. & P. 540; [Com. *v.* Goodwin, 186 Pa. 218.]

[4] R. *v.* Spilsbury, 7 C. & P. 187; {Eskridge *v.* State, 25 Ala. 30; Com. *v.* Howe, 9 Gray 110; State *v.* Feltes, 51 Iowa 495; Jefferds *v.* People, 5 Park. Cr. R. 547; Lester *v.* State, 32 Ark. 727;} [Vaughan's Trial, 13 How. St. Tr. 507; State *v.* Berry, La. An. 24 So. 329; State *v.* Cannon, S. C., 30 S. E. 589 (morphine); Leach *v.* State, 99 Tenn. 584; White *v.* State, 32 Tex. Cr. 625.] {But a confession made during sleep is inadmissible: People *v.* Robinson, 19 Cal. 40.}

[5] R. *v.* Green, 6 C. & P. 655; R. *v.* Lloyd, ib. 393; {State *v.* Wentworth, 37 N. H. 196; *e. g.*, that he shall see his wife, or have some spirits, or have his handcuffs removed (R. *v.* Green; R. *v.* Lloyd), or be released from solitary confinement, and be allowed to associate with other prisoners: State *v.* Tatro, 50 Vt. 483.}

[6] R. *v.* Derrington, 2 C. & P. 418; Burley's Case, 2 Stark. Evid. 12, n.; {Com. *v.*

questions, whether put to the prisoner by a magistrate, officer, or private person; and the form of the question is immaterial to the admissibility, even though it assumes the prisoner's guilt.[7] In all these cases the evidence may be laid before the jury, however little it may weigh, under the circumstances, and however reprehensible may be the mode in which, in some of them, it was obtained. All persons, except counsellors and attorneys, are compellable at common law to reveal what they may have heard; and counsellors and attorneys are excepted only because it is absolutely necessary, for the sake of their clients, and of remedial justice, that communications to them should be protected.[8] Neither is it necessary to the admissibility of any confession, to whomsoever it may have been made, that it should appear that the prisoner was warned that what he said would be used against him. On the contrary, if the confession was voluntary, it is sufficient, though it should appear that he was not so warned.[9]

§ 220 *c*. **Confessions while under Arrest.** It has been thought that illegal imprisonment exerted such influence upon the mind of the prisoner as to justify the inference that his confessions, made during its continuance, were not voluntary; and therefore they have been rejected.[1] But this doctrine cannot yet be considered as satisfactorily established.[2] [That the mere fact of the accused person's being under arrest at the time of making the confession does not exclude it seems generally conceded.[3]]

§ 221. **Removing the Improper Inducement.** But though promises or threats have been used, yet if it appears to the satisfaction of the judge that their influence was totally done away before the confes-

Hanlon, 3 Brewst. Pa. 461;] [Stone *v.* State, 105 Ala. 60; Burton *v.* State, 107 id. 108; Cornwall *v.* State, 91 Ga. 277; State *v.* Brooks, 92 Mo. 542, 576.]

[7] R. *v.* Wild, 1 Mood. Cr. Cas. 452; R. *v.* Thornton, ib. 27; Gibney's Case, Jebb's Cr. Cas. 15; Kerr's Case, 8 C. & P. 179. See Joy on Confessions, 34–40, 42–44; Arnold's Case, 8 C. & P. 622; [R. *v.* Johnston, 15 Ir. C. L. 60; R. *v.* Berriman, 6 Cox Cr. C. 388; R. *v.* Cheverton, 2 F. & F. 833.]

[8] Per Patteson, J., in R. *v.* Shaw, 6 C. & P. 372; *infra*, §§ 247, 248 and notes.

[9] Gibney's Case, Jebb's Cr. Cas. 15; R. *v.* Magill, cited in McNally's Evid. 38; R. *v.* Arnold, 8 C. & P. 622; Joy on Confessions, 45–48.

[1] Per Holroyd, J., in Ackroyd and Warburton's Case, 1 Lewin Cr. Cas. 49.

[2] R. *v.* Thornton, 1 Mood. Cr. Cas. 27; [it was repudiated in Balbo *v.* People, 80 N. Y. 499; for the general doctrine that illegality in the mode of obtaining evidence does not exclude it, see *post*, § 254 *a*.]

[3] R. *v.* Wild, 1 Mood. Cr. C. 452; R. *v.* Gibney, Jebb Cr. C. 15; R. *v.* Johnston, 15 Ir. C. L. 60; Burton *v.* State, 107 Ala. 108; People *v.* Ramirez, 56 Cal. 536; State *v.* Trusty, Del., 40 Atl. 766; Green *v.* State, Fla., 23 So. 851; Nobles *v.* State, 98 Ga. 73; State *v.* Davis, Ida., 53 Pac. 678; Walker *v.* State, 136 Ind. 663; State *v.* Fortner, 43 Ia. 495; State *v.* Jones, 47 La. An. 1524; Com. *v.* Cuffee, 108 Mass. 287; Com. *v.* Bond, 170 id. 41; People *v.* Warner, 104 Mich. 337; State *v.* McClain, 137 Mo. 307; Faulkner *v.* Terr., 6 N. M. 464; People *v.* McGloin, 91 N. Y. 242; Com. *v.* Mosler, 4 Pa. St. 264; State *v.* Cook, 15 Rich. L. 29; Wilson *v.* U. S., 162 U. S. 613; State *v.* Bradley, 67 Vt. 465; State *v.* Munson, 7 Wash. 239; Connors *v.* State, 95 Wis. 77.

In Texas a statute seems to affect the doctrine peculiarly: [Marshall *v.* State, 5 Tex. App. 273; Angell *v.* State, id. 451; Davis *v.* State, ib. 510;] Barth *v.* State, Tex. Cr., 46 S. W. 228.]

sion was made, the evidence will be received. Thus, where a magistrate, who was also a clergyman, told the prisoner that if he was not the man who struck the fatal blow, and would disclose all he knew respecting the murder, he would use all his endeavors and influence to prevent any ill consequences from falling on him; and he accordingly wrote to the Secretary of State, and received an answer, that mercy could not be extended to the prisoner; which answer he communicated to the prisoner, who afterwards made a confession to the coroner; it was held that the confession was clearly voluntary, and as such it was admitted.[1] So, where the prisoner had been induced, by promises of favor, to make a confession, which was for that cause excluded, but about five months afterwards, and after having been solemnly warned by two magistrates that he must expect death and prepare to meet it, he again made a full confession, this latter confession was admitted in evidence.[2] In this case, upon much consideration, the rule was stated to be, that, although an original confession may have been obtained by improper means, yet subsequent confessions of the same or of like facts may be admitted, if the Court believes, from the length of time intervening, or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled.[3] In the absence of any such circumstances, the influence of the motives proved to have been offered will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence; and the confession will therefore be rejected.[4] Accordingly, where an inducement has been held out by an officer, or a prosecutor, but the prisoner is subsequently warned by the magistrate, that what he may say will be evidence against himself, or that a confession will be of no benefit to him, or he is simply cautioned by the magistrate not to say anything against himself, his confession, afterwards made, will be received as a voluntary confession.[5]

[1] R. *v.* Clewes, 4 C. & P. 221.

[2] Guild's Case, 5 Halst. 163, 168.

[3] Guild's Case, 5 Halst. 180. But otherwise the evidence of a subsequent confession, made on the basis of a prior one unduly obtained, will be rejected: Com. *v.* Harman, 4 Barr 269; State *v.* Roberts, 1 Dev. 259.

[4] Roberts' Case, 1 Dev. 259, 264; Meynell's Case, 2 Lewin's Cr. Cas. 122; Sherrington's Case, id. 123; R. *v.* Cooper, 5 C. & P. 535.

[5] R. *v.* Howes, 6 C. & P. 404; R. *v.* Richards, 5 id. 318; Nute's Case, 2 Russ. on Crimes, 648; Joy on Confessions, 27, 28, 69–75; R. *v.* Bryan, Jebb's Cr. Cas. 157. If the inducement was held out by a person of superior authority, and the confession was afterwards made to one of inferior authority, as a turnkey, it seems inadmissible, unless the prisoner was first cautioned by the latter: R. *v.* Cooper, 5 C. & P. 535. [The rulings depend much on the circumstances of each case, and, in England, upon a modern statute requiring express warning to be given; see further R. *v.* Hornbrook, 1 Cox Cr. 54; R. *v.* Horner, ib. 364; R. *v.* Collier, 3 id. 57; R. *v.* Sansome, 4 id. 206; R. *v.* Bond, ib. 235; R. *v.* Bate, 11 id. 686; Porter *v.* State, 55 Ala. 101; {McAdory *v.* State, 62 id. 154; People *v.* Johnson, 41 Cal. 452;} Beery *v.* U. S., 2 Colo. 203; State

§ 222. **Persons in Authority.** In regard to the person by whom the inducements were offered, it is very clear, that if they were offered by the prosecutor,[1] or by his wife, the prisoner being his servant,[2] or by an officer having the prisoner in custody,[3] or by a magistrate,[4] or, indeed, by any one having authority over him, or over the prosecution itself,[5] or by a private person in the presence of one in authority,[6] — the confession will not be deemed voluntary, and will be rejected. The authority, known to be possessed by those persons, may well be supposed both to animate the prisoner's hopes of favor, on the one hand, and on the other to inspire him with awe, and in some degree to overcome the powers of his mind. It has been argued, that a confession made upon the promises or threats of a person, erroneously believed by the prisoner to possess such authority, the person assuming to act in the capacity of an officer or magistrate, ought, upon the same principle, to be excluded. The principle itself would seem to require such exclusion; but the point is not known to have received any judicial consideration.

§ 223. But whether a confession, made to a person who has no authority, upon an inducement held out by that person, is receivable, is a question upon which learned judges are known to entertain opposite opinions.[1] In one case, it was laid down as a settled rule, that any person telling a prisoner that it would be better for him to confess will always exclude any confession made to that per-

v. Willis, Conn., 41 Atl. 820 ; {State *v.* Chambers, 39 Ia. 179 ;} Dunne *v.* Park Com'rs, 159 Ill. 60 ; Laughlin *v.* Com., Ky., 37 S. W. 590 ; Com. *v.* Cullen, 111 Mass. 437 ; Com. *v.* Myers, 160 id. 530 ; Peter *v.* State, 4 Sm. & M. 36 ; State *v.* Jones, 54 Mo. 479 ; State *v.* Guild, 10 N. J. L. 163, 179 ; State *v.* Lowhorne, 66 N. C. 638 ; State *v.* Drake, 113 id. 624 ; State *v.* Frazier, 6 Baxt. 540 ; Barnes *v.* State, 36 Tex. 356; Early's Case, 86 Va. 927 ; State *v.* Carr, 37 Vt. 191.]

[1] Thompson's Case, 1 Leach's Cr. Cas. 325 ; Cass's Case, id. 328, n.; R. *v.* Jones, Russ. & R. 152; R. *v.* Griffin, ib. 151 ; Chabbock's Case, 1 Mass. 144; R. *v.* Gibbons, 1 C. & P. 97, n. (*a*); R. *v.* Partridge, 7 id. 551 ; Roberts's Case, 1 Dev. 259 ; R. *v.* Jenkins, Russ. & Ry. 492 ; R. *v.* Hearn, 1 Car. & Marsh. 109. See also Phil. & Am. on Evid. 430, 431.

[2] R. *v.* Upchurch, 1 Mood. Cr. Cas. 465 ; R. *v.* Hewett, 1 Car. & Marsh. 534; R. *v.* Taylor, 8 C. & P. 733. In R. *v.* Simpson, 1 Mood. Cr. Cas. 410, the inducements were held out by the mother-in-law of the prosecutor, in his house, and in the presence of his wife, who was very deaf ; and the confessions thus obtained were held inadmissible. See Joy on Confessions, 5–10.

[3] R. *v.* Swatkins, 4 C. & P. 548; R. *v.* Mills, 6 id. 146 ; R. *v.* Sextons, 6 Petersd. Abr. 84; R. *v.* Shepherd, 7 C. & P. 579. See also R. *v.* Thornton, 1 Mood. Cr. Cas. 27. But see Com. *v.* Mosler, 4 Barr 264.

[4] Rudd's Case, 1 Leach Cr. Cas. 135; Guild's Case, 5 Halst. 163.

[5] R. *v.* Parratt, 4 C. & P. 570, which was a confession by a sailor to his captain, who threatened him with prison, on a charge of stealing a watch. R. *v.* Enoch, 5 C. & P. 539, was a confession made to a woman, in whose custody the prisoner, who was a female, had been left by the officer. The official character of the person to whom the confession is made does not affect its admissibility, provided no inducements were employed: Joy on Confessions, 59–61 ; R. *v.* Gibbons, 1 C. & P. 97, n. (*a*); Knapp's Case, 10 Pick. 477 ; Mosler's Case, 6 Pa. Law Journ. 90 ; 4 Barr 264.

[6] Roberts's Case, 1 Dev. 259 ; R. *v.* Pountney, 7 C. & P. 302 ; R. *v.* Laugher, 2 C. & K. 225.

[1] So stated by Parke, B., in R. *v.* Spencer, 7 C. & P. 776. See also R. *v.* Pountney, ib. 302, per Alderson, B.; R. *v.* Row, Russ. & Ry. 153, per Chambre, J.

son.[2] And this rule has been applied in a variety of cases, both early and more recent.[3] On the other hand, it has been held, that a promise made by an indifferent person, who interfered officiously, without any kind of authority, and promised, without the means of performance, can scarcely be deemed sufficient to produce any effect even on the weakest mind, as an inducement to confess; and, accordingly, confessions made under such circumstances have been admitted in evidence.[4] The difficulty experienced in this matter seems to have arisen from the endeavor to define and settle, as a rule of law, the facts and circumstances which shall be deemed, in all cases, to have influenced the mind of the prisoner in making the confession. In regard to persons in authority, there is not much room to doubt. Public policy, also, requires the exclusion of confessions, obtained by means of inducements held out by such persons. Yet even here the age, experience, intelligence, and constitution, both physical and mental, of prisoners, are so various, and the power of performance so different, in the different persons promising, and under different circumstances of the prosecution, that the rule will necessarily sometimes fail of meeting the truth of the case. But as it is thought to succeed in a large majority of instances, it is wisely adopted as a rule of law applicable to them all. Promises and threats by private persons, however, not being found so uniform in their operation, perhaps may, with more propriety, be treated as mixed questions of law and fact; the principle of law, that the confession must be voluntary, being strictly adhered to, and the question, whether the promises or threats of the private individuals who employed them, were sufficient to overcome the mind of the prisoner, being left to the discretion of the judge, under all the circumstances of the case.[5]

[2] R. *v.* Dunn, 4 C. & P. 543, per Bosanquet, J.; R. *v.* Slaughter, ib. 544.

[3] See, accordingly, R. *v.* Kingston, 4 C. & P. 387; R. *v.* Clewes, ib. 221; R. *v.* Walkley, 6 id. 175; Guild's Case, 5 Halst. 163; Knapp's Case, 9 Pick. 496, 500–510; R. *v.* Thomas, 6 C. & P. 353.

[4] R. *v.* Hardwick, 6 Petersd. Abr. 84, per Wood, B.; R. *v.* Taylor, 8 C. & P. 734. See, accordingly, R. *v.* Gibbons, 1 id. 97; R. *v.* Tyler, ib. 129; R. *v.* Lingate, 6 Petersd. 84; 2 Lewin Cr. Cas. 125, n.

[5] In Scotland, it is left to the jury; see Alison's Criminal Law of Scotland, pp. 581, 582. Mr. Joy maintains the unqualified proposition, that "a confession is admissible in evidence, although an inducement is held out, if such inducement proceeds from a person not in authority over the prisoner;" and it is strongly supported by the authorities he cites, which are also cited in the notes to this section; see Joy on Confessions, ss. 2, 23–33. His work has been published since the first edition of this book; but, upon a deliberate revision of the point, I have concluded to leave it where the learned judges have stated it to stand, as one on which they were divided in opinion. [The question has since been settled in England so that the existence of a legal interest in the prosecution has been taken as the test whether the person is one whose inducements make the confession inadmissible: R. *v.* Moore, 2 Den. Cr. C. 522; see later rulings in R. *v.* Luckhurst, 6 Cox Cr. 243; R. *v.* Sleeman, ib. 245; R. *v.* Vernon, 12 id. 153; a police officer is of course also a person in authority: R. *v.* Moore, *supra*. In the United States, this distinction has not been sharply drawn, owing in part to the circumstance that the injured person does not, as usually in England, have the institution and management of the criminal prosecution. Occasionally it is said that only inducements by those having official authority are improper: U. S. *v.* Stone,

§ 224. **Confessions at an Examination before a Magistrate.**[1] The same rule, that the confession must be voluntary, is applied in cases where the prisoner has been examined before a magistrate, in the course of which examination the confession is made. The practice of examining the accused was familiar in the Roman jurisprudence, and is still continued in Continental Europe;[2] but the maxim of the common law was, *Nemo tenetur prodere seipsum;* and therefore no examination of the prisoner himself was permitted in England, until the passage of the statutes of Philip and Mary.[3] By these statutes, the main features of which have been adopted in several of the United States, the justices, before whom any person shall be brought, charged with any of the crimes therein mentioned, shall take the examination of the prisoner, as well as that of the witnesses, in writing, which the magistrate shall subscribe, and deliver to the proper officer of the court where the trial is to be had. The signature of the prisoner, when not specially required by statute, is not necessary; though it is expedient, and therefore is usually obtained.[4] The certificate of the magistrate, as will be hereafter shown in its proper place,[5] is conclusive evidence of the manner in which the examination was conducted; and, therefore, where he had certified that the prisoner was examined under oath, parol evidence to show

8 Fed. 260; but usually the question is made to depend upon the actual relation of power in the case in hand by the person offering the inducement; see Murphy *v.* State, 63 Ala. 3; Com. *v.* Morey, 1 Gray 463; State *v.* Carrick, 16 Nev. 128; Shifflet's Case, 14 Gratt. 657; State *v.* Caldwell, 50 La. An., 23 So. 869;] {Beggarly *v.* State, 8 Baxt. 520; McAdory *v.* State, 62 Ala. 154; Young *v.* Com., 8 Bush 366; Johnson *v.* State, 61 Ga. 305; Com. *v.* Howe, 2 Allen 153; Com. *v.* Sego, 125 Mass. 210; State *v.* Darnell, 1 Houst. C. C. 321; Ulrich *v.* People, 39 Mich. 245; Flagg *v.* People, 40 id. 706;} State *v.* Kirby, 1 Strobh. 155.

[1] [The important subject of the next three sections is so complicated by necessary distinctions, conflicting rulings, and historical variations of practice, that it is impossible to review the state of the law in this place; and accordingly a full statement of the differing theories and distinctions and the precedents in each jurisdiction has been placed *post* as Appendix III, to which the reader is referred.]

[2] The course of proceeding, in such cases, is fully detailed in B. Carpzov. Practicæ Rerum Criminal. Pars III, Quæst. 113, per tot.

[3] 1–2 Phil. & M. c. 13; 2–3 Phil. & M. c. 10; 7 Geo. IV, c. 64; 4 Bl. Comm. 295. [How incorrect historically the above statement is may be seen by a perusal of Stephen's History of the Criminal Law, vol. i, *passim;* the maxim *nemo tenetur*, etc., was not recognized in the common law until long after the time of the above statutes; see an article by the editor in 5 Harv. L. Rev. 71.] The object of these statutes, it is said, is to enable the judge to see whether the offence is bailable, and that both the judge and jury may see whether the witnesses are consistent or contradictory, in their accounts of the transaction. The prisoner should only be asked, whether he wishes to say anything in answer to the charge, when he had heard all that the witnesses in support of it had to say against him: Joy on Confessions, etc., pp. 92–94; R. *v.* Saunders, 2 Leach Cr. Cas. 652; R. *v.* Fagg, 4 C. & P. 567. But if he is called upon to make his answer to the charge, before he is put in possession of all the evidence against him, this irregularity is not sufficient to exclude the evidence of his confession: R. *v.* Bell, 5 C. & P. 163. His statement is not an answer to the depositions, but to the charge. He is not entitled to have the depositions first read, as a matter of right. But if his examination refers to any particular depositions, he is entitled to have them read at the trial, by way of explanation: Dennis's Case, 2 Lew. Cr. Cas. 261; see further, Rowland *v.* Ashby, Ry. & M. 231, per Best, C. J.; R. *v.* Simons, 6 C. & P. 540; R. *v.* Arnold, 8 id. 621.

[4] 1 Chitty's Crim. Law 87; Lambe's Case, 2 Leach Cr. Cas. 625.

[5] *Infra*, § 227.

that in fact no oath had been administered to the prisoner was held inadmissible.[6] But the examination cannot be given in evidence until its identity is proved.[7] If the prisoner has signed it with his name, this implies that he can read, and it is admitted on proof of his signature; but if he has signed it with his mark only, or has not signed it at all, the magistrate or his clerk must be called to identify the writing, and prove that it was truly read to the prisoner, who assented to its correctness.[8]

§ 225. The manner of examination is, therefore, particularly regarded; and if it appears that the prisoner had not been left wholly free, and did not consider himself to be so, in what he was called upon to say, or did not feel himself at liberty wholly to decline any explanation or declaration whatever, the examination is not held to have been voluntary. In such cases, not only is the written evidence rejected, but oral evidence will not be received of what the prisoner said on that occasion.[1] The prisoner, therefore, must not be sworn.[2] But where, being mistaken for a witness, he was sworn, and afterwards, the mistake being discovered, the deposition was destroyed; and the prisoner, after having been cautioned by the magistrate, subsequently made a statement; this latter statement was held admissible.[3] It may, at first view, appear unreasonable to refuse evidence of confession, merely because it was made under oath, thus having in favor of its truth one of the highest sanctions known in the law. But it is to be observed, that none but voluntary confessions are admissible; and that if to the perplexities and embarrassments of the prisoner's situation are added the danger of perjury, and the dread of additional penalties, the confession can scarcely be regarded as voluntary; but, on the contrary, it seems to be made under the very influences which the law is particularly solicitous to avoid. But where the prisoner, having been examined as a witness, in a prosecution against another person, answered questions to which he might have demurred, as tending to criminate himself, and which, therefore, he was not bound to answer, his answers are deemed voluntary, and, as such, may be subsequently

[6] R. *v.* Smith & Hornage, 1 Stark. 242; R. *v.* Rivers, 7 C. & P. 177; R. *v.* Pikesley, 9 id. 124.

[7] Hawk. P. C. b. 2, c. 46, § 3, n. (1).

[8] R. *v.* Chappel, 1 M. & Rob. 395.

[1] R. *v.* Rivers, 7 C. & P. 177; R. *v.* Smith, 1 Stark. 242; Harman's Case, 6 Pa. Law Journ. 120. But an examination, by way of question and answer, is now held good, if it appears free from any other objection: R. *v.* Ellis, Ry. & M. 432; 2 Stark. Evid. 29, n. (*g*); though formerly it was held otherwise, in Wilson's Case, Holt 597. See acc. Jones's Case, 2 Russ. 658, n.; Roscoe's Crim. Evid. 44. So, if the questions were put by a police-officer (R. *v.* Thornton, 1 Mood. Cr. Cas. 27), or by a fellow-prisoner (R. *v.* Shaw, 6 C. & P. 372), they are not, on that account, objectionable.

[2] Bull. N. P. 242; Hawk. P. C. b. 2, c. 46, § 3; [R. *v.* Scott, 1 D. & B. 47.]

[3] R. *v.* Webb, 4 C. & P. 564. [The above statute has been superseded in England by St. 11–12 Vict., c. 42, s. 18 (for Ireland, St. 12–13 Vict., c. 69, s. 18; 14–15 Vict., c. 93, s. 14), which has been construed in R. *v.* Pettit, 4 Cox Cr. 164; R. *v.* Sansome, ib. 207; R. *v.* Stripp, 7 id. 97; R. *v.* Berriman, 6 id. 388; R. *v.* Mick, 3 F. & F. 822; R. *v.* Johnston, 15 Ir. C. L. 82. See the whole subject discussed *post*, Appendix III.]

used against himself, for all purposes;[4] though where his answers are compulsory, and under the peril of punishment for contempt, they are not received.[5]

§ 226. Thus, also, where several persons, among whom was the prisoner, were summoned before a committing magistrate upon an investigation touching a felony, there being at that time no specific charge against any person; and the prisoner, being sworn with the others, made a statement, and at the conclusion of the examination he was committed for trial; it was held, that the statement so made was not admissible in evidence against the prisoner.[1] This case may seem, at the first view, to be at variance with what has been just stated as the general principle, in regard to testimony given in another case; but the difference lies in the different natures of the two proceedings. In the former case, the mind of the witness is not disturbed by a criminal charge, and, moreover, he is generally aided and protected by the presence of the counsel in the cause; but in the latter case, being a prisoner, subjected to an inquisitorial examination, and himself at least in danger of an accusation, his mind is brought under the full influence of those disturbing forces against which it is the policy of the law to protect him.[2]

§ 227. **Magistrate's Report of Examination conclusive.** (1) As the statutes require that the magistrate shall reduce to writing the whole examination, or so much thereof as shall be material, the law conclusively presumes, that, if anything was taken down in writing, the magistrate performed all his duty by taking down all that was material.[1] In such case, no parol evidence of what the prisoner may have said on that occasion can be received.[2] (2) But if it is shown

[4] 2 Stark. Evid. 28; Wheater's Case, 2 Lew. Cr. Cas. 157; s. c. 2 Mood. Cr. Cas. 45; Joy on Confessions, 62–66; Hawarth's Case, Roscoe's Crim. Evid. 45; R. *v.* Tubby, 5 C. & P. 530, cited and agreed in R. *v.* Lewis, 6 id. 161; R. *v.* Walker, cited by Gurney, B., in the same case. But see R. *v.* Davis, 6 C. & P. 177, *contra.*

[5] R. *v.* Garbett, 2 C. & K. 474. But where one was examined before the grand jury as a witness, on a complaint against another person, and was afterwards himself indicted for that same offence, it was held that his testimony before the grand jury was admissible in evidence against him: State *v.* Broughton, 7 Ired. 96. [For all this, see Appendix III.]

[1] R. *v.* Lewis, 6 C. & P. 161, per Gurney, B.; R. *v.* Wheeley, 8 id. 250; R. *v.* Owen, 9 id. 238. [For this, see Appendix III.]

[2] It has been thought, on the authority of Britton's Case, 1 M. & Rob. 297, that the balance-sheet of a bankrupt, rendered in his examination under the commission, was not admissible in evidence against him on a subsequent criminal charge because it was rendered upon compulsion. But the ground of this decision was afterwards declared by the learned judge who pronounced it, to be only this, that there was no previous evidence of the issuing of the commission; and, therefore, no foundation had been laid for introducing the balance-sheet at all; see Wheater's Case, 2 Mood. Cr. Cas. 45, 51.

[1] Whatever the prisoner voluntarily said, respecting the particular felony under examination, should be taken down, but not that which relates to another matter: R. *v.* Weller, 2 C. & K. 223; and see R. *v.* Butler, ib. 221.

[2] R. *v.* Weller, *supra.* Mr. Joy, in his Treatise on Confessions, 89–92, 237, dissents from this proposition, so far as regards the conclusive character of the presumption; which, he thinks, is neither "supported by the authorities," nor "reconcilable with the

that the examination was not reduced to writing; or if the written examination is wholly inadmissible, by reason of irregularity; parol evidence is admissible to prove what he voluntarily disclosed.[3] And if it remains uncertain whether it was reduced to writing by the magistrate or not, it will not be presumed that he did his duty, and oral evidence will be rejected.[4] (3) A written examination, however, will not exclude parol evidence of a confession previously and extrajudicially made;[5] nor of something incidentally said by the prisoner during his examination, but not taken down by the magistrate, provided it formed no part of the judicial inquiry, so as to make it the duty of the magistrate to take it down.[6] So where the prisoner was charged with several larcenies, and the magistrate took his confession in regard to the property of A, but omitted to write down what he confessed as to the goods of B, not remembering to have heard anything said respecting them, it was held that parol evidence of the latter confession, being precise and distinct, was properly admitted.[7]

§ 228. It has already been stated, that the signature of the prisoner is not necessary to the admissibility of his examination, though

object with which examinations are taken;" see *supra*, § 224, n. But upon a careful review of the authorities, and with deference to the opinion of that learned writer, I am constrained to leave the text unaltered; see *infra*, §§ 275–277. If the magistrate returns, that the prisoner "declined to say anything," parol evidence of statements made by him in the magistrate's presence, at the time of the examination, is not admissible: R. *v.* Walter, 7 C. & P. 267; see also R. *v.* Rivers, ib. 177; R. *v.* Morse *et al.*, 8 id. 605; Leach *v.* Simpson, 7 Dowl. 513.

[The learned author seems to have been correct, in his difference of opinion with Mr. Joy: R. *v.* Reason, 16 How. St. Tr. 35; R. *v.* Smith, 1 Stark. 242; R. Bentley, 6 C. & P. 148; R. *v.* Walter, 7 id. 267; R. *v.* Pikesley, 9 id. 124; R. *v.* Martin, 6 State Tr. N. S. 925, 989; but see R. *v.* Erdheim, 1896, 2 Q. B. 260. But it was always conceded that the magistrate's report must first be produced, as preferred testimony to what was said. Being so produced, it could not be shown that it was incorrect. In the American cases it does not always appear clearly whether the magistrate's report is treated merely as a preferred source, to be first used or accounted for, or whether it is furthermore conclusive; see Leggett *v.* State, 97 Ga. 426; Powell *v.* State, Miss., 23 So. 266; State *v.* Steeves, 29 Or. 85; State *v.* Branham, 13 S. C. 389; Alfred *v.* Anthony, 2 Swan 581.]

[3] Jeans *v.* Wheedon, 2 M. & Rob. 486; R. *v.* Fearshire, 1 Leach Cr. Cas. 240; R. *v.* Jacobs, ib. 347; Irwin's Case, 1 Hayw. 112; R. *v.* Bell, 5 C. & P. 162; R. *v.* Reed, 1 M. & M. 403; Phillips *v.* Wimburn, 4 C. & P. 273; [R. *v.* Hayman, 1 M. & M. 403;] {State *v.* Vincent, 1 Houst. C. C. 11; State *v.* Parish, Busb. Law, 239.}

[4] Hinxman's Case, 1 Leach Cr. Cas. 349, n.

[5] R. *v.* Carty, McNally's Evid. p. 45.

[6] Moore's Case, Roscoe's Crim. Evid. 45, per Parke, J.; R. *v.* Spilsbury, 7 C. & P. 188; Maloney's Case, ib. (otherwise Mulvey's Case, Joy on Confessions, 238), per Littledale, J. In Rowland *v.* Ashby, Ry. & M. 231, Mr. Justice Best was of opinion that, "upon clear and satisfactory evidence, it would be admissible to prove something said by a prisoner, beyond what was taken down by the committing magistrate." [See R. *v.* Coveney, 6 C. & P. 667; R. *v.* Thomas, ib. 817; R. *v.* Morse, 8 id. 605; R. *v.* Wilkinson, 9 id. 662; R. *v.* Weller, 2 C. & K. 223; R. *v.* Christopher, ib. 994; Griffith *v.* State, 37 Ark. 332.]

[7] Harris's Case, 1 Mood. Cr. Cas. 338. See 2 Phil. Evid. 84, n., where the learned author has reviewed this case, and limited its application to confessions of other offences than the one for which the prisoner was on trial; but the case is more fully stated, and the view of Mr. Phillips dissented from, in 2 Russell on Crimes, 876–878, n. by Mr. Greaves; see also Joy on Confessions, pp. 89–93.

it is usually obtained. But where it has been requested agreeably to the usage, and is absolutely refused by the prisoner, the examination has been held inadmissible, on the ground that it was to be considered as incomplete, and not a deliberate and distinct confession.[1] Yet where, in a similar case, the prisoner, on being required to sign the document, said, "It is all true enough; but he would rather decline signing it," the examination was held complete, and was accordingly admitted.[2] And in the former case, which, however, is not easily reconcilable with those statutes which require nothing more than the act of the magistrate, though the examination is excluded, yet parol evidence of what the prisoner voluntarily said is admissible. For though, as we have previously observed,[3] in certain cases where the examination is rejected, parol evidence of what was said on the same occasion is not received, yet the reason is, that in those cases the confession was not voluntary; whereas, in the case now stated, the confession is deemed voluntary, but the examination only is incomplete.[4] And wherever the examination is rejected as documentary evidence, for informality, it may still be used as a writing, to refresh the memory of the witness who wrote it, when testifying to what the prisoner voluntarily confessed upon that occasion.[5]

§§ 229, 230.[1]

[1] R. *v.* Telicote, 2 Stark. 483; Bennet's Case, 2 Leach Cr. Cas. 627, n.; R. *v.* Foster, 1 Lewin Cr. Cas. 46; R. *v.* Hirst, ib. 46.

[2] Lambe's Case, 2 Leach Cr. Cas. 625.

[3] *Supra*, § 225.

[4] Thomas's Case, 2 Leach Cr. Cas. 727; Dewhurst's Case, 1 Lewin Cr. Cas. 47; R. *v.* Swatkins, 4 C. & P. 548; R. *v.* Reed, 1 M. & M. 403.

[5] Layer's Case, 16 How. St. Tr. 215; R. *v.* Swatkins, 4 C. & P. 548, and n. (*a*); R. *v.* Tarrant, 6 id. 182; R. *v.* Pressly, ib. 183; [R. *v.* Telicote, *supra;* Dewhurst's Case, *supra;* R. v. Bell, 5 C. & P. 162; R. *v.* Watson, 3 C. & K. 111; upon the principle of § 439 *b*, *post.*]

[1] [Transferred *ante*, as §§ 220 *b*, 220 *c*. Questions analogous to those treated in §§ 227–228 arise also in connection with the magistrate's report of the *testimony of the witnesses* at the examination. The statute usually requires him to reduce these to writing as well as the accused's statement, but the questions that arise, though similar, are not always solved in the same way as for the accused's statement. (1) The first question is whether the magistrate's report is a preferred source of testimony to what the witness said; *i. e.*, whether it is the "best evidence," in the sense of § 97 *d*, *ante*. There is much difference of opinion on this point. That the witness (as by some statutes) is required to sign it, after it is read over to him, seems to be generally regarded as making it preferred; though this does not necessarily follow, for the original oral statement of the witness and the subsequent report signed and adopted by him may still be regarded as distinct statements. Nevertheless, it is better to regard the magistrate's report, taken as required by law, as preferred testimony, *i. e.* to be first used or accounted for, even though the witness is not required to sign it or fails to sign it. (2) The next question is whether the magistrate's report is conclusive, when produced, *i. e.* whether it can be shown that it is an incorrect report, or that the witness said things not contained in the report. Here also there is difference of opinion. The better opinion is that its incorrectness may be shown and omissions supplied, even where the witness has by signing adopted it as correct. Cases on both sides of the above questions are as follows: Annesley's Trial, 17 How. St. Tr. 1121; Rowland *v.* Ashby, Ry. & Mo. 231; R. *v.* Harris, Mood. Cr. C. 338; Venafra *v.* Johnson, 1 Moo. & Rob. 316; Resolutions of Judges, 7 C. & P. 676; Leach *v.* Simpson, 7 Dowl. Tr. 513; 5 M. & W. 309; R.

§ 231. **Corroborating Discoveries, as curing a Defective Confession.** The object of all the care which, as we have now seen, is taken to exclude confessions which were not voluntary, is to exclude testimony not probably true. But where, in consequence of the information obtained from the prisoner, the property stolen, or the instrument of the crime, or the bloody clothes of the person murdered, or any other material fact, is discovered, it is competent to show that such discovery was made conformably to the information given by the prisoner. The statement as to his knowledge of the place where the property or other evidence was to be found, being thus confirmed by the fact, is proved to be true, and not to have been fabricated in consequence of any inducement. It is competent, therefore, to inquire whether the prisoner stated that the thing would be found by searching a particular place, and to prove that it was accordingly so found; but it would not be competent to inquire whether he confessed that he had concealed it there.[1] This limitation of the rule was distinctly laid down by Lord Eldon, who said that where the knowledge of any fact was obtained from a prisoner, under such a promise as excluded the confession itself from being given in evidence, he should direct an acquittal, unless the fact itself proved would have been sufficient to warrant a conviction without any confession leading to it.[2]

§ 232. If the prisoner himself produces the goods stolen, and delivers them up to the prosecutor, notwithstanding it may appear that this was done upon inducements to confess, held out by the latter, there seems no reason to reject the declarations of the prisoner, contemporaneous with the act of delivery, and explanatory of its char-

v. Taylor, 8 C. & P. 726; Reporter's note to 2 Moo. & Rob. 487, approved in 1 Den. Cr. C. 542; R. *v.* Taylor, 13 Cox Cr. 77; R. *v.* Dillon, 14 id. 4; Dunn *v.* State, 2 Ark. 229, 248; Atkins *v.* State, 16 id. 568, 588; Talbot *v.* Wilkins, 31 id. 411; Nelson *v.* State, 32 id. 192; State *v.* Kirkpatrick, ib. 117; Shackelford *v.* State, 33 id. 539; Cole *v.* State, 59 id. 50; People *v.* Robles, 29 Cal. 421; Hobbs *v.* Duff, 43 id. 485; People *v.* Devine, 44 id. 452; People *v.* Gordon, 99 id. 227; Cicero *v.* State, 54 Ga. 156; Williams *v.* State, 69 id. 11, 30; Broyles *v.* State, 47 Ind. 251; Woods *v.* State, 63 id. 353; Hinshaw *v.* State, 147 id. 334; Pearce *v.* Furr, 2 Sm. & M. 58; State *v.* Zellers, 7 N. J. L. 220, 236; State *v.* Jones, 29 S. C. 227; Wade *v.* State, 7 Baxt. 80; Titus *v.* State, ib. 132; Carrico *v.* R. Co., 39 W. Va. 86. But the principle on which this report, if made conclusive, is so treated, must not be regarded as necessarily being the principle of Integration, *post*, § 305 *g*. The magistrate's report can hardly be regarded as the equivalent of the witness' statement (except, perhaps, where the witness by signing has adopted it), but remains merely testimony to what the witness said; and hence it seems better to regard it as preferred testimony, and, when not allowed to be contradicted, as a case of absolute and conclusive preference, — as suggested *ante*, § 97 *d*. (3) As in the case of an accused's statement, so here also, if the magistrate's report is inadmissible because taken irregularly, or if the magistrate did not reduce the statement to writing, then certainly it may be proved by other witnesses: Brown *v.* State, 71 Ind. 470; Wade *v.* State, 7 Baxt. 80; Alston *v.* State, 41 Tex. 40. (4) For these questions in connection with testimony at a former trial, see *ante*, § 166.]

[1] 1 Phil. Evid. 411; Warickshall's Case, 1 Leach Cr. Cas. 298; Mosey's Case, ib. 301, n.; Com. *v.* Knapp, 9 Pick. 496, 511; R. *v.* Gould, 9 C. & P. 364; R. *v.* Harris, 1 Mood. Cr. Cas. 338.

[2] 2 East P. C. 657; Harvey's Case, ib. 658; Lockhart's Case, 1 Leach Cr. Cas. 430.

acter and design, though they may amount to a confession of guilt;[1] but whatever he may have said at the same time, not qualifying or explaining the act of delivery, is to be rejected. And if, in consequence of the confession of the prisoner, thus improperly induced, and of the information by him given, the search for the property or person in question proves wholly ineffectual, no proof of either will be received. The confession is excluded, because, being made under the influence of a promise, it cannot be relied upon; and the acts and information of the prisoner, under the same influence, not being confirmed by the finding of the property or person, are open to the same objection. The influence which may produce a groundless confession may also produce groundless conduct.[2]

§ 233. **Confessions of other Persons; Conspirators.** As to the prisoner's liability to be affected by the confessions of others, it may be remarked, in general, that the principle of the law in civil and criminal cases is the same. In civil cases, as we have already seen[1] when once the fact of agency or partnership is established, every act and declaration of one, in furtherance of the common business, and until its completion, is deemed the act of all. And so, in cases of conspiracy, riot, or other crime, perpetrated by several persons, when once the conspiracy or combination is established, the act or declaration of one conspirator or accomplice, in the prosecution of the enterprise, is considered the act of all, and is evidence against all.[2] Each is deemed to assent to, or command, what is done by any

[1] R. *v.* Griffin, Russ. & Ry. 151; R. *v.* Jones, ib. 152.

[2] R. *v.* Jenkins, Russ. & Ry. 492; R. *v.* Hearn, 1 Car. & Marsh. 109. [As to the subject of the above two sections, the following may be said: (1) On principle, the discovery by search of facts corroborating the confession removes the reasons for distrust created by the improper inducement, and should render the confession admissible as a whole; yet no Court seems clearly to go this far; see the dissenting opinion of Wells, J., in Beery *v.* U. S., 2 Colo. 211, for a good exposition of the reasoning; and Brister *v.* State, 26 Ala. 128; Warren *v.* State, 29 Tex. 369. (2) A number of Courts properly go so far as to admit *that part* of the confession confirmed by the discovery, and this doctrine is gaining ground: Lowe *v.* State, 88 Ala. 8; Pressley *v.* State, 111 id. 34; Yates *v.* State, 47 Ark. 174; Hinkle *v.* State, 94 Ga. 595; State *v.* Drake, 82 N. C. 596; State *v.* Winston, 116 id. 990; Laros *v.* Com., 84 Pa. 209; Strait *v.* State, 43 Tex. 488; State *v.* Jenkins, 5 Vt. 379; Fredrick *v.* State, 3 W. Va. 697. (3) The practice in England, and in some American jurisdictions, is not to admit any part of the confession directly, but merely to admit the fact that the discoveries had been made in consequence of a statement made or information given by the accused: R. *v.* Mosey, 1 Leach Cr. L. 3d ed. 301, note; R. *v.* Jenkins, R. & R. 492; R. *v.* Cain, 1 Cr. & D. 37; R. *v.* Gould, 9 C. & P. 364; R. *v.* Berriman, 6 Cox Cr. 388; R. *v.* Doyle, 12 Ont. 350, *semble;* Garrard *v.* State, 50 Miss. 151; State *v.* Motley, 7 Rich. L. 337; Deathridge *v.* State, 1 Sneed 80; White *v.* State, 3 Heisk. 341. (4) The facts themselves, as discovered, are always admissible: R. *v.* Warickshall, 1 Leach Cr. L. 3d ed. 298; R. *v.* Mosey, ib. 301, note; R. *v.* Lockhart, ib. 430; U. S. *v.* Nott, 1 McL. 502; Duffy *v.* People, 26 N. Y. 590.]

[1] *Supra,* §§ 184 *b*, *c*, *d*.

[2] [For the subject of this section, see a fuller treatment *ante,* § 184 *a*.] So is the Roman law. "Confessio unius non probat in præjudicium alterius; quia alias esset in manu confitentis dicere quod vellet, et sic jus alteri quæsitum auferre, quando omnino jure prohibent; — etiamsi talis confitens esset omni exceptione major. Sed limitabis, *quando inter partes convenit parere confessioni et dicto unius alterius.*" Mascard. de Probat. Concl. 486, vol. i, p. 409.

other, in furtherance of the common object.[3] Thus, in an indictment against the owner of a ship, for violation of the statutes against the slave-trade, testimony of the declarations of the master, being part of the *res gestæ*, connected with acts in furtherance of the voyage, and within the scope of his authority, as an agent of the owner, in the conduct of the guilty enterprise, is admissible against the owner.[4] But after the common enterprise is at an end, whether by accomplishment or abandonment is not material, no one is permitted, by any subsequent act or declaration of his own, to affect the others. His confession, therefore, subsequently made, even though by the plea of guilty, is not admissible in evidence, as such, against any but himself.[5] If it were made in the presence of another, and addressed to him, it might, in certain circumstances, be receivable, on the ground of assent or implied admission.[6] In fine, the declarations of a conspirator or accomplice are receivable against his fellows only when they are either in themselves acts, or accompany and explain acts, for which the others are responsible; but not when they are in the nature of narratives, descriptions, or subsequent confessions.[7]

§ 234. **Same: Agents.** The same principle prevails in cases of agency. In general, no person is answerable criminally for the acts of his servants or agents, whether he be the prosecutor or the accused, unless a criminal design is brought home to him. The act of the agent or servant may be shown in evidence as proof that such an act was so done; for a fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence; but it is a totally different question, in the consideration of criminal as distinguished from civil justice, how the principal may

[3] Per Story, J., in U. S. *v.* Gooding, 12 Wheat. 469. And see *supra*, § 111, [now § 184 *a*,] and cases there cited; American Fur Co. *v.* U. S., 2 Peters 358; Com. *v.* Eberle, 3 S. & R. 9; Wilbur *v.* Strickland, 1 Rawle 458; Reitenbach *v.* Reitenbach, ib. 362; 2 Stark. Evid. 232–237; State *v.* Soper, 4 Shepl. 293.

[4] U. S. *v.* Gooding, 12 Wheat. 460.

[5] R. *v.* Turner, 1 Mood. Cr. Cas. 347; R. *v.* Appleby, 3 Stark. 33; and see Melen *v.* Andrews, 1 M. & M. 336, per Parke, J.; R. *v.* Hinks, 1 Den. Cr. Cas. 84; 1 Phil. Evid. 199 (9th ed.); R. *v.* Blake, 6 Q. B. 126; {State *v.* Weasel, 30 La. An. 919; Spencer *v.* State, 31 Tex. 64; Com. *v.* Thompson, 99 Mass. 444; Ake *v.* State, 30 Tex. 466.}

[6] {Where statements are made by one of two jointly charged with an offence, the silence of the other and his failure to make any explanation is not to be used against him: Com. *v.* McDermott, 123 Mass. 441; Com. *v.* Walker, 13 Allen, 570. But if a confession has been made, and, in accordance with it, property stolen has been found, it seems to be the rule that this fact of the finding and so much of the confession as relates to it may be given in evidence against all the *participes criminis:* Zumwalt *v.* State, 5 Tex. Ap. 521.}

[7] 1 Phil. on Evid. 414; 4 Hawk. P. C. b. 2, c. 46, § 34; Tong's Case, Sir J. Kelyng's R. 18, 5th Res.; {Priest *v.* State, 10 Neb. 393; Gove *v.* State, 58 Ala. 391; State *v.* Thibeau, 30 Vt. 100.} [For the use of another person's confession that he committed the crime now charged against the defendant, see *ante*, § 152 *d*.] In a case of piracy, where the persons who made the confessions were not identified, but the evidence was only that *some* did confess, it was held that, though such confessions could not be applied to any one of the prisoners as proof of his personal guilt, yet the jury might consider them, so far as they went, to identify the piratical vessel: United States *v.* Gibert, 2 Sumn. 19; State *v.* Thibeau, 30 Vt. 100.

be affected by the fact, when so established.[1] Where it was proposed to show that an agent of the prosecutor, not called as a witness, offered a bribe to a witness, who also was not called, the evidence was held inadmissible; though the general doctrine, as above stated, was recognized.[2]

§ 235.[1]

[1] Lord Melville's Case, 29 How. St. Tr. 764; The Queen's Case, 2 Brod. & Bing. 306, 307; *supra*, §§ 184 *c*, *d*.

[2] The Queen's Case, 2 Brod. & Bing. 302, 306–309. To the rule, thus generally laid down, there is an apparent exception, in the case of the proprietor of a newspaper, who is, *prima facie*, criminally responsible for any libel it contains, though inserted by his agent or servant without his knowledge. But Lord Tenterden considered this case as falling strictly within the principle of the rule; for "surely," said he, "a person who derives profit from, and who furnishes means for carrying on, the concern, and entrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, though you cannot show that he was individually concerned in the particular publication:" R. *v.* Gutch, 1 M. & M. 433, 437. See also Story on Agency, §§ 452, 453, 455; R. *v.* Almon, 5 Burr. 2686; R. *v.* Walter, 3 Esp. 21; Southwick *v.* Stevens, 10 Johns. 443.

[1] [Transferred *ante*, as § 217 *a*.]

CHAPTER XIX.

EXCLUSIONS BASED ON PUBLIC POLICY; PRIVILEGE.

§ 236. In general.

1. *Attorney and Client.*

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§ 247. Priest and Penitent.
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3. *Other Exclusions based on Public Policy.*

§ 254 *a*. Evidence procured by Illegal Means.
§ 254 *b*. Indecent Evidence.
§ 254 *c*. Judge; Arbitrator; Attorney.

§ 236. **In general.** There are some kinds of evidence which the law excludes, or dispenses with, on grounds of public policy, because greater mischiefs would probably result from requiring or permitting its admission, than from wholly rejecting it. The principle of this rule of the law has respect, in some cases, to the person testifying, and in others to the matters concerning which he is interrogated, thus including the case of the party himself, and that of the husband or wife of the party on the one hand, and, on the other, the subject of professional communications, awards, secrets of State, and some others. The two former of these belong more properly to the head of the competency of witnesses, under which they will accordingly be hereafter treated.[1] The latter we shall now proceed briefly to consider.

1. *Attorney and Client.*

§ 237. **General Principle.** And, in the first place, in regard to professional communications, the reason of public policy, which excludes them, applies solely, as we shall presently show, to those between a client and his legal adviser; and the rule is clear and well settled, that the confidential counsellor, solicitor, or attorney of the party cannot be compelled to disclose papers delivered, or communi-

[1] §§ 326–429.

cations made to him, or letters or entries made by him, in that capacity.[1] "This protection," said Lord Chancellor Brougham, "is not qualified by any reference to proceedings pending, or in contemplation. If, touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, either from a client, or on his account and for his benefit, in the transaction of his business, or, which amounts to the same thing, if they commit to paper in the course of their employment on his behalf matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information, or produce the papers, in any court of law or equity, either as party or as witness."[2]

§ 238. **Reason for the Privilege.** "The foundation of this rule," he adds, "is not on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection. 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 such communications were not protected, no man, as the same learned judge remarked in another case, would dare to consult a professional adviser, with a view to his defence, or to the enforcement of his rights; and no man could safely come into a court, either to obtain redress, or to defend himself.[1] "It is to be remembered, whenever a question of this kind arises, that communications to attorneys and counsel are not protected from disclosure in court for the reason that they are made confidentially; for no such protection is given to confidential communications made to members of other professions. 'The principle of the rule which applies to attorneys and counsel,' says Chief Justice Shaw, in Hatton *v.* Robinson,[2] 'is that so numerous and complex are the laws by which

[1] Greenough *v.* Gaskell, 1 My. & K. 101; in this decision, the Lord Chancellor was assisted by consultation with Lord Lyndhurst, Tindal, C. J., and Parke, J., 4 B. & Ad. 876; and it is mentioned, as one in which all the authorities have been reviewed, in 2 M. & W. 100, per Lord Abinger, and is cited in Russell *v.* Jackson, 15 Jur. 1117, as settling the law on this subject. See also 16 id. 30, 41–43, where the cases on this subject are reviewed. The earliest reported case on this subject is that of Berd *v.* Lovelace, 19 Eliz., in Chancery, Cary's R. 88. See also Austen *v.* Vesey, id. 89; Kelway *v.* Kelway, id. 127; Dennis *v.* Codrington, id. 143; all of which are stated at large by Mr. Metcalf, in his notes to 2 Stark. Evid. 395 (1st Am. ed.). See also 12 Vin. Abr. Evid. B, a; Wilson *v.* Rastall, 4 T. R. 753; R. *v.* Withers, 2 Campb. 578; Wilson *v.* Troup, 7 Johns. Ch. 25; 2 Cowen 195; Mills *v.* Oddy, 6 C. & P. 728; Anon., 8 Mass. 370; Walker *v.* Wildman, 6 Madd. 47; Story's Eq. Pl. 458–461; Jackson *v.* Burtis, 14 Johns. 391; Foster *v.* Hall, 12 Pick. 89; Chirac *v.* Reinicker, 11 Wheat. 295; R. *v.* Shaw, 6 C. & P. 372; Granger *v.* Warrington, 3 Gilm. 299; Wheeler *v.* Hill, 4 Shepl. 329.

[2] Greenough *v.* Gaskell, *supra.*

[1] Bolton *v.* Corporation of Liverpool, 1 My. & K. 94, 95.

[2] 14 Pick. 22.

the rights and duties of citizens are governed, so important is it they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country and maintaining them most safely in courts, without publishing those facts which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sustain this confidence by requiring that on such facts the mouth of the attorney shall be forever sealed.'"[3]}

§ 239. **Who is a Legal Adviser.** In regard to the persons to whom the communications must have been made in order to be thus protected, they must have been made to the counsel, attorney, or solicitor, acting, for the time being, in the character of legal adviser.[1] For the reason of the rule, having respect solely to the free and unembarrassed administration of justice, and to security in the enjoyment of civil rights, does not extend to things confidentially communicated to other persons, nor even to those which come to the knowledge of counsel, when not standing in that relation to the party. Whether he be called as a witness, or be made defendant, and a discovery sought from him, as such, by bill in Chancery, whatever he has learned, as counsel, solicitor, or attorney, he is not obliged nor permitted to disclose.[2] And this protection extends also to all the necessary organs of communication between the attorney and his client; an interpreter[3] and an agent[4] being considered as standing in precisely the same situation as the attorney himself, and under the same obligation of secrecy. It extends also to a case submitted to counsel in a foreign country and his opinion thereon.[5] It was formerly thought that an attorney's or a barrister's clerk was not within the reason and exigency of the rule; but it is now considered otherwise, from the necessity they are under to employ clerks, being unable to transact all their business in person; and accordingly clerks are not compellable to disclose facts, coming to their knowledge in the course of their employment in that

[3] Metcalf, J., in Barnes *v.* Harris, 7 Cush. 576, 578. [See other good expositions in the leading case of Craig *v.* Auglesea, 17 How. St. Tr. 1225; and by Emery, J., in Wade *v.* Ridley, 87 Me. 368.]

[1] Turquand *v.* Knight, 2 M. & W. 101. If the party has been requested to act as solicitor, and the communication is made under the impression that the request has been acceded to, it is privileged: Smith *v.* Fell, 2 Curt. 667; Sargent *v.* Hampden, 38 Me. 581; McLellan *v.* Longfellow, 32 id. 494.

[2] Greenough *v.* Gaskell, 1 My. & K. 98; Wilson *v.* Rastall, 4 T. R. 753.

[3] Du Barré *v.* Livette, Peake's Cas. 77, explained in 4 T. R. 756; Jackson *v.* French, 3 Wend. 337; Andrews *v.* Solomon, 1 Pet. C. C. 356; Parker *v.* Carter, 4 Munf. 273.

[4] Parkins *v.* Hawkshaw, 2 Stark. 239; Tait on Evid. 385; Bunbury *v.* Bunbury, 2 Beav. 173; Steele *v.* Stewart, 1 Phil. Ch. 471; Carpmael *v.* Powis, 1 Phil. Ch. 687; s. c. 9 Beav. 16.

[5] Bunbury *v.* Bunbury, 2 Beav. 173.

capacity, to which the attorney or barrister himself could not be interrogated.[6] [But here it is as a necessary assistant of the legal adviser that the clerk comes within the privilege; hence, a person acting independently of such employment is not a professional legal adviser merely because he is a student or apprentice of law,[7] or because he is conducting a case before a petty Court,[8] or because as conveyancer, scrivener, or land-broker, he has to do with legal documents.[9] On the other hand, the person must be at the time acting as legal adviser;[10] hence a communication with an attorney merely as with a lender of money,[11] a friend,[12] or a scrivener[13] is not privileged. Having in view the object of the rule, viz., subjectively to encourage free communication between client and adviser, it would seem that the protection should extend to communications to a person supposed to be, but in fact not, a lawyer.[14]] And as the privilege is not personal to the attorney, but is a rule of law, for the protection of the client, the executor of the attorney seems to be within the rule, in regard to papers coming to his hands, as the personal representative of the attorney.[15]

§ 240. **Purpose and Nature of the Communication.** This protection extends to every communication which the client makes to his legal adviser, for the purpose of professional advice or aid, upon the subject of his rights and liabilities. [It is not material that no fee has yet been paid or is to be paid;[1] and it does not matter that the disclosures were not necessary for the purpose, provided they were thought necessary by the client.[2]] Nor is it necessary that any judi-

[6] Taylor *v.* Forster, 2 C. P. 195, per Best, J., cited and approved in 12 Pick. 93; R. *v.* Upper Boddington, 8 Dow. & Ry. 726, per Bailey, J.; Foote *v.* Hayne, 1 C. & P. 545, per Abbott, C. J.; s. c. R. & M. 165; Jackson *v.* French, 3 Wend. 337; Power *v.* Kent, 1 Cohen 211; Bowman *v.* Norton, 5 C. & P. 177; Shore *v.* Bedford, 5 M. & Gr. 271; Jardine *v.* Sheridan, 2 C. & K. 24; {Sibley *v.* Waffle, 16 N. Y. App. 180; Hawes *v.* State, 88 Ala. 68; Landsberger *v.* Gorham, 5 Cal. 450; see Fenner *v.* R. Co., L. R. 7 Q. B. 67.} [Under certain conditions an expert witness assisting in preparing the case may be treated as an assistant of counsel: Lalance & G. M. Co. *v.* Haberman M. Co., 87 Fed. 563. A New York statute includes stenographers and other employees of counsel: § 835, C. C. P.]

[7] [Schubkagel *v.* Dierstein, 131 Pa. 54;] {Barnes *v.* Harris, 7 Cush. 576.}

[8] {McLaughlin *v.* Gilmore, 1 Ill. App. 563; Holman *v.* Kimball, 22 Vt. 555.}

[9] Matthew's Estate, 5 Pa. L. J. R. 149; 4 Amer. Law J. N. S. 356. [See *post*, § 241, for communications to an attorney about conveyances.]

[10] Foster *v.* Hall, 12 Pick. 89; see Bean *v.* Quimby, 5 N. H. 94.

[11] R. *v.* Farley, 1 Den. Cr. C. 197; see R. *v.* Jones, ib. 166.

[12] [Patten *v.* Glover, 1 D. C. App. 466, 476; McDonald *v.* McDonald, 142 Ind. 55; O'Brien *v.* Spalding, Ga., 31 S. E. 100; Basye *v.* State, 45 Nebr. 261; State *v.* Swafford, 98 Ia. 362; or as public prosecutor: Cole *v.* Andrews, Minn., 76 N. W. 962.]

[13] {DeWolf *v.* Strader, 26 Ill. 225; Borum *v.* Fonts, 15 Ind. 50; Coon *v.* Swan, 30 Vt. 6;} [Sparks *v.* Sparks, 51 Kan. 195, 201.]

[14] [People *v.* Barker, 60 Mich. 308; State *v.* Russell, 83 Wis. 330; *contra:* Fountain *v.* Young, 6 Esp. 113;] {Sample *v.* Frost, 10 Ia. 266.}

[15] Fenwick *v.* Reed, 1 Meriv. 114, 120, arg.

[1] {Sargent *v.* Hampden, 38 Me. 581;} [Davis *v.* Morgan, 19 Mont. 141. See Wade *v.* Ridley, 87 Me. 368.]

[2] [Mounteney, B., in Craig *v.* Anglesea, 17 How. St. Tr. 1241;] Cleave *v.* Jones, 7 Exch. 421; see Aiken *v.* Kilburne, 14 Shepl. 252.

cial proceedings in particular should have been commenced or contemplated; it is enough if the matter in hand, like every other human transaction, may, by possibility, become the subject of judicial inquiry. "If," said Lord Chancellor Brougham, "the privilege were confined to communications connected with suits begun, or intended or expected, or apprehended, no one could safely adopt such precautions, as might eventually render any proceedings successful, or all proceedings superfluous."[3] Whether the party himself can be compelled, by a bill in chancery, to produce a case which he has laid before counsel, with the opinion given thereon, is not perfectly clear. At one time it was held by the House of Lords that he might be compelled to produce the case which he had sent, but not the opinion which he had received.[4] This decision, however, was not satisfactory; and though it was silently followed in one case,[5] and reluctantly submitted to in another,[6] yet its principle has since been ably controverted and refuted.[7] The great object of the rule seems plainly to require that the entire professional intercourse between client and attorney, whatever it may have consisted in, should be protected by profound secrecy.

§ 240 *a*. **Same: Opinion of Counsel.** In regard to the obligation of the party to discover and produce the opinion of counsel, various

[3] 1 M. & K. 102, 103; Carpmael *v.* Powis, 9 Beav. 16; 1 Phillips, 687; Penruddock *v.* Hammond, 11 Beav. 59; {Minet *v.* Morgan, L. R. 8 Ch. 361;} see also the observations of the learned judges, in Cromack *v.* Heathcote, 2 Brod. & B. 4, to the same effect; Gresley's Evid. 32, 33; Story's Eq. Pl. § 600; Moore *v.* Terrell, 4 B. & Ad. 870; Beltzhoover *v.* Blackstock, 3 Watts 20; Taylor *v.* Blacklow, 3 Bing. N. C. 235; Foster *v.* Hall, 12 Pick. 89, 92, 99, where the English decisions on this subject are fully reviewed by the learned Chief Justice; Doe *v.* Harris, 5 C. & P. 592; Walker *v.* Wildman, 6 Madd. 47; [Liggett *v.* Glenn, 4 U. S. App. 438, 474; Denver T. Co. *v.* Owens, 20 Colo. 107, 125.] {But a conversation while seeking to retain the adviser may not be: see Heaton *v.* Findlay, 12 Pa. St. 304.} There are some decisions which require that a suit be either pending or anticipated: see Williams *v.* Mundie, Ry. & M. 34; Broad *v.* Pitt, 3 C. & P. 518; Duffin *v.* Smith, Peake's Cas. 108; but these are now overruled; see Pearse *v.* Pearse, 11 Jur. 52; s. c. 1 De Gex & Smale, 12. The law of Scotland is the same in this matter as that of England: Tait on Evid. 384.

[4] Radcliffe *v.* Fursman, 2 Bro. P. C. 514.

[5] Preston *v.* Carr, 1 Y. & Jer. 175.

[6] Newton *v.* Beersford, 1 You. 376.

[7] In Bolton *v.* Corp. of Liverpool, 1 My. & K. 88, per Lord Chancellor Brougham, and in Pearse *v.* Pearse, 11 Jur. 52, by Knight Bruce, V. C.; see 11 Jur. pp. 54, 55; 1 De Gex & Smale, 25–29; see also Gresley on Evid. 32, 33; Bishop of Meath *v.* Marquis of Winchester, 10 Bing. 330, 375, 454, 455; Nias *v.* Northern, etc. Railway Co., 3 My. & C. 356, 357; Bunbury *v.* Bunbury, 2 Beav. 173; Herring *v.* Clobery, 1 Phil. 91; Jones *v.* Pugh, id. 96; Law Mag. (London) vol. xvii, pp. 51–74, and vol. xxx, pp. 107–123; Holmes *v.* Baddeley, 1 Phil. Ch. 476; {in Minet *v.* Morgan, L. R. 8 Ch. 361, Pearse *v.* Pearse, 16 L. J. Ch. 153, and Lawrence *v.* Campbell, 4 Drew. 485, were approved, and all the former decisions reviewed.} Lord Langdale has held that the privilege of a client, as to discovery, was not coextensive with that of his solicitor; and therefore he compelled the son and heir to discover a case which had been submitted to counsel by his father, and had come, with the estate, to his hands: Greenlaw *v.* King, 1 Beavan 137. But his opinion on the general question, whether the party is bound to discover a case submitted to his counsel, is known to be opposed to that of a majority of the English judges, though still retained by himself: see Crisp *v.* Platel, 8 Beav. 62; Reece *v.* Trye, 9 id. 316, 318, 319; Peile *v.* Stoddard, 13 Jur. 373.

distinctions have been attempted to be set up, in favor of a discovery of communications made before litigation, though in contemplation of, and with reference to, such litigation, which afterwards took place; and again, in respect to communications which, though in fact made after the dispute between the parties, which was followed by litigation, were yet made neither in contemplation of, nor with reference to, such litigation; and again, in regard to communications of cases or statements of fact, made on behalf of a party by or for his solicitor or legal adviser, on the subject-matter in question, after litigation commenced, or in contemplation of litigation on the same subject with other persons, with the view of asserting the same right; but all these distinctions have been overruled, and the communications held to be within the privilege.[1]

§ 241. **Same: Consultation as Conveyancer; Title-deeds and other Documents.** Upon the foregoing principles it has been held that the attorney is not bound to produce title-deeds, or other documents, left with him by his client for professional advice; though he may be examined to the fact of their existence, in order to let in secondary evidence of their contents, which must be from some other source than himself.[1] But whether the object of leaving the documents with the attorney was for professional advice or for another purpose, may be determined by the judge.[2] If he was consulted

[1] Lord Walsingham *v.* Goodricke, 3 Hare 122, 125; Hughes *v.* Biddulph, 4 Russ. 190; Vent *v.* Pacey, id. 193; Clagett *v.* Phillips, 2 Y. & C. 82; Combe *v.* Corp. of Lond., 1 id. 631; Holmes *v.* Baddeley, 1 Phil. Ch. 476. Where a *cestui que trust* filed a bill against his trustee, to set aside a purchase by the latter of the trust property, made thirty years back; and the trustee filed his cross-bill, alleging that the *cestui que trust* had long known his situation in respect to the property, and had acquiesced in the purchase, and in proof thereof that he had, fifteen years before, taken the opinion of counsel thereon, of which he prayed a discovery and production, — it was held that the opinion, as it was taken after the dispute had arisen which was the subject of the original and cross bill and for the guidance of one of the parties in respect of that very dispute, was privileged at the time it was taken; and as the same dispute was still the subject of the litigation, the communication still retained its privilege: Woods *v.* Woods, 9 Jur. 615, per Sir J. Wigram, V. C. But where a bill for the specific performance of a contract for the sale of an estate was brought by the assignees of a bankrupt who has sold it under their commission, and a cross-bill was filed against them for discovery, in aid of the defence it was held that the privilege of protection did not extend to professional and confidential communications between the defendants and their counsel, respecting the property and before the sale, but only to such as had passed after the sale; and that it did not extend to communications between them in the relation of principal and agent; nor to those had by the defendants or their counsel with the insolvent, or his creditors, or the provisional assignee, or on behalf of the wife of the insolvent: Robinson *v.* Flight, 8 Jur. 888, per Ld. Langdale.

[1] Brard *v.* Ackerman, 5 Esp. 119; Doe *v.* Harris, 5 C. & P. 592; Jackson *v.* Bartis, 14 Johns. 391; Dale *v.* Livingston, 4 Wend. 558; Brandt *v.* Klein, 17 Johns. 335; Jackson *v.* McVey, 18 id. 330; Bevan *v.* Waters, 1 M. & M. 235; Eicke *v.* Nokes, id. 303; Mills *v.* Oddy, 6 C. & P. 728; Marston *v.* Downes, id. 381; s. c. 1 Ad. & El. 31, explained in Hibbert *v.* Knight, 12 Jur. 162; Bate *v.* Kinsey, 1 C. M. & R. 38; Doe *v.* Ross, 7 M. & W. 102; Nixon *v.* Mayoh, 1 M. & Rob. 76; Davies *v.* Waters, 9 M. & W. 608; Coates *v.* Birch, 1 G. & D. 474; 1 Dowl. P. C. 540; Doe *v.* Langdon, 12 Q. B. 711; [Dwyer *v.* Collins, 7 Exch. 639; Davis *v.* R. Co., Minn., 72 N. W. 823;] {Stokoe *v.* St. Paul, Minn. & Manit. Ry. Co., 40 Minn. 546; Brandt *v.* Klein, 17 Johns. 335; Volant *v.* Sawyer, 13 C. B. 231.}

[2] R. *v.* Jones, 1 Denis, Cr. Cas. 166.

merely as a conveyancer, to draw deeds of conveyance, the communications made to him in that capacity are within the rule of protection,[3] even though he was employed as the mutual adviser and counsel of both parties; for it would be most mischievous, said the learned judges in the Common Pleas, if it could be doubted whether or not an attorney, consulted upon a man's title to an estate, were at liberty to divulge a flaw.[4]

§ 242. **Same: Attorney as a Party.** This rule is limited to cases where the witness (or the defendant in a bill in chancery treated as such, and so called to discover) learned the matter in question only as counsel, solicitor, or attorney, and in no other way. If, therefore, he were a party to the transaction, and especially if he were party to the fraud (as, for example, if he turned informer, after being engaged in a conspiracy), or, in other words, if he were acting for himself, though he might also be employed for another, he would not be protected from disclosing; for in such a case his knowledge would not be acquired solely by his being employed professionally.[1]

§ 242 *a*. **Same Consultation for Unlawful Purpose.** [It is not within the duty of a legal adviser to assist in the planning of crime or fraud; and a consultation with a view to such an unlawful purpose would not be privileged;[1] but the extent of this limitation has not been fully defined.]

§ 243. **Death; and Waiver.** The protection given by the law to such communications does not cease with the termination of the suit, or other litigation or business, in which they were made; nor is it affected by the party's ceasing to employ the attorney and retaining

[3] Cromack *v.* Heathcote, 2 Brod. & Bing. 4; Parker *v.* Carter, 4 Munf. 273; [Foster *v.* Hall, 12 Pick. 89;] see also Wilson *v.* Troup, 7 Johns. Ch. 25; {Crane *v.* Barkdoll, 59 Md. 534; Getzlaff *v.* Seliger, 43 Wis. 297.} [Distinguish from this the case of consulting a non-professional person for conveyancing purposes, *ante*, § 239.]

[4] Cromack *v.* Heathcote, *supra;* Doe *v.* Seaton, 2 Ad. & El. 171; Clay *v.* Williams, 2 Munf. 105, 122; Doe *v.* Watkins, 3 Bing. N. C. 421. [As to an attorney acting for both parties, see *post*, § 244.] Neither does the rule require any regular retainer, as counsel, nor any particular form of application or engagement, nor the payment of fees; it is enough that he was applied to for advice or aid in his professional character. But this character must have been known to the applicant; for if a person should be consulted confidentially, on the supposition that he was an attorney, when in fact he was not one, he will be compelled to disclose the matters communicated. [On these two points, see *ante*, § 239.]

[1] Greenough *v.* Gaskell, 1 My. & K. 103, 104; Desborough *v.* Rawlins, 3 Myl. & Cr. 515, 521–523; Story on Eq. Pl. §§ 601, 602. In Duffin *v.* Smith, Peake's Cas. 108, Lord Kenyon recognized this principle, though he applied it to the case of an attorney preparing title-deeds, treating him as thereby becoming a party to the transaction; but such are now held to be professional communications.

[1] [Craig *v.* Earl of Anglesea, 17 How. St. Tr. 1229 (the claimant to the defendant's estate, purporting to be the elder brother's son, kidnapped by the defendant, came back to England after many adventures, and, while preparing to claim his inheritance, killed a person, accidentally, it was said; the defendant, wishing to employ G. to conduct the prosecution for this killing, remarked that he would give ten thousand pounds to see the claimant hanged; held, not privileged; see the opinion of Mounteney, B.); Gartside *v.* Outram, 26 L. J. Ch. 113; R. *v.* Cox, L. R. 14 Q. B. D. 153;] {Follett *v.* Jeffereyes, 1 Sim. N. S. 3; Bank *v.* Mersereau, 3 Barb. Ch. 528; People *v.* Sheriff, 29 id. 627; Higbee *v.* Dresser, 103 Mass. 523;} Russell *v.* Jackson, 15 Jur. 1117.

another; nor by any other change of relations between them; nor by the death of the client.[1] The seal of the law, once fixed upon them, remains forever; unless removed by the party himself, in whose favor it was there placed.[2] It is not removed without the client's consent, even though the interests of criminal justice may seem to require the production of the evidence.[3] The client does not waive this privilege merely by calling the attorney as a witness, unless he also examines him in chief to the matter privileged;[4] {nor by taking the stand himself on his own behalf.[5]} [The privilege is that of the client, being intended to promote freedom of consultation for those needing legal advice; hence, the client is equally protected from disclosing the communication;[6] and the attorney's willingness to disclose is immaterial.[7]]

§ 244. **Communications not within the Principle.** This rule is further illustrated by reference to the cases, in which the attorney may be examined, and which are therefore sometimes mentioned as exceptions to the rule. These apparent exceptions are, where the communication was made before the attorney was employed as such, or after his employment had ceased;[1] or where, though consulted by a friend, because he was an attorney, yet he refused to act as such, and was therefore only applied to as a friend;[2] or where there could not be said, in any correctness of speech, to be a communication at all, as where, for instance, a fact, something that was done, became known to him, from his having been brought to a certain place by the circumstance of his being the attorney, but of which fact any other man, if there, would have been equally conusant (and even this has been held privileged in some of the cases);[3] or where the matter communicated was not in its nature private, and could in no

[1] {As between heirs and devisees, however, neither can be said to represent the client rather than the other, and the privilege may not apply: see Morris *v.* Morris, 119 Ind. 343; Layman's Will, 40 Minn. 372; Russell *v.* Jackson, 15 Jur. 1117; Blackburn *v.* Crawfords, 3 Wall. 175;} [Winters *v.* Winters, 102 Ia. 53; Glover *v.* Patten, U. S., 17 Sup. 411; see the somewhat analogous discussion in regard to the privilege of physician and patient, *post*, § 247 *a*.]

[2] Wilson *v.* Rastall, 4 T. R. 759, per Buller, J.; Petrie's Case, cited arg. 4 T. R. 756; Parker *v.* Yates, 12 Moore 520; Merle *v.* More, R. & M. 390.

[3] R. *v.* Smith, Phil. & Am. on Evid. 182; R. *v.* Dixon, 3 Burr. 1687; Anon., 8 Mass. 370; Petrie's Case, *supra*.

[4] Vaillant *v.* Dodemead, 2 Atk. 524; Waldron *v.* Ward, Styles 449; {Montgomery *v.* Pickering, 116 Mass. 227.}

[5] {Hemenway *v.* Smith, 28 Vt. 701; Barker *v.* Kuhn, 38 Iowa 395; State *v.* White, 19 Kan. 445; Duttenhofer *v.* State, 34 Ohio St. 91; Bigler *v.* Reyher, 43 Ind. 112. But see Woburn *v.* Henshaw, 101 Mass. 193; People *v.* Gallagher, 75 Mich. 515; State *v.* Tall, 43 Minn. 276;} [Louisv. & N. R. Co. *v.* Hill, 115 Ala. 334.]

[6] {Hughes *v.* Biddulph, 4 Russ. 190; Holmes *v.* Baddeley, 1 Phil. 476; Hemenway *v.* Smith, 28 Vt. 701.}

[7] [Craig *v.* Anglesea, 17 How. St. Tr. 1225;] {Stephen, Digest of Evidence, art. 115; *contra:* Willis *v.* West, 60 Ga. 613.}

[1] [Harless *v.* Harless, 144 Ind. 196; Jennings *v.* Sturdevant, 140 id. 641; Brady *v.* State, 39 Nebr. 529; Home Ins. Co. *v.* Berg, 46 id. 600; Farley *v.* Peebles, 50 id. 723; Turner's Estate, 167 Pa. 609.]

[2] [See *ante*, § 239.]

[3] [See the next section.]

sense be termed the subject of a confidential disclosure;[4] or where the thing had no reference to the professional employment, though disclosed while the relation of attorney and client subsisted; or where the attorney, having made himself a subscribing witness, and thereby assumed another character for the occasion, adopted the duties which it imposes, and became bound to give evidence of all that a subscribing witness can be required to prove.[5] In all such cases, it is plain that the attorney is not called upon to disclose matters which he can be said to have learned by communication with his client, or on his client's behalf, matters which were so committed to him, in his capacity of attorney, and matters which in that capacity alone he had come to know.[6]

§ 245. **Same: Illustrations.** Thus, the attorney may be compelled to disclose the name of the person by whom he was retained, in order to let in the confessions of the real party in interest;[1] the character in which his client employed him, whether that of executor or trustee, or on his private account;[2] the time when an instrument was put into his hands, but not its condition and appearance at that time, as, whether it was stamped or indorsed, or not;[3] the fact of his paying over to his client moneys collected for him;[4] the execution of a deed by his client, which he attested;[5] a statement made by him to the adverse party;[6] {the fact of having re-

[4] [See the next section.]

[5] {McKinney *v.* G. R. Co., 104 N. Y. 352; Coleman's Will, 111 id. 226;} [N. Y. St. 1893, c. 295; O'Brien *v.* Spalding, Ga., 31 S. E. 100; Taylor *v.* Pegram, 151 Ill. 106; Pence *v.* Waugh, 135 Ind. 143, 153; Denning *v.* Butcher, 91 Ia. 425, 434; Pitt's Estate, 85 Wis. 162, 167; Mullin's Estate, 110 Cal. 252; Wax's Estate, 106 id. 343; so also where he was merely the draughtsman of the will: Fayerweather *v.* Ritch, 90 Fed. 13.]

[6] Per Ld. Brougham, in Greenough *v.* Gaskell, 1 My. & K. 104. See also Desborough *v.* Rawlins, 3 Myl. & Cr. 521, 522; Lord Walsingham *v.* Goodricke, 3 Hare 122; Story's Eq. Pl. §§ 601, 602; Bolton *v.* Corporation of Liverpool, 1 My. & K. 88; Annesley *v.* E. of Anglesea, 17 How. St. Tr. 1239–1244; Gillard *v.* Bates, 6 M. & W. 547; R. *v.* Brewer, 6 C. & P. 363; Levers *v.* Van Buskirk, 4 Barr, 309.

[1] Levy *v.* Pope, 1 M. & M. 410; Brown *v.* Payson, 6 N. H. 443; Chirac *v.* Reinicker, 11 Wheat. 280; Gower *v.* Emery, 6 Shepl. 79; [Parke, B., in Jones *v.* Jones, 9 M. & W. 75.]

[2] Beckwith *v.* Benner, 6 C. & P. 681. But see Chirac *v.* Reinicker, 11 Wheat. 280, 295, where it was held that counsel could not disclose whether they were employed to conduct an ejectment for their client as landlord of the premises.

[3] Wheatley *v.* Williams, 1 M. & W. 533; Brown *v.* Payson, 6 N. H. 443; [see Turner *v.* Warren, 160 Pa. 336; Arbuckle *v.* Templeton, 65 Vt. 205.] But if the question were about a rasure in a deed or will, he might be examined to the question, whether he had ever seen it in any other plight: Bull. N. P. 284. So, as to a confession of the rasure by his client, if it were confessed before his retainer: Cuts *v.* Pickering, 1 Ventr. 197. See also Baker *v.* Arnold, 1 Cai. 258, per Thompson and Livingston, JJ.

[4] [See Freeman *v.* Brewster, 93 Ga. 648; Caldwell *v.* Melvedt, 93 Ia. 730. For the privilege as applied to matters in bankruptcy, see an article in 33 Law Journal 489 (1898).]

[5] Doe *v.* Andrews, Cowp. 845; Robson *v.* Kemp, 4 Esp. 235; s. c. 5 id. 53; Sandford *v.* Remington, 2 Ves. Jr. 189; [and whether he attested it or not: Duchess of Kingston's Case, 20 How. St. Tr. 613; Stanhilber *v.* Graves, 97 Wis. 515, *semble*;] {Rundle *v.* Foster, 3 Tenn. Ch. 658.}

[6] Ripon *v.* Davies, 2 Nev. & M. 310; Shore *v.* Bedford, 5 M. & Gr. 271; Griffith *v.* Davies, 5 B. & Ad. 502, overruling Gainsford *v.* Grammar, 2 Campb. 9, *contra*.

ceived money from his client and deposited it.7} He may also be called to prove the identity of his client;[8] the fact of his having sworn to his answer in Chancery, if he were then present;[9] usury in a loan made by him as broker, as well as attorney to the lender;[10] the fact that he or his client is in possession of a certain document of his client's for the purpose of letting in secondary evidence of its contents;[11] and his client's handwriting,[12] [or mental condition.[13]] [The presence of a third person will usually be treated as indicating that the communication was not confidential;[14] moreover, a third person who overhears the communication is not within the confidence and may disclose what he hears.[15] Where the same attorney is acting for both parties, it is perhaps difficult to say whether the communications should be treated as joint confidences and therefore privileged in litigation between the same parties, or whether, on the contrary, they should be considered as confidential against all other persons, but not as between the parties themselves; the latter view seems usually preferable.[16]] But in all cases of this sort, the privilege of secrecy is carefully extended to all the matters professionally disclosed, and which he would not have known but from his being consulted professionally by his client. [Communications by a witness, when consulted by the attorney, are not privileged,

7 {Jeanes *v.* Fridenburgh, 5 Pa. L. J. R. 199; Williams *v.* Young, 46 Ia. 140.}

8 Cowp. 846; Beckwith *v.* Benner, 6 C. & P. 681; Hurd *v.* Moring, 1 id. 372; R. *v.* Watkinson, 2 Str. 1122 and note.

9 Bull. N. P. 284; Cowp. 846; [Duchess of Kingston's Case, 20 How. St. Tr. 613.]

10 Duffin *v.* Smith, Peake's Cas. 108.

11 Revan *v.* Waters, 1 M. & M. 235; Eicke *v.* Nokes, ib. 303; Jackson *v.* McVey, 18 Johns. 330; Brandt *v.* Klein, 17 id. 335; Doe *v.* Ross, 7 M. & W. 102; Robson *v.* Kemp, 5 Esp. 53; Coates *v.* Birch, 2 Q. B. 252; Coveney *v.* Tannahill, 1 Hill 33; Dwyer *v.* Collins, 16 Jur. 569; 7 Exch. 639; {see Allen *v.* Root, 39 Tex. 589.}

12 Hurd *v.* Moring, 1 C. & P. 372; Johnson *v.* Daverne, 19 Johns. 134; 4 Hawk. P. C. b. 2, ch. 36, § 89; [Duchess of Kingston's Case, 20 How. St. Tr. 613.]

13 {Daniel *v.* Daniel, 39 Pa. 191;} [Wicks *v.* Dean, Ky., 44 S. W. 397; State *v.* Fitzgerald, 68 Vt. 125; *contra:* Gurley *v.* Park, 135 Ind. 440.]

14 {Goddard *v.* Gardner, 28 Conn. 172;} [People *v.* Buchanan, 145 N. Y. 1; Hummel *v.* Kistner, 182 Pa. 216; particularly if the third person is an opposing party: Wyland *v.* Griffith, 96 Ia. 24; Frank *v.* Morley, 106 Mich. 635; David Adler & S. C. Co. *v.* Hellman, Nebr., 75 N. W. 877.]

15 [See Denver T. Co. *v.* Owens, 20 Colo. 107, 125; Perry *v.* State, Ida., 38 Pac. 658; Basye *v.* State, 45 Nebr. 261;] {Hoy *v.* Morris, 13 Gray 519; Whiting *v.* Barney, 30 N. Y. 330.} [*Contra*, for a lost writing, Liggett *v.* Glenn, 4 U. S. App. 438, 472; but compare Calcraft *v.* Guest, 1898, 1 Q. B. 759.]

16 [The cases are not harmonious; see] R. *v.* Avery, 6 C. & P. 596; Shore *v.* Bedford, 5 M. & Gr. 271; Bank *v.* Merserean, 3 Barb. Ch. 528; Pritchard *v.* Foulkes, 1 Coop. 14; Warde *v.* Warde, 15 Jur. 759; {Doe *v.* Watkins, 3 Bing. N. C. 421; Doe *v.* Seaton, 2 A. & E. 171; Reynell *v.* Sprye, 10 Beav. 51; Gulick *v.* Gulick, 39 N. J. Eq. 516; Michael *v.* Foil, 100 N. C. 189; Cady *v.* Walker, 62 Mich. 157; Tyler *v.* Tyler, 126 Ill. 541; Lynn *v.* Lyerle, 113 Ill. 134; *Re* Bauer, 79 Cal. 312; Coolt *v.* McConnell, 116 Ind. 256; Goodwin Company's Appeal, 117 Pa. St. 537; Hanlon *v.* Doherty, 109 Ind. 37; Rice *v.* Rice, 14 B. Mon. 417;} [Murphy *v.* Waterhouse, 113 Cal. 467; Sparks *v.* Sparks, 51 Kan. 195, 201; Livingston *v.* Wagner, 23 Nev. 53; Roper *v.* State, 58 N. J. L. 420; Levers *v.* Van Buskirk, Pa., 40 Atl. 1008.]

for the witness is in principle not a partisan or agent of either party.[17]]

§ 246.[1]

2. *Other Confidential Relations.*

§ 247. **Priest and Penitent.** There is one other situation in which the exclusion of evidence has been strongly contended for, on the ground of confidence and the general good, namely, that of a clergyman; and this chiefly, if not wholly, in reference to criminal conduct and proceedings; that the guilty conscience may with safety disburden itself by penitential confessions, and by spiritual advice, instruction, and discipline, seek pardon and relief. The law of Papal Rome has adopted this principle in its fullest extent; not only excepting such confessions from the general rules of evidence, as we have already intimated,[1] but punishing the priest who reveals them. It even has gone farther; for Mascardus, after observing that, in general, persons coming to the knowledge of facts, under an oath of secrecy, are compellable to disclose them as witnesses, proceeds to state the case of confessions to a priest as not within the operation of the rule, on the ground that the confession is made not so much to the priest as to the Deity, whom he represents; and that therefore the priest, when appearing as a witness in his private character, may lawfully swear that he knows nothing of the subject. "Hoc tamen restringe, non posse procedere in sacerdote producto in testem contra reum criminis, quando in confessione sacramentali fuit aliquid sibi dictum, quia potest dicere, se nihil scire ex eo; quod illud, quod scit, scit ut Deus, et ut Deus non producitur in testem, sed ut homo, et tanquam homo ignorat illud super quo producitur."[2] In Scotland, where a prisoner in custody and preparing for his trial has confessed his crimes to a clergyman, in order to obtain spiritual advice and comfort, the clergyman is not required to give evidence of such confession. But even in criminal cases this exception is not carried so far as to include communications made confidentially

[17] [Duchess of Kingston's Case, 20 How. St. Tr. 613;] Mackenzie *v.* Yeo, 2 Curt. 866. [*Contra:* State *v.* Houseworth, 91 Ia. 740. For the client's communications *to* an expert witness, see *ante*, § 239. As to consultation by a party's wife, see R. *v.* Farley, 2 C. & K. 313.]

[1] [Transferred *post*, as § 469 *n.*]

[1] *Supra*, § 229, n. By the Capitularies of the French kings and some other continental codes of the Middle Ages, the clergy were not only excused, but in some cases were utterly prohibited from attending as witnesses in any cause. Clerici de judicii sui cognitione non cogantur in publicum dicere testimonium: Capit. Reg. Francorum, lib. 7, § 118 (A. D. 827). Ut nulla ad testimonia dicendum, ecclesiastici cujuslibet pulsetur persona: Id. § 91. See Leges Barbar. Antiq. vol. iii, pp. 313, 316; Leges Langobardicæ, in the same collection, vol. i, pp. 184, 209, 237. But from the constitutions of King Ethelred, which provide for the punishment of priests guilty of perjury, — "Si presbyter, *alicubi* inveniatur in falso testimonio, vel in perjurio," — it would seem that the English law of that day did not recognize any distinction between them and the laity, in regard to the obligation to testify as witnesses: see Leges Barbaror. Antiq. vol. iv, p. 294; Ancient Laws and Inst. of England, vol i, p. 347, § 27.

[2] Mascard. De Probat. vol. i, Quæst. 5, n. 61; id. Concl. 377. Vid. et P. Farinac, Opera, tit. 8, Quæst. 78, n. 73.

to clergymen in the ordinary course of their duty.[3] Though the law of England encourages the penitent to confess his sins, "for the unburthening of his conscience, and to receive spiritual consolation and ease of mind," yet the minister to whom the confession is made is merely excused from presenting the offender to the civil magistracy, and enjoined not to reveal the matter confessed, "under pain of irregularity."[4] In all other respects, he is left to the full operation of the rules of the common law, by which he is bound to testify in such cases as any other person when duly summoned. In the common law of evidence there is no distinction between clergymen and laymen; but all confessions, and other matters not confided to legal counsel, must be disclosed when required for the purposes of justice. Neither penitential confessions, made to the minister or to members of the party's own church, nor secrets confided to a Roman Catholic priest in the course of confession, are regarded as privileged communications.[5] [By statute in a few jurisdictions such a privilege has been created;[6] but, while little harm to the interests of justice can be done thereby, it is questionable whether any addition to the existing privileges is desirable.]

§ 247 *a*. **Physician and Patient.** Neither is this protection extended to medical persons, in regard to information which they have acquired confidentially, by attending in their professional characters;[1] [but by statute, two generations ago, the privilege was created in a few jurisdictions, and this policy has found favor of recent years in a large number of other jurisdictions. The privilege thus established is usually made to apply to such communications only as are necessary for obtaining the medical advice.[2] Whether it includes all facts learned by observation or otherwise, or merely the

[3] Tait on Evidence, pp. 386, 387; Alison's Practice, p. 586.

[4] Const. & Canon, 1 Jac. I, Can. exiii; Gibson's Codex, p. 963.

[5] Wilson *v.* Rastall, 4 T. R. 753; Butler *v.* Moore, McNally's Evid. 253–255; Anon., Skin. 404, per Holt, C. J.; Du Barré *v.* Livette, Peake's Cas. 77; Com. *v.* Drake, 15 Mass. 161; [Jessel, M. R., in Wheeler *v.* LeMarchant, L. R. 17 Ch. 10, 675; Normanshaw *v.* Normanshaw, 69 L. T. Rep. 468.] The contrary was held by De Witt Clinton, Mayor, in the Court of General Sessions in New York, June, 1813, in People *v.* Phillips, 1 Southwest. Law Journ. p. 90. See also Broad *v.* Pitt, 3 C. & P. 518, in which case Best, C. J., said, that he for one would never compel a clergyman to disclose communications made to him by a prisoner; but that, if he chose to disclose them, he would receive them in evidence: Joy on Confessions, etc., pp. 49–58; Best's Principles of Evidence, §§ 417–419; [in the Tichborne Case, R. *v.* Castro, Charge of the Chief Justice, I, 648, a priest refused to disclose and was not compelled; see an historical article by Mr. Hopwood, in 3 Jurid. Soc. Pap. 29.]

[6] [See the Iowa statute applied in State *v.* Brown, 95 Ia. 381.]

[1] Duchess of Kingston's Case, 11 Hargr. St. Tr. 243; 20 How. St. Tr. 643; R. *v.* Gibbons, 1 C. & P. 97; Broad *v.* Pitt, 3 id. 518, per Best, C. J.; [Jessel, M. R., in Wheeler *v.* LeMarchant, *supra*.]

[2] [Statements by the mother of a bastard, naming its father; statements by an injured person as to the occasion of the injury, — these illustrate the sort of question that arises; see Collins *v.* Mack, 31 Ark. 693; Redfield's Estate, 116 Cal. 637; Penns. Co. *v.* Marion, 123 Ind. 415; Bower *v.* Bower, 142 id. 194; Kans. C. F. S. & M. R. Co. *v.* Murray, 55 Kan. 336; Campan *v.* North, 39 Mich. 606; People *v.* Cole, id., 71 N. W. 455; Edington *v.* Ins. Co., 67 N. Y. 185, 194; Feency *v.* R. Co., 116 id. 380; Grattan *v.* Ins. Co., 80 id. 281, 297; Redmond *v.* Ben. Ass'n, 150 id. 167.]

verbal communications of the patient, is generally not left doubtful by the statute, the former and broader rule being the usual one.[8] It is properly held that an implied qualification exists, similar to that in the case of attorneys, not exempting communications made while preparing or committing a crime or fraud.[4] The communication will not be privileged if made under circumstances negativing its confidentiality;[5] as where the physician has been asked to attest a will,[6] or has been sent by the opponent to examine the person's condition,[7] or after the relation of medical adviser has ended.[8] The patient may of course waive the privilege, either by express act beforehand,[9] or by calling the physician to testify to his knowledge of the former's condition.[10] Whether after the patient's death the privilege may in his interest be waived by his representative, and, in particular, whether in a contest between heirs and devisees the one or the other can be said for this purpose to be the deceased's representative, there is no general agreement, the statutory phrasing often being peculiar and controlling.[11] The person consulted may be an assistant or partner of the physician;[12] but a dentist[13] or a drug-clerk[14] or a mere bystander[15] would not be a person as to whom the communication would be privileged.[16]

As to the policy of the privilege, and of extending it, there can only be condemnation. The chief classes of litigation in which it

[8] [See Gurley *v.* Park, 135 Ind. 440; Bower *v* Bower, 142 id. 194; Prader *v.* Accid. Ass'n, 95 Ia. 149; Brown *v.* Ins. Co., 65 Mich. 306; Lammiman *v.* R. Co., id., 71 N. W. 153; Nelson *v.* Oneida, N. Y., 50 N. E. 802;] {People *v.* Kemmler, 119 id. 585; Grattan *v.* Ins. Co., 80 id. 297.}

[4] [See Hauk *v.* State, 148 Ind. 238; State *v.* Kidd, 89 Ia. 56; State *v.* Smith, 99 id. 26; Hewitt *v.* Prime, 21 Wend. 79; People *v.* Harris, 136 N. Y. 423, 437, 448.]

[5] [But compare Renihan *v.* Dennin, 103 N. Y. 577.]

[6] [Mullin's Estate, 110 Cal. 252.]

[7] [Freel *v.* R. Co., 97 Cal. 40, *semble*; Nesbit *v.* People, 19 Colo. 441, 461; People *v.* Sliney, 137 N. Y. 570; People *v.* Hoch, 150 id. 291; compare Renihan *v.* Dennin, 103 id. 577.]

[8] [People *v.* Koerner, 154 N. Y. 355.]

[9] [Foley *v.* Royal Arcanum, 151 N. Y. 196.]

[10] [Wheelock *v.* Godfrey, 100 Cal. 587; Lissak *v.* Croker Est. Co., 119 id. 442;] {see McKinney *v.* R. Co., 104 N. Y. 355.} [For waiver by calling one of several physicians who examined, see Baxter *v.* Cedar Rapids, 103 Ia. 599; Morris *v.* R. Co., 148 N. Y. 88.]

[11] [See Flint's Estate, 100 Cal. 391; Harrison *v.* R. Co., 116 id. 156; Morris *v.* Morris, 119 Ind. 341; Heuston *v.* Simpson, 115 id. 62; Winters *v.* Winters, 102 Ia. 53; Denning *v.* Butcher, 91 id. 425, 436; Fraser *v.* Jennison, 42 Mich. 206; Groll *v.* Tower, 85 Mo. 249; Thompson *v.* Ish, 99 id. 160; Edington *v.* Ins. Co., 67 N. Y. 185; Westover *v.* Ins. Co., 99 id. 56; Renihan *v.* Dennin, 103 id. 573; Loder *v.* Whelpley, 111 id. 239; Hoyt *v.* Hoyt, 112 id. 513.]

[12] {Ætna L. Ins. Co. *v.* Denning, 123 Ind. 384.}

[13] [People *v.* De France, 104 Mich. 563.]

[14] [Brown *v.* R. Co., 66 Mo. 597; or a veterinary surgeon: Hendershott *v.* Tel. Co., Ia., 76 N. W. 828.]

[15] [Springer *v.* Byram, 137 Ind. 15, 23.]

[16] [In California, the statute does not apply to criminal cases: People *v.* Lane, 101 Cal. 513; People *v.* West, 106 id. 89.] {In New York it has been said that the accused cannot invoke it for communications by the deceased on whom the crime was committed: Pierson *v.* People, 18 Hun 239, 79 N. Y. 424.}

is invoked are actions on policies of life insurance, where the deceased's misrepresentations as to health are involved; actions for corporal injuries, where the plaintiff's bodily condition is to be ascertained; and testamentary actions, where the testator's mental condition is in issue. In all of these cases the medical testimony is "the most vital and reliable," "the most important and decisive,"[17] and is absolutely needed for purposes of learning the truth. In none of them is there any reason for the party to conceal the facts except to perpetrate a fraud upon the opposing party, and in the first two of these classes the advancement of fraudulent claims is notoriously common. In none of these cases need there be any fear that the absence of the privilege will subjectively hinder people from consulting physicians freely (which is, as we have seen, the true reason for maintaining the privilege for clients of attorneys); the injured person would still seek medical aid, the insured person would still submit to a medical examination, and the dying testator would still summon physicians to his cure. In litigation about wills, policies, and personal injuries, the privilege, where it exists, is known in practice to be a serious obstacle to the ascertainment of truth and a useful weapon for those interested in suppressing it. Any extension of it to other jurisdictions is to be earnestly deprecated.]

§ 248. **Ordinary Private Relations.** Neither is this protection extended to confidential friends,[1] clerks,[2] bankers,[3] or stewards[4] (except as to matters which the employer himself would not be obliged to disclose, such as his title-deeds and private papers, in a case in which he is not a party). [The purpose of trials could never be accomplished, if every disclosure made in confidence were to be sealed with perpetual secrecy. In the language of Lord Camden,[5] "it is not befitting the dignity of this high Court of justice to be debating the etiquette of honor at the same time when we are trying lives and liberties." The protection accorded to the relations treated in the preceding and ensuing paragraphs is not based on a respect for the confidentiality of the communication, but on the policy of fostering the greatest freedom within that relation and, as a means thereto, of assuring beforehand to persons in such relations the feeling of security and liberty. There is, thus, no privilege for a confidential communication merely as such.[6]]

[17] [By the Court, criticising the privilege, in Renihan *v.* Dennin, 103 N. Y. 577.]

[1] 4 T. R. 758, per Ld. Kenyon; Hoffman *v.* Smith, 1 Caines 157, 159; [Duchess of Kingston's Case, 20 How. St. Tr. 586; Hill's Trial, ib. 1362; R. *v.* Shaw, 6 C. & P. 373; R. *v.* Thomas, 7 id. 346; Cox *v.* Montague, 78 Fed. 845; nor to a fellow-member of a fraternal order: Owens *v.* Frank, Wyo., 53 Pac. 282.]

[2] Lee *v.* Birrell, 3 Campb. 337; Webb *v.* Smith, 1 C. & P. 337.

[3] Loyd *v.* Freshfield, 2 C. & P. 325.

[4] Vaillant *v.* Dodemead, 2 Atk. 524; 4 T. R. 756, per Buller, J.; E. of Falmouth *v.* Moss, 11 Price 455; [and of course not to a newspaper reporter: People *v.* Durrant, 116 Cal. 179; *Ex parte* Lawrence, ib. 298.]

[5] [In Duchess of Kingston's Case, *supra*.]

[6] [It has thus been repudiated for a commercial agency: Shaner *v.* Alterton, 151 U. S. 607, 617;] [and for a telegraph company: State *v.* Litchfield, 58 Me. 267; Nat'l

§ 249.[1]

§ 250. **Government and Informer.** We now proceed to the third class of cases, in which evidence is excluded from motives of public policy, namely, secrets of State, or things the disclosure of which would be prejudicial to the public interest. These matters are either those which concern the administration of penal justice, or those which concern the administration of government; but the principle of public safety is in both cases the same, and the rule of exclusion is applied no further than the attainment of that object requires.

Thus, in criminal trials, the names of persons employed in the discovery of the crime are not permitted to be disclosed,[1] any farther than is essential to a fair trial of the question of the prisoner's innocence or guilt.[2] "It is perfectly right," said Lord Chief Justice Eyre,[1] "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 be unnecessarily disclosed." Accordingly, where a witness, possessed of such knowledge, testified that he related it to a friend, not in office, who advised him to communicate it to another quarter, a majority of the learned judges held that the witness was not to be asked the name of that friend; and they all were of opinion that all those questions which tend to the discovery of the channels by which the disclosure was made to the officers of justice, were, upon the general principle of the convenience of public justice, to be suppressed; that all persons in that situation were protected from the discovery; and that, if it was objected to, it was no more competent for the defendant to ask the witness who the person was that advised him to make a disclosure, than to ask who the person was to whom he made the disclosure in consequence of that advice, or to ask any other question respecting the channel of communication, or all that was done under it.[3] Hence it appears that a witness, who has been employed to collect information for the use of government, or for the purposes of the police, will not be permitted to disclose the name of his employer, or the nature of the connection between them, or the name of any person who was the channel of communication with the government or its officers, nor whether the information has actually reached

Bank *v.* Bank, 7 W. Va. 544;] [*Ex parte* Brown, 72 Mo. 83, 91; and see the article by Mr. Hitchcock, in 5 So. L. Rev. N. s. 473.]

[1] [Transferred *post*, as § 254 *c*.]

[1] [Hardy's Trial, 24 How. St. Tr. 8 (leading case); Watson's Trial, 32 id. 102; R. *v.* O'Connell, 5 State Tr. N. s. 1, 208; R. *v.* O'Brien, 7 id. 1, 123;] Att'y-Gen'l *v.* Briant, 15 L. J. N. s. Exch. 265.

[2] [As to this last clause, see *post*, at the end of the section.]

[3] R. *v.* Hardy, 24 How. St. Tr. 808–815, per Ld. C. J. Eyre.

the government. But he may be asked whether the person to whom the information was communicated was a magistrate or not.[4]

§ 251. **Confidential Official Business.** On a like principle of public policy, the official transactions between the heads of the departments of State and their subordinate officers are in general treated as privileged communications. Thus, communications between a provincial governor and his attorney-general on the state of the colony, or the conduct of its officers;[1] or between such governor and a military officer under his authority;[2] the report of a military commission of inquiry made to the commander-in-chief;[3] and the correspondence between an agent of the government and a Secretary of State,[4] are confidential and privileged matters, which the interests of the State will not permit to be disclosed. The President of the United States, and the governors of the several States, are not bound to produce papers or disclose information communicated to them, when, in their own judgment, the disclosure would, on public considerations, be inexpedient.[5] And where the law is restrained by public policy from enforcing the production of papers, the like necessity restrains it from doing what would be the same thing in effect; namely, receiving secondary evidence of their contents.[6] But communications, though made to official persons, are not privileged where they are not made in the discharge of any public duty; such, for example, as a letter by a private individual to the chief secretary of the

[4] 1 Phil. Evid. 180, 181; R. *v.* Watson, 2 Stark. 136; 32 How. St. Tr. 101; U. S. *v.* Moses, 4 Wash. C. C. 726; Home *v.* Lord F. C. Bentinck, 2 Brod. & Bing. 130, 162, per Dallas, C. J.; [Humphrey *v.* Archibald, 20 Ont. App. 267; Worthington *v.* Scribner, 109 Mass. 487. Whether the exclusion is absolute, or whether the Court may, in discretion and in fairness to a defendant or where otherwise the disclosure would be desirable, require it to be made, is not clearly settled: see {Oliver *v.* Pate, 43 Ind. 132; Stephen, Dig. of Evidence, art. 113;} and the opinions in the last two cases above cited. The rule does not apply to an application for a liquor-license: *Re* Hirsch, 74 Fed. 928; *contra*, on peculiar grounds: *Re* Weeks, 82 Fed. 729.]

[1] Wyatt *v.* Gore, Holt's N. P. Cas. 299; {or between a district-attorney and the Attorney-General: U. S. *v.* Six Lots of Ground, 1 Woods C. C. 234.}

[2] Cooke *v.* Maxwell, 2 Stark. 183.

[3] Home *v.* Lord F. C. Bentinck, 2 Brod. & Bing. 130.

[4] Anderson *v.* Hamilton, 2 Brod. & Bing. 156, n.; 2 Stark. 185, per Lord Ellenborough, cited by the Attorney-General; Marbury *v.* Madison, 1 Cranch 144; see also *post*, Vol. III, § 498.

[5] 1 Burr's Trial, 186, 187, per Marshall, C. J.; Gray *v.* Pentland, 2 S. & R. 23.

[6] Gray *v.* Pentland, 2 S. & R. 23, 31, 32, per Tilghman, C. J., cited and approved in Yoter *v.* Sanno, 6 Watts 166, per Gibson, C. J. In Law *v.* Scott, 5 Har. & J. 438, it seems to have been held that a senator of the United States may be examined as to what transpired in a secret executive session, if the Senate has refused, on the party's application, to remove the injunction of secrecy. *Sed quære*, for if so, the object of the rule, in the preservation of State secrets, may generally be defeated. And see Plunkett *v.* Cobbett, 29 Howell's St. Tr. 71, 72; s. c. 5 Esp. 136, where Lord Ellenborough held that though one member of Parliament may be asked as to the fact that another member took part in a debate, yet he was not bound to relate anything which had been delivered by such a speaker as a member of Parliament. But it is to be observed that this was placed by Lord Ellenborough on the ground of personal privilege in the member; whereas the transactions of a session, after strangers are excluded, are placed under an injunction of secrecy for reasons of State: {see Chubb *v.* Salomons, 3 C. & K. 75.}

Postmaster-General, complaining of the conduct of the guard of the mail towards a passenger.[7]

§ 252. **Proceedings of Grand Jurors.** For the same reason of public policy, in the furtherance of justice, the proceedings of grand jurors are regarded as privileged communications. It is the policy of the law, that the preliminary inquiry, as to the guilt or innocence of a party accused, should be secretly conducted; and in furtherance of this object every grand juror is sworn to secrecy. One reason may be, to prevent the escape of the party should he know that proceedings were in train against him; another may be, to secure freedom of deliberation and opinion among the grand jurors, which would be impaired if the part taken by each might be made known to the accused. A third reason may be, to prevent the testimony produced before them from being contradicted at the trial of the indictment, by subornation of perjury on the part of the accused. The rule includes not only the grand jurors themselves, but their clerk,[1] if they have one, and the prosecuting officer, if he is present at their deliberations;[2] all these being equally concerned in the administration of the same portion of penal law. They are not permitted to disclose who agreed to find the bill of indictment, or who did not agree; nor to detail the evidence on which the accusation was founded.[3] But they may be compelled to state whether a particular person testified as a witness before the grand jury;[4] though it seems they cannot be asked if his testimony there agreed with what he testified upon the trial of the indictment.[5] Grand jurors may also be asked, whether

[7] Blake *v.* Pilfold, 1 M. & Rob. 198.

[There seems also to be a privilege, not well defined, against the disclosure, not merely of communications from other officials, but also of facts coming to the witness' knowledge through an official position, where the disclosure of the facts would injure State policy: see Bishop Atterbury's Trial, 16 How. St. Tr. 494, 495, 543, 587, 629, 672 (cipher used by official detectives, etc.); Nundocomar's Trial, 20 id. 1057; {Beatson *v.* Skene, 5 H. & N. 838;} Hartranft's Appeal, 85 Pa. 433. Distinguish from all the above questions (1) that of the amenability of a public official to legal process for official acts, and (2) the exemption of an executive officer of State from responding to a subpœna as witness: see Hartranft's Appeal, *supra.* Letters in the public post are not privileged apart from statute: Tomline *v.* Tyler, 44 L. T. N. S. 187; *Re* Smith, L. R. Ir. 7 Ch. D. 286; but the constitutional provision protecting against unlawful search has been spoken of as applying to the mail: *Ex parte* Jackson, 96 U. S. 727.]

[1] 12 Vin. Abr. 38, tit. Evid. B, *a*, pl. 5; Trials per Pais, 315.

[2] Com. *v.* Tilden, cited in 2 Stark. Evid. 232, n. (1), by Metcalf; McLellan *v.* Richardson, 1 Shepl. 82; [Jenkins *v.* State, Fla., 18 So. 182.] But on the trial of an indictment for perjury, committed in giving evidence before the grand jury, it has been held that another person, who was present as a witness in the same matter, at the same time, is competent to testify to what the prisoner said before the grand jury; and that a police-officer in waiting was competent for the same purpose; neither of these being sworn to secrecy: R. *v.* Hughes, 1 Car. & Kir. 519.

[3] Sykes *v.* Dunbar, 2 Selw. N. P. 815 (1059); Huidekoper *v.* Cotton, 3 Watts 56; McLellan *v.* Richardson, 1 Shepl. 82; Low's Case, 4 Greenl. 439, 446, 453; Burr's Trial (Anon.), Evidence for Deft. p. 2; [see Owen *v.* Owen, Md., 132 Atl. 247.]

[4] Sykes *v.* Dunbar, 2 Selw. N. P. 815 (1059); Huidekoper *v.* Cotton, 1 Watts 56; Freeman *v.* Arkell, 1 C. & P. 135, 137, n. (*c*); [or the date of the witness' attendance: Watson's Trial, 32 How. St. Tr. 107.]

[5] 12 Vin. Abr. 20, tit. Evidence, H; Imlay *v.* Rogers, 2 Halst. 347. The rule in

twelve of their number actually concurred in the finding of a bill, the certificate of the foreman not being conclusive evidence of that fact.[6]

§ 252 *a*. **Proceedings of Traverse Jurors.** On similar grounds of public policy, and for the protection of parties against fraud, the law excludes the testimony of traverse jurors, when offered to prove misbehavior in the jury in regard to the verdict. Formerly, indeed, the affidavits of jurors have been admitted in support of motions to set aside verdicts by reason of misconduct; but that practice was broken in upon by Lord Mansfield, and the settled course now is to reject them, because of the mischiefs which may result if the verdict is thus placed in the power of a single juryman.[1] [But while it may be conceded that the communications between jurors are in general accorded the protection of privacy, the true question in most of such cases seems to be one of jury-law or of the law of new trials, *i. e.* whether certain kinds of misconduct will be considered as sufficient ground for disturbing the verdict, and whether it is wiser to attempt to investigate the truth about such occurrences or to let the verdict make an end of controversy, — much on the same principle that, after a judicial record has been made up or a contract reduced to a final written memorial, the prior parol proceedings or negotiations will not be investigated for the purpose of overthrowing the record or instrument. In other words, it is then not so much a question of whether the things said or done in the jury room shall be kept secret as of whether certain things said or done should be given any legal effect in overturning or supporting a verdict. Some things — such as tossing coins to determine the verdict — might well be

the text is applicable only to civil actions. In the case last cited, which was trespass, the question arose on a motion for a new trial, for the rejection of the grand juror, who was offered in order to discredit a witness; and the Court being equally divided, the motion did not prevail. Probably such also was the nature of the case in Clayt. 84, pl. 140, cited by Viner. [Moreover, whatever the rule may now be in England (see Stephen, Digest of Evidence, art. 114), the general view in this country is that where a witness testifies on a trial, the reasons for preserving privacy as to his former statements before the grand jury do not forbid the resort to that testimony for the purpose of exposing the inconsistency of his story: see {Com. *v.* Mead, 12 Gray 166; Jones *v.* Turpin, 6 Heisk. 181; State *v.* Wood, 53 N. H. 484; Shattuck *v.* State, 11 Ind. 473; Burdick *v.* Hunt, 43 id. 381; New Hamp. F. I. Co. *v.* Healey, 151 Mass. 538;} Jenkins *v.* State, 35 Fla. 737; Hinshaw *v.* State, 147 Ind. 334; State *v.* Benner, 64 Me. 282; People *v.* O'Neill, 107 Mich. 556; Kirk *v.* Garrett, 84 Md. 383; State *v.* Brown, 28 Or. 147; statutes often regulate the subject; as, *e. g.*, in State *v.* Thomas, 99 Mo. 235, 259.] Where a witness before the grand jury has committed perjury in his testimony, either before them or at the trial, the reasons mentioned in the text for excluding the testimony of grand jurors do not prevent them from being called as witnesses after the first indictment has been tried, in order to establish the guilt of the perjured party: see 4 Bl. Comm. 126, n. 5, by Christian; 1 Chitty's Crim. Law, p. 317; Sir J. Fenwick's Case, 13 How. St. Tr. 610, 611; 5 St. Tr. 72; [People *v.* O'Neill, 107 Mich. 556.]

[6] 4 Hawk. P. C. b. 2, c. 25, § 15; McLellan *v* Richardson, 1 Shepl. 82; Low's Case, 4 Greenl. 439; Com. *v.* Smith, 9 Mass. 107; [*contra:* Bayard's Trial, 14 How. St. Tr. 478.]

[1] Vaise *v.* Delaval, 1 T. R. 11; Jackson *v.* Williamson, 2 T. R. 281; Owen *v.* Warburton, 1 N. R. 326; Little *v.* Larrabee, 2 Greenl. 37, 41, n., where the cases are collected: State *v.* Freeman, 5 Conn. 348; Meade *v.* Smith, 16 Conn. 346; Straker *v.* Graham, 4 M. & W. 721.

investigated and given effect; others — such as misunderstanding the instructions — might well be thought so elusive and so fruitful of unending controversy as to forbid consideration for the purpose of affecting the verdict. Judicial opinion naturally differs much as to the kinds of conduct which may thus be investigated.[2]]

§ 253.[1]

§ 254. **Communications between Husband and Wife.** Communications between husband and wife belong also to the class of privileged communications, and are therefore protected independently of the ground of interest and identity, which precludes the parties from testifying for or against each other. The happiness of the married state requires that there should be the most unlimited confidence between husband and wife; and this confidence the law secures by providing that it shall be kept forever inviolable; that nothing shall be extracted from the bosom of the wife which was confided there by the husband. [The common-law privilege has usually been dealt with by the statutes abolishing disqualification by reason of interest. Most of these statutes[1] have abolished the common-law disqualification of one spouse to testify for the other, and a few of them have also abolished the privilege of one spouse not to have the other testify in opposition (*post*, §§ 333 *c*–346); but all of these have preserved, or intended to preserve, the present privilege (for confidential communications) undiminished. The practical differences between these three principles — wholly distinct in policy and effect, but not always carefully distinguished — is explained in another place (*post*, § 333 *c*). In several of these statutes, however, the three matters have been dealt with so confusedly that the original features of the present common-law privilege have been more or less altered, usually by the interpolation of some of the incidents of the other two principles above mentioned, but occasionally by the direct expansion of the scope of the present privilege. In many jurisdictions, therefore, the limits of the privilege will depend wholly on the wording of the local statute. In this place it will be possible to note only a few of the more general questions that arise.

At common law the privilege seems clearly to have included only such communications as are private or confidential; but by some of

[2] [Leading opinions are those by Brewer, J., in Perry *v.* Bailey, 12 Kan. 539; Gray, J., in Woodward *v.* Leavitt, 107 Mass. 453; Fuller, C. J., in Mattox *v.* U. S., 146 U. S. 140; see also {Tucker *v.* South Kingston, 5 R. I. 558; Bridgewater *v.* Plymouth, 97 Mass. 382; Boston, etc. R. R. Corp. *v.* Dana, 1 Gray 83, 105; Folsom *v.* Manchester, 11 Cush. 334, 337; Rowe *v.* Canney, 139 Mass. 41; Warren *v.* Water Co., 143 id. 155; Com. *v.* White, 147 id. 76; Heffron *v.* Gallupe, 55 Me. 563; Dana *v.* Tucker, 4 Johns. 487; Tenney *v.* Evans, 13 N. H. 462; State *v.* Ayer, 23 id. 301;} Kelly *v.* State, 39 Fla. 122; Bolden *v.* G. R. & B. Co., Ga., 27 S. E. 664; Christ *v.* Webster City, Ia., 74 N. W. 743; State *v.* McCormick, 57 Kan. 440; Harrington *v.* R. Co., 157 Mass. 579; Rush *v.* R. Co., Minn., 72 N. W. 733; Hamburg B. F. I. Co. *v.* Mfg. Co., U. S. App., 76 Fed. 479: Thompson on Trials, § 2618.]

[1] [Transferred *post*, as § 254 *b*.]

[1] [See these statutes set out in Appendix I.]

the statutes it includes all communications between husband and wife.[2] In construing the privilege in its original and proper form, it is usually held that a conversation in the presence of third persons is not confidential;[3] various other situations present the same question, but much must depend on the circumstances of each case.[4] But a conversation with a third person is not excluded because the other spouse was also present;[5] and one who surreptitiously overhears the communication may testify to it, presumably on the principle that the person making the communication might, by taking more pains, have secured that privacy which the law would have respected.[6] The common-law privilege protects only conversations or communications; and the question may thus arise whether certain conduct by one spouse in the presence of the other — such as the payment of money or the signing of a note — is to be treated as a communication; but under certain statutes which enlarge the privilege to "transactions" these questions arise less frequently.[7] Precisely whose the privilege is — *i. e.*, in particular, whether the objection of the other spouse would still be effectual, supposing that the spouse against whom it is offered has waived it — does not seem to be clearly settled; but it seems certain, on the one hand, that as against the one who has waived it — *e. g.* by voluntarily disclosing it to a third person — the protection of the privilege ceases,[8] and, on the other hand, that the voluntary disclosure by one spouse to a third person does not make the communication admissible as against the other;[9] moreover, the privilege seems to belong equally to the

[2] [See the statutes in Appendix I;] {also Campbell *v.* Chace, 12 R. I. 333; Estate of Low, Myrick's Probate 143; Bird *v.* Hueston, 10 Ohio St. 418; Westerman *v.* Westerman, 25 id. 500.}

[3] [The circumstances of each case may affect the decision: see Reynolds *v.* State, 147 Ind. 3; Jacobs *v.* Hesler, 113 Mass. 159; Fay *v.* Guynon, 131 id. 31; Lyon *v.* Prouty, 154 id. 489; Toole *v.* Toole, 111 N. C. 152; Dumbach *v.* Bishop, 183 Pa. 602; Wheeler *v.* Campbell, 68 Vt. 98.]

[4] {See Dexter *v.* Booth, 2 All. 559; Raynes *v.* Bennett, 114 Mass. 425; Com. *v.* Jardine, 143 id. 567; Com. *v.* Hayes, 145 id. 293; Wood *v.* Chetwood, 27 N. J. Eq. 311;} [Hagerman *v.* Wigent, 108 Mich. 192; Newstrom *v.* R. Co., 61 Minn. 78; Seitz *v.* Seitz, 170 Pa. 71; Phœnix Ins. Co. *v.* Shoemaker, 95 Tenn. 72; Southwick *v.* Southwick, 49 N. Y. 510.]

[5] [Allbright *v.* Hannah, 103 Ia. 98;] {Griffin *v.* Smith, 45 Ind. 366; Higbee *v.* McMillen, 18 Kan. 133.}

[6] [R. *v.* Simons, 6 C. & P. 541; Com. *v.* Griffin, 110 Mass. 181;] {State *v.* Carter, 35 Vt. 378.}

[On this principle, if a written communication is obtained by a third person (supposably without collusion), the latter may put it in: see State *v.* Hoyt, 47 Conn. 540; {State *v.* Buffington, 20 Kan. 599;} *contra*, Mercer *v.* State, Fla., 24 So. 154. Distinguish this from a voluntary disclosure by one of the spouses to a third person, *post.*]

[7] [See examples under both forms of the privilege in Poulson *v.* Stanley, Cal., 55 Pac. 605; Griffith *v.* Griffith, 162 Ill. 368; Polson *v.* State, 137 Ind. 519, 524; Beyerline *v.* State, 147 id. 125; McKenzie *v.* Lautenschlager, Mich., 71 N. W. 489; Shanklin *v.* McCracken, 140 Mo. 348; Phœnix Ins. Co. *v.* Shoemaker, 95 Tenn. 72; French *v.* Ware, 65 Vt. 338, 344; Horner *v.* Yance, 93 Wis. 352; Lanctot *v.* State, id., 73 N. W. 575.]

[8] [See People *v.* Hayes, 140 N. Y. 484, 495; Kelley *v.* Andrews, 102 Ia. 119;] {Brown *v.* Wood, 121 Mass. 137.}

[9] [See Scott *v.* Com., 94 Ky. 511; Wilkerson *v.* State, 91 Ga. 729, 738.]

spouse making and the spouse receiving the communication. The object of the privilege being to give to the spouses such an assurance of privacy as will subjectively induce between them complete freedom of communication,] therefore, after the parties are separated, whether it be by divorce [10] or by the death [11] of the husband, the wife is still precluded from disclosing any conversations with him, though she may be admitted to testify to facts which came to her knowledge by means equally accessible to any person not standing in that relation.[12] Their general incompetency to testify for or against each other will be considered hereafter in its more appropriate place.

3. *Other Exclusions based on Public Policy.*

§ 254 *a.* **Evidence procured by Illegal Means.** 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.[1] [This principle is regularly applied to incriminating materials — tools, liquor, documents, etc. — obtained by unlawful search of premises,[2] or by unlawful search of the person,[3] or by other unauthorized means.[4] On the same principle a letter or other document obtained by fraud or other dishonor-

[10] [Griffith *v.* Griffith, 162 Ill. 368.]

[11] [Newstrom *v.* R. Co., 61 Minn. 78; Buckingham *v.* Roar, 45 Nebr. 244; Southwick *v.* Southwick, 49 N. Y. 510; Geer *v.* Goudy, Ill., 51 N. E. 623.]

[12] Monroe *v.* Twistleton, Peake's Evid. App. lxxxii, as explained by Lord Ellenborough, in Aveson *v.* Lord Kinnaird, 6 East 192, 193; Doker *v.* Hasler, Ry. & M. 198; Stein *v.* Bowman, 13 Peters 209, 223; Coffin *v.* Jones, 13 Pick. 441, 445; Edgell *v.* Bennett, 7 Vt. 536; Williams *v.* Baldwin, id. 503, 506, per Royce, J.; {Bigelow *v.* Sickles, 75 Wis. 428.} In Beveridge *v.* Minter, 1 C. & P. 364, where the widow was permitted by Abbott, C. J., to testify to certain admissions of her deceased husband, relative to the money in question, this point was not considered, the objection being placed wholly on the ground of her interest in the estate. See also 2 Kent Comm. 180; 2 Stark. Evid. 399; Robin *v.* King, 2 Leigh 142, 144.

[1] Com. *v.* Dana, 2 Met. 329, 337; Legatt *v.* Tollervey, 14 East 302; Jordan *v.* Lewis, id. 306, n.; [Perry *v.* State, Ida., 38 Pac. 658. Good expositions of the principle will be found in opinions by Wilde, J., in Com. *v.* Dana, *supra;* Lumpkin, P. J., in Williams *v.* State, *infra.*]

[2] [Bishop Atterbury's Trial, 16 How. St. Tr. 495, 629; R. *v.* Granatelli, 7 State Tr. N. S. 979, 987; Starchman *v.* State, 62 Ark. 538; State *v.* Griswold, 67 Conn. 290; Wood *v.* McGuire, 21 Ga. 576; Williams *v.* State, 100 id. 511; Trask *v.* People, 151 Ill. 523; Com. *v.* Tibbetts, 157 Mass. 519; Com. *v.* Hurley, 158 id. 159; Com. *v.* Acton, 165 id. 11; Com. *v.* Smith, 166 id. 370; State *v.* Atkinson, 40 S. C. 363, 371.]

[3] [Shields *v.* State, 104 Ala. 35; Scott *v.* State, 113 id. 64; Com. *v.* Welch, 163 Mass. 372; State *v.* Cross, W. Va., 29 S. E. 527. See State *v.* Van Tassel, 103 Ia. 6.]

[4] [People *v.* Alden, 113 Cal. 264; Stevison *v.* Earnest, 80 Ill. 513 (leading case); State *v.* Sawtelle, 66 N. H. 488, *semble;*] State *v.* Graham, 74 N. C. 646.

able means is not excluded.[5] The illegality of obtaining evidence by violating the privilege against self-crimination does not exclude it; but the privilege itself nevertheless operates to exclude it.[6]]

§ 254 *b* [253]. **Indecent Evidence.** There is a fourth species of evidence which is excluded, namely, that which is indecent, or offensive to public morals, or injurious to the feelings or interests of third persons, the parties themselves having no interest in the matter, except what they have impertinently and voluntarily created. The mere indecency of disclosures does not, in general, suffice to exclude them where the evidence is necessary for the purposes of civil or criminal justice; as, in an indictment for a rape; or, in a question upon the sex of one claiming an estate entailed, as heir male or female; or upon the legitimacy of one claiming as lawful heir; or in an action by the husband for criminal conversation with the wife. In these and similar cases the evidence is necessary, either for the proof and punishment of crime or for the vindication of rights existing before, or independent of, the fact sought to be disclosed.[1] But where the parties have voluntarily and impertinently interested themselves in a question tending to violate the peace of society by exhibiting an innocent third person to the world in a ridiculous or contemptible light, or to disturb his own peace and comfort, or to offend public decency by the disclosures which its decision may require, the evidence will not be received. Of this sort are wagers or contracts respecting the sex of a third person,[2] or upon the question whether an unmarried woman has had a child.[3] In this place may also be mentioned the declarations of the husband or wife that they have had no connection, though living together, and that therefore the offspring is spurious; which, on the same general ground of decency, morality, and policy, are uniformly excluded.[4]

§ 254 *c* [249]. **Judge; Juror; Arbitrator; Attorney.** In regard [1] to judges of courts of record, it is considered dangerous to allow them to be called upon to state what occurred before them in court; and on this ground the grand jury were advised not to examine the chairman of the Quarter Sessions as to what a person testified in a

[5] [Legatt *v.* Tollervy, 14 East 306; Stockfleth *v.* DeTastet, 4 Camp. 11; R. *v.* Derrington, 2 C. & P. 419; State *v.* Renard, 50 La. An., 23 So. 894.
For this principle as illustrated in the use of *confessions*, see *ante*, § 229.]

[6] [See *post*, § 469 *d*.]

[1] [Compare the principle as to indecent exhibition of the person, etc., *ante*, § 13 *g*.]

[2] Da Costa *v.* Jones, Cowp. 729.

[3] Ditchburn *v.* Goldsmith, 4 Campb. 152. If the subject of the action is frivolous, or the question impertinent, and this is apparent on the record, the Court will not proceed at all in the trial: Brown *v.* Leeson, 2 H. Bl. 43; Henkin *v.* Gerss, 2 Campb. 408.

[4] Goodright *v.* Moss, Cowp. 594, said, per Lord Mansfield, to have been solemnly decided at the Delegates; Cope *v.* Cope, 1 M. & Rob. 269, per Alderson, J.; R. *v.* Rook, 1 Wils. 340; R. *v.* Luffe, 8 East 193, 202, 203; R. *v.* Kea, 11 id. 132; Com. *v.* Shepherd, 6 Binn. 283; [Simon *v.* State, 31 Tex. Cr. 186, 199; Rabeke *v.* Baer, Mich., 73 N. W. 242; see *ante*, § 28, under the presumption of legitimacy.]

[1] [This section began in the original text as follows:] The case of judges and arbitrators may be mentioned, as the second class of privileged communications.

trial in that court.[2] It may be [3] proper to take notice of the case, where the facts are personally known by the judge, before whom the cause is tried; and whatever difference of opinion may once have existed on this point, it seems now to be agreed, that the same person cannot be both witness and judge, in a cause, which is on trial before him. If he is the sole judge, he cannot be sworn; and if he sits with others, he still can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another.[4] Whether his knowledge of common notoriety is admissible proof of that fact, is not so clearly agreed.[5] This principle [of exclusion] has not been extended to jurors.[6] Though the jury may use their general knowledge on the subject of any question before them; yet, if any juror has a particular knowledge, as to which he can testify, he must be sworn as a witness.[7] On grounds of public interest and convenience, a judge cannot be called as a witness to testify to what took place before him in the trial of another cause;[8] though he may testify to foreign and collateral matters, which happened in his presence while the trial was pending or after it was ended.[9] The case of arbitrators is governed by the same general policy;[10] and neither the courts of law nor of equity will disturb decisions deliberately made by arbitrators, by requiring them to disclose the grounds of their award, unless under very cogent circumstances, such as upon an allegation of fraud; for, "Interest reipublicæ ut sit finis litium."[11] On grounds[12] of public policy, and

[2] R. *v.* Gazard, 8 C. & P. 595, per Patteson, J.; People *v.* Miller, 2 Parker C. R. 197. {But this seems not to be the law: R. *v.* Gazard, 8 C. & P. 595; State *v.* Duffy, 57 Conn. 525; Huff *v.* Bennett, 4 Sandf. 120; Schall *v.* Miller, 5 Whart. 156.} [Magistrates and judges are frequently called upon to state testimony given before them; and though they might perhaps plead public duty in refusal to attend (*Re* Lester, 77 Ga. 143), there seems to be no objection to their testimony if they are willing.]

[3] [The next five sentences are transferred from § 364.]

[4] Ross *v.* Buhler, 2 Martin's R. N. S. 313; [Estes *v.* Bridgforth, 114 Ala. 221; Rogers *v.* State, 60 Ark. 76; Shockley *v.* Morgan, Ga., 29 S. E. 694; Baker *v.* Thompson, 89 id. 486 (on special grounds); Maitland *v.* Zanga, 14 Wash. 92. But this seems not to have been the orthodox rule: Cornish's Trial, 11 How. St. Tr. 459; Fenwick's Trial, 13 id. 663, 667.] So is the law of Spain, Partid. 3, tit. 16, l. 19; 1 Moreau & Carleton's Tr. p. 200; — and of Scotland, Glassford on Evid. p. 602; Tait on Evid. 432; Stair's Inst. Book iv, tit. 45, 4; Erskine's Inst. Book iv, tit. 2, 33.

[5] Lord Stair and Mr. Erskine seem to have been of opinion that it was, "unless it be overruled by pregnant contrary evidence;" but Mr. Glassford and Mr. Tait are of the contrary opinion. [On this point, see *ante*, Chap. II.]

[6] [Sav. F. & W. R. Co. *v.* Ono, Ga., 29 S. E. 607; People *v.* Thiede, 11 Vt. 241; Thiede *v.* Utah, 159 U. S. 510.]

[7] R. *v.* Rosser, 7 C. & P. 648; Stones *v.* Byron, 4 Dowl. & L. 393; [see *ante*, §§ 6 *c*, 162 *o*.]

[8] R. *v.* Gazard, 8 C. & P. 595, per Patteson, J.; [see the beginning of this section, *supra*.]

[9] R. *v.* Earl of Thanet, 27 How. St. Tr. 847, 848.

[10] [The policy is in truth a different one, *i. e.* that the grounds of the award are in the nature of the case immaterial; on any material facts, the arbitrator as a witness is not excluded: Whiteley & Roberts' Arbitr., 1891, 1 Ch. 558.]

[11] Story Eq. Pl. 458, n. (1); Anon., 3 Atk. 644; 2 Story Eq. Jurisp. 680; Johnson *v.* Durant, 4 C. & P. 327; Ellis *v.* Saltau, ib. n. (*a*); Habershon *v.* Troby, 3 Esp. 38.

[12] [This sentence is transferred from § 386.]

for the purer administration of justice, the relation of lawyer and client is so far regarded by the rules of practice in some courts, as that the lawyer is not permitted to be both advocate and witness for his client in the same cause.[13]

[The privileges against *self-crimination*, against the production of *documents* by one not a party, and against inspection of the *person of a civil plaintiff*, are treated *post*, §§ 469 *d*–469 *n*.]

[13] Stones *v.* Byron, 4 Dowl. & Lowndes 393; Dunn *v.* Packwood, 11 Jur. 242; Reg. Gen. Sup. Court, N. Hamp. Reg. 23; 6 N. Hamp. R. 580; Mishler *v.* Baumgardner, 1 Am. Law Jour. 304, N. S. *Contra:* Little *v.* Keon, 1 N. Y. Code Rep. 4; 1 Sandf. 607; Potter *v.* Ware, 1 Cush. 518, 524, and cases cited by Metcalf, J. [In § 364, the author states the above rule as obtaining in England, but adds, citing no authority: "But in the United States no case has been found to proceed to that extent; and the fact is hardly ever known to occur." Modern practice does not exclude the advocate as witness.]

CHAPTER XX.

QUANTITY OF EVIDENCE; NUMBER OF WITNESSES; CORROBORATION.

§ 255. Treason.
§ 256. Same: Overt Act and Evidence of it.
§ 257. Perjury.
§ 257 *a*. Same: Several Assignments.
§ 258. Same: Corroborating Circumstances.
§ 259. Same: Inconsistent Statements as Proof.
§ 260. Answers in Chancery.
§ 260 *a*. Usage; Wills and Deeds.
§ 260 *b*. Accomplice; Complainant in Rape or Seduction.

§ 255. **Treason.** Under this head it is not proposed to go into an extended consideration of the statutes of treason, or of frauds, but only to mention briefly some instances in which those statutes, and some other rules of law, have regulated particular cases, taking them out of the operation of the general principles by which they would otherwise be governed. Thus in regard to treasons, though by the common law the crime was sufficiently proved by one credible witness,[1] yet, considering the great weight of the oath or duty of allegiance against the probability of the fact of treason,[2] it has been deemed expedient to provide[3] that no person shall be indicted or convicted of high treason but upon the oaths and testimony of two witnesses to the same overt act, or to separate overt acts of the same treason, unless upon his voluntary confession in open court. We have already seen that a voluntary confession out of court, if proved

[1] Foster's Disc. p. 233; Woodbeck *v.* Keller, 6 Cowen 120; McNally's Evid. 31.

[2] This is conceived to be the true foundation on which the rule has, in modern times, been enacted. The manner of its first introduction into the statutes was thus stated by the Lord Chancellor, in Lord Stafford's Case, T. Raym. 408: "Upon this occasion, my Lord Chancellor, in the Lords' House, was pleased to communicate a notion concerning the reason of two witnesses in treason, which he said was not very familiar, he believed; and it was this: anciently all or most of the judges were churchmen and ecclesiastical persons, and by the canon law now, and then, in use all over the Christian world, none can be condemned of heresy but by two lawful and credible witnesses; and bare words may make a heretic, but not a traitor, and anciently heresy was treason; and from thence the Parliament thought fit to appoint that two witnesses ought to be for proof of high treason."

[3] This was done by Stat. 7 W. III, c. 3, § 2. Two witnesses were required by the earlier statutes of 1 Ed. IV, c. 12, and 5–6 Ed. VI, c. 11; in the construction of which statutes, the rule afterwards declared in Stat. 7 W. III was adopted; see R. *v.* Lord Stafford, T. Raym. 407. The Constitution of the United States provides that "No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." Art. 3, § 3. This provision has been adopted, in terms, in many of the State constitutions. But as in many other States there is no express law requiring that the testimony of both witnesses should be to the same overt act, the rule stated in the text is conceived to be that which would govern in trials for treason against those States; though in trials in the other States, and for treason against the United States, the constitutional provision would confine the evidence to the same overt act.

by two witnesses, is sufficient to warrant a conviction; and that in England the crime is well proved if there be one witness to one overt act, and another witness to another overt act, of the same species of treason.[4] It is also settled that when the prisoner's confession is offered, as corroborative of the testimony of such witnesses, it is admissible, though it be proved by only one witness; the law not having excluded confessions, proved in that manner, from the consideration of the jury, but only provided that they alone shall not be sufficient to convict the prisoner.[5] And as to all matters merely collateral, and not conducing to the proof of the overt acts, it may be safely laid down as a general rule, that whatever was evidence at common law is still good evidence under the express constitutional and statutory provision above mentioned.[6]

§ 256. **Same: Overt Act and Evidence of it.** It may be proper in this place to observe that in treason the rule is that no evidence can be given of any overt act which is not expressly laid in the indictment. But the meaning of the rule is, not that the whole detail of facts should be set forth, but that no overt act, amounting to a distinct independent charge, though falling under the same head of treason, shall be given in evidence unless it be expressly laid in the indictment. If, however, it will conduce to the proof of any of the overt acts which are laid, it may be admitted as evidence of such overt acts.[1] This rule is not peculiar to prosecutions for treason; though, in consequence of the oppressive character of some former State prosecutions for that crime, it has been deemed expedient expressly to enact it in the later statutes of treason. It is nothing more than a particular application of a fundamental doctrine of the law of remedy and of evidence; namely, that the proof must correspond with the allegations, and be confined to the point in issue.[2] This issue, in treason, is whether the prisoner committed that crime by doing the treasonable act stated in the indictment; as, in slander, the question is, whether the defendant injured the plaintiff by maliciously uttering the falsehoods laid in the declaration; and evidence of collateral facts is admitted or rejected on the like principle in either case, accordingly as it does or does not tend to establish the specific charge. Therefore the declarations of the prisoner, and seditious language used by him, are admissible in evidence as explanatory of his conduct, and of the nature and object of the conspiracy in which he was engaged.[3] And after proof of the overt act

[4] *Supra*, § 235, n.; Lord Stafford's Case, 7 How. St. Tr. 1527; Foster's Disc. 237; 1 Burr's Trial 196.

[5] Willis's Case, 15 How. St. Tr. 623–625; Grossfield's Case, 26 id. 55–57; Foster's Disc. 241.

[6] *Supra*, § 235; Foster's Disc. 240, 242; 1 East P. C. 130.

[1] Foster's Disc. p. 245; 1 Phil. Evid. 471; Deacon's Case, 18 How. St. Tr. 366; s. c. Foster 9; Regicide's Case, J. Kely. 8, 9; 1 East P. C. 121–123; 2 Stark. Evid. 800, 801.

[2] *Supra*, §§ 51–53.

[3] R. v. Watson, 2 Stark. 116, 134; [U. S. v. Hanway, 2 Wall. Jr. 139.]

of treason, in the county mentioned in the indictment, other acts of treason tending to prove the overt acts laid, though done in a foreign country, may be given in evidence.[4]

§ 257. **Perjury.** In proof of the crime of perjury, also, it was formerly held that two witnesses were necessary, because otherwise there would be nothing more than the oath of one man against another, upon which the jury could not safely convict.[1] But this strictness has long since been relaxed; the true principle of the rule being merely this, that the evidence must be something more than sufficient to counterbalance the oath of the prisoner, and the legal presumption of his innocence.[2] The oath of the opposing witness, therefore, will not avail, unless it be corroborated by other independent circumstances.[3] But it is not precisely accurate to say, that these additional circumstances must be tantamount to another witness. The same effect being given to the oath of the prisoner, as though it were the oath of a credible witness, the scale of evidence is exactly balanced, and the equilibrium must be destroyed, by material and independent circumstances, before the party can be convicted. The additional evidence need not be such as, standing by itself, would justify a conviction in a case where the testimony of a single witness would suffice for that purpose. But it must be at least strongly corroborative of the testimony of the accusing witness;[4] or, in the quaint but energetic language of Parker, C. J., "a

[4] Deacon's Case, 16 How. St. Tr. 367; s. c. Foster 9; Sir Henry Vane's Case, 4th res., 6 id. 123, 129, n.; 1 East P. C. 125, 126; {see *post*, Vol. III, §§ 246–248.}

[1] 1 Stark. Evid. 443; 4 Hawk. P. C. b. 2, c. 46, § 10; 4 Bl. Comm. 358; 2 Russ. on Crimes, 1791.

[2] The history of this relaxation of the sternness of the old rule is thus stated by Mr. Justice Wayne, in delivering the opinion of the Court in U. S. *v.* Wood, 14 Pet. 440, 441: "At first, two witnesses were required to convict in a case of perjury; both swearing directly adversely from the defendant's oath. Contemporaneously with this requisition, the larger number of witnesses on one side or the other prevailed. Then a single witness, corroborated by other witnesses, swearing to circumstances bearing directly upon the imputed *corpus delicti* of a defendant, was deemed sufficient. Next, as in the case of R. *v.* Knill, 5 B. & Ald. 929, n., with a long interval between it and the preceding, a witness who gave proof only of the contradictory oaths of the defendant on two occasions, one being an examination before the House of Lords, and the other an examination before the House of Commons, was held to be sufficient; though this principle had been acted on as early as 1764, by Justice Yates, as may be seen in the note to the case of The King *v* Harris, 5 B. & Ald. 937, and was acquiesced in by Lord Mansfield, and Justices Wilmont and Aston. We are aware that, in a note to R. *v.* Mayhew, 6 C. & P. 315, a doubt is implied concerning the case decided by Justice Yates: but it has the stamp of authenticity, from its having been referred to in a case happening ten years afterwards before Justice Chambre, as will appear by the note in 5 B. & Ald. 937. Afterwards, a single witness, with the defendant's bill of costs (not sworn to) in lieu of a second witness, delivered by the defendant to the prosecutor, was held sufficient to contradict his oath; and in that case Lord Denman says, 'A letter written by the defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness.' 6 C. & P. 315. We thus see that this rule, in its proper application, has been expanded beyond its literal terms, as cases have occurred in which proofs have been offered equivalent to the end intended to be accomplished by the rule."

[3] [See *post*, Vol. III, § 198, and Terr. *v.* Williams, Ariz., 54 Pac. 232.]

[4] Woodbeck *v.* Keller, 6 Cowen 118, 121, per Sutherland, J.; Champney's Case,

strong and clear evidence, and more numerous than the evidence given for the defendant."[5]

§ 257 *a*. **Same: Several Assignments.** When there are several assignments of perjury in the same indictment, it does not seem to be clearly settled, whether, in addition to the testimony of a single witness there must be corroborative proof with respect to each; but the better opinion is, that such proof is necessary; and that, too, although all the perjuries assigned were committed at one time and place.[1] For instance, if a person, on putting in his schedule in the insolvent debtors' court, or on other the like occasion, has sworn that he has paid certain creditors, and is then indicted for perjury on several assignments, each specifying a particular creditor who has not been paid, a single witness with respect to each debt will not, it seems, suffice, though it may be very difficult to obtain any fuller evidence.[2]

§ 258. **Same: Corroborating Circumstances as Equivalent of Witness.** The principle that one witness with corroborating circumstances is sufficient to establish the charge of perjury, leads to the conclusion that circumstances, without any witness, when they exist in documentary or written testimony, may combine to the same effect; as they may combine altogether unaided by oral proof, except the evidence of their authenticity, to prove any other fact, connected with the declarations of persons or the business of human life. The principle is, that circumstances necessarily make a part of the proofs of human transactions; that such as have been reduced to writing, in unequivocal terms, when the writing has been proved to be authentic, cannot be made more certain by evidence *aliunde;* and that such as have not been reduced to writing, whether they relate to the declarations or conduct of men, can only be proved by oral testi-

2 Lew. Cr. C. 258; {R. *v.* Braithwaite, 8 Cox Cr. 254; R. *v.* Shaw, 10 id. 66; R. *v.* Boulter, 16 Jur. 135; State *v.* Buie, 43 Tex. 532; State *v.* Heed, 57 Mo. 252. The fact of swearing and testifying as alleged, independently of the falsity, may be proved by one witness: Com. *v.* Pollard, 12 Metc. 225.}

[5] The Queen *v.* Muscot, 10 Mod. 194; see also State *v.* Molier, 1 Dev. 263, 265; State *v.* Hayward, 1 Nott & McCord 547; R. *v.* Mayhew, 6 C. & P. 315; R. *v.* Boulter, 16 Jur. 135; Roscoe on Crim. Evid. 686, 687; Clark's Executors *v.* Van Riemsdyk, 9 Cranch 160. It must corroborate him in something more than some slight particulars: R. *v.* Yates, 1 Car. & Marsh. 139. More recently, corroborative evidence, in cases where more than one witness is required by law, has been defined by Dr. Lushington to be not merely evidence showing that the account is probable, but evidence proving facts *ejusdem generis*, and tending to produce the same results: Simmons *v.* Simmons, 11 Jur. 830. See further to this point, R. *v.* Parker, C. & Marsh. 646; R. *v.* Champney, 2 Lewin 258; R. *v.* Gardiner, 8 C. & P. 737; R. *v.* Roberts, 2 Car. & Kir. 614.

[1] R. *v.* Virrier, 12 A. & E. 317, 324, per Ld. Denman; {R. *v.* Parker, Russell on Crimes, 5th ed., III, 80; Williams *v.* Com., 91 Pa. 493. But not where the assignment is of a continuous nature: R. *v.* Hare, 13 Cox Cr. 174.}

[2] R. *v.* Parker, C. & Marsh. 639, 645–647, per Tindal, C. J. In R. *v.* Mudie, 1 M. & Rob. 128, 129, Lord Tenterden, under similar circumstances, refused to stop the case, saying that, if the defendant was convicted, he might move for a new trial. He was, however, acquitted: see the (London) Law Review, etc., May, 1846, p. 128.

mony. Accordingly, it is now held that a living witness of the *corpus delicti* may be dispensed with, and documentary or written evidence be relied upon to convict of perjury, — first, where the falsehood of the matter sworn by the prisoner is directly proved by documentary or written evidence springing from himself, with circumstances showing the corrupt intent; secondly, in cases where the matter so sworn is contradicted by a public record, proved to have been well known by the prisoner when he took the oath, the oath only being proved to have been taken; and, thirdly, in cases where the party is charged with taking an oath, contrary to what he must necessarily have known to be true; the falsehood being shown by his own letters relating to the fact sworn to, or by any other written testimony existing and being found in his possession, and which has been treated by him as containing the evidence of the fact recited in it.[1]

§ 259. **Same: Inconsistent Statements as Proof.** If the evidence adduced in proof of the crime of perjury consists of two opposing statements of the prisoner, and nothing more, he cannot be convicted. For if one only was delivered under oath, it must be presumed, from the solemnity of the sanction, that that declaration was the truth, and the other an error or a falsehood; though the latter, being inconsistent with what he has sworn, may form important evidence, with other circumstances, against him. And if both the contradictory statements were delivered under oath, there is still nothing to show which of them is false, where no other evidence of the falsity is given.[1] If, indeed, it can be shown that, before giving the testimony on which perjury is assigned, the accused had been tampered with,[2] or if there be other circumstances in the case, tending to prove that the statement offered in evidence against the accused was in fact true, a legal conviction may be obtained.[3] And "although the jury may believe that on the one or the other occasion the prisoner swore to what was not true, yet it is not a necessary consequence that he committed perjury. For there are cases in which a person might very honestly and conscientiously swear to a particular fact, from the best of his recollection and belief, and from other circumstances subsequently be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time."[4]

[1] U. S. *v.* Wood, 14 Peters 440, 441; in this case, under the latter head of the rule here stated, it was held that, if the jury were satisfied of the corrupt intent, the prisoner might well be convicted of perjury, in taking, at the custom-house in New York, the "owner's oath in cases where goods, wares, or merchandise have been actually purchased," upon the evidence of the invoice-book of his father, John Wood, of Saddleworth, England, and of thirty-five letters from the prisoner to his father, disclosing a combination between them to defraud the United States, by invoicing and entering the goods shipped at less than their actual cost.

[1] See Alison's Principles of the Criminal Law of Scotland, p. 481; R. *v.* Hughes, 1 C. & K. 519; R. *v.* Wheatland, 8 C. & P. 238; R. *v.* Champney, 2 Lew. 258.

[2] Anon., 5 B. & Ald. 939, 940, n.; and see 2 Russ. Cr. & M. 653, n.

[3] R. *v.* Knill, 5 B. & Ald. 929, 930, n.

[4] Per Holroyd, J., in Jackson's Case, 1 Lewin's Cr. Cas. 270. This very reasonable

§ 260. **Answers in Chancery.** The principles above stated, in regard to the proof of perjury, apply with equal force to the case of an answer in Chancery. Formerly, when a material fact was directly put in issue by the answer, the Courts of equity followed the maxim of the Roman law, *responsio unius non omnino audiatur*, and required the evidence of two witnesses, as the foundation of a decree. But of late years the rule has been referred more strictly to the equitable principle on which it is founded; namely, the right to credit which the defendant may claim, equal to that of any other witness in all cases where his answer is "positively, clearly, and precisely" responsive to any matter stated in the bill. For the plaintiff, by calling on the defendant to answer an allegation which he makes, thereby admits the answer to be evidence.[1] In such case, if the defendant in express terms negatives the allegations in the bill, and the bill is supported by the evidence of only a single witness, affirming what has been so denied, the Court will neither make a decree, nor send the case to be tried at law; but will simply dismiss the bill.[2] But the corroborating testimony of an additional witness, or of circumstances, may give a turn either way to the balance. And even the evidence arising from circumstances alone, may be stronger than the testimony of any single witness.[3]

§ 260 *a*. **Usage; Wills and Deeds.** It has also been held that the testimony of one witness alone is not sufficient to establish any usage of trade, of which all dealers in that particular line are bound to take notice, and are presumed to be informed.[1] [The requirement

doctrine is in perfect accordance with the rule of the Criminal Law of Scotland, as laid down by Mr. Alison in his lucid and elegant treatise on that subject, in the following terms: "When contradictory and inconsistent oaths have been emitted, the mere contradiction is not decisive evidence of the existence of perjury in one or other of them; but the prosecutor must establish which was the true one, and libel on the other as containing the falsehood. Where depositions contradictory to each other have been emitted by the same person on the same matter, it may with certainty be concluded that one or other of them is false. But it is not relevant to infer perjury in so loose a manner; but the prosecutor must go a step farther, and specify distinctly which of the two contains the falsehood, and peril his case upon the means he possesses of proving perjury in that deposition. To admit the opposite course, and allow the prosecutor to libel on both depositions, and make out his charge by comparing them together, without distinguishing which contains the truth and which the falsehood, would be directly contrary to the precision justly required in criminal proceedings. In the older practice this distinction does not seem to have been distinctly recognized; but it is now justly considered indispensable, that the perjury should be specified existing in one, and the other deposition referred to in *modum probationis*, to make out, along with other circumstances, where the truth really lay:" Alison's Crim. Law of Scotland, 475.

[1] Gresley on Evid. p. 4.

[2] Cooth *v.* Jackson, 6 Ves. 40, per Ld. Eldon.

[3] Pember *v.* Mathers, 1 Bro. Ch. 52; 2 Story on Eq. Jur. § 1528; Gresley on Evid. p. 4; Clark *v.* Van Riemsdyk, 9 Cranch 160; Keys *v.* Williams, 3 Y. & C. 55; Dawson *v.* Massey, 1 Ball & Beat. 234; Maddox *v.* Sullivan, 2 Rich. Eq. 4; {Hinkle *v.* Wanzer, 17 How. 353; Lawton *v.* Kittredge, 30 N. H. 500; Ing *v.* Brown, 3 Md. Ch. Dec. 521; Glenn *v.* Grover, 3 Md. 212; Jordon *v.* Fenno, 13 Ark. 593; Johnson *v.* McGruder, 15 Mo. 365; Walton *v.* Walton, 17 id. 376; White *v.* Crew, 16 Ga. 416; Calkin *v.* Evans, 5 Ind. 441; see further, *post*, Vol. III, § 289.}

[1] Wood *v.* Hickok, 2 Wend. 501; Parrott *v.* Thacher, 9 Pick. 426; Thomas *v.*

that a will or a deed must be subscribed by one or more attesting witnesses is a rule of substantive law affecting the validity of the instrument, and not a rule of evidence. But the question whether all such attesting witnesses must be called, in preference to other witnesses to the document's execution, is a rule of evidence, and is treated in another place (*post*, § 569). In one or two jurisdictions a will is required to be proved by two witnesses, or the equivalent, even though no attestation of the document is required as an element in its validity.[2]]

§ 260 *b*. **Accomplice; Complainant in Rape or Seduction.** [It is in some jurisdictions required that an accomplice's testimony shall not suffice for a conviction without corroboration; the doctrine on that subject is examined *post*, § 380. In a few jurisdictions, usually by statute, a similar rule exists for the testimony of a complainant in rape[1] and a complainant in the statutory criminal charge of seduction.[2]]

§§ 261–274.[1]

Graves, 1 Mills Const. Rep. 150 [308]; {Boardman *v.* Spooner, 13 All. 353, 359; {*contra:* Jones *v.* Hoey, 128 Mass. 585; Vail *v.* Rice, 1 Seld. 155; Robinson *v.* U. S., 13 Wall. 363.}

[2] [*E. g.*, in Pennsylvania: Derr *v.* Greenwalt, 76 Pa. 239, 253. A similar statutory provision exists in most States for nuncupative wills, and sometimes also for wills of personalty or for the revocation of a will. Apart from such statutes, even a lost will may be proved by one witness: Johnson's Will, 40 Conn. 587; *Re* Page, 118 Ill. 576; Baker *v.* Dobyns, 4 Dana Ky. 220; Dickey *v.* Malechi, 6 Mo. 177; Wyckoff *v.* Wyckoff, 16 N. J. Eq. 401.]

[1] [State *v.* Bailor, 104 Ia. 1; Hammond *v.* State, 39 Nebr. 252; Sowers *v.* Terr., Okl., 50 Pac. 257; O'Boyle *v.* State, Wis., 75 N. W. 989; *contra:* Curby *v.* Terr., Ariz., 42 Pac. 953; Doyle *v.* State, 39 Fla. 155; State *v.* Connelly, 57 Minn. 482; State *v.* Marcks, 140 Mo. 656; Thompson *v.* State, 33 Tex. Cr. 472; Tway *v.* State, Wyo., 50 Pac. 188.]

[2] [Suther *v.* State, Ala., 24 So. 43; State *v.* Bauerkemper, 95 Ia. 562; Ferguson *v.* State, 71 Miss. 805, 815; State *v.* Davis, 141 Mo. 522; State *v.* King, 9 S. D. 628; Mills *v.* Com., 93 Va. 815; *contra:* People *v.* Wade, 118 Cal. 672; State *v.* Marshall, 137 Mo. 463; Ferguson *v.* Moore, 98 Tenn. 342.]

[1] [These sections, dealing with the necessity of a writing for deeds, for sales of personalty (Statute of Frauds), and for wills and their revocation, have been transferred to Appendix II, since they are not in strictness concerned with rules of evidence and since they can only be adequately treated in special works on the subject; see a discussion of the theory of such rules as to writings, *post*, § 305 *g*.]

CHAPTER XXI.

THE PAROL EVIDENCE RULE.

1. *The Parol Evidence Rule.*

§§ 275, 276. General Principle.
§ 277. Interpretation.
§ 278. Same: Words taken in their Ordinary Sense.
§ 279. Parol Evidence Rule applicable to Parties only.
§ 280. Local Usage.
§§ 281, 282. Collateral Agreements.
§ 283. Agreement in more than one Writing.
§ 284. Instrument may be shown Void or Voidable.
§ 284 *a*. Transaction partially reduced to Writing.
§ 285. Contradicting a Recital.
§§ 286–288. Interpretation of Terms of the Instrument.
§§ 289–291. Interpretation of Wills; Declarations of Intention.
§ 292. Interpretation by Special Usage.
§ 293. Usage, applied to Statutes, Charters, and Deeds.
§ 294. Usage, applied to annex Incidents.
§§ 295, 295 *a*. Standard of Usage as aiding Interpretation.
§ 296. Will Cases; Rebutting an Equity.
§ 296 *a*. Mutual Mistake; Deed Absolute as Security.
§§ 297–300. Interpretation of Ambiguities.
§ 301. Interpretation of False Descriptions.
§ 302. Showing a Discharge.
§§ 303, 304. Showing an Additional or Substituted Agreement.
§ 305. Contradicting Receipts.

2. *Another View of the Parol Evidence Rule; Integration and Interpretation.*

§ 305 *a*. Parol Evidence Rule not a Rule of Evidence.
§ 305 *b*. Constitution and Interpretation of Legal Acts; Parol Evidence Rule.
§ 305 *c*. (I) Constitution of Legal Acts; (1) Whether an Act has been consummated at all.
§ 305 *d*. Same: (2) Whether a Defence or Excuse exists, rendering the Act voidable.
§ 305 *e*. Integration of Legal Acts by Intent of Parties; (1) Whether the Act has been integrated at all.
§ 305 *f*. Same: (2) Whether the Part of the Act in question has been integrated.
§ 305 *g*. Integration by Requirement of Law.
§ 305 *h*. Parol Evidence Rule applicable only between the Parties.
§ 305 *i*. (II) Interpretation of Legal Acts.
§ 305 *j*. Same: General Principle of Interpretation.
§ 305 *k*. Same: (1) Rule against using Declarations of Intention.
§ 305 *l*. Same: (2) Rule against disturbing a Clear Meaning.
§ 305 *m*. Same: (3) Rule against correcting a False Description.

1. *The Parol Evidence Rule.*[1]

§ 275. **General Principle.** By written evidence,[2] in this place, is meant not everything which is in writing, but that only which is of a

[1] [So many questions of general principle arise in this Chapter, and they are so intimately connected with each other, that their treatment in a series of scattered notes has not seemed feasible; and accordingly a general and connected view of the subject has been given *post*, at the end of the Chapter, in a group of sections (305 *a*–305 *n*) entitled "Another View of the Parol Evidence Rule." Illustrative citations from recent rulings will there be found, together with a number of the classical precedents. Cross-references to that exposition and to the recent citations will be given at the proper places in the ensuing sections 275–305.]

[2] [The parol-evidence rule is in truth no rule of evidence, but of substantive law; see *post*, § 305 *a*.]

documentary and more solemn nature, containing the terms of a contract between the parties, and designed to be the repository and evidence of their final intentions. "Fiunt enim de his [contractibus] scripturæ, ut, quod actum est, per eas facilius probari poterit."[3] When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous *colloquium* between the parties, or of conversation or declarations at the time when it was completed, or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected.[4] In other words, as the rule is now more briefly expressed, "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument."[5]

§ 276. This rule "was introduced in early times, when the most frequent mode of ascertaining a party to a contract was by his seal affixed to the instrument;[1] and it has been continued in force, since the vast multiplication of written contracts, in consequence of the

[3] Dig. lib. 20, tit. 1, l. 4; Id. lib. 22, tit. 4, l. 4.

[4] Stackpole *v.* Arnold, 11 Mass. 30, 31, per Parker, J.; Preston *v.* Merceau, 2 W. Bl. 1249; Coker *v.* Guy, 2 B. & P. 565, 569; Bogert *v.* Cauman, Anthon 97; Bayard *v.* Malcolm, 1 Johns. 467, per Kent, C. J.; Rich *v.* Jackson, 4 Bro. Ch. 519, per Ld. Thurlow; Sinclair *v.* Stevenson, 1 C. & P. 582, per Best, C. J.; McLellan *v.* Cumberland Bank, 11 Shepl. 566. [See *post*, § 305 *b*.] The general rule of the Scotch law is to the same effect, namely, that "writing cannot be cut down or taken away, by the testimony of witnesses:" Tait on Evid. pp. 326, 327. And this, in other language, is the rule of the Roman civil law: Contra scriptum testimonium, non scriptum testimonium non fertur: Cod. lib. 4, tit. 20, l. 1.

[5] Phil. & Am. on Evid. p. 753; 2 Phil. Evid. 350; 2 Stark. Evid. 544, 548; Adams *v.* Wordley, 1 M. & W. 379, 380, per Parke, B.; Boorman *v.* Johnston, 12 Wend. 573; Bast *v.* Bank, 101 U. S. 93; Slocum *v.* Swift, 2 Low. 212; Muhlig *v.* Fiske, 131 Mass. 110; Keller *v.* Webb, 126 id. 393; Fay *v.* Gray, 124 id. 500; Schwass *v.* Hershey, 125 Ill. 653; Sanders *v.* Cooper, 115 N. Y. 279; Van Vechten *v.* Smith, 59 Iowa 173; Seckler *v.* Fox, 51 Mich. 92; Best *v.* Sinz, 73 Wis. 243; Hostetter *v.* Auman, 119 Ind. 7; The Gazelle, 128 U. S. 484; Coots *v.* Farnsworth, 61 Mich. 502; Gordon *v.* Niemann, 118 N. Y. 152; Smith *v.* Burton, 59 Vt. 408; Diven *v.* Johnson, 117 Ind. 512; Lafayette C. M. Co. *v.* Magoon, 73 Wis. 627; Avery *v.* Miller, 86 Ala. 495; Carlton *v.* Vineland Wine Co., 33 N. J. Eq. 466; Fengar *v.* Brown, 57 Conn. 60; Hennershotz *v.* Gallagher, 124 Pa. St. 9; Ames *v.* Brooks, 143 Mass. 347; Hunt *v.* Gray, 76 Iowa 270; De Witt *v.* Berry, 134 U. S. 315; Corse *v.* Peck, 102 N. Y. 517; Fordice *v.* Scribner, 108 Ind. 88; Frost *v.* Brigham, 139 Mass. 43; Express Pub. Co. *v.* Aldine Press, 126 Pa. St. 347; Paddock *v.* Bartlett, 68 Iowa 16; Miller *v.* Butterfield, 79 Cal. 62; Patterson *v.* Wilson, 101 N. C. 564; Munde *v.* Lambie, 122 id. 336; Stevens *v.* Haskell, 70 Me. 202; Van Syckel *v.* Dalrymple, 32 N. J. Eq. 233; Etheridge *v.* Palin, 72 N. C. 213; Monroe *v.* Berens, 67 Pa. St. 459; Farrow *v.* Hayes, 51 Md. 498; Daggett *v.* Johnson, 49 Vt. 345. The rule in Pennsylvania is peculiar; see Thomas *v.* Loose, 115 Pa. 45; Cullmans *v.* Lindsay, id. 170; Cake *v.* Pottsville Bank, 116 id. 270; Greenawalt *v.* Kohne, 85 id. 369; Barclay *v.* Wainwright, 86 id. 191.]

[1] [For the history of the rule, see Thayer, Preliminary Treatise on the Law of Evidence, 401, ff.]

increased business and commerce of the world. It is not because a seal is put to the contract, that it shall not be explained away, varied, or rendered ineffectual; but because the contract itself is plainly and intelligibly stated, in the language of the parties, and is the best possible evidence of the intent and meaning of those who are bound by the contract, and of those who are to receive the benefit of it." "The rule of excluding oral testimony has heretofore been applied generally, if not universally, to simple contracts in writing, to the same extent and with the same exceptions as to specialties or contracts under seal.[2]

§ 277. **Interpretation.** It is to be observed, that the rule is directed only against the admission of any other evidence of the language employed by the parties in making the contract, than that which is furnished by the writing itself. The writing, it is true, may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties; but, as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, or substituted in its stead. The duty of the Court in such cases is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the meaning of words they have used.[1] It is merely a duty of interpretation; that is, to find out the true sense of the written words, as the parties used them; and of construction, that is, when the true sense is ascertained, to subject the instrument, in its operation, to the established rules of law.[2] And where the language of an instrument has a settled legal construction, parol evidence is not admissible to contradict that construction. Thus, where no time is expressly limited for the payment of the money mentioned in a special contract in writing, the legal construction is, that it is payable presently; and parol evidence of a contemporaneous verbal agreement, for the payment at a future day, is not admissible.[3]

[2] Per Parker, J., in Stackpole *v.* Arnold, 11 Mass. 31. See also Woollam *v.* Hearn, 7 Ves. 218, per Sir William Grant; Hunt *v.* Adams, 7 Mass. 522, per Sewall, J. {The rule applies also to all records of judgments or official proceedings: Mayhew *v.* Gay Head, 13 Allen 129; Hunneman *v.* Fire District, 37 Vt. 46; Eddy *v.* Wilson, 43 id. 362; Quinn *v.* Com., 20 Gratt. 138; Brooks *v.* Claiborne Co., 8 Baxt. 43; Roberts *v.* Johnson, 48 Tex. 133; Wilson *v.* Wilson, 45 Cal. 399; Com. *v.* Slocum, 14 Gray 395; so that an official entry on a record, void for uncertainty, cannot be explained by extrinsic evidence: Porter *v.* Byrne, 10 Ind. 146; see McMicken *v.* Com., 58 Pa. St. 213; Wilcox *v.* Emerson, 10 R. I. 270; Gregory *v.* Sherman, 44 Conn. 466–473, note; Kendig's Appeal, 82 Pa. St. 68; McDermott *v.* Hoffman, 70 id. 31.} [For a further explanation of the application of the principle to records, see *post*, § 305 *g*.]

[1] Doe *v.* Gwillim, 5 B. & Ad. 122, 129, per Parke, J.; Doe *v.* Martin, 4 id. 771, 786, per Parke, J.; Beaumont *v.* Field, 2 Chitty 275, per Abbott, C. J.

[2] [See *post*, §§ 305 *i*–305 *n*, on the subject of Interpretation.]

[3] Warren *v.* Wheeler, 8 Met. 97. Nor is parol evidence admissible to prove how a written contract was understood by either of the parties, in an action upon it at law, in the absence of any fraud: Bigelow *v.* Collamore, 5 Cush. 226; Harper *v.* Gilbert, ib. 417; {Taft *v.* Dickinson, 6 Allen 553; Davis Sewing Machine Co. *v.* Stone, 131 Mass. 384;} [see further, *post*, § 305 *j*.]

§ 278. **Same: Words taken in their Ordinary Sense.** The terms of every written instrument are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense, distinct from the popular sense of the same words; or unless the context evidently points out that, in the particular instance, and in order to effectuate the immediate intention of the parties, it should be understood in some other and peculiar sense.[1] But where the instrument consists partly of a printed formula, and partly of written words, if there is any reasonable doubt of the meaning of the whole, the written words are entitled to have greater effect in the interpretation than those which are printed; they being the immediate language and terms selected by the parties themselves for the expression of their meaning, while the printed formula is more general in its nature, applying equally to their case and to that of all other contracting parties, on similar subjects and occasions.[2]

§ 279. **Parol Evidence Rule applicable to Parties only.** The rule under consideration is applied only (in suits) between the parties to the instrument; as they alone are to blame if the writing contains what was not intended, or omits that which it should have contained. It cannot affect third persons, who, if it were otherwise, might be prejudiced by things recited in the writings, contrary to the truth, through the ignorance, carelessness, or fraud of the parties; and who, therefore, ought not to be precluded from proving the truth, however contradictory to the written statements of others.[1]

§ 280. **Local Usage.** It is almost superfluous to add that the rule does not exclude the testimony of experts, to aid the Court in reading the instrument. If the characters are difficult to be deciphered, or the language, whether technical, or local and provincial, or altogether foreign, is not understood by the Court, the evidence of persons skilled in deciphering writings, or who understood the language in which the instrument is written, or the technical or local meaning of the terms employed, is admissible to declare what are the characters, or to translate the instrument, or to testify to the proper meaning of the

[1] {Holt *v.* Collyer, L. R. 16 Ch. D. 718; Chemical E. L. Co. *v.* Howard, 150 Mass. 496;} [see *post*, § 305 *l*.]

[2] Per Ld. Ellenborough, in Robertson *v.* French, 4 East 135, 136. See also Boorman *v.* Johnston, 12 Wend. 573; Taylor *v.* Briggs, 2 C. & P. 525; Alsager *v.* St. Katherine's Dock Co., 14 M. & W. 799, per Parke, B.; {Smith *v.* Flanders, 129 Mass. 322; Holt *v.* Pie, 120 Pa. 439.}

[1] 1 Poth. Obl. by Evans, part 4, c. 2, art. 3, n. (766); 2 Stark. Evid. 575; Krider *v.* Lafferty, 1 Whart. 303, 314, per Kennedy, J.; Reynolds *v.* Magness, 2 Iredell 26; {Cunningham *v.* Milner, 56 Ala. 522; Kellogg *v.* Tompson, 142 Mass. 76; Talbot *v.* Wilkins, 31 Ark. 411; Hussman *v.* Wilke, 50 Cal. 250; McMaster *v.* Insurance Co. of N. America, 55 N. Y. 222; Brown *v.* Thurber, 77 id. 613; s. c. 58 How. Pr. 95; Bell *v.* Woodman, 60 Me. 465; Tobey *v.* Leonard, 2 Cliff. 40; Edgerly *v.* Emerson, 23 N. H. 555. See Langdon *v.* Langdon, 4 Gray 186; Arthur *v.* Roberts, 60 Barb. 580;} [and cases cited *post*, § 305 *h*.]

particular words.[1] Thus the words "inhabitant,"[2] "level,"[3] "thousands,"[4] "fur,"[5] "freight,"[6] and many others, have been interpreted, and their peculiar meaning, when used in connection with the subject-matter of the transaction, has been fixed, by parol evidence of the sense in which they are usually received, when employed in cases similar to the case at bar. And so of the meaning of the phrase, "duly honored,"[7] when applied to a bill of exchange; and of the expression "in the month of October,"[8] when applied to the time when a vessel was to sail; and many others of the like kind.[9] If the question arises from the obscurity of the writing itself, it is determined by the Court alone;[10] but questions of custom, usage, and actual intention and meaning derived therefrom, are for the jury.[11] But where the

[1] Wigram on the Interpretation of Wills, p. 48; 2 Stark. Evid. 565, 566; Birch *v.* Depeyster, 1 Stark. 210, and cases there cited; Sheldon *v.* Benham, 4 Hill N. Y. 129; {Com. *v.* Morgan, 107 Mass. 200.}

[2] R. *v.* Mashiter, 6 Ad. & El. 153.

[3] Clayton *v.* Gregson, 5 Ad. & El. 302; s. c. 4 N. & M. 602.

[4] Smith *v.* Wilson, 3 B. & Ad. 728. The doctrine of the text was more fully expounded by Shaw, C. J., in Brown *v.* Brown, 8 Met. 576, 577, as follows: "The meaning of words, and the grammatical construction of the English language, so far as they are established by the rules and usages of the language, are, *prima facie*, matter of law, to be construed and passed upon by the Court. But language may be ambiguous, and used in different senses; or general words, in particular trades and branches of business, — as among merchants, for instance, — may be used in a new, peculiar, or technical sense; and, therefore, in a few instances, evidence may be received, from those who are conversant with such branches of business, and such technical or peculiar use of language, to explain and illustrate it. One of the strongest of these, perhaps, among the recent cases, is the case of Smith *v.* Wilson, 3 B. & Ad. 728, where it was held that, in an action on a lease of an estate including a rabbit-warren, evidence of usage was admissible to show that the words, 'thousand of rabbits,' were understood to mean one hundred dozen, that is, twelve hundred. But the decision was placed on the ground that the words 'hundred,' 'thousand,' and the like, were not understood, when applied to particular subjects, to mean that number of units; that the definition was not fixed by law, and therefore was open to such proof of usage. Though it is exceedingly difficult to draw the precise line of distinction, yet it is manifest that such evidence can be admitted only in a few cases like the above. Were it otherwise, written instruments, instead of importing certainty and verity, as being the sole repository of the will, intent, and purposes of the parties, to be construed by the rules of law, might be made to speak a very different language by the aid of parol evidence."

[5] Astor *v.* Union Ins. Co., 7 Cowen 202.

[6] Peisch *v.* Dickson, 1 Mason 11, 12.

[7] Lucas *v.* Groning, 7 Taunt. 164.

[8] Chaurand *v.* Angerstein, Peake 43. See also Peisch *v.* Dickson, 1 Mason 12; Doe *v.* Benson, 4 B. & Ald. 588; U. S. *v.* Breed, 1 Sumn. 159; Taylor *v.* Briggs, 2 C. & P. 525.

[9] {So, to explain such an expression as "regular turns of loading," in an action on a contract for loading coals at Newcastle (Leideman *v.* Schultz, 24 Eng. Law & Eq. 305; 14 C. B. 38); "payable in trade" (Dudley *v.* Vose, 114 Mass. 34); "dollars," "current funds" (Thorington *v.* Smith, 8 Wall. 1, 12; Bryan *v.* Harrison, 76 N. C. 360; Davis *v.* Glenn, ib. 427); "spitting of blood," in an insurance policy (Singleton *v.* St. Louis Mut. Ins. Co., 66 Mo. 63); "crop of flax" (Goodrich *v.* Stevens, 5 Lans. 230); "horn chains" (Swett *v.* Shumway, 102 Mass. 365); "barrel" (Miller *v.* Stevens, 100 id. 518); "all faults" (Whitney *v.* Boardman, 118 id. 242); "best oil" (Lucas *v.* Bristow, E. B. & E. 907); "f. o. b." (Silberman *v.* Clark, 96 N. Y. 524; see also Herrick *v.* Noble, 27 Vt. 1; Taylor *v.* Sayre, 4 Zabr. 647).}

[10] Remon *v.* Hayward, 2 Ad. & El. 666; Crofts *v.* Marshall, 7 C. & P. 597; *infra*, § 300. But see Sheldon *v.* Benham, 4 Hill N. Y. 129.

[11] Lucas *v.* Groning, 7 Taunt. 164, 167, 168; Birch *v.* Depeyster, 1 Stark. 210; Paley on Agency (by Lloyd), p. 198; Hutchison *v.* Bowker, 5 M. & W. 535.

words have a known legal meaning, such, for example, as measures of quantity fixed by statute, parol evidence, that the parties intended to use them in a sense different from the legal meaning, though it were still the customary and popular sense, is not admissible.[12]

§ 281. **Collateral Agreements.** The reason and policy of the rule will be further seen, by adverting to some of the cases in which parol evidence has been rejected.[1] Thus, where a policy of insurance was effected on goods, "in ship or ships from Surinam to London," parol evidence was held inadmissible to show that a particular ship in the fleet, which was lost, was verbally excepted at the time of the contract.[2] So, where a policy described the two *termini* of the voyage, parol evidence was held inadmissible to prove that the risk was not to commence until the vessel reached an intermediate place.[3] So, where the instrument purported to be an absolute engagement to pay at a specified day, parol evidence of an oral agreement at the same time that the payment should be prolonged,[4] or depend upon a contingency,[5] or be made out of a particular fund, has been rejected.[6] Where a written agreement of partnership was unlimited as to the time of commencement, parol evidence that it was at the same time verbally agreed that the partnership should not commence until a future day, was held inadmissible.[7] So, where, in *assumpsit* for use and occupation, upon a written memorandum of lease, at a certain rent, parol evidence was offered by the plaintiff of an agreement at the same

[12] Smith *v.* Wilson, 3 B. & Ad. 728, per Ld. Tenterden; Hockin *v.* Cooke, 4 T. R. 314; Attorney-General *v.* Cast Plate Glass Co., 1 Anst. 39; Sleght *v.* Rhinelander, 1 Johns. 192; Frith *v.* Barker, 2 id. 335; Stoever *v.* Whitman, 6 Binn. 417; Henry *v.* Risk, 1 Dall. 265; Doe *v.* Lea, 11 East 312; Caine *v.* Horsefall, 2 C. & K. 349; {Insurance Company *v.* Throop, 22 Mich. 146; Willmering *v.* McGaughey, 30 Iowa 205; Arthur *v.* Roberts, 60 Barb. 580; Butler *v.* Gale, 27 Vt. 739.} [See on this point, § 305 *l*, *post*.] Conversations between the parties at the time of making a contract are competent evidence, as a part of the *res gestæ*, to show the sense which they attached to a particular term used in the contract: Gray *v.* Harper, 1 Story 574. Where a sold note run thus: "18 pockets of hops, at 100*s*.," parol evidence was held admissible to show that 100*s*. meant the price per hundredweight: Spicer *v.* Cooper, 1 G. & D. 52.

[1] [The illustrations in this section concern mainly the principle of §§ 305 *c*–305 *f*, *post*, not that of Interpretation, §§ 305 *i*, 305 *l*.]

[2] Weston *v.* Emes, 1 Taunt. 115.

[3] Kaines *v.* Knightly, Skin. 54; Leslie *v.* De la Torre, cited 12 East 583; {see Barrett *v.* Ins. Co., 7 Cush. 175, 180; Lee *v.* Howard, etc. Co., 3 Gray 583, 592; Union M. Ins. Co. *v.* Wilkinson, 13 Wall. 222; Sayward *v.* Stevens, 3 Gray 97, 102.}

[4] Hoare *v.* Graham, 3 Campb. 57; Hanson *v.* Stetson, 5 Pick. 506; Spring *v.* Lovett, 11 id. 417; [and citations *post*, § 305 *c*.]

[5] Rawson *v.* Walker, 1 Stark. 361; Foster *v.* Jolly, 1 C. M. & R. 703; Hunt *v.* Adams, 7 Mass. 518; Free *v.* Hawkins, 8 Taunt. 92; Thompson *v.* Ketcham, 8 Johns. 189; Woodbridge *v.* Spooner, 3 B. & Ald. 233; Moseley *v.* Hanford, 10 B. & C. 729; Erwin *v.* Saunders, 1 Cowen 249, [and citations *post*, § 305 *c*.]

[6] Campbell *v.* Hodgson, 1 Gow 74; {Allen *v.* Furbish, 4 Gray 504; Hollenbeck *v.* Shutts, 1 id. 431; Billings *v.* Billings, 10 Cush. 178, 182; Southwick *v.* Hapgood, ib. 119, 121; Ridgway *v.* Bowman, 7 Cush. 268, 271; City Bank *v.* Adams, 45 Me. 455;} [and *post*, § 305 *c*;] {for other instances, see Langdon *v.* Langdon, 4 Gray 186, 188; Furbush *v.* Goodwin, 25 N. H. 425; Wood *v.* Whiting, 21 Barb. 190, 197; Alexander *v.* Moore, 19 Mo. 143; Sutton *v.* Kettell, 1 Sprague 309.}

[7] Dix *v.* Otis, 5 Pick. 38.

time to pay a further sum, being the ground rent of the premises, to the ground landlord, it was rejected.[8] So, where, in a written contract of sale of a ship, the ship was particularly described, it was held that parol evidence of a further descriptive representation, made prior to the time of sale, was not admissible to charge the vendor, without proof of actual fraud; all previous conversation being merged in the written contract.[9] So, where a contract was for the sale and delivery of "ware potatoes," of which there were several kinds or qualities, parol evidence was held not admissible to show that the contract was in fact for the best of those kinds.[10] Where one signed a premium note in his own name, parol evidence was held inadmissible to show that he signed it as the agent of the defendant, on whose property he had caused insurance to be effected by the plaintiff, at the defendant's request, and who was sued as the promisor in the note, made by his agent.[11] So, where an agent let a ship on hire, describing himself in the charter-party as "owner," it was held, in an action upon the charter-party, brought by the true owner, that parol evidence was not admissible to show that the plaintiff, and not the agent, was the real owner of the ship.[12] Even the subsequent confession of

[8] Preston *v.* Merceau, 2 W. Bl. 1249. A similar decision was made in The Isabella, 2 Rob. Adm. 241, and in White *v.* Wilson, 2 B. & P. 116, where seamen's wages were claimed in addition to the sum named in the shipping articles. The English statutes not only require such contracts to be in writing, but declare that the articles shall be conclusive upon the parties. The statute of the United States is equally imperative as to the writing, but omits the latter provision as to its conclusiveness. But the decisions in both the cases just cited rest upon the general rule stated in the text, which is a doctrine of general jurisprudence, and not upon the mere positive enactments of the statutes; see 2 Rob. Adm. 243; Bogert *v.* Cauman, Anthon 97. The American Courts adopt the same doctrine, both on general principles and as agreeable to the intent of the act of Congress regulating the merchant service. See Abbott on Shipping (by Story), p. 434, n.; Bartlett *v.* Wyman, 14 Johns. 260; Johnson *v.* Dalton, 1 Cowen 543. The same rule is applied in regard to the Statute of Frauds; see 11 Mass. 31. See further, Rich *v.* Jackson, 4 Bro. Ch. 514; Brigham *v.* Rogers, 17 Mass. 571; Flinn *v.* Calow, 1 M. & G. 589. {For agreements collateral to deeds, see Howe *v.* Walker, 4 Gray 318; Goodrich *v.* Longley, ib. 379, 383; Raymond *v.* Raymond, 10 Cush. 134, 141; Dutton *v.* Gerrish, 9 id. 89. For mining leases, see Lyon *v.* Miller, 24 Pa. St. 392; Kennedy *v.* Erie, etc. Plank Road Co., 25 id. 224; Chase *v.* Jewett, 37 Me. 351.} [For receipts, bills of lading, and the like, see *post*, §§ 305, 305 *f*.]

[9] Pickering *v.* Dowson, 4 Taunt. 779. See also Powell *v.* Edmunds, 12 East 6; Pender *v.* Fobes, 1 Dev. & Bat. 250; Wright *v.* Crookes, 1 Scott N. R. 685.

[10] Smith *v.* Jeffryes, 15 M. & W. 561.

[11] Stackpole *v.* Arnold, 11 Mass. 27. See also Hunt *v.* Adams, 7 Mass. 518; Shankland *v.* Corp. of Washington, 5 Peters 394; {Myrick *v.* Dame, 9 Cush. 248; Arnold *v.* Cessna, 25 Pa. 34.} But parol evidence is admissible to show that one of several promisors signed as the surety of another: Carpenter *v.* King, 9 Met. 511; McGee *v.* Prouty, ib. 547; {as to agreements for suretyship, see Weston *v.* Chamberlin, 7 Cush. 404; Riley *v.* Gerrish, 9 ib. 104; Barry *v.* Ransom, 2 Kernan 462; Norton *v.* Coons, 2 Selden 33; Dickinson *v.* Commissioner, 6 Ind. 128; Riley *v.* Gregg, 16 Wis. 666;} [and *post*, § 305 *c*.]

[12] Humble *v.* Hunter, 12 Q. B. 310. And see Lucas *v.* De la Cour, 1 M. & S. 249; Robson *v.* Drummond, 2 B. & Ad. 303. Where a special agreement was made in writing for the sale of goods from A to B, the latter being in part the agent of C, whose name did not appear in the transaction, it was held that C might maintain an action in his own name against A for the breach of this contract, and that parol evidence was admissible to prove that B acted merely as the agent of C, and for his exclusive benefit: Hubbert *v.* Borden, 6 Wharton 79; [see *post*, § 305 *c*.]

the party, as to the true intent and construction of the title-deed, under which he claims, will be rejected.[13] The books abound in cases of the application of this rule; but these are deemed sufficient to illustrate its spirit and meaning, which is the extent of our present design.

§ 282. From the examples given in the two preceding sections, it is thus apparent that the rule excludes only parol evidence of the language of the parties, contradicting, varying, or adding to that which is contained in the written instrument; and this because they have themselves committed to writing all which they deemed necessary to give full expression to their meaning, and because of the mischiefs which would result, if verbal testimony were in such cases received. But where the agreement in writing is expressed in short and incomplete terms, parol evidence is admissible to explain that which is *per se* unintelligible, such explanation not being inconsistent with the written terms.[1] It is also to be kept in mind, that though the first question in all cases of contract is one of interpretation and intention, yet the question, as we have already remarked, is not what the parties may have secretly and in fact intended, but what meaning did they intend to convey, by the words they employed in the written instrument. To ascertain the meaning of these words, it is obvious that parol evidence of extraneous facts and circumstances may in some cases be admitted to a very great extent, without in any wise infringing the spirit of the rule under consideration. These cases, which in truth are not exceptions to the rule, but on the contrary are out of the range of its operation, we shall now proceed to consider.

§ 283. **Agreement in more than one Writing.** It is in the first place to be observed that the rule does not restrict the Court to the perusal of a single instrument or paper; for, while the controversy is between the original parties, or their representatives, all their contemporaneous writings, relating to the same subject-matter, are admissible in evidence.[1]

[13] Paine *v.* McIntier, 1 Mass. 69, as explained in 10 id. 461. See also Townsend *v.* Weld, 8 id. 146.

[1] Sweet *v.* Lee, 3 M. & G. 452; {so, where the writing was, "Rec'd of P. $500, due on demand," it was held that parol evidence was admissible of the consideration of the promise and the circumstances of the transaction: De Lavallette *v.* Wendt, 75 N. Y. 579; so, when the writing was, "I. O. U. the sum of $160, which I shall pay on demand to you," parol evidence is admissible to identify "you:" Kinney *v.* Flynn, 2 R. I. 319; see Collender *v.* Dunsmore, 55 N. Y. 200. Certain contracts, however, though very concise in their language, have a definite meaning in the commercial world and may not be contradicted by parol evidence: such are in some instances acceptances and indorsements of commercial paper: Hauer *v.* Patterson, 84 Pa. St. 274; Ross *v.* Espy, 66 id. 481; Jones *v.* Albee, 70 Ill. 34.}

[1] Leeds *v.* Lancashire, 2 Campb. 205; Hartley *v.* Wilkinson, 4 id. 127; Stone *v.* Metcalf, 1 Stark. 53; Bowerbank *v.* Monteiro, 4 Taunt. 846, per Gibbs, J.; Hunt *v.* Livermore, 5 Pick. 395; Davlin *v.* Hill, 2 Fairf. 434; Couch *v.* Meeker, 2 Conn. 302; Lee *v.* Dick, 10 Pet. 482; Bell *v.* Bruen, 17 id. 161; s. c. 1 Howard 169, 183; [but this must be confined to writings forming separate parts of a single entire contract; except so far as the other writings may be admissible as indicating usage for the purpose of interpretation.]

§ 284. **Instrument may be shown Void or Voidable.** It is in the next place to be noted that the rule is not infringed by the admission of parol evidence, showing that the instrument is altogether void, or that it never had any legal existence or binding force;[1] either by reason of fraud, or for want of due execution and delivery, or for the illegality of the subject-matter; this qualification applies to all contracts, whether under seal or not. The want of consideration may also be proved to show that the agreement is not binding;[2] unless it is either under seal, which is conclusive evidence of a sufficient consideration,[3] or is a negotiable instrument in the hands of an innocent indorsee.[4] Fraud, practised by the party seeking the remedy, upon him against whom it is sought, and in that which is the subject-matter of the action or claim, is universally held fatal to his title. "The covin," says Lord Coke, "doth suffocate the right." The foundation of the claim, whether it be a record, or a deed, or a writing without seal, is of no importance; they being alike void, if obtained by fraud.[5] Parol evidence may also be offered to show that the contract was made for the furtherance of objects forbidden by law,[6]

[1] {O'Donnell *v.* Clinton, 145 Mass. 461; Faunce *v.* Ins. Co., 101 id. 279; Sherman *v.* Wilder, 106 id. 537; Wilson *v.* Haecker, 85 Ill. 349; Heeter *v.* Glasgow, 79 Pa. St. 79; Beers *v.* Beers, 22 Mich. 42; Martin *v.* Clarke, 8 R. I. 389; Grierson *v.* Mason, 60 N. Y. 394; Ware *v.* Allen, 128 U. S. 590; Kalamazoo Nov. Man. Co. *v.* McAlister, 40 Mich. 84; Hill *v.* Miller, 76 N. Y. 32; Reynolds *v.* Robinson, 110 id. 654; Wilson *v.* Powers, 131 Mass. 539; Com. *v.* Welch, 144 id. 356; Adams *v.* Morgan, 150 id. 148; Lindley *v.* Lacey, 17 C. B. N. S. 578; Murray *v.* Stair, 2 B. & C. 82; Wilson *v.* Powers, 131 Mass. 539; Earle *v.* Rice, 111 id. 17; Greenawalt *v.* Kohne, 85 Pa. St. 369; Black *v.* Lamb, 1 Beasl. N. J. 108;} [see further, *post*, § 305 *c*.]

[2] {Meyer *v.* Casey, 57 Miss. 615; Howell *v.* Moores, 127 Ill. 86; Illinois Land & Loan Co. *v.* Bonner, 91 id. 120; Bruce *v.* Slemp, 82 Va. 357; Green *v.* Batson, 71 Wis. 57; compare Simanovich *v.* Wood, 145 Mass. 180;} [and see further, *post*, §§ 304, 305 *f*.]

[3] {Gardner *v.* Lightfoot, 71 Iowa 577; Feeney *v.* Howard, 79 Cal. 525; Salisbury *v.* Clark, 61 Vt. 453.}

[4] {For an agreement to treat a deed absolute as a *security* only, see Campbell *v.* Dearborn, 109 Mass. 130; Brick *v.* Brick, 98 U. S. 514; Matthews *v.* Sheehan, 69 N. Y. 585; Odenbaugh *v.* Bradford, 67 Pa. St. 96; Plumer *v.* Guthrie, 76 id. 441; Lindauer *v.* Cummings, 57 Ill. 195; Hassam *v.* Barrett, 115 Mass. 256; Bonham *v.* Craig, 80 N. C. 224; McClane *v.* White, 5 Minn. 178; Tillson *v.* Moulton, 23 Ill. 648; People *v.* Irwin, 14 Cal. 428; Marsh *v.* McNair, 99 N. Y. 178; Newton *v.* Fay, 10 Allen 505; Butman *v.* Howell, 144 Mass. 66; Reeve *v.* Dennett, 137 id. 315; Grant *v.* Frost, 80 Me. 204; Philbrook *v.* Eaton, 134 Mass. 400; Pennock *v.* McCormick, 120 id. 275;} [and *post*, § 305 *f*.] {For the propriety of showing the actual *date* of an instrument, see Reffell *v.* Reffell, L. R. 1 P. & D. 139; Shaughnessey *v.* Lewis, 130 Mass. 355; Cole *v.* Howe, 50 Vt. 35; Gately *v.* Irvine, 51 Cal. 172; Finney's Appeal, 59 Pa. St. 398; Joseph *v.* Bigelow, 4 Cush. 82; Stockham *v.* Stockham, 32 Md. 196;} [and *post*, § 305 *f*.]

[5] 2 Stark. Evid. 340; Tait on Evid. 327, 328; Chitty on Contr. 527 *a*; Buckler *v.* Millerd, 2 Ventr. 107; Filmer *v.* Gott, 4 Bro. P. C. 230; Taylor *v.* Weld, 5 Mass. 116, per Sedgwick, J.; Franchot *v.* Leach, 5 Cowen 508; Dorr *v.* Munsell, 13 Johns. 431; Morton *v.* Chandler, 8 Greenl. 9; Com. *v.* Bullard, 9 Mass. 270; Scott *v.* Burton, 2 Ashm. 312; {Allen *v.* Furbish, 4 Gray 504; Prescott *v.* Wright, id. 461; Cushing *v.* Rice, 46 Me. 303; Thompson *v.* Bell, 37 Ala. 438; Plant *v.* Condit, 22 Ark. 454; Selden *v.* Myers, 20 How. 506;} [and *post*, § 305 *d*.]

[6] Collins *v.* Blantern, 2 Wils. 347; 1 Smith's Leading Cas. 154, 168, note, and cases there cited. If the contract is by deed, the illegality must be specially pleaded:

whether it be by statute or by an express rule of the common law, or by the general policy of the law; or that the writing was obtained by felony,[7] or by duress;[8] or that the party was incapable of binding himself, either by reason of some legal impediment, such as infancy or coverture,[9] or from actual imbecility or want of reason,[10] whether it be by means of permanent idiocy or insanity, or from a temporary cause, such as drunkenness;[11] or that the instrument came into the hands of the plaintiff without any absolute and final delivery,[12] by the obligor or party charged.

§ 284 *a*. **Transaction partially reduced to Writing.** Nor does the rule apply in cases where the original contract was verbal and entire, and a part only of it was reduced to writing. Thus, where, upon an adjustment of accounts, the debtor conveyed certain real estate to the creditor at an assumed value, which was greater than the amount due, and took the creditor's promissory note for the balance; it being verbally agreed that the real estate should be sold, and the proceeds accounted for by the grantee, and that the deficiency, if any, below the estimated value, should be made good by the grantor; which agreement the grantor afterwards acknowledged in writing, — it was held, in an action brought by the latter to recover the contents of the note, that the whole agreement was admissible in evidence on the part of the defendant; and that, upon the proof that the sale of the land produced less than the estimated value, the deficiency should be deducted from the amount due upon the note.[1]

Whelpdale's Case, 5 Co. 119; Mestayer *v*. Biggs, 4 Tyrw. 471. But the rule in the text applies to such cases as well as to those arising under the general issue. See also Biggs *v*. Lawrence, 3 T. R. 454; Waymell *v*. Reed, 5 id. 600; Doe *v*. Ford, 3 Ad. & El. 649; Catlin *v*. Bell, 4 Campb. 183; Com. *v*. Pease, 16 Mass. 91; Norman *v*. Cole, 3 Esp. 253; Sinclair *v*. Stevenson, 1 C. & P. 582; Chitty on Contr. 519–527.

[7] 2 B. & P. 471, per Heath, J.

[8] 2 Inst. 482, 483; 5 Com. Dig. Pleader, 2 W. 18–23; Stouffer *v*. Latshaw, 2 Watts 165; Thompson *v*. Lockwood, 15 Johns. 256; 2 Stark. Evid. 274.

[9] 2 Stark. Evid. 274; Anon., 12 Mod. 609; Van Valkenburgh *v*. Rouk, 12 Johns. 338; 2 Inst. 482, 483; 5 Dig. *ubi sup*.

[10] 2 Kent Comm. 450–453, and cases there cited; Webster *v*. Woodford, 3 Day 90; Mitchell *v*. Kingman, 5 Pick. 431; Rice *v*. Peet, 15 Johns. 503.

[11] See Barrett *v*. Buxton, 2 Aik. 167, where this point is ably examined by Prentiss, J.; Seymour *v*. Delancy, 3 Cowen 518; 1 Story's Eq. Jur. § 231, n. (2); Wigglesworth *v*. Steers, 1 Hen. & Munf. 70; Prentice *v*. Achorn, 2 Paige 31. {For execution by an illiterate person, see Trambly *v*. Ricard, 130 Mass. 259; Foye *v*. Patch, 132 id. 106;} [and *post*, § 305 *c*.]

[12] Clark *v*. Gifford, 10 Wend. 310; United States *v*. Leffler, 11 Pet. 86; Jackson d. Titus *v*. Myers, 11 Wend. 533, 536; Couch *v*. Meeker, 2 Conn. 302.

[1] Lewis *v*. Gray, 1 Mass. 297; Lapham *v*. Whipple, 8 Met. 59; {see other instances in Morgan *v*. Griffith, L. R. 6 Ex. 70; Chapin *v*. Dobson, 78 N. Y. 74; Callan *v*. Lukens, 89 Pa. St. 134; Barclay *v*. Wainwright, 86 id. 191; Caley *v*. Phila., etc. R. R. Co., 80 id. 363; Barclay *v*. Hopkins, 59 Ga. 562; Willis *v*. Hulbert, 117 Mass. 151; Bissenger *v*. Guiteman, 6 Heisk. 277; Rohan *v*. Hanson, 11 Cush. 44; Paige *v*. Monks, 5 Gray 492; Snow *v*. Alley, 151 Mass. 15; Bonney *v*. Morrill, 57 Me. 368; Basshor *v*. Forbes, 36 Md. 154; Sheffield *v*. Page, Sprague 285; Harris *v*. Forman, 5 C. B. N. S. 1; Wallis *v*. Littell, 11 id. 368; 8 Jur. N. S. 745; Wake *v*. Harrop, 10 W. R. 626; s. c. 7 Law T. N. S. 96; Crane *v*. Elizabeth, etc., 29 N. J. L. 302; Beach *v*. R. Co., 37 N. Y. 457; Page *v*. Sheffield, 2 Curt. C. C. 377; Cilley *v*. Tenny,

§ 285. **Contradicting a Recital.** Neither is this rule infringed by the introduction of parol evidence, contradicting or explaining the instrument in some of its recitals of facts, where such recitals do not, on other principles, estop the party to deny them; and accordingly in some cases such evidence is received.[1] Thus, in a settlement case, where the value of an estate, upon which the settlement was gained, was in question, evidence of a greater sum paid than was recited in the deed was held admissible.[2] So, to show that the lands described in the deed as in one parish, were in fact situated in another.[3] So, to show that at the time of entering into a contract of service in a particular employment, there was a further agreement to pay a sum of money as a premium, for teaching the party the trade, whereby an apprenticeship was intended; and that the whole was therefore void for want of a stamp, and so no settlement was gained.[4] So, to contradict the recital of the date of a deed; as, for example, by proving that a charter-party, dated February 6th, conditioned to sail on or before February 12th, was not executed till after the latter day, and that therefore the condition was dispensed with.[5] So, to show that the reference in a codicil to a will of 1833 was a mistake, that will being supposed to be destroyed; and that the will of 1837 was intended.[6] And, on the other hand, where a written guaranty was expressed to be "in consideration of your having discounted V.'s note," and it was objected that it was for a past consideration, and therefore void, explanatory parol evidence was held admissible to show that the discount was contemporaneous with the guaranty.[7] So, where the guaranty was "in consideration of your having this day advanced to V. D.," similar evidence was held admissible.[8] It is also admissible to show when a written promise, without date, was in fact made.[9] Evidence may also be given of a consideration, not mentioned in a deed, provided it be not inconsistent with the consideration expressed in it.[10]

31 Vt. 401; Real Estate T. Co.'s Appeal, 125 Pa. St. 560; Thomas *v.* Loose, 114 id. 35; Dodge *v.* Zimmer, 110 N. Y. 49;] [and *post*, § 305 *f*.]

[1] 2 Poth. on Obl., by Evans, 181, 182; [Ingersoll *v.* Truebody, 40 Cal. 603; Harris *v.* Rickett, 4 H. & N. 1; Chapman *v.* Callis, 2 F. & F. 161;] [for receipts, bills of lading, and the like, see *post*, §§ 305, 305 *f*.]

[2] R. *v.* Scammonden, 3 T. R. 474. See also Doe *v.* Ford, 3 Ad. & El. 649.

[3] R. *v.* Wickham, 2 Ad. & El. 517.

[4] R. *v.* Laindon, 8 T. R. 379.

[5] Hall *v.* Cazenove, 4 East 477; [*ante*, § 284.] See further, Tait on Evid. pp. 332, 333–336; *infra*, § 304.

[6] Quincey *v.* Quincey, 11 Jur. 111.

[7] *Ex parte* Flight, 35 Leg. Obs. 240. And see Haigh *v.* Brooks, 10 Ad. & El. 309; Butcher *v.* Steuart, 11 M. & W. 857.

[8] Goldshede *v.* Swan, 35 Leg. Obs. 203; 1 Exch. 154. This case has been the subject of some animated discussion in England. See 12 Jur. 22, 94, 102.

[9] Lobb *v.* Stanley, 5 Q. B. 574.

[10] Clifford *v.* Turrill, 9 Jur. 633; [see *ante*, § 284. At this point the author seems to have broken off his treatment of that portion of the parol-evidence rule which has been hereinafter (§ 305 *b*) termed the Integration rule; the remainder of his treatment of that part of the subject will be found *post*, §§ 302–305.]

§ 286. **Interpretation of Terms of the Instrument.** As it is a leading rule, in regard to written instruments, that they are to be interpreted according to their subject-matter, it is obvious that parol or verbal testimony must be resorted to, in order to ascertain the nature and qualities of the subject,[1] to which the instrument refers. Evidence which is calculated to explain the subject of an instrument is essentially different in its character from evidence of verbal communications respecting it. Whatever, therefore, indicates the nature of the subject, is a just medium of interpretation of the language and meaning of the parties in relation to it, and is also a just foundation for giving the instrument an interpretation, when considered relatively different from that which it would receive if considered in the abstract. Thus, where certain premises were leased, including a yard, described by metes and bounds, and the question was, whether a cellar under the yard was or was not included in the lease; verbal evidence was held admissible to show that, at the time of the lease, the cellar was in the occupancy of another tenant, and, therefore, that it could not have been intended by the parties that it should pass by the lease.[2] So, where a house, or a mill, or a factory is conveyed, *eo nomine*, and the question is as to what was part and parcel thereof, and so passed by the deed, parol evidence to this point is admitted.[3]

§ 287. Indeed, there is no material difference of principle in the rules of interpretation between wills and contracts, except what naturally arises from the different circumstances of the parties. The object, in both cases, is the same, namely, to discover the intention. And, to do this, the Court may, in either case, put themselves in the place of the party, and then see how the terms of the instrument affect the property or subject-matter.[1] With this view, evidence

[1] In the term "subject," in this connection, text-writers include everything to which the instrument relates, as well as the person who is the other contracting party, or who is the object of the provision, whether it be by will or deed: Phil. & Am. on Evid. 732, n. (1).

[2] 2 Poth. on Obl., by Evans, p. 185; Doe d. Freeland *v.* Burt, 1 T. R. 701; Elfe *v.* Gadsden, 2 Rich. 373; Brown *v.* Slater, 16 Conn. 192; Milbourn *v.* Ewart, 5 T. R. 381, 385.

[3] Ropps *v.* Barker, 4 Pick. 239; Farrar *v.* Stackpole, 6 Greenl. 154. But where the language of the deed was broad enough plainly to include a garden, together with the house, it was held that the written paper of conditions of sale, excepting the garden, was inadmissible to contradict the deed: Doe *v.* Webster, 4 P. & D. 273; {see other instances in McKenzie *v.* Wimberly, 86 Ala. 195; Moffitt *v.* Maness, 102 N. C. 457; Brady *v.* Cassidy, 104 N. Y. 155; Cleverly *v.* Cleverly, 124 Mass. 314; Thornell *v.* Brockton, 141 id. 151; Thayer *v.* Finton, 108 N. Y. 397; Sweet *v.* Shumway, 102 Mass. 365; Whitney *v.* Boardman, 118 id. 242; Habenicht *v.* Lissak, 77 Cal. 139; West *v.* Smith, 101 U. S. 263; Knick *v.* Knick, 75 Va. 19; Watson *v.* Baker, 71 Tex. 739; Bulkley *v.* Devine, 127 Ill. 407; Brown *v.* Fales, 139 Mass. 21; Parsons *v.* Thornton, 82 Ala. 308;} [and *post*, §§ 305 *l*, 305 *m*.]

[1] Doe *v.* Martin, 1 N. & M. 524; s. c. 4 B. & Ad. 771, 785, per Park, J.; Holsten *v.* Jumpson, 4 Esp. 189; Brown *v.* Thorndike, 15 Pick. 400; Phil. & Am. on Evid. 736; 2 Phil. Evid. 277; Guy *v.* Sharp, 1 M. & K. 602. [On this subject, see §§ 305 *i*, 305 *j*, *post*.]

must be admissible of all the circumstances surrounding the author of the instrument.[2] In the simplest case that can be put, namely, that of an instrument appearing on the face of it to be perfectly intelligible, inquiry must be made for a subject-matter to satisfy the description. If, in the conveyance of an estate, it is designated as Blackacre, parol evidence must be admitted to show what field is known by that name. Upon the same principle, where there is a devise of an estate purchased of A, or of a farm in the occupation of B, it must be shown by extrinsic evidence what estate it was that was purchased of A, or what farm was in the occupation of B, before it can be known what is devised.[3] So, if a contract in writing is made, for extending the time of payment of "certain notes," held by one party against the other, parol evidence is admissible to show what notes were so held and intended.[4]

§ 288. It is only in this mode that parol evidence is admissible (as is sometimes, but not very accurately, said) to explain written instruments; namely, by showing the situation of the party in all his relations to persons and things around him, or, as elsewhere expressed, by proof of the surrounding circumstances. Thus, if the language of the instrument is applicable to several persons, to several parcels of land, to several species of goods, to several monuments or boundaries, to several writings;[1] or the terms be vague and general, or have divers meanings, as "household furniture," "stock," "freight," "factory prices," and the like;[2] or in a will, the words

[2] The propriety of admitting such evidence in order to ascertain the meaning of doubtful words or expressions in a will, is expressly conceded by Marshall, C. J., in Smith *v.* Bell, 6 Peters 75. See also Wooster *v.* Butler, 13 Conn. 317; Baldwin *v.* Carter, 17 id. 201; Brown *v.* Slater, 16 id. 192; Marshall's Appeal, 2 Barr 388; Stoner's Appeal, ib. 428; Great Northern Railw. Co. *v.* Harrison, 16 Jur. 565; 14 Eng. L. & Eq. 195, per Parke, B.

[3] Sandford *v.* Raikes, 1 Mer. 646, 653, per Sir W. Grant; Doe d. Preedy *v.* Holtom, 4 Ad. & El. 76, 81, per Coleridge, J.; Doe *v.* Martin, 4 B. & Ad. 771, per Parke, J. "Whether parcel, or not, of the thing demised, is always matter of evidence:" per Buller, J., in Doe *v.* Burt, 1 T. R. 704; Doe *v.* E. of Jersey, 3 B. & C. 870; Doe *v.* Chichester, 4 Dow 65; 2 Stark. Evid. 558–561.

[4] Bell *v.* Martin, 3 Harrison 167; [see other instances in Keller *v.* Webb, 125 Mass. 88; Railroad Co. *v.* Durant, 95 U. S. 576, Dunham *v.* Gannett, 124 Mass. 151; Woods *v.* Sawin, 4 Gray 322; Raymond *v.* Coffey, 5 Or. 132; Russel *v.* Werntz, 24 Pa. 337; Gerrish *v.* Towne, 3 Gray 82; Altschul *v.* Assoc., 43 Cal. 171; Field *v.* Munson, 47 N. Y. 221; Suffern *v.* Butler, 21 N. J. Eq. 410; Foster *v.* McGraw, 64 Pa. St. 464; Tuxbury *v.* French, 41 Mich. 7; Cleverly *v.* Cleverly, 124 Mass. 314; Black *v.* Hill, 32 Oh. St. 313; Maguire *v.* Baker, 57 Ga. 109; Bancroft *v.* Grover, 23 Wis. 463; Kimball *v.* Myers, 21 Mich. 276; Thorington *v.* Smith, 8 Wall. 1; McDonald *v.* Longbottom, 1 E. & E. 977; Mumford *v.* Gething, 7 C. B. N. S. 305; Almgren *v.* Dutilh, 5 N. Y. 28; Barrett *v.* Stow, 15 Ill. 423; Stoops *v.* Smith, 100 Mass. 63; Hart *v.* Hammett, 18 Vt. 127; Sargent *v.* Adams, 3 Gray 72;] [and compare §§ 305 *l*, 305 *m*, *post*.]

[1] Miller *v.* Travers, 8 Bing. 244; Storer *v.* Freeman, 6 Mass. 435; Waterman *v.* Johnson, 13 Pick. 261; Hodges *v.* Horsfall, 1 Rus. & My. 116; Dillon *v.* Harris, 4 Bligh N. S. 343, 356; Parks *v.* Gen. Int. Assur. Co., 5 Pick. 34; Coit *v.* Starkweather, 8 Conn. 289; Blake *v.* Doherty, 5 Wheaton 359; 2 Stark. Evid. 558–561.

[2] Peisch *v.* Dickson, 1 Mason 10–12, per Story, J.; Pratt *v.* Jackson, 1 Bro. P. C. 222; Kelly *v.* Powlet, Ambl. 610; Bunn *v.* Winthrop, 1 Johns. Ch. 329; Le Farrant

"child," "children," "grandchildren," "son," "family," or "nearest relations," are employed;[3] in all these and the like cases, parol evidence is admissible of any extrinsic circumstances, tending to show what person or persons, or what things, were intended by the party, or to ascertain his meaning in any other respect;[4] and this, without any infringement of the rule, which, as we have seen, only excludes parol evidence of other language, declaring his meaning, than that which is contained in the instrument itself.

§ 289. **Interpretation of Wills; Declarations of Intention.** In regard to wills, much greater latitude was formerly allowed, in the admission of evidence of intention, than is warranted by the later cases.[1] The modern doctrine on this subject is nearly or quite identical with that which governs in the interpretation of other instruments;[2] and is best stated in the language of Lord Abinger's own lucid exposition, in a case in the Exchequer.[3] "The object," he

v. Spencer, 1 Ves. 97; Colpoys *v.* Colpoys, Jacob 451; Wigram on Wills, p. 64; Goblet *v.* Beechey, 3 Sim. 24; Barrett *v.* Allen, 10 Ohio 426; Avery *v.* Stewart, 2 Conn. 69; Williams *v.* Gilman, 3 Greenl. 276.

[3] Blackwell *v.* Bull, 1 Keen 176; Wylde's Case, 6 Co. 16; Brown *v.* Thorndike, 15 Pick. 400; Richardson *v.* Watson, 4 B. & Ad. 787. See also Wigram on Wills, p. 58; Doe *v.* Joinville, 3 East 172; Green *v.* Howard, 1 Bro. Ch. 32; Leigh *v.* Leigh, 15 Ves. 92; Beachcroft *v.* Beachcroft, 1 Madd. 430; [*post*, §§ 290, 305 *l*.]

[4] Goodinge *v.* Goodinge, 1 Ves. 231; Jeacock *v.* Falkener, 1 Bro. Ch. 295; Fonnereau *v.* Poyntz, ib. 473; Mackell *v.* Winter, 3 Ves. Jr. 540, 541; Lane *v.* Lord Stanhope, 6 T. R. 345; Doe *v.* Huthwaite, 3 B. & Ald. 632; Goodright *v.* Downshire, 2 B. & P. 608, per Lord Alvanley; Lansdowne *v.* Lansdowne, 2 Bligh 60; Clementson *v.* Gandy, 1 Keen 309; King *v.* Badeley, 3 My. & K. 417; [*post*, §§ 305 *j*, 305 *m*.] So parol evidence is admissible to show what debt was referred to, in a letter of collateral guaranty: Drummond *v.* Prestman, 12 Wheat. 515. So, to show that advances, which had been made, were in fact made upon the credit of a particular letter of guaranty: Douglass *v.* Reynolds, 7 Pet. 113. So, to identify a note, which is provided for in an assignment of the debtor's property for the benefit of his creditors, but which is misdescribed in the schedule annexed to the assignment: Pierce *v.* Parker, 4 Met. 80. So, to show that the indorsement of a note was made merely for collateral security: Dwight *v.* Linton, 3 Rob. La. 57. See also Bell *v.* Firemen's Ins. Co., ib. 423, 428, where parol evidence was admitted of an agreement to sell, prior to the deed or act of sale. So, to show what flats were occupied by the riparian proprietor, as appurtenant to his upland and wharf, and passed with them by the deed: Treat *v.* Strickland, 10 Shepl. 234. {See other instances in Storer *v.* Ins. Co., 45 Me. 175; Reamer *v.* Nesmith, 34 Cal. 624; Garwood *v.* Garwood, 29 id. 514; Holding *v.* Elliott, 5 H. & N. 117; Herring *v.* Iron Co., 1 Gray 134; Hopkins *v.* School District, 27 Vt. 281; Rey *v.* Simpson, 22 How. 341; Sargent *v.* Adams, 3 Gray 72; Bainbridge *v.* Wade, 20 L. J. N. S. Q. B. 7; Blossom *v.* Griffin, 13 N. Y. 569; Griffiths *v.* Hardenbergh, 41 id. 468; Bradley *v.* Wash., etc. Co., 13 Pet. 89; George *v.* Joy, 19 N. H. 544; Linsley *v.* Lovely, 26 Vt. 123.}

[1] [The development seems in fact to have been just the opposite; see Thayer, Preliminary Treatise, 414 ff.]

[2] [Compare the discriminations in § 305 *j*, *post*.]

[3] Doe d. Hiscocks *v.* Hiscocks, 5 M. & W. 363, 367. This was an action of ejectment, brought on the demise of Simon Hiscocks against John Hiscocks. The question turned on the words of a devise in the will of Simon Hiscocks, the grandfather of the lessor of the plaintiff and of the defendant. 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 devised those estates to "my grandson, John Hiscocks, eldest son of the said John Hiscocks." It was on this devise that the question wholly turned. In fact, John Hiscocks, the father,

remarked, "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.[4] 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 cipher, 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,' that is, the words

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, did not, both by name and description, apply to either the lessor of the plaintiff, who was the eldest son, but whose name was Simon, nor to the defendant, who, though his name was John, was not the eldest son.

[4] See Crocker *v.* Crocker, 11 Pick. 257; Lamb *v.* Lamb, ib. 375, per Shaw, C. J.; Bainbridge *v.* Wade, 20 Law J. N. S. Q. B. 7; 1 Eng. L. & Eq. 236.

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."

§ 290. From the above case, and two other leading modern decisions,[1] it has been collected,[2] (1) that where the description in the will, of the person or thing intended, is applicable with legal certainty to each of several subjects, extrinsic evidence is admissible to prove which of such subjects was intended by the testator. But (2) if the description of the person or thing be wholly inapplicable to the subject intended, or said to be intended by it, evidence is not admissible to prove whom or what the testator really intended to describe;[3] his declarations of intention, whether made before or after the making of the will, are alike inadmissible.[4] Those made at the time of making the will, when admitted at all, are admitted under the general rules of evidence applicable alike to all written instruments.

§ 291. But declarations of the testator, proving or tending to prove a material fact collateral to the question of intention, where such fact would go in aid of the interpretation of the testator's words, are, on the principles already stated, admissible. These cases, however, will be found to be those only in which the description in the will is unambiguous[1] in its application to any one of several subjects.[2] Thus, where lands were devised to John Cluer of Calcot, and

[1] Miller *v.* Travers, 8 Bing. 244 : [see this case discussed in Thayer, Preliminary Treatise, 474; and *post*, § 305 *k*;] Doe d. Gord *v.* Needs, 2 M. & W. 129; Atkinson *v.* Cummins, 9 How. 479. The same rule is applied to the monuments in a deed, in Clough *v.* Bowman, 15 N. H. 504.

[2] By Vice-Chancellor Wigram, in his Treatise on the Interpretation of Wills, pl. 184, 188. See also Gresley on Evid. 203.

[3] [For these supposed rules, see further §§ 305 *j*–305 *l*, *post*.]

[4] Wigram on Wills, pl. 104, 187; Brown *v.* Saltonstall, 3 Met. 423, 426; Trustees, etc. *v.* Peaslee, 15 N. H. 317, 330; [see other instances in Castle *v.* Fox, L. R. 11 Eq. 542; Ellis *v.* Houston, L. R. 10 Ch. Div. 236; Weatherhead *v.* Sewell, 9 Humph. 272; Brower *v.* Bowers, 1 Abb. App. Dec. 214; *Re* Cahn, 3 Redf. 31; Benham *v.* Hendrickson, 32 N. J. Eq. 441; Sherratt *v.* Mountford, L. R. 8 Ch. 928; *Re* Wolverton Mortgaged Estates, L. R. 7 Ch. Div. 197; Moseley *v.* Martin, 37 Ala. 216; Morse *v.* Stearns, 131 Mass. 389; Lovejoy *v.* Lovett, 124 id. 270; Hoar *v.* Goulding, 116 id. 132; Chester Emery Co. *v.* Lucas, 112 id. 424; Putnam *v.* Bond, 100 id. 58; Hall *v.* Davis, 36 N. H. 569; Morgan *v.* Burrows, 45 Wis. 211; Ganson *v.* Madigan, 15 id. 144; Clark *v.* Clark, 2 Lea 723; Vreeland *v.* Williams, 32 N. J. Eq. 734; Horner *v.* Stillwell, 35 N. J. L. 307. For instances in *deeds*, see Kingsford *v.* Hood, 105 Mass. 495; Simpson *v.* Dix, 131 id. 179; Whitmore *v.* Learned, 70 Me. 276.]

[1] [Possibly this word should be "ambiguous;" see *post*, § 305 *k*.]

[2] Wigram on Wills, pl. 5, 96, 104, 194, 195, 211–215; Doe *v.* Martin, 1 N. & M.

there were father and son of that name, parol evidence of the testator's declarations, that he intended to leave them to the son, was held admissible.[3] So, where a legacy was given to "the four children of A," who had six children, two by a first, and four by a second, marriage, parol evidence of declarations by the testatrix, that she meant the latter four, was held admissible.[4] So, where the devise was, "to my granddaughter, Mary Thomas of Llechloyd in Merthyr parish," and the testator had a granddaughter named Elinor Evans in that parish, and a great-granddaughter, Mary Thomas, in the parish of Llangain; parol evidence of the testator's declarations at the time of making the will was received to show which was intended.[5] So, where a legacy was given to Catherine Earnley, and there was no person of that name, but the legacy was claimed by Gertrude Yardley; parol proof was received that the testator's voice, when the scrivener wrote the will, was very low, that he usually called the legatee Gatty, and had declared that he would do well by her in his will; and thereupon the legacy was awarded to her.[6] So, also, where

524, per Parke, J.; s. c. 4 B. & Ad. 771; Guy *v.* Sharp, 1 M. & K. 602, per Ld. Broughman, C. See also Boys *v.* Williams, 2 Russ. & My. 689, where parol evidence of the testator's property and situation was held admissible to determine whether a bequest of stock was intended as a specific or a pecuniary legacy. These rules apply with equal force to the interpretation of every other private instrument.

[3] Jones *v.* Newman, 1 W. Bl. 60. See also Doe *v.* Beynon, 4 P. & D. 193; Doe *v.* Allen, ib. 220. But where the testator devised to his "grandson Rufus," and there were two of that name, the one legitimate, who lived in a foreign land, and whom he had seen only once and when a child, and the other illegitimate, living with him, and whom he had brought up and educated; it was held, that the words were legally applicable only to the legitimate grandson, and that parol evidence to the contrary was not admissible: Doe *v.* Taylor, 1 Allen 144 (N. Bruns.), Street, J., *dissentiente*.

[4] Hampshire *v.* Pierce, 2 Ves. 216.

[5] Thomas *v.* Thomas, 6 T. R. 671.

[6] Beaumont *v.* Fell, 2 P. Wms. 141. The propriety of receiving evidence of the testator's declarations, in either of the two last-cited cases, was, as we have just seen *supra*, § 239, note), strongly questioned by Lord Abinger (in Hiscocks *v.* Hiscocks, 5 M. & W. 371), who thought them at variance, in this particular, with the decision in Miller *v.* Travers, 8 Bing. 244, which, he observed, was a decision entitled to great weight. But upon the case of Beaumont *v.* Fell, it has been correctly remarked, that "the evidence, which is confessedly admissible, would, in conjunction with the will itself, show that there was a devise to Catherine Earnley, and that no such person existed, but that there was a claimant named Gertrude Yardley, whom the testator usually called Gatty. In this state of the case, the question would be, whether, upon the principle of *falsa demonstratio non nocet*, the surname of Earnley being rejected, the Christian name, if correct, would itself be a sufficient indication of the devisee; and if so, whether Gatty satisfied that indication. Both these questions leave untouched the general question of the admissibility of evidence, to show the process by which Gatty passed into Katty, and from Katty to Catherine." See Phil. & Am. on Evid. p. 729, note (2). It is not easy, however, to perceive why extrinsic evidence of the testator's declared intentions of beneficence towards an individual is not as admissible, as evidence is that he used to speak of him or address him as his son, or godson, or adopted child; when the object in both cases is to ascertain which of several demonstrations is to be retained as true, and which rejected as false. Now the evidence of such declarations, in Beaumont *v.* Fell, went to show that "Earnley" was to be rejected as *falsa demonstratio*; and the other evidence went to designate the individual intended by the word "Catherine;" not by adding words to the will, but by showing what the word used meant. See *infra*, § 301; Wigram on the Interpretation of Wills, pp. 128, 129,

a devise was to "the second son of Charles Weld, of Lulworth, Esq.," and there was no person of that name, but the testator had two relatives there, bearing the names of Joseph Weld and Edward-Joseph Weld, it was held, upon the context of the will, and upon extrinsic evidence, that the second son of Joseph Weld was the person intended. So, where a bequest was to John Newbolt, second son of William-Strangways Newbolt, Vicar of Somerton; and it appeared *aliunde* that the name of the vicar was William-Robert Newbolt, that his second son was Henry-Robert, and that his third son was John-Pryce; it was held that John-Pryce was entitled to the legacy.[7] So, where the testatrix gave legacies to Mrs. and Miss B. of H., widow and daughter of the Rev. Mr. B.; upon the legacies being claimed by Mrs. and Miss W., widow and daughter of the late Rev. Mr. W. of H., it was held that they were entitled; it appearing *aliunde* that there were no persons literally answering the description in the will, at its date; but that the claimants were a daughter and granddaughter of the late Rev. Mr. B., with all of whom the testatrix had been intimately acquainted, and that she was accustomed to call the claimant by the maiden name of Mrs. W.[8] The general principle in all these cases is this, that if there be a mistake in the name of the devisee, but a right description of him, the Court may act upon such right description;[9] and that if two persons equally answer the same name or description, the Court may determine, from the rest of the will and the surrounding circumstances, to which of them the will applies.[10]

§ 292. **Interpretation by Special Usage.** It is further to be observed, that the rule under consideration, which forbids the admission of parol evidence to contradict or vary a written contract, is not infringed by any evidence of known and established[1] usage respecting the subject to which the contract relates. To such usage, as well as to the *lex loci*, the parties may be supposed to refer, just as they are presumed

pl. 166; [*post*, § 305 *k*.] See also Baylis *v.* Attorney-General, 2 Atk. 239; Abbot *v.* Massie, 3 Ves. 148; Doe d. Oxenden *v.* Chichester, 4 Dow 65, 93; Duke of Dorset *v.* Lord Hawarden, 3 Curt. 80; Trustees *v.* Peaslee, 15 N. H. 317; Doe *v.* Hubbard, 15 Q. B. 248, per Ld. Campbell; {Charter *v.* Charter, L. R. 7 H. L. 364; *Re* Kilverts' Trusts, L. R. 12 Eq. 183; Leonard *v.* Davenport, 58 How. N. Y. Pr. 384; Dunham *v.* Averill, 45 Conn. 61; Colette's Estate, Myrick's Prob. Cal. 116.}

[7] Newbolt *v.* Price, 14 Sim. 354.

[8] Lee *v.* Pain, 4 Hare 251; 9 Jur. 247.

[9] On the other hand, if the name is right, but the description is wrong, the name will be regarded as the best evidence of the testator's intention; thus, where the testator had married two wives, Mary and Caroline, successively, both of whom survived him, and he devised an estate to his "dear wife Caroline," the latter was held entitled to take, though she was not the true wife: Doe *v.* Roast, 12 Jur. 99; {Andrews *v.* Dyer, 81 Me. 105.}

[10] Blundell *v.* Gladstone, 1 Phil. Ch. 279, 288, per Patteson, J.

[1] The usage must be general in the whole city or place, or among all persons in the trade, and not the usage of a particular class only, or the course of practice in a particular office or bank, to whom or which the party is a stranger: Gabay *v.* Lloyd, 3 B. & C. 793; {Byrne *v.* Packing Co., 137 Mass. 313; Mooney *v.* Ins. Co., 138 id. 375;} [*post*, § 305 *j*.]

to employ words in their usual and ordinary signification; and accordingly the rule is in both cases the same. Proof of usage is admitted, either to interpret the meaning of the language of the contract, or to ascertain the nature and extent of the contract, in the absence of express stipulations, and where the meaning is equivocal and obscure.[2] Thus, upon a contract for a year's service, as it does not in terms bind the party for every day in the year, parol evidence is admissible to show a usage for servants to have certain holidays for themselves.[3] So, where the contract was for performance as an actor in a theatre, for three years, at a certain sum per week, parol evidence was held admissible to show that, according to uniform theatrical usage, the actor was to be paid only during the theatrical season; namely, during the time while the theatre was open for performance, in each of those years.[4] So, where a ship is warranted "to depart with convoy," parol evidence is admissible to show at what place convoy for such a voyage is usually taken; and to that place the parties are presumed to refer.[5] So, where one of the subjects of a charter-party was "cotton in bales," parol evidence of the mercantile use and meaning of this term was held admissible.[6] So, where a promissory note or bill is payable with grace, parol evidence of the known and established usage of the bank at which it is payable is admissible to show on what day the grace expired.[7] But though usage may be admissible to explain what is doubtful, it is not admissible to contradict what is plain.[8] Thus, where a policy was made in the usual form, upon the ship, her tackle, apparel, boats, etc., evidence of usage, that the underwriters never pay for the loss of boats slung

[2] 2 Poth. on Obl. by Evans, App. No. xvi, p. 187; 2 Sumn. 569, per Story, J.,; 11 Sim. 626, per Parke, B.; 4 East 135, per Ld. Ellenborough; Cutter *v.* Powell 6 T. R. 320; Vallance *v.* Dewar, 1 Campb. 503; Noble *v.* Kennoway, 2 Doug. 510; Bottomley *v.* Forbes, 5 Bing. N. C. 121; 6 Scott 866; Ellis *v.* Thompson, 3 M. & W. 445; *post*, Vol. II, §§ 251, 252, and notes. [But the principles and the difficulties concerned in its admission are of three distinct sorts: (1) Under the parol-evidence rule proper, the question arises whether, when parties have reduced their contract to a writing, the terms of an unwritten usage may be treated as part of the contract; *post*, § 305 *f*; (2) in the interpretation of a contract, the standard of interpretation must be a mutual one; hence, the question arises whether the usage offered in interpretation was common to both parties; *post*, § 305 *i*; (3) the rule against disturbing a clear meaning may operate to exclude a usage offered by way of interpretation; *post*, § 305 *l*.]

[3] R. *v.* Stoke upon Trent, 5 Q. B. 303.

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

[5] Lethulier's Case, 2 Salk. 443.

[6] Taylor *v.* Briggs, 2 C. & P. 525.

[7] Renner *v.* Bank of Columbia, 9 Wheat. 581, where the decisions to this point are reviewed by Mr. Justice Thompson; [see other instances in Fleet *v.* Murton, L. R. 7 Q. B. 126; Hutchinson *v.* Tatham, L. R. 8 C. P. 482; Harris *v.* Rathbun, 2 Abb. App. 326; Swett *v.* Shumway, 102 Mass. 365; Robinson *v.* U. S., 13 Wall. 363; Newhall *v.* Appleton, 114 N. Y. 143; Walls *v.* Bailey, 49 id. 464; Gorrissen *v.* Perrin, 27 L. J. C. P. 29; Russian S. W. Co. *v.* Silva, 13 C. B. N. S. 610: Florence Mach. Co. *v.* Daggett, 135 Mass. 582; Mooney *v.* Ins. Co., 138 id. 375; Newhall *v.* Appleton, 114 N. Y. 143; Dana *v.* Fiedler, 2 Kernan 40; Brown *v.* Brooks, 25 Pa. St. 210; Allan *v.* Comstock, 17 Ga. 554; Brown *v.* Byrne, 26 Eng. Law & Eq. 247; 3 El. & Bl. 703;] [and *post*, § 305 *f*.]

[8] 2 Cr. & J. 249, per Lord Lyndhurst.

upon the quarter, outside of the ship, was held inadmissible.[9] So, also, in a libel *in rem* upon a bill of lading, containing the usual clause "the dangers of the seas only excepted," where it was articulated in the answer that there was an established usage, in the trade in question, that the ship-owners should see the merchandise properly secured and stowed, and that this being done they should not be liable for any damages not occasioned by their own neglect; it was held that this article was incompetent, in point of law, to be admitted to proof.[10]

§ 293. **Usage applied to Statutes, Charters, and Deeds.** The reasons which warrant the admission of evidence of usage in any case, apply equally, whether it be required to aid the interpretation of a statute, a public charter, or a private deed; and whether the usage be still existing or not, if it were contemporaneous with the instrument.[1] And where the language of a deed is doubtful in the description of the land conveyed, parol evidence of the practical interpretation, by the acts of the parties, is admissible to remove the doubt.[2] So, evidence of former transactions between the same parties has been held admissible to explain the meaning of terms in a written contract respecting subsequent transactions of the same character.[3]

[9] Blackett *v.* Ass. Co., 2 Cr. & J. 244.

[10] Schooner Reeside, 2 Sumn. 567; so, where the written contract was for "prime singed bacon," and evidence was offered to prove that by the usage of the trade, a certain latitude of deterioration, called average taint, was allowed to subsist, before the bacon ceases to answer the description of prime bacon, it was held inadmissible: Yates *v.* Pym, 6 Taunt. 446. So, also, parol evidence has been held inadmissible to prove, that by the words "glass ware in casks," in the memorandum of excepted articles in a fire policy, according to the common understanding and usage of insurers and insured, were meant such ware in open casks only. Bend *v.* Ins. Co., 1 N. Y. Leg. Obs. 12; see Taylor *v.* Briggs, 2 C. & P. 525; Smith *v.* Wilson, 3 B. & Ad. 728; 2 Stark. Evid. 565; Park on Ins. c. 2, pp. 30–60; *post*, Vol. II, § 251; Hone *v.* Ins. Co., 1 Sandf. 137; {De Witt *v.* Berry, 134 U. S. 312; Bigelow *v.* Legg, 102 N. Y. 654; Emery *v.* Ins. Co., 138 Mass. 398; Lichtenheim *v.* R. Co., 11 Cush. 70; Hedden *v.* Roberts, 134 Mass. 38; Brown *v.* Foster, 113 id. 136; Hearne *v.* N. E. Marine Ins. Co., 3 Cliff. 318; Schenck *v.* Griffin, 38 N. J. L. 462; Spears *v.* Ward, 48 Ind. 541; Martin *v.* Union P. R. Co., 1 Wy. 143; Winn *v.* Chamberlin, 32 Vt. 318; Symonds *v.* Lloyd, 6 C. B. N. S. 691; Beacon L. & F. Ass. Co. *v.* Gibb, 1 Moo. P. C. N. S. 73; 9 Jur. N. S. 185; Whitmore *v.* The South Boston Iron Co., 2 Allen 52.} [Most of these precedents are concerned with the principle of § 305 *f*, *post*; but some involve the principle of § 305 *l*.]

[1] Withnell *v.* Gartham, 6 T. R. 388; Stammers *v.* Dixon, 7 East 200; Wadley *v.* Bayliss, 5 Taunt. 752; 2 Inst. 282; Stradling *v.* Morgan, Plowd. 205, ad. calc.; Heydon's Case, 3 Co. 7; Wells *v.* Porter, 2 Bing. N. C. 729, per Tindal, C. J.; Duke of Devonshire *v.* Lodge, 7 B. & C. 36, 39, 40; Chad *v.* Tilsed, 2 Brod. & Bing. 403; Attorney-General *v.* Boston, 9 Jur. 838; s. c. 2 Eq. Rep. 107; Farrar *v.* Stackpole, 6 Greenl. 154; Meriam *v.* Harsen, 2 Barb. Ch. 232.

[2] Stone *v.* Clark, 1 Metc. 378; Livingston *v.* Tenbroeck, 16 Johns. 14, 22, 23; Cooke *v.* Booth, Cowp. 819. This last case has been repeatedly disapproved of, and may be considered as overruled; not, however, in the principle it asserts, but in the application of the principle to that case. See Phil. & Am. on Evid. 747, n. (1); 1 Sugd. Vend. (6th ed.) 210 (255); Cambridge *v.* Lexington, 17 Pick. 222; Choate *v.* Burnham, 7 id. 274; Allen *v.* Kingsbury, 16 id. 239; 4 Cruise's Dig. tit. 32, c. 20, § 23, n. (Greenleaf's ed.), 2d ed. 1857, vol. ii, p. 598, and note.

[3] Bourne *v.* Gatliff, 11 Cl. & Fin. 45, 69, 70.

§ 294. **Usage applied to annex Incidents.** Upon the same principle, parol evidence of usage or custom is admissible "to annex incidents," as it is termed; that is, to show what things are customarily treated as incidental and accessorial to the principal thing, which is the subject of the contract, or to which the instrument relates. Thus, it may be shown by parol that a heriot is due by custom, on the death of a tenant for life, though it is not expressed in the lease.[1] So, a lessee by a deed may show that, by the custom of the country, he is entitled to an away-going crop, though no such right is reserved in the deed.[2] So, in an action for the price of tobacco sold, evidence was held admissible to show that, by the usage of the trade, all sales were by sample, though not so expressed in the bought and sold notes.[3] This evidence is admitted on the principle, that the parties did not intend to express in writing the whole of the contract by which they were to be bound, but only to make their contract with reference to the known and established usages and customs relating to the subject-matter. But, in all cases of this sort, the rule for admitting the evidence of usage or custom must be taken with this qualification, that the evidence be not repugnant to, or inconsistent with, the contract; for otherwise it would not go to interpret and explain, but to contradict, that which is written.[4] This rule does not add new terms to the contract, which, as has already been shown,[5] cannot be done; but it shows the full extent and meaning of those which are contained in the instrument.

§ 295. **Standard of Usage as Aiding Interpretation.** But, in resorting to usage for the meaning of particular words in a contract, a distinction is to be observed between local and technical words, and other words. In regard to words which are purely technical, or local, that is, words which are not of universal use, but are familiarly known and employed, either in a particular district, or in a particular science or trade, parol evidence is always receivable, to define and explain their meaning among those who use them. And the principle and practice are the same in regard to words which have two meanings, the one common and universal, and the other technical, peculiar, or local; parol evidence being admissible of facts tending to show that the words were used in the latter sense, and to ascertain their technical or local meaning.[1] The same principle is also applied in regard to words and phrases used in a peculiar sense

[1] White *v.* Sayer, Palm. 211.

[2] Wigglesworth *v.* Dallison, 1 Doug. 201; 1 Smith's Lead. Cas. 300; 1 Bligh 287; Senior *v.* Armytage, Holt's N. P. Cas. 197; Hutton *v.* Warren, 1 M. & W. 466; {so, also, upon a conveyance, that growing crops were orally reserved: Merrill *v.* Blodgett, 34 Vt. 480; Backenstoss *v.* Stahler, 33 Pa. St. 251; Harbold *v.* Kuster, 44 id. 392.}

[3] Syers *v.* Jonas, 2 Exch. 111.

[4] Yeats *v.* Pim, Holt's N. P. 95; Holding *v.* Pigott, 7 Bing. 465, 474; Blackett *v.* Ass. Co., 2 C. & J. 244; Caine *v.* Horsefall, 2 C. & K. 349.

[5] *Ante*, § 281.

[1] [See *post*, § 305*j*, upon this subject.]

by members of a particular religious sect.[2] But beyond this the principle does not extend. If, therefore, a contract is made in ordinary and popular language, to which no local or technical and peculiar meaning is attached, parol evidence, it seems, is not admissible to show that, in that particular case, the words were used in any other than their ordinary and popular sense.[3]

§ 295 *a*. It is thus apparent, as was remarked at the outset, that in all the cases in which parol evidence has been admitted in exposition of that which is written, the principle of admission is, that the Court may be placed, in regard to the surrounding circumstances, as nearly as possible in the situation of the party whose written language is to be interpreted; the question being, What did the person, thus circumstanced, mean by the language he has employed?

§ 296. **Will Cases; Rebutting an Equity.** There is another class of cases, in which parol evidence is allowed by courts of equity to affect the operation of a writing, though the writing on its face is free from ambiguity, which is yet considered as no infringement of the general rule; namely, where the evidence is offered to rebut an equity. The meaning of this is, that where a certain presumption would, in general, be deduced from the nature of an act, such presumption may be repelled by extrinsic evidence, showing the intention to be otherwise.[1] The simplest instance of this occurs, when two legacies, of which the sums and the expressed motives exactly coincide, are presumed not to have been intended as cumulative. In such case, to rebut the presumption which makes one of these legacies inoperative, parol evidence will be received; its effect being not to show that the testator did not mean what he said, but, on the contrary, to prove that he did mean what he had expressed.[2] In like manner, parol evidence is received to repel the presumption against an executor's title to the residue, from the fact that a legacy has been given to him. So, also, to repel the presumption that a portion is satisfied by a legacy;[3] and in some cases, that the portionment of a legatee was intended as an ademption of the legacy.[4]

[2] The doctrine on this subject has recently been very fully reviewed, in the case of Lady Hewley's charities: Attorney-General *v.* Shore, 11 Sim. 592; 7 id. 309; see Attorney-General *v.* Pearson, 3 Meriv. 353; 7 id. 290; Attorney-General *v.* Drummond, 1 Dr. & W. 353; 2 Eng. L. & Eq. 15; 14 Jur. 137; Attorney-General *v.* Glasgow College, 10 Jur. 676; {Hinckley *v.* Thatcher, 139 Mass. 477.}

[3] 2 Stark. Evid. 566; *supra*, §§ 277, 280; but see Gray *v.* Harper, 1 Story 574, where two booksellers having contracted for the sale and purchase of a certain work at "cost," parol evidence of conversations between them at the time of making the contract was held admissible to show what sense they attached to that term; see also Selden *v.* Williams, 9 Watts 9; Kemble *v.* Lull, 3 McLean 272; [see also the criticisms *post*, § 305 *l*.]

[1] 2 Poth. on Obl. by Evans, App. No. xvi, p. 184; Coote *v.* Boyd, 2 Bro. Ch. 522; Bull. N. P. 297, 298; Mann *v.* Mann, 1 Johns. Ch. 231; {King *v.* Ruckman, 21 N. J. Eq. 599;} [see the explanation *post*, § 305 *n*.]

[2] Gresley on Evid. 210; Hurst *v.* Beach, 5 Madd. 360, per Sir J. Leach, V. C.

[3] 5 Madd. 360; 2 Poth. on Obl. by Evans, App. No. xvi, p. 184; Ellison *v.* Cookson, 1 Ves. Jr. 100; Clinton *v.* Hooper, ib. 173. So, to rebut an implied trust: Livermore *v.* Aldrich, 5 Cush. 431.

[4] Kirk *v.* Eddowes, 8 Jur. 530. As the further pursuit of this point, as well as the

§ 296 *a*. **Mutual Mistake; Deed Absolute as Security.** Courts of equity also admit parol evidence to contradict or vary a writing, where it is founded in a mistake of material facts, and it would be unconscientious or unjust to enforce it against either party, according to its expressed terms. Thus, if the plaintiff seeks a specific performance of the agreement, the defendant may show that such a decree would be against equity and justice, by parol evidence of the circumstances, even though they contradict the writing. So, if the agreement speaks, by mistake, a different language from what the parties intended, this may be shown in a bill to reform the writing and correct the mistake.[1] In short, wherever the active agency of a court of equity is invoked, specifically to enforce an agreement, it admits parol evidence to show that the claim is unjust, although such evidence contradicts that which is written. Whether courts of equity will sustain a claim to reform a writing, or to establish a mistake in it, by parol evidence, and for specific performance of it when corrected, in one and the same bill, is still an open question. The English authorities are against it; but in America their soundness is strongly questioned.[2] So, also, if a grantee fraudulently attempts to convert into an absolute sale that which was originally meant to be a security for a loan, the original design of the conveyance, though contrary to the terms of the writing, may be shown by parol.[3]

§ 297. **Interpretation of Ambiguities.** Having thus explained the nature of the rule under consideration, and shown that it only excludes evidence of the language of the party, and not of the circumstances in which he was placed, or of collateral facts, it may be proper to consider the case of ambiguities, both latent and patent. The leading rule on this subject is thus given by Lord Bacon: "Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum, verificatione facti tollitur."[1] Upon which he remarks, that, "there be two sorts of ambiguities of words; the one is *ambiguitas patens* and the other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which

consideration of the presumed revocation of a will by a subsequent marriage and the birth of issue, does not consist with the plan of this treatise, the reader is referred to 1 Roper on Legacies, by White, pp. 317–353; Gresley on Evid. pp. 209–218; 6 Cruise's Dig. tit. 38, c. 6, §§ 45–57, and notes by Greenleaf, {2d ed. 1857, vol. iii, p. 104, and notes;} 1 Jarm. on Wills, c. 7, and notes by Perkins. See also *post*, Vol. II, §§ 684, 685.

[1] {Fisher *v.* Diebert, 54 Pa. St. 460; Cunningham *v.* Wrenn, 23 Ill. 64; Mussey *v.* Curtis, 60 Vt. 272; Davis *v.* Road Co., 84 Ind. 39; Lazear *v.* Bank, 52 Md. 119; Potter *v.* Sewall, 54 Me. 142;} [see *post*, §§ 305 *c*, 305 *d*.]

[2] 1 Story Eq. Jurisp. §§ 152–161; Gresley on Evid. 205–209.

[3] Morris *v.* Nixon, 17 Pet. 109. See Jenkins *v.* Eldredge, 3 Story 181, 284–287; [and *ante*, § 284, *post*, § 305 *d*.]

[1] Bacon's Maxims, Reg. 23 [25]; [as to this "unprofitable subtlety," its history and significance, see Thayer, Preliminary Treatise on Evidence, 422, 471. For another treatment of the topics covered by the next four sections, see *post*, §§ 305 *j*–305 *m*.]

seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity. *Ambiguitas patens* is never holpen by averment; and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed which the law appointeth shall not pass but by deed. Therefore, if a man give land to J. D. and J. S. *et hæredibus*, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was (that) the inheritance should be limited." "But if it be *ambiguitas latens*, then otherwise it is; as if I grant my manor of S. to J. F. and his heirs, here appeareth no ambiguity at all. 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 party intended should pass."[2]

§ 298. But here it is to be observed, that words cannot be said to be ambiguous because they are unintelligible to a man who cannot read; nor is a written instrument ambiguous or uncertain merely because an ignorant or uninformed person may be unable to interpret it. It is ambiguous only, when found to be of uncertain meaning by persons of competent skill and information. Neither is a judge at liberty to declare an instrument ambiguous, because he is ignorant of a particular fact, art, or science, which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used. If this were not so, then the question, whether a will or other instrument were ambiguous or uncertain, might depend not upon the propriety of the language the party has used, but upon the degree of knowledge, general or local, which a particular judge might happen to possess; nay, the technical accuracy and precision of a scientific man might occasion his intestacy, or defeat his contract. Hence it follows that no judge is at liberty to pronounce an instrument ambiguous or uncertain, until he has brought to his aid, in its interpretation, all the lights afforded by the collateral facts and circumstances, which, as we have shown, may be proved by parol.[1]

§ 299. A distinction is further to be observed, between the ambiguity of language and its inaccuracy. "Language," Vice-Chancellor

[2] See Bacon's Law Tracts, pp. 99, 100. And see Miller *v.* Travers, 8 Bing. 244; *supra*, § 290; Reed *v.* Prop'rs of Locks, etc., 8 How. 274. Where a bill was drawn expressing £200 in the body in words, but £245 in figures in the margin, it was held that the words in the body must be taken to be the true amount to be paid; and that the ambiguity created by the figures in the margin was patent, and could not be explained by parol: Saunderson *v.* Piper, 5 Bing. N. C. 425.

[1] See Wigram on the Interpretation of Wills, p. 174, pl. 200, 201.

Wigram remarks, "may be inaccurate without being ambiguous, and it may be ambiguous although perfectly accurate. If, for instance, a testator, having one leasehold house in a given place and no other house, were to devise his freehold house there to A. B., the description, though inaccurate, would occasion no ambiguity. If, however, a testator were to devise an estate to John Baker, of Dale, the son of Thomas, and there were two persons to whom the entire description accurately applied, this description, though accurate, would be ambiguous. It is obvious, therefore, that the whole of that class of cases in which an accurate description is found to be sufficient merely by the rejection of words of surplusage are cases in which no ambiguity really exists. The meaning is certain, notwithstanding the inaccuracy of the testator's language. A judge, in such cases, may hesitate long before he comes to a conclusion; but if he is able to come to a conclusion at last, with no other assistance than the light derived from a knowledge of those circumstances, to which the words of the will expressly or tacitly refer, he does in effect declare that the words have legal certainty, — a declaration which, of course, excludes the existence of any ambiguity. The language may be inaccurate; but if the Court can determine the meaning of this inaccurate language, without any other guide than a knowledge of the simple facts, upon which — from the very nature of language in general — its meaning depends, the language, though inaccurate, cannot be ambiguous. The circumstance, that the inaccuracy is apparent on the face of the instrument, cannot, in principle, alter the case."[1] Thus, in the will of Nollekens, the sculptor, it was provided, that, upon his decease, "all the marble in the yard, the tools in the shop, bankers, mod, tools for carving," etc., should be the property of Alex. Goblet. The controversy was upon the word "mod," which was a case of patent inaccuracy; but the Court, with no guide to the testator's intention but his words, and the knowledge common to every working sculptor, decided that the word in question sufficiently described the testator's "models;" thus negativing the existence of any ambiguity whatever.[2]

§ 300. The patent ambiguity, therefore, of which Lord Bacon speaks, must be understood to be that which remains uncertain to the Court, after all the evidence of surrounding circumstances and collateral facts, which is admissible under the rules already stated, is exhausted. His illustrations of this part of the rule are not cases of misdescription, either of the person or of the thing to which the instrument relates; but are cases in which the persons and things being sufficiently described, the intention of the party in relation to them is ambiguously expressed.[1] Where this is the case, no

[1] Wigram, pp. 175, 176, pl. 203, 204.
[2] Goblet *v.* Beechey, 3 Sim. 24; Wigram, p. 179.
[1] Wigram, p. 179; Fish *v.* Hubbard, 21 Wend. 651.

parol evidence of expressed intention can be admitted. In other words, and more generally speaking, if the Court, placing itself in the situation in which the testator or contracting party stood at the time of executing the instrument, and with full understanding of the force and import of the words, cannot ascertain his meaning and intention from the language of the instrument thus illustrated, it is a case of incurable and hopeless uncertainty, and the instrument, therefore, is so far inoperative and void.[2]

§ 301. **Interpretation of False Descriptions.** There is another class of cases, so nearly allied to these as to require mention in this place; namely, those in which, upon applying the instrument to its subject-matter, it appears that in relation to the subject, whether person or thing, the description in it is true in part, but not true in every particular.[1] The rule, in such cases, is derived from the maxim, "Falsa demonstratio non nocet, cum de corpore constat."[2] Here so much of the description as is false is rejected; and the instrument will take effect, if a sufficient description remains to ascertain its application. It is essential, that enough remains to show plainly the intent.[3] "The rule," said Mr. Justice Parke,[4] "is clearly settled, that when there is a sufficient description set forth of premises, by giving the particular name of a close, or otherwise, we may reject a false demonstration; but that if the premises be described in general terms, and a particular description be added, the latter controls the former." It is not, however, because one part of the description is placed first and the other last in the sentence; but because, taking the whole together, that intention is manifest. For, indeed, "it is vain to imagine one part before another; for though words can neither be spoken nor written at once, yet the mind of the author comprehends them at once, which gives *vitam et modum* to the sentence."[5] Therefore, under a lease of "all that part of Blenheim Park, situate in the county of Oxford, now in the occupation of one S., lying" within certain specified abuttals, "with all the houses thereto belonging, which are in the occupation of said S.," it was held that a

[2] Per Parsons, C. J., in Worthington *v.* Hylyer, 4 Mass. 205; U. S. *v.* Cantril, 4 Cranch 167; 1 Jarman on Wills, 315; 1 Powell on Devises (by Jarman), p. 348; 4 Cruise's Dig. 255, tit. 32, c. 20, § 60 (Greenleaf's 2d ed., vol. ii, p. 609). Patent ambiguities are to be dealt with by the Court alone. But where the meaning of an instrument becomes ambiguous, by reason of extrinsic evidence, it is for the jury to determine it: Smith *v.* Thompson, 18 Law J. C. P. 314; Doe *v.* Beviss, ib. 128. See *supra*, § 280.

[1] [For the subject of this section, and additional citations, see further, *post*, §§ 305 *k*, 305 *m*; and the author's note, *ante*, § 291.]

[2] 6 T. R. 676; Broom's Maxims, p. 269; Bac. Max. Reg. 25. And see Just. Ins. lib. 2, tit. 20, § 29: "Siquidem in nomine, cognomine, prænomine, agnomine legatarii, testator erraverit, cum de persona constat, nihilominus valet legatum; idemque in hæredibus servatur; et recte: nomina enim significandorum hominum gratia reperta sunt; qui si alio quolibet modo intelligantur, nihil interest."

[3] Doe *v.* Hubbard, 15 Q. B. 240, 241, 245.

[4] Doe d. Smith *v.* Galloway, 5 B. & Ad. 43, 51.

[5] Stukeley *v.* Butler, Hob. 171.

house lying within the abuttals, though not in the occupation of S., would pass.[6] So, by a devise of "the farm called Trogue's Farm, now in the occupation of C.," it was held that the whole farm passed, though it was not all in C.'s occupation.[7] Thus, also, where one devised all his freehold and real estate "in the county of Limerick and in the city of Limerick;" and the testator had no real estates in the county of Limerick, but his real estates consisted of estates in the county of Clare, which was not mentioned in the will, and a small estate in the city of Limerick, inadequate to meet the charges in the will; it was held that the devisee could not be allowed to show, by parol evidence, that the estates in the county of Clare were inserted in the devise to him, in the first draft of the will, which was sent to a conveyancer, to make certain alterations, not affecting those estates; that, by mistake, he erased the words "county of Clare;" and that the testator, after keeping the will by him for some time, executed it, without adverting to the alteration as to that county.[8] And so, where land was described in a patent as lying in the county of M., and further described by reference to natural monuments; and it appeared that the land described by the monuments was in the county of H., and not of M.; that part of the description which related to the county was rejected. The entire description in the patent, said the learned judge, who delivered the opinion of the Court, must be taken, and the identity of the land ascertained by a reasonable construction of the language used. If there be a repugnant call, which, by the other calls in the patent, clearly appears to have been made through mistake, that does not make void the patent. But if the land granted be so inaccurately described as to render its identity wholly uncertain, it is admitted that the grant is void.[9] So, if lands are described by the number or name of the lot or parcel, and also by metes and bounds, and the grantor owns lands answering to the one description and not to the other, the description of the lands which he owned will be taken to be the true one, and the other rejected as *falsa demonstratio*.[10] So, where one devised "all that freehold farm called the Wick Farm, containing two hundred acres or thereabouts, occupied by W. E. as tenant to me, with the appurtenances," to uses applicable to freehold property alone; and at the date of the will, and at the death of the testator, W. E. held, under a lease from him, two hundred and two acres of land, which were described in the lease as the Wick

[6] Doe d. Smith *v.* Galloway, 5 B. & Ad. 43.

[7] Goodtitle *v.* Southern, 1 M. & S. 299.

[8] Miller *v.* Travers, 8 Bing. 244; Doe *v.* Chichester, 4 Dow 65; Doe *v.* Lyford, 4 M. & S. 550; [for comments on the effect of Miller *v.* Travers, see *post*, § 305 *k*; and Thayer, Preliminary Treatise, 474.]

[9] Boardman *v.* Reed and Ford's Lessees, 6 Pet. 328, 345, per McLean, J.

[10] Loomis *v.* Jackson, 19 Johns. 449; Lush *v.* Druse, 4 Wend. 313; Jackson *v.* Marsh, 6 Cowen 281; Worthington *v.* Hylyer, 4 Mass. 196; Blague *v.* Gold, Cro. Car. 447; Swift *v.* Eyres, id. 548.

Farm, but of which twelve acres were not freehold, but were leasehold only; it was held that these twelve acres did not pass by the devise.[11] The object in cases of this kind is, to interpret the instrument, that is, to ascertain the intent of the parties; the rule to find the intent is, to give most effect to those things about which men are least liable to mistake.[12] On this principle, the things usually called for in a grant, that is, the things by which the land granted is described, have been thus marshalled: first, the highest regard is had to natural boundaries; secondly, to lines actually run, and corners actually marked, at the time of the grant; thirdly, if the lines and courses of an adjoining tract are called for, the lines will be extended to them, if they are sufficiently established, and no other departure from the deed is thereby required; marked lines prevailing over those which are not marked; fourthly, to courses and distances; giving preference to the one or the other, according to circumstances.[13] And in determining the lines of old surveys, in the absence of any monuments to be found, the variation of the needle from the true meridian, at the date of the original survey, should be ascertained; and this is to be found by the jury, it being a question of fact, and not of law.[14] Monuments mentioned in the deed, and not then existing, but which are forthwith erected by the parties in order to conform to the deed, will be regarded as the monuments referred to, and will control the distances given in the deed.[15] And if no monuments are mentioned, evidence of long-continued occupation, though beyond the given distances, is admissible.[16] If the description is ambiguous or doubtful, parol evidence of the practical construction given by the parties, by acts of occupancy, recognition of monuments or boundaries, or otherwise, is admissible in aid of the interpretation.[17] Words necessary to ascertain the premises must be retained; but words not necessary for that purpose may be rejected, if inconsistent with the others.[18] The expression of quan-

[11] Hall *v.* Fisher, 1 Collyer 47.

[12] Davis *v.* Rainsford, 17 Mass. 210; McIver *v.* Walker, 9 Cranch 178.

[13] See Cherry *v.* Slade, 3 Murphy 82; Dogan *v.* Seekright, 4 Hen. & Munf. 125, 130; Preston *v.* Bowmar, 6 Wheat. 582; Loring *v.* Norton, 8 Greenl. 61; 2 Flintoff on Real Property, 537, 538; Nelson *v.* Hall, 1 McLean 518; Wells *v.* Compton, 3 Rob. La. 171; {Kellogg *v.* Smith, 7 Cush. 375, 379–384; Newhill *v.* Ireson, 8 id. 595; Haynes *v.* Young, 36 Me. 557.}

[14] Burgin *v.* Chenault, 9 B. Monr. 285; 2 Am. Law Journ. N. S. 470.

[15] Makepeace *v.* Bancroft, 12 Mass. 469; Davis *v.* Rainsford, 17 id. 207; Lernerd *v.* Morrill, 2 N. H. 197; {Blaney *v.* Rice, 20 Pick. 62; Cleaveland *v.* Flagg, 4 Cush. 76, 81.}

[16] Owen *v.* Bartholomew, 9 Pick. 520.

[17] Stone *v.* Clark, 1 Met. 378; {Kellogg *v.* Smith, 7 Cush. 375, 383; Waterman *v.* Johnson, 13 Pick. 261; Frost *v.* Spaulding, 19 id. 445; Clark *v.* Munyan, 22 id. 410; Crafts *v.* Hibbard, 4 Met. 438; Civil Code of Louisiana, art. 1951; Wells *v.* Compton, 3 Rob. La. 171.}

[18] Worthington *v.* Hylyer, 4 Mass. 205; Jackson *v.* Sprague, 1 Paine 494; Vose *v.* Handy, 2 Greenl. 322. [For other citations illustrating the general principle, see *post*, § 305 *m.*]

tity is descriptive, and may well aid in finding the intent, where the boundaries are doubtful.[19]

§ 302. **Showing a Discharge.** Returning now to the consideration of the general rule, that extrinsic verbal evidence is not admissible to contradict or alter a written instrument, it is further to be observed, that this rule does not exclude such evidence, when it is adduced to prove that the written agreement is totally discharged.[1] If the agreement be by deed, it cannot, in general, be dissolved by any executory agreement of an inferior nature; but any obligation by writing not under seal may be totally dissolved, before breach, by an oral agreement.[2] And there seems little room to doubt, that this rule will apply, even to those cases where a writing is by the Statute of Frauds made necessary to the validity of the agreement.[3] But where there is an entire agreement in writing, consisting of divers particulars, partly requisite to be in writing by the Statute of Frauds, and partly not within the statute, it is not competent to prove an agreed variation of the latter part, by oral evidence, though that part might, of itself, have been good without writing.[4]

§ 303. **Showing an Additional or Substituted Agreement.** Neither is the rule infringed by the admission of oral evidence to prove a new and distinct agreement, upon a new consideration, whether it be as a substitute for the old, or in addition to and beyond it.[1] And if subsequent, and involving the same subject-matter, it is immaterial whether the new agreement be entirely oral, or whether it refers to and partially or totally adopts the provisions of the former contract in writing, provided the old agreement be recsinded and abandoned.[2]

[19] Mann *v.* Pearson, 2 Johns. 37, 41; Perkins *v.* Webster, 2 N. H. 287; Thorndike *v.* Richards, 1 Shepl. 437; Allen *v.* Allen, 2 id. 387; Woodman *v.* Lane, 7 N. H. 241; Pernam *v.* Wead, 6 Mass. 131; Reddick *v.* Leggat, 3 Murphy 539, 544; *supra*, § 290. See also 4 Cruise's Dig. tit. 32, c. 21, § 31, n., 2 Greenleaf's ed. (1856) vol. ii, pp. 623–641, and notes, where this subject is more fully considered.

[1] [On this subject, see *post*, § 305 *d*.]

[2] Bull. N. P. 152; Milward *v.* Ingram, 1 Mod. 206; s. c. 2 id. 43; Edwards *v.* Weeks, 1 id. 262; s. c. 2 id. 259; s. c. 1 Freem. 230; Lord Milton *v.* Edgworth, 5 Bro. P. C. 318; 4 Cruise's Dig. tit. 32, c. 3, § 51; Clement *v.* Durgin, 5 Greenl. 9; Cottrill *v.* Myrick, 3 Fairf. 222; Ratcliff *v.* Pemberton, 1 Esp. 35; Fleming *v.* Gilbert, 3 Johns. 531. But if the obligation be by deed, and there be a parol agreement in discharge of such obligation, if the parol agreement be executed, it is a good discharge: Dearborn *v.* Cross, 7 Cowen 48. See also Littler *v.* Holland, 5 T. R. 390; Peytoe's Case, 9 Co. 77; Kaye *v.* Waghorn, 1 Taunt. 428; Le Fevre *v.* Le Fevre, 4 S. & R. 241; Suydam *v.* Jones, 10 Wend. 180; Barnard *v.* Darling, 11 id. 27, 30. In equity, a parol rescission of a written contract, after breach, may be set up in bar of a bill for specific performance: Walker *v.* Wheatly, 2 Humphreys 119. By the law of Scotland, no written obligation whatever can be extinguished or renounced, without either the creditor's oath, or a writing signed by him: Tait on Evid. p. 325.

[3] Phil. & Am. on Evid. 776; 2 Phil. Evid. 363; Goss *v.* Lord Nugent, 5 B. & Ad. 58, 65, 66, per Ld. Denman, C. J.; Stowell *v.* Robinson, 3 Bing. N. C. 928; Cummings *v.* Arnold, 3 Met. 486; Stearns *v.* Hall, 9 Cush. 31, 34; [see cases cited *post*, § 305 *d*.]

[4] Harvey *v.* Grabham, 5 Ad. & El. 61, 74; Marshall *v.* Lynn, 6 M. & W. 109.

[1] [On this subject, see further, *post*, § 305 *d*.]

[2] Burn *v.* Miller, 4 Taunt. 745; Foster *v.* Allanson, 2 T. R. 479; Schack *v.* Anthony, 1 M. & S. 573, 575; Sturdy *v.* Arnaud, 3 T. R. 599; Brigham *v.* Rogers, 17

Thus, where one by an instrument under seal agreed to erect a building for a fixed price, which was not an adequate compensation, and, having performed part of the work, refused to proceed, and the obligee thereupon promised that, if he would proceed, he should be paid for his labor and materials, and should not suffer, and he did so; it was held that he might recover in *assumpsit* upon this verbal agreement.[3] So, where the abandonment of the old contract was expressly mutual.[4] So, where a ship was hired by a charter-party under seal, for eight months, commencing from the day of her sailing from Gravesend, and to be loaded at any British port in the English Channel; and it was afterwards agreed by parol that she should be laden in the Thames, and that the freight should commence from her entry outwards at the custom-house; it was held that an action would lie upon the latter agreement.[5]

§ 304. It is also well settled that, in a case of a simple contract in writing, oral evidence is admissible to show that, by a subsequent agreement, the time of performance was enlarged, or the place of performance changed, the contract having been performed according to the enlarged time, or at the substituted place, or the performance having been prevented by the act of the other party; or that the damages for non-performance were waived and remitted;[1] or that it was founded upon an insufficient or an unlawful consideration, or was without consideration;[2] or that the agreement itself was waived and abandoned.[3] So, it has been held competent to prove an additional and suppletory agreement, by parol; as, for example, where a contract for the hire of a horse was in writing, and it was further agreed by parol that accidents, occasioned by his shying,

Mass. 573, per Putnam, J.; Heard *v.* Wadham, 1 East 630, per Lawrence, J.; 1 Chitty on Pl. 93; Richardson *v.* Hooper, 13 Pick. 446; Brewster *v.* Countryman, 12 Wend. 446; Delacroix *v.* Bulkley, 13 id. 71; Vicary *v.* Moore, 2 Watts 456, 457, per Gibson, C. J.; Brock *v.* Sturdivant, 3 Fairf. 81; Marshall *v.* Baker, 1 Appleton 402; Chitty on Contracts, p. 88; {Russell *v.* Barry, 115 Mass. 300; Whitney *v.* Shippen, 89 Pa. St. 22; Wiggin *v.* Goodwin, 63 Me. 389; Davidson *v.* Bodley, 27 La. An. 149; Sharkey *v.* Miller, 69 Ill. 560; Hastings *v.* Lovejoy, 140 Mass. 261; Emery *v.* Boston Marine Ins. Co., 138 id. 398; Cummings *v.* Arnold, 3 Met. 486, 489.}

[3] Munroe *v.* Perkins, 9 Pick. 298. See also Rand *v.* Mather, 11 Cush. 1.

[4] Lattimore *v.* Harsen, 14 Johns. 330.

[5] White *v.* Parkin, 12 East 578.

[1] Jones *v.* Barkley, 2 Doug. 684, 694; Hotham *v.* East Ind. Co., 1 T. R. 638; Cummings *v.* Arnold, 3 Met. 486; Clement *v.* Durgin, 5 Greenl. 9; Keating *v.* Price, 1 Johns. Cas. 22; Fleming *v.* Gilbert, 3 Johns. 530, 531, per Thompson, J.; Erwin *v.* Saunders, 1 Cowen 249; Frost *v.* Everett, 5 id. 497; Dearborn *v.* Cross, 7 id. 50; Neil *v.* Cheves, 1 Bailey 537, 538, n. (*a*); Cuff *v.* Penn, 1 M. & S. 21; Robinson *v.* Bachelder, 4 N. H. 40; Medomak Bank *v.* Curtis, 11 Shepl. 36; Blood *v.* Goodrich, 9 Wend. 68; Youqua *v.* Nixon, 1 Peters C. C. 221; {Stearns *v.* Hall, 9 Cush. 31;} but see Marshall *v.* Lynn, 6 M. & W. 109.

[2] See *ante*, § 26, [and § 284;] Mills *v.* Wyman, 3 Pick. 207; Erwin *v.* Saunders, 1 Cowen 249; Hill *v.* Buckminster, 5 Pick. 391; Rawson *v.* Walker, 1 Stark. 361; Foster *v.* Jolly, 1 C. M. & R. 707, 708, per Parke, B.; Stackpole *v.* Arnold, 11 Mass. 27, 32; Folsom *v.* Mussey, 8 Greenl. 400.

[3] Ballard *v.* Walker, 3 Johns. Cas. 60; Poth. on Obl. pt. 3, c. 6, art. 2, No. 636; Marshall *v.* Baker, 1 Appleton 402; Eden *v.* Blake, 13 M. & W. 614.

should be at the risk of the hirer.[4] A further consideration may also be proved by parol, if it is not of a different nature from that which is expressed in the deed.[5] And if the deed appears to be a voluntary conveyance, a valuable consideration may be proved by parol.[6]

§ 305. **Contradicting Receipts.** In regard to receipts, it is to be noted that they may be either mere acknowledgments of payment or delivery, or they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge payment or delivery, it is merely *prima facie* evidence of the fact, and not conclusive; and therefore the fact which it recites may be contradicted by oral testimony. But in so far as it is evidence of a contract between the parties, it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol.[1] Thus, for example, a bill of lading, which partakes of both these characters, may be contradicted and explained in its recital, that the goods were in good order and well conditioned, by showing that their internal order and condition was bad; and, in like manner in any other fact which it erroneously recites; but in other respects it is to be treated like other written contracts.[2]

2. *Another View of the Parol Evidence Rule.*

§ 305 *a*. **Parol Evidence Rule, not a Rule of Evidence.** [An unfortunate employment of a terminology in which the subject cannot

[4] Jeffery *v.* Walton, 1 Stark. 267; in a suit for breach of a written agreement to manufacture and deliver weekly to the plaintiff a certain quantity of cloth, at a certain price per yard, on eight months' credit, it was held that the defendant might give in evidence, as a good defence, a subsequent parol agreement between him and the plaintiff, made on sufficient consideration, by which the mode of payment was varied, and that the plaintiff had refused to perform the parol agreement: Cummings *v.* Arnold, 3 Met. 486. See further, Wright *v.* Crookes, 1 Scott N. S. 685.

[5] Clifford *v.* Turrill, 9 Jur. 633; {Miller *v.* Goodwin, 8 Gray 542; Pierce *v.* Weymouth, 45 Me. 481; Lewis *v.* Brewster, 57 Pa. St. 410; Cowan *v.* Cooper, 41 Ala. 187; Hendrick *v.* Crowley, 31 Cal. 471; Sewell *v.* Baxter, 2 Md. Ch. 447; Rhine *v.* Ellen, 36 Cal. 362.}

[6] Pott *v.* Todhunter, 2 Collyer Ch. Cas. 76, 84.

[1] Straton *v.* Rastall, 2 T. R. 366; Ainer *v.* George, 1 Campb. 392; *supra*, § 26, n.; Stackpole *v.* Arnold, 11 Mass. 27, 32; Tucker *v.* Maxwell, ib. 143; Johnson *v.* Johnson, ib. 359, 363, per Parker, C. J.; Wilkinson *v.* Scott, 17 id. 257; R. *v.* Scammonden, 3 T. R. 474; Rollins *v.* Dyer, 4 Shepl. 475; Brooks *v.* White, 2 Met. 283; Niles *v.* Culver, 4 Law Rep. N. S. 72; Fuller *v.* Crittenden, 9 Conn. 406; {Hildreth *v.* O'Brien, 10 Allen 104; Stacy *v.* Kemp, 97 Mass. 166; Kinsman *v.* Kershaw, 119 id. 140; Alexander *v.* Thompson, 42 Minn. 499; Squires *v.* Amherst, 145 id. 192; Hill *v.* R. Co., 73 N. Y. 351; Leonard *v.* Dunton, 51 Ill. 482; Harris *v.* Johnston, 3 Cranch 311; Wallace *v.* Rogers, 2 N. H. 506; Bradford *v.* Manley, 13 Mass. 139; Fletcher *v.* Willard, 14 Pick. 464; Hazard *v.* Loring, 10 Cush. 267, 268;} [and see additional citations in § 305 *f*, *post*, and the author's brief reference to the subject, *ante*, § 285.]

[2] Barrett *v.* Rogers, 7 Mass. 297; Gardner *v.* Chace, 2 R. I. 112; The Tuskar, 1 Sprague 71; Benjamin *v.* Sinclair, 1 Bailey 174; Smith *v.* Brown, 3 Hawks 580; May *v.* Babcock, 4 Ohio 334, 346; {Clarke *v.* Barnwell, 12 How. 272; O'Brien *v.* Gilchrist, 34 Me. 554; Ellis *v.* Willard, 5 Selden 529; Fitzhugh *v.* Wiman, ib. 559, 566; McTyer *v.* Steele, 26 Ala. 487; Burke *v.* Ray, 40 Minn. 35; Adams *v.* Davis, 109 Ind. 21; Haverly *v.* Railroad Company, 125 Pa. St. 122; Thompson *v.* Maxwell, 74 Iowa 415;} [see *post*, § 305 *f*.]

possibly be discussed with accuracy and lucidity, a lack of systematic treatment in its proper department and surroundings, and an inherent necessity for certain distinctions which are simple in themselves but are in application to individual cases often unavoidably indecisive and difficult to trace, — these considerations alone would suffice to account for the confusion, the apparent inconsistency, and the discouraging difficulties that attend the so-called parol-evidence rule and make it perhaps the most troublesome in the whole field of evidence. No one can approach the subject, in any attempt to re-state its limitations, except with a sense of temerity; and the following brief arrangement of the leading topics of the rule is offered merely in the belief that no new way of stating them can be more confusing than some of those now to be found, while a mode of statement discarding the evidential terminology, and emphasizing certain related doctrines of substantive law, may make it easier, if not to solve the various problems, at least to appreciate what is the nature of the problem to be solved.[1]

(1) It is first to be noticed that the rule or rules concerned are not rules of evidence. They do not exclude certain data because those data for one reason or another are untrustworthy or undesirable means of evidencing something to be proved. They do not declare that something here is admissible evidence while something there is not. What the rule does is to forbid a certain thing to be proved at all, and this, of course, is in effect to declare that the thing is legally immaterial for some reason of substantive law. When a thing is not to be proved at all, the rule of prohibition is not a rule of evidence, even though the words "proof" or "evidence" are employed in stating the prohibition; just as, on a plea of self-defence to an action for battery, if we say that no evidence of the plaintiff's insulting words will be admitted, we mean that his words are no excuse for the battery. If, then, we dismiss once for all any notion that the parol-evidence rule is concerned with any doubts or precautions or limitations based on the nature of certain evidentiary matter, or indeed with any regulation about evidence, we shall have taken the first step to a clearer understanding of the working of the rule.

(2) It is next to be noted that the thing that is to be excluded as immaterial by the rule is not particularly anything that can clearly be described as "parol." Without attempting to discriminate the various possible senses of this word, it will be enough to note that, so far as it conveys the impression that what is excluded is excluded because it is oral — because somebody spoke or did something not in writing, or is now offering to testify orally, — this impression is not the correct one. Where the rule is applicable, what is excluded

[1] [For an acute analysis and historical examination of the whole subject, see ch. 10 in Professor Thayer's "Preliminary Treatise on the Law of Evidence."]

may be written material as well as conversations, circumstances, and oral matter in general; and where the rule is applicable so as to exclude certain written material, nevertheless certain oral material may properly be considered. So that the term "parol" affords no necessary clue to the kind of material excluded; and it conduces to the intelligent use of the rule to dismiss any notion that oral or parol matters are inherently the object of its prohibition.

(3) Again, within the scope of the rule are usually treated two distinct bodies of doctrine, which do not properly touch each other, except in certain relations at certain points. One of these concerns the constitution of legal acts, the other concerns their interpretation; and the difficulties of principle and lines of precedents for these two subjects are as a whole entirely distinct, and cannot properly be subsumed under any single generalization or rule.

In short, then, the "parol-evidence rule" does not concern doctrines of evidence; nor is it to be tested by the oral nature of the fact to be proved; nor is there any one rule on the subject.]

§ 305 *b*. **Constitution and Interpretation of Legal Acts; Parol Evidence Rule.** [A person's conduct is one of the chief sources of any changes that occur in his legal relations. The creation, transfer, and extinction of a right and of an obligation are made in great part to depend upon specified kinds of conduct on his part. This conduct, regarded as having legal consequences of the above sort, may be spoken of, in individual instances, as a legal act.[1] The terms or nature of the act vary, of course, according to the nature of the right or the obligation aimed at, — a contract, a sale, a will, a notice, and so on; the substantive law specifies these terms appropriately in the various instances; and the various branches of the substantive law are to be sought for these essential terms of the conduct required to constitute an effective act.

Now the conduct which may go to make up the terms of a legal act may normally be spread over various times and contained in various materials, — as where a contract to sell goods may have to be gathered from conversations, letters, telegrams, price-lists, and other data. If there were no such rule as the "parol-evidence" rule, such would always be the various data in which would be sought the terms of the act. Conceivably, and frequently, they would not be found in a single utterance or a single writing, nor in writings nor utterances made at one time. But there is a doctrine, founded on sound policy and experience, which imposes restrictions upon the sort of data that are to be considered as effectively supplying the terms of a legal act. The restrictions thus imposed affect both time and material;

[1] [The true point of view has thus been obscured by our traditional handling of the subject in terms of evidence. The German discussions of the general subject, while of no service in elucidating our special problems, take a better standpoint for discussion; a profitable work is "Der Irrthum bei nichtigen Vertragen," by Dr. Rudolph Leonhard (Dummlers, Berlin, 1882).]

i. e., they may require the terms of the act to be sought in the utterances or conduct of one occasion (forbidding a range over preceding occasions of the same negotiation); and they may require the terms to be contained in a special mode of expression, *i. e.* writing or its equivalent (excluding the use of oral utterances [2]). Usually the two sorts of restriction are combined, *i. e.* the terms of the act are to be sought in a single writing made at one time.

When do such restrictions become applicable, so as to have this effect of giving legal standing and validity to a single writing only, and of forbidding the consideration of all other conduct as supplying the terms of the legal act? The restrictions may become applicable in two kinds of situations: (1) where a specific rule of law provides that the act, to be effective legally, must be contained in a single writing; as where a will or a deed is required to be in writing; (2) where the parties to the act have by intention made a single writing the sole memorial and repository of its terms, — as where the parties to a contract finally, after sundry negotiations, embody in a single writing the terms agreed upon. This process of reducing the act's terms to a single memorial, whether by requirement of law or by intention of the parties, may be, for convenience of discussion, termed Integration, *i. e.* the constitution of the whole in a single memorial.

This principle is well established and unquestioned in the law. The difficulties that arise are concerned with the scope of its application. The effect of the principle is an exclusionary one, *i. e.* to reject from consideration, as having no legal standing and effect, data of conduct other than the sole written memorial. The matter thus excluded has come to be termed "parol evidence;" although, as already pointed out, it is not evidence and not necessarily in parol. As the question usually comes up in Court, a writing is received from one party; and then matter other than this writing, and tending to overturn its legal effect, is offered by the other party and is objected to by the first party by virtue of the present principle. The inquiry is thus presented whether the data thus offered in opposition are obnoxious to this rule of Integration; in other words, Granting that there is a writing by the party or parties, is this sufficient to exclude the opposing data? Does the mere fact of the writing have that effect? Are there not many cases in which such data, although affecting the writing in the interest of the opponent, are nevertheless receivable without being obnoxious to the Integration rule? Unquestionably there are such cases; but the difficulty is to draw the line consistently and to expound the reasons soundly

[2] [It may be noted that, as Mr. J. Blackburn has acutely pointed out (when arguing as counsel in Brown *v.* Byrne, 3 E. & B. 703), the parol-evidence rule might conceivably apply even to an oral utterance constituting the final fixing of the terms, thus excluding other oral utterances; so also Gilbert *v.* McGinnis, 114 Ill. 28; but practically this possibility need not be considered.]

and systematically. The great mass of the rulings upon the parol-evidence rule are concerned with the attempt to draw this line and define these situations. The various cases in which such data are receivable seem to fall under the following heads: —

(I) (1) It may always be shown that no legal act at all has ever been consummated or that some defence or excuse exists which overturns or sets aside an act conceded to have been done. (*a*) Under the first of these heads, there are certain constantly recurring situations, depending somewhat for their solution upon the particular department of law (contracts, wills, etc.), yet capable of being discussed in general terms applicable to all legal acts. They concern the will or conscious volition of the person in setting his hand to the act; and the question is whether he has after all consummated any legal act at all or an act of the alleged tenor, *i. e.* whether it is to be treated as his act (that is, an act having the supposed legal consequences) if he has merely drafted its terms but not finally willed to execute it, or if he has done it with the understanding that it is to be only morally binding, or if he has done it subject to another's approval, or if he has signed a writing without reading it over, and the like. (*b*) The second of these heads deals with the effect of some accompanying circumstance as making the act, though consummated and intrinsically effective, potentially avoidable, *e. g.* subject to some defence or excuse which will enable the actor to repudiate it or set it aside or successfully defend against the consequences, *e. g.* whether fraud, or an agreement to hold in trust or for security, will avail for this purpose. Thus, these two kinds of situations allow a consideration of all data by which it appears, as a rule of substantive law (*a*) that no legal act has been consummated at all, or (*b*) that the act, though consummated, is subject to avoidance upon grounds justifying such a defence.

(2) Independently of the preceding, it is further true that the Integration rule, excluding other data, does not apply unless there has been integration. Consequently, such extrinsic data may always be considered (*a*) where there has not been, by intention of the parties, any integration at all, or (*a'*) only a partial integration, not extending to the matters in question; and (*b*) where the law does not specifically require an integration in writing.

(II) Furthermore, a legal act existing, it has constantly to be interpreted in order to be made effective; for, since its terms will be found chiefly in words, and since words are merely symbols indicating external objects as to which the right or duty is predicated, the connection between these symbols and all possible objects must be ascertained in order to carry the terms into effects corresponding with their significance as predetermined by the party or parties to the act. In this process of Interpretation, various data have to be considered; and there may be rules of guidance for choosing or ascertaining the proper meaning; a new series of questions arise,

peculiar to this subject; but the general process of using the interpreting data is not obnoxious to the Integration rule.

These several subjects may now be examined in more detail.]

§ 305 *c*. (I) **Constitution of Legal Acts; (1) Whether an Act has been consummated at all.** [Only a small part of conduct is legal conduct, *i. e.* conduct intended to have legal effectiveness. The same conduct may under varying circumstances be intended to have other sorts of consequences than a legal one or the particular legal one, — as where a person hands a parcel to another, or writes a letter; and the distinction will often turn entirely on the accompanying intent. In other words, whether an act of an alleged tenor has been consummated will often depend chiefly on whether an intention to do an act of that tenor accompanied the conduct in question. At the same time, since for reasons of policy designed to protect others in their dealings against undisclosed and undiscoverable defects in their rights, there may be cases in which the doing of the conduct itself, irrespective of the intention, must be taken as finally consummating the act. Thus the problem is to define these situations in which the effectiveness or validity of the act is to depend merely on its doing and apart from its intention. Put in the shape of a rule of exclusion, the question becomes: When may it not be shown that the intention of the actor was not to do an act of the sort apparently done? Observing that this is distinctly a question of substantive law determining the existence of rights and duties, and that the solution may well be different in different parts of the law, we may notice briefly the various types of situation. The alleged incompleteness of the act may be attributed to the circumstance (*a*) that the act was intended to have no legal significance at all, but only a moral or social one; or (*b*) that the act was provisional or preparatory only, and never finally willed as a consummated act; or (*c*) that though a legal act of some sort was intended, yet it was not this legal act, but an act of some other tenor, either wholly or in part.

(*a*) This variety of situation, while common enough, seldom gives rise to legal controversy. An invitation to dine, extended to a friend, illustrates it, and is to be contrasted with the promise of a restaurateur to furnish a meal. An instance of a different sort is found in *Earle* v. *Rice*,[1] where it was allowed to be shown that an agreement, signed by husband and wife, as to the sale of her lands and the disposition of the proceeds for the benefit of the children, was understood between them to be only morally binding. In this aspect, the "parol-evidence rule" may be stated somewhat thus, namely, that conduct apparently having the form of a legal act may always be shown to have been done with the intent to assume only moral or social consequences.[2]

[1] [111 Mass. 17.]

[2] [See Gunz *v.* Giegling, 108 Mich. 295; Church *v.* Case, 110 id. 621; Grand Isle *v.* Kinney, Vt., 41 Atl. 130.]

(*b*) This variety of situation gives rise to constant legal controversy, chiefly because it is often difficult to distinguish practically between such a total absence of effective intent as to leave the act merely inchoate and such a partial modification of the effect of a consummated act as concedes the consummation but violates the principle of Integration by improperly setting up a competing agreement to modify the integrated act. An instance of the less difficult sort is the writing of a draft promissory note for possible use, where the lack of intent to consummate a note leaves the writing without final legal significance. Again, in *Nicholls* v. *Nicholls*,[3] it was allowed to be shown that a paper purporting to be a will was written during a friendly conversation, in the course of which the writer put certain words on a paper, and said "That is as good a will as I shall probably ever make;" these words indicating possibly that the writing was intended merely as an experiment or suggestion. Instances of the more difficult sort are cases of contract-writings drawn up in complete detail and signed, but agreed not to be regarded as binding and consummated until the happening of some condition precedent. Thus, it may be shown that an agreement, though signed, was understood not to be a binding act until the signature of another party was obtained,[4] or until the approval or consent of a third person should be obtained,[5] or that some other act should be done by a party or a third person.[6] On the other hand, an understanding which concedes that an effective legal act has been consummated but purports to affect the terms of the obligation, by limiting the conditions of default or specifying events on which it shall by condition subsequent cease to be binding, does not come within the above notion, and is excluded because it comes in competition with the terms of the written act, under the principle of § 305 *e*, *post;* thus, an understanding that a note is to be payable out of certain funds only,[7] or that its payment will not be enforced at all,[8] or only upon certain conditions,[9] would not be considered.[10] Under the present head seems also to

[3] [Prerog. Ct., Ann. Reg. 1814, p. 278.]

[4] [Pattle *v.* Hornbrook, 1897, 1 Ch. 25; State *v.* Wallis, 57 Ark. 64; Robertson *v.* Rowell, 158 Mass. 94; Kelly *v.* Oliver, 113 N. C. 442; Mfrs. Furn. Co. *v.* Kremer, 7 S. D. 463; McCormick Co. *v.* Faulkner, ib. 363; Gilman *v.* Gross, 97 Wis. 224; see Beard *v.* Boylan, 59 Conn. 181.]

[5] [Cleveland Ref. Co. *v.* Dunning, Mich., 73 N. W. 339; Tug R. C. & S. Co. *v.* Brigel, U. S. App., 86 Fed. 818; Pym *v.* Campbell, 6 E. & B. 370.]

[6] [Blewitt *v.* Boorum, 142 N. Y. 357; Curry *v.* Colburn, Wis., 74 N. W. 778.]

[7] [Stein *v.* Fogarty, Ida., 43 Pac. 681; Mumford *v.* Tolman, 157 Ill. 258; Gorrell *v.* Ins. Co., 24 U. S. App. 188; *contra:* Clinch Co. *v.* Willing, 180 Pa. 165.]

[8] [First Nat'l B'k *v.* Foote, 12 Utah 157; Bryan *v.* Duff, 12 Wash. 233.]

[9] [Van Syckel *v.* Dalrymple, 32 N. J. Eq. 233; Northern Trust Co. *v.* Hiltgen, 62 Minn. 361; Van Etten *v.* Howell, 40 Nebr. 850; Wilson *v.* Wilson, 26 Or. 251; Shea *v.* Leisy, 85 Fed. 243; Nebr. Expos. Ass'n *v.* Townley, 46 Nebr. 893; Taylor *v.* Hunt, 118 N. C. 168; Murchie *v.* Peck, 160 Ill. 175.]

[10] [For other instances illustrating the above distinctions, see Guidery *v.* Green, 95 Cal. 630; Ryan *v.* Cooke, 172 Ill. 302; Hanck *v.* Wright, Miss., 23 So. 422; Western Mfg. Co. *v.* Rogers, Nebr., 74 N. W. 849; Ellison *v.* Gray, N. J. L., 37 Atl.

belong the class of cases in which it is desired to show that the person attempted to be charged as a party to a document did not sign as a party but only as a witness; this may be shown, because it means that as to that person there was no legal act.[11]

(*c*) In this situation the execution of some legal act is conceded, but it is desired to show that its purporting terms were, either wholly or in part, not intended by the party doing the act. The typical cases are those of one signing a blank paper afterwards filled out by another without any authority or differently from a limited authority; of a blind or illiterate person signing a document whose contents are, fraudulently or otherwise, incorrectly stated to him; of an ordinary person signing a document whose terms he has misread or has not read at all. Here there is opportunity for much difference of policy, depending on the nature of the act and the relations of the parties. In general, it seems fair to insist that, where the intention was to do a legal act of some sort, the efficient element is supplied, and the terms of the specific act intended should depend solely on the document and not on the unexpressed state of mind of the party doing the act; so that a mistake due to one or the other of the above reasons should be immaterial. At the same time there are certain situations in which policy may well allow a relaxation of this rule. In the first place, it need not be enforced in favor of a party who by fraud or carelessness has brought about the mistake, — as in the case of one fraudulently misreading a document to an illiterate person.[12] In the next place, it need not be enforced where the writing

1018; Lowenfeld *v.* Curtis, U. S. App., 72 Fed. 103. For additional instances, see *ante*, § 284, note 1. Needless to say, the application of the distinctions in a given instance may offer much room for difference of opinion.]

[11] [Garrison *v.* Owens, 1 Pinney 473; Isham *v.* Cooper, N. J. L., 39 Atl. 760. Distinguish the case of one concededly signing as surety, who wishes to show that it was understood that he would not be called upon to pay; this cannot be done, for it merely involves a variation of the obligation: Altman *v.* Anton, 91 Ia. 612. In the law of *negotiable instruments*, several questions of an analogous sort arise, but peculiar considerations apply in that field of the law; for the effect of a parol agreement that an indorsement in blank or in full shall be without recourse against the indorser, see True *v.* Bullard, 45 Nebr. 409; Iowa V. S. Bank *v.* Sigstad, 96 Ia. 491; Martin *v.* Cole, 104 U. S. 30; Ames, Cases on Bills and Notes, vol. ii, Summary, "Collateral Agreement;" for the effect of an agreement that an indorsing payee is to be treated as guarantor, co-surety, or joint maker, see Hately *v.* Pike, 162 Ill. 241; Richardson *v.* Foster, 73 Miss. 12; *ante*, § 281; Ames, *ubi supra*; for the effect of an agreement that joint makers or maker and indorser, or indorser and indorsee, are to be treated between themselves as sureties, see Kendall *v.* Milligan, 62 Ark. 629; McCollum *v.* Boughton, 132 Mo. 601; Montgomery *v.* Page, 29 Or. 320; *ante*, § 281; Ames, *ubi supra*. In the law of *agency*, also, some special questions arise, governed by more or less peculiar considerations; for the effect of an agreement that a person signing a contract is to be treated as agent only, or that a person signing as agent is to be treated as also a principal, see Frankland *v.* Johnson, 147 Ill. 520; Tewksbury *v.* Howard, 138 Ind. 103; Matthews *v.* Mattrass Co., 87 Ia. 246; Armstrong *v.* Andrews, 109 Mich. 537; Wambaugh, Cases on Agency, 658–664, 723–728; for the propriety of showing the existence of an undisclosed principal, see Briggs *v.* Partridge, 64 N. Y. 357; Barbre *v.* Goodale, 28 Or. 465; Wambaugh, *ubi supra*, 627–657, 673–723.]

[12] [See Harriman on Contracts, 35; Thoroughgood's Case, 2 Co. Rep. 9 *b*; Foster *v.* Mackinnon, L. R 4 C. P. 704; O'Donnell *v.* Clinton, 145 Mass. 461; Wanner *v.*

is equally fallacious in representing the terms as understood by the opposing party; in other words, in the case of mutual mistake, where in Chancery the reformation of the instrument is allowed.[13] In the third place, a testator signing a will is not in the position of one on the faith of whose act another party to the transaction may be misled, and thus there may be less objection than in the case of contracts to permitting the testator's ignorance of the contents, through misreading or otherwise, to be shown.[14] But all these questions are here seen, more clearly perhaps than in other parts of the subject, to be in truth questions in the various departments of substantive law concerned with the different kinds of legal acts; and broad and varying considerations of policy are concerned, into which it is not necessary here to enter.]

§ 305 *d*. **Same: (2) Whether a Defence or Excuse exists, rendering the Act voidable.** [Assuming that a legal act has been done, it may be desired to show that some defence or excuse exists, by reason of which the act is voidable and may be repudiated. There is here no attempt to alter the terms of the act; it is conceded, and its terms are conceded; but an independent defence is set up. Whether this defence may be shown depends merely on whether the policy of the substantive law applicable to that class of acts recognizes the circumstance as rendering the act voidable and constituting a defence to its enforcement. The clearest case of this sort is that of fraud. The substantive law concerned determines when fraud is to be regarded as a defence, and what circumstances are to be regarded as amounting to fraud. But there is no objection to the showing of fraud from the present point of view, *i. e.* the constitution and integration of legal acts, because no effort is made to resort to other than the integrated act for ascertaining its terms; the terms are conceded to be represented by the writing only, and the object is to set up independent circumstances rendering the act voidable.[1] A showing of duress, also, wherever the substantive law recognizes it as an available defence, is equally unobjectionable from the present point of view.[2] Possibly the proceeding for reformation on the ground of mutual mistake[3] may be regarded as properly belonging under the present head. The more difficult case is that of an accompanying agreement to hold property as trustee or to hold it as security only. It

Landis, 137 Pa. 61; Bank *v.* Webb, 108 Ala. 132; Yock *v.* Ins. Co., 111 Cal. 503; Green *v.* Wilkie, 98 Ia. 74; Coates *v.* Early, 46 S. C. 220; Hartford L. I. Co. *v.* Gray, 80 Ill. 28.]

[13] [See Wilcox *v.* Lucas, 121 Mass. 22; Bush *v.* Hicks, 60 N. Y. 298; Andrews *v.* Andrews, 81 Me. 337; Stockbridge Co. *v.* Hudson Co., 107 Mass. 290; *ante*, § 296 *a*.]

[14] [See Guardhouse *v.* Blackburn, L. R. 1 P. D. 109; Fulton *v.* Andrew, L. R. 7 H. L. 460; Morrell *v.* Morrell, L. R. 7 P. D. 68; Stephen. Digest of Evidence, 4th ed. App. note 33, and Pref. p. 37; Sheer *v.* Sheer, 159 Ill. 591.]

[1] [State *v.* Cass, 52 N. J. L. 77.]

[2] [So also for infancy or other legal incapacity to act: *ante*, § 284.]

[3] [*Supra*, § 305 *d*, note 13; *ante*, § 305 *c*.]

may be suggested that the title to property can be regarded as capable of separation into various qualities or modalities, — title as both beneficial and legal owner, title as legal owner only (with the beneficial interest in another), and title as security-holder only (with the redemption-interest in another). The simple transfer of ownership will in all cases transfer the bare legal title, but it may or may not carry with it the beneficial interest of the second or third sort. The title being thus separable into distinct elements, it is easy to regard the act of separating and retaining (by mutual understanding) the beneficial interest of the second or third sort as an independent circumstance which may be availed of to cut down the apparent interest of the title-holder, by way of defence or avoidance. Thus, where the circumstances are such as to justify, by the substantive law, the recognition of a resulting trust, there is no objection from the present point of view; and it may be shown just as fraud could be shown.[4] So also a retention of the redemption-interest in the transferor, with the effect of giving the transferee a security-title only, may be shown, as an independent circumstance constituting a defence to his apparent right to claim full and beneficial title.[5] But in the latter case it may happen that the act of transfer clearly purports to give not merely the bare legal title, an element common to all transfers of title, but also the full beneficial interest, free from any redemption-interest; and where this is the case, all the possible elements of a title being accounted for and covered, a supposed retention of the redemption-interest can no longer be regarded as a separate act available in defence, but comes directly in competition with the terms of the transfer, and is thus in this instance not available.[6] Another sort of independent act which, by setting aside the original act, substitutes a new one and furnishes a defence to any claim founded on the avoided one, is a novation; this may be shown, whether it involves a novation in the full sense, *i. e.* a complete supersession of the original act,[7] or merely a change of some of its terms by subsequent agreement or waiver.[8] An agreement not to sue, or not to sue for a limited time, is perhaps not to be regarded, at least apart from equity, as an available defence;[9]

[4] [Feltz *v.* Walker, 49 Conn. 93.]

[5] [*Ante*, § 284; Campbell *v.* Dearborn, 107 Mass. 130; Barry *v.* Colville, 129 N. Y. 302; Hieronymus *v.* Glass, Ala. 23 So. 674; Ahern *v.* McCarthy, 107 Cal. 382; Shad *v.* Livingston, 31 Fla. 89; German Ins. Co. *v.* Gibe, 162 Ill. 251; Bever *v.* Bever, 144 Ind. 157; Libby *v.* Clark, 88 Me. 32; Dixon *v.* Ins. Co., 168 Mass. 48; Pinch *v.* Willard, 108 Mich. 204; Vanderhoven *v.* Romaine, N. J. Eq., 39 Atl. 129; Voorhies *v.* Hennessy, 7 Wash. 243; Shank *v.* Groff, 43 W. Va. 337; Gettelman *v.* Assur. Co., 97 Wis. 237.]

[6] [Thomas *v.* Scutt, 127 N. Y. 133. Occasionally this is laid down as a general rule, in disregard of the distinction above noted; see Munford *v.* Green, Ky. 44 S. W. 419; Goon Gan *v.* Richardson, 16 Wash. 373.]

[7] [Guidery *v.* Green, 95 Cal. 630.]

[8] [Goss *v.* Nugent, 5 B. & Ad. 863; Smith *v.* Kelley, Mich., 73 N. W. 385; Harris *v.* Murphy, 119 N. C. 34; Dunklee *v.* Goodenough, 68 Vt. 113; Chic. B. & Q. R. Co. *v.* Dickson, 143 Ill. 368; see other instances in §§ 302, 303, *ante*.]

[9] [Ford *v.* Beach, 11 Q. B. 852; Dow *v.* Tuttle, 4 Mass. 883. Compare the case of

but an agreement to forbear forever to sue is in theory equivalent to a promise to give a release, and thus, in equity at least, is of the nature of a defence which can be set up in an action on the main contract.[10] But it may be difficult, in specific instances, to determine whether the agreement should be treated as genuinely one of the above sort or as merely an agreement limiting liability and thus of an inadmissible sort;[11] for example, an agreement not to collect more than a part of the amount of a note may be regarded as not available,[12] but an agreement to credit a certain counter-claim in payment may be given effect.[13] It may be added that where the facts to be shown negative the very existence or consummation of a legal act (as in § 305*c*, *ante*), they may be shown as against any assignee of the supposed right created by the act, because he can obtain nothing if there was nothing to transfer to him; whereas, if the facts concern merely a defence or enable a consummated act to be avoided (as in the present section), the showing will, in some departments of the law, not be allowed as against a *bona fide* assignee for value of the right created by the act.[14]]

§ 305 *e*. **Integration of Legal Acts by Intent of Parties; (1) Whether the Act has been Integrated at all.** [The principle of Integration — *i. e.* refusing to recognize, as a part of the act or as furnishing its terms, anything but the final written memorial as adopted by the parties — assumes that there has been an integration into a final written memorial. It is therefore, of course, always possible to show that a writing offered as such has never been enacted by the parties as such a memorial, *i. e.* that there never has been an integration; and in such case any negotiations or parts of the transaction whatever may be considered in order to determine the entire terms of the act. A mere temporary or preliminary memorandum[1] or a series of letters,[2] for example, will usually not be such an exclusive memorial; though it is always a question as to the intent of the parties in the particular case. A memorandum made to satisfy the fourth and seventeenth sections of the Statute of Frauds is not as such and necessarily the exclusive memorial of the transaction.[3] A receipt, acknowledging the payment of money or delivery of goods, is not as such an exclusive memorial of the terms of a contract connected with the money or the goods;[4] though a document may be at

a contemporaneous agreement to renew: Hoare *v.* Graham, 3 Campb. 57; Ames, Cases on Bills and Notes, II, 124, note.]

[10] [Dean *v.* Newhall, 8 T. R. 168; Harriman on Contracts, 283.]

[11] [*Ante*, § 305 *c* (*b*).]

[12] [Loudermilk *v.* Loudermilk, 93 Ga. 443.]

[13] [Bennett *v.* Tillmon, 18 Mont. 28; *contra:* Phelps *v.* Abbott, Mich., 72 N. W. 3.]

[14] [See Dow *v.* Tuttle, *supra;* Martin *v.* Cole, 104 U. S. 30.]

[1] [Ramsbottom *v.* Tunbridge, 2 M. & S. 434; Doe *v.* Cartwright, 3 B. & Ald. 326; R. *v.* Wrangle, 2 A. & E. 514; Allen *v.* Pink, 4 M. & W. 140; Vaughan *v.* McCarthy, 63 Minn. 221.]

[2] [Burditt *v.* Howe, 69 Vt. 563.]

[3] [Browne, Statute of Frauds, cc. 17, 18.]

[4] [Singleton *v.* Barrett, 2 Cr. & J. 368; Equit. Secur. Co. *v.* Talbert, 49 La. An. 1393; State *v.* Giese, N. J. L., 36 Atl. 680; Keaton *v.* Jones, 119 N. C. 43; *ante*, § 305.]

the same time a receipt and the exclusive memorial of contract;[5] whence arises the well-known distinction that a bill of lading, as a receipt for goods, but not as a contract of carriage, may be shown to be incorrect in its terms.[6]]

§ 305 *f*. **Same: (2) Whether the Part of the Act in Question has been Integrated.** [Even though there has been an integration, *i. e.* a reduction of a transaction to a final and exclusive written memorial, yet, since several transactions may be consummated by the same parties at the same time of negotiation, and since the parties may integrate one of these transactions and not another, or may integrate one part of a transaction and not another part, it is of course always open to show that the integration was partial only; and in such case the terms of the remainder, not covered by the written memorial, may be gleaned from anything said or done by the parties independently of the writing. Effect is given to the written memorial as exclusively representing the terms of the transaction, but only because the parties have so intended it, and therefore only so far the parties have intended it. Since all depends thus on the parties' intention as to the extent or scope of the integration, the application of the principle will depend almost entirely on the circumstances of each case, — including the kind of transaction, the usual terms of such transactions, the scope of the writing, and the surrounding circumstances of the particular negotiation.[1] No detailed rules can be formulated; and the working of the principle can best be understood by noticing its application in particular instances. For example, where a written lease was given, an oral agreement by the lessor to destroy rabbits on the leased land was admitted;[2] where a written lease of a house and the furniture therein was made, an oral agreement by the lessor to put in certain furniture was excluded;[3] where a deed of land abutting on a street was made, an oral agreement by the vendor to have the street graded was admitted;[4] where a deed of similar land was made, an oral agreement by the vendor to pay for a sewer in the course of construction was admitted;[5] where a deed of two houses,

[5] [See Ramsdell *v.* Clark, 20 Mont. 103; Jackson *v.* Ely, 57 Oh. 450; Allen *v.* Mill Co., 18 Wash. 216.]

[6] [The Delaware, 14 Wall. 579; Tallassee F. M. Co. *v.* R. Co., Ala., 23 So. 139; *ante*, § 305; McClain, Cases on Carriers, pp. 233–248; Hutchinson, Carriers, §§ 122 ff. A passage-ticket is usually not an exclusive memorial of the contract of carriage: Mann B. C. Co. *v.* Dupre, 13 U. S. App. 183; Hutchinson, Carriers, §§ 568 ff.; Professor Beale, in 1 Harv. Law Rev. 17.]

[1] [It is occasionally said (*e. g.* in Naumberg *v.* Young, 44 N. J. L. 331, whose language has been approved in Thompson *v.* Libby, 34 Minn. 374; Seitz *v.* Refrig. Co., 141 U. S. 510), that the parties' intention as to the exclusive effect of the document is to be gathered exclusively from the terms of the document itself; but this is unsound in principle as well as impossible in practice; the fallacy is repudiated in Eighmie *v.* Taylor, 98 N. Y. 288, and has little support.]

[2] [Morgan *v.* Griffith, L. R. 6 Exch. 70.]

[3] [Angell *v.* Duke, 32 L. T. N. S. 320.]

[4] [Durkin *v.* Cobleigh, Mass., 30 N. E. 474.]

[5] [Carr *v.* Dooley, 119 Mass. 294.]

with the lease of a hall, was made, an oral agreement to put hard-pine flooring into the hall was admitted;[6] where a deed of land and a store provided that "this grant includes all the shelving in the building," an agreement to sell personalty in the store was admitted;[7] where a written contract was made to give possession of the promisor's premises for the purpose of building, an oral agreement to provide certain room for storage purposes was excluded;[8] where a covenant was made to furnish a person's support, an agreement that the promisee would live at a certain place was excluded;[9] where a written lease of land was made, an oral agreement by the lessor to devise the lands to the lessees, on condition that they improved the premises and paid an annual rent, was admitted;[10] where a written agreement was made to board "three persons," an oral agreement specifying the three was excluded;[11] where a written agreement was made to build waterworks, an oral agreement to give bond for faithful performance was excluded;[12] where a written stipulation was made to discontinue a suit without costs, an oral agreement to pay counsel-fees was excluded;[13] where a written agreement to employ an actor was made, an oral agreement to give him certain parts to play was excluded;[14] where a written agreement was made for cutting, peeling, and driving timber, an oral agreement as to who should scale it was admitted;[15] where a written agreement was made for hauling lumber, an oral agreement to furnish a right of way was excluded;[16] where a written agreement was made to cut, bank, and deliver lumber, an oral agreement to furnish a place for banking it was excluded;[17] where a deed of fruit-land was given, an oral agreement to allow the buyer to take fruit from adjoining land of the seller till the trees bought should bear fruit was excluded;[18] where a lease allowed sub-leasing for "business purposes," an oral agreement not to sub-lease for a liquor-saloon was excluded;[19] where a deed of land was given, an oral agreement by the vendor not to sell adjoining lots at a lower rate was admitted;[20] where a written contract for the purchase of soap was made, an agreement by the vendor to advertise the soap was admitted.[21] Most of these in-

[6] [Graffam *v.* Pierce, 143 Mass. 386.]
[7] [Bretto *v.* Levine, 50 Minn. 168.]
[8] [Dixon-Woods Co. *v.* Glass Co., 169 Pa. 167.]
[9] [Tuttle *v.* Burgett, 53 Oh. 498.]
[10] [Harman *v.* Harman, 34 U. S. App. 316.]
[11] [Rector *v.* Bernaschina, 64 Ark. 650.]
[12] [Brewton *v.* Glass, Ala. 22 So. 916.]
[13] [Patek *v.* Waples, Mich. 72 N. W. 995.]
[14] [Grimston *v.* Cunningham, 1894, 1 Q. B. 125.]
[15] [Gould *v.* Excelsior Co., 91 Me. 214.]
[16] [Sutton *v.* Lumber Co., Ky., 44 S. W. 86.]
[17] [Godkin *v.* Monahan, U. S. App., 83 Fed. 116.]
[18] [Long *v.* Perine, 41 W. Va. 314.]
[19] [Harrison *v.* Howe, 109 Mich. 476.]
[20] [Rackemann *v.* Impr. Co., 167 Mass. 1.]
[21] [Ayer *v.* Mfg. Co., 147 Mass. 46. *Warranties* of quality, capacity, and the like

stances are arguable, in the sense that a contrary decision could not be thought unsupportable; and in most of them the decisions have depended more or less on the attendant circumstances. But however arguable the ruling may be in a particular instance, the general notion is always the same and is everywhere accepted.[22] The inquiry is, for each instance anew, Was the subject of the offered agreement intended by the parties to be covered or disposed of in the written memorial? If they intended that writing to represent the net result of their negotiations on that topic, then no other matter, whether oral or written, is to be consulted for ascertaining the terms of their act. — It is sometimes said that the test is whether the parol agreement "varies or adds to" the written memorial, or whether it is "inconsistent" with it. But these, it is obvious, may be fallacious tests; for, though an oral agreement which is inconsistent with or varies from the written memorial will always be ineffective and inadmissible, it is not true, conversely, that an oral agreement which is not inconsistent with the written memorial is admissible. Where the parties have clearly intended to cover the whole of a subject having many possible details, the promisor may not purport to make an engagement as to one of the possible details, and thus an oral engagement on that precise point is not in strictness inconsistent with the written memorial, nor does it vary the latter; yet it may be inadmissible if the memorial apparently intended to embrace the whole of the promise on the general subject to which that detail belongs; for example, a written contract of sale for an engine is in strictness not inconsistent with nor varied by an oral warranty of the engine's working-capacity, if the written memorial does not refer in any way to the engine's capacity; yet such a warranty would be by most Courts excluded. It seems more accurate in practice and more correct on principle to avoid such phrasings of the test, and to inquire, more broadly, whether the subject of the offered agreement has been

furnish especial difficulties; whether such a warranty is to be regarded as the subject of an independent transaction not intended to be covered by the written contract of sale or manufacture, must depend much on the kind of transaction; different views have been taken of this situation, but such warranties are usually excluded; see Chapin *v.* Dobson, 78 N. Y. 74; Eighmie *v.* Taylor, 98 id. 288; Hills *v.* Farmington, Conn., 39 Atl. 795; Barrie *v.* Smith, Ga., 31 S. E. 121; Conant *v.* Bank, 121 Ind. 324; Mast *v.* Pierce, 58 Ia. 579; Zimmerman Mfg. Co. *v.* Dolph, 104 Mich. 281; Thompson *v.* Libby, 34 Minn. 374; Miller *v.* Electric Co., 133 Mo. 205; Quinn *v.* Moss, 45 Nebr. 614; Naumberg *v.* Young, 44 N. J. L. 331; Seitz *v.* Refrig. Co., 141 U. S. 510; Van Winkle *v.* Crowell, 146 id. 42; Milwaukee B. Co. *v.* Duncan, 87 Wis. 120; Case Plow Works *v.* N. & S. Co., 90 id. 590.

In *deeds*, the recital of the *consideration* given is usually in the nature of a mere receipt and not of a term of the contract of transfer, and may therefore be contradicted when of that nature only: *ante*, §§ 284, 304; Baum *v.* Lynn, 72 Miss. 932 (instructive case and opinion); Stewart *v.* R. Co., 141 Ind. 55; Hill *v.* Whidden, 158 Mass. 267; Ford *v.* Savage, 111 Mich. 144; Thompson *v.* Bryant, Miss., 21 So. 655; Squier *v.* Evans, 127 Mo. 514; Baird *v.* Baird, 145 N. Y. 659; so also as to the *date*: *ante*, § 284; Vaughan *v.* Parker, 112 N. C. 96; Moore *v.* Smead, 89 Wis. 558.]

[22] [See other instances, *ante*, § 281.]

intended to be wholly disposed of by the written memorial; if so, the agreement is not to be considered, whether it is consistent or inconsistent with the memorial's specific terms.

The principle now under consideration finds frequent application where it is desired to imply into the contract a *custom* or usage which prevails for the class of transactions involved, and would be regarded, but for the written memorial, as an implied term of the contract. Ordinarily, parties do not intend to reduce to writing in the memorial all the usages applicable to the class of transactions involved; in other words, the scope of their intended integration includes only such matters as may or must vary with the particular transaction, and not such matters as are uniformly arranged for by current usage;[23] thus, in an order for a large quantity of flour, the quantity, the quality, the grade of wheat, the consignee, the time and place of delivery, will naturally vary with the particular order, and a written memorial of the contract will therefore have necessarily for its object the reduction to certainty of these variable particulars; but the mode of manufacturing, the mode of packing, and the mode of marking, may by local usage be uniform in all cases, and hence there will usually be no occasion and no intention to deal with these matters in the written memorial; in other words, there has been on those points no intended integration; and therefore it is open to resort to current usage for the implied terms of the contract on those points. If, however, the writing, by mentioning one or another of those points, shows that there has been an intention to deal with the matter in the written memorial, or if such an intention can be otherwise ascertained, then the usage cannot be resorted to as furnishing a term of the contract. Usually, then, it may be said, that when the written memorial contains nothing on the subject of the usage offered, the usage (if of such a sort as by the law of contracts would be an implied term of the contract) may be resorted to, in spite of the existence of the written memorial. Here, however, as in all other applications of the present principle, the result will depend chiefly on the circumstances of each case.[24]]

[23] ["Parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included, however, as of course, by mutual understanding. . . . The contract in truth is partly express and in writing, partly implied or understood and unwritten:" Coleridge, J., in Brown *v.* Byrne, 3 E. & B. 703.]

[24] [Some instances are as follows: Brown *v.* Byrne, 3 E. & B. 703 (consignee "paying freight" at a specified rate; custom to allow a discount admitted); Scott *v.* Hartley, 126 Ind. 239 (sale of grain at "50½ net;" custom for the consignee to deduct freight paid, excluded); Fairly *v.* Wappoo Mills, 44 S. C. 227 ("sold 2000 tons, seller paying brokerage at 10 cents per ton; custom to pay brokerage on only the amount delivered, not the amount contracted for, excluded); Richards Co. *v.* Hiltebeitel, 92 Va. 91 (contract specifying the prices for laying bricks; usage as to the method of ascertaining the quantities laid, admitted); Gilbert *v.* McGinnis, 114 Ill. 28 (agreement to make advances; custom to require notes for the advances, excluded); see many more instances, *ante*, § 292.]

§ 305 *g*. **Integration by Requirement of Law.** [The process of Integration, from which it results that the terms of a particular transaction are to be sought only in a written memorial, is one dependent usually upon the intent of the parties. If they have willed that a certain writing shall exclusively be and represent their act, then the Court will so treat it; if they have not so willed, then the Court will resort to any negotiations that may have occurred, and to any dealings, whether oral or written, to ascertain and piece together the total of terms of the act. But there is another case in which the Court may decline to consider sundry acts and dealings as furnishing the terms of a legal act, and may confine itself solely to a single written memorial; and that is where by provision of law the act is to be valid only when it is transacted in the shape of a single written memorial. When the law has provided that the only way in which an act may be given legal significance or existence is by doing it, and all of it, in writing, then no other conduct or dealings, purporting to be such an act, can be considered, and evidence of them is of course inadmissible because tending to prove an immaterial *factum probandum*. The difference between the effect of non-integration of this sort and of the preceding sort is that, in the former case (integration by intent of the parties), resort to parol[1] transactions is forbidden only when the parties have by intention made the single writing the exclusive memorial; and if they have not, then resort may be had to parol transactions if any occurred; while in the latter case (integration by requirement of law) resort to parol transactions is absolutely forbidden,[2] so that if the act has not been integrated in writing as required, a transaction in parol will still be of no significance for the purpose in hand.

The cases in which by requirement of law there must be an integration in writing are of two general sorts: (1) certain acts by ordinary persons, creating, transferring, and extinguishing rights and obligations; (2) proceedings by judicial and other officers.

(1) In only a few instances does a requirement of law prescribe that an act, to be valid, must be reduced to writing; the genius of our law being contrary to that of the Continental law in this respect. Almost universally such a requirement[3] is made for wills of realty;[4] in most jurisdictions the requirement extends to wills of personalty also; in probably all jurisdictions an exception exists for oral (nuncupative) wills by soldiers and sailors in service, and, sometimes, by persons on a deathbed or during a journey.[5] In most juris-

[1] [By "parol," in connection with the present principle is properly meant, not merely oral utterances, but also informal writings, *i. e.* writings (letters, memoranda, etc.) other than the single and final written memorial; see *ante*, § 305 *a*.]

[2] [There is one apparent exception, to be noted later.]

[3] [This matter is briefly dealt with by the author *ante*, §§ 261–274, now transferred to Appendix II.]

[4] [See Jarman on Wills, 6th Am. ed. 76.]

[5] [See Jarman, *ubi supra*, 784.]

dictions, also, grants of realty are required to be reduced wholly to writing. The requirement of a memorandum of certain data in a transaction of sale, provided for in the fourth and seventeenth sections of the Statute of Frauds, is to be distinguished from a requirement of the above sort; that which the statute requires is merely an accompanying or collateral written memorandum of some parts of the transaction;[6] it thus differs in the two important respects that an oral contract of sale may exist independently of the memorandum[7] (whereas the written will, and nothing else, is the testamentary act), and that only certain parts of the transaction need be noted in the memorandum (whereas the written will must contain every part of the testamentary act).

(2) It has long been a principle of our law, irrespective of any statutory requirement, that the proceedings of a Court exist and are to be found only in the "record."[8] Precisely what the "record" is has been the subject of many detailed rulings and much statutory regulation; but the general notion conceives it as the final enrolment or written expansion of all the proceedings in a litigation, made by the clerk or the judge, and verified by the judge.[9] This "record" is, in legal theory, not a testimonial report by the officer of the proceedings, nor a copy of some other written act; it *is* the proceeding and the act itself.[10] Nothing that is not in this record is a legal act or a part of the proceedings; what is not in the record has not been done; and, consequently, it cannot be shown that something was done which is not noted in the record, or that a thing noted in the record was in truth done differently. The principle applies, of course, only to such proceedings as properly form a component part of the proceedings; and hence transactions not properly forming a part of the record may be shown otherwise than by the record; and there is much learning as to the discriminations here necessary to be taken. Moreover, though in legal theory the record is the proceeding itself, nevertheless it is usually not prepared till an interval of time has elapsed after the actual oral proceeding, and in the meantime the clerk or the judge has, in a docket or a minute-book, made a temporary note of the various things done. Thus a question may arise as to the propriety of using the minutes to correct the record;[11] though even when this is allowed, the record is still in legal theory the proceeding

[6] [See Browne, Statute of Frauds, cc. 17, 18. The statute is briefly treated by the author, *ante*, §§ 262–273, now transferred to Appendix II.]

[7] [So that, for example, the memorandum may be made after the actual contract of sale.]

[8] [Briefly treated by the author, *ante*, § 86.]

[9] [See the nature and policy of the doctrine expounded in Pruden *v.* Alden, 23 Pick. 184; Ward *v.* Saunders, 6 Ired. 382; Wells *v.* Stevens, 2 Gray 115.]

[10] ["The record is tried by inspection; and if the judgment does not there appear, the conclusion of law is that none was rendered:" Nisbet, J., in Bryant *v.* Owen, 1 Ga. 355, 367.]

[11] [By making an entry *nunc pro tunc;* see Jacks *v.* Adamson, 56 Oh. 397; State *v.* Feister, Or., 50 Pac. 561.]

itself, and stands effective until formally corrected. Thus again, resort may be had to the minutes as representing and constituting the proceeding, where the record proper has been lost or destroyed or has never been made up;[12] and here occurs the peculiar difference[13] between this kind of integration by law and the preceding kind; for in the case, for example, of a will, if no will in writing exists, no oral or other informal attempt at a will may take its place; while, if a record has not been made up, the provisional minute-book or docket is treated as representing the proceeding.

There are but few other official proceedings which are treated, after the analogy of judicial records, as constituted solely in and by the official writing. The principle is sometimes applied to the records of a public corporation;[14] and is usually applied to the journals of a Legislature.[15] The acknowledgment by a married woman that she signs a deed of her own free will is in many jurisdictions treated as a judicial proceeding, and the official certificate can thus not be shown to be incorrect; but other views have often (sometimes by express statute) prevailed.[16] The registration of a deed is usually regarded as merely the preservation of an official copy of the original and effective document;[17] but perhaps under the recent improved systems of transfer the official registry may be treated on the principles of judicial records.[18] To be distinguished from the principles applicable to judicial records is a principle, not infrequently treated as equivalent, by which an official's report or certificate of an act done before him by a person wishing to do a legal act is treated as conclusive testimony to the nature of the act done. There are but few well-established instances of this; the chief one being the magistrate's report, as required by many statutes, of the statement of an accused person

[12] ["Until they can be made up, the short notes must stand as the record:" Pruden *v.* Alden, 23 Pick. 184; "Minutes may be introduced as . . . in truth for the time being constituting the record itself:" McGrath *v.* Seagrave, 2 All. 443. Where the final record is lost, the minutes take its place: Cook *v.* Wood, 1 McCord 139.]

[13] [See note 2, *ante*.]

[14] [See Saxton *v.* Ninnus, 14 Mass. 315; Thayer *v.* Stearns, 1 Pick. 109; Roland *v.* District, 161 Pa. 102, 106. But there is sometimes a difference, in that oral proceedings can be shown if no record was made: Boggs *v.* Ass'n, 111 Cal. 354; Zalesky *v.* Ins. Co., 102 Ia. 512; *contra*, Taylor *v.* Henry, 2 Pick. 397.]

[15] [*Post*, § 482.]

[16] [One view is that the certificate is conclusive except as to appearance or jurisdiction in general; another, that it is impeachable only for fraud or perhaps for mistake; another, that it may be contradicted on any point; see the various views represented in Elliott *v.* Peirsol, 1 Pet. 328; Edinb. R. L. M. Co. *v.* Peoples, 102 Ala. 241; Woodhead *v.* Foulds, 7 Bush 222; Dodge *v.* Hollinshead, 6 Minn. 25, 39; Davis *v.* Howard, 172 Ill. 340; Harkins *v.* Forsyth, 11 Leigh 294.]

[17] [See Harvey *v.* Thorpe, 28 Ala. 250; Gaston *v.* Merriam, 33 Minn 271; Fleming *v.* Parry, 24 Pa. 47; Hastings *v.* B. H. T. Co., 9 Pick. 80; Ames *v.* Phelps, 18 Pick. 314; Jones, Real Property, § 1475; so also as to its non-conclusiveness in regard to the time of recording: Bartlett *v.* Boyd, 34 Vt. 256; Horsley *v.* Garth, 2 Gratt. 371, 391.]

[18] [See articles in 6 Harv. L. Rev. 302, 369, 410; 7 id. 24.]

examined before him;[19] here the real process seems to be the making of a specific witness' testimony conclusive.[20]]

§ 305 *h*. **Parol Evidence Rule applicable only between the Parties.** [It is usually said[1] that the parol-evidence rule is applicable only between the parties. That this is correct, for many purposes at least, may be seen by noticing the principle of the rule so far as the integration was made by intent of the parties. Their determination is that, for the purposes of constituting a certain legal act of theirs, a particular writing shall alone be consulted; but, so far as concerns their relations to other persons, their conduct and utterances extrinsic to that writing may still be considered, so far as such data are not treated as part of that act but become material for some other purpose. For example, where the issue is as to adverse possession of a right of way, the deed not reserving such a right, a conversation between grantor and grantee, the former conceding the way, would be receivable as affecting the adverse nature of the grantee's possession;[2] so also a creditor, claiming to set aside a mortgage as fraudulent, could show, as evidence of fraud, the debtor's oral agreement with the mortgagee;[3] so, also, in a criminal prosecution for embezzlement, in which the intent is the material issue, an oral promise by the employer to allow certain sums to the employee, could be shown, in spite of the terms of the written contract between them.[4] Where the integration is re-

[19] [This subject is examined *ante*, § 227.

There are many other instances in which such a conclusive effect has been claimed but usually denied for an official certificate; for example, to a registration of birth (Hermann *v.* State, 73 Wis. 248); to an enrolment of recruits by a military officer (Wilson *v.* McClure, 50 Ill. 366); to a notarial certificate (Wood *v.* Trust Co., 7 How. Miss. 609, 630; Merrill *v.* Sypert, Ark., 44 S. W. 462); to the certificate of an oath-taking, or jurat (see R. *v.* Emden, 9 East 437; Thurston *v.* Slatford, 1 Salk. 284; Sherman *v.* Needham, 4 Pick. 66).]

[20] [The feature superficially common to both principles is that it is forbidden to show that the thing was done other than as stated in the document. But the reasons for this identical result are not the same in both cases. In the case of a judicial record, the record is the proceeding; consequently nothing else may be consulted as constituting the proceeding. In the case of an official's report, the effective legal act is still what was done or said before him; and his writing is no more than a reporting or testifying to that act of another person; it is a preferred report and is conclusive, but it is still only a report (compare § 97 *d*, *ante*.) The practical difference is that, in the case of a magistrate's report, if it is for any reason not available (by loss or destruction, for example), it is sufficient to prove directly the oral statements of the accused by one who heard them, on the theory that when a preferred witness is unavailable, an ordinary witness will suffice; while in the case of a judicial record, if the record itself was never made, then the proceeding cannot be proved at all (as well expounded by Hubbard, J., in Sayles *v.* Briggs, 4 Metc. 421), and if it was made but is lost, then the proof would be, not of the oral doings, but of the record's contents (Mandeville *v.* Reynolds, 68 N. Y. 528, 533; see *post*, § 509), and where by statute the resort to oral doings is allowable in order to restore lost records, it is in legal theory, not the substitution of one kind of testimony for another, but the re-constitution, by compilation, of the judicial act itself.]

[1] [*Ante*, § 279.]

[2] [Ashley *v.* Ashley, 4 Gray 197.]

[3] [Jewett *v.* Sundback, 5 S. D. 111, 119.]

[4] [Walker *v.* State, Ala., 23 So. 149; compare *Re* Clapton, 3 Cox Cr. 126.]

quired by law, the same consequence may follow; thus, on an issue as to the contents of a lost will or of undue influence, the testator's normal testamentary intentions being admissible in evidence, oral statements of intention,[5] or a will not duly executed, or a will not proved by the attesting witnesses,[6] could be used as showing the testamentary intention; since here there is no attempt to use the utterances as having testamentary effectiveness. The truth seems to be, then, that the rule, as regards others than the parties to the act, does not exclude extrinsic utterances so far as they are for any purpose admissible; but that even for other parties, it would still apply to exclude, where the object was to show the terms of the act as the effective transaction between the parties. Nevertheless, it is common to say, without qualification (as in § 279, *ante*), that the rule applies only in suits between the parties.[7]]

§ 305 *i*. (II) **Interpretation of Legal Acts.** [Assuming that a legal act has been consummated (whether it has or has not been integrated), a peculiar situation and a new set of questions are presented when the act comes before the Courts for enforcement. The process of realizing, enforcing, or giving objective effectiveness to the party's act involves the application of the terms of the act to external objects so as to carry out and make good, by process of law, the results prescribed by the act. Assuming that there is no legal objection to this realization of the act, then the sole aim of the Court is to ascertain the significance of its terms, or, in other words, the associations or connections between the terms of the act and the various possible objects of the external world. The process of fulfilling this aim is the process of Interpretation. In order to understand the questions which it presents, two fundamental distinctions must be noticed at the outset: (1) the distinction between the intention of the party and the meaning of his words; (2) the distinction between various standards of meaning, *i. e.* individual, mutual, and customary meaning.

(1) The distinction between "intention" and "meaning" (quite apart from any dispute as to the propriety of these names) is vital. Interpretation as a legal process is concerned with the meaning of words and not with the intention of the one using them.[1] It is com-

[5] [*Ante*, §§ 14 *m*, 162 *e*.]

[6] [Demombreun *v.* Walker, 4 Baxt. 199.]

[7] [For other instances, see Dunn *v.* Price, 112 Cal. 46; Roof *v.* Pulley Co., 36 Fla. 284; Kellogg *v.* Tompson, 142 Mass. 76; Plainfield F. N. B'k *v.* Dunn, 57 N. J. L. 404; Libby *v.* Land Co., N. H., 32 Atl. 772; Hankinson *v.* Vantine, 152 N. Y. 20; Johnson *v.* Portwood, 89 Tex. 235; Signa Iron Co. *v.* Greeve, U. S. App., 88 Fed. 207.]

[1] [This distinction and the above canon, insisted upon by many judges (*e. g.* Lord Denman, 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") and by Sir J. Wigram, in his treatise on "Extrinsic Evidence in Aid of the Interpretation of Wills," has been acutely and strenuously denied by F. V. Hawkins, Esq., in his paper "On the Principles of Legal Interpretation (2 Jurid. Soc. Papers 298; reprinted in Thayer's "Preliminary Treatise on Evidence," App. C);

monly said, as explaining the process, that the words are symbols, and that the object of interpretation is to ascertain the meaning of the symbols. But it is here still open to believe that in ascertaining the "meaning" of the symbols we are endeavoring to ascertain the state of the party's mind as fixed upon certain objects; and we are thus relegated once more to his mental condition as the ultimate object of the investigation. This mode of defining the process is likely to mislead, because the private intent of the party is constantly found to be excluded by the law from consideration, and it is difficult to reconcile this prohibition with the theory that interpretation aims ultimately to ascertain intention. Perhaps a better notion of the distinction between intent and the meaning of words may be obtained from the analogy of other illustrations. Suppose a vessel coasting the shore and entering various harbors where the Government maintains a uniform system of harbor-buoys of 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 party's (*e. g.* 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, 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, just as the testator may have intended to use other words; but in both cases the state of mind as to intention 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, *e. g.* of chess, to be played by B with his guest A. If the two are of the same nation, their standards — *e. g.* 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

Mr. Hawkins calls the above principle "a fallacy of no small importance," since interpretation is mainly "a collecting of the intent from all available signs or marks." Nevertheless, it would be possible to show that the fallacy, on the contrary, lies in not recognizing this principle; and its recognition seems to enable us better to understand the actual rules of law; see the discussions in Leonhard, Das Irrthum bei nichtigen Vertragen, referred to *ante*, § 305 c.]

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 effect or meaning to his acts of moving the chessmen, yet it would remain true that his private intent or state of mind, 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. In the same way, the process of interpretation may concern itself with the individual significance of a testator's words as associated by his standards with specific objects, but it may at the same time refuse to concern itself with the state of mind that led up to the use of those words.[2] — On the one hand, then, is to be noted the distinction between "intention" (or state of mind at the time of acting) and "meaning" (or the association between specific words and external objects). The process of interpretation may best be thought of as the tracing and ascertainment of this association.

(2) In this process of ascertainment, whose standard of meaning shall be taken? The standards may be different, according as the transaction is a unilateral or a bilateral one. Where effect is to be given to the act of a single person — for example, a testator, — there is no reason why his individual standard of usage should not be employed; for example, if he names a house on "Maple Place," the words are to be applied to the locality habitually associated by him with that term even though that locality is commonly designated as "Maple Street."[3] But if the transaction is one in which another person has shared (as a deed or contract) so that the other person has acted on the faith of a certain meaning to the words, then the standard must be enlarged; it is not to be the individual standard of the first party, but the standard which the other party was reasonably justified in acting upon, — primarily and usually, the standard common to other persons generally, but, secondarily and peculiarly, the particular standard of the second party, if that should differ from the standard of the community and still be a reasonable one. It follows (1) that the individual meaning or sense used by the first party alone is in itself immaterial;[4] (2) that the sense to be taken is that which the other party was by universal usage in the community justified in attributing to the words; (3) that provided both parties are acquainted with a special (usually a commercial) usage, which

[2] [The law might conceivably choose to give effect to the intention; it does rarely, as in the case of reformation for mutual mistake; why it usually does not is noted in the next section.]

[3] [For the supposed rule against disturbing a clear meaning, see *post*, § 305 *l*.]

[4] [Fox *v.* R. Co. *v.* Conn., 38 Atl. 871; Gamble *v.* Mfg. Co., 50 Nebr. 463; Rickerson *v.* Ins. Co., 149 N. Y. 307; Fudge *v.* Payne, 86 Va. 306; Anderson *v.* Jarrett, 43 W. Va. 246. The case of an ambiguity in which each party's sense is a reasonable one (Raffles *v.* Wichelhaus, 2 H. & C. 906; "ex Peerless") rests on peculiar grounds.]

would naturally apply to the case in hand, the term may be interpreted according to that special usage;[5] (4) that where the first party employs the term in an individual sense, which differs from the general sense, but is nevertheless known to the second party to be attached to the term, the second party is not entitled to invoke the general standard, but must be content with an enforcement according to this individual sense.[6]]

§ 305 *j*. **Same: General Principle of Interpretation.** [In this process of ascertaining the association between specific words, as used by the person acting, and external objects, a large field of investigation is opened. So far as concerns the implications of the process itself, it is natural, and it may be accepted as a legal principle, that all sources of information should be consulted. The circumstances amid which the person lived and acted, his usages as to words and phrases, his conduct and expressions, may all furnish data throwing light upon his association of specific objects with specific words and phrases, — *i. e.* upon the meaning of such words and phrases. "To understand the meaning of any writer we must first be apprised of the persons and circumstances that are the subject 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."[1] "The Court has a right to ascertain all the facts which were known to the testator at the time he made the will, and thus to place itself in the testator's position, in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be, reasonably and with sufficient certainty applied."[2] "To get at the intention expressed by the will, . . . as a will must necessarily apply to persons and things external, any evidence may be given of facts and circumstances which have any tendency to give effect and operation to the will; such as the names, descriptions, and designations of persons, the relations in which they stood to the testator, the facts of his life, as having been single or married one or more times, having had children by one or more wives, their names, ages, places of residence, occupations; so of grandchildren, brothers and

[5] [See Armstrong *v.* Granite Co., Ill., 42 N. E. 186; Eaton *v.* Gladwell, 108 Mich. 678; Rickerson *v.* Ins. Co., 149 N. Y. 307; these cases illustrate that the usage must be in fact known to the other party, or so general that it was probably known to him.]

[6] [For additional instances upon all these points, see *ante*, §§ 280, 292.

For the application here of the supposed rule against disturbing a clear meaning, see *post*, § 305 *l*.]

[1] [Lord Abinger, C. B., in Doe *v.* Hiscocks, 5 M. & W. 363.]

[2] [Lord Cairns, L. C., in Charter *v.* Charter, L. R. 7 H. L. 364.]

sisters, nephews and nieces; and all similar facts; and the same kind of evidence may be given of all facts and circumstances attending the property bequeathed, its name, place, and description, as by its former owner, present occupant, or otherwise."[3] "The general rule is that in construing a will the Court is entitled to put itself into the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will."[4]

There is thus, so far as the natural suggestions of the process of interpretation are concerned, a "free and full range among extrinsic facts in aid of interpretation."[5] But are there any limitations upon this range of search, other than the ordinary rules as to the admissibility of evidence? It is not easy to trace and distinguish the various elusive shapes taken by certain supposed rules of limitation. But those that have, in one shape or another, received effect, correctly or incorrectly, seem reducible to three general rules: (1) a rule against using declarations of intention; (2) a rule against disturbing a clear meaning; and (3) a rule against correcting a false description.[6]]

§ 305 *k*. **Same: (1) Rule against using Declarations of Intention.** [An established rule, never questioned, is that, for the purpose of interpretation, declarations of intention are not to be consulted. The reason is not that such declarations cannot throw light upon the application of the words; for they might conceivably do so; but that their chief and overshadowing function and effect would be to set up a rival declaration of volition, coming directly into competition with the words of the document which alone is to be regarded as the legal act. Thus, where a will provides for a bequest of the testator's library to his cousin James, an oral declaration of his, "I want my nephew William to have my library," while conceivably it might with other facts help out a disputed interpretation, would be likely to have the paramount effect, if considered, of overturning the words of the will and substituting, as that part of the testamentary act, a declaration not in itself available as a testamentary act; in

[3] [Shaw, C. J., in Tucker *v.* Seaman's Aid Society, 7 Met. 188.]

[4] [Blackburn, J., in Allgood *v.* Blake, L. R. 8 Ex. 160.]

[5] [Thayer, Preliminary Treatise, 414.]

[6] [Nothing will here be said about Lord Bacon's distinction (*ante*, § 297) between "patent" and "latent" ambiguities; this "unprofitable subtlety," which still "performs a great and confusing function in our legal discussions," in spite of the repeated exposures of its inutility as a working rule, has been fully disposed of in Professor Thayer's Preliminary Treatise, pp. 422, 471.

The limitations noted *ante*, § 305 *i*, as to employing usage to interpret contracts or deeds, are to be understood as additional to those above mentioned; but they do not flow from the nature of data that may be consulted, so much as from the standard controlling the entire process of interpretation. Where a unilateral act is to be interpreted, the standard or object is the sense employed by the single actor; where a bilateral act is to be interpreted, the standard is primarily the joint sense of the two parties: and the special limitations applicable in the latter case are thus outside of and preliminary to the further limitations now to be noted.]

other words, it violates the rule of Integration already examined.[1] To this rule of limitation there is one exception well settled, and another once prevailing but now generally repudiated.

(*a*) Where an object is described in terms equally applicable to two or more objects, the testator's declarations specifying the particular one signified are admissible; as in the often-used illustration, if one devise his manor of S. to A. B., and he has two manors, North S. and South S., "it being clear that he means to devise one only, whereas both are equally denoted by the words he has used."[2] This is the situation ordinarily known as "equivocation;"[3] and the exception is unquestioned.[4] The same principle may be applied to

[1] [In the case of wills, such declarations are excluded "upon this plain ground, because his will ought to be made in writing" (Lord Abinger, C. B., in Doe *v.* Hiscocks, 5 M. & W. 363; so also Shaw, C. J., in Tucker *v.* Seaman's Aid Society, 7 Met. 188); in the case of contracts and deeds, because the parties by intention made the writing the sole memorial of the act, and further, because one party's intention or sense is immaterial. If we could suppose that a will were not required to be in writing and signed, it would seem that various declarations of testamentary intention might be consulted for the purpose of determining which was the effective testamentary act and what its tenor. Moreover, wherever the actual intent or state of mind may, by the Integration rule, be looked to for the purpose of invalidating or reforming a supposed act (as in reformation of a deed for mutual mistake — *ante*, § 305 *c* — or in those cases where a testator's mistake as to the contents of a will may be shown — *ante*, § 305 *c*), it would seem that declarations of intention could be considered. So that the exclusion of such declarations in the process of interpretation seems to be explainable, not as a rule of evidence affecting interpretation, but as the consequence of the rule, already treated, about integration or parol evidence. Professor Thayer has expressed the view (Preliminary Treatise, 414) that it is "usually and rightly regarded as an excluding rule of evidence;" though he elsewhere (p. 444) concedes that it "partakes of the character of both" a rule of evidence and a rule of construction; yet the suggestion of Lord Abinger, *supra*, that it is a consequence of the general rule excluding utterances which compete with the writing, seems preferable.

Distinguish the use (*ante*, § 14 *k*) of ante-testamentary declarations of a testator as showing the probable contents of the will as ultimately executed; here there is no attempt at interpretation nor at setting up declarations to compete with conceded contents.]

[2] [Bacon's Maxims, R. 25; Lord Abinger, C. B., in Doe *v.* Hiscocks, 5 M. & W. 363.]

[3] [Here the declarations are not obnoxious to the parol-evidence or integration rule, because they do not compete for effect with any terms of the writing, and thus their interpretative force, as showing the significance of the words "manor of S.," can be given full play without the danger of contravening that rule; this is the explanation of Parke, B., in Doe *v.* Needs, 2 M. & W. 129: "The words of the will do describe the object or subject intended; and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever; it only enables the Court to reject one of the subjects or objects to which the description in the will applies and to determine which of the two the devisor understood to be signified by the description which he used in the will;" see the same language adopted by Bigelow, C. J., in Bodman *v.* American Tract Society, 9 All. 447.]

[4] [The Lord Cheyney's Case, 5 Co. 68 *b* (on a devise "to his son John generally," it might be shown "that he, at the time of the will made, named his son John the younger"); Doe *v.* Westlake, 4 B. & Ald. 57 ("to M. W., my brother, and to S. W. my brother's son;" the testator had three brothers, each of whom had a son S. W.; declarations naming S. W. the son of R. W. were admitted); Doe *v.* Needs, 2 M. & W. 129 ("to George Gord, the son of Gord;" there were two George Gords, sons of J. G. and G. G. respectively; declarations naming the latter were admitted);

contracts and deeds, so as to admit the understanding of the parties, though expressed independently of the document, as to the application of ambiguous words or phrases.[5] (*a'*) Where a blank occurs, the exception does not ordinarily apply to admit such declarations; because the blank will usually indicate a deliberate non-exercise of testamentary or contractual action on that subject in the document, and so the use of other declarations to supply the blank would in effect violate the rule of integration, already described, requiring the terms of the act to be sought in the written memorial alone.[6] But where the blank indicates merely the party's ignorance of the complete description and not a failure to make a definite act of transfer, the situation is the ordinary one of an equivocation.[7] (*a''*) Where a gift is to or of one of a class, the situation may be equivalent to that of a blank; *e. g.*, a devise to "A and B and heirs," or to "one of the sons of C," or to "my nephew D or E;" for here there is a failure to complete the testamentary disposition.[8] But, on the other hand, it may be in effect a definite disposition giving an

Doe *v.* Allen, 12 A. & E. 451) "to J. A., the grandson of my brother T.;" there were two such grandsons, each named J. A.; declarations naming one of them were admitted); Phelan *v.* Slattery, 19 L. R. Ire. 177 ("to my nephew;" there were five persons who fulfilled the description; the testator's instructions to his solicitor were admitted); Bodman *v.* American Tract Society, 9 All. 447 ("to the American Tract Society;" there were two bodies of this name, one in New York the other in Boston; declarations naming the former to the scrivener of the will, admitted); Chambers *v.* Watson, 60 Ia. 339 (devise of "60 acres, Se 25, toon 7; 40 acres, se 24, toon 6," no range being mentioned; declarations at the time of making the will, admitted); Schlottman *v.* Hoffman, 73 Miss. 188 (figures, which might mean $5 or $500); Bartlett *v.* Remington, 59 N. H. 364 ("in trust for Sarah;" evidence admitted to show that Sarah Sturoc was meant).]

[5] [Diggs *v.* Kurtz, 132 Mo. 250 (deed of "lot No. 312," not naming boundaries or plat; oral agreement admitted); Maynard *v.* Render, Ga., 23 S. E. 194 ("cords" of wood; mutual understanding as to a cord's length admitted); Waldheim *v.* Miller, 97 Wis. 300 (guaranty of "account of B;" that the parties meant a future account only, admitted); Pfeifer *v.* Ins. Co., 62 Minn. 536 (indorsement, cancelling a policy on two horses, so as "to cover one horse only;" evidence as to which one was intended, admitted); The Barnstable, 84 Fed. 895 (agreement to pay "the insurance on the vessel;" mutual understanding as to the kinds of risks covered, admitted).]

[6] [In the following instances the declarations were not admitted: Hunt *v.* Hort, 3 Prec. Ch. 311 ("to become the property of Lady ");" Baylis *v.* Att'y-Gen'l, 2 Atk. 237 (money given "according to Mr. —— his will"). It may be noted that this situation may occur even where the document does not contain what could be termed literally a blank; for example, where a will contained a list of devisees indicated by successive letters, K, L, M, etc., and provided that "the key and index to initials is in my writing-desk," but the key to the cipher was dated eight years later than the will; this was excluded, because the will was in effect unfinished when executed, and the subsequent key was not a valid testamentary act. On this principle the following case may be questionable: Dennis *v.* Holsapple, 148 Ind. 297; devise to "whoever shall take care of me and maintain, nurse, clothe, and furnish me, etc., during the time of life yet when I shall need the same;" the claimant was allowed to show that she fulfilled this description, and that the testatrix had in asking her aid referred to the above provision.]

[7] [This was the case in the following instances: Price *v.* Page, 4 Ves. Jr. 679 (bequest to " Price, the son of Price "); Marske *v.* Willard, 169 Ill. 276 (lease of "lot No. —— in assessor's subdivision of Whiting's block No. 8").]

[8] [Altham's Case, 8 Co. 155; Strode *v.* Russell, 2 Vern. 621.]

election to some donee to choose out of a class of objects; here the gift is not void for uncertainty."

(*b*) Where the terms of the will are not applicable exactly to any object, *i. e.* where the description "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 whose Christian name is mistaken, or whose description is imperfect or inaccurate," [10] there seems no reason against using declarations of intention; because their effect is not to compete with the terms of the will, but merely to aid in determining which is the essential part of the description and which the non-essential part; the description had a definite sense for the testator, but some part of it has to yield, being inaccurate, and the only effect of the declarations can be to aid in applying the description as used by the testator. That declarations of intention are in such a case admissible may fairly be said to have been once the law in England; [11] but subsequent rulings have rejected such evidence.[12] In the United States the evidence has sometimes been received.[13]]

§ 305 *l*. **Same: Rule against disturbing a Clear Meaning.** [It is often said that where a word or a phrase bears a single clear meaning or application, no showing will be allowed that the party or parties actually used it in a different sense; and that therefore no evidence of usage or circumstances tending to prove such a sense will be considered. This limitation finds expression in varying forms; some-

[9] [Bacon, Maxims, Rule 25 ; though it would apparently not be a case of equivocation where declarations could be used.]

[10] [Tindal, C. J., in Miller *v.* Travers, 8 Bing. 244.]

[11] [Thomas *v.* Thomas, 6 T. R. 671 ("to my granddaughter, Mary Thomas, of L., in M. parish ;" there was an M. T., but she was a great-granddaughter, and lived in another parish ; there was an E. E., who was a granddaughter and lived in M. parish ; declarations of intent made at the time of execution were held admissible) ; Selwood *v.* Mildmay, 3 Ves. Jr. 306 (bequest of stock "in the four per cent annuities of the Bank of England ;" the testator had only long annuities not four per cents; instructions to his attorney admitted) ; Still *v.* Hoste, 6 Madd. 192 (bequest to "Sophia S., daughter of P. S.;" P. S. had daughters, but none named Sophia ; instructions to scrivener admitted) ; Tindal, C. J., in Miller *v.* Travers, quoted *supra ;* instances cited *ante*, § 290, where the author takes the present view.]

[12] [Doe *v.* Hiscocks, 5 M. & W. 363 (to "my grandson, J. H., eldest son of the said J. H.;" J. H., the father, had a son S., the eldest by his first wife, and a son J. H., the eldest by his second wife ; instructions and declarations excluded, almost solely on the authority of Miller *v.* Travers, *supra ;* the decision thus rests on a direct misunderstanding) ; Bernasconi *v.* Atkinson, 10 Hare 345 (following Doe *v.* Hiscocks) ; Drake *v.* Drake, 8 H. L. C. 172, 175 (resting solely on Doe *v.* Hiscocks) ; Charter *v.* Charter, L. R. 7 H. L. 364 (by three judges ; but Lord Selborne, one of them, added, "Why the law should be so . . . I am not sure that I clearly understand ;" the preceding cases were held to control). Professor Thayer, Preliminary Treatise, 480, accepts this result as sound.]

[13] [The question has not often been discussed, because of a tendency to ignore the distinction between declarations of intention and other evidence; *admitted :* Covert *v.* Selbern, 73 Ia. 564 ; Lassing *v.* James, 107 Cal. 348; Gordon *v.* Burris, 141 Mo. 602 ; *excluded :* Eckford *v.* Eckford, Ia., 53 N. W. 344 ; Judy *v.* Gilbert, 77 Ind. 96; Funk *v.* Davis, 122 id. 281 ; Ehrman *v.* Hoskins, 57 Miss. 192.]

times, for example, it is said that outside circumstances may be considered to identify and apply the description, and if a single object is found which exactly fits the description, then that object alone will be taken as designated by the terms of the document; sometimes it is said that where no ambiguity exists, no facts showing a peculiar intent will be considered. These varying phrasings, however, seem to rest on the same general notion, that, where the literal terms of the document have a clear and precise significance according to general standards, then the process of appealing to the individual standard of party or parties making the document, and of showing the application or sense of the words to have been used by them peculiarly and differently from the ordinary or apparent one, will be prohibited. This attitude may be partly accounted for historically, as a survival of an early scholastic and narrow view of the limits of interpretation,[1] partly (in the American cases) by a misapplication of the preceding exclusionary rule about declarations of intention to the whole field of interpretative data.[2] But it will be seen that it can have no justification in principle. The object of interpretation, as already explained, is to discover and enforce the terms of the document in the sense employed by the party (if one only) or parties (if two or more); and it cannot matter what other persons might have signified by the words, if the party himself has not used them in that significance. It may be difficult, in a given instance, to believe that the party did use them in a peculiar and (to others) unnatural sense, and the evidence may be in a given case insufficient to convince that he did; but if it can be shown beyond doubt that he did, then there is no legal reason why his sense and application of the words should not be enforced and why the data that show it should not be considered. "No amount of evidence," said Sir George Jessel, Master of the Rolls, in a well-known witticism, "would convince him that black was white;"[3] but it is one thing not to be convinced by the evidence in a given case, and a very different thing not to listen to evidence at all or not to accept the consequences if the evidence does convince. The truth is that this rule about not disturbing a clear meaning, so far as it should have any recognition, ought to be (in the epigrammatic phrase of Lord Justice Bowen[4]) "not so much a canon of construction as a counsel of caution."

To-day this supposed rule has an anomalous standing. On the one hand, we find it frequently mentioned and occasionally enforced; on the other hand, we find rulings which clearly demonstrate that it

[1] [This history is fully expounded by Professor Thayer, Preliminary Treatise, 410, 445.]

[2] [Usually by treating that rule as equivalent to the exclusion of all "parol evidence" unless an "ambiguity" existed.]

[3] [Mitchell *v.* Henry, 24 Sol. Journ. 690; 15 Ch. D. 181; the question was whether the term "white selvage" could be shown by trade usage to be applicable to an article which to ordinary observers was dark gray or black.]

[4] [*Re* Jodrell, 44 Ch. D. 590.]

has no necessary part and no established status in the law. (1) In the case of *wills*, it has been repudiated in several rulings which go to the extreme in illustrating the true process of interpretation, namely, that of finding and enforcing the sense used by the testator, no matter what the sense obtaining among other persons; the possible result of this process is typified in Chief Justice Doe's summing up,[5] that "a person known to the testator as A. B., and to all others as C. D., may take a legacy given to A. B.;"[6] a frequent field for the process is in enforcing the testator's individual usage of terms which ordinarily have a fixed legal significance of a different purport.[7] On the other hand, there are many rulings in which the apparent or natural sense has been enforced, and no showing of the testator's individual and abnormal usage has been allowed.[8] (2) In the case of *contracts* and *deeds*, the standard of usage is changed, *i. e.* it is the joint sense

[5] [Tilton *v.* Amer. Bible Soc'y, 60 N. H. 377.]

[6] [Some of the cases are as follows: Ryall *v.* Hannam, 10 Beav. 536 ("to Elizabeth Abbott, a natural daughter of E. A., of the parish of G., single woman, and who formerly lived in my service;" on data too numerous to note here, this description was held to signify John, the natural son of E. A., then married); Parsons *v.* Parsons, 1 Ves. Jr. 266 (to his "brother Edward Parsons;" taken to apply to Samuel P., whom the testator had habitually called Edward; though there was a deceased brother Edward); Beaumont *v.* Fell, 2 P. Wms. 141 (to "Catherine Earnley;" interpreted to apply to one Gertrude Yardley); Blundell *v.* Gladstone, 11 Sim. 467, on appeal in 1 Phillips 279 (particularly the opinion of Patteson, J.); Powell *v.* Biddle, 2 Dall. 70 (to "Samuel P., son of S. P., of the city of Philadelphia, carpenter;" S. P. had sons William and Samuel; the legacy was given to William, on the strength of the testator's usage as to the name); Smith *v.* Kimball, 62 N. H. 606 (to "Meredith Institution;" construed on the facts as applicable to the Kimball Union Academy of Meriden); Ross *v.* Kiger, 42 W. Va. 402 (similar to the preceding case).]

[7] [Doe *v.* Beynon, 12 A. & E. 431 (to "her three daughters;" application to illegitimate daughter, allowed to be evidenced); Grant *v.* Grant, L. R. 5 C. P. 727, per Blackburn, J. ("my nephew, J. G.;" there were two such nephews, sons respectively of the testator's brother and of his wife's brother; the term was held applicable, by the testator's usage, to the latter); *Re* Horner, 37 Ch. D. 695 (to "my sister C., the wife of T. H.," and on her death, "among her children;" H. was only cohabiting with C., and the testator knew this; but his words were interpreted to signify C.'s illegitimate children); *Re* Jodrell, 44 Ch. D. 590 (to "relatives;" held to apply to "all those the testator had before treated as relatives," even including persons related through illegitimate children); Robb's Estate, 37 S. C. 19, 28, 39 (to "such persons as shall be entitled under the law;" the law did not recognize persons related through illegitimacy; but the testator's usage as applying the terms to such persons was admitted).]

[8] [Stringer *v.* Gardiner, 4 De G. & J. 468 ("my said niece E. S.;" a niece E. S. had died before the date of the will; a granddaughter of this niece, also named E. S., was living; the description was applied to the former, by the present rule); Dorin *v.* Dorin, L. R. 7 H. L. 568 (to "our children;" not applied to two illegitimate children by a person married to the testator just before the making of the will, there being no children after the marriage; the legal meaning held, in defiance of common sense, to apply and to exclude those children); *Re* Fish, 1894, 2 Ch. 83 (to a "niece E. W.;" there was no such niece, but there was a legitimate and an illegitimate grandniece of the wife, each named E. W.; facts showing the applicability of the terms to the latter were excluded); American Bible Soc'y *v.* Pratt, 9 All. 109 ("Dedham Bank;" there was such a bank, but also a Dedham Institution for Savings; facts showing the applicability of the term to the latter were excluded); Tucker *v.* Seaman's Aid Society, 7 Met. 188 (to "the Seaman's Aid Society in the city of Boston;" there were two societies, one named as above, the other named the Seaman's Friend Society; the bequest given to the former, by the present rule); Flora *v.* Anderson, U. S. App., 67 Fed. 182; see other instances *ante*, §§ 288, 290, 295.]

of the parties that it is to be sought;[9] but if it can be clearly discovered, in the shape of usage or express agreement, there is on principle no objection to it merely on the score that it varies, however widely, from the natural or common or legal sense of the terms. Such is the attitude of many Courts.[10] But here also we find many rulings adopting the principle that a clear meaning cannot be overturned, by any express understanding or special usage.[11]]

§ 305 *m*. **Same: (3) Rule against correcting a False Description.** [A doctrine has obtained some footing in the United States that where a description does not apply exactly to any object, but applies partly to one or partly to another, no data at all can be considered to interpret and apply the description to an object which would be sufficiently and correctly described if a part of the terms of the writing were omitted. This result seems to have been reached in part by the influence of the supposed rule (just explained) against disturbing a clear meaning, and in part by the influence of the Baconian phrases about ambiguities, *i. e.* it is argued in such rulings that there is no ambiguity in such a case, and then it is assumed (forgetting that the excluding rule — *ante*, § 305 *k*, — to which there is an exception for ambiguities or equivocations, affects merely declarations of intention)

[9] [*Ante*, § 305 *i*.]

[10] [Mitchell *v.* Henry, L. R. 15 Ch. D. 181 (stated *supra*, n. 3; James, L. J., said: "The question is not whether the selvage is white, but whether it is what the trade know as a white selvage"); Cochran *v.* Retberg, 3 Esp. 121 (vessel to pay "five guineas a day demurrage;" custom not to reckon Sundays and holidays, held to prevail); Grant *v.* Maddox, 15 M. & W. 737 (actress' engagement for "three years," at a certain salary "per week in those years respectively;" custom to exclude vacation-weeks, held to prevail); Myers *v.* Sarl, 3 E. & E. 306 (contract conditioned on "weekly account of the work done;" trade usage held to prevail; Blackburn, J.: "Every individual case must be decided on its own grounds"); Higgins *v.* Cal. P. & A. Co., Cal., 52 Pac. 108 (contract to pay "fifty cents per ton for each and every gross ton;" a statute provided that 20 cwt. constituted a ton; the parties' usage as signifying 2240 pounds was held to prevail; the opinion of Temple, J., is valuable); Sullivan *v.* Collins, Cal., 39 Pac. 334 (usage may prevail to apply a tax-deed description to property otherwise named in the tax-list); Leavitt *v.* Kinnicutt, 157 Ill. 235 (like Grant *v.* Maddox, *supra*); McChesney *v.* Chicago, 173 id. 75 ("Sec. 23, 18, 14," interpreted by usage to mean "range 38, township 14"); Brody *v.* Chittenden, Ia., 76 N. W. 1009 ("furniture" interpreted by usage to cover jewelers' tools, etc.); Brown *v.* Doyle, Minn., 72 N. W. 814 (warranty of a horse as "sure foal-getter;" evidence admitted to show "sure" to mean 60 per cent); Com. *v.* Hobbs, 140 Mass. 443 ("white arsenic," in fact colored with lamp-black, "still remained the substance known as white arsenic"); Farnum *v.* R. Co., 66 N. H. 569 ("noiseless steam motor;" technical application to motors making some noise, allowed); Read *v.* Tacoma Assoc., 2 Wash. 198 (deed running a line "west;" custom to run such lines a little north of west, admitted).]

[11] [Balfour *v.* Fresno C. & I. Co., 109 Cal. 221; Harrison *v.* Tate, 100 Ga. 383; Armstrong *v.* Granite Co., Ill., 42 N. E. 186; Allen *v.* Kingsbury, 16 Pick. 238 ("evidence of usage is never to be received to overturn the words of a deed"); Brackett *v.* Bartholomew, 6 Met. 396; Goode *v.* Riley, 153 Mass. 585 ("You cannot prove a mere private convention between the 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 500 feet they agreed it should mean 100 inches, or that Bunker Hill Monument should signify the Old South Church;" as to this, the sufficient answer is that the real significance of a large proportion of commercial cipher telegrams could then never be proved); Brown *v.* Schiappacassee, Mich., 72 N. W. 1096; First N. B'k of Nashville *v.* R. Co., Tenn., 46 S. W. 312; Standard S. M. Co. *v.* Leslie, 46 U. S. App. 680; see other instances *ante*, §§ 280, 292.]

that, not merely declarations of intention, but all circumstances whatever, helping to interpret the description, are to be excluded.[1] There is no support on principle, or in orthodox precedent, for such a result; the process is merely that of applying or interpreting a description, and of perceiving, upon the comparison of the terms with an external object, that one or more terms are non-essential and superfluous, and that the remainder are vital and decisive indices of description. Thus, if a will gives property to "James Winchendon, native of Portland, Maine, husband of my daughter Sarah, carpenter by trade, and residing at No. 48 West Street, Jamesville," and we find a person who fulfils all these terms except that he lives at No. 348 West Street, we may treat that term of the description as non-essential, and still be satisfied that a person fulfilling the other and essential terms is the one signified. This process, as including an examination of all the circumstances, a rejection of part of the description as superfluous, and an application of the remainder to an object fulfilling it, is correct on principle, whether it is as simple as in the above instance or more extensive and radical; the only question can be whether in a given instance the circumstances sufficiently convince us that a certain part of the description may be rejected as non-essential and superfluous. This result has long been established in England.[2] In the United States no difficulty seems to have been experienced in cases other than wills of land containing erroneous descriptions. In deeds of land it seems to be generally accepted (according to the maxim, *falsa demonstratio non nocet*) that the process of ascertaining what terms (*e. g.* courses and marks) may be rejected as non-essential, and of considering the circumstances for that purpose, is a proper one; the

[1] [This attitude is seen in the dissenting opinion in Patch *v.* White, 117 U. S. 210, cited *post*, where, after much reference to ambiguities, it is finally said: "If there is any proposition settled in the law of wills, it is that extrinsic evidence is inadmissible to show the intention of the testator, unless it be to explain a latent ambiguity;" here the real rule referred to is the rule excluding declarations of intention; and this unfortunate confusion of declarations of intention with all "extrinsic evidence" whatever is frequently found as the source of erroneous rulings.]

[2] [Co. Litt. 3*a*: "If lands be given to Robert, Earl of Pembroke, where his name is Henry, . . . in these and like cases there can be but one of that dignity or name, and therefore such a grant is good, albeit the name of baptism is mistaken;" Goodtitle *v.* Southern, 1 M. & S. 299 ("all my farm, lands, and hereditaments called T. farm, . . . now in the occupation of A. C.;" though two closes of T. farm were occupied by M., the whole was held to pass); Doe *v.* Huthwaite, 3 B. & Ald. 632 (to "G. H., eldest son of J. H., etc., in default, etc., to S. H., second son of J. H., etc., in default, etc., to J. H., third son of J. H.;" in fact, S. H. was third son and J. H. second son; circumstances considered to show which part of the description was essential); Doe *v.* Hiscocks, 5 M. & W. 363 (similar ruling; see citation *ante*, § 305 *k*, n. 12); Camoys *v.* Blundell, 1 H. L. C. 778 (similar ruling; same will as in Blundell *v.* Gladstone, *ante*, § 305 *l*, n. 6. Lord Brougham: "The object must be to get at the meaning of the testator in the best way you can"); Bernasconi *v.* Atkinson, 10 Hare 345 (similar ruling); Drake *v.* Drake, 8 H. L. C. 172 (similar ruling); Charter *v.* Charter, L. R. 7 H. L. 982 (similar ruling, by divided Court); Cowen *v.* Truefitt, 1893, 2 Ch. 551 (deed of rooms on second floor of Nos. 13 and 14, Old Bond Street, with free ingress "through the staircase and passage of No. 13;" there was a staircase and passage in No. 14, but none in No. 13; the words "of No. 13" rejected as *falsa demonstratio*).]

only limitation being that enough must remain to indicate the land with certainty.[3] Where a will is involved, a distinction may conceivably, though perhaps not properly, be taken between a will devising "all my land, to wit," followed by the description in question, and a will not so premising ownership; in the former case, if the description names "the S. E. ¼ of the N. E. ¼ of sect. 36, t. 18, r. 10," and the testator owns no such land, but owns the S. W. ¼ of the N. E. ¼, then the whole description may be interpreted to read, omitting the first term as non-essential, "my land in the N. E. ¼," etc., which is easily applied; in the latter case, there being no such preliminary term in the will, the description, omitting the first part, would run, "the N. E. ¼ of sect. 36," etc., which could not be enforced, because the testator does not own the whole N. E. ¼.[4] Thus we have a further distinction between rulings which regard it possible to imply such a term as "my land," where it is wanting, and rulings which regard such an implication as improper.[5] Of the general state of the rulings it may be said (1) that the process of ascertaining the non-essential terms, by considering all the circumstances and by applying the description with the omission of the non-essential terms, is in the United States almost everywhere treated (as it is in England) as proper; (2) that where it is necessary, in order to obtain a sufficient description, to imply into the will such a term as "land belonging to me," there are varying rulings (in the few instances where the question has been raised), even by Courts of the same jurisdiction.[6]]

[3] [*Ante*, § 301 ; see other examples in Fancher *v.* De Montegre, 1 Head 40 ; Higdon *v.* Rice, 119 N. C. 623 ; Davidson *v.* Shuler, ib. 582, and cases cited ; New York L. I. Co. *v.* Aitkin, 125 N. Y. 661 ; Gordon *v.* Kitrell, Miss., 21 So. 922; Rushton *v.* Hallett, Utah, 30 Pac. 1014.]

[4] [The controversy has centred around the case of Kurtz *v.* Hibner, 55 Ill. 514; criticised by Judge Redfield of Vermont in 10 Amer. Law Reg. N. s. 93, and defended by Judge Caton of Illinois, ib. 353, and by Julius Rosenthal, Esq., of Chicago, in Chicago Legal News, March 18, 1871. In that case, the devise was of "the west half of the southwest quarter of section 32, township 35, range 10, containing eighty acres ;" it was offered to show, among other circumstances, that the testator owned only one 80-acre tract in township 35, but in section 33, and that by the draughtsman's mistake "32" had been written instead of "33 ;" and a similar showing was offered as to another bequest. The second part of this evidence (as to mistake) was rightly rejected, but the Court excluded the first part also, and it is from this latter point of view that the ruling is to be questioned and has been the subject of controversy. The Court laid stress on the fact that there were no other words in the will by which the description could be applied to section 33.]

[5] [The answer to the above suggestions seems to be that it is not necessary to imply any terms at all into the will ; that the inquiry is merely what object the description as a whole signifies in the light of the circumstances ; and that the circumstance of the testator's owning *e. g.* one quarter-section and not owning another may suffice to indicate that the description taken as a whole was applied to the former, even though it is not literally accurate in common usage. If there were a bequest to "James Ryder," and the testator's usage applied this name to Joseph Ryder of Jamestown, it would be useless to argue that, by striking out the incorrect "James," the remaining "Ryder" could not be applied to that particular Ryder named Joseph because that would mean implying the word "Joseph" or "of Jamestown" into the will; and yet the two arguments seem to rest on the same footing.]

[6] [The question seems to have arisen chiefly in Illinois, Indiana, and Iowa, but in none of these jurisdictions, particularly in Illinois, are the successive rulings con-

§ 305 *n*. **Discriminations.** [There are some uses of data dealing with a testator's intention, which must be discriminated from the preceding questions, because they do not in strictness involve a question of the interpretation of the document, but of getting at the testator's actual intention (as distinguished from the significance of his testamentary words). The question involved in them is whether by the substantive law his intention will be given any effect for the purpose in hand. (1) It has already been seen that a mistake in writing the wrong words or signing the wrong document, *i. e.* the intention to make a different document, is on principles of substantive law usually not to be considered for the purpose of invalidating the document as signed (*ante*, § 305 *e*); nevertheless, there are possible instances in which this may exceptionally be allowed in the case of a will (*ante*, § 305 *c*); but if this is allowed to be done, it is in no sense a process of interpretation of the testamentary act, but of invalidating or reforming it. (2) By the law of wills, there may be certain consequences prescribed as to the devolution of the estate in the absence of an expressed intent to the contrary; where this is the case, the intent may come in issue as an independent fact under such a rule. (*a*) Thus, the rule that the personal estate undisposed of should vest in the executor, but that a gift to the executor would suffice to indicate an intent not to give him the surplus, allowed the testator's intent to be inquired into for the purpose of "rebutting the equity" against the executor created by such a gift. By statute this rule has in England been so changed that the executor is not to take unless the contrary intention appears in the will itself.[1] (*b*) By statute, in some jurisdictions, children omitted from the provisions of a will are nevertheless to be given a proportionate share of the estate, unless the intent to disinherit is clearly apparent; here the intent is made an inde-

sistent: Donehow *v.* Johnson, 113 Ala. 126; Kurtz *v.* Hibner, 55 Ill. 514 (referred to *ante*); Bowen *v.* Allen, 43 id. 53; Bishop *v.* Morgan, 82 id. 351 (the dissenting opinion of Dickey, J., is valuable); Einmert *v.* Hayes, 89 id. 16; Decker *v.* Decker, 121 id. 341 (practically overruling Kurtz *v.* Hibner); Bingel *v.* Volz, 142 id. 214 (following Kurtz *v.* Hibner); Hallady *v.* Hess, 147 id. 588; Cleveland *v.* Spillman, 25 Ind. 95; Judy *v.* Gilbert, 77 id. 96; Funk *v.* Davis, 112 id. 281; Sturgis *v.* Work, 122 id. 134; Rook *v.* Wilson, 142 id. 24; Hartwig *v.* Schiefer, 147 id. 64; Fitzpatrick *v.* Fitzpatrick, 36 Ia. 674; Christy *v.* Badger, 72 id. 581; Covert *v.* Sebern, 73 id. 564; Eckford *v.* Eckford, id., 53 N. W. 344; Wilson *v.* Stevens, Kan., 51 Pac. 903; Riggs *v.* Myers, 20 Mo. 239; Gordon *v.* Burris, 141 id. 602; Winkley *v.* Kaime, 32 N. H. 268 (useful case); Jackson *v.* Sill, 11 Johns. 201; Scates *v.* Henderson, 44 S. C. 548; Minor *v.* Powers, Tex., 24 S. W. 710; Patch *v.* White, 117 U. S. 210; Wildberger *v.* Check, 94 Va. 517; Ross *v.* Kiger, 42 W. Va. 402; *ante*, § 301.

From the above cases should be distinguished those in which a real equivocation exists, *e. g.* where a deed or will names "the S. E. ¼ of the N. W. ¼ of sect. 10," but does not name range or township, county or State; here the description is equally and correctly applicable to several pieces of land, and the case is analogous to a bequest to "John Smith;" in such cases, even declarations of intention would be admissible (*ante*, § 305 *k*); and it is clear that at least the circumstances may be looked to in applying the equivocal description: see instances; Hallady *v.* Hess, 147 Ill. 588; Ill. Cent. R. Co. *v.* LeBlanc, 74 Miss. 650; Ladnier *v.* Ladnier, id., 23 So. 430; and cases cited therein.]

[1] [*Ante*, § 296; Jarman, Wills, 6th Am. ed. 391.]

pendent issue, as affecting the disposition provisionally prescribed by this rule of law; the question may also arise whether the disinheriting intent is to be sought exclusively in the will.[2] (*c*) A similar inquiry may arise as to whether a will was intended to be an execution of a power.[3]]

[2] [See *Re* Salmon's Estate, 107 Cal. 614; Hawle *v.* R. Co., 165 Ill. 561; Ingersol *v.* Hopkins, 170 Mass. 401; Carpenter *v.* Snow, Mich., 76 N. W. 78; Atwood's Estate, 14 Utah 1.]

[3] [See Emery *v.* Haven, N. H., 35 Atl. 940.]

CHAPTER XXII.

WITNESSES: ATTENDANCE IN COURT, AND TESTIMONY BY DEPOSITION.

§§ 306–308. Classification.

1. *Attendance to testify in Person.*

§ 309. *Subpœna.*
§ 310. Fees and Expenses: (1) Civil Cases.
§ 311. Same: (2) Criminal Cases.
§ 312. Witness in Custody.
§ 313. Recognizance.
§ 314. Time of Service of *Subpœna.*
§ 315. Manner of Service.
§ 316. Protection from Arrest.
§ 317. Same: Persons included.
§ 318. Same: Remedy.
§ 319. Failure to attend, as a Contempt.

2. *Testifying by Deposition.*

§ 320. At Common Law.
§§ 321, 322. By Statute.
§ 323. Same: Magistrate's Certificate; Mode of objecting.
§§ 324, 325. *Dedimus Potestatem;* Depositions *in Perpetuam.*

§ 306. **Classification.** Having thus considered the general nature and principles of evidence, and the rules which govern in the production of evidence, we come now, in the third place, to speak of the instruments of evidence or the means by which the truth in fact is established. In treating this subject, we shall consider how such instruments are obtained and used, and their admissibility and effect.

§ 307. The instruments of evidence are divided into two general classes; namely, unwritten and written. The former is more naturally to be first considered, because oral testimony is often the first step in proceeding by documentary evidence, it being frequently necessary first to establish, in that mode, the genuineness of the documents to be adduced.

§ 308. By unwritten or oral evidence is meant the testimony given by witnesses, *viva voce*, either in open court or before a magistrate acting under its commission or the authority of law. Under this head it is proposed briefly to consider the method, in general, of procuring the attendance and testimony of witnesses; the competency of witnesses; the course and practice in the examination of witnesses; and herein of the impeachment and the corroboration of their testimony.

1. *Attendance to testify in Person.*

§ 309. **Subpœna.** And, first, in regard to the method of procuring the attendance of witnesses, it is to be observed that every Court, having power definitely to hear and determine any suit, has, by the common law, inherent power to call for all adequate proofs of the

facts in controversy, and, to that end, to summon and compel the attendance of witnesses before it.[1] The ordinary summons is a writ of *subpœna*, which is a judicial writ, directed to the witness, commanding him to appear at the court to testify what he knows in the cause therein described, pending in such court, under a certain penalty mentioned in the writ. If the witness is expected to produce any books or papers in his possession, a clause to that effect[2] is inserted in the writ, which is then termed a *subpœna duces tecum.*[3] The writ of *subpœna* suffices for only one sitting or term of the Court. If the cause is made a *remanet*, or is postponed by adjournment to another term or session, the witness must be summoned anew. The manner of serving the *subpœna* being in general regulated by statutes, or rules of Court, which in the different States of the Union are not perfectly similar, any further pursuit of this part of the subject would not comport with the design of this work.[4] And the same observation may be applied, once for all, to all points of practice in matters of evidence which are regulated by local law.

§ 310. **Fees and Expenses: (1) Civil Cases.** In order to secure the attendance of a witness in civil cases, it is requisite, by Stat. 5 Eliz. c. 9, that he "have tendered to him, according to his countenance or calling, his reasonable charges." Under this statute it is held necessary, in England, that his reasonable expenses, for going to and returning from the trial, and for his reasonable stay at the place, be tendered to him at the time of serving the *subpœna;* and, if he appears, he is not bound to give evidence until such charges are actually paid or tendered,[1] unless he resides, and is summoned to testify,

[1] {For the power of a Legislature to compel the attendance of witnesses, see *post*, § 319, note.}

[2] {The *subpœna* must in this case call him to testify, as well as to produce: Murray *v.* Elston, 23 N. J. Eq. 212.}

[3] This additional clause is to the following effect: "And also, that you do diligently and carefully search for, examine, and inquire after, and bring with you and produce, at the time and place aforesaid, a bill of exchange, dated," etc. (here describing with precision the papers and documents to be produced), "together with all copies, drafts, and vouchers, relating to the said documents, and all other documents, letters, and paper writings whatsoever, that can or may afford any information or evidence in said cause; then and there to testify and show all and singular those things which you (or either of you) know, or the said documents, letters, or instruments in writing do import, of and concerning the said cause now depending. And this you (or any of you) shall in no wise omit:" 3 Chitty's Gen. Practice, 830, n.; Amey *v.* Long, 9 East 473; {U. S. *v.* Babcock, 3 Dill. U. S. 568 ("the papers are required to be stated or specified only with that degree of certainty which is practicable considering all the circumstances of the case, so that the witness may be able to know what is wanted of him and to have the papers at the trial so that they can be used if the Court shall then determine them to be competent and relevant evidence"); to require a solicitor to produce all his books, papers, etc., relating to all dealings between him and a party to the suit during a term of thirty-three years is too vague: Lee *v.* Angas, L. R. 2 Eq. 59.} [The *subpœna* is not necessary if the documents are in Court: Hunton *v.* Hertz & H. Co., Mich., 76 N. W. 1041.]

[4] The English practice is stated in 2 Tidd's Prac. (9th ed.) 805–809; 1 Stark. Evid. 77 *et seq.*; 3 Chitty's Gen. Prac. 828–834; 2 Phil. Evid. 370–392.

[1] Newton *v.* Harland, 9 Dowl. 16; Atwood *v.* Scott, 99 Mass. 177. {A party as a witness has the same privilege: Penny *v.* Brink, 75 N. C. 68.}

within the weekly bills of mortality; in which case it is usual to leave a shilling with him upon the delivery of the *subpœna* ticket. These expenses of a witness are allowed pursuant to a scale, graduated according to his situation in life.[2] But 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 trial and back, without regard to the employment of the witness, or his rank in life. The sums paid are not alike in all the States, but the principle is believed to be everywhere the same. In some States, it is sufficient to tender to the witness his fees for travel, from his home to the place of trial, and one day's attendance, in order to compel him to appear upon the summons; but in others, the tender must include his fees for travel in returning.[3] Neither is the practice uniform in this country, as to the question whether the witness, having appeared, is bound to attend from day to day, until the trial is closed, without the payment of his daily fees; but the better opinion seems to be, that without payment of his fees, he is not bound to submit to an examination.[4] {Where a witness attends for two or more cases tried together, it may be proper to allow attendance fees for all and travelling-expenses for one.[5]} It has been held that for witnesses brought from another State, no fees can be taxed for travel, beyond the line of the State in which the cause is tried.[6] But the reasons for these decisions are not stated, nor are they very easily perceived. In England, the early practice was to allow all the expenses of bringing over foreign witnesses, incurred in good faith; but a large sum being claimed in one case, an order was made in the Common Pleas that no costs should be allowed, except while the witness was within the reach of process.[7] This order was soon afterwards rescinded, and the old practice restored;[8] since which the uniform course, both in that court and in B. R., has been to allow all the actual expenses of procuring the attendance of the witness, and of his return.[9] {The party summoning is of course ordinarily the one to pay the fees; and

[2] 2 Phil. Evid. pp. 375, 376; 2 Tidd's Prac. (9th ed.) p. 806.

[3] The latter is the rule in the courts of the United States. See Conkling's Practice, pp. 265, 266 [U. S. R. S. § 848.]

[4] 1 Paine & Duer's Practice 497; Hallet *v.* Mears, 13 East 15, 16, n.; Mattocks *v.* Wheaton, 10 Vt. 493; {see Bliss *v.* Brainerd, 42 N. H. 255.}

[5] {See Barker *v.* Parsons, 145 Mass. 203; Vernon G. & R. Co. *v.* Johnson, 108 Ind. 128.}

[6] Howland *v.* Lenox, 4 Johns. 311; Newman *v.* Atlas Ins. Co., Phillip's Digest, 113; Melvin *v.* Whiting, 13 Pick. 190; White *v.* Judd, 1 Met. 293; {Kingfield *v.* Pullen, 54 Me. 398; Crawford *v.* Abraham, 2 Or. 163; *contra:* Dutcher *v.* Justices, 38 Ga. 214. So in the Federal Court, where the witness is more than one hundred miles from the place of trial and without the district: Anon., 5 Blatchf. 134; The Leo, 5 Bened. 486.}

[7] Hagedorn *v.* Allnut, 3 Taunt. 379.

[8] Cotton *v.* Witt, 4 Taunt. 55.

[9] Tremain *v.* Barrett, 6 Taunt. 88; 2 Tidd's Pr. 814; 2 Phil. Evid. 376 (9th ed.); and see Hutchins *v.* State, 8 Mo. 288.

even when it is the practice for the party who summons a witness to produce him for cross-examination if he is notified that the other side wishes to cross-examine (otherwise the witness not appearing again), the fees for this second appearance of the witness must be paid by the party who originally summoned him, not the party cross-examining him.[10]} An additional compensation, for loss of time, was formerly allowed to medical men and attorneys; but that rule is now exploded. But a reasonable compensation paid to a foreign witness, who refused to come without it, and whose attendance was essential in the cause, will in general be allowed and taxed against the losing party.[11] There is also a distinction [with reference to the privilege of refusing to testify without extra compensation] between a witness to facts, and a witness selected by a party to give his opinion on a subject with which he is peculiarly conversant from his employment in life. The former is bound, as a matter of public duty, to testify to facts within his knowledge; the latter is under no such obligation; and the party who selects him must pay him for his time, before he will be compelled to testify.[12] [But though this distinction may once have been the common law of England,[13] it has been almost universally repudiated in this country.[14] This result may be justified on these grounds: (1) The expert is not asked to render professional services as a physician, chemist, etc.; he is asked merely to tell what he knows, as other witnesses are; (2) the hardship on the expert who loses his day's fees is no greater, relatively, than upon the merchant or the mechanic who loses his day's earnings; (3) it is only by accident, and not by premeditation or deliberate resolve with reference to the litigation, that either has become desirable as a source of evidence; (4) so far as concerns the collateral policy of not deterring possible witnesses, no one will ever decline to enter a professional calling because of the fear of being called upon to spend his time gratuitously at trials, but persons are often deterred from observing an accident, etc., because of

[10] {Richards *v.* Goddard, L. R. 17 Eq. 238.}

[11] See Lonergan *v.* Assurance, 7 Bing. 725, ib. 729; Collins *v.* Godfrey, 1 B. & Ad. 950.

[12] Webb *v.* Page, 1 C. & K. 23; {Clark *v.* Gill, 1 K. & J. 19; *Re* Working M. M. S., L. R. 21 Ch. D. 831.}

[13] [Which seems doubtful, in view of Collins *v.* Godefroy, 1 B. & Ad. 950, 956; see Rules of Court 1883, Ord. 37, R. 9; Ord. 65, R. 27.]

[14] [The leading cases are *Ex parte* Dement, 53 Ala. 389, opinion by Manning, J., and Dixon *v.* People, 168 Ill. 179, opinion by Magruder, J.

Accord: Flinn *v.* Prairie Co., 60 Ark. 204; Board *v.* Lee, 3 Colo. App. 177, 179; Fairchild *v.* Ada Co., Ida., 55 Pac. 654, *semble;* State *v.* Teipner, 36 Minn. 535 (practically overruling Le Mere *v.* McHale, 30 id. 410); Allegheny Co. *v.* Watt, 3 Pa. St. 462; Northampton Co. *v.* Innes, 26 id. 156; Com. *v.* Higgins, 5 Kulp Pa. 269; Summers *v.* State, 5 Tex. App. 365, 377.

Contra: Re Roelker, 1 Sprague 276; U. S. *v.* Howe, 12 Cent. L. J. 192 (both U. S. District Court rulings). In Indiana a constitutional provision forbidding "particular services" to be exacted gratuitously is held to allow a demand for extra compensation: Buchman *v.* State, 59 Ind. 1, 14; see also Daly *v.* Multnomah Co., 14 Or. 20 (left undecided).]

that fear; so that the latter, if either, should be the one to receive extra compensation. — So far, however, as the demand of the Court is not for mere testimony, but for distinctly professional services — *e. g.* a *post mortem* examination,[15] — or for special preparation in order to become competent — *e. g.* attending a trial to listen to testimony to the mental condition of a testator or an accused,[16] — the function of a witness is not involved, and the expert may make his own terms. The question, moreover, whether by the practice of the Court as to costs, a witness or a party may claim extra fees for expert testimony, is a very different one, and depends entirely on local regulations; the expert may not be privileged to refuse to testify without such fees, but he may nevertheless conceivably have a claim by statute for them against the county after testifying, or the party may be entitled to claim them in his costs.]

§ 311. **Same: (2) Criminal Cases.** In criminal cases, no tender of fees is in general necessary, on the part of the government, in order to compel its witnesses to attend; it being the duty of every citizen to obey a call of that description, and it being also a case, in which he is himself, in some sense, a party.[1] But his fees will in general be finally paid from the public treasury. In all such cases, the accused is entitled to have compulsory process for obtaining witnesses in his favor.[2] The payment or tender of fees, however, is not necessary in any case, in order to secure the attendance of the witness, if he has waived it; the provision being solely for his benefit.[3] But it is necessary in all civil cases, that the witness be summoned, in order to compel him to testify; for, otherwise, he is not obliged to answer the call, though he be present in court; but in criminal cases, a person present in court, though he have not been summoned, is bound to answer.[4] And where, in criminal cases, the witnesses for the prosecution are bound to attend upon the summons, without the payment or tender of fees, if, from poverty, the witness cannot obey the summons, he will not, as it seems, be guilty of a contempt.[5]

[15] [Cases in preceding note.]

[16] [People *v.* Montgomery, 13 Abb. Pr. N. S. 207, 238.]

[1] In New York, witnesses are bound to attend for the State, in all criminal prosecutions, and for the defendant, in any indictment, without any tender or payment of fees: 2 Rev. Stat. p. 729, § 65; Chamberlain's Case, 4 Cowen 49. In Pennsylvania, the person accused may have process for his witnesses before indictment: U. S. *v.* Moore, Wallace C. C. 23. In Massachusetts, in capital cases, the prisoner may have process to bring in his witnesses at the expense of the Commonwealth: William's Case, 13 Mass. 501. In England, the Court has power to order the payment of fees to witnesses for the crown, in all cases of felony; and, in some cases, to allow further compensation: Stat. 18 Geo. III, c. 19; Phil. & Am. on Evid. 788, 789; 2 Phil. Evid. 380; 1 Stark. Evid. 82, 83.

[2] Const. U. S. Amendments, art. 6.

[3] Goodwin *v.* West, Cro. Car. 522, 540.

[4] R. *v.* Sadler, 4 C. & P. 218; Blackburn *v.* Hargreave, 2 Lewin Cr. Cas. 259 [Robinson *v.* Trull, 4 Cush. 249.]

[5] 2 Phil. Evid. 379, 383; [U. S. *v.* Durling, 4 Biss. C. C. 509.]

§ 312. **Witness in Custody.** If a witness is in custody, or is in the military or naval service, and therefore is not at liberty to attend without leave of his superior officer, which he cannot obtain, he may be brought into court to testify by a writ of *habeas corpus ad testificandum*. This writ is grantable at discretion, on motion in open court, or by any judge, at chambers, who has general authority to issue a writ of *habeas corpus*. The application, in civil cases, is made upon affidavit, stating the nature of the suit, and the materiality of the testimony, as the party is advised by his counsel and verily believes, together with the fact and general circumstances of restraint, which call for the issuing of the writ; and if he is not actually a prisoner, it should state his willingness to attend.[1] In criminal cases, no affidavit is deemed necessary on the part of the prosecuting attorney. The writ is left with the sheriff, if the witness is in custody; but if he is in the military or naval service, it is left with the officer in immediate command; to be served, obeyed, and returned, like any other writ of *habeas corpus*.[2] If the witness is a prisoner of war, he cannot be brought up but by an order from the Secretary of State; but a rule may be granted on the adverse party, to show cause why he should not consent either to admit the fact, or that the prisoner should be examined upon interrogatories.[3]

§ 313. **Recognizance.** There is another method by which the attendance of witnesses for the government, in criminal cases, is enforced, namely, by recognizance. This is the usual course upon all examinations, where the party accused is committed, or is bound over for trial. And any witness, whom the magistrate may order to recognize for his own appearance at the trial, if he refuses so to do, may be committed. Sureties are not usually demanded, though they may be required, at the magistrate's discretion; but if they cannot be obtained by the witness, when required, his own recognizance must be taken.[1]

§ 314. **Time of Service of Subpœna.** The service of a *subpœna* upon a witness ought always to be made in a reasonable time before trial, to enable him to put his affairs in such order, that his attendance upon the Court may be as little detrimental as possible to his

[1] R. *v.* Roddam, Cowp. 672.

[2] 2 Phil. Evid. 374, 375; Conkling's Pr. 264; 1 Paine & Duer's Pr. 503, 504, 2 Tidd's Pr. 809. {Though the process by which a prisoner is brought before the Court as a witness may be defective, yet when the witness is in court, by virtue of such process, he may be compelled to answer: Maxwell *v.* Rives, 11 Nev. 213.}

[3] Furly *v.* Newnham, 2 Doug. 419.

[1] 2 Hale P. C. 282; Bennet *v.* Watson, 3 M. & S. 1; 1 Stark. Evid. 82; Roscoe's Crim. Evid. p. 87; Evans *v.* Rees, 12 Ad. & El. 55. {See U. S. R. S. § 879. In State *v.* Grace, 18 Minn. 398, it is said to be unjust and oppressive and against common right to commit a witness to jail in default of bail, without some proof of his intent not to appear at the trial.

In California, by statute, the witness for the State in a criminal case, if unable to procure sureties, may be discharged from committal and his deposition taken: People *v.* Lee, 49 Cal. 37.}

interest.[1] On this principle, a summons in the morning to attend in the afternoon of the same day has been held insufficient, though the witness lived in the same town, and very near to the place of trial. In the United States, the reasonableness of the time is generally fixed by statute, requiring an allowance of one day for every certain number of miles distance from the witness' residence to the place of trial; and this is usually twenty miles. But at least one day's notice is deemed necessary, however inconsiderable the distance may be.[2]

§ 315. **Manner of Service.** As to the manner of service, in order to compel the attendance of the witness, it should be personal, since, otherwise, he cannot be chargeable with a contempt in not appearing upon the summons.[1] The *subpœna* is plainly of no force beyond the jurisdictional limits of the court in which the action is pending, and from which it issued; but the courts of the United States, sitting in any district, are empowered by statute [2] to send *subpœnas* for witnesses into any other district, provided that, in civil causes, the witnesses do not live at a greater distance than one hundred miles from the place of trial.[3]

§ 316. **Protection from Arrest.** Witnesses as well as parties are protected from arrest while going to the place of trial, while attending there for the purpose of testifying in the cause, and while returning home, *eundo, morando, et redeundo*.[1] A *subpœna* is not necessary to protection, if the witness have consented to go without one; nor is a writ of protection essential for this purpose; its principal use being to prevent the trouble of an arrest and an application for dis-

[1] Hammond *v.* Stewart, 1 Stra. 510.

[2] Sims *v.* Kitchen, 5 Esp. 46; 2 Tidd's Pr. 806; 3 Chitty's Gen. Pr. 801; 1 Paine & Duer's Pr. 497; {Scammon *v.* Scammon, 33 N. H. 52.}

[1] In some of the United States, as well as in England, a *subpœna* ticket, which is a copy of the writ, or more properly a statement of its substance, duly certified, is delivered to the witness, at the same time that the writ is shown to him: 1 Paine & Duer's Pr. 496; 1 Tidd's Pr. 806; 1 Stark. Ev. 77; Phil. & Am. on Evid. 781, 782; 2 Phil. Evid. 373. But the general practice is believed to be, either to show the *subpœna* to the witness, or to serve him with an attested copy. The writ, being directed to the witness himself, may be shown or delivered to him by a private person, and the service proved by affidavit; or it may be served by the sheriff's officer, and proved by his official return.

[2] Stat. 1793, c. 66; [U. S. R. S. § 876.] {This applies to proceedings in bankruptcy also: *Re* Woodward, 12 Bankr. Reg. 297.}

[3] In most of the States, there are provisions by statute for taking the depositions of witnesses who live more than a specified number of miles from the place of trial. But these regulations are made for the convenience of the parties, and do not absolve the witness from the obligation of personal attendance at the court, at whatever distance it be holden, if he resides within its jurisdiction, and is duly summoned. In Georgia, the depositions of females may be taken in all civil cases: Rev. St. 1815 (by Hotchkiss), p. 586.

[1] This rule of protection was laid down, upon deliberation, in the case of Meekins *v.* Smith, 1 H. Bl. 636, as extending to "all persons who had relation to a suit, which called for their attendance, whether they were compelled to attend by process or not (in which number bail were included), provided they came *bona fide*." Randall *v.* Gurney, 3 B. & Ald. 252; Hurst's Case, 4 Dall. 387; {Com. *v.* Huggeford, 9 Pick. 257.}

charge, by showing it to the arresting officer; and sometimes, especially where a writ of protection is shown, to subject the officer to punishment, for contempt.[2] Preventing, or using means to prevent, a witness from attending court, who has been duly summoned, is also punishable as a contempt of court.[3] On the same principle, it is deemed as a contempt to serve process upon a witness, even by summons, if it be done in the immediate or constructive presence of the court upon which he is attending;[4] though any service elsewhere without personal restraint, it seems, is good. But this freedom from arrest is a personal privilege, which the party may waive; and if he willingly submits himself to the custody of the officer, he cannot afterwards object to the imprisonment, as unlawful.[5] The privilege of exemption from arrest does not extend through the whole sitting or term of the court at which the witness is summoned to attend; but it continues during the space of time necessarily and reasonably employed in going to the place of trial, staying there until the trial is ended, and returning home again. In making this allowance of time, the Courts are disposed to be liberal; but unreasonable loitering and deviation from the way will not be permitted.[6] But a witness is not privileged from arrest by his bail, on his return from giving evidence; and if he has absconded from his bail, he may be retaken, even during his attendance at court.[7]

§ 317. **Same: Persons included.** This privilege is granted in all cases where the attendance of the party or witness is given in any matter pending before a lawful tribunal having jurisdiction of the cause. Thus it has been extended to a party attending on an arbitration, under a rule of court;[1] on the execution of a writ of inquiry;[2] to a bankrupt and witnesses, attending before the commissioners, on notice;[3] to a witness attending before a magistrate, to give his deposition under an order of court;[4] or {before commissioners on the estate of a deceased insolvent;[5] or before a legislative committee.[6]}

[2] Meekins *v.* Smith, 1 H. Bl. 636; Arding *v.* Flower, 8 T. R. 536; Norris *v.* Beach, 2 Johns. 294; U. S. *v.* Edme, 9 S. & R. 147; Sanford *v.* Chase, 3 Cowen 381; Bours *v.* Tuckerman, 7 Johns. 538; {*contra*: *Ex parte* McNeil, 3 Mass. 288, 6 id. 264.}

[3] Com. *v.* Feely, 2 Virg. Cas. 1.

[4] Cole *v.* Hawkins, Andrews 275; Blight *v.* Fisher, 1 Peters C. C. 41; Miles *v.* McCullough, 1 Binn. 77.

[5] Brown *v.* Getchell, 11 Mass. 11, 14; Geyer *v.* Irwin, 4 Dall. 107.

[6] Meekins *v.* Smith, 1 H. Bl. 636; Randall *v.* Gurney, 3 B. & Ald. 252; Willingham *v.* Matthews, 2 Marsh. 57; Lightfoot *v.* Cameron, 2 W. Bl. 1113; Selby *v.* Hills, 8 Bing. 166; Hurst's Case, 4 Dall. 387; Smythe *v.* Banks, ib. 329; 1 Tidd's Pr. 195–197; Phil. & Am. on Evid. 782, 783; 2 Phil. Evid. 374; {Chaffee *v.* Jones, 19 Pick. 260.}

[7] 1 Tidd's Pr. 197; *Ex parte* Lyne, 3 Stark. 470.

[1] Spence *v.* Stuart, 3 East 89; Sanford *v.* Chase, 3 Cowen 381.

[2] Walters *v.* Rees, 4 J. B. Moore 34.

[3] Arding *v.* Flower, 8 T. R. 534; 1 Tidd's Pr. 197.

[4] *Ex parte* Edme, 9 S. & R. 147.

[5] {Wood *v.* Neale, 5 Gray 538.}

[6] {Thompson's Case, 122 Mass. 428; Wilder *v.* Welsh, 1 MacArth. 566.}

It also includes witnesses coming without a *subpœna* from abroad[7] {or from another of the United States, whence he could not be compelled to come.[8] In the case of such non-residents, the object being to encourage them to attend, the exemption extends also to parties as witnesses,[9] and privileges them equally against service on civil process;[10] and in some jurisdictions this policy is treated as applicable also to attendance at a trial in the same State but in another county or district than that in which process would ordinarily be served.[11]}

§ 318. **Same: Remedy.** If a person thus clearly entitled to privilege is unlawfully arrested, the Court, in which the cause is to be, or has been, tried, if it have power, will discharge him upon motion: and not put him to the necessity of suing out process for that purpose, or of filing common bail. But otherwise, and where the question of privilege is doubtful, the Court will not discharge him out of custody upon motion, but will leave him to his remedy by writ; and in either case the trial will be put off until he is released.[1]

§ 319. **Failure to attend, as a Contempt.** Where a witness has been duly summoned, and his fees paid or tendered, or the payment or the tender waived, if he wilfully neglects to appear, he is guilty of a contempt of the process of Court, and may be proceeded against by an attachment.[1] It has sometimes been held necessary that the cause should be called on for trial, the jury sworn, and the witness called to testify;[2] but the better opinion is, that the witness is to be deemed guilty of contempt, whenever it is distinctly shown that he is absent from court with intent to disobey the writ of *subpœna;* and that the calling of him in court is of no other use than to obtain clear evidence of his having neglected to appear; but that is not necessary, if it can be clearly shown by other means that he has disobeyed the order of Court.[3] An attachment for contempt proceeds

[7] Tidd's Practice, I, 195; Norris *v.* Beach, 2 Johns. 294.

[8] {Jones *v.* Knauss, 31 N. J. Eq. 211; Person *v.* Grier, 66 N. Y. 124; May *v.* Shumway, 16 Gray 86.}

[9] {Wilson *v.* Donaldson, 117 Ind. 356; Dungan *v.* Miller, 37 N. J. L. 182.}

[10] {Sherman *v.* Gundlach, 37 Minn. 118; Person *v.* Grier, 66 N. Y. 124; Matthews *v.* Tufts, 87 id. 568; *In re* Healey, 53 Vt. 694; Mitchell *v.* Judge, 53 Mich. 541; s. c. *sub nom.* Mitchell *v.* Wixon, 19 N. W. Rep. 176; Palmer *v.* Rowan, 21 Neb. 452; Compton *v.* Wilder, 40 Oh. St. 130 (summons and arrest); Massey *v.* Colville, 45 N. J. L. 119; Dungan *v.* Miller, 37 id. 182.}

[11] {See Person *v.* Grier, 66 N. Y. 124; Christian *v.* Williams, 35 Mo. App. 303; Mitchell *v.* Judge, 53 Mich. 541; Andrews *v.* Lembeck, 46 Oh. St. 38; Palmer *v.* Rowen, 21 Neb. 452; Massey *v.* Colville, 45 N. J. L. 119.}

[1] 1 Tidd's Pr. 197, 216; 2 Paine & Duer's Pr. 6, 10; Hurst's Case, 4 Dall. 387; *Ex parte* Edme, 9 S. & R. 147; Sanford *v.* Chase, 3 Cowen 381; {see Norris *v.* Beach, 2 Johns. 294; Person *v.* Grier, 66 N. Y. 124.}

[1] Where two *subpœnas* were served the same day, on a witness, requiring his attendance at different places, distant from each other, it was held that he might make his election which he will obey: Icehour *v.* Martin, Busbee Law 478.

[2] Bland *v.* Swafford, Peake's Cas. 60.

[3] Barrow *v.* Humphreys, 3 B. & Ald. 598; 2 Tidd's Pr. 808; {Wilson *v.* State, 57 Ind. 71.}

not upon the ground of any damage sustained by an individual, but is instituted to vindicate the dignity of the Court;[4] and it is said that it must be a perfectly clear case to call for the exercise of this extraordinary jurisdiction.[5] The motion for an attachment should therefore be brought forward as soon as possible, and the party applying must show, by affidavits or otherwise, that the *subpœna* was seasonably and personally served on the witness, that his fees were paid or tendered, or the tender expressly waived, and that everything has been done which was necessary to call for his attendance.[6] But if it appears that the testimony of the witness could not have been material, the rule for an attachment will not be granted.[7] {So, when one is served with a *subpœna duces* requiring him to bring certain public documents which might be proved by copies, his neglect to attend will not justify an attachment for contempt.[8] If the witness has reasonable ground to believe that he will not be wanted at the trial;[9] or has been excused by the attorney of the party who summoned him;[10] or is too poor,[11] no attachment will lie. But a witness who is duly summoned takes the risk if he does not attend so early as he might under the summons, thinking to be able to attend to some other matter before he goes to court;[12] and if it appears that the witness intentionally defied the process of the Court, the fact that his evidence would have been immaterial will not release him from the liability to attachment.[13]} If a case of palpable contempt is shown, such as an express and positive refusal to attend, the Court will grant an attachment in the first instance; otherwise, the usual course is to grant a rule to show cause.[14] It is hardly nec-

[4] 3 B. & Ald. 600, per Best, J. Where a justice of the peace has power to bind a witness by recognizance to appear at a higher court, he may compel his attendance before himself for that purpose by attachment: Bennet *v.* Watson, 3 M. & S. 1; 2 Hale P. C. 282; Evans *v.* Rees, 12 Ad. & El. 55; *supra*, § 313.

[5] Horne *v.* Smith, 6 Taunt. 10, 11; Garden *v.* Creswell, 2 M. & W. 319; R. *v.* Lord J. Russell, 7 Dowl. 693.

[6] 2 Tidd's Pr. 807, 808; Garden *v.* Creswell, 2 M. & W. 319; 1 Paine & Duer's Pr. 499, 500; Conkling's Pr. 265.

[7] Dicas *v.* Lawson, 1 Cr. M. & R. 934.

[8] {Corbett *v.* Gibson, 16 Blatchf. 334.}

[9] {R. *v.* Sloman, 1 Dowl. 618.}

[10] {Farrah *v.* Keat, 6 Dowl. 470.}

[11] {2 Phill. Evid. 383.}

[12] {Jackson *v.* Seager, 2 Dowl. & L. 13.}

[13] {Chapman *v.* Davis, 3 M. & G. 609; Scholes *v.* Hilton, 10 M. & W. 16; apparently overruling Tinley *v.* Porter, 5 Dowl. 744, and Taylor *v.* Willans, 4 M. & P. 59.}

[14] Anon., Salk. 84; 4 Bl. Comm. 286, 287; R. *v.* Jones, 1 Stra. 185; Jackson *v.* Mann, 2 Caines 92; Andrews *v.* Andrews, 2 Johns. Cas. 109; Thomas *v.* Cummins, 1 Yeates 1; Conkling's Pr. 265; 1 Paine & Duer's Pr. 500; 2 Tidd's Pr. 807, 808. The party injured by the non-attendance of a witness has also his remedy, by action on the case for damages, at common law; and a further remedy, by action of debt, is given by Stat. 5 Eliz. c. 9; but these are deemed foreign to the object of this work. {For the power of a Legislature to punish for contempt one who fails to attend as a witness, see Anderson *v.* Dunn, 6 Wheat. 204; Kilbourn *v.* Thompson, 103 U. S. 168; Burnham *v.* Morrissey, 14 Gray 226.}

essary to add, that if a witness, being present in court, refuses to be sworn or to testify, he is guilty of contempt. In all cases of contempt the punishment is by fine and imprisonment, at the discretion of the Court.[15]

2. *Testifying by Deposition.*

§ 320. **At Common Law.** If the witness resides abroad, out of the jurisdiction, and refuses to attend, or is sick and unable to attend, his testimony can be obtained only by taking his deposition before a magistrate, or before a commissioner duly authorized by an order of the court where the cause is pending; and if the commissioner is not a judge or magistrate, it is usual to require that he be first sworn.[1] This method of obtaining testimony from witnesses, in a foreign country, has always been familiar in the courts of admiralty; but it is also deemed to be within the inherent powers of all courts of justice. For, by the law of nations, courts of justice, of different countries, are bound mutually to aid and assist each other, for the furtherance of justice; and hence, when the testimony of a foreign witness is necessary, the court before which the action is pending may send to the court within whose jurisdiction the witness resides, a writ, either patent or close, usually termed a letter rogatory, or a commission *sub mutuæ vicissitudinis obtentu ac in juris subsidium*, from those words contained in it. By this instrument, the court abroad is informed of the pendency of the cause and the names of the foreign witnesses, and is requested to cause their depositions to be taken in due course of law, for the furtherance of justice; with an offer, on the part of the trribunal making the request, to do the like for the other, in a similar case. The writ or commission is usually accompanied by interrogatories, filed by the parties on each side, to which the answers of the witnesses are desired. The commission is executed by the judge, who receives it, either by calling the witness before himself, or by the intervention of a commissioner for that purpose; and the original answers, duly signed and sworn to by the deponent, and properly authenticated, are returned with the commission to the court from which it issued.[2] The

[15] 4 Bl. Comm. 286, 287; R. *v.* Beardmore, 2 Burr. 792. [If several witnesses are arrested for contempt, they should be sentenced separately, and each held responsible for his own costs only: Humphrey *v.* Knapp, 41 Conn. 313.]

[1] Ponsford *v.* O'Connor, 5 M. & W. 673; Clay *v.* Stephenson, 3 Ad. & El. 807.

[2] See Clerk's Praxis, tit. 27; Cunningham *v.* Otis, 1 Gall. 166; Hall's Adm. Pr. part 2, tit. 19, cum. add., and tit. 27, cum. add. pp. 37, 38, 55–60; Oughton's Ordo Judiciorum, vol. i, pp. 150–152, tit. 95, 96. See also id. pp. 139–149, tit. 88–94. The general practice, in the foreign continental courts, is, to retain the original deposition, which is entered of record, returning a copy duly authenticated. But in the common-law courts, the production of the original is generally required: Clay *v.* Stephenson, 7 Ad. & El. 185. The practice, however, is not uniform. See an early instance of

Court of Chancery has always freely exercised this power, by a commission, either directed to foreign magistrates, by their official designation, or, more usually, to individuals by name; which latter course, the peculiar nature of its jurisdiction and proceedings enables it to induce the parties to adopt, by consent, where any doubt exists as to its inherent authority. The Courts of common law in England seem not to have asserted this power in a direct manner, and of their own authority; but have been in the habit of using indirect means to coerce the adverse party into a consent to the examination of witnesses, who were absent in foreign countries, under a commission for that purpose. These means of coercion were various; such as putting off the trial, or refusing to enter judgment, as in case of nonsuit, if the defendant was the recusant party; or by a stay of proceedings, till the party applying for the commission could have recourse to a court of equity, by instituting a new suit there, auxiliary to the suit at law.[3] But, subsequently, the learned judges appear not to have been satisfied that it was proper for them to compel a party, by indirect means, to do that which they had no authority to compel him to do directly; and they accordingly refused to put off a trial for that purpose.[4] This inconvenience was therefore remedied by statutes[5] which provide that in all cases of the absence of witnesses, whether by sickness, or travelling out of the jurisdiction, or residence abroad, the Courts, in their discretion, for the due administration of justice, may cause the witnesses to be examined under a commission issued for that purpose. {Under these

letters rogatory, in 1 Roll. Abr. 530, pl. 15, temp. Ed. I. The following form may be found in 1 Peters C. C. 236, n. (*a*):—

UNITED STATES OF AMERICA.

District of ——, *ss.*

The President of the United States, to any judge or tribunal having jurisdiction of civil causes, in the city (or province) of ——, in the kingdom of ——, Greeting:—

SEAL.

Whereas a certain suit is pending in our —— Court for the District of ——, in which A. B. is plaintiff [or claimant, against the ship ——], and C. D. is defendant, and it has been suggested to us that there are witnesses residing within your jurisdiction, without whose testimony justice cannot completely be done between the said parties; we therefore request you that, in furtherance of justice, you will, by the proper and usual process of your court, cause such witness or witnesses as shall be named or pointed out to you by the said parties, or either of them, to appear before you, or some competent person by you for that purpose to be appointed and authorized, at a precise time and place, by you to be fixed, and there to answer, on their oaths and affirmations, to the several interrogatories hereunto annexed; and that you will cause their depositions to be committed to writing, and returned to us under cover, duly closed and sealed up, together with these presents. And we shall be ready and willing to do the same for you in a similar case, when required. Witness, etc.

[3] Furly *v.* Newnham, Doug. 419; Anon., cited in Mostyn *v.* Fabrigas, Cowp. 174; 2 Tidd's Pr. 770, 810.

[4] Calliand *v.* Vaughan, 1 B. & P. 210. See also Grant *v.* Ridley, 5 Man. & Grang. 203, per Tindal, C. J.; Macaulay *v.* Shackell, 1 Bligh N. S. 119, 130, 131.

[5] 13 Geo. III, c. 63, and 1 W. IV, c. 22; Report of Commissioners on Chancery Practice, p. 109; Second Report of Commissioners on Courts of Common Law, pp. 23, 24.

statutes, such a commission may be issued on the application of a party to the suit, either nominal or real, if the testimony sought is material to the cause; so, when a land company was in the course of liquidation, an application of persons who are substantially mortgage creditors of the company, to have issued a commission to examine witnesses abroad, to test the accuracy of the accounts of the liquidator, was granted, as an incident in the prosecution of the accounts.[6] The commission may issue *ex parte*, on affidavit of applicant that great inconvenience would result otherwise;[7] and it has been held that the Court would not exercise its discretion to grant the commission to examine parties to the action under 1 W. IV, c. 22, unless it were shown, by the party applying therefor, that it is necessary to the due administration of justice; and that it is not enough to show that the plaintiff or defendant lives out of the jurisdiction of the Court.[8]} In general, the examination is made by interrogatories, previously prepared; but, in proper cases, the witnesses may be examined *viva voce*, by the commissioner, who in that case writes down the testimony given; or he may be examined partly in that manner and partly upon interrogatories.[9]

§ 321. **By Statute.** In the United States, provisions have existed in the statutes of the several States, from a very early period, for the taking of depositions to be used in civil actions in the courts of law, in all cases where the personal attendance of the witness could not be had, by reason of sickness or other inability to attend; and also in cases where the witness is about to sail on a foreign voyage, or to take a journey out of the jurisdiction, and not to return before the time of trial.[1] Similar provisions have also been made in many of the United States for taking the depositions of witnesses *in perpetuam rei memoriam*, without the aid of a court of equity, in cases where no action is pending. In these latter cases there is some diversity in the statutory provisions, in regard to the magistrates before whom the depositions may be taken, and in regard to some of the modes of proceeding, the details of which are not within the scope of this treatise. It may suffice to state that, generally, notice must be previously given to all persons known to be interested in the subject-matter to which the testimony is to relate; that the names of the persons thus summoned must be mentioned in the magistrate's certificate or caption, appended to the deposition; and that the deposition is admissible only in case of the death or incapacity of

[6] {*Re* Imperial Land Co., 37 L. T. R. N. S. 588.}

[7] {Spiller *v.* Rink Co., 27 W. R. 225.}

[8] {Castelli *v.* Groom, 16 Jur. 888.} [These matters are now chiefly regulated in England by the Rules of Court of 1883; see the Annual Practice, where the various Orders are given in full with annotations.]

[9] 2 Tidd's Pr. 810, 811; 1 Stark. Evid. 274–278; Phil. & Am. on Evid. pp. 796–800; 2 Phil. Evid. 386–388; Pole *v.* Rogers, 3 Bing. N. C. 780.

[1] See Stat. United States, 1812, c. 25, § 3; [U. S. Rev. St. §§ 863 ff. By c. 4, St. 1892, it is additionally allowed to take depositions in the Federal Courts according to the mode of the State in which the court is held.] In several of the United States, depositions may, in certain contingencies, be taken and used in criminal cases.

the witness, and against those only who have had opportunity to cross-examine, and those in privity with them.[2]

§ 322. In regard, also, to the other class of depositions, namely, those taken in civil causes, under the statutes alluded to, there are similar diversities in the forms of proceeding. In some of the States, the judges of the courts of law are empowered to issue commissions, at chambers, in their discretion, for the examination of witnesses unable or not compellable to attend, from any cause whatever. In others, though with the like diversities in form, the party himself may, on application to any magistrate, cause the deposition of any witness to be taken, who is situated as described in the acts. In their essential features these statutes are nearly alike; and these features may be collected from that part of the judiciary Act of the United States, and its supplements, which regulate this subject.[1] By that act, when the testimony of a person is necessary in any civil cause, pending in a court of the United States, and the person lives more than a hundred miles[2] from the place of trial, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district, and more than that distance from the place of trial, or is ancient, or very infirm, his deposition may be taken *de bene esse*, before any iudge of any court of the United States, or before any chancellor or judge of any superior court of a State, or any judge of a county court, or court of common pleas, or any mayor or chief magistrate of any city[3] in the United States, not being of counsel, nor interested in the suit; provided that a notification from the magistrate before whom the deposition is to be taken, to the adverse party, to be present at the taking, and put interrogatories, if he think fit, be first served on him or his attorney, as either may be nearest, if either is within a hundred miles of the place of caption;[2] allowing time, after the service of the notification, not less than at the rate of one day, Sundays exclusive, for twenty miles' travel.[4] The witness is to

[2] [For the necessity of notice and opportunity to cross-examine, see *ante*, §§ 163 *b*, *c*.]

[1] Stat. 1789, c. 20, § 30; Stat. 1793, c. 22, § 6; [U. S. Rev. St. §§ 863 ff.] This provision is not peremptory; it only enables the party to take the deposition, if he pleases: Prouty *v.* Ruggles, 2 Story, 199; 4 Law Rep. 161.

[2] These distances are various in the similar statutes of the States, but are generally thirty miles, though in some cases less.

[3] In the several States, this authority is generally delegated to justices of the peace.

[4] Under the Judiciary Act, § 30, there must be personal notice served upon the adverse party; service by leaving a copy at his place of abode is not sufficient: Carrington *v.* Stimson, 1 Curtis C. C. 437. The magistrate in his return need not state the distance of the place of residence of the party or his attorney from the place where the deposition was taken: Voce *v.* Lawrence, 4 McLean 203. To ascertain the proper notice in point of time to be given to the adverse party, the distance must be reckoned from the party's residence to the place of caption: Porter *v.* Pillsbury, 36 Me. 278. Where the certificate states simply that the adverse party was not personally present, a copy of the notice, and of the return of service thereof, should be annexed; and if it is not annexed, and it does not distinctly appear that the adverse party was present, either in person or by counsel, the deposition will be rejected: Carlton *v.* Patterson, 9 Foster 580; see also Bowman *v.* Sanborn, 5 id. 87. [For the necessity of notice as giving an opportunity to cross-examine, see *ante*, § 163 *b*.]

be carefully examined and cautioned, and sworn or affirmed to testify the whole truth,[5] and must subscribe the testimony by him given, after it has been reduced to writing by the magistrate, or by the deponent in his presence. The deposition so taken must be retained by the magistrate, until he shall deliver it with his own hand into the court for which it is taken; or it must, together with a certificate of the causes or reasons for taking it, as above specified, and of the notice, if any, given to the adverse party, be by the magistrate sealed up, directed to the court, and remain under his seal until it is opened in court.[6] And such witnesses may be compelled to appear and depose as above mentioned, in the same manner as to appear and testify in court.[7]

§ 323. **Same: Magistrate's Certificate; Mode of Objecting.** The provisions of this act being in derogation of the common law, it has been held that they must be strictly complied with.[1] But if it appears on the face of the deposition, or the certificate which accompanies it, that the magistrate before whom it was taken was duly authorized, within the statute, it is sufficient, in the first instance, without any other proof of his authority;[2] and his certificate will be

[5] Where the State statute requires that the deponent shall be sworn to testify to the truth, the whole truth, etc., "*relating to the cause for which the deposition is to be taken*," the omission of the magistrate in his certificate to state that the witness was so sworn, makes the deposition inadmissible; and the defect is not cured by the addition that "after giving the deposition he was duly sworn thereto according to law:" Parsons *v.* Huff, 38 Me. 137; Brighton *v.* Walker, 35 id. 132; Fabyan *v.* Adams, 15 N. H. 371. It should distinctly appear that the oath was administered where the witness was examined: Erskine *v.* Boyd, 35 Me. 511. {A certificate by the magistrate that the witness was "duly sworn" is sufficient: Gulf City Insurance Co. *v.* Stephens, 51 Ala. 121; so if the caption states that the witness was affirmed by him according to law, for this implies an objection by the witness to swearing: Horne *v.* Haverhill, 113 Mass. 344; but if the caption omits the words "severally make oath and say," or "make oath," or "before me," the deposition is inadmissible: *Ex parte* Torkington, L. R. 9 Ch. 298; Allen *v.* Taylor, L. R. 10 Eq. 52; 39 L. J. Ch. 627; Powers *v.* Shepherd, 21 N. H. 60. So if the witness is sworn to tell the "truth and nothing but the truth:" Call *v.* Perkins, 68 Me. 158. If a form of oath is prescribed by statute, it must be followed, or the deposition will be inadmissible: Bacon *v.* Bacon, 33 Wis. 147.}

[6] The mode of transmission is not prescribed by the statute; and in practice it is usual to transmit depositions by post, whenever it is most convenient; in which case the postages are included in the taxed costs: Prouty *v.* Ruggles, 2 Story 199; 5 Law Reporter 161. Care must be taken, however, to inform the clerk, by a proper superscription, of the nature of the document enclosed to his care; for, if opened by him out of court, though by mistake, it will be rejected: Beal *v.* Thompson, 8 Cranch 70; but see Law *v.* Law, 4 Greenl. 167. {Where, by statute, the magistrate is allowed to return the deposition by *mail*, this does not do away the common-law methods, and he may himself hand the deposition to the clerk: Andrews *v.* Parker, 48 Tex. 94.}

[7] {State *v.* Ingerson, 62 N. H. 438; Burnham *v.* Stevens, 33 id. 247; State *v.* Towle, 42 id. 540.}

[1] Bell *v.* Morrison, 1 Peters 355; The Thomas & Henry *v.* U. S., 1 Brockenbrough 367; Nelson *v.* U. S., 1 Peters C. C. 235; {Jones *v.* Neale, 1 Hughes C. C. 268; Wilson Sewing Machine Co. *v.* Jackson, id. 295.}

[2] Ruggles *v.* Bucknor, 1 Paine 358; Patapsco Ins Co. *v.* Southgate, 5 Peters 604 Fowler *v.* Merrill, 11 How. 375; {Palmer *v.* Fogg, 35 Me. 368; Hoyt *v.* Hammekin, 14 How. 346; Lyon *v.* Ely, 24 Conn. 507; West Boylston *v.* Sterling, 17 Pick. 126; Littlehale *v.* Dix, 11 Cush. 365.}

good evidence of all the facts therein stated, so as to entitle the deposition to be read, if the necessary facts are therein sufficiently disclosed.[3] [The terms of the statute under which the deposition is taken will vary more or less in each jurisdiction as to the preliminary facts required to be shown and the formalities required to be observed; and as the decisions on this subject deal largely with the mere interpretation of the local statutes, they are without the scope of the present work. So far as the common-law principles requiring confrontation and cross-examination are involved, they have been already treated (*ante*, Chap. XVI).] {It may be noted, in general, as to the time when objections to the admission of depositions should be made, that any objection based on a defect or irregularity in the manner of taking the deposition, and which might be remedied by retaking the deposition, should be made as soon as the party objecting finds out the defect, and this will generally be before trial.[4] If a party, knowing of such defect, wait till the trial before objecting to the deposition, he will be held to have waived the objection. His proper course is to move to suppress the deposition. Objections to the substance of the testimony, however, as that the witness is incompetent or the evidence is inadmissible, may be taken at any time before the trial or at the trial.[5]}

§ 324. **Dedimus Potestatem; Depositions in Perpetuam.** By the act of Congress already cited,[1] the power of the Courts of the United States, as courts of common law, to grant a *dedimus potestatem* to take depositions, whenever it may be necessary, in order to prevent a failure or delay of justice, is expressly recognized; and the Circuit Courts, when sitting as Courts of equity, are empowered to direct depositions to be taken *in perpetuam rei memoriam*, according to the usages in Chancery, where the matters to which they relate are cognizable in those courts. A later statute [2] has facilitated the taking of depositions in the former of these cases, by providing that when a commission shall be issued by a Court of the United States, for taking the testimony of a witness, at any place within the United States, or the territories thereof, the clerk of any Court of the United States, for the district or territory where the place may be, may issue a *subpœna* for the attendance of the witness before the commissioner, provided the place be in the county where the witness resides, and not more than forty miles from his dwelling. And if the witness, being duly summoned, shall neglect or refuse to appear, or shall refuse to

[3] Bell *v.* Morrison, 1 Peters 356.

[4] {Leavitt *v.* Baker, 82 Me. 28; Doane *v.* Glenn, 21 Wall. 33; Merchants Dispatch Co. *v.* Leysor, 89 Ill. 43; Stowell *v.* Moore, 89 id. 563; Barnum *v.* Barnum, 42 Md. 251; Vilmar *v.* Schall, 61 N. Y. 564.}

[5] {Eslava *v.* Mazange, 1 Woods C. C. 623; Fielden *v.* Lahens, 2 Abb. App. Dec. 111; Lord *v.* Moore, 37 Me. 208; Whitney *v.* Heywood, 6 Cush. 82.}

[1] Stat. 1789, c. 20, § 30.

[2] Stat. 1827, c. 4. See the practice and course of proceeding in these cases, in 2 Paine & Duer's Pr. pp. 102–110; 2 Tidd's Pr. 810–812; [U. S. Rev. St. §§ 866 ff.]

testify, any judge of the same Court, upon proof of such contempt, may enforce obedience, or punish the disobedience, in the same manner as the Courts of the United States may do, in case of disobedience to their own process of *subpœna ad testificandum*. Some of the States have made provision by law for the taking of depositions, to be used in suits pending in other States, by bringing the deponent within the operation of their own statutes against perjury; and national comity plainly requires the enactment of similar provisions in all civilized countries. But as yet they are far from being universal; and whether, in the absence of such provision, false swearing in such case is punishable as perjury, has been gravely doubted.[3] Where the production of papers is required, in the case of examinations under commissions issued from Courts of the United States, any judge of a Court of the United States may, by the same statute, order the clerk to issue a *subpœna duces tecum* requiring the witness to produce such papers to the commissioner, upon the affidavit of the applicant to his belief that the witness possesses the papers, and that they are material to his case; and may enforce the obedience and punish the disobedience of the witness, in the manner above stated.

§ 325. But independently of statutory provisions, Chancery has power to sustain bills, filed for the purpose of preserving the evidence of witnesses *in perpetuam rei memoriam*, touching any matter which cannot be immediately investigated in a court of law, or where the evidence of a material witness is likely to be lost, by his death, or departure from the jurisdiction, or by any other cause, before the facts can be judicially investigated. The defendant, in such cases, is compelled to appear and answer, and the cause is brought to issue, and a commission for the examination of the witnesses is made out, executed, and returned in the same manner as in other cases; but no relief being prayed, the suit is never brought to a hearing; nor will the Court ordinarily permit the publication of the depositions, except in support of a suit or action; nor then, unless the witnesses are dead, or otherwise incapable of attending to be examined.[4]

[3] Calliand *v.* Vaughan, 1 B. & P. 210.
[4] Smith's Chancery Prac. 284–286.

CHAPTER XXIII.

WITNESSES (CONTINUED): QUALIFICATIONS.

§§ 326, 327. In general.
§ 328 *a*. Proof of Incompetency.

1. *Interest.*

§ 328 *b*. Interest in general as a Disqualification.
§ 328 *c*. Parties in Civil Cases; Testimony to Own Intent.
§ 333 *a*. Defendants in Criminal Cases.
§ 333 *b*. Survivors of a Transaction with a Deceased Person.
§ 333 *c*. Husband and Wife.
§§ 334, 335. Same: Common-law Rule, in general.
§ 336. Same: Matters occurring before Marriage.
§§ 337, 338. Same: Testimony after Death or Divorce.
§ 339. Same: Marriage must be lawful.
§ 340. Same: Waiver of Privilege by the other Spouse.
§ 341. Same: Spouse not a Party, but directly interested.
§ 342. Same: Spouse not legally interested.
§ 343. Same: Exceptions in Cases of Necessity.
§ 344. Same: Secret Facts.
§ 345. Same: High Treason.
§ 346. Same: Dying Declarations.

2. *Oath.*

§ 364 *a*. Object and Nature of the Oath.
§ 364 *b*. Form of the Oath.
§ 367. Capacity to take the Oath; Children.
§ 368. Same: Atheists.
§ 369. Same: Nature of Theological Belief.
§ 370. Same: Mode of ascertaining Belief.
§ 370 *a*. Statutory Changes.

3. *Mental Capacity.*

§ 370 *b*. In general.
§ 370 *c*. Insanity.
§ 370 *d*. Infancy.
§ 370 *e*. Intoxication.

4. *Moral Capacity.*

§ 372. Infamy; Conviction of Crime.
§ 373. Same: Kind of Crime.
§ 374. Same: Exception for a Party.
§ 375. Same: Judgment necessary; Production of Record.
§ 376. Same: Conviction in another Jurisdiction.
§§ 377, 378. Same: Removed by Pardon.
§ 378 *a*. Same: Statutory Changes.
§ 378 *b*. Race, Religious Belief.
§ 379. Accomplices.
§ 380. Same: Corroboration.
§ 381. Same: What amounts to Corroboration.
§ 382. Same: Who are Accomplices.

5. *Experiential Capacity.*

§ 430 *a*. In general.
§ 430 *b*. Foreign Law.
§ 430 *c*. Medical Matters.
§ 430 *d*. Handwriting; Paper-money, etc.
§ 430 *e*. Value.
§ 430 *f*. Discretion of Trial Court.
§ 430 *g*. Opinion Rule.

6. *Knowledge; Personal Observation.*

§ 430 *h*. In general.
§ 430 *i*. Quality of Knowledge; "Belief," "Impression," "Opinion."
§ 430 *j*. Personal Observation, not Hearsay Knowledge.
§ 430 *k*. Same: Testimony to one's own Age.
§ 430 *l*. Same: Medical Man's Knowledge.
§ 430 *m*. Same: Knowledge of Foreign Law.
§ 430 *n*. Same: Knowledge of Values and Prices.
§ 430 *o*. Same: Sundries.
§ 430 *p*. Adequacy of Opportunities of Observation; (1) Sanity; (2) Value.
§ 430 *q*. Testimony based on Telephonic Communication.

§ 326. **In general.** Although, in the ordinary affairs of life, temptations to practise deceit and falsehood may be comparatively few,

and therefore men may ordinarily be disposed to believe the statements of each other; yet, in judicial investigations, the motives to pervert the truth and to perpetrate falsehood and fraud are so greatly multiplied, that if statements were received with the same undiscriminating freedom as in private life, the ends of justice could with far less certainty be attained. In private life, too, men can inquire and determine for themselves whom they will deal with, and in whom they will confide; but the situation of judges and jurors renders it difficult, if not impossible, in the narrow compass of a trial, to investigate the character of witnesses; and from the very nature of judicial proceedings, and the necessity of preventing the multiplication of issues to be tried, it often may happen that the testimony of a witness, unworthy of credit, may receive as much consideration as that of one worthy of the fullest confidence. If no means were employed totally to exclude any contaminating influences from the fountains of justice, this evil would constantly occur. But the danger has always been felt, and always guarded against, in all civilized countries. And while all evidence is open to the objection of the adverse party, before it is admitted, it has been found necessary to the ends of justice that certain kinds of evidence should be uniformly excluded.[1]

§ 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

[1] 4 Inst. 279.

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; not because they may not sometimes state the truth, but because it would ordinarily be unsafe to rely on their testimony. Other causes concur in some of these cases to render the persons incompetent, which will be mentioned in their proper places. We shall now proceed to consider, in their order, each of these classes of persons held incompetent to testify; adding some observations on certain descriptions of persons, held incompetent in particular cases.

§ 328.[1]

§ 328 *a*. **Proof of Incompetency.** [The capacity of an offered witness is in general assumed to exist as to all qualifications except that of experience and knowledge (*post*, §§ 430 *a*–430 *p*), *i. e.* so far as concerns his interest, his capacity to take the oath, his mental capacity, and his moral capacity, it is assumed that he does not belong to one of the forbidden classes of persons, and it is for the opponent to show that he does. So far as there are any exceptions to this, apparent or real, they are noted under the respective heads following. The modes of evidencing the fact of incapacity are either the ordinary one of producing other witnesses to testify to it, or the preliminary examination of the offered person, or both. In the case of a party, it would often be sufficient to call attention to the record. In the case of interest in general, an examination of the offered person, on a preliminary oath, called the *voir dire*, was customary at common law,[1] and the orthodox doctrine was that the opponent might use either the *voir dire* or other testimony, but not both. As to the time of the objection, the general principle is that, if known to the opponent, it should be made before the administration of the oath,[2] or at any rate before the examination in chief has begun;[3] but that if it is not then known, but is later discovered, it may be made as soon as discovered. The peculiarities as to each sort of incompetency are noticed under the respective heads.]

1. *Interest.*

§ 328 *b*. **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

[1] [Transferred *post*, preceding § 365.]

[1] [See §§ 421–424, Appendix II.]

[2] [R. *v.* Frost, 4 State Tr. N. s. 85, 253; § 421, *post*.]

[3] [State *v.* Downs, 50 La. An., 23 So. 456; Pillow *v.* Impr. Co., 92 Va. 144; *post*, § 421.]

theory was that "from the nature of human passions and actions there is more reason to distrust such a biassed testimony than to believe it." [1]

"If it be objected, that interest in the matter in dispute might, from the bias it creates, be an exception to the credit, but that it ought not to be absolutely so to the competency, any more than the friendship or enmity of a party, whose evidence is offered, towards either of the parties in the cause, or many other considerations hereafter to be intimated; the general answer may be this, that in point of authority no distinction is more absolutely settled; and in point of theory, the existence of a direct interest is capable of being precisely proved; but its influence on the mind is of a nature not to discover itself to the jury; whence it hath been held expedient to adopt a general exception, by which witnesses so circumstanced are free from temptation, and the cause not exposed to the hazard of the very doubtful estimate, what quantity of interest in the question, in proportion to the character of the witness, in any instance, leaves his testimony entitled to belief. Some, indeed, are incapable of being biassed even latently by the greatest interest; many would betray the most solemn obligation and public confidence for an interest very inconsiderable. An universal exclusion, where no line short of this could have been drawn, preserves infirmity from a snare, and integrity from suspicion; and keeps the current of evidence, thus far at least, clear and uninfected." [2]

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,[3] 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;[4] 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 [5] the general rule of disqualification by reason of interest was abolished in England; and the first statute [6] of the same sort seems to have been enacted in this

[1] Gilbert, Evidence, 119.

[2] Same, Loft's edition, 223.

[3] [Lord Mansfield, in Walton *v.* Shelley, 1 T. R. 300; Lord Kenyon, in Bent *v.* Baker, 3 id. 27.]

[4] [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.]

[5] [St. 6–7 Vict., c. 85.]

[6] [Rev. St. 1846, c. 102, § 99.]

country in Michigan in 1846; to be followed within two or three decades by the remaining jurisdictions.[7] The mass of detailed rules and exceptions depending upon this principle have therefore ceased to be law;[8] 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,[9] and are even for that purpose rarely referred to by the Courts of to-day.[10]

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 were preserved certain important remnants of the old principle; and though some of these have in many jurisdictions been done away with, the change has not always been made at the same time or to the same extent; and the precedents at common law, together with the statutory changes, on each of these topics, form separate bodies of law, not connected (except in the general underlying policy) with the obsolete and broad principle of interest as a disqualification. These topics are four in number: (*a*) Parties in civil cases; (*b*) Defendants in criminal cases; (*c*) Survivors of a transaction with a deceased person; (*d*) Husband and wife.]

§ 328 *c*. **Parties in Civil Cases.** [The notion of interest at common law included of course the parties to the case, for their interest in the issue of the litigation was of the most marked sort. That interest was the real principle calling for their exclusion from testifying in their own favor is clear;[1] and certain details of the rule rested on this theory, *e. g.* the consequence that a mere titular or nominal party might not be excluded, or a party against whom judgment had been given by default. There were a few direct exceptions to the general rule, chiefly based on the necessity of employing such testimony where none other could be had, *e. g.* the exception for the owner of a lost package testifying to its contents or for the affidavit of a party to the loss of a document once possessed by him.[2] But this general disqualification also has been abolished by legislation in every jurisdiction. The first statutes in England, beginning in 1846, were of a tentative and limited nature; and the general abolition did not come until 1851.[3] In this country, however, the change was in most cases made at the same time with the general abolition of the interest-qualification, by declaring that interest, "either as a party

[7] [See the statutes set out in Appendix I.]

[8] [Except in the Federal Court of Claims: U. S. *v.* Clark, 96 U. S. 41.]

[9] [Chiefly in regard to the exclusion of interested survivors, treated *post*, § 333 *b*.]

[10] [The sections of the original text of the author on this subject, §§ 386–430, have therefore been placed in Appendix II.]

[1] [Worrall *v.* Jones, 7 Bing. 398.]

[2] [The original sections expounding the rule and its exceptions, §§ 329–333, 347–361, will be found in Appendix II.]

[3] [St. 14–15 Vict., c. 99.]

or otherwise," should not disqualify;[4] though in some jurisdictions a first step had been taken by allowing a party to testify in his own favor when summoned by his opponent, by admitting the complainant in a bastardy-charge on certain conditions,[5] and by a few other statutory beginnings.

It is the law in one State[6] that a person, whether party or not, may not testify to his *own intent*, however material it may be, because he may falsely describe it without possibility of exposure by other witnesses. This notion has been everywhere else repudiated;[7] but the repudiation is often put on the ground that such a rule existed when parties were disqualified, because then a party could not testify to his intent nor to anything else, and that therefore the rule has ceased to exist only by virtue of the removal of that disqualification.[8] Now, before that removal, any person, otherwise a competent witness, might testify to his own intent whenever it was material to the cause;[9] and it is an error to suppose that there was any prohibition upon such testimony. The propriety of it is therefore by no means due to the removal of parties' disqualifications; and it is unnecessary to seek for any such justification for its use. When, there-

[4] [See the several statutes set out in Appendix I. The earliest one seems to have been that of Connecticut, in 1849.]

[5] [The traces of this are seen in the doctrine *post*, § 469 *c*, at end.]

[6] [Alabama: see Manch. F. A. Co. *v.* Feibelman, Ala., 23 So. 759; and a long line of preceding cases.]

[7] [People *v.* Farrell, 31 Cal. 582 (leading case); Harris *v.* Lumber Co., 97 Ga. 465; Miner *v.* Phillips, 42 Ill. 131; Wohlford *v.* People, 148 id. 296, 298; Greer *v.* State, 53 Ind. 420; White *v.* State, ib. 595; Shockey *v.* Mills, 71 id. 288; Bidinger *v.* Bishop, 76 id. 255; Parrish *v.* Thurston, 87 id. 440; Sedgwick *v.* Tucker, 90 id. 281; Over *v.* Schiffling, 102 id. 193; Heap *v.* Parish, 104 id. 39; Ross *v.* State, 116 id. 497; Zimmerman *v.* Brannon, 103 Ia. 144; Counselman *v.* Reichart, ib. 430; State *v.* Dillon, 48 La. An. 1365; Cornina *v.* Exeter, 13 Me. 328; Edwards *v.* Currier, 43 id. 484; Wheelden *v.* Wilson, 44 id. 18; Cushing *v.* Friendship, 89 id. 525; Fisk *v.* Chester, 8 Gray 508; Kelly *v.* Cunningham, 1 All. 473, 474; Thacher *v.* Phinney, 7 id. 149; Lombard *v.* Oliver, ib. 157; Reeder *v.* Holcomb, 105 Mass. 94; Snow *v.* Paine, 114 id. 526; Watkins *v.* Wallace, 19 Mich. 75; Spalding *v.* Lowe, 56 id. 366, 374; Berkey *v.* Judd, 22 Minn. 297; Albion *v.* Maple Lake, id., 74 N. W. 282; Ferguson *v.* State, 71 Miss. 805, 813; Vawter *v.* Hultz, 112 Mo. 633, 640; Gassert *v.* Noyes, 18 Mont. 216; State *v.* Harrington, 12 Nev. 135; Gale *v.* Ins. Co., 41 N. H. 175; Blodgett Paper Co. *v.* Farmer, ib. 402; Severance *v.* Carr, 43 id. 67; Graves *v.* Graves, 45 id. 223; Hale *v.* Taylor, ib. 406; Delano *v.* Goodwin, 48 id. 205; Homans *v.* Corning, 60 id. 419; Downer *v.* Society, 63 id. 152; People *v.* Ferguson, 8 Cow. 107; Cunningham *v.* Freeborn, 11 Wend. 244; Seymour *v.* Wilson, 14 N. Y. 567; Griffin *v.* Marquardt, 21 id. 122; Forbes *v.* Waller, 25 id. 439; McKown *v.* Hunter, 30 id. 625; Bedell *v.* Chase, 34 id. 388; Osborn *v.* Robbins, 36 id. 375; Thurston *v.* Cornell, 38 id. 287; Dillon *v.* Anderson, 43 id. 236; Cortland Co. *v.* Herkimer Co., 44 id. 22; Fiedler *v.* Darrin, 50 id. 443; Kerrains *v.* People, 60 id. 228; Turner *v.* Keller, 66 id. 66; Bayliss *v.* Cockcroft, 81 id. 371; Starin *v.* Kelly, 88 id. 420; People *v.* Baker, 96 id. 349; Crook *v.* Rindskopf, 105 id. 482; Hard *v.* Ashley, 117 id. 617; Grever *v.* Taylor, 53 Oh. 621; Com. *v.* Julius, 173 Pa. 322; Weaver *v.* Cone, 174 id. 104; Wallace *v.* U. S., U. S., 16 Sup. 859; People *v.* Hughes, 11 Utah 100; Jackson *v.* Com., Va., 30 S. E. 452; Hulett *v.* Hulett, 37 Vt. 581, 586; Stearns *v.* Gosselin, 58 id. 38; State *v.* Evans, 33 W. Va. 417, 425; Commercial B'k *v.* Ins. Co., 87 Wis. 297, 303.]

[8] [Sanderson, J., in People *v.* Farrell, Cal.; People *v.* Hughes, Utah, *supra*.]

[9] [Answer of Judges, 22 How. St. Tr. 296, 300.]

fore, it is a question as to the intent of an alleged criminal act, or the intent of a transfer by an insolvent, or the good faith of a purchaser from an insolvent, or the reliance of a person on false representations, or the intent of one having a residence or making a gift, or as to any other state of mind, the person as to whom it is predicated may testify to it. In many instances, of course, the intent or motive cannot be testified to, by that person or by any other, because it is immaterial under the substantive law applicable; as, the private intent of a promisor [10] or of a voter.[11] Whether one may testify to the intent of another person is also a different question.[12]]

§§ 329–333.[1]

§ 333 *a*. **Defendants in Criminal Cases.** [The principle upon which parties in civil cases were excluded was of course regarded as also excluding the defendant in a criminal case, and he was incompetent to testify in his own favor.[1] Where there were two or more co-defendants, the rule prevented one of them from testifying for the other, until he had been discharged from the record as a party, either by a *nolle prosequi*, a verdict of acquittal, a plea of guilty, or other final disposition; and the same requirement was thought to prevent the prosecution from calling him against the other defendant, unless on the same conditions.[2] The accomplice was not as such incompetent, nor yet by virtue of being interested through a promise of pardon, but only so far as by being indicted and tried with the other he became a party-defendant.[3]

This disqualification, though offending deeply against notions of fairness as well as being open to all other objections to the interest-disqualification, was longer in coming to its end. In England, indeed, where special reasons perhaps gave greater plausibility to the arguments of those who, solely in the interest of accused persons, opposed a change, the abolition did not come until 1898;[4] but in this country the same step had long ago been taken in most jurisdictions.[5] That portion of the law has therefore no longer any direct interest, so far as the abolition has been complete. But the change has in some jurisdictions been made in part only, or by a phrasing not sufficiently comprehensive; and accordingly certain questions may there still arise in connection with the original principles. (1) Under

[10] [See Hibbard *v.* Russell, 16 N. H. 417.]
[11] [See People *v.* Saxton, 22 N. Y. 309.]
[12] [See *post*, § 441 *h*.]
[1] [Transferred to Appendix II.]
[1] [For his privilege against testifying, see *post*, § 469 *d*.]
[2] [The original sections of the author on this subject, §§ 362–363, will be found in Appendix II.]
[3] [See § 379, *post*; §§ 407, 413, in Appendix II.]
[4] [St. 61–62 Vict., c. 36; for the history of the change and some of the reasons for the opposition to it, see 99 Law Times 103; 100 id. 412; 101 id. 582; 103 id. 297; 104 id. 415; 30 Law Journal 218, 277, 288; 31 id. 140, 151, 189; 32 id. 210, 362.]
[5] [See the statutes set out in Appendix I.]

the English practice, before the change, an accused person, though he could not testify, might make a "statement," independent of the address of his counsel.[6] In this country a first stage of statutory enactment, in some jurisdictions, was to allow merely this unsworn statement; and this stage has perhaps not yet been everywhere left behind.[7] A number of questions — as to cross-examination, impeachment, etc. — call for a special solution under such a practice; but as it is abnormal, and will probably soon disappear forever, it need not concern us here.[8] (2) The Legislatures, having in view the disqualifications of interested persons in general, of parties in civil actions, and of accused persons, and desiring to remove one or all of these forms of the interest-disqualification, have used varying phraseology for the purpose, and questions of interpretation, depending ultimately on the terms of the statute, have arisen. The doubt thus most frequently raised is whether the common-law rules (abovementioned) as to the competency of a co-defendant, or one jointly indicted, to testify for the defence[9] or for the prosecution,[10] have ceased to operate.]

§ 333 *b*. **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

[6] [R. *v.* Malings, 8 C. & P. 242; R. *v.* Walkling, ib. 243; R. *v.* Shimmin, 15 Cox Cr. 122 (with a note referring to other cases); R. *v.* Millhouse, ib. 622 (limiting the right); see People *v.* Thomas, 9 Mich. 314.]

[7] [See Appendix I.]

[8] [See Bond *v.* State, 21 Fla. 738, 759; Smith *v.* State, 25 id. 517; Steele *v.* State, 33 id. 348; Hart *v.* State, 38 id. 39; Lester *v.* State, 37 id. 382; Milton *v.* State, 24 So. 60.]

[9] [See State *v.* Bogue, 52 Kan. 79, 84; Davis *v.* State, 38 Md. 15, 45; Benson *v.* U. S., 146 U. S. 325, 337; Ballard *v.* State, 31 Fla. 266, 284; McGinnis *v.* State, 4 Wyo. 115; Kidwell *v.* Com., 97 Ky. 538; State *v.* Franks, 51 S. C. 259.]

[10] [See Benson *v.* U. S., 146 U. S. 325, 333; State *v.* Asbury, 49 La. An. 1741; Smith *v.* Com., 90 Va. 759; State *v.* Magone, Or., 51 Pac. 452; Love *v.* People, 160 Ill. 501; State *v.* Smith, 8 S. D. 547; People *v.* Plyler, Cal., 53 Pac. 553.]

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." [1] 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. So far as the notion of interest is involved, the principles of the common law survive, and its precedents might have a bearing; but they are rarely resorted to, and the limits of this rule of exclusion depend almost entirely on the varying terms of the local statute; these differences being such that the precedents in one jurisdiction are rarely of use in another.[2] It is enough here to note two lines of distinction between the various statutes, viz., (1) some exclude only parties to the cause, while the others exclude any person interested in the issue; (2) 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.[3]]

§ 333 *c*. **Husband and Wife**. [Testimony by a husband or wife may involve any one or more of three distinct and independent prin-

[1] [Brickell, C. J., in Louis *v.* Easton, 50 Ala. 471.]

[2] [See the statutes in Appendix I.]

[3] [Corliss, J., in St. John *v.* Lofland, 5 N. D. 140: "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 it 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." If any recognition at all is to be given to the considerations underlying this disqualification, there are two simple ways, each having a statutory sanction to-day, either of which would accomplish the purpose without the crude, technical, unjust method of disqualification. One is (as in New Mexico) to allow no recovery in such cases on the party's sole testimony, but to require corroboration of some sort. The other is (as in Connecticut) in such cases to admit, as well as the surviving party, any declarations on the subject by the deceased opponent.]

ciples, not always kept separate by authors and judges: (1) One spouse may not testify for the other; (2) One spouse may not testify against the other; (3) One spouse may not testify to confidential communications by the other. The first rests on the notion of interest, *i. e.* the untrustworthiness of one spouse as likely to favor the other by testifying falsely on the other's behalf. The second rests on a notion of policy or sentiment, that it is a hardship to the one to be condemned by the testimony of the other, and that the allowance of such a practice would tend to disturb marital harmony. The third rests on a public policy similar to that which protects confidential communications between attorney and client, government and informer, and certain other classes of persons; the thought being that the full activity and benefit of the relation cannot be attained unless the persons in it have full security in advance that their confidences cannot be disclosed. The distinction between these three principles, both in theory and in working rules, is so important that attention may be called to some of its features. (1) Under the first head, the exclusion is absolute. It is not a matter of privilege, and the consent of neither person can make the other competent. Furthermore, the death of the other person may still leave the survivor incompetent to testify in favor of the estate, while divorce may destroy the incompetency. On the other hand, the other person must be a party to the cause, or at least interested in it. Furthermore, there are probably no exceptions to the rule on the score of necessity. (2) Under this head, the question is in principle one of privilege; *i. e.*, it is a matter in which perhaps the other person to the relation may by waiver allow the testimony to be received. Furthermore, the testimony may perhaps be excluded even though the other member of the relation is not a party-opponent in the cause. Again, the death of the other member may cause the prohibition to cease. Finally, there are some well-established exceptions based on reasons of necessity. (3) Under the third head, the principle applies quite irrespective of whether either spouse is a party to the cause. Moreover, the death or the divorce of the other member does not affect the policy of prohibition. Again, the other member may always waive the privilege. Finally, there are no exceptions to the rule. — It will thus be seen that it is of the highest importance to distinguish which of these principles is involved in a given offer of evidence, especially since the statutory changes of the past forty years; for by statute the first above principle has been discarded in the majority of jurisdictions, the second has been discarded in a few jurisdictions, and the third has never been and probably never will be infringed upon. Thus, if a wife is to-day called to the stand, she may testify, in most jurisdictions, if her husband is the party calling her; she may do so, in a few jurisdictions only, if she is called against him; while, though he is not a

party on either side, she may not testify to his confidential communications; though at common law she would have been excluded in all three cases. In the following sections, these three distinct principles are treated together without discrimination,[1] — a practice, to be sure, to be observed in many of the earlier judicial opinions on the subject and in several of the statutory enactments.[2] It will be necessary to observe carefully the precise principle under consideration in each passage, though this it is not always possible to ascertain. The statutory changes,[3] it should be added, have not always taken the simple expedient of abolishing the first or the first two of the above principles, but have often qualified the change by exceptions of various sorts, so that the modern decisions are in most cases dependent chiefly on the precise terms of the local statute. It remains only to be said that the discarding of the first principle above (incompetency of one spouse to testify on behalf of the other) is a change demanded by all considerations of justice and policy, and that the exceptions which still encumber several statutes are mere remnants of the obsolete traditions of the interest-disqualifications;[4] that the discarding of the second principle (prohibition of one spouse testifying against another) rests on a policy less generally conceded, but equally required by an enlightened view of the law of evidence;[5] and that the third principle (privacy of confidential communications) is one which no one is likely ever to propose to abolish. The statute of New Hampshire may be regarded as a model enactment.]

§§ 334, 335. **Same: Common-law Rule, in general.** The rule by which parties are excluded from being witnesses for themselves applies to the case of husband and wife; neither of them being admissible as a witness in a cause, civil or criminal, in which the other is a party.[1] This exclusion is founded partly on the identity of their legal rights and interests, and partly on principles of public policy, which lie at the basis of civil society. For it is essential to the happiness of social life that the confidence subsisting between husband and wife should be sacredly protected and cherished in its most un-

[1] [The third principle is also treated *ante*, § 254, *q. v.*]

[2] [For a careful discrimination of the topics, see the Second Report of the Commissioners on Procedure at Common Law, 1853, p. 12; see the differences illustrated in Saffold *v.* Horne, 72 Miss. 470; Mercer *v.* State, Fla., 24 So. 154; Southwick *v.* Southwick, 49 N. Y. 510.]

[3] [For the statutes in full, see Appendix I. The first general statute in England came in 1853, St. 16–17 Vict., c. 83, s. 4.]

[4] [See Appleton, Evidence, c. ix; Bentham, Judicial Evidence, B. ix, pt. iii.]

[5] [See Appleton, Evidence, c. ix.]

[1] An exception or qualification of this rule is admitted, in cases where the husband's account-books have been kept by the wife, and are offered in evidence in an action brought by him for goods sold, etc. Here the wife is held a competent witness, to testify that she made the entries by his direction and in his presence; after which his own suppletory oath may be received, as to the times when the charges were made, and that they are just and true: Littlefield *v.* Rice, 10 Met. 287; and see Stanton *v.* Willson, 3 Day 37; Smith *v.* Sanford, 12 Pick. 139. In the principal case, the correctness of the contrary decision in Carr *v.* Cornell, 4 Vt. 116, was denied.

limited extent; and to break down or impair the great principles which protect the sanctities of that relation would be to destroy the best solace of human existence.[2] The principle of this rule requires its application to all cases in which the interests of the other party are involved. And, therefore, the wife is not a competent witness against any co-defendant tried with her husband, if the testimony concern the husband, though it be not directly given against him.[3] Nor is she a witness for a co-defendant,[4] if her testimony, as in the case of a conspiracy,[5] would tend directly to her husband's acquittal; nor where, as in the case of an assault,[6] the interests of all the defendants are inseparable; nor in any suit in which the rights of her husband, though not a party, would be concluded by any verdict therein; nor may she, in a suit between others, testify to any matter for which, if true, her husband may be indicted.[7] Yet where the grounds of defence are several and distinct, and in no manner dependent on each other, no reason is perceived why the wife of one defendant should not be admitted as a witness for another.[8]

§ 336. **Same: Matters occurring before Marriage.** It makes no difference at what time the relation of husband and wife commenced; the principle of exclusion being applied in its full extent wherever the interests of either of them are directly concerned. Thus, where the defendant married one of the plaintiff's witnesses, after she was actually summoned to testify in the suit, she was held incompetent to give evidence.[1] Nor is there any difference in principle between

[2] Stein *v.* Bowman, 13 Peters 223, per McLean, J.; *supra*, § 254; Co. Lit. 6 *b*; Davis *v.* Dinwoody, 4 T. R. 678; Barker *v.* Dixie, Cas. temp. Hardw. 264; Bentley *v.* Cooke, 3 Doug. 422, per Ld. Mansfield. The rule is the same in equity: Vowles *v.* Young, 13 Ves. 144. So is the law of Scotland: Alison's Practice, p. 461. See also 2 Kent Comm. 179, 180; Com. *v.* Marsh, 10 Pick. 57; Robin *v.* King, 2 Leigh 142, 144; Snyder *v.* Snyder, 6 Binn. 483; Corse *v.* Patterson, 6 Har. & Johns. 153; Barbat *v.* Allen, 7 Exch. 609.

[3] Hale P. C. 301; Dalt. Just. c. 111; R. *v.* Hood, 1 Mood. Cr. Cas. 281; R. *v.* Smith, ib. 289. [But this need not be so where the husband is not a party: see § 342.]

[4] [Holley *v.* State, 105 Ala. 100; Gillespie *v.* People, Ill., 52 N. E. 250; Bartlett *v.* Clough, 94 Wis. 196.]

[5] R. *v.* Locker, 5 Esp. 107, per Ld. Ellenborough, who said it was a clear rule of the law of England: State *v.* Burlingham, 3 Shepl. 104. But where several are jointly indicted for an offence, which might have been committed either by one or more, and they are tried separately, it has been held that the wife of one is a competent witness for the others: Com. *v.* Manson, 2 Ashm. 31; State *v.* Worthing, 1 Redington, 62; *infra*, § 363, n. But see Pullen *v.* People, 1 Doug. (Mich.) 48.

[6] R. *v.* Frederick, 2 Stra. 1095.

[7] Den d. Stewart *v.* Johnson, 3 Harrison 88; [see *post*, § 342.]

[8] Phil. & Am. on Evid. 160, n. (2); 1 Phil. Evid. 75, n. (1). But where the wife of one prisoner was called to prove an *alibi* in favor of another jointly indicted, she was held incompetent, on the ground that her evidence went to weaken that of the witness against her husband, by showing that that witness was mistaken in a material fact: R. *v.* Smith, 1 Mood. Cr. Cas. 289. If the conviction of a prisoner, *against* whom she is called, will strengthen the hope of pardon for her husband, who is already convicted, this goes only to her credibility: R. *v.* Rudd, 1 Leach 115, 131. Where one of two persons, separately indicted for the same larceny, has been convicted, his wife is a competent witness against the other: R. *v.* Williams, 8 C. & P. 284; [see *post*, § 342.]

[1] Pedley *v.* Wellesley, 3 C. & P. 558. This case forms an exception to the general

the admissibility of the husband and that of the wife, where the other is a party.[2] And when, in any case, they are admissible against each other, they are also admissible for each other.[3]

§ 337. **Same: Testimony after Death or Divorce.** Neither is it material that this relation no longer exists. 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] And even where a wife, who had been divorced by act of Parliament, and had married another person, was offered as a witness by the plaintiff, to prove a contract against her former husband, Lord Alvanley held her clearly incompetent; adding, with his characteristic energy, "it never shall be endured that the confidence, which the law has created while the parties remained in the most intimate of all relations, shall be broken whenever, by the misconduct of one party, the relation has been dissolved."[2] [But the preceding remarks apparently apply to testimony revealing marital confidences, *i. e.* the third principle above mentioned in § 333 *b*. As to this there can be no doubt, on principle, that death or divorce does not destroy the privilege.[3] But where such confidences are not involved, the policy of preserving the marital peace does not forbid one spouse from testifying against the other's interests after the latter's death or divorce.[4] Nor is the one incompetent for the other after divorce.[5]]

§ 338. This rule, [*i. e.* the third above-mentioned in § 333 *b*,] in its spirit and extent, is analogous to that which excludes confidential

rule, that neither a witness nor a party can, by his own act, deprive the other party of a right to the testimony of the witness.

[2] R. *v.* Serjeant, 1 Ry. & M. 352. In this case, the husband was, on this ground, held incompetent as a witness against the wife, upon an indictment against her and others for conspiracy, in procuring him to marry her.

[3] R. *v.* Serjeant, 1 Ry. & M. 352.

[1] Stein *v.* Bowman, 13 Pet. 209.

[2] Monroe *v.* Twistleton, Peake's Evid. App. lxxxvii (xci), expounded and confirmed in Aveson *v.* Lord Kinnaird, 6 East 192, 193, per Ld. Ellenborough, and in Doker *v.* Hasler, Ry. & M. 198, per Best, C. J.; Stein *v.* Bowman, 13 Peters 223. In the case of Beveridge *v.* Minter, 1 C. & P. 364, in which the widow of a deceased promisor was admitted by Abbott, C. J., as a witness for the plaintiff to prove the promise, in an action against her husband's executors, the principle of the rule does not seem to have received any consideration; and the point was not saved, the verdict being for the defendants. See also Terry *v.* Belcher, 1 Bailey 568, that the rule excludes the testimony of a husband or wife separated from each other, under articles. See further, State *v.* Jolly, 3 Dev. & Bat. 110; Barnes *v.* Camack, 1 Barb. 392; {Patton *v.* Wilson, 2 Lea 101; Low's Estate, Myrick's Prob. (Cal.) 143; Succession of Ames, 33 La. An. 1317.}

[3] [See *ante*, § 254.]

[4] [French *v.* Ware, 65 Vt. 338, 344 (divorce); Inman *v.* State, Ark., 47 S. W. 558 (divorce). *Contra:* Emmons *v.* Barton, 109 Cal. 662 (death); State *v.* Raby, N. C., 28 S. C. 490 (divorce).]

[5] [See cases cited in note to § 344, *post*.]

communications made by a client to his attorney, and which has been already considered.[1] Accordingly, the wife, after the death of the husband, has been held competent to prove facts coming to her knowledge from other sources, and not by means of her situation as a wife, notwithstanding they related to the transactions of her husband.[2]

§ 339. **Same: Marriage must be lawful.** This rule of protection is extended only to lawful marriages, or at least to such as are innocent in the eye of the law. If the cohabitation is clearly of an immoral character, as, for example, in the case of a kept mistress, the parties are competent witnesses for and against each other.[1] On the other hand, upon a trial for polygamy, the first marriage being proved and not controverted, the woman, with whom the second marriage was had, is a competent witness; for the second marriage is void.[2] But if the proof of the first marriage were doubtful, and the fact were controverted, it is conceived that she would not be admitted.[3] It seems, however, that a reputed or supposed wife may be examined, on the *voir dire*, to facts showing the invalidity of the marriage.[4] Whether a woman is admissible in favor of a man with whom she has cohabited for a long time as his wife, whom he has constantly represented and acknowledged as such, and by whom he has had children, has been declared to be at least doubtful.[5] Lord Kenyon rejected such a witness, when offered by the prisoner, in a capital case tried before him;[6] and in a later case, in which his decisions were mentioned as entitled to be held in respect and reverence, an arbitrator rejected a witness similarly situated; and the Court, abstaining from any opinion as to her competency, confirmed the award, on the ground that the law and fact had both been submitted to the arbitrator.[7] It would doubtless be incompetent for another

[1] *Supra*, § 237.

[2] Coffin *v.* Jones, 13 Pick. 445; William *v.* Baldwin, 7 Vt. 506; Cornell *v.* Vanartsdalen, 4 Barr 364; Wells *v.* Tucker, 3 Binn. 366; and see Saunders *v.* Hendrix, 5 Ala. 224; McGuire *v.* Maloney, 1 B. Monr. 224.

[1] Batthews *v.* Galindo, 4 Bing. 610.

[2] Bull. N. P. 287; [Wrye *v.* State, 95 Ga. 466.]

[3] [Lowery *v.* People, 172 Ill. 466.] If the fact of the second marriage is in controversy, the same principle, it seems, will exclude the second wife also; see 2 Stark. Evid. 400; Grigg's Case, T. Raym. 1. But it seems that the wife, though inadmissible as a witness, may be produced in court for the purpose of being identified, although the proof thus furnished may affix a criminal charge upon the husband; as, for example, to show that she was the person to whom he was first married; or, who passed a note, which he is charged with having stolen: Alison's Pr. p. 463.

[4] Peat's Case, 2 Lew. Cr. Cas. 288; Wakefield's Case, id. 279.

[5] 1 Price 88, 89, per Thompson, C. B. If a woman sue as a *feme sole*, her husband is not admissible as a witness for the defendant, to prove her a *feme covert*, thereby to nonsuit her: Bentley *v.* Cooke, Tr. 24 Geo. III, B. R., cited 2 T. R. 265, 269; s. c. 3 Dong. 422.

[6] Anon., cited by Richards, B., in 1 Price 83.

[7] Campbell *v.* Twemlow, 1 Price 81, 88, 90, 91; Richards, B., observed, that he should certainly have done as the arbitrator did. To admit the witness in such a case would both encourage immorality, and enable the parties at their pleasure to perpetrate fraud, by admitting or denying the marriage, as may suit their convenience. Hence, cohabitation and acknowledgment, as husband and wife, are held conclusive

person to offer the testimony of an acknowledged wife, on the ground that the parties were never legally married, if that relation were always recognized and believed to be lawful by the parties. But where the parties had lived together as man and wife, believing themselves lawfully married, but had separated on discovering that a prior husband, supposed to be dead, was still living, the woman was held a competent witness against the second husband, even as to facts communicated to her by him during their cohabitation.[8]

§ 340. **Same: Waiver of Privilege by the other Person.** Whether the rule [*i. e.* the second above-mentioned in § 333 *b*] may be relaxed, so as to admit the wife to testify against the husband, by his consent, the authorities are not agreed. Lord Hardwicke was of opinion that she was not admissible, even with the husband's consent;[1] and this opinion has been followed in this country;[2] apparently upon the ground, that the interest of the husband in preserving the confidence reposed in her is not the sole foundation of the rule, the public having also an interest in the preservation of domestic peace, which might be disturbed by her testimony, notwithstanding his consent. The very great temptation to perjury, in such case, is not to be overlooked.[3] But Lord Chief Justice Best, in a case before him,[4] said he would receive the evidence of the wife, if her husband consented; apparently regarding only the interest of the husband as the ground of her exclusion, as he cited a case, where Lord Mansfield had once permitted a plaintiff to be examined with his own consent.

§ 341. **Same: Spouse not a Party, but directly interested.** Where the husband or wife is not a party to the record, but yet has an interest directly involved in the suit, and is therefore incompetent to testify, the other also is incompetent.[1] Thus, the wife of a bankrupt cannot be called to prove the fact of his bankruptcy,[2] [nor the wife of a survivor incompetent to testify against the estate of a deceased person.[3]] And the husband cannot be a witness for or against his wife, in a question touching her separate estate, even though there are other parties in respect of whom he would be competent.[4] So,

against the parties, in all cases, except where the fact or the incidents of marriage, such as legitimacy and inheritance, are directly in controversy: see also Divoll *v.* Leadbetter, 4 Pick. 220.

[8] Wells *v.* Fletcher, 5 C. & P. 12; Wells *v.* Fisher, 1 M. & Rob. 99 and n.

[1] Barker *v.* Dixie, Cas. temp. Hardw. 264; Sedgwick *v.* Watkins, 1 Ves. Jun. 49; Grigg's Case, T. Raym. 1.

[2] Randall's Case, 5 City Hall Rec. 141, 153, 154; see also Colbern's Case, 1 Wheeler's Crim. Cas. 479.

[3] Davis *v.* Dinwoody, 4 T. R. 679, per Ld. Kenyon.

[4] Pedley *v.* Wellesley, 3 C. & P. 558.

[1] {Labaree *v.* Wood, 54 Vt. 452;} [Buckingham *v.* Roar, 45 Nebr. 244; Wolverton *v.* Van Syckel, Pa., 31 Atl. 640.]

[2] *Ex parte* James, 1 P. Wms. 610, 611. But she is made competent by statute to make discovery of his estate: 6 Geo. IV, c. 16, § 37.

[3] [Bevelot *v.* Lestrade, 153 Ill. 625; Stodder *v.* Hoffman, 158 id. 486. See Pyle *v.* Pyle, ib. 289; Berry *v.* Stevens, 69 Me. 290.]

[4] 1 Burr. 424, per Ld. Mansfield; Davis *v.* Dinwoody, 4 T. R. 678; Snyder *v.*

also, where the one party, though a competent witness in the cause, is not bound to answer a particular question, because the answer would directly and certainly expose him or her to a criminal prosecution and conviction, the other, it seems, is not obliged to answer the same question.[5]

The declarations of husband and wife are subject to the same rules of exclusion which govern their testimony as witnesses.[6]

§ 342. **Same: Spouse not legally interested.** But though the husband and wife are not admissible as witnesses against each other, where either is directly interested in the event of the proceeding, whether civil or criminal; yet, in collateral proceedings, not immediately affecting their mutual interests, their evidence is receivable, notwithstanding it may tend to criminate, or may contradict the other, or may subject the other to a legal demand.[1] Thus, where, in a question upon a female pauper's settlement, a man testified that he was married to the pauper upon a certain day, and another woman, being called to prove her own marriage with the same man on a previous day, was objected to as incompetent, she was held clearly admissible for that purpose; for though, if the testimony of both was true, the husband was chargeable with the crime of bigamy, yet neither the evidence, nor the record in the present case, could be received in evidence against him upon that charge, it being *res inter alios acta*, and neither the husband nor the wife having any interest

Snyder, 6 Binn. 483; Langley *v.* Fisher, 5 Beav. 443. But where the interest is contingent and uncertain, he is admissible: Richardson *v.* Learned, 10 Pick. 261. See further, Hatfield *v.* Thorp, 5 B. & Ald. 589; Cornish *v.* Pugh, 8 D. & R. 65; 12 Vin. Abr. Evidence B. If an attesting witness to a will afterwards marries a female legatee, the legacy not being given to her separate use, he is inadmissible to prove the will: Mackenzie *v.* Yeo, 2 Curt. 509. The wife of an executor is also incompetent: Young *v.* Richards, ib. 371. But where the statute declares the legacy void which is given to an attesting witness of a will, it has been held that, if the husband is a legatee and the wife is a witness, the legacy is void, and the wife is admissible: Winslow *v.* Kimball, 12 Shepl. 493; [*contra, semble*, Kettredge *v.* Hodgman, N. H., 32 Atl. 158.]

[5] See Phil. & Am. on Evid. 168; Den *v.* Johnson, 3 Harr. 87.

[6] Alban *v.* Pritchett, 6 T. R. 680; Denn *v.* White, 7 id. 112; Kelly *v.* Small, 2 Esp. 716; Bull N. P. 28; Winsmore *v.* Greenbank, Willes 577. Whether where the husband and wife are jointly indicted for a joint offence, or are otherwise joint parties, their declarations are mutually receivable against each other, is still questioned; the general rule, as to persons jointly concerned, being in favor of their admissibility, and the policy of the law of husband and wife being against it: see Com. *v.* Robbins, 3 Pick. 63; Com. *v.* Briggs, 5 id. 429; Evans *v.* Smith, 5 Monroe 363, 364; Turner *v.* Coe, 5 Conn. 93. The declarations of the wife, however, are admissible for or against the husband, wherever they constitute part of the *res gestæ* which are material to be proved; as, where he obtained insurance on her life as a person in health, she being in fact diseased, Aveson *v.* Lord Kinnaird, 6 East 188; or, in an action by him against another for beating her, Thompson *v.* Freeman, Skin. 402; or, for enticing her away, Gilchrist *v.* Bale, 8 Watts 355; or, in an action against him for her board, he having turned her out of doors, Walton *v.* Green, 1 C. & P. 621. So, where she acted as his agent, *supra*, § 334, n.; Thomas *v.* Hargrave, Wright, 595. But her declarations made after marriage, in respect to a debt previously due by her, are not admissible for the creditor, in an action against the husband and wife, for the recovery of that debt: Brown *v.* Laselle, 6 Blackf. 147.

[1] Fitch *v.* Hill, 11 Mass. 286; Baring *v.* Reeder, 1 Hen. & Mun. 154, 168, per Roane, J. In Griffin *v.* Brown, 2 Pick. 308, speaking of the cases cited to this point,

in the decision.[2] So, where the action was by the indorsee of a bill of exchange, against the acceptor, and the defence was, that it had been fraudulently altered by the drawer, after the acceptance; the wife of the drawer was held a competent witness to prove the alteration.[3]

§ 343. **Same: Exceptions in Cases of Necessity.** To this general rule, excluding the husband and wife as witnesses, there are some exceptions; which are allowed from the necessity of the case, partly for the protection of the wife in her life and liberty, and partly for the sake of public justice. But the necessity which calls for this exception for the wife's security is described to mean, "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."[1] Thus, a woman is a competent witness against a man indicted for forcible abduction and marriage, if the force were continuing upon her until the marriage; of which fact she is also a competent witness; and this, by the weight of the authorities, notwithstanding her subsequent assent and voluntary cohabitation; for otherwise, the offender would take advantage of his wrong.[2] So, she is a competent witness against

Parker, C. J., said: "They establish this principle, that the wife may be a witness to excuse a party sued for a supposed liability, although the effect of her testimony is to charge her husband upon the same debt, in an action afterwards to be brought against him. And the reason is, that the verdict in the action, in which she testifies, cannot be used in the action against her husband; so that, although her testimony goes to show that he is chargeable, yet he cannot be prejudiced by it. And it may be observed, that, in these very cases, the husband himself would be a competent witness, if he were willing to testify, for his evidence would be a confession against himself." Williams *v.* Johnson, 1 Stra. 504; Vowles *v.* Young, 13 Ves. 144; 2 Stark. Evid. 401; see also Mr. Hargrave's note (29) to Co. Lit. 6 *b*; {Com. *v.* Reid, 1 Leg. Gaz. Rep. 182, where the cases are fully discussed;} [Bluman *v.* State, 33 Tex. Cr. 43, 58; State *v.* Goforth, 136 Mo. 111; Lihs *v.* Lihs, 44 Nebr. 143; Rios *v.* State, Tex. Cr., 47 S. W. 987.]

[2] R. *v.* Bathwick, 2 B. & Ad. 639, 647; s. p. R. *v.* All Saints, 6 M. & S. 194. In this case, the previous decision in R. *v.* Cliviger, 2 T. R. 263, to the effect that a wife was in every case incompetent to give evidence, even *tending* to criminate her husband, was considered and restricted; Lord Ellenborough remarking, that the rule was there laid down "somewhat too largely." In R. *v.* Bathwick, it was held to be "undoubtedly true in the case of a direct charge and proceeding against him for any offence," but was denied in its application to collateral matters. But on the trial of a man for the crime of adultery, the husband of the woman with whom the crime was alleged to have been committed has been held not to be admissible as a witness for the prosecution, as his testimony would go directly to charge the crime upon his wife: State *v.* Welch, 13 Shepl. 30; [People *v.* Fowler, 104 Mich. 449. See R. *v.* All Saints, 6 M. & S. 194; State *v.* Bridgman, 49 Vt. 206 (citing cases); Howard *v.* State, 94 Ga. 587.]

[3] Henman *v.* Dickinson, 5 Bing. 183.

[1] Bentley *v.* Cooke, 3 Doug. 422, per Ld. Mansfield. In Sedgwick *v.* Watkins, 1 Ves. 49, Lord Thurlow spoke of this necessity as extending only to security of the peace, and not to an indictment.

[2] 1 East's P. C. 454; Brown's Case, 1 Ventr. 243; 1 Russ. on Crimes, 572; Wakefield's Case, 2 Lewin Cr. Cas. 1, 20, 279. See also R. *v.* Yore, 1 Jebb & Symes, 563, 572; Perry's Case, cited in McNally's Evid. 1881; R. *v.* Serjeant, Ry. & M. 352; 1 Hawk. P. C. c. 41, § 13; 2 Russ. on Crimes, 605, 606. This case may be considered anomalous; for she can hardly be said to be his wife, the marriage contract having been obtained by force. 1 Bl. Comm. 443; McNally's Evid. 179, 180; 3 Chitty's Crim. Law, 817, n. (*y*); Roscoe's Crim. Evid. 115.

him on an indictment for a rape, committed on her own person;[3] or, for an assault and battery upon her;[4] or, for maliciously shooting her;[5] [or for incest.[6]] She may also exhibit articles of the peace against him; in which case her affidavit shall not be allowed to be controlled and overthrown by his own.[7] Indeed, Mr. East considered it to be settled, that "in all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other."[8] But Mr. Justice Holroyd thought that the wife could only be admitted to prove facts, which could not be proved by any other witness.[9]

§ 344. **Same: Secret Facts.** The wife has also, on the same ground of necessity, been sometimes admitted as a witness to testify to secret facts which no one but herself could know. Thus, upon an appeal against an order of filiation, in the case of a married woman, she was held a competent witness to prove her criminal connection with the defendant, though her husband was interested in the event;[1] but for reasons of public decency and morality, she cannot be allowed to say, after marriage, that she had no connection with her husband, and that therefore her offspring is spurious.[2]

§ 345. **Same: High Treason.** In cases of high treason, the question whether the wife is admissible as a witness against her husband has been much discussed, and opinions of great weight have been given on both sides. The affirmative of the question is maintained,[1]

[3] Lord Audley's Case, 3 Howell's St. Tr. 402, 413; Hutton, 115, 116; Bull. N. P. 287; [*contra*, but erroneously, for a rape before marriage: State *v.* Evans, 138 Mo. 116; see also People *v.* Schoonmaker, Mich., 75 N. W. 349.]

[4] Lady Lawley's Case, Bull. N. P. 287; R. *v.* Azire, 1 Stra. 633; Soule's Case, 5 Greenl. 407; State *v.* Davis, 3 Brevard 3; [Clarke *v.* State, Ala., 23 So. 677, murder of child by beating pregnant wife.]

[5] Whitehouse's Case, cited 2 Russ. on Crimes, 606.

[6] [State *v.* Hurd, 101 Ia. 391; State *v.* Chambers, 87 id. 1, 3; but a Court has been found to say that bigamy is not an offence against the wife: Boyd *v.* State, 33 Tex. Cr. 470.]

[7] R. *v.* Doherty, 13 East 171; Lord Vane's Case, id. n. (a); 2 Stra. 1202; R. *v.* Earl Ferrers, 1 Burr. 635. Her affidavit is also admissible, on an application for an information against him for an attempt to take her by force, contrary to articles of separation, Lady Lawley's Case, Bull. N. P. 287; or, in a *habeas corpus* sued out by him for the same object, R. *v.* Mead, 1 Burr. 542.

[8] 1 East's P. C. 455. In Wakefield's Case, 2 Lewin Cr. Cas. 287, Hullock, B., expressed himself to the same effect, speaking of the admissibility of the wife only: 2 Hawk. P. C. c. 46, § 77; People, *ex rel.* Ordronaux, *v.* Chegaray, 18 Wend. 642.

[9] In R. *v.* Jagger, cited 2 Russ. on Crimes, 606.

[1] R. *v.* Reading, Cas. temp. Hardw. 79, 82; R. *v.* Luffe, 8 East 193; Com. *v.* Shepherd, 6 Binn. 283; State *v.* Pettaway, 3 Hawks 623. So, after divorce *a vinculo*, the wife may be a witness for her late husband, in an action brought by him against a third person, for criminal conversation with her during the marriage: Ratcliff *v.* Wales, 1 Hill N. Y. 63; Dickerman *v.* Graves, 6 Cush. 308. So, it has been held, that, on an indictment against him for an assault and battery upon her, she is a competent witness for him to disprove the charge: State *v.* Neill, 6 Ala. 685.

[2] Cope *v.* Cope, 1 M. & Rob. 269, 274; Goodright *v.* Moss, Cowp. 594; *supra*, § 28.

[1] These authorities may be said to favor the affirmative of the question: 2 Russ. on Crimes, 607; Bull. N. P. 286; 1 Gilb. Evid. by Lofft, 252; Mary Grigg's Case, T. Raym. 1; 2 Stark. Evid. 404.

on the ground of the extreme necessity of the case, and the nature of the offence, tending as it does to the destruction of many lives, the supervision of government, and the sacrifice of social happiness. For the same reasons, also, it is said that, if the wife should commit this crime, no plea of coverture shall excuse her; no presumption of the husband's coercion shall extenuate her guilt.[2] But, on the other hand, it is argued, that, as she is not bound to discover her husband's treason,[3] by parity of reason she is not compellable to testify against him.[4] The latter is deemed, by the later text-writers, to be the better opinion.[5]

§ 346. **Same; Dying Declaration.** Upon the same principle on which the testimony of the husband or wife is sometimes admitted, as well as for some other reasons already stated,[1] the dying declarations of either are admissible, where the other party is charged with the murder of the declarant.[2]

§§ 347–363.[1]

§ 364.[2]

2. *Oath.*

§ 364 *a* [328].[1] **Object and Nature of the Oath.** Here it is proper to observe, that one of the main provisions of the law, for securing the purity and truth of oral evidence, is, that it be delivered under the sanction of an oath. Men in general are sensible of the motives and restraints of religion, and acknowledge their accountability to that Being, from whom no secrets are hid. In a Christian country, it is presumed that all the members of the community entertain the common faith, and are sensible to its influences; and the law founds itself on this presumption, while, in seeking for the best attainable evidence of every fact, in controversy, it lays hold on the conscience of the witness by this act of religion; namely, a public and solemn appeal to the Supreme Being for the truth of what he may utter. "The administration of an oath supposes that a moral and religious accountability is felt to a Supreme Being, and this is the sanction which the law requires upon the conscience, before it admits him to testify."[2] An oath is ordinarily defined to be a solemn invocation

[2] 4 Bl. Comm. 29.

[3] 1 Brownl. 47.

[4] 1 Hale's P. C. 48, 301; 2 Hawk. P. C. c. 46, § 82; 2 Bac. Ab. 578, tit. Evid. A, 1; 1 Chitty's Crim. Law 595; McNally's Evid. 181.

[5] Roscoe's Crim. Evid. 114; Phil. & Am. on Evid. 161; 1 Phil. Evid. 71. See also 2 Stark. Evid. 404, n. (*b*).

[1] *Supra*, § 156.

[2] R. *v.* Woodcock, 2 Leach 500; McNally's Evid. 174; Stoop's Case, Addis. 381; People *v.* Green, 1 Denio 614; {State *v.* Ryan, 30 La. An. Pt. II, 1176.}

[1] [Transferred to Appendix II.]

[2] [Transferred *ante*, as § 254 *c*.]

[1] [Originally placed *ante*, as § 328.]

[2] Wakefield *v.* Ross, 5 Mason 18, per Story, J. See also Menochius, De Præsumpt.

of the vengeance of the Deity upon the witness, if he do not declare the whole truth as far as he knows it;[3] or, a religious asseveration by which a person renounces the mercy and imprecates the vengeance of Heaven, if he do not speak the truth.[4] But the corrrectness of this view of the nature of an oath has been justly questioned by a late writer,[5] on the ground that the imprecatory clause is not essential to the true idea of an oath, nor to the attainment of the object of the law in requiring this solemnity. The design of the oath is not to call the attention of God to man; but the attention of man to God; — not to call on Him to punish the wrong-doer; but on man to remember that He will.[6] That this is all which the law requires is evident from the statutes in regard to Quakers, Moravians, and other classes of persons, conscientiously scrupulous of testifying under any other sanction, and of whom, therefore, no other declaration is required. Accordingly an oath has been well defined, by the same writer, to be "an outward pledge, given by the juror" (or person taking it), "that his attestation or promise is made under an immediate sense of his responsibility to God."[7] A security to this extent, for the truth of testimony, is all that the law seems to have deemed necessary; and with less security than this, it is believed that the purposes of justice cannot be accomplished.

§ 364 *b* [371].[1] **Form of Oath.** It may be added, in this place, that all witnesses are to be sworn according to the peculiar ceremonies of their own religion, or in such manner as they may deem binding on their own consciences. If the witness is not of the Christian religion, the Court will inquire as to the form in which an oath is administered in his own country, or among those of his own faith, and will impose it in that form. And if, being a Christian, he has conscientious scruples against taking an oath in the usual

lib. 1, Quæst. 2, n. 32, 33; Farinac. Opera, tom. ii, App. p. 162, n. 32, p. 281, n. 33; Bynkershoek, Observ. Juris. Rom. lib. 6, c. 2.

[3] 1 Stark. Evid. 22. The force and utility of this sanction were familiar to the Romans from the earliest times. The solemn oath was anciently taken by this formula, the witness holding a flint-stone in his right hand: "Si sciens fallo, tum me Diespiter, salva urbe arceque, bonis ejiciat, ut ego hanc lapidem:" Adam's Ant. 247; Cic. Fam. Ep. vii, 1, 12; 12 Law Mag. (Lond.) 272. The early Christians refused to utter any imprecation whatever, Tyler on Oaths, c. 6; and accordingly, under the Christian Emperors, oaths were taken in the simple form of religious asseveration, "invocato Dei Omnipotentis nomine," Cod. lib. 2, tit. 4, l. 41; "sacrosanctis evangeliis tactis," Cod. lib. 3, tit. 1, l. 14. Constantine added in a rescript, "Jurisjurandi religione testes, prius quam perhibeant testimonium, jamdudum arctari præcipimus:" Cod. lib. 4, tit. 20, l. 9. See also Omichund *v.* Barker, 1 Atk. 21, 48, per Ld. Hardwicke; s. c. Willes 538; 1 Phil. Evid. p. 8; Atcheson *v.* Everitt, Cowp. 389. The subject of oaths is very fully and ably treated by Mr. Tyler, in his book on Oaths, their Nature, Origin, and History; Lond. 1834.

[4] White's Case, 2 Leach Cr. Cas. (4th ed.) 430.

[5] Tyler on Oaths, pp. 12, 13.

[6] [Curtiss *v.* Strong, 4 Day 56; Clinton *v.* State, 33 Oh. 33; Blackburn *v.* State, 71 Ala. 319.]

[7] Tyler on Oaths, p. 15. See also the report of the Lords' Committee, ib. Introd. p. xiv; 3 Inst. 165; Fleta, lib. 5, c. 22; Fortescue, De Laud. Leg. Angl. c. 26, p. 58.

[1] [Originally placed *post*, at § 371.]

form, he will be allowed to make a solemn religious asseveration, involving a like appeal to God for the truth of his testimony, in any mode which he shall declare to be binding on his conscience.[2] The Court, in ascertaining whether the form in which the oath is administered is binding on the conscience of the witness,[3] may inquire of the witness himself; and the proper time for making this inquiry is before he is sworn. But if the witness, without making any objection, takes the oath in the usual form, he may be afterwards asked, whether he thinks the oath binding on his conscience; but it is unnecessary and irrelevant to ask him, if he considers any form of oath more binding, and therefore such question cannot be asked.[4] If a witness, without objecting, is sworn in the usual mode, but, being of a different faith, the oath was not in a form affecting his conscience, as if, being a Jew, he was sworn on the Gospels, he is still punishable for perjury, if he swears falsely.[5]

§§ 365–366.[1]

§ 367. **Capacity to take the Oath: Children.** In respect to children, there is no precise age within which they are absolutely

[2] Omichund *v.* Barker, 1 Atk. 21, 46; s. c. Willes 538, 545–549; Ramkissenseat *v.* Barker, 1 Atk. 19; Atcheson *v.* Everitt, Cowp. 389, 390; Bull. N. P. 292; 1 Phil. Evid. 9–11; 1 Stark. Evid. 22, 23; R. *v.* Morgan, 1 Leach Cr. Cas. 54; Vail *v.* Nickerson, 6 Mass. 262; Edmonds *v.* Rowe, Ry. & M. 77; Com. *v.* Buzzell, 16 Pick. 153; "Quumque sit adseveratio religiosa, satis patet jusjurandum attemperandum esse cujusque religioni:" Heinec. ad Pand. pars 3, §§ 13, 15; "Quodcunque nomen dederis, id utique constat, omne jusjurandum proficisci ex fide et persuasione jurantis; et inutile esse, nisi quis credat Deum, quem testem advocat, perjurii sui idoneum esse vendicem. Id autem credat, qui jurat per Deum suum, per sacra sua, et ex sua ipsius animi religione:" Bynkers. Obs. Jur. Rom. lib. 6, c. 2; [Miller *v.* Salomons, 7 Exch. 535; Gill *v.* Caldwell, 1 Ill. 53; Arnold *v.* Arnold, 13 Vt. 362, Odell *v.* State, 61 Tenn. 91. Statutes sometimes state this explicitly. Examples of the form in various religious sects are as follows: Fachina *v.* Sabine, 2 Stra. 1104 (Mahometan); R. *v.* Entrehman, C. & M. 248 (Chinese); Newman *v.* Newman, 7 N. J. Eq. 26 (Hebrew); State *v.* Gin Pon, 16 Wash. 425 (Chinese). If no special form exists in the witness' religion, none is necessary: R. *v.* Pah-Mah-Gay, 20 U. C. Q. B. 196.]

[3] By Stat. 1–2 Vict., c. 105, an oath is binding, in whatever form, if administered in such form, and with such ceremonies as the person may declare binding. But the doctrine itself is conceived to be common law.

[4] The Queen's Case, 2 B. & B. 284.

[5] Sells *v.* Hoare, 3 B. & B. 232; State *v.* Whisenhurst, 2 Hawks 458. But the adverse party cannot, for that cause, have a new trial. Whether he may, if a witness on the other side testified without having been sworn at all, *quære*. If the omission of the oath was known at the time, it seems he cannot: Lawrence *v.* Houghton, 5 Johns. 129; White *v.* Hawn, ib. 351. But if it was not discovered until after the trial, he may: Hawks *v.* Baker, 6 Greenl. 72.

[1] [These sections, dealing with a lunatic's competency, have been placed in Appendix II. The author treated the subject as involving incompetency to take an oath; but it is to-day recognized that, even where the oath has been abolished, mental capacity to testify is necessary, and the question is now regarded as important only from that point of view. If the witness is mentally disqualified, the question of the oath does not arise; if he is mentally qualified, the question of the oath is the same for him as for other adults. But as a matter of legal theory, an insane person may not be in a condition to appreciate the obligation of an oath: R. *v.* Hill, 2 Den. & P. Cr. C. 254; Holcomb *v.* Holcomb, 28 Conn. 179; R. *v.* Whitehead, L. R. 1 C. C. R. 33.]

excluded, on the presumption that they have not sufficient understanding. At the age of fourteen, every person is presumed to have common discretion and understanding, until the contrary appears; but under that age it is not so presumed; and therefore inquiry is made as to the degree of understanding, which the child offered as a witness may possess;[1] and if he appears to have sufficient natural intelligence, and to have been so instructed as to comprehend the nature and effect of an oath, he is admitted to testify, whatever his age may be.[2] [The discretion of the trial Court should be allowed to control in determining whether a given child is competent.[3]] This examination of the child, in order to ascertain his capacity to be sworn, is made by the judge at his discretion; and though, as has been just said, no age has been precisely fixed, within which a child shall be conclusively presumed incapable, yet in one case a learned judge promptly rejected the dying declarations of a child of four years of age, observing, that it was quite impossible that she, however precocious her mind, could have had that idea of a future state which is necessary to make such declarations admissible.[4] On the other hand, it is not unusual to receive the testimony of children under nine, and sometimes even under seven years of age, if they appear to be of sufficient understanding;[5] and it has been admitted even at the age of five years.[6] If the child, being a principal witness, appears not yet sufficiently instructed in the nature of an oath, the Court [may then and there instruct it or cause it to be instructed, provided the child is capable of understanding,[7] or] will, in its discretion, put off the trial, that this may be done.[8] But whether the trial ought to be put off for the purpose of instructing an adult witness has been doubted.[9]

§ 368. **Same: Atheists.** The third class of persons incompetent to testify as witnesses consists of those who are insensible to the obligations of an oath, from defect of religious sentiment and belief.

[1] [In Com. *v.* Wilson, Pa., 40 Atl. 283, a boy of thirteen was presumed competent.]

[2] [R. *v.* Brasier, East Pl. Cr. I, 443;] McNally's Evid. p. 149, c. 11; Bull. N. P. 293; 1 Hale P. C. 302; 2 Russ. on Crimes, p. 590; Jackson *v.* Gridley, 18 Johns. 98; {McGuire *v.* People, 44 Mich. 286; McGuff *v.* State, 88 Ala. 151;} [Flanagin *v.* State, 25 Ark. 96; Warner *v.* State, ib. 447; State *v.* Richie, 28 La. An. 327; State *v.* Severson, 78 Ia. 653; Davis *v.* State, 31 Nebr. 247.]

[3] [Com. *v.* Lynes, 142 Mass. 580; Day *v.* Day, 56 N. H. 316; State *v.* Edwards, 79 N. C. 650; Wade *v.* State, 50 Ala. 164.]

[4] R. *v.* Pike, 3 C. & P. 598; People *v.* McNair, 21 Wend. 608. Neither can the declarations of such a child, if living, be received in evidence: R. *v.* Brasier, 1 East P. C. 443; {Smith *v.* State, 41 Tex. 352.}

[5] 1 East P. C. 442; Com. *v.* Hutchinson, 10 Mass. 225; McNally's Evid. p. 154; State *v.* Whittier, 8 Shepl. 341.

[6] R. *v.* Brasier, 1 Leach Cr. Cas. 199; s. c. Bull. N. P. 293; s. c. 1 East P. C. 443.

[7] [Anon., 1 Leach Cr. C., 4th ed. 430 n.; R. *v.* Nicholas, 2 C. & K. 246; R. *v.* Baylis, 4 Cox Cr. C. 23; People *v.* McNair, 21 Wend. 608; Day *v.* Day, 56 N. H. 316; Carter *v.* State, 63 Ala. 53; Com. *v.* Lynes, 142 Mass. 578; *contra:* Patteson, J., in R. *v.* Williams, 7 C. & P. 320.]

[8] [Anon., R. *v.* Nicholas, Day *v.* Day, *supra.*]

[9] R. *v.* Wade, 1 Moo. Cr. C. 86; [see R. *v.* Whitehead, L. R. 1 C. C. R. 33.]

The very nature of an oath, it being a religious and most solemn appeal to God, as the Judge of all men, presupposes that the witness believes in the existence of an omniscient Supreme Being, who is "the rewarder of truth and avenger of falsehood;"[1] and that, by such a formal appeal, the conscience of the witness is affected. Without this belief, the person cannot be subject to that sanction, which the law deems an indispensable test of truth.[2] It is not sufficient, that a witness believes himself bound to speak the truth from a regard to character, or to the common interests of society, or from fear of the punishment which the law inflicts upon persons guilty of perjury. Such motives have indeed their influence, but they are not considered as affording a sufficient safeguard for the strict observance of truth. Our law, in common with the law of most civilized countries, requires the additional security afforded by the religious sanction implied in an oath; and, as a necessary consequence, rejects all witnesses, who are incapable of giving this security.[3] Atheists, therefore, and all infidels, that is, those who profess no religion that can bind their consciences to speak truth, are rejected as incompetent to testify as witnesses.[4]

§ 369. **Same: Nature of Theological Belief.** As to the nature and degree of religious faith required in a witness, the rule of law, as at present understood, seems to be this, that the person is competent to testify, if he believes in the being of God, and a future state of rewards and punishments; that is, that Divine punishment will be the certain consequence of perjury.[1] It may be considered as now generally settled, in this country, that it is not material, whether the witness believes that the punishment will be inflicted in this world, or in the next; it is enough if he has the religious sense of accountability to the Omniscient Being, who is invoked by an oath.[2] [Particular sorts of belief are often passed upon by the

[1] Per Lord Hardwicke, 1 Atk. 48. The opinions of the earlier as well as later jurists, concerning the nature and obligations of an oath, are quoted and discussed much at large, in Omichund *v.* Barker, 1 Atk. 21, and in Tyler on Oaths, *passim*, to which the learned reader is referred.

[2] 1 Stark. Evid. 22.

[3] 1 Phil. Evid. 10 (9th ed.).

[4] Bull. N. P. 292; 1 Stark. Evid. 22; 1 Atk. 40, 45; 1 Phil. Evid. 10 (9th ed.).

[1] The proper test of the competency of a witness on the score of a religious belief was settled, upon great consideration, in the case of Omichund *v.* Barker, Willes, 545, s. c. 1 Atk. 21, to be the belief of a God, and that he will reward and punish us according to our deserts. This rule was recognized in Butts *v.* Swartwood, 2 Cowen 431; People *v.* Matteson, ib. 433, 473, n.; and by Story, J., in Wakefield *v.* Ross, 5 Mason 18; s. p. 9 Dane's Abr. 317; and see Brock *v.* Milligan, 10 Oh. 125; Arnold *v.* Arnold, 13 Vt. 362.

[2] Whether any belief in a future state of existence is necessary, provided accountability to God in this life is acknowledged, is not perfectly clear. In Com. *v.* Bachelor, 4 Am. Jurist, 81, Thacher, J., seemed to think it was. But in Hunscom *v.* Hunscom, 15 Mass. 184, the Court held that mere disbelief in a future existence went only to the credibility. This degree of disbelief is not inconsistent with the faith required in Omichund *v.* Barker. The only case clearly to the contrary is Atwood *v.* Welton, 7 Conn. 66. In Curtiss *v.* Strong, 4 Day 51, the witness did not believe in the obliga-

Courts, — *e. g.* "that the witness would go to hell if he did not tell the truth," — but a detailed examination of them here would not be profitable.[3]]

§ 370. **Same: Mode of ascertaining Belief.** It should here be observed that defect of religious faith is never presumed. On the contrary, the law presumes that every man brought up in a Christian land, where God is generally acknowledged, does believe in him, and fear him. The charity of its judgment is extended alike to all. The burden of proof is not on the party adducing the witness, to prove that he is a believer; but it is on the objecting party, to prove that he is not. Neither does the law presume that any man is a hypocrite. On the contrary, it presumes him to be what he professes himself to be, whether atheist or Christian; and the state of a man's opinions, as well as the sanity of his mind, being once proved, is, as we have already seen,[1] presumed to continue unchanged, until the contrary is shown. The state of his religious belief at the time he is offered as a witness is a fact to be ascertained; and this is presumed to be the common faith of the country, unless the objector can prove that it is not. The ordinary mode of showing this is by evidence of his declarations, previously made to others;[2] the person himself not being interrogated;[3] for the object of interrogating a

tion of an oath; and in Jackson *v.* Gridley, 18 Johns. 98, he was a mere atheist, without any sense of religion whatever; all that was said in these two cases, beyond the point in judgment, was extrajudicial. [In England, the law seems to have been settled by Att'y-Gen'l *v.* Bradlaugh, 14 Q. B. D. 697, holding that the belief need not extend to the future state; and this is now generally accepted in this country: Blocker *v.* Burness, 2 Ala. 355; Noble *v.* People, 1 Ill. 56; Cent. M. T. R. Co. *v.* Rockafellow, 17 id. 253, *semble;* Searcy *v.* Miller, 57 Ia. 613; Free *v.* Buckingham, 59 N. H. 225; People *v.* Matteson, 2 Cow. 433; Shaw *v.* Moore, 4 Jones L. 26; State *v.* Washington, 49 La. An., *semble;* Brock *v.* Milligan, 10 Oh. 121; Clinton *v.* State, 33 Oh. St. 33; Cubbison *v.* M'Creary, 2 W. & S. 263; Blair *v.* Seaver, 26 Pa. 276; Jones *v.* Harris, 1 Strob. 160; Bennett *v.* State, 1 Swan 411; Arnold *v.* Arnold, 13 Vt. 362.] In Maine, a belief in the existence of the Supreme Being was rendered sufficient by Stat. 1833, c. 58, without any reference to rewards or punishments; Smith *v.* Coffin, 6 Shepl. 157; but even this seems to be no longer required. See further, People *v.* McGarren, 17 Wend. 460; Cubbison *v.* McCreary, 2 Watts & Serg. 262; Brock *v.* Milligan, 10 Oh. 121; Thurston *v.* Whitney, 2 Law Rep. N. S. 18.

[3] [See R. *v.* Holmes, 2 F. & F. 788; Vincent *v.* State, 3 Heisk. 121; Draper *v.* Draper, 68 Ill. 17; Davidson *v.* State, 39 Tex. 129; State *v.* Michael, 37 W. Va. 568; Moore *v.* State, 79 Ga. 498.]

[1] *Supra*, § 42; State *v.* Stinson, 7 Law Reporter, 383.

[2] Swift's Evid. 48; Smith *v.* Coffin, 6 Shepl. 157. It has been questioned, whether the evidence of his declarations ought not to be confined to a period shortly anterior to the time of proving them, so that no change of opinion might be presumed: Brock *v.* Milligan, 10 Oh. 126, per Wood, J.

[3] "The witness himself is never questioned in *modern* practice, as to his religious belief, though formerly it was otherwise (1 Swift's Dig. 739; 5 Mason 19; American Jurist, vol. iv, p. 79, n.). It is not allowed, even after he has been sworn (The Queen's Case, 2 Brod. & Bing. 284). Not because it is a question tending to disgrace him, but because it would be a personal scrutiny into the state of his faith and conscience, foreign to the spirit of our institutions. No man is obliged to avow his belief, but if he voluntarily does avow it, there is no reason why the avowal should not be proved, like any other fact. The truth and sincerity of the avowal, and the continuance of the belief thus avowed, are presumed, and very justly too, till they are disproved. If his opinions

witness, in these cases, before he is sworn, is not to obtain the knowledge of other facts, but to ascertain from his answers the extent of his capacity, and whether he has sufficient understanding to be sworn.

§ 370 *a*. **Statutory Changes.** [During the present century there has arisen an opinion that the oath, as an additional security for trustworthiness, is without efficacy; and upon this question (which depends much upon experience in particular communities) views of great weight on each side are to be found.[1] But at the same time professional and public opinion has also come to see that, whatever the efficacy of the oath may be for those upon whose religious feelings it exerts an influence, the absolute exclusion from the witness-stand of those who have scruples against taking it, or of those on whose belief it has no binding effect, is both unjust and impolitic. Accordingly, legislation has in most jurisdictions acted with the purpose of removing these disadvantages, and to a great extent the common-law rules involved in the application of the oath have been superseded. These changes have been of three sorts. (1) In some jurisdictions, it has been provided that no person shall be incompetent to testify because of his religious opinions. This, in effect, leaves the oath as a uniform formality, but practically abolishes the requirements of belief formerly existing. (2) In other jurisdictions, the oath is made optional and those who either have scruples against taking it or have not the proper belief or merely do not wish to take it (according to the varying statutes) are allowed to substitute an affirmation. (3) In still other jurisdictions, the oath is entirely abolished, and an affirmation is used as the uniform preliminary to testimony.[2]]

3. *Mental Capacity.*

§ 370 *b*. **In general.** [A person offered as a witness must have the organic capacity to receive correct impressions, to record them in memory and recollect them, and to narrate them intelligently; and

have been subsequently changed, this change will generally, if not always, be provable in the same mode (Atwood *v.* Welton, 7 Conn. 66; Curtis *v.* Strong, 4 Day 51; Swift's Evid. 48–50; Scott *v.* Hooper, 14 Vt. 535; Mr. Christian's note to 3 Bl. Comm. 369; 1 Phil. Evid. 18; Com. *v.* Bachelor, 4 Am. Jur. 79, n.);" 1 Law Reporter, Boston, 347. {*Accord:* Com. *v.* Smith, 2 Gray 516;} [People *v.* Jenness, 5 Mich. 319; Den *v.* Vancleve, 2 South. 653; Jackson *v.* Gridley, 18 Johns. 220; Searcy *v.* Miller, 57 Ia. 613. But the better view, both in policy and in logic, is that either source of information may be used and the witness may be interrogated: Harrel *v.* State, 38 Tenn. 126; Odell *v.* Koppee, 61 id. 91; Arnd *v.* Amling, 53 Md. 197, *semble;* Free *v.* Buckingham, 59 N. H. 225; Doukle *v.* Kohn, 44 Ga. 271, *semble.*]

[1] [See Appleton, Evidence, c. xvi.]

[2] [Under these varying statutes (set forth in Appendix I), various questions of interpretation arise: see Priest *v.* State, 10 Nebr. 399; Cent. M. T. R. Co. *v.* Rockafellow, 17 Ill. 553; Snyder *v.* Nations, 5 Blackf. 295; Parry *v.* Com., 3 Gratt. 632; Bush *v.* Com., 80 Ky. 249; Clinton *v.* State, 33 Oh. St. 31; Fuller *v.* Fuller, 17 Cal. 612; Smith *v.* York, 18 Me. 164; R. *v.* Moore, 6 L. J. M. C. 80; White *v.* Com., 96 Ky. 180; State *v.* Washington, 49 La. An. 1602.]

this quite independently of whether he is fitted by theological belief to take the oath. These fundamental requirements continue to exist, even though the oath has been abolished or made optional. So long as the requirement of the oath was invariably applied, the concurrent existence of these requirements was not emphasized[1] and seldom came distinctly into notice; and for this reason, it is often difficult to learn, in some of the earlier judicial opinions, whether the language applies to the latter of these subjects or to the former. But at the present day it is the latter that more commonly comes before the Courts. The general principles applied are based on a natural view of the testimonial needs, and look towards the acceptance of a witness unless it appears that he is totally unworthy of reliance.]

§ 370 *c.* **Insanity.** [The older rule was that the lunatic and the idiot were absolutely incompetent, except when the former enjoyed a "lucid interval." This rule conceived the lunatic as a person sharply distinguished from a sane person by entirely different qualities, as an African is distinguished from a Caucasian; and further conceived him as objectively — *i. e.* with reference to all matters of life and consciousness — in the class of incompetents, as a stone or a lump of lead is what it is everywhere and for all purposes. But modern science has led us to appreciate that insanity is both graded and relative, — *i. e.* that there are degrees of transition which make it impossible to class all persons as either sane or insane, and that most forms of insanity affect certain topics only and leave a greater or less portion of the mental operations in a normal and trustworthy condition. It follows that, for the purposes of testimony, there should be no inflexible rule of exclusion; the inquiry should be, in the case of each person, whether the delusion or the imbecility is of such a nature, with reference to the subject of the desired testimony, that the person is wholly untrustworthy. This doctrine, first emphasized and excellently illustrated in R. *v.* Hill,[1] may now be said to be generally accepted.[2] It should follow that the discretion of the trial Court in each case should determine whether the delusion is such as to exclude;[3] and that the mere existence of insanity at a former time should not of itself exclude.[4] But if the delusion existed at the time of the events and

[1] [For this reason, perhaps, the author's original treatment of the subject did not discriminate between the theological capacity to take the oath and the mental capacity to testify in general.]

[1] [1851, 2 Den. & P. Cr. C. 254; 15 Jur. 470; 5 Eng. L. & Eq. 547; 5 Cox Cr. 259. But Evans *v.* Hettich, *infra*, and other American rulings, were earlier.]

[2] [Kendall *v.* May, 10 All. 64; Worthington *v.* Mencer, 96 Ala. 310 (leading cases). *Accord:* Clements *v.* McGinn, Cal., 33 Pac. 920; Walker *v.* State, 97 Ala. 85; State *v.* Weldon, 39 S. C. 318; Coleman *v.* Com., 25 Grat. 873; Evans *v.* Hettich, 5 Wheat. 470; Wright *v.* Express Co., 80 Fed. 85; District *v.* Armes, 107 U. S. 521; Guthrie *v.* Shaffer, Okl., 54 Pac. 698; and cases in the next two notes.]

[3] [Den *v.* Vancleve, 2 South. N. J. 653; Armstrong *v.* Timmons, 5 Harringt. 345; Kendall *v.* May, *supra*; Cannady *v.* Lynch, 27 Minn. 436; District *v.* Armes, *supra*; Pittsb. & W. R. Co. *v.* Thompson, U. S. App., 32 Fed. 720; State *v.* Meyers, 46 Nebr. 152.]

[4] [Pittsb. & W. R. Co. *v.* Thompson, *supra*; Clements *v.* McGinn, Cal., 33 Pac. 920; Sarbach *v.* Jones, 20 Kan. 500; Wright *v.* Express Co., *supra*.]

affected his power to observe them correctly, it should exclude him;[5] or if it did not then exist, but has since supervened and affects his power to recollect and narrate correctly, it should exclude him.[6] It would seem also that if the aberration, though not affecting his intelligence, has destroyed his moral responsibility or sense of truth, he should be excluded.[7] The opponent must cause the incompetency to appear;[8] and this may be ascertained from a *voir dire* examination[9] or by outside testimony,[10] or by the course of his testimony, in which case he may be taken from the stand and his testimony struck out.[11] The fact of prior committal or present confinement in an asylum would suffice to make it necessary for the party offering the witness to show his competency.[12] Moreover, the Court may, while admitting him to testify, leave it to the jury to reject the testimony if they deem him not credible.[13] A *deaf-and-dumb* person, in the times of less accurate knowledge, was treated as presumably an imbecile and therefore as incompetent unless shown to be sufficiently intelligent.[14] To-day, there appears to be no such presumption,[15] and such persons may testify so far as any means of communication are available.[16]]

§ 370 *d*. **Infancy.** [The child, as well as the lunatic, may still be excluded, even where the oath has been made optional or has been abolished, if it appears not to be capable to observe, to recollect, and to narrate intelligently. It is not always possible, especially in the earlier cases, to learn whether the language of the Court is used with exclusive reference to the oath-test; but that certain independent requirements exist seems generally accepted. In keeping with the liberal modern principle accepted for insane persons is the generally accepted principle that there can be no particular age at which a child invariably becomes incompetent;[1] and it should follow that

[5] [Holcomb *v.* Holcomb, 20 Conn. 179; Worthington *v.* Mencer, *supra*. *Contra*: Sarbach *v.* Jones, *supra*; Campbell *v.* State, 23 Ala. 74; Cal. C. C. P. § 1880.]

[6] [District *v.* Armes, *supra*; Bowdle *v.* R. Co., 103 Mich. 272.]

[7] [Worthington *v.* Mencer, *supra*; Hartford *v.* Palmer, 16 Johns. 142; Cannady *v.* Lynch, *supra*. Many Courts refer to this, but it is not always possible to tell whether they have in view the oath-test or this independent principle.]

[8] [Mayor *v.* Caldwell, 81 Ga. 78.]

[9] [District *v.* Armes, *supra*; Att'y-Gen'l *v.* Hitchcock, 1 Exch. 95.]

[10] [*Contra*, but erroneous, Robinson *v.* Dana, 16 Vt. 474; Mayor *v.* Caldwell, *supra*, is peculiar.]

[11] [R. *v.* Whitehead, L. R. 1 C. C. R. 33.]

[12] [See Spittle *v.* Walton, L. R. 11 Eq. 420; *Re* Christie, 5 Paige Ch. 241; Clements *v.* McGinn, Cal., 33 Pac. 920; Pittsb. W. R. Co. *v.* Thompson, U. S. App., 82 Fed. 720.]

[13] [Mead *v.* Harris, 101 Mich. 585; Bowdle *v.* R. Co., 103 id. 272.]

[14] [See Hale Pl. Cr. I, 34; R. *v.* Ruston, 1 Leach Cr. L. 408; Morrison *v.* Leonard, 3 C. & P. 127.]

[15] [People *v.* McGee, 1 Denio 21; Quinn *v.* Halbert, 55 Vt. 228; Ritchey *v.* People, 23 Colo. 314; State *v.* Howard, 118 Mo. 127, 143; State *v.* Weldon, 39 S. C. 318.]

[16] [For modes of communication, see *post*, §§ 439 *d*–439 *h*.]

[1] [R. *v.* Brasier, 1 Leach Cr. C. 199, dealing primarily with the oath-test, has in effect established this. *Accord:* McGuff *v.* State, 88 Ala. 147; Gaines *v.* State, 99 Ga. 703; Draper *v.* Draper, 68 Ill. 17; Hughes *v.* R. Co., 65 Mich. 10; State *v.* Denis, 19 La. An. 119; State *v.* Nelson, 132 Mo. 184; Terr. *v.* De Guzman, N. M., 42 Pac. 68;

the discretion of the trial Court, in view of the circumstances of each case, should be left to determine for itself.[2] The principle upon which their rulings should proceed is that the child should be sufficiently mature to receive correct impressions by its senses [3] and to recollect and narrate intelligently; [4] and also, it is said, to appreciate the moral duty to tell the truth; [5] although, as this moral sense is so slow in developing in children, even after the age of intelligence, it seems much more practical to omit such a requirement and take the child's story for what it may appear to be worth.[6]]

§ 370 *e*. **Intoxication.** [A person may by intoxication become incompetent. It is clear that intoxication while on the stand, sufficient to destroy the present power of intelligent recollection and narration, may suffice to exclude; [1] and it would seem that intoxication at the time of the events in question, sufficient to prevent intelligent observation, might equally suffice to exclude.[2] But the mere fact of intoxication is not in itself sufficient; [3] and confessions by intoxicated persons have often been received.[4]]

§ 371.[1]

Wheeler *v.* U. S., 159 U. S. 523; and cases in the next note. In a few States, a presumption of incompetency is said to arise at a certain age: see People *v.* Craig, 111 Cal. 460; Terr. *v.* De Guzman, *supra;* State *v.* Michael, 37 W. Va. 565; Hughes *v.* R. Co., 31 N. W. 605. Sometimes a statute excludes those under a certain age: see St. Louis I. M. & S. R. Co. *v.* Waren, Ark., 48 S. W. 222.]

[2] [People *v.* Craig, 111 Cal. 460; People *v.* Baldwin, 117 id. 244; Peterson *v.* State, 47 Ga. 527; Minturn *v.* State, 99 id. 254; People *v.* Walker, Mich., 71 N. W. 641; State *v.* Levy, 23 Minn. 108; Com. *v.* Mullins, 2 All. 296; Com. *v.* Robinson, 165 Mass. 426; Freeny *v.* Freeny, 80 Md. 406; State *v.* Nelson, 132 Mo. 184; State *v.* Prather, 136 id. 20; State *v.* Ridenhour, 102 id. 288; State *v.* Sawtelle, 66 N. H. 488; State *v.* Jackson, 9 Or. 459; Williams *v.* U. S., 3 D. C. App. 335, 339; Wheeler *v.* U. S., 159 U. S. 523; State *v.* Reddington, 7 S. D. 368; State *v.* Juneau, 88 Wis. 180.]

[3] [Kelly *v.* State, 75 Ala. 22; People *v.* Bernal, 10 Cal. 66; Mo. R. S. 1889, § 8925.]

[4] [Com. *v.* Mullins, 2 All. 296; White *v.* Com., 96 Ky. 180; State *v.* Douglas, 53 Kan. 669; Terr. *v.* De Guzman, N. M., 42 Pac. 68.]

[5] [Johnson *v.* State, 61 Ga. 36; Williams *v.* State, 109 Ala. 64; State *v.* Reddington, 7 S. D. 368; State *v.* Whittier, 21 Me. 347; Com. *v.* Robinson, 165 Mass. 426; Hughes *v.* R. Co., 65 Mich. 10; Wheeler *v.* U. S., 159 U. S. 523.]

[6] [See Campbell, C. J., in Hughes *v.* R. Co., 65 Mich. 10.]

[1] [Walker's Trial, 23 How. St. Tr. 1153; Hartford *v.* Palmer, 16 Johns. 143; Gould *v.* Crawford, 2 Pa. St. 90; Gebhart *v.* Shindle, 15 S. & R. 238; State *v.* Costello, 62 Ia. 407, *semble.*]

[2] [State *v.* Costello, *supra, semble. Contra:* Gebhart *v.* Shindle, *supra;* Coleman *v.* Com., 25 Grat. 865.]

[3] [Eskridge *v.* State, 25 Ala. 33; People *v.* Ramirez, 56 Cal. 536.]

[4] [R. *v.* Spilsbury, 7 C. & P. 187; Lester *v.* State, 32 Ark. 730; State *v.* Feltes, 53 Ia. 496; Com. *v.* Howe, 9 Gray 112; State *v.* Grear, 28 Minn. 426; Jefferds *v.* People, 5 Park. Cr. C. 547; Williams *v.* State, 12 Lea 212; see Com. *v.* McCabe, Pa., 8 Atl. 54.

It has been held that the use of opium does not make the person incompetent: State *v.* White, 10 Wash. 611.

For the admissibility of intoxication, etc., as impeaching credibility, see *post*, § 450 *b*.]

[1] [Transferred *ante*, as § 364 *b*.]

4. *Moral Capacity.*

§ 372. **Infamy; Conviction of Crime.**[1] [The possession of a truthful disposition and inclination is not regarded as an essential part of the equipment of a witness, in the sense that his competency depends upon it;[2] so that neither is the party offering him required to show that he possesses such a character, nor may the opponent exclude him by showing his character for truth-telling to be bad. But the notion of positive moral worthlessness seems nevertheless to have been the foundation of the important common-law principle that infamous persons — *i. e.* persons convicted of heinous offences — are not competent as witnesses.] The basis of the rule seems to be, that such a person is morally too corrupt to be trusted to testify; so reckless of the distinction between truth and falsehood and insensible to the restraining force of an oath, as to render it extremely improbable that he will speak the truth at all. Of such a person Chief Baron Gilbert remarks, that the credit of his oath is overbalanced by the stain of his iniquity.[3] The party, however, must have been legally adjudged guilty of the crime. If he is stigmatized by public fame only, and not by the censure of law, it affects the credit of his testimony, but not his admissibility as a witness.[4] The record, therefore, is required as the sole evidence of his guilt; no other proof being admitted of the crime; not only because of the gross injustice of trying the guilt of a third person in a case to which he is not a party, but also, lest, in the multiplication of the issues to be tried, the principal case should be lost sight of, and the administration of justice should be frustrated.[5]

§ 373. **Same: Kind of Crime.** It is a point of no small difficulty to determine precisely the crimes which render 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 principle, as carries with it a conclusion of a total disregard to the obligation of an oath."[1] But the difficulty lies in the specification of those offences. The usual and more general enumeration is, treason, felony, and the *crimen falsi*.[2] In regard to the two former,

[1] [The first sentence of the original section has been transferred to Appendix II.]

[2] [Except so far as a child or a lunatic may be excluded because lacking in moral responsibility: *ante*, §§ 370 *c*, 370 *d*.]

[3] 1 Gilb. Evid. by Lofft, p. 256. It was formerly thought that an infamous *punishment*, for whatever crime, rendered the person incompetent as a witness, by reason of infamy. But this notion is exploded; and it is now settled that it is the crime and not the punishment that renders the man infamous: Bull. N. P. 292; Pendock *v.* Mackinder, Willes 666; [R. *v.* Priddle, 1 Leach Cr. L., 4th ed. 442; R. *v.* Ford, 2 Salk. 69.]

[4] 2 Dods. 186, per Sir Wm. Scott; [Brown *v.* State, 18 Oh. St. 510.]

[5] R. *v.* Castell Careinion, 8 East 77; Lee *v.* Gansel, Cowp. 3, per Ld. Mansfield.

[1] 2 Dods. 186, per Sir Wm. Scott.

[2] Phil. & Am. on Evid. p. 17; 6 Com. Dig. 353, *Testmoigne*, A, 4, 5; Co. Lit. 6 *b*; 2 Hale P. C. 277; 1 Stark. Evid. 94, 95. A conviction for petty larceny disqualifies, as well as for grand larceny: Pendock *v.* Mackinder, Willes 665.

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.[3] If the offence did not fall under any other head, it was called *stellionatus*,[4] 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 defraud by spreading false news,[5] 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,[6] perjury, subornation of perjury,[7] suppression of testimony by bribery, or conspiracy to procure the absence of a witness,[8] or other conspiracy to accuse one of a crime,[9] and barratry.[10] And from these deci-

[3] Cod. lib. 9, tit. 22, ad legem Corneliam de falsis; Cujac. Opera, tom. ix, in locum (Ed. Prati, A. D. 1839, 4to, pp. 2191–2200; 1 Brown's Civ. & Adm. Law, p. 525); Dig. lib. 48, tit. 10; Heinec. in Pand. pars vii, §§ 214–218. The *crimen falsi*, as recognized in the Roman law, might be committed: 1. By words, as in perjury; 2. By writing, as in forgery; 3. By act or deed; namely, in counterfeiting or adulterating the public money, — in fraudulently substituting one child for another, or a supposititious birth, — or in fraudulently personating another, — in using false weights or measures, — in selling or mortgaging the same thing to two several persons, in two several contracts, and in officiously supporting the suit of another by money, etc., answering to the common-law crime of maintenance. Wood, Instit. Civil Law, pp. 282, 283; Halifax, Analysis Rom. Law, p. 134. The law of Normandy disposed of the whole subject in these words: "Notandum siquidem est, quod nemo in querela sua pro teste recipiendus est; nec ejus hæredes nec participes querelæ. Et hoc intelligendum est tam ex parte actoris, quam ex parte defensoris. Omnes autem illi, qui *perjurio* vel *læsione fidei* sunt infames, ob hoc etiam sunt repellendi, et omnes illi, qui in bello succubuerunt:" Jura Normaniæ, c. 62 (in Le Grand Coustumier, fol. edit. 1539). In the ancient Danish law, it is thus defined, in the chapter entitled *Falsi crimen quod nam censetur:* "Falsum est, si terminum, finesve quis moverit, monetam nisi venia vel mandato regio cusserit, argentum adulterinum conflaverit, nummisve reprobis dolo malo emat vendatque, vel argento adulterino:" Ancher, Lex Cimbrica, lib. 3, c. 65, p. 249.

[4] Dig. lib. 47, tit. 20, l. 3, Cujac. (in locum) Opera, tom. ix (ed. *supra*), p. 2224. Stellionatus nomine significatur omne crimen, quod nomen proprium non habet, omnis fraus, quæ nomine proprio vacat. Translatum autem esse nomen stellionatus, nemo est qui nesciat, ab animali ad hominem vafrum, et decipiendi peritum: Ib.; Heinec. ad Pand. pars. vii, §§ 147, 148; 1 Brown's Civ. & Adm. Law, p. 426.

[5] The Ville de Varsovie, 2 Dods. 174. But see Crowther *v.* Hopwood, 3 Stark. 21.

[6] R. *v.* Davis, 5 Mod. 74.

[7] Co. Lit. 6 *b*; 6 Com. Dig. 353, *Testm.* A, 5.

[8] Clancey's Case, Fortesc. 208; Bushel *v.* Barrett, Ry. & M. 434.

[9] 2 Hale P. C. 277; Hawk. P. C. b. 2, c. 46, § 101; Co. Lit. 6 *b*; R. *v.* Priddle, 2 Leach Cr. Cas. 442; Crowther *v.* Hopwood, 3 Stark. 21, arg.; 1 Stark. Evid. 95; 2 Dods. 191.

[10] R. *v.* Ford, 2 Salk. 690; Bull. N. P. 292. The receiver of stolen goods is

sions, 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. At least it may be said, in the language of Sir William Scott,[11] "so far the law has gone affirmatively; and it is not for me to say where it should stop, negatively."

§ 374. **Same: Exception for a Party.** In regard to the extent and effect of the disability thus created, a distinction is to be observed between cases in which the person disqualified is a party, and those in which he is not. In cases between third persons, his testimony is universally excluded.[1] But where he is a party, in order that he may not be wholly remediless, he may make any affidavit necessary to his exculpation or defence, or for relief against an irregular judgment, or the like;[2] but it is said that his affidavit shall not be read to support a criminal charge.[3] If he was one of the subscribing witnesses to a deed, will, or other instrument, before his conviction, his handwriting may be proved as though he were dead.[4]

§ 375. **Same: Judgment necessary; Production of Record.** 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 the 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.[1] And it must appear that the judgment was rendered by a Court of competent jurisdiction.[2] Judgment of outlawry, for treason or felony, will have the same effect;[3] 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),[4] or, by his

incompetent as a witness: Com. *v.* Rogers, 7 Metc. 500. If a statute declare the perpetrator of a crime "infamous," this, it seems, will render him incompetent to testify: 1 Gilb. Evid. by Lofft, pp. 256, 257; Co. Lit. 6 *b*.

[11] 2 Dods. 191. See also 2 Russ. on Crimes, 592, 593.

[1] Even where it is merely offered as an affidavit in showing cause against a rule calling upon the party to answer, it will be rejected: *In re* Sawyer, 2 Q. B. 721.

[2] Davis & Carter's Case, 2 Salk. 461; R. *v.* Gardner, 2 Burr. 1117; Atcheson *v.* Everitt, Cowp. 382; Skinner *v.* Perot, 1 Ashm. 57.

[3] Walker *v.* Kearney, 2 Stra. 1148; R. *v.* Gardner, 2 Burr. 1117.

[4] Jones *v.* Mason, 2 Stra. 833.

[1] 6 Com. Dig. 354, *Testm.* A, 5; R. *v.* Castell Careinion, 8 East 77; Lee *v.* Gansel, Cowp. 3; Bull. N. P. 292; Fitch *v.* Smalbrook, T. Ray. 32; People *v.* Whipple, 9 Cowen 707: People *v.* Herrick, 13 Johns. 82; Cushman *v.* Loker, 2 Mass. 108; Castellano *v.* Peillon, 2 Martin, N. s. 466.

[2] Cooke *v.* Maxwell, 2 Stark. 183.

[3] Co. Lit. 6 *b*; Hawk. P. C. b. 2, c. 48, § 22; 3 Inst. 212; 6 Com. Dig. 354, *Testm.* A, 5; 1 Stark. Evid. 95, 96. In Scotland, it is otherwise: Tait's Evid. p. 347.

[4] [For this question, see *post*, § 461 *b*, so far as concerns the impeachment of witnesses.]

plea of "guilty" which has not been followed by a judgment,[5] the proof does not go to the competency of the witness, however it may affect his credibility.[6] And the judgment itself, when offered against his admissibility, can be proved only by the record, or, in proper cases, by an authenticated copy, which the objector must offer and produce at the time when the witness is about to be sworn, or at farthest in the course of the trial.[7]

§ 376. **Same: Conviction in another Jurisdiction.** Whether judgment of an infamous crime, passed by a foreign tribunal, ought to be allowed to affect the competency of the party as a witness, in the courts of this country, is a question upon which jurists are not entirely agreed. But the weight of modern opinion seems to be, that personal disqualifications, not arising from the law of nature, but from the positive law of the country, and especially such as are of a penal nature, are strictly territorial, and cannot be enforced in any country other than that in which they originated.[1] Accordingly, it has been held, upon great consideration, that a conviction and sentence for a felony in one of the United States did not render the party incompetent as a witness in the courts of another State; though it might be shown in diminution of the credit due to this testimony.[2]

§ 377. **Same: Removed by Pardon.** The disability thus arising from infamy may, in general, be removed in two modes: (1) by reversal of the judgment;[1] and (2) by a pardon.[2] The reversal of the

[5] R. *v.* Hinks, 1 Denis. Cr. Cas. 84; [see Smith *v.* Brown, 2 Mich. 162.]

[6] R. *v.* Castell Careinion, 8 East 77; Wicks *v.* Smalbrook, 1 Sid. 51; s. c. T. Ray. 32; People *v.* Herrick, 13 Johns. 82; {People *v.* O'Neil, 109 N. Y. 265.}

[7] Ib.; Hilts *v.* Colvin, 14 Johns. 182; Com. *v.* Green, 17 Mass. 537; [Boyd *v.* State, 94 Tenn. 505]; in State *v.* Ridgely, 2 Har. & McHen. 120, and Clark's Lessee *v.* Hall, ib. 378, which have been cited to the contrary, parol evidence was admitted to prove only the fact of the witness' having been transported as a convict, not to prove the judgment of conviction. [The record must contain the caption, return of the indictment, the indictment and arraignment; a mittimus, with the judgment, is not sufficient: Bartholomew *v.* People, 104 Ill. 601, 606. Where an appeal from the judgment is pending, the objector must show that it has been dismissed: Foster *v.* State, Tex. Cr., 46 S. W. 231. It must appear either that by acceptance of sentence or affirmance of judgment the disposition has been final: Stanley *v.* State, Tex. Cr., 46 S. W. 645.]

[1] Story on Confl. of Laws, §§ 91, 92, 104, 620–625; Martens, Law of Nations, b. 3, c. 3, §§ 24, 25.

[2] Com. *v.* Green, 17 Mass. 515, 539–549 (leading case); {Sims *v.* Sims, 75 N. Y. 466; National Trust Company *v.* Gleason, 77 id. 400;} [Logan *v.* U. S., 144 U. S. 303.] *Contra:* [Chase *v.* Blodgett, 10 N. H. 30 (leading case);] {State *v.* Foley, 15 Nev. 64;} State *v.* Candler, 3 Hawks 393, per Taylor, C. J., and Henderson, J.; Hall, J., *dubitante*, but inclining in favor of admitting the witness; in the cases of State *v.* Ridgely, 2 Har. & McHen. 120, Clark's Lessee *v.* Hall, ib. 378, and Cole's Lessee *v.* Cole, 1 Har. & Johns. 572, which are sometimes cited in the negative, this point was not raised nor considered; they being cases of persons sentenced in England for felony, and transported to Maryland under the sentence prior to the Revolution.

[1] [See *ante*, § 375, note 7.]

[2] [Crosby's Trial, 12 How. St. Tr. 1297; Boyd *v.* U. S., 142 U. S. 450; Logan *v.* U. S., 144 id. 303; State *v.* Foley, 15 Nev. 67. It was formerly doubted whether a pardon, without the customary burning in the hand, sufficed: Rookwood's Trial, 13 How. St. Tr. 183, 185, 187; Warwick's Trial, ib. 1011, 1019. See in general a learned opinion by Mr. J. Doe, in 50 N. H. 244.]

judgment must be shown in the same manner that the judgment itself must have been proved; namely, by production of the record of reversal, or, in proper cases, by a duly authenticated exemplification of it. The pardon must be proved, by production of the charter of pardon, under the Great Seal. And though it were granted after the prisoner had suffered the entire punishment awarded against him, yet it has been held sufficient to restore the competency of the witness, though he would, in such case, be entitled to very little credit.[3]

§ 378. The rule that a pardon restores the competency and completely rehabilitates the party is *limited* to cases where the disability is a consequence of the judgment, according to the principles of the common law.[1] But where the disability is annexed to the conviction of a crime by the express words of a statute, it is generally agreed that the pardon will not, in such a case, restore the competency of the offender; the prerogative of the sovereign being controlled by the authority of the express law. Thus, if a man be adjudged guilty on an indictment for perjury, at common law, a pardon will restore his competency; but if the indictment be founded on the statute of 5 Eliz. c. 9, which declares that no person, convicted and attainted of perjury or subornation of perjury, shall be from thenceforth received as a witness in any court of record, he will not be rendered competent by a pardon.[2]

§ 378 *a*. **Same: Statutory Changes.** [The policy of absolute exclusion for persons convicted of crime can no longer be defended.[1] Nevertheless, legislation has not yet everywhere caught up with enlightened opinion. (1) In the greater number of jurisdictions[2] this disqualification has been entirely removed.[3] (2) In a smaller number, it is retained for a few crimes, — usually the crime of perjury. (3) In a few jurisdictions, the old crudities remain.[4]]

[3] U. S. *v.* Jones, 2 Wheeler's Cr. Cas. 451, per Thompson, J. By Stat. 9 Geo. IV, c. 32, § 3, enduring the punishment to which an offender has been sentenced for any felony not punishable with death has the same effect as a pardon under the Great Seal, for the same offence; and of course it removes the disqualification to testify; and the same effect is given by § 4 of the same statute, to the endurance of the punishment awarded for any misdemeanor, except perjury and subornation of perjury; see also 1 W. IV, c. 37, to the same effect; Tait on Evid. pp. 346, 347. But whether these enactments have proceeded on the ground that the incompetency is in the nature of punishment, or that the offender is reformed by the salutary discipline he has undergone, does not clearly appear.

[1] If the pardon of one sentenced to the penitentiary for life contains a proviso, that nothing therein contained shall be construed, so as to relieve the party from the legal disabilities consequent upon his sentence, other than the imprisonment, the proviso is void, and the party is fully rehabilitated: People *v.* Pease, 3 Johns. Cas. 333.

[2] R. *v.* Ford, 2 Salk. 690; Dover *v.* Mæstaer, 5 Esp. 92, 94; 2 Russ. on Crimes, 595, 596; R. *v.* Greepe, 2 Salk. 513, 514; Bull. N. P. 292; Phil. & Am. on Evid. 21, 22; Hargrave's Juridical Arguments, vol. ii, p. 221 *et seq.*; Amer. Jur. xi, 360. [*Contra*, Diehl *v.* Rogers, 169 Pa. 316. See also the statutes in Appendix II.]

[1] [See Appleton, Evidence, c. iii, condensing Bentham's arguments. There is no answer to them.]

[2] [Beginning in 1843, with St. 6–7 Vict., c. 85.]

[3] [For the use of a conviction in impeachment, see *post*, § 461 *b*.]

[4] [For all these statutes, see Appendix I.]

§ 378 *b*. **Race, Religious Belief.** [Independently of the oath-requirements, no Court has ever decided that an immoral religious belief could be a ground of exclusion;[1] though it was suggested by Bentham[2] that cacotheism, or a wicked religion which sanctioned and justified perjury, might well justify rejection, and though it has more than once been argued[3] that a jesuitical belief in absolution for perjury against heretics should suffice to exclude.[4] In many States, until the completion of the contest to abolish slavery, and in a few States even since that time,[5] statutes excluded the testimony of negroes, of Indians, and even of persons of mixed blood, in all cases except for or against each other. Nothing is to be said for these anachronisms, and the question is happily no longer a living one. Nor can anything better be said of a similar exclusion of the testimony of the Chinese, which once was the law of California.[6] The modern and enlightened policy is to make no discriminations based on race.]

§ 379. **Accomplices.** The case of accomplices is usually mentioned under the head of Infamy; but we propose to treat it more appropriately when we come to speak of persons disqualified by interest, since accomplices generally testify under a promise or expectation of pardon or some other benefit.[1] But it may here be observed that it is a settled rule of evidence that a *particeps criminis*, notwithstanding the turpitude of his conduct, is not, on that account, an incompetent witness so long as he remains not convicted and sentenced for an infamous crime. The admission of accomplices, as witnesses for the government, is justified by the necessity of the case, it being often impossible to bring the principal offenders to justice without them. The usual course is to leave out of the indictment those who are to be called as witnesses; but it makes no difference as to the admissibility of an accomplice, whether he is indicted or not, if he has not been put on his trial at the same time with his companions in crime.[2] He is also a competent witness in their favor; and if he is put on his trial at the same time with them, and there is only very slight evidence, if any at all, against him, the Court may, as we have already seen,[3] and generally will, forth-

[1] [But this was suggested by O'Neall, J., in Anon., 1 Hill S. C. 258.]
[2] [Rationale of Judicial Evidence, Bowring's ed., I, 235, V, 134.]
[3] [Freind's Trial, 13 How. St. Tr. 31, 43, 58 (repudiated by L. C. J. Holt); Darby *v.* Ouseley, 1 H. & N. 6, 10; Com. *v.* Buzzell, 6 Pick. 156; see Bentham, Vol. I, 235, Vol. V, 134.]
[4] [For using this in impeachment, see *post*, § 450 *a*.]
[5] [In Alabama the law continued until 1876; Delaware's statute-book is still thus disfigured; see Appendix I.]
[6] [Denounced by Sawyer, J., in People *v.* Jones, 31 Cal. 573.]
[1] [See § 413, in Appendix II.]
[2] See Jones *v.* Georgia, 1 Kelly 610; [State *v.* Reed, 50 La. An., 24 So. 131; State *v.* Riney, 137 Mo. 102; State *v.* Stewart, 142 id. 412; State *v.* Black, id., 44 S. W. 341; see *ante*, § 333 *a*. An accomplice may be an interpreter: State *v.* Kent, S. D., 62 N. W. 631.]
[3] *Supra*, § 362.

with direct a separate verdict as to him, and, upon his acquittal, will admit him as a witness for others. If he is convicted, and the punishment is by fine only, he will be admitted for the others, if he has paid the fine.[4] But whether an accomplice already charged with the crime, by indictment, shall be admitted as a witness for the government, or not, is determined by the judges, in their discretion, as may best serve the purpose of justice. If he appears to have been the principal offender, he will be rejected.[5] And if an accomplice, having made a private confession, upon a promise of pardon made by the attorney-general, should afterwards refuse to testify, he may be convicted upon the evidence of that confession.[6]

§ 380. **Same: Corroboration.** The degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury. It has sometimes been said that they ought not to believe him, unless his testimony is corroborated by other evidence;[1] and, without doubt, great caution in weighing such testimony is dictated by prudence and good reason. But there is no such rule of law; it being expressly conceded that the jury may, if they please, act upon the evidence of the accomplice, without any confirmation of his statement.[2] But, on the other hand, judges, in their discretion, will advise a jury not to convict of felony upon the testimony of an accomplice alone and without corroboration; and it is now so generally the practice to give them such advice, that its omission would be regarded as an omission of duty on the part of the judge.[3] And considering the respect always paid

[4] 2 Russ. on Crimes, 597, 600; R. *v.* Westbeer, 1 Leach Cr. Cas. 14; Charnock's Case, 4 St. Tr. 582 (ed. 1730); s. c. 12 How. St. Tr. 1454; R. *v.* Fletcher, 1 Str. 633. The rule of the Roman law, "Nemo, allegans turpitudinem suam, est audiendus," though formerly applied to witnesses, is now to that extent exploded. It can only be applied, at this day, to the case of a party seeking relief: see *infra*, § 383, n.; see also 2 Stark. Evid. 9, 10; 2 Hale P. C. 280; 7 T. R. 611; Musson *v.* Fales, 16 Mass. 335; Churchill *v.* Suter, 4 id. 162; Townsend *v.* Bush, 1 Conn. 267, per Trumbull, J.

[5] People *v.* Whipple, 9 Cowen 707; *supra*, § 363.

[6] Com. *v.* Knapp, 10 Pick. 477; R. *v.* Burley, 2 Stark. Evid. 12, n. (*r*).

[1] [This doctrine has received considerable support in some American jurisdictions, apparently through a misunderstanding of the liberal English practice in charging the jury, as explained in the text. In these jurisdictions corroboration is required, sometimes by statute: Kent *v.* State, 64 Ark. 247; People *v.* Creagan, Cal., 53 Pac. 1082; Schaefer *v.* State, 93 Ga. 177; State *v.* Russell, 90 Ia. 493 (§ 4559); State *v.* McDonald, 57 Kan. 537; State *v.* Callahan, 47 La. An. 455; People *v.* Mayhew, 150 N. Y. 346 (§ 399); State *v.* Condotte, N. D., 72 N. W. 913 (§ 8195); State *v.* Scott, 28 Or. 331; State *v.* Phelps, 5 S. D. 480, 488.]

[2] R. *v.* Hastings, 7 C. & P. 152, per Ld. Denman, C. J.; R. *v.* Jones, 2 Campb. 132, per Ld. Ellenborough; s. c. 31 How. St. Tr. 315; R. *v.* Atwood, 2 Leach Cr. Cas. 464; R. *v.* Durham, ib. 478; R. *v.* Dawber, 3 Stark. 34; R. *v.* Barnard, 1 C. & P. 87, 88 {R. *v.* Boyes, 9 Cox Cr. 32;} People *v.* Costello, 1 Denio 83. [The correct principle, as above described by the author, is clearly explained by Maule, J., in R. *v.* Mullins, 7 State Tr. N. S. 1110, 3 Cox Cr. 526. In the following jurisdictions the orthodox rule is followed: Campbell *v.* People, 159 Ill. 9; Com. *v.* Bishop, 165 Mass. 148; State *v.* Tobie, 141 Mo. 547; Lamb *v.* State, 40 Nebr. 312, 319; Cox *v.* Com., 125 Pa. 103; State *v.* Green, 48 S. C. 136.]

[3] Roscoe's Crim. Evid. p. 120; 2 Stark. Evid. 12; R. *v.* Barnard, 1 C. & P. 87; {R.

by the jury to this advice from the bench, it may be regarded as the settled course of practice, not to convict a prisoner in any case of felony upon the sole and uncorroborated testimony of an accomplice. The judges do not, in cases, withdraw the cause from the jury by positive direction to acquit,[4] but only advise them not to give credit to the testimony.

§ 381. **Same: What amounts to Corroboration.** But though it is thus the settled practice, in cases of felony, to require other evidence in corroboration of that of an accomplice, yet, in regard to the manner and extent of the corroboration to be required, learned judges are not perfectly agreed. Some have deemed it sufficient, if the witness is confirmed in any material part of the case;[1] others

v. Stubbs, 7 Cox Cr. 48.] [But this is perhaps exaggerated: see R. Mullins, *supra*;] [State *v.* Litchfield, 58 Me. 267; Carroll *v.* Com., 84 Pa. 107. The practice of caution from the bench is not so uniform in the case of misdemeanors as in felonies, though the distinction is rather one of degree than of kind: R. *v.* Farler, 8 C. & P. 106; and the extent of corroboration, it has been said, will depend much upon the nature of the crime: R. *v.* Jarvis, 2 M. & Rob. 40; and if the offence be a statute one, as the non-repair of a highway; or involve no great moral delinquency, as being present at a prize-fight which terminated in manslaughter: R. *v.* Hargrave, 5 C. & P. 170; R. *v.* Young, 19 Cox C. C. 371; or the action be for a penalty, the caution has been refused: McClory *v.* Wright, 10 Ir. Law 514; Magee *v.* Mark, 11 id. 449.] For the limitation of this practice to cases of felony, see R. *v.* Jones, 31 Howell's St. Tr. 315, per Gibbs, Attor.-Gen., arg. See also R. *v.* Hargrave, 5 C. & P. 170, where persons present at a fight, which resulted in manslaughter, though principals in the second degree, were held not to be such accomplices as required corroboration, when testifying as witnesses.

[4] [*Re* Meunier, 1894, 2 Q. B. 415.]

[1] This is the rule in Massachusetts, where the law was stated by Morton, J., in Com. *v.* Bosworth, 22 Pick. 397, as follows: "1. It is competent for a jury to convict on the testimony of an accomplice alone. The principle which allows the evidence to go to the jury necessarily involves in it a power in them to believe it. The defendant has a right to have the jury decide upon the evidence which may be offered against him; and their duty will require of them to return a verdict of guilty or not guilty, according to the conviction which that evidence shall produce in their minds: 2 Hawk. P. C. c. 46, § 135; 1 Hale P. C. 304, 305; Roscoe's Crim. Ev. 119; 1 Phil. Ev. 32; 2 Stark. Ev. 18, 20. 2. But the source of this evidence is so corrupt, that it is always looked upon with suspicion and jealousy, and is deemed unsafe to rely upon without confirmation. Hence the Court ever consider it their duty to advise a jury to acquit, where there is no evidence other than the uncorroborated testimony of an accomplice. 1 Phil. Evid. 34; 2 Stark. Evid. 24; R. *v.* Durham, 2 Leach 478; R. *v.* Jones, 2 Campb. 132; 1 Wheeler's Crim. Cas. 418; 2 Rogers's Recorder, 38; 5 id. 95. 3. The mode of corroboration seems to be less certain. It is perfectly clear, that it need not extend to the whole testimony; but it being shown that the accomplice has testified truly in some particulars, the jury may infer that he has in others. But what amounts to corroboration? We think the rule is, that the corroborative evidence must relate to some portion of the testimony which is material to the issue. To prove that an accomplice had told the truth in relation to irrelevant and immaterial matters, which were known to everybody, would have no tendency to confirm his testimony, involving the guilt of the party on trial. If this were the case, every witness, not incompetent for the want of understanding, could always furnish materials for the corroboration of his own testimony. If he could state where he was born, where he had resided, in whose custody he had been, or in what jail, or what room in the jail, he had been confined, he might easily get confirmation of all these particulars. But these circumstances having no necessary connection with the guilt of the defendant, the proof of the correctness of the statement in relation to them would not conduce to prove that a statement of the guilt of the defendant was true. Roscoe's Crim. Evid. 120; R. *v.* Addis, 6 C. & P. 388;" [this case is reviewed and explained in Com. *v.* Holmes, 127 Mass. 424; Com. *v.* Hayes, 140 id. 366;] [Com. *v.* Bishop, 165 id. 148.] A similar view of the nature of corroborative evidence, in cases where such

have required confirmatory evidence as to the *corpus delicti* only; and others have thought it essential that there should be corroborating proof that the prisoner actually participated in the offence; and that, when several prisoners are to be tried, confirmation is to be required as to all of them before all can be safely convicted; the confirmation of the witness, as to the commission of the crime, being regarded as no confirmation at all, as it respects the prisoner; for, in describing the circumstances of the offence, he may have no inducement to speak falsely, but may have every motive to declare the truth, if he intends to be believed, when he afterwards fixes the crime upon the prisoner.[2] If two or more accomplices are produced as witnesses, they are not deemed to corroborate each other; but the same rule is applied, and the same confirmation is required, as if there were but one.[3]

§ 382. **Same: Who are Accomplices.** There is one class of persons apparently accomplices, to whom the rule requiring corroborating evidence does not apply; namely, persons who have entered into communication with conspirators, but either afterwards repenting, or, having originally determined to frustrate the enterprise, have subsequently disclosed the conspiracy to the public authorities, under whose direction they continue to act with their guilty confederates until the matter can be so far advanced and matured, as to insure their conviction and punishment;[1] the early disclosure is considered as binding the party to his duty; and though a great degree of objec-

evidence is necessary, was taken by Dr. Lushington, who held that it meant evidence, not merely showing that the account given is probable, but proving facts *ejusdem generis*, and tending to produce the same result: Simmons *v.* Simmons, 11 Jur. 830; and see Maddox *v.* Sullivan, 2 Rich. Eq. 4. [The best exposition of this more liberal view is found in R. *v.* Tidd, 33 How. St. Tr. 1483.]

[2] R. *v.* Wilkes, 7 C. & P. 272, per Alderson, B.; R. *v.* Moore, id. 270; R. *v.* Addis, 6 C. & P. 388, per Patteson, J.; R. *v.* Wells, 1 Mood. & M. 326, per Littledale, J.; R. *v.* Webb, 6 C. & P. 595; R. *v.* Dyke, 8 id. 261; R. *v.* Birkett, 8 id. 732; Com. *v.* Bosworth, 22 Pick. 399, per Morton, J. The course of opinions and practice on this subject is stated more at large in 1 Phil. Evid. pp. 30–38; 2 Russ. on Crimes, pp. 956–968, and in 2 Stark. Evid. p. 12, n. (*x*), to which the learned reader is referred; see also Roscoe's Crim. Evid. p. 120. Chief Baron Joy, after an elaborate examination of English authorities, states the true rule to be this, that "the confirmation ought to be in such and so many parts of the accomplice's *narrative*, as may reasonably satisfy the jury that he is telling truth, without restricting the confirmation to any particular points, and leaving the effect of such confirmation (which may vary in its effect according to the nature and circumstances of the particular case) to the consideration of the jury, aided in that consideration by the observations of the judge:" Joy on the Evidence of Accomplices, pp. 98, 99. By the Scotch law, the evidence of a single witness is in no case sufficient to warrant a conviction, unless supported by a train of circumstances: Alison's Practice, p. 551. [For shades of definition in different jurisdictions, see {People *v.* Hooghkerk, 96 N. Y. 162;} State *v.* Feuerhaken, 96 Ia. 299.]

[3] R. *v.* Noakes, 5 C. & P. 326, per Littledale, J.; R. *v.* Bannen, 2 Mood. Cr. Cas. 309; [People *v.* Creagan, Cal., 53 Pac. 1082; unless the other is an accomplice to a different crime: People *v.* Sternberg, 111 id. 3.] The testimony of the wife of an accomplice is not considered as corroborative of her husband: R. *v.* Neal, 7 C. & P. 168, per Park, J.

[1] R. *v.* Despard, 28 How. St. Tr. 489, per Lord Ellenborough; {State *v.* McKean, 36 Ia. 343;} [R. *v.* Mullins, 7 State Tr. N. S. 1110; 8 Cox Cr. 756; Com. *v.* Hollister, 157 Pa. 13.]

tion or disfavor may attach to him for the part he has acted as an informer, or on other accounts, yet his case is not treated as the case of an accomplice. {One who purchases liquor, sold illegally, in order to obtain evidence for prosecuting, is not an accomplice.[2] Nor is the victim of a seduction,[3] nor the woman upon whom an abortion is performed,[4]} [or with whom incest is committed;[5] nor the person who pays a bribe, where the prosecution is for demanding a bribe;[6] nor is the thief an accomplice in the crime of knowingly receiving stolen goods.[7]]

§§ 383–385.[1]

§§ 386–430.[2]

5. *Experiential Capacity.*

§ 430 *a.* **In general.** [Besides the fundamental or organic powers, mental and moral, requisite for all testimony, there is another sort of capacity, always requisite, — the power of acquiring fairly accurate knowledge so far as the element of skill enters into the acquisition of knowledge. Such skill or fitness to obtain correct impressions comes from circumstances which may roughly be summed up in the term "experience," — a term of wide scope embracing the everyday use of the faculties, the habit and practice of an occupation, special study, professional training, etc., which may have contributed to form this sort of capacity.

Two or three general principles are clear. (1) In legal theory, every witness whosoever is an "expert," in the sense that he must be fitted to have knowledge on the subject of which he speaks. But since the vast majority of subjects of testimony are matters of common observation for which the ordinary everyday experience of human beings has fitted them to acquire correct impressions, so on these subjects every witness is assumed to have the necessary fitness. Yet a case may arise in which it may be lacking, and in which therefore even the ordinary witness is incompetent. For example, every one is assumed to be able to read and write, and therefore competent to testify to the signature of a document which he has seen; but if it appears that he cannot read writing, he may be excluded as incompetent. There is therefore, in a strict sense, no class of "expert" as distinguished from ordinary witnesses; for every witness must be "expert" upon the subject of his testimony. There are

[2] {Com. *v.* Downing, 4 Gray 29.}

[3] [Keller *v.* State, Ga., 31 S. E. 92.]

[4] {Com. *v.* Wood, 11 Gray 85; Com. *v.* Boynton, 116 Mass. 343;} [State *v.* Smith, 99 Ia. 26.]

[5] [State *v.* Kouhns, 103 Ia. 720.]

[6] [State *v.* Durnam, Minn., 75 N. W. 1127; see State *v.* Carr, 28 Or. 389.]

[7] [Springer *v.* State, Ga., 30 S. E. 971.]

[1] [Transferred to Appendix II.]

[2] [Transferred to Appendix II.]

rather two broad classes of "experts," — those who are assumed to be expert, because the matter is one upon which most persons have the necessary experience, and those who must appear to have a special or abnormal experience, because the subject of the testimony is one in which ordinary experience does not produce fitness. The latter may be divided into two subordinate classes; in one of these the experience is of the sort called "practical;" from the wood-chopper to the advertising agent there is a long list of occupations in which it is the practice of the occupation which gives the necessary fitness; in the other, it is by some sort of scientific or systematic training, usually termed "professional," that the fitness is acquired. But these constantly shade off into each other or are intermingled; and the distinction has little legal significance. The important legal distinction is between the first and the second class above-mentioned; though unfortunately for clear legal thinking, the term "expert" is commonly applied to the second class alone.

(2) The experience-capacity is in every case a relative one, *i. e.* relative to the topic about which the person is asked to speak. Whether a person is expert enough to testify must be determined by taking as our standpoint the subject of the desired testimony, and then comparing with it the qualifications of the offered witness. The classification of the various rules should not be according to classes of persons, but according to classes of subjects.

(3) It follows that there are no fixed classes of expert persons, in one of which a witness finds himself and remains permanently. A person may be sufficiently skilled for one question, and totally unqualified for the next. He may be competent to say whether the deceased had gray hair, and incompetent to say what killed him; competent to say whether the deceased was asphyxiated by gas, and incompetent to distinguish between coal-gas and water-gas; competent to say whether a hatchet was sharp, and incompetent to tell whether a stain upon it was of human blood. The witness may from question to question enter or leave the class of persons fitted to answer. It is desirable to appreciate that expert capacity is a matter wholly relative to the subject of the particular question; that therefore the existence of the capacity arises in theory as a new inquiry from question to question; and that a particular person is not to be thought of as objectively or absolutely an expert, in the sense that he is absolutely a German or a negro or six feet high.

The rulings of the Courts on the present subject are usually of one of two sorts: (*a*) On what matters is ordinary experience insufficient, *i. e.* is a so-called "expert" needed? (*b*) If such special experience is needed, of what sort should it be for the matter in hand? So far as the answer to the latter question lays down no general principle, but merely declares the offered person competent on the circumstances of his experience, the ruling is of little or no value as

a precedent; and of this sort are the great majority of rulings on this topic. In the following sections the chief general principles will be noticed.]

§ 430 *b*. **Foreign Law.** [It is fairly settled that a witness to foreign law need not be a professional follower of the law, — counsel, judge, or the like. In England, however, it is required that he should have followed an occupation in which legal knowledge on the matters in hand was necessary.[1] In this country, even this much does not seem to be necessary; it is enough if on the facts the person appears to have obtained the necessary familiarity.[2] A custom of merchants may sometimes involve a question of law.[3]]

§ 430 *c*. **Medical Matters.** [(*a*) While on matters strictly involving medical science, some special skill must be shown, yet on numerous subjects of everyday experience, though involving health or physical condition, no such showing is necessary.[1] Laymen have been allowed, for example, to speak as to the appearance of health or illness,[2] or the kind or the appearance of a wound;[3] but not as to the nature of a disease[4] or the permanence of an injury.[5] As to sanity, it is now universally conceded that a layman is competent to form an opinion.[6]

(*b*) On matters in which special medical experience is necessary, the question may arise whether a general practitioner will suffice, or whether a specialist in the particular subject is necessary. The Courts usually and properly repudiate the finical demand for the latter class of witnesses.[7]]

§ 430 *d*. **Handwriting, Paper-money, etc.** [Any person able to

[1] [Vander Donckt *v.* Thelusson, 8 C. B. 812; Sussex Peerage Case, 11 Cl. & F. 117, 134.]

[2] [See Pickard *v.* Bailey, 26 N. H. 170; Kenny *v.* Clarkson, 1 Johns. 394; Chanoine *v.* Fowler, 3 Wend. 17; Amer. L. I. & T. Co. *v.* Rosenagle, 77 Pa. 515; Bird's Case, 21 Gratt. 801, 808; Phillips *v.* Gregg, 10 Watts 161, 170; State *v.* Cueller, 47 Tex. 304; People *v.* Lambert, 5 Mich. 362; Layton *v.* Chaylon, 4 La. An. 319; Marguerite *v.* Chouteau, 3 Mo. 540, 562; Barrows *v.* Downs, 9 R. I. 453; Armstrong *v.* U. S., 6 Ct. of Cl. 226; Molina *v.* U. S., ib. 272.]

For the question whether the witness has sufficient means of knowledge of the law in question, see *post*, § 430 *m*.

[3] [See Phelps *v.* Town, 14 Mich. 379; Comstock *v.* Smith, 20 id. 342.]

[1] [See Evans *v.* People, 12 Mich. 36 (leading case).]

[2] [Milton *v.* Rowland, 11 Ala. 737; Stone *v.* Watson, 37 id. 288; Balt. & L. T. Co. *v.* Cassell, 66 Md. 432; Knight *v.* Smythe, 57 Vt. 530; Smalley *v.* Appleton, 70 Wis. 344.]

[3] [People *v.* Hong Ah Duck, 61 Cal. 390; People *v.* Gibson, 106 id. 458; Linsday *v.* People, 63 N. Y. 152.]

[4] [McLean *v.* State, 16 Ala. 679; Thompson *v.* Bertrand, 23 Ark. 733.]

[5] [Atl. S. R. Co. *v.* Walker, 93 Ga. 462.]

[6] [Conn. L. Ins. Co. *v.* Lathrop, 111 U. S. 612. The dispute in this connection has arisen because of the Opinion rule, and the cases involving that question, which also usually deal with the present one, are dealt with *post*, § 441 *f*.]

[7] [Siebert *v.* People, 143 Ill. 579 (arsenic-poisoning); State *v.* Hinkle, 6 Ia. 385 (chemical analysis); Young *v.* Makepeace, 103 Mass. 53 (child-birth); Hardiman *v.* Brown, 162 id. 585 (brain-tumor); Seckinger *v.* Mfg. Co., 129 Mo. 590 (in general); Kelly *v.* U. S., 27 Fed. 618 (same); Hathaway *v.* Ins. Co., 48 Vt. 351 (same).]

read writing is competent to testify to the identity or genuineness of a style of writing with which he is acquainted. The controversies that arise in regard to proof of handwriting depend upon other principles, chiefly (1) whether the witness has personal acquaintance with the handwriting, — dealt with *post*, § 577; (2) whether any other rule excludes his testimony, — dealt with *post*, § 579.

In speaking to the genuineness of bank-notes, Government paper, and the like, it seems not to be necessary to have special experience in detecting such forgeries; any occupation in which these things are habitually received and scrutinized is sufficient to qualify.[1]]

§ 430 *e*. **Value.** [Special experience may often be necessary in testifying to value; but it is usually difficult to separate this requirement from that of knowledge; and accordingly the two subjects are dealt with *post*, § 430 *n*.]

§ 430 *f*. **Discretion of Trial Court.** [In most jurisdictions, it is declared that the determination of a witness' experiential qualifications should be left to the discretion of the trial Court. The phrasing differs, and the practice seldom lives up to the theory. In some Courts this discretion is not reviewable; in others, it is reviewable only in case of its abuse; in others, it is said "largely" to control. It cannot be doubted that this beneficent principle should be further extended and strictly observed, so that a witness' experiential qualifications should be invariably left to be determined by the trial Court without review.[1]]

§ 430 *g*. **Opinion Rule.** [The requirement of special experience for certain topics of testimony is based on a distrust of the powers of one having only ordinary experience to form intelligent judgments thereon, and must be distinguished carefully from a rule of exclusion which may also operate to exclude persons not having special experi-

[1] [State *v*. Cheek, 13 Ired. 120; Yates *v*. Yates, 76 N. C. 149; Atwood *v*. Cornwall, 28 Mich. 339; May *v*. Dorsett, 30 Ga. 118.]

[1] [See, for the attitudes of the various Courts: Hunnicutt *v*. Kirkpatrick, 39 Ark. 172; Sowden *v*. Quartz Mining Co., 55 Cal. 451; Fort Wayne *v*. Coombs, 107 Ind. 86; Higgins *v*. Higgins, 75 Me. 346; Fayette *v*. Chesterville, 77 id. 33; State *v*. Thompson, 80 id. 200; Lincoln *v*. Barre, 5 Cush. 591; Quinsigamond B'k *v*. Hobbs, 11 Gray 257; Bacon *v*. Williams, 13 id. 527; Marcy *v*. Barnes, 16 id. 164; Com. *v*. Nefus, 135 Mass. 534; Swan *v*. Middlesex, 101 id. 177; Gossler *v*. Refinery, 103 id. 335; Com. *v*. Williams, 105 id. 67; Tucker *v*. Railroad, 118 id. 548; Lawrence *v*. Boston, 119 id. 132; Perkins *v*. Stickney, 132 id. 217; Campbell *v*. Russell, 139 id. 279; Warren *v*. Water Co., 143 id. 164; Hill *v*. Home Ins. Co., 129 id. 349; Lowell *v*. Com'rs, 146 id. 412; Com. *v*. Hall, 164 id. 152; 41 N. E. 133; McEwen *v*. Bigelow, 40 Mich. 217; Ives *v*. Leonard, 50 id. 299; Jones *v*. Tucker, 41 N. H. 549; Dole *v*. Johnson, 50 id. 459; Ellingwood *v*. Bragg, 52 id. 490; Goodwin *v*. Scott, 61 id. 114; Carpenter *v*. Hatch, 64 id. 576; Nelson *v*. Ins. Co., 71 N. Y. 460; Slocovich *v*. Ins. Co., 108 id. 62; Flynt *v*. Bodenhamer, 80 N. C. 205; State *v*. Cole, 94 id. 964; Ardesco Oil Co. *v*. Gilson, 63 Pa. 152; Sorg *v*. Congregation, ib. 161; D. & C. Towboat Co. *v*. Starrs, 69 id. 41; First Nat'l B'k *v*. Wirebach's Ex'r, 106 id. 44; Howard *v*. Providence, 6 R. I. 514; Sarle *v*. Arnold, 7 id. 586; Powers *v*. McKenzie, 90 Tenn. 181; Stillwell Mfg. Co. *v*. Phelps, 130 U. S. 527; Wright *v*. Williams Estate, 47 Vt. 232; R. Co. *v*. Bixby, 57 id. 563; Carpenter *v*. Corinth, 58 id. 216; Bemis *v*. R. Co., ib. 641.]

ence, but is based on wholly different reasons, namely, the Opinion rule. Assume that the present rule has been satisfied and that the Court has determined that the subject does not require a person of special experience, *e. g.* that, as to whether a stain on a hatchet is of blood or of paint, a layman and not a chemist may testify. At this point the Opinion rule begins to operate, and the question will arise whether the testimony of a layman on this subject is not superfluous and unnecessary. If the jury can judge for themselves on this matter equally as well as the lay witness, it is obvious that it would be a waste of time to ask for any testimony from him or from a dozen or a hundred other persons no more capable than he of adding to the jury's own information. Now if the hatchet is in Court and before the jury, the above situation will exist, *i. e.* the layman's judgment as to the nature of the stain will be superfluous; but if the hatchet is lost and the witness saw it before it was lost, the jury are not in an equal position with the witness, and his testimony will not be superfluous. Or again, if the inquiry be whether a person not present was disabled by an injury, it might be thought that a description of the person's physical condition and conduct would sufficiently place before the jury the data from which they could draw, equally well with the witness, the inference whether he was disabled. Such, in essence, is the Opinion rule, — obviously a different thing from the rules as to experiential qualifications, and yet not always kept sufficiently distinct. The two sets of rules usually come into application at the same time, but they are wholly independent in principle. Roughly speaking, the testimony of a witness admissible by special experience is also admissible under the Opinion rule; while that of a witness admissible by ordinary experience only may still be excluded by the Opinion rule; and this joint operation of the two rules has occasionally led to their treatment as a single rule. But the Opinion rule (treated *post*, §§ 441 *b*–441 *l*) might be entirely abolished, and yet that would not affect in the slightest the doctrine of experiential qualifications; and the correct solution of the many troublesome problems created by the Opinion rule can be reached only by keeping distinctly in mind the two separate principles that may be involved.]

6. *Knowledge; Adequate Observation.*

§ 430 *h*. **In general.** [Observation, or an adequate opportunity to obtain correct impressions on the subject of the testimony, is another qualification necessarily predicated of every witness. It is common to say that the witness must have knowledge upon the subject, but knowledge is an absolute term, implying the verity of the thing known, and such absolute verity is of course not attributed to the statements of any witness; so that it is more accurate to say that

the witness must have had the means of obtaining knowledge, — in other words, must have observed, or had the opportunity to observe, the matters to which he testifies. In the usual case a person who is not so qualified is not put forward as a witness; for the necessity of this qualification is obvious; but the requirement is nevertheless a real one, as has been often pointed out.[1] Its application is usually simple enough; but a few situations of difficulty have given rise to controversies, which must now be briefly noticed.]

§ 430 *i*. **Quality of Knowledge; "Belief," "Impression," "Opinion."** [When a witness expresses his thought upon the matter in hand, it may be that he does not assert it with the positiveness of knowledge, but qualifies his state of mind on the subject as a "belief," "impression," "opinion;" he may "think" or "suppose" the matter to be so. These expressions are ambiguous in that the qualification may be due to one of three distinct sources. (1) He may have had no actual observation or source of knowledge at all, but may have made up his mind merely by guess or conjecture; when this appears to be the case, he is evidently not qualified, and his "impression," etc., is not admissible.[1] (2) He may have had actual observation of the matter, but he may not have received a very definite impression; *e. g.*, he saw a man, and "thought" it was the accused; to this defect in the quality of the impression the law makes no objection, but receives it for what it is worth. (3) He may have had entirely clear and positive impressions at the time, but his recollection of them is not as strong as it might be; here, also, the law accepts whatever quality of recollection he is able to bring. In short, if he has actually observed, the quality of the impression and the strength of its persistence are no grounds of objection. The rulings of the Courts, however, do not always distinguish the exact point involved; and it is impossible to separate them.[2]]

[1] [State *v.* Allen, 1 Hawks 9; Evans *v.* People, 12 Mich. 35; Wetherbee *v.* Norris, 103 Mass. 566.]

[1] [Clark *v.* Bigelow, 16 Me. 247; State *v.* Flanders, 38 N. H. 332; Wood *v.* Brewer, 57 Ala. 517.

Accord: Jordan *v.* Foster, 11 Ark. 142; Tait *v.* Hall, 71 Cal. 152; Macon & W. R. Co. *v.* Johnson, 38 Ga. 436; Terr. *v.* McKern, Ida., 26 Pac. 123; Jones *v.* Chiles, 33 Ky. 33; Tibbetts *v.* Flanders, 18 N. H. 292; Kingsbury *v.* Moses, 45 N. H. 225; Higbie *v.* Ins. Co., 53 N. Y. 604; Carmalt *v.* Post, 8 Watts 411; Duvall's Ex'r *v.* Darby, 38 Pa. 59; Atchison R. Co. *v.* U. S., 15 Ct. of Cl. 141; Patten *v.* U. S., ib. 290.]

[2] [*Admitted:* Miller's Case, 3 Wils. 428; Horne Tooke's Trial, 25 How. St. Tr. 71; Garrells *v.* Alexander, 4 Esp. 37; Hill *v.* Hill's Adm'r, 9 Ala. 792; Turner *v.* McFee, 61 id. 470; Bass Furnace Co. *v.* Glasscock, 82 id. 456; People *v.* Rolfe, 61 Cal. 540; Lyon *v.* Lyman, 9 Conn. 60; Dawson *v.* Callaway, 18 Ga. 579; Goodwyn *v.* Goodwyn, 20 id. 620; Huguley *v.* Holstein, 35 id. 272; Rhode *v.* Louthain, 8 Blackf. 413; State *v.* Porter, 34 Ia. 133; State *v.* Lucas, 57 id. 502; State *v.* Seymore, 94 id. 699; Bradford *v.* Cooper, 1 La. An. 326; State *v.* Goodwin, 37 id. 713, 715; Lewis *v.* Freeman, 17 Me. 260; Hopkins *v.* Megquire, 35 id. 80; Humphries *v.* Parker, 52 id. 504; B. & O. R. Co. *v.* Thompson, 10 Md. 84; Fulton *v.* McCracken, 18 id. 542; Hamilton *v.* Nickerson, 13 All. 352; Com. *v.* Kennedy, Mass., 48 N. E. 770; Johnston *v.* Ins. Co., 106 Mich. 96; Ferris *v.* Thaw, 72 Mo. 450; Greenwell *v.* Crow, 73 id.

§ 430 *j*. **Personal Observation; not Hearsay Knowledge.** [A witness' testimony must be (in the words of Chief Baron Gilbert[1]) "to what he knows and not to that only which he hath heard," "for if indeed he doth not know, he can be no evidence." There must be personal observation, as distinguished from belief founded on the report of others;[2] in judicial inquiry the law asks only for belief founded on personal observation. The principle is of simple and frequent application. But the question arises, in various situations, whether an exception should be allowed, *i. e.* whether for practical purposes a belief or knowledge founded partly or wholly on others' information, and not on personal observation, may not suffice.]

§ 430 *j*[a]. **Same: Contents of Documents.** [As a general rule, a person who testifies to the contents of a document must have read it himself, and not merely heard it read by another or otherwise have based his belief on others' statements;[1] and, conversely, any one who has read a document may testify to its contents.[2] There is, however, a classical exception to this rule, where a copy of a public document is to be proved; here a "cross-reading" has always been deemed sufficient, though the witness even here is after all speaking from hearsay; and it has also been settled, on the ground of practical convenience, that even a cross-reading is not necessary.[3]]

640; State *v.* Bable, 76 id. 504; State *v.* Hopkirk, 84 id. 288; State *v.* Harvey, 131 id. 339; State *v.* Dale, 141 id. 284; Burnham *v.* Ayer, 36 N. H. 185; Nute *v.* Nute, 41 id. 68; Carrington *v.* Ward, 71 N. Y. 364; Blake *v.* People, 73 id. 586; Beverly *v.* Williams, 4 Dev. & B. 237; McRae *v.* Morrison, 13 Ired. 48; State *v.* Lytle, 117 N. C. 799; Crowell *v.* Bank, 3 Oh. St. 411; State *v.* Chee Gong, 17 Or. 638; Farmers' Bank *v.* Saling, id., 54 Pac. 190; Sigfried *v.* Levan, 6 S. & R. 313; Farmers' Bank *v.* Whitehill, 10 id. 112; Shitler *v.* Bremer, 23 Pa. 413; Duvall's Ex'r *v.* Darby, 38 id. 59; Dodge *v.* Bache, 57 id. 424; P. V. & C. R. Co. *v.* Vance, 115 id. 332; Woodward *v.* State, 4 Baxt. 324; Swinney *v.* Booth, 28 Tex. 116; Bouldin *v.* Massie's Heirs, 7 Wheat. 153; Riggs *v.* Tayloe, 9 id. 487; State *v.* Ward, 61 Vt. 187; State *v.* Bradley, 67 id. 465; Combs *v.* Com., 90 Va. 88, 91; Erd *v.* R. Co., 41 Wis. 68.

Excluded: R. *v.* Dewhurst, 1 State Tr. N. s. 529, 590; Redford *v.* Birley, ib. 1071, 1171; McDonald *v.* Jacobs, 77 Ala. 525, 527; Morris *v.* Stokes, 21 Ga. 570; Parker *v.* Chambers, 24 id. 524; Ohio & M. R. Co. *v.* Stein, 140 Ind. 61; Simonson *v.* R. Co., 49 Ia. 88; Orr *v.* R. Co., 94 id. 423; Carrico *v.* Neal, 1 Dana Ky. 162; Paty *v.* Martin, 15 La. An. 620; Hovey *v.* Chase, 52 Me. 313; Elbin *v.* Wilson, 33 Md. 144; Lovejoy *v.* Howe, 55 Minn. 353, 354; Sanchez *v.* People, 22 N. Y. 154; Carmalt *v.* Post, 8 Watts 411; Fullam *v.* Rose, 181 Pa. 138; Bank *v.* Brown, Dudley 62, 65; Wilcocks *v.* Phillips' Ex'rs, 1 Wall. Jr. 49, 53; Guyette *v.* Bolton, 40 Vt. 232.

[1] Evidence, 152.

[2] [This is a different thing from the Hearsay rule and its exceptions, which deal with the reception as evidence of statements by persons not in Court and under examination: see *ante*, § 99 *a*.]

[1] [Hodges *v.* Hodges, 2 Cush. 460; Nichols *v.* Kingdom Co., 56 N. Y. 618, Edwards *v.* Noyes, 65 id. 126; People *v.* Mathis, N. C., 20 S. E. 710; McGinniss *v.* Sawyer, 63 Pa. 266; Coxe *v.* England, 65 id. 222; Johnson *v.* Bolton, 43 Vt. 303. *Contra:* Mathews *v.* Coalter, 9 Mo. 696, 701.]

[2] [Fisher *v.* Saunda, 1 Camp. 193; Huls *v.* Kimball, 52 Ill. 395; Smith *v.* Bank, 45 Nebr. 444.]

[3] [Reid *v.* Margison, 1 Camp. 469; M'Neil *v.* Perchard, 1 Esp. 264; Gyles *v.* Hill, 1 Camp. 471, note; Rolf *v.* Dart, 2 Taunt. 52; Fyson *v.* Kemp, 6 C. & P. 72; R. *v.* Hughes, 1 Cr. & D. 13; Lynde *v.* Judd, 3 Day 499; Pickard *v.* Bailey, 26 N. H. 169. *Contra:* Sloane Peerage Case, 5 Cl. & F. 42.]

§ 430 *k*. **Same: Testimony to one's own Age.** [In strictness, a person's belief as to his own age rests upon hearsay only, not on actual observation and recollection. Nevertheless, such belief, sufficient as it is for action in the practical affairs of life, ought also to be admissible in judicial inquiries, and such is the conclusion generally accepted.[1] Moreover, there may be cases in which, of one's own knowledge, it may be possible to state that one was alive or over or under a certain age at a given time.[2]]

§ 430 *l*. **Same: Medical Man's Knowledge.** [(1) It will usually be the case that the medical or surgical witness has acquired the greater part of his knowledge of professional matters in general from hearsay, — both from the data recorded in books and journals and from his professional instructors. It would be absurd to deny judicial standing to such knowledge, because all scientific data must be handed down from generation to generation by hearsay, and each student can hope to test only a trifling fraction of scientific truth by personal experience. This attitude the Courts generally take; and it is not necessary that a witness of this sort should have learned his scientific truths by personal observation.[1] (2) When the medical or surgical witness is testifying to the facts of a patient's condition, a portion of his sources of information must usually be his patient's description of internal symptoms. If his action in matters of life and death can be based upon this, it would seem that no stricter rule was needed for his testimony in Court; indeed, to separate the one source of belief from the other would often be impossible; and to condemn a belief founded upon this source would often be to bar out medical testimony entirely. Accordingly, it is generally accepted that medical or surgical testimony is not inadmissible because, like all such conclusions, it is founded in part on the patient's own statement of symptoms;[2] but such testimony founded on hearsay infor-

[1] [People *v.* Ratz, 115 Cal. 132; State *v.* McLain, 49 Kan. 730; Com. *v.* Stevenson, 142 Mass. 468, *semble;* Cheever *v.* Congdon, 34 Mich. 295; Houlton *v.* Manteuffel, 51 Minn. 185; State *v.* Marshall, 137 Mo. 463, *semble;* State *v.* Bowser, Mont., 53 Pac. 179; State *v.* Cain, 9 W. Va. 569; Dodge *v.* State, Wis., 75 N. W. 954. *Contra:* Doe *v.* Ford, 3 U. C. Q. B. 353. Some Courts prefer to work the problem out by treating the testimony as stating the family reputation, admissible under the Pedigree exception on restricted conditions: *ante*, § 114 *c*.]

[2] [See Hill *v.* Eldredge, 126 Mass. 234; Foltz *v.* State, 33 Ind. 217.]

[1] [The cases vary somewhat in their phrasing: see Finnegan *v.* Gasworks Co., 159 Mass. 312 (leading case); Carter *v.* State, 2 Ind. 619; State *v.* Baldwin, 36 Kan. 16; Hardiman *v.* Brown, 162 Mass. 585; 39 N. E. 192; Marshall *v.* Brown, 50 Mich. 148; Jackson *v.* Boone, Ga., 20 S. E. 46; Taylor *v.* R. Co., 48 N. H. 306; State *v.* Wood, 53 id. 495; State *v.* Terrell, 12 Rich. L. 327.]

[2] [Eckles *v.* Bates, 26 Ala. 659; Ill. C. R. Co. *v.* Sutton, 42 Ill. 440; Chic. B. & Q. R. Co. *v.* Martin, 112 id. 17; W. & A. R. Co. *v.* Stafford, 99 Ga. 187, *semble;* Louisv. N. A. & C. R. Co. *v.* Falvey, 104 Ind. 419; same *v.* Wood, 113 id. 548; same *v.* Snyder, 117 id. 436; Chic. St. L. & P. R. Co. *v.* Spilker, 134 id. 380, 392; Ohio & M. R. Co. *v.* Heaton, 137 id. 1; South. K. R. Co. *v.* Michaels, 57 Kan. 474; Barber *v.* Merriam, 11 All. 324; Lamberton *v.* Traction Co., N. J., 35 Atl. 100, 38 id. 683, *semble;* Matteson *v.* R. Co., 35 N. Y. 491; People *v.* Strait, 148 id. 566, *semble;* State *v.* Chiles, 44 S. C. 338; Union P. R. Co. *v.* Novak, 15 U. S. App. 400, 414; Quaife

mation from others would be excluded,[3] though where the person is a nurse or other attendant, it would seem that the same necessity and propriety here demanded its admission.[4] The admission of the patient's hearsay statements themselves is, of course, a different question, involving the exception to the Hearsay rule treated *ante*, § 162 *b*.]

§ 430 *m*. **Same: Knowledge of Foreign Law.** [So far as our own system of law is concerned, it is an undeniable fact of modern conditions — whatever it may have been down to Coke's time — that a knowledge of the law may be adequately gained by the mere study of books — *i. e.* hearsay reports — without attendance at court.[1] But so far as foreign law is concerned, it may well be that some practice of it in the courts of the country should be exacted of the witness, — not so much because books are not a satisfactory source of knowledge, as because the ability to interpret and to value the sources thus consulted is better guaranteed by a practice among the members of the bar. Some such indefinite requirement seems to be generally made.[2]]

§ 430 *n*. **Same: Knowledge of Values and Prices.** [To know values or prices is to know of acceptances or offers averaged into a mean or probable figure, and all testimony to value rests on an acquaintance, more or less indefinitely implied, with such data. One who does not obtain these data at first-hand, but testifies to value only from a casual inquiry made of others, will ordinarily be excluded.[1] But in most commercial occupations a dealer's acquaintance with values rests partially or entirely on regular reports, in journals or otherwise, furnished for the purpose; and, where such is the course of trade, a dealer whose knowledge is obtained in the customary way from prices-current or other sources accepted in the trade may well be qualified to testify.[2]]

v. R. Co., 48 Wis. 521; Block *v.* R. Co., 89 id. 371. *Contra:* Van Winkle *v.* R. Co., 93 Ia. 509; People *v.* Murphy, 101 N. Y. 130, *semble;* Davidson *v.* Cornell, 132 id. 236, *semble;* Abbot *v.* Heath, 84 Wis. 314; Del. L. & W. R. Co. *v.* Roalefs, 28 U. S. App. 569.]

[3] [Brown *v.* Ins. Co., 65 Mich. 315; Rouch *v.* Zehring, 59 Pa. 78; U. S. *v.* Faulkner, 35 Fed. 732; Vosburg *v.* Putney, 78 Wis. 87.]

[4] [*Contra:* Heald *v.* Thing, 45 Me. 395; Atch. T. & S. F. R. Co. *v.* Frazier, 27 Kan. 463; Wetherbee *v.* Wetherbee, 38 Vt. 454.]

[1] [Coleridge, J., in Baron de Bode's Case, 8 Q. B. 263.]

[2] [See Bristow *v.* Sequeville, 5 Exch. 275; *Re* Bonelli's Goods, L. R. 1 P. D. 69; Cartwright *v.* Cartwright, 26 W. R. 864; Consol. Ins. Co. *v.* Cashow, 41 Md. 79; Hall *v.* Costello, 48 N. H. 179.]

[1] [Green *v.* Caulk, 16 Md. 572; Lewis *v.* Ins. Co., 10 Gray 511; Kost *v.* Bender, 25 Mich. 519. *Contra:* Thatcher *v.* Kautcher, 2 Colo. 700; Lush *v.* Druse, 4 Wend. 317.]

[2] [Smith *v.* R. Co., 68 N. C. 115; Whitney *v.* Thacher, 117 Mass. 53 (leading cases); Cent. R. Co. *v.* Skellie, 86 Ga. 69; Hudson *v.* R. Co., 92 Ia. 231; Sisson *v.* R. Co., 14 Mich. 490; C. & T. R. Co. *v.* Perkins, 17 id. 301; Sirrine *v.* Briggs, 31 Mich. 446; Hoxsie *v.* Lumber Co., 41 Minn. 548; Harrison *v.* Glover, 72 N. Y. 454; Fairley *v.* Smith, 87 N. C. 367; Tex. & P. R. Co. *v.* Donovan, 86 Tex. 378; Cliquot's Champagne, 3 Wall. 141.

For the use of the price-lists themselves, as an exception to the Hearsay rule, see *ante*, § 162 *l*.]

§ 430 *o*. **Same: Sundries.** [In still other ways, an element of hearsay may enter into a person's sources of belief, and yet may not practically be objectionable, — particularly in the case of professional observers; as, for example, tests by a thermometer whose accuracy rests on a certificate by a professional authority;[1] reckoning by a counting-machine;[2] statements by a railroad-official as to car-mileage, based on calculations made by subordinates;[3] surgeons testifying to infected districts, and speaking chiefly from reported data.[4] Testimony based on the use of vacuum-rays — Roentgen rays — would seem to be supportable from this point of view.[5]]

§ 430 *p*. **Adequacy of Opportunities of Observation; (1) Sanity; (2) Value.** [Whether a witness has by his situation had a sufficient opportunity of observing the matter in hand will usually depend upon the discretion of the trial Court.[1] The cases in which the question most commonly arises are those of (1) sanity, (2) value, and (3) handwriting.

(1) *Sanity*. A person put forward to testify as to the sanity or insanity of another person must, of course, have had an opportunity, by observation of the latter's conduct, sufficient to form an opinion worth listening to. To express a test which shall be flexible enough to cover all situations, and at the same time definite enough to serve as a rule, is perhaps impossible.[2] The precedents in the various Courts are little more than rulings upon the particular witness before them, and no general test can be said to prevail. It should be noted that, by long tradition, the attesting witness to a will is always admissible to speak as to the testator's sanity, whatever the length of his acquaintance may have been.[3]

(2) *Value*. Knowledge of the value of a thing usually involves, first, a knowledge of the value of the class of things in question, and, secondly, an acquaintance with the particular thing to be valued; besides this, a third qualification may be demanded, viz., experience or skill in judging of values. A ruling as to a value-witness usually involves a ruling on all three of these matters; and it is not always easy to distinguish to which of them a particular phrasing is directed, especially as between the first and the third of the above principles.

[1] [Hatcher *v*. Dunn, 102 Ia. 411.]
[2] [More's Estate, Cal., 54 Pac. 97.]
[3] [So. I. C. Line *v*. R. Co., Tenn., 42 S. W. 529.]
[4] [Grayson *v*. Lynch, U. S., 16 Sup. 1064.]
[5] [For the use of photographs by this process — a different question, — see *post*, § 439 *h*.]
[1] [Stillwell Mfg. Co. *v*. Phelps, 130 U. S. 527; Montana R. Co. *v*. Warren, 137 id. 353.]
[2] [See for careful attempts, Clary *v*. Clary, 2 Ired. 85; Powell *v*. State, 25 Ala. 72; Choile *v*. State, 31 Ga. 467; Beaubien *v*. Cicotte, 12 Mich. 503; Carpenter's Estate, 94 Cal. 414.]
[3] [Heyward *v*. Heyward, Bay 349; Williams *v*. Spencer, 150 Mass. 349; Garrison *v*. Blanton, 48 Tex. 303.]

It will be possible here merely to indicate the general nature of the controversies and the principles commonly applied.

(*a*) As to the first and the third above principles — experience in judging values generally, and familiarity with the class of values in question — it is almost universally laid down that no special training or experience is necessary for a witness to value, and that an actual acquaintance with the class of values in question is alone necessary. In particular, a witness to *land*-value need not be by occupation a dealer in land;[4] nor need he himself have made purchases or sales of land;[5] nor need he have had personal knowledge of specific sales;[6] it is generally said that any person acquainted with such values may testify, or any person residing in or owning land in the neighborhood.[7] For the value of *services*, the witness, if the services are of the sort termed professional, must probably be a member of the profession;[8] for other services, an acquaintance with the value of their class is necessary;[9] though one who had employed the person in question might testify, irrespective of such general knowledge,[10] as well as the person himself who has rendered them.[11] For the value of *personalty*, any one familiar with the class of values is usually deemed competent;[12] and in any case the owner of an article may usually testify to its value.[13]

(*b*) As to the second principle above — the witness' acquaintance with the particular thing to be valued, — it is of course necessary that the witness should possess such acquaintance;[14] but its sufficiency in

[4] [San Diego Land Co. *v.* Neale, 78 Cal. 76; Snodgrass *v.* Chicago, 152 Ill. 600; Pike *v.* Chicago, 155 id. 656; L. & W. R. Co. *v.* Hawk, 39 Kan. 640; Lincoln *v.* Com., 164 Mass. 368; Union Elev. Co. *v.* R. Co., 135 Mo. 353; Huff *v.* Hall, 56 Mich. 458; Lincoln & B. H. R. Co. *v.* Sutherland, 44 Nebr. 526; Chic. R. I. & P. R. Co. *v.* Buel, id., 76 N. W. 571; Robertson *v.* Knapp, 35 N. Y. 92; P. & N. Y. R. Co. *v.* Bunnell, 81 Pa. 426; Hanover Water Co. *v.* Iron Co., 84 id. 281, 285.]

[5] [Walker *v.* Boston, 8 Cush. 279; Swan *v.* Middlesex, 101 Mass. 177; N. E. N. R. Co. *v.* Frazier, 25 Nebr. 54.]

[6] [Chic. & E. R. Co. *v.* Blake, 116 Ill. 166; L. & W. R. Co. *v.* Hawk, 39 Kan. 640.]

[7] [Hunnicutt *v.* Kirkpatrick, 39 Ark. 172; Bradshaw *v.* Atkins, 110 Ill. 332; Stone *v.* Covell, 29 Mich. 362; Lehmicke *v.* R. Co., 19 Minn. 481; Thomas *v.* Mallinckrodt, 43 Mo. 65; Union El. Co. *v.* R. Co., 135 id. 353; N. E. N. R. Co. *v.* Frazier, 25 Nebr. 54; Penn. & N. Y. R. Co. *v.* Bunnell, 81 Pa. 426; Hanover Water Co. *v.* Iron Co., 84 id. 281.]

[8] [See Mock *v.* Kelly, 3 Ala. 387; Turnbull *v.* Richardson, 69 Mich. 406; Kelley *v.* Richardson, ib. 432; Clark *v.* Ellsworth, 104 Ia. 442.]

[9] [See Chamness *v.* Chamness, 53 Ind. 304; Alt *v.* Syrup Co., 19 Nev. 19; Cornell *v.* Dean, 105 Mass. 435.]

[10] [See Doster *v.* Brown, 25 Ga. 25; Kennett *v.* Fickel, 41 Kan. 213; Kendall *v.* May, 10 All. 61, 67; Ritter *v.* Daniels, 47 Mich. 618; McPetres *v.* Ray, 85 N. C. 464.]

[11] [Chic. & E. I. R. Co. *v.* Bivans, 142 Ill. 401; Misso. P. Co. *v.* R. Parmer, Nebr., 76 N. W. 169.]

[12] [State *v.* Finch, 70 Ia. 317; Brady *v.* Brady, 8 All. 101; Conti. Ins. Co. *v.* Horton, 28 Mich. 175; Hood *v.* Maxwell, 1 W. Va. 221.]

[13] [Thomason *v.* Ins. Co., 92 Ia. 72; Whitesell *v.* Cane, 8 W. & S. 371; Adams Ex. Co. *v.* Schlessinger, 75 Pa. 248, 256; Shea *v.* Hudson, 165 Mass. 43.]

[14] [See the principle set forth in Bedell *v.* R. Co., 44 N. Y. 370; P. V. & C. R. Co. *v.* Vance, 115 Pa. 332.]

a given case must be largely a matter for the trial Court's discretion, depending on the circumstances of each case.[15]

(3) A witness to *handwriting* must, of course, have become familiar by observation with the style of handwriting in question; but it will be convenient to discuss in another place all the questions connected with proof of handwriting.[16]]

§ 430 *q*. **Testimony based on Telephonic Communication.** [Several questions here arise, some of them involving the present principle, and it is necessary carefully to distinguish the different evidential objections involved.

(1) The question of the *identity* or personality of the antiphonal speaker may arise. B asserts that certain words (assumed to be admissible) were uttered to him by A over the telephone; how does B know that the speaker was A? (*a*) It is generally conceded that a person may be recognized by his voice,[1] if the hearer is acquainted with the speaker's voice; assuming, then, that B is thus so acquainted with A's voice, and that voices can sometimes be distinguished on the telephone, and that in this instance B did distinguish A's voice, then B's belief that A was the speaker seems to be well founded and admissible; and this seems generally conceded.[2] (*b*) If there is no recognition of voice, is B's belief in A's personality inadmissible? Or may other circumstances give sufficient data for justifying and receiving his belief? There is much to be said for the view that the mercantile custom, by which the numbers in a telephone-book do correspond to the stated addresses, and operators do call up the correct office, and the person called up does give a correct answer, is sufficiently trustworthy; and that a belief based on it is admissible, just as a belief based on regular prices-current or on accepted medical books (*ante*, §§ 430 *l*, 430 *n*) is receivable; and this view has some support in authority.[3] Besides this, however, the particular case may furnish other data which suffice to give a basis for the witness' belief.[4] (*c*) A similar, but different, question arises where the antiphonal speaker does not purport to be a particular person, but merely some agent authorized to make a contract or an admission; here the question is whether he was really a person acting in the opponent's office

[15] [See examples in Dyer *v.* Rosenthal, 45 Mich. 590; Metzger *v.* Assur. Co., Mich., 63 N. W. 647; Lehmicke *v.* R. Co., 19 Minn. 482; Slocovich *v.* Ins. Co., 108 N. Y. 61; Mewes *v.* Pipe-Line Co., 170 Pa. 364.]

[16] [*Post*, §§ 576 ff.]

[1] [Fussell *v.* State, 93 Ga. 450; Deal *v.* State, 140 Ind. 354; Ogden *v.* Illinois, 134 Ill. 599; Com. *v.* Williams, 105 Mass. 67; State *v.* Hopkirk, 84 Mo. 288.]

[2] [Deering *v.* Shumpik, 67 Minn. 348; Stepp *v.* State, 31 Tex. Cr. 349, 352.]

[3] [Globe Printing Co. *v.* Stahl, 23 Mo. App. 451, 458, opinion by Thompson, J.; Wolfe *v.* R. Co., 97 Mo. 481.]

[4] [See People *v.* McKane, 143 N. Y. 455; Davis *v.* Walter, 70 Ia. 466. Whether such information is enough to furnish the basis of an affidavit (Murphy *v.* Jack, 142 N. Y. 212), or of a notary's certificate of acknowledgment (Banning *v.* Banning, 80 Cal. 273), or of an order discharging a juror (State *v.* Nelson, 19 R. I. 467), may well be a different question.]

and about the opponent's business, or was a mere intruder or bystander. On the principle above suggested, mercantile custom should suffice to admit the testimony, since a person who is called up and proceeds to conduct the negotiation is *prima facie* a person in the opponent's office and authorized to do such things.[5] Here, also, in any case, further data may suffice to complete the gap, — as where the details of the conversation indicate a person trusted with the business.[6]

(2) The matter of identity not being in dispute, there may still be a question of the Hearsay rule. If B, instead of speaking directly to A, converses with a clerk or a telephone-operator at the other end of the line, and the latter reports to B A's statements (usually admissions or contract-negotiations), then B is no longer in any view a witness to A's remarks, and we are in truth asked to receive the operator's hearsay (*i. e.* extrajudicial) report of A's utterances. Here two or three solutions offer. (*a*) If we apply the hearsay rule strictly, the evidence is excluded.[7] (*b*) But suppose that A had sent his clerk to B to report orally the same statement; here the clerk would clearly be A's agent to report A's admission, contract-acceptance, etc., to B. Why does not the same principle admit the report of the telephone-operator, on the theory that A, by resorting to the telephone, has made the operator his agent for the purpose of communicating? This solution seems sound, and has more than once been accepted.[8] (*c*) The preceding solution applies only where A is a party, and can thus be affected by his agent's acts. It does not cover the case where A is a third person; and for this situation there seems no solution except by making a distinct exception to the Hearsay rule, after the analogy of regular entries in the course of business (*ante*, § 120 *a*) or of commercial reports (*ante*, § 162 *l*); but this solution seems not yet to have been attempted by any Court.

(3) Occasionally still other principles may be involved; whether there was a sufficiency of information for an affidavit, etc.,[9] whether a person may corroborate himself by telling what he repeated at the time as the message received;[10] and these must be carefully distinguished from the preceding and more troublesome questions.]

[5] [Rock I. & P. R. Co. *v.* Potter, 36 Ill. App. 592; Wolfe *v.* R. Co., 97 Mo. 481; *contra:* Obermann Brewing Co. *v.* Adams, 35 Ill. App. 540.]

[6] [Miss. P. R. Co. *v.* Heidenheimer, 82 Tex. 207. See Morrell *v.* Lumber Co., 51 Mo. App. 595.]

[7] [As in Wilson *v.* Coleman, 81 Ga. 299.]

[8] [Sullivan *v.* Kuykendall, 82 Ky. 489; Oskamp *v.* Gadsden, 35 Nebr. 7.]

[9] [*Ante*, note 4.]

[10] [Excluded in German B'k *v.* Citizens' B'k, 101 Ia. 530, on the principle of § 469 *b*, *post*.]

CHAPTER XXIV.

WITNESSES (CONTINUED); MODE OF EXAMINATION.

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§ 432. Allowable in Discretion.
§ 432 *a*. Who may be excluded.
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3. *Recollection.*

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§ 441 *b*. General Principle.
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§ 441 *i*. Same: Discriminations.
§ 441 *j*. Sundries.
§ 441 *k*. Hypothetical Questions; General Principle.
§ 441 *l*. Same: Rules for the Use of Hypothetical Questions.

§ 431. **In general.** Having thus treated of the means of procuring the attendance of witnesses, and of their competency, we come now to consider the manner in which they are to be examined. And, here, in the first place, it is to be observed, that the subject lies chiefly in the discretion of the judge, before whom the cause is tried, it being from its very nature susceptible of but few positive and stringent rules. The great object is to elicit the truth from the witness; but the character, intelligence, moral courage, bias, memory, and other circumstances of witnesses are so various, as to require almost equal variety in the manner of interrogation, and the degree of its intensity, to attain that end. This manner and degree, therefore, as well as the other circumstances of the trial, must necessarily be left somewhat at large, subject to the few general rules which we shall proceed to state; remarking only, that wherever any matter is left to the discretion of one judge, his decision is not subject to be reversed or revised by another.

1. *Sequestration.*

§ 432. **Allowable in Discretion.** If the judge deems it essential to the discovery of truth, that the witnesses should be examined out

of the hearing of each other, he will so order it. [The process is termed, in many American courts, "putting under the rule;" but a better term seems "sequestration."] This order, upon the motion or suggestion of either party, is rarely withheld, but, by the weight of authority, the party does not seem entitled to it as a matter of right.[1]

§ 432 *a*. **Who may be excluded.** [The ordinary witness may always be subjected to this safeguard. Where he is also a party to the cause, there is some difference of opinion as to whether he may be subjected to it and thus deprived of the opportunity of watching and advising in the cause; the better opinion is that he cannot be excluded.[1]] An attorney in the cause, whose personal attendance is necessary, is usually excepted from the order to withdraw.[2]

§ 432 *b*. **Exclusion of some only.** [It is not necessary that all should be excluded; the Court has discretion to exclude some and to allow others to remain; and the asking party cannot complain that such exceptions are made.[1]]

§ 432 *c*. **Consequence of Disobedience.** The course in such cases 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

[1] In R. *v.* Cook, 13 How. St. Tr. 348, it was declared by Lord C. J. Treby to be grantable of favor only, at the discretion of the Court, and this opinion was followed by Lord C. J. Holt, in R. *v.* Vaughan, ib. 494, and by Sir Michael Foster, in R. *v.* Goodere, 17 How. St. Tr. 1015; see also 1 Stark. Evid. 163; Beamon *v.* Ellice, 4 C. & P. 585, per Taunton, J.; State *v.* Sparrow, 3 Murphy 487. The rule is stated by Fortescue, in these words: "Et si necessitas exegerit, dividantur testes hujusmodi, donec ipsi deposuerint quicquid velint, ita quod dictum unius non docebit aut concitabit eorum alium ad consimiliter testificandum:" Fortesc De Laud. Leg. Angl. c. 26. This, however, does not necessarily exclude the right of the Court to determine whether there is any need of a separate examination. Mr. Phillips states it only as the uniform course of practice, that "the Court, on the application of counsel, will order the witnesses on both sides to withdraw:" 2 Phil. Evid. 395; and see, accordingly, Williams *v.* Hulie, 1 Sid. 131; Swift on Evid. 512. In Taylor *v.* Lawson, 3 C. & P. 543, Best, C. J., regretted that the rule of parliamentary practice, which excludes all witnesses but the one under examination, was not universally adopted. But in Southey *v.* Nash, 7 C. & P. 632, Alderson, B., expressly recognized it as "the right of either party, at any moment, to require that the unexamined witnesses shall leave the court." [It was said in R. *v.* Murphy, 8 C. & P. 307, to be "almost a right;" and in a few Courts it is said to be so demandable: Shaw *v.* State, Ga., 29 S. E. 477; Nelson *v.* State, 2 Swan 237, 257. But the great majority of Courts treat it as a matter of discretion: McClellan *v.* State, Ala., 23 So. 653; People *v.* McCarty, 117 Cal. 65; Parkes *v.* U. S., Ind. Terr., 43 S. W. 858; Kent Lumber Co. *v.* Abney, Ky., 31 S. W. 279; Com. *v.* Thompson, 159 Mass. 56; People *v.* Considine, 105 Mich. 149; State *v.* Duffey, 128 Mo. 549; Chic. B. & Q. R. Co. *v.* Kellogg, Nebr., 74 N. W. 403.]

[1] *Contra:* {Penniman *v.* Hill, 24 W. R. 245;} *accord:* [Kent. Lumber Co. *v.* Abney, Ky., 31 S. W. 279; Richards *v.* State, 91 Tenn. 723;] {and it is customary not to exclude a party: Selfe *v.* Isaacson, 1 F. & F. 194; Charnock *v.* Dewings, 3 C. & K. 378.}

[2] Everett *v.* Loudham, 5 C. & P. 91; Pomeroy *v.* Baddeley, Rv. & M. 430.

[1] [R. *v.* O'Brien, 7 State Tr. N. S. 1, 45 (reporter); Wobb *v.* State, 100 Ala. 47, 52 (sheriff); Cent. R. Co. *v.* Phillips, 91 Ga. 526; Keller *v.* State, id., 31 S. E. 92; State *v.* Whitworth, 126 Mo. 573 (father of rape-complainant); Dement *v.* State, Tex. Cr., 46 S. W. 917; Johnican *v.* State, id., 48 S. W. 181; Jackson *v.* Com., Va., 30 S. E. 452.]

order from the bench, accompanied with notice, that if they remain they will not be examined. In the latter case, if a witness remains in court in violation of the order even by mistake, it is in the discretion of the judge whether or not he shall be examined.[1] The course formerly was to exclude him; and this is still the inflexible rule in the Exchequer in revenue cases, in order to prevent any imputation of unfairness in proceedings between the crown and the subject; but with this exception, the rule in criminal and civil cases is the same.[2] The right of excluding witnesses for disobedience to such an order, though well established, is rarely exercised in America;[3] but the witness is punishable for the contempt.

§ 433.[1]

2. *Leading Questions.*

§ 434. **General Rule.** In the direct examination of a witness, it is not allowed to put to him what are termed leading questions; that is, questions which suggest to the witness the answer desired.[1] The rule is to be understood in a reasonable sense; for if it were not allowed to approach the points at issue by such questions, the examinations would be most inconveniently protracted. To abridge the proceedings, and bring the witness as soon as possible to the material points on which he is to speak, the counsel may lead him on to that length, and may recapitulate to him the acknowledged facts of the case which have been already established. The rule, therefore, is not applied to that part of the examination, which is merely introductory of that which is material.[2]

[A leading question is a question which directly suggests the answer that is expected;[3] the rule is intended to avoid the danger

[1] It has, however, been held, that, if the witness remains in court, in disobedience of its order, his testimony cannot, on that ground alone, be excluded; but that it is matter for observation on his evidence: Chandler *v.* Horne, 2 M. & Rob. 423.

[2] Attorney-General *v.* Bulpit, 9 Price 4; Parker *v.* McWilliam, 6 Bing. 683; s. c. 4 Moore & Payne 480; Thomas *v.* David, 7 C. & P. 350; R. *v.* Colley, 1 M. & Malk. 329; Beamon *v.* Ellice, 4 C. & P. 585, and n. (*b*); {Cobbett *v.* Hudson, 1 E. & B. 14; People *v.* Sam Lung, 70 Cal. 516;} [Thorn *v.* Kemp, 98 Ala. 417, 423; Goon Bow *v.* People, Ill., 43 N. E. 593; State *v.* Jones, 47 La. An. 1524; State *v.* David, 131 Mo. 380; Holder *v.* U. S., 150 U. S. 91. Some Courts take the distinction that the disobedience must appear to have been by collusion with the party: {Davis *v.* Byrd, 94 Ind. 525; State *v.* Thomas, 111 id. 516;} Davenport *v.* Ogg, 15 Kan. 366; Com. *v.* Crowley, 168 Mass. 121; People *v.* Piper, Mich., 71 N. W. 175; and a few hold that the disobedience should not be visited by exclusion: R. *v.* Boyle, 1 Lew. Cr. C. 325; Cunningham *v.* State, 97 Ga. 214; Timberlake *v.* Thayer, Miss., 23 So. 767; Brown *v.* Com., 90 Va. 671;] {State *v.* Ward, 61 Vt. 179; Hubbard *v.* Hubbard, 7 Or. 42.}

[3] See Anon., 1 Hill S. C. 254, 256; State *v.* Sparrow, 3 Murph. 487; State *v.* Brookshire, 2 Ala. 303; Dyer *v.* Morris, 4 Mo. 214; Keith *v.* Wilson, 6 Mo. 435; {Pleasant *v.* State, 15 Ark. 624.}

[1] [Transferred to Appendix II.]

[1] Snyder *v.* Snyder, 6 Binn. 483; Harrison *v.* Rowan, 3 Washingt. 580; Parkin *v.* Moon, 7 C. & P. 408; Alison's Practice, 545; Tait on Evid. 427.

[2] [Gannon *v.* Stevens, 13 Kan. 457; Hall *v.* Taylor, 45 N. H. 407; Hansenfluck *v.* Com., 85 Va. 707.]

[3] [Page *v.* Parker, 40 N. H. 63; Coogler *v.* Rhodes, 38 Fla. 240.]

that the questioner may suggest and the witness, unwittingly or by connivance, may assent to or repeat a form of words which does not represent the witness' real and unaided belief. Any question, therefore, may in certain circumstances be suggestive or leading;[4] and whether a particular question violates the rule is usually and properly said to be determinable by the discretion of the trial Court.[5] A few general types of questions, however, have frequently come up for ruling upon principle.] Questions are objectionable, as leading, which, embodying a material fact, admit of an answer by a simple negative or affirmative, [provided the inquiry is directly suggestive of the desired answer, — as, "Did not the plaintiff wear a white hat?"[6] but where it is framed in the alternative — as, "Say whether he wore a white hat or not," — it is usually treated as not necessarily either improper or proper; it may be either according to the circumstances.[7]] An argumentative or pregnant course of interrogation is as faulty as the like course in pleading; the interrogatory must not assume facts to have been proved which have not been proved; nor, that particular answers have been given which have not been given.[8]

§ 435. **Exceptions.** In some cases, however, leading questions are permitted, even in a direct examination, — namely, where the witness appears to be hostile to the party producing him, or in the interest of the other party, or unwilling to give evidence;[1] or where an omission in his testimony is evidently caused by want of recollection, which a suggestion may assist; thus, where the witness stated that he could not recollect the names of the component members of a firm, so as to repeat them without suggestion, but thought he might possibly recollect them if suggested to him, this was permitted to be done;[2] so, where the transaction involves numerous items or dates; so, where, from the nature of the case, the mind of the witness cannot be directed

[4] [Steer *v.* Little, 44 N. H. 616.]

[5] [R. *v.* Murphy, 8 C. & P. 306; Ohlsen *v.* Terrero, L. R. 10 Ch. 129; Blevins *v.* Pope, 7 Ala. 374; Doran *v.* Mullen, 78 Ill. 145; Shockey *v.* Mills, 71 Ind. 291; People *v.* Goldensen, 76 Cal. 349; Welch *v.* Stipe, 95 Ga. 762; State *v.* Bauerkemper, 95 Ia. 562; Francis *v.* Rosa, 151 Mass. 534; People *v.* Roat, Mich., 76 N. W. 91; State *v.* Duestrow, 137 Mo. 44; Harvard *v.* Stiles, Nebr., 74 N. W. 399; Trenton R. Co. *v.* Cooper, N. J., 37 Atl. 730; Crenshaw *v.* Johnson, 120 N. C. 270; State *v.* Johnson, 43 S. C. 123; St. Clair *v.* U. S., 154 U. S. 134, 150.

For the rule as to depositions, see also *post*, Vol. III, § 351.]

[6] [Nicholls *v.* Dowding, 1 Stark. 81; People *v.* Mather, 4 Wend. 448.]

[7] [People *v.* Mather, *supra;* McKeown *v.* Harvey, 40 Mich. 228; State *v.* Wickliff, 95 Ia. 386; Coogler *v.* Rhodes, 38 Fla. 240; Steer *v.* Little, 44 N. H. 616.]

[8] Hill *v.* Coombe, 1 Stark. Evid. 163, n.; Turney *v.* State, 8 Sm. & M. 103; [Steer *v.* Little, 44 N. H. 616; Carpenter *v.* Ambroson, 20 Ill. 172; Davis *v.* Cook, 14 Nev. 287; *Re* Hine, 68 Conn. 551.]

[1] Clarke *v.* Saffery, Ry. & M. 126, per Best, C. J.; R. *v.* Chapman, 8 C. & P. 558; R. *v.* Ball, id. 745; R. *v.* Murphy, id. 297; Bank of North. Liberties *v.* Davis, 6 Watts & Serg. 285; Towns *v.* Alford, 2 Ala. 378; [State *v.* Benner, 64 Me. 279; Bradshaw *v.* Combs, 102 Ill. 434; McBride *v.* Wallace, 62 Mich. 453; Putnam *v.* U. S., 162 U. S. 687.]

[2] Acerro *v.* Petroni, 1 Stark. 100, per Ld. Ellenborough; [Herring *v.* Skaggs, 73 Ala. 453; State *v.* Jeandell, 5 Harringt. 475; Severance *v.* Carr, 43 N. H. 67; O'Hagan *v.* Dillon, 76 N. Y. 173.]

to the subject of inquiry, without a particular specification of it;[3] as, where he is called to contradict another, as to the contents of a letter, which is lost, and cannot, without suggestion, recollect all its contents, the particular passage may be suggested to him; so, where a witness is called to contradict another, who had stated that such and such expressions were used, or the like, counsel are sometimes permitted to ask, whether those particular expressions were used, of those things said, instead of asking the witness to state what was said.[4] [So, also, it may be necessary to put questions in this form to a child[5] or to an ignorant person,[6] or to one having a defect of speech.[7]] Where the witness stands in a situation which of necessity makes him adverse to the party calling him, as, for example, on the trial of an issue out of Chancery, with power to the plaintiff to examine the defendant himself as a witness, he may be cross-examined, as a matter of right.[8] [In general, on cross-examination, since the witness may be assumed not to be inclined to favor the cross-examiner, questions leading in form are allowable,[9] — though there seems to have been in England for some time a difference of opinion on this point.[10] Where the cross-examined witness turns out really to favor the cross-examining party and to be hostile to the party calling him, the prohibition of course applies.[11]] Indeed, when and under what circumstances a leading question may be put, is a matter resting in the sound discretion of the Court, and not a matter which can be assigned for error.[12] [A question by the judge, it may be added, cannot in the nature of the case be obnoxious to the present principle, since the judge is not supposed to favor either side, and therefore neither for the questioner nor for the witness can the supposed danger of improper suggestion exist.[13]]

[3] [Nicholls *v.* Dowding, 1 Stark. 81; DeHaven *v.* DeHaven, 77 Ind. 240; Bullard *v.* Hascall, 25 Mich. 136.]

[4] Courteen *v.* Touse, 1 Campb. 43; Edmonds *v.* Walter, 3 Stark. 7; 1 Stark. Evid. 152; [Phœnix Ins. Co. *v.* Moog, 78 Ala. 310; People *v.* Ah Yute, 60 Cal. 95; Gunter *v.* Watson, 4 Jones L. 457; Un. P. R. Co. *v.* O'Brien, 161 U. S. 451; Norton *v.* Parsons, 67 Vt. 526; Rounds *v.* State, 57 Wis. 53.]

[5] [Moody *v.* Rowell, 17 Pick. 498.]

[6] [Doran *v.* Mullen, 78 Ill. 345.]

[7] [Belknap *v.* Stewart, 38 Nebr. 304, 310.]

[8] Clarke *v.* Saffery, Ry. & M. 126.

[9] [Parkin *v.* Moon, 7 C. & P. 409; U. S. *v.* Dickerson, 2 McLean 331; Harrison *v.* Rowan, 3 Wash. C. C. 582; State *v.* Benner, 64 Me. 279. The language of many judges, that leading questions may be put to adverse witnesses, probably is intended to include this situation. Distinguish here the question whether one's own case may be gone into on cross-examination, which may incidentally involve the present question: *post*, § 445.]

[10] [Seven Bishops' Trial, 12 How. St. Tr. 310; Hardy's Trial, 24 id. 659; Anon., 1 Lew. Cr. C. 322; Joseph Chitty, Practice of the Law, III, 892. In Wilson's Trial, 2 Green (Sc.) 119, the counsel, Mr. Murray, on being told that by Scotch law he could not lead on cross-examination, remarked: "I remember hearing a judge in England, upon that being stated to him, saying, 'Great God! What a country!'"]

[11] Moody *v.* Rowell, 17 Pick. 498.

[12] [See *ante*, § 434.]

[13] [Lord Ellenborough, C. J., in 25 Parl. Deb. 207; Epps *v.* State, 19 Ga. 111; Dunn *v.* People, 172 Ill. 582; Com. *v.* Galavan, 9 All. 272.]

3. *Recollection.*

§§ 436–439.[1]

§ 439 *a*. **Two Kinds of Recollection, Past and Present.** [It is to-day generally understood that there are two sorts of recollection which are properly available for a witness, — past recollection and present recollection. In the latter and usual sort, the witness either has a sufficiently clear recollection, or can summon it and make it distinct and actual if he can stimulate and refresh it, and the chief question is as to the propriety of certain means of stimulating it, — in particular, of using written or printed notes, memoranda, or other things as refreshing it. In the former sort, the witness is totally lacking in present recollection and cannot revive it by stimulation, but there was a time when he did have a sufficient recollection and when it was recorded, so that he can adopt this record of his then existing recollection and use it as sufficiently representing the tenor of his knowledge on the subject. This use of a past recollection depends of course on certain conditions; while the stimulation of an actual present recollection need be subject to no fixed rules; and it is through the improper application of the limitations of the one case to the other that some confusion of decisions has arisen. It will therefore be profitable to examine first the conditions appropriate to the use of a record of past recollection.]

§ 439 *b*. **Record of Past Recollection.** [(1) The record (memorandum, note, entry, etc.) must have been made *at or about the time* of the event recorded. Whether in a given case it was made so near that the recollection may be assumed to have been then sufficiently fresh must depend on the circumstances of the case.[1] (2) The witness need not have *made the record himself;*[2] the essential thing is that he should be able to guarantee that the record actually represented his recollection at the time,[3] and this he may be able to do, either by

[1] [Transferred to Appendix II, because the treatment was misleading, in view of the modern development of the doctrines.]

[1] [Some illustrations of the practice will be found in the following cases: Anderson *v.* Whalley, 3 C. & K. 54; Fraser *v.* Fraser, 14 U. C. C. P. 70; S. G. Mut. Ins. Co. *v.* Riley, 15 Md. 54; Swartz *v.* Chickering, 58 id. 290; Watson *v.* Walker, 23 N. H. 496; O'Neale *v.* Walton, 1 Rich. 234; Ballard *v.* Ballard, 5 id. 495; Bates *v.* Preble, 151 U. S. 154; Pinney *v.* Andrus, 41 Vt. 648.]

[2] [Burrough *v.* Martin, 2 Camp. 112; Green *v.* Caulk, 16 Md. 573; Jacob *v.* Lindsay, 1 East 560; R. *v.* Philpotts, 5 Cox Cr. 329; R. *v.* Langton, L. R. 2 Q. B. D. 296; Birmingham *v.* McPoland, 96 Ala. 363; Torrey *v.* Burney, 113 id. 496; McGowan *v.* McDonald, 111 Cal. 57; Grant *v.* Dreyfus, id., 52 Pac. 1074; Curtis *v.* Bradley, 65 Conn. 99; Phœnix Ins. Co. *v.* Sullivan, 39 Kan. 451; Chamberlain *v.* Sands, 27 Me. 458; Owens *v.* State, 16 Md. 307; Pillsbury *v.* Locke, 33 N. H. 96; Kearney *v.* Themanson, 48 Nebr. 74; State *v.* Lyon, 89 N. C. 568; Harrison *v.* Middleton, 11 Gratt. 546; Hazer *v.* Streich, 92 Wis. 505.

Where the record was made by another person, and the witness has not perused it and known it at the time to be correct, it is of course inadmissible: Hematite M. Co. *v.* R. Co., 92 Ga. 268, 272; Pingree *v.* Johnson, 69 Vt. 225.]

[3] [Acklen *v.* Hickman, 63 Ala. 499; Davis *v.* Field, 56 Vt. 426.]

virtue of his general custom in making such records,[4] or (as in the common case of an attesting witness) by his assurance that he would not have made the record if he had not believed it correct.[5] (3) The *original record* (in accordance with the general principle as to primary evidence, *post*, § 563 *a*) should be produced, not a copy;[6] nevertheless, a copy may be used if the original is lost or otherwise unavailable.[7] Since the process of making a copy of it is a distinct thing from the process of making the original record, there is no reason why the copy may not be one made by another person, if properly proved by the other person on the stand.[8] This being so, why is not a copy receivable of a report originally oral? The situation is the same, except that the salesman, workman, etc., instead of handing the bookkeeper, clerk, etc., a written statement of the transaction, makes an oral statement, which is transcribed, and in effect represents the first person's recollection as orally reported by him. The joint testimony of the two ought to be receivable on principle; and such is the result generally reached by the Courts, though usually the reports are required to have been made in the regular course of business.[9] In such a case, if the original observer is not produced together with the person recording it, the Hearsay rule forms an obstacle; and accordingly the use of these records under such circumstances has been treated *ante*, § 120 *a*. (4) As a

[4] [As in the case of notaries (Morris *v.* Sargent, 18 Ia. 95; Miller *v.* Hackley, 5 Johns. 375; Bank *v.* Cowan, 7 Humph. 70), bank-officers (New Haven B'k *v.* Mitchell, 15 Conn. 224; Bell *v.* Hagerstown B'k, 7 Gill 226; Mathias *v.* O'Neill, 94 Mo. 525), and others (Leonard *v.* Mixon, 96 Ga. 239).]

[5] [Pearson *v.* Wightman, 1 Mills Const. 344; Maugham *v.* Hubbard, 2 M. & Ryl. 5; R. *v.* St. Martin's, 2 A. & E. 210; Haven *v.* Wendell, 11 N. H. 112. There is perhaps in Massachusetts a peculiar additional limitation, not found elsewhere, and due to the course of historical development, that the record must have been a regular entry in the course of business: see Shove *v.* Wiley, 18 Pick. 558; Costello *v.* Crowell, 133 Mass. 352; Cobb *v.* Boston, 109 id. 444.]

[6] [Doe *v.* Perkins, 3 T. R. 754; Horne *v.* Mackenzie, 5 Cl. & F. 628; Topham *v.* McGregor, 1 C. & K. 320; Lord Talbot *v.* Cusack, 17 Ir. C. L. 213; Clifford *v.* Drake, 110 Ill. 135; Bonnet *v.* Glatfeldt, 120 id. 166 (see, as apparently inconsistent, Chic. R. Co. *v.* Adler, 56 id. 344; Brown *v.* Luehrs, 79 id. 575); Adams *v.* Board, 37 Fla. 266; Stanwood *v.* McLellan, 48 Me. 475; Thomas *v.* Price, 30 id. 484; Banking House *v.* Darr, 139 Mo. 660; Ryerson *v.* Grover, 1 N. J. L. 459; Halsey *v.* Sinsebaugh, 15 N. Y. 485; Marcly *v.* Shults, 29 id. 346; Downs *v.* R. Co., 47 id. 87; Mead *v.* McGraw, 19 Oh. St. 55; State *v.* Lyon, 89 N. C. 568; Bank *v.* Zorn, 14 S. C. 444; Rogers *v.* Burton, Peck 108; Beets *v.* State, Meigs 106; Ins. Co. *v.* Weide, 9 Wall. 677; Davis *v.* Field, 56 Vt. 420; Harrison *v.* Middleton, 11 Gratt. 547.]

[7] [See the cases in the preceding note.]

[8] [State *v.* Shinborn, 46 N. H. 503; Smith *v.* Sanford, 12 Pick. 140; Holmes *v.* Marsden, ib. 171, *semble;* Morris *v.* Briggs, 3 Cush. 343; Barker *v.* Haskell, 9 id. 218; White *v.* Wilkinson, 12 La. An. 360; Chic. Lumbering Co. *v.* Hewitt, 22 U. S. App. 646; The Norma, 35 id. 421. *Contra:* Peck *v.* Valentine, 94 N. Y. 569, but this case is discredited by Mayor *v.* R. Co., *post.*]

[9] [Mayor *v.* R. Co., 102 N. Y. 572; Harwood *v.* Mulry, 8 Gray 250 (leading cases); Stettauer *v.* White, 12 La. An. 360; Littlefield *v.* Rice, 10 Metc. 289; Kent *v.* Garvin, 1 Gray 150; Miller *v.* Shay, 145 Mass. 163; Ingraham *v.* Bockins, 9 S. & R. 285; Clough *v.* Little, 3 Rich. L. 353; Green *v.* Cawthorn, 4 Dev. L. 409; Shear *v.* Van Dyke, 10 Hun 529; Thomas *v.* Porter, 4 Strob. Eq. 163; The Norma, 35 U. S. App. 421. *Contra:* Lewis *v.* Kramer, 3 Md. 286.]

measure of fairness and a precaution against imposition, the opponent may demand that the record be shown him for purposes of inspection and cross-examination.[10] (5) Since the witness has verified and adopted the record as representing his knowledge on the subject, it becomes a part of his testimony, "just as if without it the witness had orally repeated the words from memory," [11] and may therefore be read aloud by him and shown to the jury, or otherwise put in evidence.[12] A few Courts speak of the writing as "not in itself evidence," [13] — meaning apparently — what cannot be denied — that it has no standing except as verified and adopted by the witness. A few others expressly refuse to allow it to be "read in evidence," [14] or "given in evidence;" [15] but this must be regarded as erroneous.[16] (6) A local doctrine in New York requires it to appear that the witness' present memory is exhausted before he is allowed to adopt a record of past recollection; [17] but this seems unpractical and unsound.]

§ 439 *c.* **Stimulating (Refreshing) Present Recollection.** [Here the witness is proceeding to testify from a present and existing recollection, but he is unable to produce that recollection by unaided mental effort, and the question is whether a resort to notes, etc., to

[10] [Hardy's Trial, 24 How. St. Tr. 824; R. *v.* St. Martin's, 2 A. & E. 10; Beech *v.* Jones, 5 C. B. 696; Loyd *v.* Freshfield, 2 C. & P. 332; Adae *v.* Zangs, 44 Ia. 536; Hall *v.* Ray, 18 N. H. 126; Nicholson *v.* Withers, 2 McCord 429; Chute *v.* State, 19 Minn. 277.]

[11] [Bryan *v.* Moring, 94 N. C. 687.]

[12] [Howard *v.* McDonough, 77 N. Y. 592; Mason *v.* Phelps, 48 Mich. 126; Moots *v.* State, 21 Oh. St. 653. *Accord*, on this general principle: Jacob *v.* Lindsay, 1 East 460; Loyd *v.* Freshfield, 2 C. & P. 332; Mims *v.* Sturtevant, 36 Ala. 630; Acklen's Ex'r *v.* Hickman, 63 id. 8; State *v.* Brady, 100 Ia. 191; Mineral Point R. Co. *v.* Keep, 22 Ill. 20; Solomon R. Co. *v.* Jones, 34 Kan. 443; Wright *v.* Wright, 58 id. 525; Cobb *v.* Boston, 109 Mass. 444; Mason *v.* Phelps, 48 Mich. 126; Haven *v.* Wendell, 11 N. H. 112; Kelsea *v.* Fletcher, 48 id. 282; Watts *v.* Sawyer, 55 id. 40; Pinkham *v.* Benton, 62 id. 687; Halsey *v.* Sinsebaugh, 15 N. Y. 485; Russell *v.* R. Co., 17 id. 134; Marcly *v.* Shults, 29 id. 346; McCormick *v.* R. Co., 49 id. 303; Flood *v.* Mitchell, 68 id. 509; Howard *v.* McDonough, 77 id. 592; Peck *v.* Valentine, 94 id. 569; N. Y. C. B'k *v.* Madden, 114 id. 280; Bryan *v.* Moring, 94 N. C. 687; F. M. Bank *v.* Boraef, 1 Rawle 152; Haig *v.* Newton, 1 Mills Const. Ct. 423; Columbia *v.* Harrison, 2 id. 212; Mt. Terry M. Co. *v.* White, S. D., 74 N. W. 1060; Ins. Co. *v.* Weide, 9 Wall. 677; Ins. Co. *v.* Weides, 14 id. 379; Rueh *v.* Rock Island, 97 U. S. 695; Lapham *v.* Kelly, 35 Vt. 198; Davis *v.* Field, 56 id. 426; Bates *v.* Sabin, 64 id. 511, 520; Williams *v.* Wager, ib. 326, 336; Harrison *v.* Middleton, 11 Gratt. 547.]

[13] [R. *v.* St. Martin's, 2 A. & E. 210; Lipscomb *v.* Lyon, 19 Nebr. 521; Vinal *v.* Gilman, 21 W. Va. 309.]

[14] [Rounds *v.* State, 57 Wis. 52.]

[15] [Phœnix Ins. Co. *v.* Am. Co., 63 Ark. 187; People *v.* Elyea, 14 Cal. 144; Hoffman *v.* R. Co., 40 Minn. 60.]

[16] [In Bates *v.* Preble, 151 U. S. 149, 155, there is complete confusion of thought. In Massachusetts, both theory and practice seem unsettled: see Costello *v.* Crowell, 133 Mass. 352, and cases cited. In Curtis *v.* Bradley, 65 Conn. 99, an ingenious but questionable theory is advanced.]

[17] [Russell *v.* R. Co. 17 N. Y. 134; People *v.* McLaughlin, 150 id. 365. This heterodox limitation has of late leavened the doctrine of a few other Courts: State *v.* Baldwin, 36 Kan. 15; State B'k *v.* Brewer, 100 Ia. 576, *semble;* Stahl *v.* Duluth, Minn., 74 N. W. 143 (yet compare Chute *v.* State, 19 id. 277); Jaques *v.* Horton, 76 Ala. 243; Weaver *v.* Bromley, 65 Mich. 214; Friendly *v.* Lee, 20 Or. 205; Vicksburg R. Co. *v.* O'Brien, 119 U. S. 99.]

stimulate and revive it is under the circumstances improper. The vagaries of memory being infinite, it would be futile for the law to attempt to determine by fixed rules what things have or have not a potency to stimulate recollection. It can only act on the circumstances of each case, excluding the desired aid only when it is apparent or likely that the witness is not really aided but is repeating a form of words of whose truth he has no knowledge. (1) Accordingly, so far as concerns stimulation by reference to a writing or the like, the fundamental notion is that *any* paper *may* in the circumstances be properly used for the purpose.[1] In particular, (2) that the paper was not written by the witness himself is no objection;[2] and it is therefore incorrect (confusing this with the preceding subject) to require that the paper be one written by the witness or under his direction or known to him to be correct.[3] Nevertheless, papers prepared by others may, under the circumstances of the case, be so suspicious or questionable as to make their use improper.[4] (3) Furthermore, it is not an objection that the paper is a copy, and not an original, provided it does in fact serve to revive the recollection.[5] (4) Again, it is equally immaterial that the paper was not made at or about the time of the event; for it is not used as a record of a past memory (as in the cases in § 439 *b*), and its power to stimulate and revive the memory by the allusions which it contains must be precisely the same whether it was made at the time or not. This is the necessary result of the principle involved, and is maintained by a number of Courts;[6] but many, misled by the limitation applicable

[1] [Lawes *v.* Reed, 2 Lew. Cr. C. 152, note; Henry *v.* Lee, 2 Chitty 124; Huff *v.* Bennett, 6 N. Y. 337; Dunlop *v.* Berry, 3 Scam. 327; McNeely *v.* Duff, 50 Kan. 488.]

[2] [Henry *v.* Lee, *supra;* Lawes *v.* Reed, *supra;* Smith *v.* Morgan, 2 Moo. & R. 257; R. *v.* Watson, 3 C. & K. 111; R. *v.* Williams, 8 Cox Cr. 343; Atkins *v.* State, 16 Ark. 589; Dunlop *v.* Berry, 3 Scam. 327; Miner *v.* Phillips, 42 Ill. 131; State *v.* Kremling, 53 Ia. 209; State *v.* Lull, 37 Me. 246; Cameron *v.* Blackman, 39 Mich. 108; Culver *v.* Lumber Co., 53 Minn. 360, 365; Huff *v.* Bennett, 6 N. Y. 337; McCormick *v.* R. Co., 49 id. 303; Bigelow *v.* Hall, 91 id. 145; State *v.* Staton, 114 N. C. 813, 816; State *v.* Finley, 118 id. 1161; O'Neale *v.* Walton, 1 Rich. L. 234; Berry *v.* Jourdan, 11 id. 67, 78; Bank *v.* Zorn, 14 S. C. 444; State *v.* Collins, 15 id. 373; Hill *v.* State, 17 Wis. 675; Folsom *v.* Log-driving Co., 41 id. 602.]

[3] [As in Cal. C. C. P. § 2047; Coffin *v.* Vincent, 12 Cush. 98; State *v.* Cardoza, 11 S. C. 238; Walker *v.* State, Ala., 23 So. 149.]

[4] [Noel's Motion, 3 T. R. 752 (notes written out by solicitor for witness); Alcock *v.* Ins. Co., 13 Q. B. 292, 305 ("swearing by reference" to a deposition); Layer *v.* Wagstaff, 5 Beav. 462 (deposition prepared for witness).]

[5] [Dunlop *v.* Berry, 3 Scam. 327; Huff *v.* Bennett, 6 N. Y. 337; Folsom *v.* Log-driving Co., 41 Wis. 602 (leading cases). *Accord:* Tanner *v.* Taylor, 3 T. R. 754; Doe *v.* Perkins, ib. 749; Anon., 1 Lew. Cr. 101; R. *v.* Williams, 6 Cox Cr. 343; Lawson *v.* Gloss, 6 Colo. 134; Erie Preserving Co. *v.* Miller, 52 Conn. 444; Finch *v.* Barclay, 87 Ga. 393; Iglehart *v.* Jernegan, 16 Ill. 513; Chicago R. Co. *v.* Adler, 56 id. 345; Davie *v.* Jones, 68 Me. 393; Bullock *v.* Hunter, 44 Md. 425; Hopper *v.* Beck, 83 id. 647; Coffin *v.* Vincent, 12 Cush. 98; Cameron *v.* Blackman, 39 Mich. 108; Hudnutt *v.* Comstock, 50 id. 596; Clough *v.* State, 7 Nebr. 336; Huff *v.* Bennett, 6 N. Y. 337; Marcly *v.* Shults, 29 id. 346; McCormick *v.* R. Co., 49 id. 303; H. & T. C. R. Co. *v.* Burke, 55 Tex. 342; Watson *v.* Miller, 82 id. 285; State *v.* Hopkins, 56 Vt. 258; Harrison *v.* Middleton, 11 Gratt. 530, 547.]

[6] [Bank *v.* Zorn, 14 S. C. 444; Folsom *v.* Log-driving Co., 41 Wis. 602; and many

to a record of past recollection (*ante*, § 439 *b*), require that the paper should be one contemporaneous with the event.[7] (5) Upon the erroneous view just referred to, it has recently been declared[8] that, on being surprised by the testimony of one's own witness, one may not refer to former testimony or a deposition by the same witness and endeavor to stimulate the memory to a correction; basing this result chiefly on the supposed principle that the reference for refreshing must always be to a contemporary writing. That this supposed principle, as applied to refreshing by deposition or former testimony, is wholly unsound may be understood by noting the numerous decisions in which this mode of refreshing has been allowed;[9] while, independently of this supposed principle, there is no reason why refreshment may not be equally well attained by the counsel's oral reference to or reading from the deposition, etc., as by the witness' own perusal of it, and the precedents abundantly sustain this practice.[10] (6) As a matter of fairness and to prevent imposition, the paper must be produced in Court, on demand, for inspection and cross-examination by the opponent.[11] (7) But since, in Lord Ellenborough's words, "it is not the memorandum that is the evidence, but the recollection of the witness,"[12] the party whose witness uses it has no right to have it read to or handed to the jury;[13] it is only the opponent who may do this in case he wishes to cast doubt on the reality of the refreshment of memory.[14]]

of the cases cited in notes 1, 2, and 5, *ante*, where it is clear that the paper must have been made long after the event, — in particular, the cases in which depositions were used.]

[7] [Steinkeller *v.* Newton, 9 C. & P. 313; Whitfield *v.* Aland, 2 C. & K. 1015; Paige *v.* Carter, 64 Cal. 489; Sanders *v.* Wakefield, 41 Kan. 11; Bigelow *v.* Hall, 91 N. Y. 145; Maxwell *v.* Wilkinson, 113 U. S. 657; Putnam *v.* U. S., 162 id. 687.]

[8] [Putnam *v.* U. S., 162 U. S. 687; the opinion confuses the bearings of the present subject and that of impeaching one's own witness (*post*, § 444).]

[9] [See the following cases in notes 1 and 2, *ante;* R. *v.* Watson, Smith *v.* Morgan, R. *v.* Williams, Atkins *v.* State, State *v.* Kremling, State *v.* Staton, and others.]

[10] [R. *v.* Edwards, 8 C. & P. 26, 31; R. *v.* Barnet, 4 Cox Cr. 269; R. *v.* Ford, 5 id. 184; R. *v.* Williams, 8 id. 343; R. *v.* Quin, 2 F. & F. 818; Harvey *v.* State, 40 Ind. 519; Stanley *v.* Stanley, 112 id. 145; Johnson *v.* Gwin, 100 id. 466, 474; Beaubien *v.* Cicotte, 12 Mich. 459, 485; Hurley *v.* State, 46 Oh. 313. The only contrary decision, Com. *v.* Phelps, 11 Gray 73, is based on no precedent.]

[11] [Hardy's Trial, 24 How. St. Tr. 824; R. *v.* Ramsden, 2 C. & P. 603; Lord *v.* Colvin, 2 Drewr. 205; Duncan *v.* Seeley, 34 Mich. 369; Tibbetts *v.* Sterberg, 66 Barb. 201 (leading cases). There should be no question on this point, but a few Courts take the opposite view: Addington *v.* Wilson, 5 Ind. 133; State *v.* Cheek, 13 Ired. 114.]

[12] [Henry *v.* Lee, 2 Chitty 124.]

[13] [Gregory *v.* Taverner, 6 C. & P. 281; Aeklen *v.* Hickman, 63 Ala. 498; Curtis *v.* Bradley, 65 Conn. 99; Elmore *v.* Overton, 104 Ind. 548, 555; Com. *v.* Ford, 130 Mass. 66; Watts *v.* Sawyer, 55 N. H. 40; Howard *v.* McDonough, 77 N. Y. 592; Friendly *v.* Lee, 20 Or. 202.

Contra: Iglehart *v.* Jernegan, 16 Ill. 513 (mistakenly applying the doctrine for past recollection).]

[14] [Gregory *v.* Taverner, Aeklen *v.* Hickman, Com. *v.* Ford, *supra;* Com. *v.* Jeffs, 132 Mass. 5; Smith *v.* Jackson, Mich., 71 N. W. 843.]

4. *Modes of Testifying.*

§ 439 *d*. **In general.** [A witness' testimony, being an attempt to communicate to the tribunal the knowledge possessed by the witness, will usually employ the ordinary mode of expression, viz., oral utterance in the language customary in judicial proceedings of the locality. But there are other modes of communication, and the need for resorting to them often rises. As to one and all of them, it should be noted that whatever mode of communication is employed presupposes a qualified witness as its testimonial support and cannot of itself have any standing independently of some witness whose knowledge it serves to represent. Thus, a map or model or photograph cannot of itself be receivable, but must enter as representing some witness' testimony in graphic form. Conversely, the maker of the map, model, or photograph is not necessarily the person who must use it; for any qualified witness may adopt it as representing the idea which he wishes to convey.]

§ 439 *e*. **Interpretation.** [A dumb person may be heard as a witness by any mode of communication which is intelligible.[1] Persons speaking an alien language may be heard through interpreters, and the necessity of this should be determined by the trial Court.[2] In the same way a person may be appointed to repeat the words of one who cannot speak loud enough.[3] But an interpreter, under the Hearsay rule, must be sworn as a witness.[4]]

§ 439 *f*. **Writing.** [It may happen that a writing will form part of a witness' testimony, — as where he uses a record of past recollection,[1] or where he proves a copy of a document.[2]]

§ 439 *g*. **Maps, Drawings, Diagrams, Models.** [That a witness may properly communicate his knowledge in the form of a map, drawing, or diagram, has never been doubted, and in numerous instances they have been received to describe all manner of physical objects, from houses and land to blood-corpuscles; and the mode of representation, whether termed chart, map, plan, diagram, sketch, or otherwise, is immaterial.[1] The map, etc., on the principle already explained, must

[1] [Ruston's Case, 1 Leach Cr. L., 4th ed. 408; Morrison *v.* Leonard, 3 C. & P. 127; State *v.* De Wolf, 8 Conn. 98; Snyder *v.* Nations, 5 Blackf. 295; Skaggs *v.* State, 108 Ind. 57; Com. *v.* Hill, 14 Mass. 207; People *v.* McGee, 1 Denio 21; State *v.* Howard, 118 Mo. 127, 144.]

[2] [People *v.* Young, 108 Cal. 8 (C. C. P. § 1884); Skaggs *v.* State, 108 Ind. 56 (R. S. § 495); State *v.* Severson, 78 Ia. 653.]

[3] [Lord Mohun's Trial, 12 How. St. Tr. 990; Conner *v.* State, 25 Ga. 521.]

[4] [*Ante*, § 162 *p*.]

[1] [*Ante*, § 439 *b*.]

[2] [*Post*, § 563 *q*. For other instances, see Black *v.* Black, 38 Ala. 112; Sizer *v.* Burt, 4 Denio 429; State *v.* Kent, S. D., 62 N. W. 631; Names *v.* Ins. Co., 104 Ia. 612.]

[1] [Watson's Trial, 32 How. St. Tr. 125; Nolin *v.* Parmer, 21 Ala. 71; Campbell *v.* State, 23 id. 83; Humes *v.* Bernstein, 72 id. 553; Wilkinson *v.* State, 106 id. 23; Burton *v.* State, 115 id. 1; Goldsborough *v.* Pidduck, 87 Ia. 599, 601; State *v.* Knight, 43 Me. 130; Clapp *v.* Norton, 106 Mass. 33; Com. *v.* Holliston, 107 id. 233; Paine *v.* Woods, 108 id. 168; Barrett *v.* Murphy, 140 id. 143; Bennison *v.* Walbank, 38 Minn.

be verified or otherwise put in as a part of some one's testimony, and it may be excluded either because not verified at all or because the witness using it has no knowledge of the thing it purports to represent.[2] Conversely, on the same principle, it is not necessary that the user of the map, if acquainted with the object it represents, should be the maker,[3] or that the map should be an official one.[4] An official map is admissible without verification by a witness on the stand, because the official is in effect testifying to it under an exception to the Hearsay rule.[5] Where a map is referred to as a part of a description in a deed, or is a part of a public record determining boundaries, it is of course not testimony, but a part of the legal transaction, and the present principles are not involved.

A *model* is governed by the same principles just described as applying to maps and diagrams.[6]

It may often be desirable to permit a *dramatic* mode of communication, as by draping clothing on a dress-frame,[7] putting on a burglar's mask,[8] and the like;[9] and at trials for infringement of musical copyright, it is not uncommon to have the music in question played or sung in court.[10]]

§ 439 *h*. **Photographs.** [So far as concerns the accuracy of the photographic process, it would be a mistake to credit it[1] with a necessary correctness independent of human control. It is certain that the conditions of the process can be so manipulated that the photograph is as false as the falsest witness.[2] But this is no reason for excluding the testimonial use of the photograph. It stands precisely

313; Ordway *v.* Haynes, 50 N. H. 159; People *v.* Johnson, 140 N. Y. 350, 354; State *v.* Whiteacre, 98 N. C. 753; Dobson *v.* Whisenhart, 101 id. 647; Burwell *v.* Sneed, 104 id. 120; Griffith *v.* Rive, 72 Tex. 187; Bunker Hill Co. *v.* Schmelling, U. S. App., 79 Fed. 263; State *v.* Hunter, 18 Wash. 670; Poling *v.* R. Co., 38 W. Va. 645, 657; State *v.* Harr, ib. 58, 63.]

[2] [See R. *v.* Mitchell, 6 Cox Cr. 82; Humes *v.* Bernstein, 72 Ala. 553; Adams *v.* State, 23 Fla. 538; Moon *v.* State, 68 Ga. 695; W. & A. R. Co. *v.* Stafford, 99 id. 187; K. & S. R. Co. *v.* Horan, 131 Ill. 303; Rippe *v.* R. Co., 23 Minn. 22; People *v.* Johnson, 140 N. Y. 350; Com. *v.* Switzer, 134 Pa. 388; Vilas *v.* Reynolds, 6 Wis. 224.]

[3] [Fuller *v.* State, Ala., 23 So. 688; Campbell *v.* Slate, ib. 83; Shook *v.* Pate, 50 Ala. 92; State *v.* Whiteacre, 98 N. C. 753.]

[4] [Turner *v.* U. S., 30 U. S. App. 90; Hale *v.* Rich, 48 Vt. 224; Wood *v.* Willard, 36 id. 82; Justen *v.* Scharf, Ill., 51 N. E. 695.]

[5] [*Post*, § 498.]

[6] [See Davis *v.* Power Co., 107 Cal. 563; People *v.* Searcy, id. 53 Pac. 359; Penn. Coal Co. *v.* Kelly, 156 Ill. 9; Louisv. & N. R. Co. *v.* Berry, 96 Ky. 604; State *v.* Fox, 25 N. J. L. 602; Earl *v.* Leffler, 10 N. Y. St. Rep. 807.]

[7] [People *v.* Durrant, 116 Cal. 179.]

[8] [State *v.* Ellwood, 17 R. I. 763, 769.]

[9] [See Linehan *v.* State, 113 Ala. 70; People *v.* Chin Hane, 108 Cal. 597; Tudor Iron Works *v.* Weber, 31 Ill. App. 312.]

[10] [Article by Irving Browne, Esq., "Practical Tests in Evidence," 5 Green Bag 137; and see People *v.* Linkhaw, 69 N. C. 214.]

[1] [As in Franklin *v.* State, 69 Ga. 42 ("a truthful and impartial witness, the sun").]

[2] [See striking illustrations of this in the Strand Magazine, February, 1895, and later numbers, particularly May–July, 1898.]

on the same footing as the diagram or the model; it is equally legitimate as a mode of communicating testimony in appropriate instances, and it may be most helpful, but it equally requires and rests upon the credit of some witness. In general, then, the photograph is everywhere recognized as a permissible mode of testimony where appropriate,[3] and it has been received in proof of land, buildings, railroad-crossings, train-wrecks, bridges, tracks, human beings, particular parts of the body, documents, signatures, and sundry other things. The photograph must be verified by some one who has knowledge of the object represented and can testify that the photograph represents his idea of the object;[4] but, on the principle already explained, it is not necessary[5] that the witness should be the person taking the photograph, for even though he is not, the photograph, nevertheless, may serve to convey his ideas.[6] In Massachusetts the admirable principle

[3] [In the following cases the photograph was sometimes excluded for one of the reasons mentioned later in the text, but their general capability of use under proper circumstances was recognized: Tichborne's Trial, Charge to Jury, II, 640; *Re* Stephens, L. R. 9 C. P. 187; Durst *v.* Masters, L. R. 1 P. D. 378; Luke *v.* Calhoun Co., 52 Ala. 118; K. C. M. & B. R. Co. *v.* Smith, 90 id. 27; *In re* Jessup, 81 Cal. 418; People *v.* Durrant, 116 id. 179; Dyson *v.* R. Co., 57 Conn. 24; Adams *v.* State, 28 Fla. 538; Ortiz *v.* State, 30 id. 256, 265; Franklin *v.* State, 69 Ga. 42; Shaw *v.* State, 83 id. 102; Travelers Ins. Co. *v.* Sheppard, 85 id. 790; Rockford *v.* Russell, 9 Ill. App. 233; Duffin *v.* People, 107 Ill. 119; C. C. C. & St. L. R. Co. *v.* Monaghan, 140 id. 483; Beavers *v.* State, 58 Ind. 530, 535; Keyes *v.* State, 122 id. 529; Miller *v.* R. Co., 128 id. 97; Locke *v.* R. Co., 46 Ia. 110; Reddin *v.* Gates, 52 id. 213; German Theol. School *v.* Dubuque, 64 id. 737; Barker *v.* Perry, 67 id. 148; State *v.* Windahl, 95 id. 470; Shorten *v.* Judd, 56 Kan. 43; State *v.* Hersom, 90 Me. 273; People's P. R. Co. *v.* Green, 56 Md. 93; Dorsey *v.* Habersack, 84 Md. 117; Marcy *v.* Barnes, 16 Gray 163; Hollenbeck *v.* Rowley, 8 All. 475; Blair *v.* Pelham, 118 Mass. 421; Randall *v.* Chase, 133 id. 213; Verran *v.* Baird, 150 id. 142; Com. *v.* Campbell, 155 id. 537; Turner *v.* R. Co., 158 id. 261, 265; Com. *v.* Morgan, 159 id. 375, 378; Farrell *v.* Weitz, 160 id. 288; Gilbert *v.* R. Co., ib. 403; Com. *v.* Robertson, 162 id. 90; Harris *v.* Quincy, id., 50 N. E. 1042; Carey *v.* Hubbardston, id., 51 N. E. 521; Foster's Will, 34 Mich. 23; Maclean *v.* Scripps, 52 id. 218; Brown *v.* Ins. Co., 65 id. 315; Bedell *v.* Berkey, 76 id. 440; Leidlein *v.* Meyer, 95 id. 586, 591; State *v.* Holden, 42 Minn. 354; Cooper *v.* R. Co., 54 id. 379, 383; State *v.* O'Reilly, 126 Mo. 597; Marion *v.* State, 20 Neb. 240; Omaha S. R. Co. *v.* Beeson, 36 id. 361, 364; Goldsboro *v.* R. Co., N. J. L., 37 Atl. 433; Cozzens *v.* Higgins, 1 Abb. App. Cas. 451; 33 How. Pr. 436; Ruloff *v.* People, 45 N. Y. 224; Cowley *v.* People, 83 id. 477; People *v.* Buddensieck, 103 id. 500; Archer *v.* R. Co., 106 id. 603; People *v.* Johnson, 111 id. 370; Alberti *v.* People, 118 id. 88; People *v.* Smith, 121 id. 581; People *v.* Fish, 125 id. 147; People *v.* Webster, 139 id. 73, 83; People *v.* Pustolka, 149 id. 570; Hampton *v.* R. Co., 120 N. C. 534; Udderzook *v.* Com., 76 Pa. 352; Com. *v.* Connors, 156 id. 147, 151; Beardslee *v.* Columbia Tp., id., 41 Atl. 617; State *v.* Ellwood, 17 R. I. 763, 771; State *v.* Kelley, 46 S. C. 55; 24 S. E. 60; Eborn *v.* Zimpelman, 47 Tex. 519; Howard *v.* Russell, 75 id. 171; Ayers *v.* Harris, 77 id. 113, 115; Buzard *v.* McAnulty, ib. 447; M. K. & T. R. Co. *v.* Moore, id., 15 S. W. 714; T. B. & H. R. Co. *v.* Warner, 88 id. 642; Luco *v.* U. S., 23 How. 531: Leather *v.* Wrecking Co., 2 Wood 682; Wilson *v.* U. S., 162 U. S. 613; Scott *v.* New Orleans, U. S. App., 75 Fed. 373; Dederichs *v.* R. Co., 14 Utah 137; State *v.* McCoy, 15 id. 136; Rowell *v.* Fuller, 59 Vt. 695; Crane *v.* Horton, 5 Wash. 481; Church *v.* Milwaukee, 31 Wis. 519.]

[4] [This is mentioned in almost every ruling.]

[5] [As erroneously intimated in Kans. C. M. & B. R. Co. *v.* Smith, 90 Ala. 27; Hollenbeck *v.* Rowley, 8 All. 475.]

[6] [Cowley *v.* People, 83 N. Y. 478; Archer *v.* R. Co., 106 id. 603; Luke *v.* Calhoun Co., 52 Ala. 118; Locke *v.* R. Co., 46 Ia. 110; State *v.* Holden, 42 Minn. 354; People *v.* Jackson, 111 N. Y. 370; Com. *v.* Connors, 156 Pa. 147, 151.]

is fully established[7] that the sufficiency of the verification should be left wholly to the trial judge. A photograph is, of course, inadmissible where the thing represented is irrelevant or otherwise inadmissible, — as where it represents a person or place at a time when the conditions were not the same as at the time in issue,[8] or where the Court refuses to regard personal resemblance as evidence of paternity.[9] Special questions arise where photographic reproductions of writing are concerned. That in general a photograph, particularly an enlarged one, of a writing, is a proper method of exhibiting its contents seems clear;[10] the analogous use of the microscope is not without precedent.[11] But the rule of Primariness (*post*, § 563) will usually have a bearing. (1) If the original is not produced, but can be, the photograph should be rejected.[12] (2) If the original cannot be obtained, the photograph should be used as the best available evidence.[13] (3) If the original is at hand, photographic groupings of the specimens used as a standard and the disputed writing may be highly instructive, and can well be used.[14] The originals being also at hand, it may be profitable to exhibit in large detail the peculiarities of the writing by magnified photographs, and there seems every reason for allowing this.[15]

The use of photographs taken by the vacuum-tube — Roentgen rays — may involve slightly different principles. Since the operator will usually not have perceived the object — usually a concealed bone — with his ordinary organs of vision, he will not be able to put forward the photograph as corresponding to the results of his own observation; nevertheless, if he can testify that the process is known to

[7] [See cases in note 3, *ante;* in Florida and Illinois similar rulings have been made.]

[8] [As in Ortiz *v.* State, Fla., cases in Mass., Brown *v.* Ins. Co., Mich., Cooper *v.* R. Co., Minn., Hampton *v.* R. Co., N. C., all in note 3, *ante.*]

[9] [See *ante*, § 14 *s.*]

[10] [Marcy *v.* Barnes, 16 Gray 163, and cases in notes *post*, where its propriety is assumed. Only two cases seem to have negatived this principle: Taylor Will Case, 10 Abb. Pr. N. S. 318; Hynes *v.* McDermott, 82 N. Y. 51; question reserved in Geer *v.* M. L. & M. Co., 134 Mo. 85; excluded in Tome *v.* R. Co., 39 Md. 93, because all comparison of specimens was forbidden. In Duffin *v.* People, 107 Ill. 113, 119, a photograph was used to show merely the words, the handwriting not being in question.]

[11] [Frank *v.* Bank, 13 Jones & Sp. 459; Kannon *v.* Galloway, 2 Baxt. 232; it has also been used for other objects: Barker *v.* Perry, 67 Ia. 148; State *v.* Knight, 43 Me. 131.]

[12] [Maclean *v.* Scripps, 52 Mich. 218.]

[13] [*Re* Stephens, L. R. 9 C. P. 187; Foster's Will, 34 Mich. 23, *semble;* Maclean *v.* Scripps, *supra*, *semble;* Eborn *v.* Zimpelman, 47 Tex. 519; Howard *v.* Russell, 75, id. 171; Ayers *v.* Harris, 77 id. 113; Buzard *v.* McAnulty, ib. 447; Daly *v.* Maguire, 6 Blatchf. 137; Leather *v.* Wrecking Co., 2 Wood 682; Owen *v.* Mining Co., 13 U. S. App. 248, 270. *Contra* (inadvertently), Houston *v.* Blythe, 60 Tex. 508; doubtful, Duffin *v.* People, 107 Ill. 119.]

[14] [R. *v.* Castro (Tichborne Trial), Charge of Cockburn, C. J., appendix to Vol. II; Luco *v.* U. S. 23 How. 531; rejected as unnecessary on the facts: Crane *v.* Horton, 5 Wash. 481.]

[15] [Marcy *v.* Barnes, 16 Gray 163; Riggs *v.* Powell, 142 Ill. 453; Foster's Will, 34 Mich. 23, *semble;* Hynes *v.* McDermott, 82 N. Y. 51, *semble;* Crane *v.* Horton, 5 Wash. 481; Rowell *v.* Fuller, 59 Vt. 695. *Contra:* Taylor Will Case, 10 Abb. Pr. N. S. 318.]

him (by experience or otherwise) to give correct representations, the photograph is in effect supported by his testimony, and stands on the same footing as a photograph of an object whose otherwise invisible details have been rendered discernible by a magnifying lens.[16]]

5. *Opinion Rule.*

§§ 440–441.[1]

§ 441 *b*. **General Principle.** [The Opinion rule is a rule based on the thought that when all the data for drawing an inference are before the jury, or can be placed before them, it is superfluous to add, by way of testimony, the inference which they can equally well draw for themselves. For example, if a witness, A, testifying to the facts of a street accident, in which the defendant's horse is said to have become unmanageable and run over the plaintiff, has detailed the relative situation of the parties, the behavior of the horse, the efforts of the defendant to check him, and all other circumstances of the event, and is then asked whether the defendant could have stopped the horse before it reached the plaintiff, or whether the plaintiff could have avoided it in season, it would be natural to object that the data for this inference were fully before the jury, and that they were equally in a position with the witness to draw an inference from them. If a witness to an alleged assault with a knife, as to which it is said that the plaintiff was the cause of his own injury by grasping the knife while in the defendant's hands, is shown the knife and asked whether the person could have grasped the knife without cutting his hand, it may here also be suggested that the jury have all the data before them and can make this inference equally as well as the witness. The essence of the principle thus suggested is that the witness' influence is superfluous and unnecessary, and should therefore not be brought into the case. Such is the notion which underlies the so-called Opinion rule. The witness' opinion is excluded, not because inferences as such are objectionable — for a witness' knowledge and all knowledge is made up of inferences, — but because the inference under the circumstances is superfluous, and because if one person could be summoned and inquired of in this way, then the opinion of a score could equally be asked, all of them superfluous and calculated to encumber the trial, without adding anything to the essential data already before the jury. The opinion of a so-called expert and the opinion of a layman may upon this principle be equally superfluous and inadmissible, while, conversely, the opinion of a layman as well as that of an expert may be helpful and necessary. The application of this principle is often finical and unpractical, and the reason of the rule is sometimes lost sight of and arbitrary dis-

[16] [The Roentgen-ray photograph was held admissible in Bruce *v*. Beall, Tenn., 41 S. W. 445. In various lower Courts there seem to have been divergent rulings.]

[1] [Transferred to Appendix II.]

tinctions put forth; but that such is the principle in its essence, and that it still supplies a living test for the solution of the particular instances, is constantly illustrated in judicial opinion; thus, Gibson, J., in *Cornell* v. *Green*:[1] "It is a good general rule that a witness is not to give his impressions, but to state the facts from which he received them, and thus leave to the jury to draw their own conclusion; . . . but I take it that wherever the facts from which a witness received an impression are too evanescent in their nature to be recollected, or are too complicated to be separately and distinctly narrated, his impressions from these facts become evidence;" Walworth, C., in *Clark* v. *Fisher*:[2] "The opinions of witnesses are never received as evidence where all the facts on which such opinions are founded can be ascertained and made intelligible to the Court or jury;" Campbell, J., in *Evans* v. *People*:[3] "It is an elementary rule that where the Court or jury can make their own deductions they shall not be made by those testifying. In all cases, therefore, where it is possible to inform the jury fully enough to enable them to dispense with the opinions or deductions of witnesses from things noticed by themselves or described by others, such opinions or deductions should not be received."

There is, therefore, no rule admitting opinions or inferences when made by one class of persons — experts — and excluding them when made by another class — laymen; but there is a rule excluding them whenever they are superfluous and admitting them whenever they are not. Nevertheless, since the so-called expert — *i. e.* a person having special skill in a particular subject (*ante*, § 430 *a*) — will by hypothesis usually be better able than the jury to draw inferences on such matters, it occurs in practice that experts usually are able to be helpful with their opinions and are therefore usually — but not necessarily — allowed to state them. Thus, in practice, opinions are receivable, first, from persons having special skill (whether the data in question have been personally observed by them or are stated to them) whenever that special skill enables them, better than the jury, to draw inferences on the subject;[4] secondly, from persons who have no special skill but have personally observed the matter in issue, and cannot adequately state or recite the data so fully and accurately as to put the jury completely in the witness' place and enable them equally well to draw the inference.[5] The absurdities which disfigure the application of the rule come chiefly from a too

[1] [10 S. & R. 16.]
[2] [1 Paige Ch. 174.]
[3] [12 Mich. 35.]
[4] [Phrasings of the test for this class will be found in Clifford *v.* Richardson, 18 Vt. 627; Taylor *v.* Monroe, 43 Conn. 44; Protection Ins. Co. *v.* Harmer, 2 Oh. St. 457; Hamilton *v.* R. Co., 36 Ia. 37.]
[5] [Phrasings of the test for this class will be found in Cornell *v.* Green, 10 S. & R. 16; Buffum *v.* R. Co., 4 R. I. 223; Evans *v.* People, 12 Mich. 35; Bates *v.* Sharon, 45 Vt. 481; R. *v.* Schulz, 43 Oh. 282.]

illiberal interpretation of the latter notion; *i. e.*, it is frequently ruled that a personal observer can sufficiently state the observed data without adding his inference, although a just view of the situation would recognize that too much credit has been given to the witness' powers of narration, and that in truth it is impossible for the data to be fully recited. For instance, rulings that a witness may not state whether a person's answer was made in a jocular or a serious manner,[6] whether the conduct of the parties evinced a mutual attachment,[7] and the like, err in this manner. A more liberal tendency in this respect seems to be making its way in recent times; but the reports are overloaded with decisions of the sort that ought never even to have been called for; and a prominent feature in the application of the rule is the petty and unprofitable quibbling to which it gives rise.[8]

It would be impossible to rehearse in this place the hundreds of minor and detailed matters upon which rulings have been obtained. The principle already described will serve to solve most of the questions, although it must be understood that its judicial interpretation in the narrow spirit above-mentioned is frequently to be expected. It will be sufficient here to note the chief topics of complication and difficulty.

It ought first, however, to be noticed that certain reasons or tests sometimes put forward for this rule are unfounded. (1) It is said that the witness is not to "usurp the functions of the jury."[9] The answer is simply that he is not attempting to usurp them, — not attempting to decide the issue and thus usurp their place, but merely to give evidence, which they may or may not accept, as they please.[10] Even though his opinion is admitted, it is not decisive, especially when it is considered that opinions might be given by witnesses on both sides. (2) It is sometimes said that an opinion is not to be offered on "the very issue before the jury."[11] But this, as once remarked,[12] would rather "seem to be a very good reason for its admission." If the witness can add instruction over and above what the jury are able to obtain from the data before them, it is no objection that he refers to the precise matter in issue; and if his opinion is superfluous, it is inadmissible even though it concerns a matter not directly a part of the issue.[13]

The distinction, moreover, must be noticed (1) between this rule and the rule that for matters requiring special skill the witness must

[6] [Beebe *v.* Debann, 8 Ark. 520, 571.]
[7] [Leckey *v.* Bloser, 24 Pa. 404.]
[8] [See the trenchant utterances of Doe, J., in State *v.* Pike, 49 N. H. 423.]
[9] [Lincoln *v.* R. Co., 23 Wend. 432.]
[10] [Campbell, J., in Beaubien *v.* Cicotte, 12 Mich. 507.]
[11] [Yost *v.* Conroy, 92 Ind. 471.]
[12] [Danforth, J., in Snow *v.* R. Co., 65 Me. 231.]
[13] [Poole *v.* Deane, 152 Mass. 591; Van Wycklen *v.* Brooklyn, 118 N. Y. 429; Scalf *v.* Collin Co., 80 Tex. 517; Fenwick *v.* Bell, 1 C. & K. 312 and note.]

be shown to possess it, *i. e.* to be qualified as an expert (*ante*, § 430 *a*). He may be qualified as an expert, and yet his inferences as to the matter in hand may not be needed by the jury, under the circumstances, and may therefore be inadmissible. (2) There is also a difference between excluding the "opinion," *i. e.* inference, under the present rule, of one who has personally observed the matter in hand, and excluding the "opinion," *i. e.* conjecture or impression, of one who has not personal knowledge but has merely come to believe upon improper data and is therefore not qualified at all as a witness, — a distinction explained *ante*, § 430 *i*.]

§ 441 *c*. **Matters of Law.** [In a few classes of instances the witness' opinion is excluded because it virtually involves an assertion as to the legal conclusion to be drawn from certain facts; and here the data can be stated and the jury under the Court's instruction can equally apply the law. To state whether a testator was capable of making a will is therefore improper; but there is much difference of practice among Courts as to the phraseology allowable in inquiring for the desired data.[1] So it is by some regarded as improper to ask whether a person was solvent, the fact of solvency involving in strictness the application of a legal definition.[2] Whether a fence was a partition fence has been thought to be a question not open to objection,[3] but not whether a person had a duty to repair such a fence;[4] and sundry other instances are to be found.[5]]

§ 441 *d*. **Conduct as to Care, Reasonableness, Safety, etc.** [To the question whether a person was careful or reasonable, or a place safely constructed, or a machine skilfully handled, it seems that no objection was felt by the English Courts under orthodox practice;[1] but the course of decisions in this country has generally found such questions obnoxious to the Opinion rule. There is, however, no harmony in the rulings, and recent decisions show a more liberal practice.[2] The topics included are, *e. g.*, the quality of work, the

[1] [See Hewlett *v.* Wood, 55 Ala. 635; Ashcraft *v.* De Armond, 44 Ia. 233; May *v.* Bradlee, 127 Mass. 419; Poole *v.* Dean, 152 id. 590; Kempsey *v.* McGinness, 21 Mich. 141 (leading case); Pinney's Will, 27 Minn. 282; Farrell *v.* Brennan, 32 Mo. 334; Bost *v.* Bost, 87 N. C. 478; Horah *v.* Knox, ib. 485; Wilkinson *v.* Pearson, 23 Pa. 120; Brown *v.* Mitchell, 88 Tex. 350; Melendy *v.* Spaulding, 54 Vt. 517.]

[2] [Chenault *v.* Walker, 14 Ala. 154; State *v.* Myers, 54 Kan. 206; Hayes *v.* Wells, 34 Md. 518; Noyes *v.* Brown, 32 Vt. 431. *Contra:* Swan *v.* Gilbert, Ill., 51 N. E. 604.]

[3] [Avary *v.* Searcy, 50 Ala. 55.]

[4] [Chic. & A. R. Co. *v.* R. Co., 67 Ill. 145.]

[5] [See Merritt *v.* Seaman, 6 N. Y. 175; Burwell *v.* Sneed, 104 N. C. 120; Sheffield *v.* Sheffield, 3 Tex. 87; Massure *v.* Noble, 11 Ill. 531; Melsaac . Lighting Co., Mass., 51 N. E. 524; Arents *v.* R. Co., N. Y., 50 id. 422.]

[1] [Jones *v.* Boyce, 1 Stark. 493 (propriety of jumping); Jackson *v.* Tollett, 2 id. 38 (prudence of coachman); Malton *v.* Nesbit, 1 C. & P. 72 (prudence of mariner); Fenwick *v.* Bell, ib. 312 (possibility of avoiding collision); Drew *v.* New River Co., 6 id. 755 (safety of sidewalk); Wilkes *v.* Market Co., 2 Bing. N. C. 281 (necessity of obstruction); Sills *v.* Brown, 9 C. & P. 604 (duty of captain).]

[2] [Only a few recent examples from each jurisdiction are given: McCarthy *v.* R. Co., 102 Ala. 193, 203 (safety of loading); Culver *v.* R. Co., 108 id. 330 (safety of

proper method of construction or use or management of a machine, the safety or danger of a place, the appropriate mode of surgical treatment, the safety of a mode of riding or driving, the need of repairs, the possibility of avoiding an injury, and all other matters involving a judgment upon human conduct according to the circumstances.]

place); Orr *v.* State, id. 23 So. 696 (danger of rock); Howland *v.* R. Co., 110 Cal. 513 (feasibility of stopping car); Fogel *v.* R. Co., id. 42 Pac. 565 (feasibility of avoiding accident); Redfield *v.* R. Co., 112 id. 220 (safety of operating car); Denver S. P. & P. R. Co. *v.* Wilson, 12 Colo. 24 (necessity of track-walker); Grant *v.* Varney, 21 id. 329 (proper mode of timbering mine); Porter *v.* Mfg. Co., 17 Conn. 255 (sufficiency of dam); Ryan *v.* Bristol, 63 id. 26, 37 (danger of place); Camp *v.* Hall, 39 Fla. 535 (carelessness as cause of injury); Aug. & S. R. Co. *v.* Dorsey, 68 Ga. 236 (prudence of employee's conduct); E. T. V. & G. R. Co. *v.* Wright, 76 id. 536 (negligence of defendant); Ward *v.* Salisbury, 12 Ill. 369 (skill of ship's management); Chic. & N. W. R. Co. *v.* Ingersoll, 65 Ill. 402 (feasibility of delivering grain); Springfield *v.* Coe, 166 id. 22 (carefulness of conduct); Louisv. N. A. & C. R. Co. *v.* Spain, 61 Ind. 462 (sufficiency of fence); Bonebrake *v.* Board, 141 id. 62 (sufficiency of bridge); Sievers *v.* P. B. & L. Co., id. 50 N. E. 877 (safety of gearing); Funston *v.* R. Co., 61 Ia. 455 (feasibility of turning team); Betts *v.* R. Co., 92 id. 343 (sufficiency of cattle-cars); Reifsnider *v.* R. Co., 90 id. 76 (proper position of brakeman); Kan. P. R. Co. *v.* Peavey, 29 Kan. 177 (proper way of coupling); Murray *v.* Board, 58 id. 1 (safety of bridge); Cherokee Co. *v.* Dickson, 55 id. 62 (skill of employee); Claxton *v.* R. Co., 13 Bush 643 (safety of machinery); Louisv. & N. R. Co. *v.* Bowen, Ky., 39 S. W. 13 (duty of giving signal); Mayhew *v.* Mining Co., 76 Me. 111 (suitableness of apparatus); Marston *v.* Dingley, 88 id. 546 (skill of photograph); Balt. & Y. R. Co. *v.* Leonhardt, 66 Md. 77 (safety of conduct and of place); Balt. & S. P. R. Co. *v.* Hackett, Md., 39 Atl. 510 (construction of water-outlet); Lang *v.* Terry, 163 Mass. 138 (mode of managing machine); McGuerty *v.* Hale, 161 id. 51 (propriety of putting boy at work); McCarthy *v.* Duck Co., 165 id. 165 (adequacy of pulley); Merkle *v.* Bennington, 68 Mich. 143 (repair of bridge); Cross *v.* R. Co., 69 id. 369 (safety of place); Lau *v.* Fletcher, 104 id. 295 (safety of machinery); Lindsley *v.* R. Co., 36 Minn. 544 (mode of caring for cattle); Morris *v.* Ins. Co., 63 id. 420 (safety of mode of threshing); Peterson *v.* J. W. Co., id., 73 N. W. 510 (feasibility of gearing-guard); Greenwell *v.* Crow, 73 Mo. 639 (safety of deposit-place); Czezewski *v.* R. Co., 121 id. 201, 212 (proper position of driver); Benjamin *v.* R. Co., 133 id. 274 (safety of coal-hole cover); Kan. C. M. & B. R. Co. *v.* Spencer, 72 Miss. 491 (proper construction of cattle-guards); State *v.* Giroux, 19 Mont. 149 (fitness of parent as guardian); Folsom *v.* R. Co., N. H., 38 Atl. 160 (likelihood of train frightening horse); Ferguson *v.* Hubbell, 97 N. Y. 512 (propriety of firing fallow); O'Neil *v.* R. Co., 129 id. 125 (required distance for stopping a truck); Tillett *v.* R. Co., 118 N. C. 1031 (negligence in coupling cars); Ouverson *v.* Grafton, 5 N. D. 281 (tendency of machine to frighten horses); Ins. Co. *v.* Tobin, 32 Oh. St. 94 (prudent management of steamboat); Heath *v.* Glisan, 3 Or. 67 (propriety of surgical treatment); Elder *v.* Coal Co., 157 Pa. 490 (sufficiency of precautions); Cookson *v.* R. Co., 179 id. 184 (propriety of place of listening for train); Auberle *v.* McKeesport, 179 id. 321 (danger of bridge); Wilson *v.* R. Co., 18 R. I. 598 (carefulness of driving); Ward *v.* R. Co., 19 S. C. 522 (time to avoid injury); Louisv. & N. R. Co. *v.* Reagan, 96 Tenn. 128 (proper mode of uncoupling cars); Bruce *v.* Beall, id., 41 S. W. 445 (prudence of using elevator cable); Gulf C. & S. F. R. Co. *v.* Compton, 75 Tex. 673 (safety of train-hand equipment); McCray *v.* R. Co., 89 id. 168 (sufficiency of rail); Transp. Line *v.* Hope, 95 U. S. 298 (safety of mode of towing); North P. R. Co. *v.* Urlin, 158 id. 273 (carefulness of medical examination); Atl. Ave. R. Co. *v.* Van Dyke, 38 U. S. App. 334 (operation of electrical motor); Crane Co. *v.* Col. C. Co., 46 id. 52 (skill in laying gas-pipe); State *v.* McCoy, 15 Utah 136 (necessity of abortion to save life); Hayes *v.* R. Co., id., 53 Pac. 1001 (proper construction of sheds); Houston *v.* Brush, 66 Vt. 339 (suitableness of tackle-block); Sawyer *v.* Shoe Co., id., 38 Atl. 311 (safety of fastening); Bertha Zinc Co. *v.* Martin, 93 Va. 791 (safety of thawing dynamite at fire); Norf. & C. R. Co. *v.* Lumber Co., 92 id. 413 (necessity of precautious against accidents); Seliger *v.* Bastian, 66 Wis. 522 (prudent way of doing work); Mulcairns *v.* Janesville, 67 id. 35 (propriety of mode of construction).]

§ 441 *e*. **Insurance; Increase of Risk.** [Whether expert testimony by professional insurance-men may be received to throw light on the effect of a given circumstance in causing an increase of risk, is a question depending largely on the issues involved and upon the precise purpose of the inquiry. (1) If the question is as to the duty of an insurance-broker as a reasonable person to provide for new contingencies affecting the nature of the risk, it would seem that expert testimony should be received.[1] (2) If the question is whether the proximity of a railroad has increased either the actual risk of fire or the insurance-rates demanded for adjacent property, the same result seems proper.[2] (3) When the question is whether a policy should be forfeited for a misrepresentation said to be material or for an uncommunicated increase of risk, we find much difference of opinion. By one group of decisions the testimony is indiscriminately admitted,[3] but by another group rejected,[4] while other Courts take the view that it depends upon whether the particular fact said to have increased the risk is one upon which common knowledge would suffice, and if it would, the testimony is excluded.[5] If the question in form asks, not as to the witness' opinion, but as to the usage of insurers in increasing rates on such facts, some Courts still exclude it,[6] while others admit it.[7] The correct explanation seems to be that the true issue is, not as to the actual increase of risk, but whether the fact in question would have caused the insurer, in entering into the contract, to charge a higher rate;[8] and in this view the testimony

[1] [Chapman *v.* Walton, 10 Bing. 57.]

[2] [See Pingery *v.* R. Co., 78 Ia. 442; Webber *v.* R. Co., 2 Metc. 149.]

[3] [*Materiality of misrepresentation:* Lindeman *v.* Desborough, 8 B. & C. 587; Rickards *v.* Murdock, 10 id. 527; Leitch *v.* Ins. Co., 66 N. Y. 107; Moses *v.* Ins. Co., 1 Wash. C. C. 388; Marshall *v.* Ins. Co., 2 id. 358.

Increase of risk: Schmidt *v.* Ins. Co., 41 Ill. 299; Traders' Ins. Co. *v.* Catlin, 163 id. 256; Mitchell *v.* Ins. Co., 32 Ia. 424; Stennett *v.* Ins. Co., 68 id. 675 (undecided); Planters' Mut. Ins. Co. *v.* Rowland, 66 Md. 244; Lapham *v.* Ins. Co., 24 Pick. 3; Daniels *v.* Ins. Co., 12 Cush. 420; Kern *v.* Ins. Co., 40 Mo. 21; Schenck *v.* Ins. Co., 24 N. J. L. 451.]

[4] [*Materiality of misrepresentation:* Carter *v.* Boehm, 3 Burr. 1914, 1918; Durrell *v.* Baderley, Holt N. P. 284; Rawls *v.* Ins. Co., 27 N. Y. 293; Higbie *v.* Ins. Co., 53 id. 604.

Increase of risk: Joyce *v.* Ins. Co., 45 Me. 168; Cannell *v.* Ins. Co., 59 id. 591; Thayer *v.* Ins. Co., 70 id. 539; Kirby *v.* Ins. Co., 9 Lea 142.]

[5] [The following cases do not always put the principle as broadly as above: Mulry *v.* Ins. Co., 5 Gray 545; Lyman *v.* Ins. Co., 14 All. 335; Hills *v.* Ins. Co., 2 Mich. 479; Jefferson Ins. Co. *v.* Cotheal, 7 Wend. 77; Cornish *v.* Ins. Co., 74 N. Y. 297; Protection Ins. Co. *v.* Harmer, 2 Oh. St. 457; Milwaukee R. Co. *v.* Kellogg, 94 U. S. 472; Penn M. L. Ins. Co. *v.* M. S. B. & T. Co., 37 U. S. App. 692 (best opinion).]

[6] [Ins. Co. *v.* Eshelmann, 30 Oh. St. 655; Durrell *v.* Bederley, Joyce *v.* Ins. Co., Cannell *v.* Ins. Co., Rawls *v.* Ins. Co., *supra*.]

[7] [Chanraud *v.* Angerstein, Peake N. P. 44; Haywood *v.* Rogers, 4 East 592; Berthon *v.* Longhman, 2 Stark. 258; Mitchell *v.* Ins. Co., Planters' Mut. Ins. Co. *v.* Rowland, Kern *v.* Ins. Co., Moses *v.* Ins. Co., Marshall *v.* Ins. Co., Penn M. L. Ins. Co. *v.* M. S. B. & T. Co., *supra*.]

[8] [See this view well expounded by Joy, C. B., in Quin *v.* Ass. Co., *infra* (the leading case, voluminously representing all the views); Black, C. J., in Hartman *v.* Ins. Co., *infra*; Curtis, J., in Hawes *v.* Ins. Co., *infra*, and Franklin Fire Ins. Co. *v.* Gruver, *infra*.]

in the former shape (*i. e.* as to actual increase) should be excluded,[9] but in the latter shape (*i. e.* the usage of the insurer or of insurers generally) it should be admitted;[10] unless, perhaps, the policy refers only to a risk increased "to the knowledge of the insured."[11]]

§ 441 *f*. **Sanity.** [In England there never has been any doubt that the opinions of lay witnesses, duly qualified by acquaintance and observation, are receivable upon a question of mental sanity.[1] In this country, however, an early misunderstood ruling[2] served to raise the doubt;[3] and since that time the objection has been raised and considered in nearly every Court that such testimony is obnoxious to the Opinion rule. The doubt seems now almost everywhere to have been settled in favor of receiving the testimony;[4] but in some Courts certain restrictions are imposed which make the proper form of question a matter of some nicety and difficulty. It may be noted (1) that in a majority of jurisdictions it is required that the witness precede his statement of opinion by reciting the observed data by which he has been led to it; (2) that by long tradition the opinion of the attesting witness as to the testator's sanity is regarded as receivable unconditionally; (3) that, as to the local modified forms (represented chiefly by the rules of Massachusetts and New York) which have found favor, their general notion is that an opinion as to the general condition of sanity or insanity should be excluded, while an opinion as to the rationality or irrationality of particular conduct is receivable.[5]]

[9] [Berthon *v.* Loughman, 2 Stark. 258, Holroyd, J.; Quin *v.* Ins. Co., Jones & Car. (Ir.) 332, 336; Hawes *v.* Ins. Co., 2 Curt. 230.]

[10] [Elton *v.* Larkins, 5 C. & P. 387; Quin *v.* Ass. Co., *supra;* Ionides *v.* Pender, L. R. 9 Q. B. 535; Fiske *v.* Ins. Co., 15 Pick. 312; Merriam *v.* Ins. Co., 21 id. 163, *semble;* Luce *v.* Ins. Co., 105 Mass. 302, 110 id. 363; First Cong. Church *v.* Ins. Co., 158 id. 475; Hartman *v.* Ins. Co., 21 Pa. 477; Franklin Fire Ins. Co. *v.* Gruver, 100 id. 273; Pelzer Mfg. Co. *v.* Sun Fire Office, 36 S. C. 263; M'Lanahan *v.* Ins. Co., 1 Pet. 188; Hawes *v.* Ins. Co., 2 Curt. 230.]

[11] [Franklin Fire Ins. Co. *v.* Gruver, 100 Pa. 273; and probably Loomis *v.* Ins. Co., 81 Wis. 366.]

[1] [Aitken *v.* McMeckan, 1895, App. Cas. 310, is merely one of the latest of a long line of instances, the greater number of which are cited in the opinions of Mr. J. Doe, *infra*.]

[2] [Poole *v.* Richardson, 3 Mass. 330.]

[3] [The argument for exclusion is best set forth in Dewitt *v.* Barley, 9 N. Y. 387; the argument for admission in Clary *v.* Clary, 2 Ired. 80; Norris *v.* State, 16 Ala. 779, and pre-eminently in the unanswerable presentation of Doe, J., in Boardman *v.* Woodman, 47 N. H. 144, and State *v.* Pike, 49 id. 414, as well as the opinion of Foster, C. J., in Hardy *v.* Merrill, 56 id. 250.]

[4] [The witness must of course be qualified by acquaintance or the like: *ante*, § 430 *p*.]

[5] [Only a recent case or two in each jurisdiction are given; the rulings in New York, Massachusetts, and Pennsylvania should be avoided by other Courts, because the doctrine has there passed through several distinct stages, and a given ruling may not represent the current practice: Yarbrough *v.* State, 105 Ala. 43; Shaeffer *v.* State, 61 Ark. 241; Wax's Estate, 106 Cal. 343; Kimberley's Appeal, 68 Conn. 428; Armstrong *v.* State, 30 Fla. 170, 201; Welch *v.* Stipe, 95 Ga. 762; Jamison *v.* People, 145 Ill. 357, 377; Grand Lodge *v.* Wieting, 168 id. 408; Hamrick *v.* Hamrick, 134 Ind. 324; State *v.* McDonough, 104 Ia. 6; State *v.* Benerman, Kan., 53 Pac. 874; Amer. Acc. Co. *v.* Fiddler, Ky., 36 S. W. 528; Fayette *v.* Chesterville, 77 Me. 33; Williams

§ 441 *g*. **Value.** [The doubt was at one time raised whether ordinary testimony to value was not obnoxious to the Opinion rule;[1] but this doubt nowhere obtained sanction from the Courts (except in New Hampshire), and no longer presents a living question. Nevertheless, in issues involving value there may be testimony which is open to an analogous doubt, and this doubt has in some cases found judicial favor. Only one or two of the commonest instances can here be mentioned. (1) Where land is taken by eminent domain, and the substantive law allows the injury or benefit to the remaining land, of which a part has been taken, to be considered in the estimation of total damages, it is by some Courts considered that testimony in form stating the total damage to the land is objectionable, the Opinion rule requiring the elements or detailed data to be stated, and leaving it to the jury to estimate the total damage. Other Courts, while recognizing the same principle, consider that it is not objectionable for the witness to state the values of the land before the taking and after taking, — though it is usually a mere matter of arithmetic to infer from that the total damage. Still other Courts put no limitation on such evidence.[2] (2) In actions for personal

v. Williams, 47 Md. 326; May *v.* Bradlee, 127 Mass. 418; Com. *v.* Brayman, 136 id. 439; Cowles *v.* Merchants, 140 id. 381; Poole *v.* Dean, 152 id. 590; McConnell *v.* Wildes, 153 id. 490; Clark *v.* Clark, 168 Mass. 523; Sullivan *v.* Foley, Mich., 70 N. W. 322; Lamb *v.* Lippincott, id., 73 N. W. 887; Woodcock *v.* Johnson, 36 Minn. 218; Sheehan *v.* Kearney, Miss., 21 So. 46; State *v.* Williamson, 106 Mo. 170; Terr. *v.* Roberts, 9 Mont. 15; Hay *v.* Miller, 48 Nebr. 156; State *v.* Lewis, 20 Nev. 345; Boardman *v.* Woodman, 47 N. H. 134; State *v.* Pike, 49 id. 407; Hardy *v.* Merrill, 56 id. 227; Carpenter *v.* Hatch, 64 id. 576; Geng *v.* State, 58 N. J. L. 482; Terr. *v.* Padilla, N. M., 46 Pac. 346; Clapp *v.* Fullerton, 34 N. Y. 194; Holcomb *v.* Holcomb, 95 id. 320; People *v.* Packenham, 115 id. 202; Paine *v.* Aldrich, 133 id. 546; People *v.* Taylor, 138 id. 398; People *v.* Strait, 148 id. 566; People *v.* Youngs, 151 id. 210; People *v.* Burgess, 153 id. 561; People *v.* Koerner, 154 id. 355; Wyse *v.* Wyse, 155 id. 367; State *v.* Potts, 100 N. C. 462; Clark *v.* State, 12 Oh. 487; First Nat'l B'k *v.* Wirebach, 106 Pa. 45; Taylor *v.* Com., 109 id. 270; Shaver *v.* McCarthy, 110 id. 348; Elcessor *v.* Elcessor, 146 id. 363; Heyward *v.* Hazard, Bay 335; Dove *v.* State, 3 Heisk. 365; Brown *v.* Mitchell, 87 Tex. 140; Conn. L. I. Co. *v.* Lathrop, 111 U. S. 612; Christensen's Estate, Utah, 53 Pac. 1003; Westmore *v.* Sheffield, 56 Vt. 247; Whitelaws *v.* Sims, 90 Va. 588; State *v.* Maier, 36 W. Va. 757; Yanke *v.* State, 51 Wis. 468.]

[1] [The argument in answer to it may be found in an opinion by Doe, J., in State *v.* Pike, 49 N. H. 422.]

[2] [The reasoning of the different views may be seen in Yost *v.* Conroy, 92 Ind. 465; Swan *v.* Middlesex, 107 Mass. 178; Snow *v.* R. Co., 65 Me. 231. The following list contains a case or two from the various jurisdictions: Haralson *v.* Campbell, 63 Ala. 277; Tex. & S. L. R. Co. *v.* Kirby, 44 Ark. 106; C. & G. R. Co. *v.* Minns, 71 Ga. 244; Pike *v.* Chicago, 155 Ill. 656; Chic. P. & M. R. Co. *v.* Mitchell, 159 id. 406; Yost *v.* Conroy, 92 Ind. 465; Lewis *v.* Ins. Co., 71 Ia. 97; Kans. C. R. Co. *v.* Allen, 24 Kan. 34; W. & W. R. Co. *v.* Kuhn, 38 id. 676; Tucker *v.* R. Co., 118 Mass. 547; Beale *v.* Boston, 166 id. 53; Grand Rapids *v.* R. Co., 58 Mich. 647; Sherman *v.* R. Co., 30 Minn. 228; Emmons *v.* R. Co., 41 id. 133; St. Louis *v.* Ranken, 95 Mo. 192; Union Elev. Co. *v.* R. Co., 135 id. 353; N. E. & N. R. Co. *v.* Frazier, 25 Nebr. 55; F. E. & M. V. R. Co. *v.* Marley, ib. 145; Low *v.* R. Co., 45 N. H. 381; Roberts *v.* R. Co., 128 N. Y. 465; Becker *v.* R. Co., 131 id. 513; Sixth A. R. Co. *v.* El. R. Co., 133 id. 548 (there is a peculiarity in the doctrine of this Court as to speculative estimates); C. & P. R. Co. *v.* Ball, 5 Oh. St. 573; Portland *v.* Kamm, 10 Or. 384; P. & N. Y. R. Co. *v.* Bunnell, 81 Pa. 426; Lee *v.* Water Co., 176 id. 223; Brown *v.* R. Co., 12 R. I. 238;

injury, it is sometimes said that opinions as to the money-value of the injury are inadmissible;[3] and, likewise, in actions on contracts, that opinions as to the damage caused are inadmissible.[4]]

§ 441 *h*. **State of Mind (Intention, Feelings, Meaning, etc.) of another Person.** [In ordinary human dealings, the formation and expression of estimates as to another's mental state is constant and necessary. There is no good reason why testimony about it, based on personal observation of the other person's conduct, should not be admissible, so far as the Opinion rule is concerned; for it is clearly impossible to remember and re-state to the jury all the minute data of conduct and words which have served to convey the impression. Such was the orthodox common-law view;[1] and such is the rule today perpetuated in most jurisdictions.[2] Nevertheless, by many Courts the Opinion rule is deemed (but without reason) to exclude such testimony;[3] a common application of this prohibition is to testimony as to the effect of a conversation or the meaning intended by it,[4] though here also the Opinion rule should in strictness usually not exclude the testimony.[5]]

§ 441 *i*. **Same: Discriminations.** [One source of the apparent confusion of rulings upon this subject is that the intention or other state of mind of a person may not be of legal consequence, under the substantive law of the case, and for this reason evidence of it will be excluded. In the formation of contract, the private understanding or meaning of one of the parties would usually be legally immate-

Montana R. Co. *v.* Warren, 137 U. S. 352; Blair *v.* Charleston, 43 W. Va. 62; Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 509, 513; Church *v.* Milwaukee, 31 Wis. 520; Neilson *v.* R. Co., 58 id. 520.]

[3] [Thomas *v.* Hamilton, 71 Ind. 277; Cent. R. & B. Co. *v.* Kelly, 58 Ga. 110; Bain *v.* Cushman, 60 Vt. 343. See Dushane *v.* Benedict, 120 U. S. 647.]

[4] [Mitchell *v.* Allison, 29 Ind. 44. *Contra:* Fitzgerald *v.* Hayward, 50 Mo. 521. See Ferguson *v.* Stafford, 33 Ind. 164; Linn *v.* Sigsbee, 67 Ill. 75; Ironton Land Co. *v.* Butchart, Minn., 75 N. W. 749; Jones *v.* Fuller, 19 S. C. 70.]

[1] [See examples in Frost's Trial, 22 How. St. Tr. 484; Answer of the Judges, ib. 296, 300; Horne Tooke's Trial, 25 id. 420; Watson's Trial, 32 id. 67; Earl of Thanet's Trial, 27 id. 927; Taudy's Trial, ib. 1215.]

[2] [The following cases allow a witness to testify whether another person was going to shoot, or knew of a matter, or had hostile feelings, or was in good spirits, or understood English, etc., the witness being assumed to have personal observation: Taylor *v.* People, 21 Colo. 426; Berry *v.* State, 10 Ga. 514, 529; Pelamourges *v.* Clark, 9 Ia. 16; Kuen *v.* Upmier, 98 id. 393; State *v.* Baldwin, 36 Kan. 10; Tobin *v.* Shaw, 45 Me. 348; M'Kee *v.* Nelson, 4 Cow. 355.]

[3] [See Dyer *v.* Dyer, 87 Ind. 19; Carpenter *v.* Calvert, 83 Ill. 70; First Nat'l Bank *v.* Booth, 102 Ia. 333; Cole *v.* R. Co., 93 Mich. 77; Manahan *v.* Halloran, 66 Minn. 483; People *v.* McLaughlin, 150 N. Y. 365; Hamer *v.* Bank, 9 Utah 215.

This heresy perhaps started, at any rate has been most fully developed, in Alabama; a recent illustration is Guntner *v.* State, 111 Ala. 23; but in this State any direct testimony of intent is excluded: see *ante*, § 328 *c*.]

[4] [Whitmore *v.* Ainsworth, Cal., 38 Pac. 196; Hewitt *v.* Clark, 91 Ill. 608; State *v.* Brown, 86 Ia. 121; Peerless Mfg. Co. *v.* Gates, 61 Minn. 124; Braley *v.* Braley, 16 N. H. 431; People *v.* Sharp, 107 N. Y. 461; Norton *v.* Parsons, 67 Vt. 526.]

[5] [Fiske *v.* Gowing, 61 N. H. 432 (leading case); State *v.* Earnest, 56 Kan. 31; Walker *v.* R. Co., 104 Mich. 606; Woodworth *v.* Thompson, 44 Nebr. 311; Garrett *v.* Tel. Co., 92 Ia. 449.]

rial, and for this reason testimony about this is often excluded;[1] although testimony as to the understanding common to both parties would not be.[2] For the same reason, where a transaction has been reduced to writing, the intentions of the parties, as well as even their expressions independent of the writing, cannot be used to compete with or overthrow the writing.[3] Again, where a person's conduct with reference to land used as a highway has amounted to a dedication of his property to such purposes, his secret intent to the contrary may be in law immaterial.[4] So, too, the fraudulent intent of the assignee of an insolvent's property is under most statutes immaterial.[5] Again, by the law of defamation, the established or general sense or meaning of the uttered words is usually to be taken, not the private understanding of either the utterer or a hearer.[6] In these and other ways a question of substantive law may arise as to the materiality of a person's intent, motive, or the like; and the decision of such questions is to be distinguished from the operation of the Opinion rule. Certain other principles of evidence, also, involving the proof of a state of mind, must be discriminated from the Opinion rule; as, whether expressions of intention or emotion may be received under an exception to the Hearsay rule (*ante*, §§ 162 *c*, 162 *d*), or whether declarations of intent of residence or of testamentary revocation or execution are admissible (*ante*, §§ 162 *c*, 162 *e*).]

§ 441 *j*. **Sundries.** [The Opinion rule is constantly invoked against countless varieties of statements, and an enumeration of the various rulings in this place would be impossible. It is enough to say that for certain common and simple types of statement, their propriety is well settled, upon the general principle already described above. These classes of statements are occasionally summarized by Courts, in terms more or less variant; but the following passage will serve to illustrate the ordinary judicial attitude:[1] "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

[1] [Murray *v.* Bethune, 1 Wend. 196; Bonfield *v.* Smith, 12 M. & W. 403; Tracy *v.* McManus, 58 N. Y. 257; Slater *v.* D. S. & H. Co., 94 Ga. 687; *ante*, § 305 *i*.]

[2] [Garrett *v.* Tel. Co., 92 Ia. 449; Wheeler *v.* Campbell, 68 Vt. 98.]

[3] [For example, McCormick *v.* Huse, 66 Ill. 319; this involves the parol-evidence rule, *ante*, §§ 305 *e*, 305 *f*.]

[4] [For example, Indianapolis *v.* Kingsbury, 101 Ind. 213.]

[5] [For example, Hathaway *v.* Brown, 18 Minn. 423.]

[6] [See instances in Daines *v.* Hartley, 3 Exch. 200; Republican P. Co. *v.* Miner, 12 Colo. 85; Callahan *v.* Ingram, 122 Mo. 355, 375.]

[1] [Foster, C. J., in Hardy *v.* Merrill, 56 N. H. 241.]

other conditions and things, both moral and physical, too numerous to mention."]

§ 441 *k*. **Hypothetical Questions; General Principle.** [Where a witness testifies by stating his inferences from facts not personally observed by him, it is necessary, for the sake of the jury in dealing with his testimony, that the data on which he bases his inference be specified by him and stated as assumed or hypothetical. For example, suppose that a medical man were asked, in a case of alleged homicide, where the deceased had been found dead in the water, "What in your opinion was the cause of death?" and he were to answer, "Strangulation;" and suppose that the real basis of his statement was the fact of congestion of the windpipe. Had the witness had personal observation of the body, this fact of congestion would also be stated by him, either on his direct examination or on his cross-examination, as the observed fact known by him and leading to his opinion. But if he had not had any personal observation of the body, and formed his opinion merely upon testimony listened to or upon other intimations of the fact of congestion, it would be impossible for the jury, merely from his statement of opinion, to know what were the data for the opinion. It would therefore be necessary for him, in stating his opinion, not only to specify the data for it (if this were all, it might be done by a question on cross-examination), but to specify them hypothetically, *i. e.* as only assumed by him to exist. Assuming, he says, the congestion to be a fact (as to which he knows nothing one way or the other), then his inference is that strangulation was the cause of death. The jury is thus put in a position to use his opinion intelligently; for if they later find congestion as a fact (supplied by other testimony), they will apply his opinion as based upon that fact, and give it the weight it deserves; but if they find that there was no congestion in fact, they will repudiate his opinion as having no application to the actual facts. Thus, the necessity for stating the data hypothetically arises because the witness has no personal knowledge of them and because it cannot before the jury's retirement be known what data they will find to be facts and therefore what opinions are applicable to the case as found by the jury. In other words, the jury must have the means of distinguishing between opinions based on data found by them to be true and opinions based on data found by them not to be true.[1] It is sometimes said that the hypothetical question

[1] [For good expositions of this reasoning by the Courts, see L. C. Erskine, in Melville's Trial, 29 How. St. Tr. 1065; Curtis, J., in U. S. *v.* McGlue, 1 Curt. C. C. 1; Dean, J., in Lake *v.* People, 1 Park. Cr. C. 557; Shaw, C. J., in Dickenson *v.* Fitchburg, 13 Gray 556; Christiancy, J., in Kempsey *v.* McGinnis, 21 Mich. 139 (particularly good); Kingman, C. J., in State *v.* Medlicott, 9 Kan. 288; Morris, C., in Burns *v.* Barenfeld, 84 Ind. 48; Ruger, C. J., in People *v.* McElvaine, 121 N. Y. 290; McGill, C., in Malynek *v.* State, N. J. L., 40 Atl. 572. The earliest instance of a ruling on the principle seems to be Lord Hardwicke's (1760) in Earl Ferrer's Trial, 19 How. St. Tr. 943; though Beckwith *v.* Sydebotham, 1 Camp. 116 (1807), is usually taken as the starting-point of the doctrine.]

is necessary, because otherwise the witness would "usurp the function of the jury." But it is obvious that there is no risk of usurpation; the Court does not empower the expert witness to decide any facts, nor is the jury bound to accept his assertion. The real situation is rather the opposite; the risk is that the expert's opinion will be worthless unless it is clarified for the benefit of the jury. The true principle is a simple one; and to speak of usurpation tends simply to obscure the principle.]

§ 441 *l.* **Same: Rules for the Use of Hypothetical Questions.** [(1) *Kind of Witness.* As a matter of academic nicety, it might be thought to follow that even a witness speaking from personal observation might be required to specify the data for the opinion he founds on his observation; and to this extent a few rulings have gone.[1] But in such a case the direct examination or the cross-examination sufficiently brings out the data that serve to found the opinion on; and it may be taken as a proper deduction of principle that the hypothetical statement of the data need not be made except by witnesses not having personal observation of the data for their opinion.[2] It follows, also, that the same person may testify from data in part based on personal observation and in part stated hypothetically;[3] and, of course, a skilled witness may properly testify from personal observation only.[4]

(2) *Particularity of Data as stated.* The purpose of the hypothetical presentation requires that the data put forward to serve as premises should be particularized with sufficient distinctness. Various situations present themselves to be tested under this principle. (*a*) An answer based upon all the testimony in the case is generally considered as improper, because the data are too voluminous to be precisely understood and kept in mind, and because it is impossible for the jury to tell which parts of the testimony the witness has taken for true.[5] Nevertheless, many Courts, having chiefly in mind the second consideration above, allow such an answer

[1] [Hitchcock *v.* Burgett, 38 Mich. 507; Van Deusen *v.* Newcomer, 40 id. 119; McDonald *v.* McDonald, Ind., 41 N. E. 346, *semble.*]

[2] [B. & I. R. Co. *v.* Bailey, 11 Oh. St. 337; Brown *v.* Huffard, 69 Mo. 305; Tullis *v.* Rankin, N. D., 68 N. W. 187; People *v.* Youngs, N. Y., 45 N. E. 460; New York El. Eq. Co. *v.* Blair, U. S. App., 79 Fed. 896.]

[3] [Louisv. & N. A. R. Co. *v.* Foley, 104 Ind. 418; State *v.* Clark, 15 S. C. 407; Wetherbee *v.* Wetherbee, 38 Vt. 454; Pannell *v.* Com., 86 Pa. 269; Mullin's Estate, Cal., 42 Pac. 646; State *v.* Wright, Mo., 35 S. W. 1145; Selleck *v.* Janesville, Wis., 75 N. W. 975.]

[4] [Bennett *v.* Fail, 26 Ala. 610; Louisv. N. A. & C. R. Co. *v.* Shires, 108 Ill. 631; State *v.* Felter, 25 Ia. 75.]

[5] [Earl Ferrer's Trial, 19 How. St. Tr. 943; R. *v.* Wright, R. & R. 457; R. *v.* Oxford, 4 State Tr. N. s. 497, 532; Sills *v.* Brown, 9 C. & P. 604; Key *v.* Thomson, 13 N. Br. 227; Diffin *v.* Daw, 22 id. 108; People *v.* Goldenson, 76 Cal. 350; Bishop *v.* Spining, 38 Ind. 144; Smith *v.* Hickenbutton, 57 Ia. 738; Woodbury *v.* Obear, 7 Gray 471; Spear *v.* Richardson, 37 N. H. 34, *semble;* People *v.* McElvaine, 121 N. Y. 250; Aultman Co. *v.* Ferguson, S. D., 66 N. W. 1081; The Clement, 2 Curt. C. C. 369; Quinn *v.* Higgins, 63 Wis. 669, *semble.*]

if the testimony is not conflicting, or, more cautiously, exclude it unless the facts testified to are undisputed.[6] (*b*) An answer based upon a portion of the testimony (in the usual instance, to a question, "Upon what you have heard of the testimony in the case, what is your opinion?") should be treated upon the same principle, and is usually held improper.[7] (*c*) An answer based on an assumption of the truth of the testimony for one party is perhaps less objectionable;[8] its admission should depend on the testimony in the particular case.[9] (*d*) An answer based on the testimony of two or more specified witnesses should be treated in the same way.[10] (*e*) An answer based on the testimony of a single witness' testimony should be received, unless the data are too complicated or obscure; but the rulings are not uniform.[11]

(3) *Kind of Data that may be assumed.* (*a*) Since the data to be assumed as the basis are those which it is expected or claimed the jury will subsequently adopt as true, it would be both wasteful of time and misleading to assume data which there is not a fair chance the jury will accept; and a limitation for this purpose is accepted by all Courts. The phrasing differs; usually it is said that there must be "some evidence tending to prove" them; or that they must be "within the possible or probable range of the evidence; or that they must concern facts which "the jury might legitimately find upon the evidence."[12] The discretion of the trial Court should

[6] [Page *v.* State, 61 Ala. 18; Pyle *v.* Pyle, Ill., 41 N. E. 999; Tefft *v.* Wilcox, 6 Kan. 58; Chalmers *v.* Mfg. Co., Mass., 42 N. E. 98; Oliver *v.* R. Co., id., 49 N. E. 117; Walker *v.* Rogers, 24 Md. 243; Kempsey *v.* McGinniss, 21 Mich. 138, Storer's Will, 28 Minn., 11 C. & F. M. Ins. Co. *v.* May, 20 Oh. 223; Olmsted *v.* Gere, 100 Pa. 131, *semble;* Amendaiz *v.* Stillman, 67 Tex. 462; State *v.* Hayden, 51 Vt. 304; Bennett *v.* State, 57 Wis. 81; Gates *v.* Fleischer, 67 id. 508; Kreuziger *v.* R. Co., 73 id. 163.]

[7] [Champ *v.* Com., 2 Metc. Ky. 27; Connell *v.* McNett, Mich., 67 N. W. 344; Malynek *v.* State, N. J. L., 40 Atl. 572; Lake *v.* People, 1 Park. Cr. C. 557; Sanchez *v.* People, 22 N. Y. 154. *Admitted:* Swanson *v.* Mellen, Minn., 69 N. W. 620; State *v.* Hayden, 51 Vt. 299.]

[8] [*Admitted:* Polk *v.* State, 36 Ark. 123; Schneider *v.* Manning, 121 Ill. 387; Pyle *v.* Pyle, id., 41 N. E. 999. *Excluded:* People *v.* McElvaine, 121 N. Y. 250.]

[9] [Dexter *v.* Hall, 15 Wall. 26.]

[10] [*Excluded:* Wilkinson *v.* Moseley, 30 Ala. 573; Snelling's Will, 136 N. Y. 515; Reynolds *v.* Robinson, 64 id. 595; Guiterman *v.* S. S. Co., 83 id. 366. *Admitted:* Bowen *v.* Huntington, 31 W. Va. 694 (but see Kerr *v.* Lunsford, 31 id. 672).]

[11] [*Admitted:* State *v.* Baptiste, 26 La. An. 137; Twombly *v.* Leach, 11 Cush. 402; Hunt *v.* Gaslight Co., 8 All. 170; McCollum *v.* Seward, 62 N. Y. 318; Seymour *v.* Fellows, 77 id. 180; State *v.* Hayden, 51 Vt. 305; Bennett *v.* State, 57 Wis. 81; McKeon *v.* R. Co., id., 69 N. W. 175. *Excluded:* Barber's Estate, 63 Conn. 393, 408; Chic. & A. R. Co. *v.* Glenny, Ill., 51 N. E. 896; Craig *v.* R. Co., 98 Ind. 112; Stoddard *v.* Winchester, 157 Mass. 567; Detzur *v.* Brewing Co., Mich., 77 N. W. 948; Link *v.* Sheldon, 136 N. Y. 1, 9; Manuf. A. I. Co. *v.* Dorgan, 16 U. S. App. 290.]

[12] [For the phrasing in various jurisdictions, see the following cases: Courvoisier *v.* Raymond, Colo., 47 Pac. 284; Barber's Estate, 63 Conn. 393, 409; Kelly *v.* Perrault, Ida., 48 Pac. 45; Grand Lodge *v.* Wieting, Ill., 48 N. E. 59; Conway *v.* State, 118 Ind. 490; Meeker *v.* Meeker, 74 Ia. 355; Davis *v.* Ins. Co., Kan., 52 Pac. 67; Baxter *v.* Knox, Ky., 44 S. W. 972; Powers *v.* Mitchell, 77 Me. 369; Oliver *v.* R. Co., Mass., 49 N. E. 117; People *v.* Foglesong, Mich., 74 N. W. 730; Peterson *v.* R. Co.,

control in applying the principle. (*b*) The party is entitled to the witness' opinion on any state of facts within the above range; and hence, as a matter of principle alone, the question need not cover the entire mass of data put forward by the party as his case, but may cover any selected part of them.[13] Nevertheless, such a practice is found to lend itself to abuses, and to allow opinions to be given in such a way as to mislead the jury, by concealing their real significance or by unduly emphasizing certain favorable or unfavorable data. Accordingly, a Court is often found excluding answers not based on all the material parts of one witness' testimony[14] or unduly emphasizing selected data culled from the whole case.[15] (*c*) The number of data covered by a question is immaterial;[16] but lengthy questions may tend to mislead or confuse the jury, and may properly be excluded, in the trial Court's discretion.[17]

(4) The *form* of the question must in strictness be hypothetical, *i. e.* clearly assuming the data as unproved;[18] but it should be enough, though the form is not expressly hypothetical, if in effect it appears that the data are stated as assumptions and not as facts.[19]]

38 Minn. 515; Fullerton *v.* Fordyce, Mo., 44 S. W. 1053; Morrill *v.* Tegarden, 19 Nebr. 536; Lindenthal *v.* Hatch, N. J. L., 39 Atl. 662; People *v.* Augsbury, 97 N. Y. 504; Burnett *v.* R. Co., N. C., 26 S. E. 819; Rober *v.* Herring, 115 Pa. 608; North A. A. Ass'n *v.* Woodson, U. S. App., 64 Fed. 639; Hathaway *v.* Ins. Co., 48 Vt. 351; Kerr *v.* Lunsford, 31 W. Va. 672; Tebo *v.* Augusta, Wis., 63 N. W. 1045.]

[13] [People *v.* Durrant, Cal., 48 Pac. 75; Barber's Estate, 63 Conn. 393, 409; Louisv. N. A. & C. R. Co. *v.* Wood, 113 Ind. 554; Turnbull *v.* Richardson. 69 Mich. 413; Merrill *v.* Hershfield, Mont., 47 Pac. 997; Stearns *v.* Field, 90 N. Y. 640; First N. B'k *v.* Wirebach, 106 Pa. 44 (the reason well expounded); Gulf C. & S. R. Co. *v.* Compton, 75 Tex. 673.]

[14] [See Davis *v.* State, 38 Md. 40; Hand *v.* Brookline, 126 Mass. 326; Jewett *v.* Brooks, 134 id. 505.]

[15] [See People *v.* Vanderhoof, 71 Mich. 176; Gottlieb *v.* Hartman, 3 Colo. 61; Peterson *v.* R. Co., 38 Minn. 515; Thayer *v.* Davis, 38 Vt. 163.]

[16] [Mayo *v.* Wright, 63 Mich. 43.]

[17] [See Davis *v.* Ins. Co., Kan., 52 Pac. 67; Howes *v.* Colburn, Mass., 43 N. E. 125; Forsyth *v.* Doolittle, 120 U. S. 78.]

[18] [Chalmers *v.* Mfg. Co., Mass., 42 N. E. 98; Jones *v.* R. Co., 43 Minn. 281; State *v.* Keene, 100 N. C. 511; Gilman *v.* Strafford, 50 Vt. 725.]

[19] [McCollum *v.* Saward, 62 N. Y. 318; Kempsey *v.* McGinniss, 21 Mich. 139.]

CHAPTER XXV.

WITNESSES (CONTINUED): IMPEACHMENT AND DISCREDITING; CROSS-EXAMINATION.

1. *Who may be Impeached.*

§ 442. Impeaching one's own Witness.
§ 443. Same: Rule not applicable to a Compulsory Witness.
§ 443 *a*. Same: (1) By Evidence of Bias, Interest, or Corruption.
§ 443 *b*. Same: (2) By Evidence of Error; Contradicting the Witness.
§ 444. Same: (3) By Evidence of Prior Inconsistent Statements.
§ 444 *a*. Same: Who is one's own Witness.
§ 444 *b*. Accused as a Witness.
§ 444 *c*. Impeaching Witness impeached.
§ 444 *d*. Hearsay Statements; Attesting Witness.

2. *Cross-examination, in general.*

§ 445. Putting in one's own Case on Cross-examination.
§§ 446–449. Sundries.

3. *Kinds of Impeaching Evidence.*

§ 450. Bias.
§ 450 *a*. Corruption.
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§ 461 *a*. Character; (1) Kind of Character.
§ 461 *b*. Character; (2) Proof by Particular Acts of Misconduct.
§ 461 *c*. Character; (3) Proof by Personal Knowledge or Opinion.
§ 461 *d*. Character; (4) Proof by Reputation.
§ 461 *e*. Contradiction; Collateral Error.
§ 461 *f*. Prior Inconsistent Statements.
§ 462. Same: Witness' Attention must be called.
§ 462 *a*. Same: What is an Inconsistent Statement.
§ 462 *b*. Same: Explanations; Whole of Statement.
§§ 463–465. Same: Inconsistent Statements in Writing; Rule in The Queen's Case.
§ 465 *a*. Same: Theory and Policy of the Rule.

1. *Who may be Impeached.*

§ 442. **Impeaching one's own Witness.** When a party offers a witness in proof of his cause, he thereby, in general, represents him as worthy of belief. He is presumed to know the character of the witnesses he adduces;[1] and having thus presented them to the Court, the law will not permit the party afterwards to impeach their general reputation for truth, or to impugn their credibility by general evidence, tending to show them to be unworthy of belief;[2] for this would 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 hand of destroying his credit if he spoke against him. [It will be noted that this consideration applies solely to impeachment of character; the thought being that if a witness realized that,

[1] [Neither of these statements is correct in point of fact; the true reason is merely one of policy, as explained later; see the article by May, C. J., in 11 Amer. Law Review, 264 ff., in which the fallacies of the rule here concerned are vigorously criticised.]

[2] Bull. N. P. 297; Ewer *v.* Ambrose, 3 B. & C. 746; Stockton *v.* Demuth, 7 Watts 39; Smith *v.* Price, 8 id. 447. [To this extent the rule is universally accepted.]

unless his testimony were favorable, the party calling him would endeavor publicly to fix a bad character upon him, the witness would have a strong motive to make his testimony as favorable as possible, without regard to the truth. The weakness of this argument is that it applies just as strongly to an opponent's witness, and yet it has never been thought to demand a prohibition against attacking his character. But the reason has always been accepted as sufficient. The only doubt has been as to how far it applies to exclude impeachment by other modes, viz. (1) bias, interest, or corruption, (2) error, by contradicting, (3) prior inconsistent statements. These we may take up in this order; first of all, however, noticing a case to which the reason of the main rule as to character does not apply.]

§ 443. **Same: Rule not applicable to Compulsory Witness.** Where the witness is not one of the party's own selection, but is one whom the law obliges him to call, such as the subscribing witness to a deed, or a will, or the like; here he can hardly be considered as the witness of the party calling him, and therefore, as it seems, his character for truth may be generally impeached.[1]

[The chief matter of controversy is whether the principle of the rule applies also to all the various modes in which a witness may be impeached other than by character-evidence.]

§ 443 *a*. **Same: (1) By Evidence of Bias, Interest, or Corruption.** [The reason above explained should not, it would seem, operate to exclude evidence of bias, nor of interest,[1] nor, in any case, of corrupt action;[2] but the opposite view is usually taken.]

§ 443 *b*. **Same: (2) By Evidence of Error; Contradicting the Witness.** It is exceedingly clear that the party, calling a witness, is not precluded from proving the truth of any particular fact, by any other competent testimony, in direct contradiction, to what such witness may have testified; and this not only where it appears that the witness was innocently mistaken, but even where the evidence may collaterally have the effect of showing that he was generally unworthy of belief.[1] [If this were not so, a party would be (as Courts

[1] Lowe *v.* Jolliffe, 1 W. Bl. 365; Poth. on Obl. by Evans, vol. ii, p. 232, App. No. 16; Williams *v.* Walker, 2 Rich. Eq. 291; and see Goodtitle *v.* Clayton, 4 Burr. 3224; Cowden *v.* Reynolds, 12 S. & R. 281; but see Whitaker *v.* Salisbury, 15 Pick. 544, 545; Dennett *v.* Dow, 5 Shepl. 19; Brown *v.* Bellows, 4 Pick. 179. [The rule is commonly said not to be applicable to a compulsory witness: People *v.* Case, 105 Mich. 92; Whitman *v.* Morey, 63 N. H. 448, 456; Shorey *v.* Hussey, 32 Me. 579; but the cases which distinctly declare this of character evidence are few: see Diffenderfer *v.* State, Ind., 32 N. E. 87; Thornton *v.* Thornton, 39 Vt. 122, 155. A great inroad upon the rule, and one deserving imitation, has been made in Vermont by treating all eye-witnesses called by the State on a criminal charge as in effect compulsory witnesses: State *v.* Slack, 69 Vt. 486.]

[1] [*Contra:* Fenton *v.* Hughes, 7 Ves. Jr. 87; Johnson *v.* Varick, 5 Cow. 239; Stewart *v.* Hood, 10 Ala. 600; Fairly *v.* Fairly, 38 Miss. 280, 289.]

[2] [*Contra:* State *v.* Shouhausen, 26 La. An. 421. *Accord:* Dunn *v.* Aslett, 2 Mo. & Rob. 122.]

[1] Bull. N. P. 297; Alexander *v.* Gibson, 2 Campb. 555; Richardson *v.* Allan, 2 Stark. 334; Ewer *v.* Ambrose, 3 B. & C. 746; 6 D. & R. 127; s. c. 4 B. & C. 25;

have more than once pointed out) virtually at the mercy of his first witness. It follows, moreover, that a counsel, without offering other witnesses, may argue that his own witness is in error.[2]]

§ 444. **Same: (3) By Evidence of Prior Inconsistent Statements.** Whether it be competent for a party to prove that a witness whom he has called, and whose testimony is unfavorable to his cause, had previously stated the facts in a different manner, is a question upon which there exists some diversity of opinion. On the one hand, it is urged, that a party is not to be sacrificed to his witness; that he is not represented by him, nor identified with him; and that he ought not to be entrapped by the arts of a designing man, perhaps in the interest of his adversary.[1] On the other hand, it is said, that to admit such proof would enable the party to get the naked declarations of a witness before the jury, operating, in fact, as independent evidence; and this, too, even where the declarations were made out of court, by collusion, for the purpose of being thus introduced.[2] But the weight of authority seems in favor of admitting the party to show that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial, or to what the party had reason to believe he would testify; or, that the witness has recently been brought under the influence of the other party, and has deceived the party calling him. For it is said that this course is necessary for his protection against the contrivance of an artful witness; and that the danger of its being regarded by the jury as substantive evidence is no greater in such cases than it is where the contradictory declarations are proved by the adverse party.[3] [Though there can

Friedlander *v.* London Assur. Co., 4 B. & Ad. 193; Lawrence *v.* Barker, 5 Wend. 305, per Savage, C. J.; Cowden *v.* Reynolds, 12 S. & R. 281; Bradley *v.* Ricardo, 8 Bing. 57; Jackson *v.* Leek, 12 Wend. 105; Stockton *v.* Demuth, 7 Watts 39; Brown *v.* Bellows, 4 Pick. 179, 194; Perry *v.* Massey, 1 Bail. 32; Spencer *v.* White, 1 Ired. 239; Dennett *v.* Dow, 5 Shepl. 19; McArthur *v.* Hurlbert, 21 Wend. 190; Att'y-Gen. *v.* Hitchcock, 1 Exch. 91; 11 Jur. 478; The Lochlibo, 14 Jur. 792; 1 Eng. L. & Eq. 645. [This doctrine is universally accepted; the earlier law apparently excluded this also, but Rice *v.* Oatfield, 2 Stra. 1095, in 1738, seems to have led the way to the present view. The English statute mentioned in the next section inadvertently raised a doubt, which was virtually read out of the statute by Greenough *v.* Eccles, 5 C. B. N. S. 786; see Coles *v.* Brown, L. R. 1 P. & D. 70; R. *v.* Dytche, 17 Cox Cr. 39; Robinson *v.* Reynolds, 23 U. C. Q. B. 560, upon the terms of the statute.]

[2] [Mitchell *v.* Sawyer, 115 Ill. 650, 657; Webber *v.* Jackson, 79 Mich. 175; Schmidt *v.* Dunham, 50 Minn. 96; McLean *v.* Clark, 31 Fed. 501. *Contra*, but quite unsound: Claflin *v.* Dodson, 111 Mo. 195, 201; Dravo *v.* Fabel, 132 U. S. 487, 490; Graves *v.* Davenport, 50 Fed. 881.]

[1] Phil. & Am. on Evid. 904, 905; 2 Phil. Evid. 447.

[2] Ibid.; Smith *v.* Price, 8 Watts 447; Wright *v.* Beckett, 1 M. & Rob. 414, 428, per Bolland, B.

[3] Wright *v.* Beckett, 1 M. & Rob. 414, 416, per Ld. Denman; Rice *v.* New Eng. Marine Ins. Co., 4 Pick. 439; R. *v.* Oldroyd, Russ. & Ry. 88, 90, per Ld. Ellenborough and Mansfield, C. J.; Brown *v.* Bellows, 4 Pick. 179; State *v.* Norris, 1 Hayw. 437, 438; 2 Phil. Evid. 450–463; Dunn *v.* Aslett, 2 M. & Rob. 122; Bank of Northern Liberties *v.* Davis, 6 Watts & Serg. 285; *infra*, § 467, n. But see Holdsworth *v.* Mayor of Dartmouth, 2 M. & Rob. 153; R. *v.* Ball, 8 C. & P. 745; and R. *v.* Farr, ib. 768, where evidence of this kind was rejected. [The matter remained in doubt, in England, even after Melhuish *v.* Collier, 19 L. J. Q. B. 493, in 1850, and the statute

hardly be any doubt to-day that all the considerations of policy and principle are in favor of allowing the unlimited use of this sort of evidence,[4] yet the former currency of the doubts on the subject, and the varying solutions reached in the early English practice, have led to a great variety in the conclusions reached by the Courts in this country. It will be enough here to point out the chief varieties of form now to be found. (1) There are Courts which admit the evidence freely in any shape; this result has often been reached by statute. (2) There are a few Courts which have — usually in the earlier rulings — rejected the evidence in every shape. (3) There is a view by which the evidence is admitted when the party has been surprised or "entrapped" or "misled" by the witness; but this of course is usually the case, whenever such evidence is offered. (4) By another view, the inconsistent statement may not be proved by other witnesses, but may be brought out by a question to the witness himself. (5) Another view is that such evidence, however obtained, should not be received to discredit the witness, but that the inquiry may be made of the witness himself in order to stimulate his recollection and induce a correction. (6) Still another view, closely connected with the last two, excludes outside evidence, but allows the question to be put to the witness himself, primarily to stimulate recollection, but does not object to the incidental discrediting effect. (7) Another variation is to allow the question to be put to the witness himself for either purpose, but admits outside testimony only where the witness is hostile. (8) Finally, certain Courts which admit the self-contradiction freely, exclude a certain kind of such statements because they are not in truth contradictory and merely serve to introduce hearsay.[5] It must be added

17–18 Vict., c. 125, s. 22, passed in 1854, allowed the use of such evidence, subject to the trial Court's discretion; but the phrasing of the statute was unfortunate, and has led to much difference of opinion in its interpretation: see Greenough *v.* Eccles, 5 C. B. N. S. 786; Reed *v.* King, 30 L. T. 290; Faulkner *v.* Brine, 1 F. & F. 254; Dear *v.* Knight, ib. 433; Martin *v.* Ins. Co., ib. 505; Jackson *v.* Thomason, 1 B. & S. 745; Ryberg *v.* Smith, 32 L. J. P. M. & A. 112; Cresswell *v.* Jackson, 4 F. & F. 3; Pound *v.* Wilson, ib. 301; Coles *v.* Brown, L. R. 1 P. & D. 70; Anstell *v.* Alexander, 16 L. T. N. S. 830; R. *v.* Little, 15 Cox Cr. 319; Rice *v.* Howard, L. R. 16 Q. B. D. 681.]

[4] [See the exposition by Lord Denman, C. J., in Wright *v.* Beckett, 1 Mo. & Rob. 418, 425; Erle, J., in Melhuish *v.* Collier, 19 L. J. Q. B. 493; Starkie, Evidence, I, 217; Second Report of Common Law Practice Com'rs, 1853, p. 16; J. H. Benton, Jr., *arguendo*, in Hurlburt *v.* Bellows, 50 N. H. 112.]

[5] [The cases are as follows: Winston *v.* Moseley, 2 Stew. 137; Campbell *v.* State, 23 Ala. 44, 76; Hemingway *v.* Garth, 51 id. 530; Thompson *v.* State, 99 id. 173, 175; Louisv. & N. R. Co. *v.* Hart, 101 id. 34, 43; Feibelman *v.* Assur. Co., 108 id. 180; Thomas *v.* State, id., 23 So. 665; Ark. Code, § 2523; Ward *v.* Young, 42 Ark. 543, 553; Cal. Code, C. P. § 2049; People *v.* Jacobs, 49 Cal. 384; People *v.* Bushton, 80 id. 161; People *v.* Wallace, 89 id. 158, 163; People *v.* Mitchell, 94 id. 550, 556; People *v.* Kruger, 100 id. 523; *Re* Kennedy, 104 id. 429, 431; Hyde *v.* Buckner, 108 id. 522; People *v.* Crespi, 115 id. 50; People *v.* Durrant, 116 id. 179; Thiele *v.* Newman, ib. 571; Babcock *v.* People, 13 Colo. 519; Ga. Code, § 3869; McDaniel *v.* State, 53 Ga. 253; Dixon *v.* State, 86 id. 754; Garrett *v.* Sparks, 60 id. 582, 586; Ind. Code, § 244; Quinn *v.* State, 14 Ind. 589; Judy *v.* Johnson, 16 id. 371; Hill *v.* Goode, 18 id. 207, 209; R. S. 1881, § 1796; Hull *v.* State, 93 id. 128, 132; Conway *v.* State,

that the rule about showing a written statement to the witness (*post*, § 463) and the rule about refreshing memory by writings (*ante*, § 439 *c*), as well as the general principles involved in the use of inconsistent statements (*post*, § 461 *f*), constantly come into play in union with the present principle, and the operation of the several sets of rules should be carefully distinguished.]

§ 444 *a*. **Same: Who is one's own Witness.** [For the purposes of applying the preceding principles, it is often necessary to determine who is one's own witness, within the scope of the rule forbidding impeachment. On each of the situations presenting difficulty, there is much difference of opinion. The fact of calling the witness would ordinarily suffice to make the rule applicable, and to furnish a test; but this seems often to result in unfairly tying the hands of the party calling him where the witness is palpably hostile; and the whole policy of the rule, except so far as it forbids attacking character, is so questionable, that perhaps a conflict between the re-

118 id. 482, 488; Crocker *v.* Agenbroad, 122 id. 585; Miller *v.* Cook, 124 id. 101, 104; Blough *v.* Parry, 144 id. 463; Humble *v.* Shoemaker, 70 Ia. 223, 226; State *v.* Cummins, 76 id. 133, 135; Hull *v.* R. Co., 84 id. 311, 315; Smith *v.* Dawley, 92 id. 312; Spaulding *v.* R. Co., 98 id. 205; Hall *v.* Manson, 99 id. 698; Johnson *v.* Leggett, 28 Kan. 590, 605; St. L. & S. F. R. Co. *v.* Weaver, 35 id. 412, 431; State *v.* Sortor, 52 id. 531; Ky. Code, § 660; Champ *v.* Com., 2 Metc. 17, 23; Blackburn *v.* Com., 12 Bush 181, 184; Wren *v.* R. Co., Ky., 20 S. W. 215; P. C. C. & St. L. R. Co. *v.* Lewis, id., 38 S. W. 482; State *v.* Thomas, 28 La. An. 827; State *v.* Simon, 37 id. 569; State *v.* Boyd, 38 id. 105; State *v.* Johnson, 47 id. 1225; State *v.* Vickers, ib. 1574; Dennett *v.* Dow, 17 Me. 19, 22; Chamberlain *v.* Sands, 27 id. 458, 466; De Sobry *v.* De Laistre, 2 H. & J. 219; Queen *v.* State, 5 id. 232; Franklin B'k *v.* Navig. Co., 11 G. & J. 36; Sewell *v.* Gardner, 48 Md. 178, 183; Mass. St. 1869, c. 425; Ryerson *v.* Abington, 102 Mass. 531; Brannon *v.* Hursell, 112 id. 63, 70; Day *v.* Cooley, 118 id. 524, 526; Brooks *v.* Weeks, 121 id. 433; Force *v.* Martin, 122 id. 5; Com. *v.* Donahoe, 133 id. 407; Dillon *v.* Pinch, 110 Mich. 149; People *v.* O'Neill, 107 id. 556; People *v.* Gillespie, 111 id. 241; Gilbert *v.* R. Co., id., 74 N. W. 1010; State *v.* Johnson, 12 Minn. 486; State *v.* Tall, 43 id. 273, 275; Selover *v.* Bryant, 54 id. 434; Moore *v.* R. Co., 59 Miss. 243, 248; Dunlap *v.* Richardson, 63 id. 447, 449; Chism *v.* State, 70 id. 742; Bacot *v.* Lumber Co., id., 23 So. 481; Dunn *v.* Dunnaker, 87 Mo. 597, 600; State *v.* Burks, 132 id. 363; State *v.* Bloor, 20 Mont. 754; Hurlburt *v.* Bellows, 50 N. H. 105, 116; Whitman *v.* Morey, 63 id. 448, 456; Brewer *v.* Porch, 17 N. J. L. 377, 379; Kohl *v.* State, 59 id. 445; Lawrence *v.* Barker, 5 Wend. 301, 305; People *v.* Safford, 5 Den. 112, 116; Thompson *v.* Blanchard, 4 N. Y. 303, 311; Bullard *v.* Pearsall, 53 id. 230; Coulter *v.* Express Co., 56 id. 585, 588; Becker *v.* Koch, 104 id. 394, 402; Cross *v.* Cross, 108 id. 628; People *v.* Kelly, 113 id. 647, 651; De Meli *v.* De Meli, 120 id. 485, 490; People *v.* Burgess, 153 id. 561; State *v.* Norris, 1 Hayw. 429, 437; Sawrey *v.* Murrell, 2 id. 397; Neil *v.* Childs, 10 id. 195, 197; Hice *v.* Cox, 12 id. 315; State *v.* Taylor, 88 id. 696; George *v.* Triplett, 5 N. D. 50; Hurley *v.* State, 46 Oh. 320, 322; Langford *v.* Jones, 18 Or. 307, 325; State *v.* Steeves, 29 id. 85; State *v.* Bartmess, id., 54 Pac. 167; Rapp *v.* Le Blanc, 1 Dall. 63; Cowden *v.* Reynolds, 12 S. & R. 281, 283; Craig *v.* Craig, 5 Rawle 91, 95; Stockton *v.* Demuth, 7 Watts 39, 41; Smith *v.* Price, 8 id. 441; Bank of N. Liberties *v.* Davis, 6 W. & S. 285, 288; Harden *v.* Hays, 9 Pa. St. 151, 159; Stearns *v.* Bank, 53 id. 490; McNerney *v.* Reading, 150 id. 611, 615; Morris *v.* Guffey, id., 41 Atl. 731; Bauskett *v.* Keith, 22 S. C. 199; State *v.* Johnson, 43 id. 123; Story *v.* Saunders, 8 Humph. 663, 666; Erwin *v.* State, 32 Tex. Cr. 519; Ross *v.* State, id., 45 S. W. 808; Hickory *v.* U. S., 151 U. S. 303, 309; St. Clair *v.* U. S., 154 id. 134, 150; Fairchild *v.* Bascomb, 35 Vt. 398, 417; Cox *v.* Eayres, 55 id. 24, 35; Hurlburt *v.* Hurlburt, 63 id. 667, 670; Good *v.* Knox, 64 id. 97, 99; Sutton *v.* R. Co., Wis., 73 N. W. 993; Collins *v.* Hall, id., 75 N. W. 416; Arnold *v.* State, 5 Wyo. 439.]

quirements of its technicalities and the unfairness of the result is inevitable, and will account for the judicial differences of opinion. Where the opposing party may be called (under statutory enactments), it would seem fair to relax the rule.[1] A co-defendant testifying for himself seems also to be without its scope.[2] Where a witness was originally called by one party, but has then been re-called by the opponent, it would seem that the rule of prohibition applies to the former,[3] but not to the latter.[4] Where a deposition is concerned, as, for example, where it has been used by the taking party only, or by the cross-examining party only, or by both, a variety of solutions are possible.[5] A great variety of other situations may present the question.[6]]

§ 444 *b*. **Accused as a Witness.** [When, under the modern statutes removing common-law disqualifications, the defendant in a criminal case takes the stand to testify in his own behalf, two distinct questions arise, to one of which the answer of the Courts is clear and unanimous, to the other doubtful and inharmonious.

(1) Is his position as a witness so separable from his position as a defendant that what would be usable to impeach him as a witness, but would not be available against him merely as a defendant, may still be used? In particular, may his bad character be shown, may this character be searched into on cross-examination, may the other tests applicable to witnesses be employed? The answer, as policy clearly demands, is in the affirmative; for otherwise, if he were a false witness, the customary methods of exposing this would not be available, and the investigation of truth and the punishment of crime would be defeated. These reasons[1] have led to the general acceptance of the rule that an accused person taking the stand as a witness may be impeached precisely like any other witness, *i. e.* by

[1] [The cases differ, and statutes have sometimes expressly declared him to be an opposing witness; see Mair *v.* Culy, 10 U. C. Q. B. 321, 325; Warren *v.* Gabriel, 51 Ala. 235; Drennen *v.* Lindsay, 15 Ark. 361; Garrett *v.* Sparks, 60 Ga. 582; Crocker *v.* Agenbroad, 122 Ind. 585; Hunt *v.* Coe, 15 Ia. 197; Thomas *v.* McDaneld, 88 id. 380; Pfefferkorn *v.* Seefield, 66 Minn. 223; Suter *v.* Page, 64 id. 444; Chandler *v.* Freeman, 50 Mo. 239; Imhoff *v.* McArthur, id., 48 S. W. 456; Strudwick *v.* Brodnax, 83 N. C. 401, 403; Coates *v.* Wilkes, 92 id. 376; Helms *v.* Green, 105 id. 251, 262; Brubaker *v.* Taylor, 76 Pa. 83, 87; Dravo *v.* Fabel, 132 U. S. 487, 489; Good *v.* Knox, 64 Vt. 97.]

[2] [State *v.* Goff, 117 N. C. 755; State *v.* Adams, 49 S. C. 414.]

[3] [*Contra:* Hall *v.* Manson, 99 Ia. 698.]

[4] [Sawrey *v.* Murrell, 2 Hayw. 397. *Contra:* Barker *v.* Bell, 46 Ala. 216, 223; Artz *v.* R. Co., 44 Ia. 284; Smith *v.* Ass. Co., 65 Fed. 765.]

[5] [See Carville *v.* Stout, 10 Ala. 798, 802; Bunzel *v.* Maas, id., 22 So. 568; Young *v.* Wood, 11 B. Monr. 123, 134; Steinbach *v.* Ins. Co., 2 Caines 129; Crary *v.* Sprague, 12 Wend. 41; People *v.* Moore, 15 id. 420; Neil *v.* Childs, 10 Ired. 195; Richmond *v.* Richmond, 10 Yerg. 343; Story *v.* Saunders, 8 Humph. 663; Elliot *v.* Shultz, 10 id. 223.]

[6] [See Bebee *v.* Tinker, 2 Root 160; Milton *v.* State, Fla., 24 So. 60; Powers *v.* State, 80 Ind. 77; Collery *v.* Transit Co., Pa., 39 Atl. 813; Watson *v.* Ins. Co., 2 Wash. C. C. 480.]

[1] [Set forth in Com. *v.* Bonner, 97 Mass. 587; by Buskirk, C. J., in Fletcher *v.* State, 49 Ind. 130; and by Breaux, J., in State *v.* Murphy, 45 La. An. 958.]

reputation as evidence of character, by cross-examination to character, by conviction of crime, and the like.[2] (*a*) It follows, incidentally, that this may be done against him as a witness, irrespective of the rule which protects his character as a defendant from attack (*ante*, § 14 *b*) until he has offered it in defence. (*b*) It follows, also, that only such a character as affects him testimonially may be used against him — *i. e.* in most jurisdictions, his character for veracity (*post*, § 461 *a*) — until he sets up his character as evidence of innocence (*ante*, § 14 *b*).[3] The accused may not offer his testimonial character (which may be different from the character that would be evidence of innocence; *ante*, § 14 *b*, *post*, § 461 *a*), until it has been impeached, in accordance with the principle of § 469 *a*, *post*.[4] (*c*) The unsworn statement of a defendant, which until recently in some jurisdictions he was allowed to make (*ante*, § 333 *a*), did not constitute him a witness, for the present purpose.[5] (*d*) It was at one time supposed in New York that the scope of cross-examination to misconduct was narrower for a defendant-witness than for others;[6] but this limitation seems no longer to be law in that jurisdiction,[7] nor elsewhere.

(2) The second question is whether, since a witness has the privilege of declining to answer questions tending to criminate him, and since this privilege may be waived by a witness, either expressly or by implication, the voluntary taking of the stand by an accused person is a waiver of the privilege which will leave him obliged to

[2] [Hays *v.* State, 110 Ala. 60; Clark *v.* Reese, 35 Cal. 89, 96; People *v.* Reinhart, 39 id. 449; People *v.* Hickman, 113 id. 80; People *v.* Mayes, ib. 618; People *v.* Arnold, 116 id. 682; People *v.* Sears, 119 id. 267; People *v.* Reed, id., 52 Pac. 835; People *v.* Dole, id., 77 N. W. 576; State *v.* Griswold, 67 Conn. 290; Fletcher *v.* State, 49 Ind. 124, 130; Mershon *v.* State, 51 id. 14, 21; State *v.* Bloom, 68 id. 54; State *v.* Beal, ib. 346; South Bend *v.* Hardy, 98 id. 579; State *v.* Kirkpatrick, 63 Ia. 554, 559; State *v.* Teeter, 69 id. 717, 719; State *v.* O'Brien, 81 id. 93; State *v.* Pfefferle, 36 Kan. 90, 92; McDonald *v.* Com., 86 Ky. 13; Burdette *v.* Com., 93 id. 77; Montgomery *v.* Com., Ky., 30 S. W. 602; Barton *v.* Com., id., 32 S. W. 172; Trusty *v.* Com., id., 41 S. W. 766; Justice *v.* Com., id., 46 S. W. 499; State *v.* Taylor, 45 La. An. 605, 607; State *v.* Murphy, ib. 959; State *v.* Southern, 48 id. 628; State *v.* Watson, 65 Me. 79; State *v.* Witham, 72 id. 531, 534; State *v.* Farmer, 84 id. 436; Holbrook *v.* Dow, 12 Gray 357, 359; Com. *v.* Brennan, 97 Mass. 587; Com. *v.* Graham, 99 id. 421; Root *v.* Hamilton, 105 id. 23; People *v.* Sutherland, 104 Mich. 468; People *v.* Parmelee, id., 70 N. W. 577; Georgia *v.* Bond, id., 72 N. W. 232; State *v.* Sauer, 42 Minn. 259; State *v.* Clinton, 67 Mo. 380, 390; State *v.* Testerman, 68 id. 408, 414; State *v.* Rugan, ib. 215; State *v.* Cooper, 71 id. 436, 442; State *v.* Rider, 90 id. 54, 63; 95 id. 474, 486; State *v.* Taylor, 98 id. 240, 244; State *v.* Smith, 125 id. 2, 6; State *v.* Dyer, 139 id. 199; State *v.* Cohn, 9 Nev. 179, 189; State *v.* Huff, 11 id. 17, 27; Terr. *v.* De Gutman, N. M., 42 Pac. 68; People *v.* Conroy, 153 N. Y. 174; State *v.* Traylor, N. C., 28 S. E. 493; Asher *v.* Terr., Okl., 54 Pac. 445; State *v.* Bartmess, Or., 54 Pac. 166; State *v.* McGuire, 15 R. I. 23; State *v.* Turner, 36 S. C. 534, 543; Hill *v.* State, 91 Tenn. 521, 524; Bell *v.* State, 31 Tex. Cr. 276; Holley *v.* State, id., 46 S. W. 39.]

[3] [*E. g.* in People *v.* Reed, Cal., *supra*.]

[4] [*E. g.* in Hays *v.* State, Ala., *supra*.]

[5] [See Hart *v.* State, 38 Fla. 39; Lester *v.* State, 37 id. 382; Blackburn *v.* State, 71 Ala. 321; see People *v.* Thomas, 9 Mich. 314.]

[6] [See the citations *post*, under § 461 *b*.]

[7] [See People *v.* Conroy, 153 N. Y. 174.]

answer such questions on cross-examination. A Court may answer in the affirmative the first question above, by holding that any impeaching questions may properly be put to such a witness on cross-examination, but the question will still remain open whether, for such of those questions as involve self-crimination, the witness is privileged not to answer. This question is wholly distinct, and is treated *post*, § 469 *d*, under the head of Privilege; but the discrimination should be insisted on, for we occasionally find the inquiry stated, "May an accused person on the stand be cross-examined like any other witness?" as if but one question were involved, and without noticing the necessary discrimination.]

§ 444 *c*. **Impeaching Witness impeached.** [May the impeaching witness himself be impeached? No doubt here arises (the answer being in the affirmative), except for character-evidence. For such evidence it has always been thought that convenience and propriety require some limit to be put to the process of mutual abuse. Three solutions have found favor; one, to prohibit entirely the impeachment of an impeaching witness' character; another, to allow such impeachment of the impeaching witness, but no more; a third, to leave the matter to the discretion of the trial Court; the last being of course the preferable rule.[1]]

§ 444 *d*. **Hearsay Statements; Attesting Witness.** [Statements admitted under exceptions to the Hearsay rule are in effect testimony; and the process of impeaching or discrediting the deceased or absent declarant is proper both in theory and in policy; but the cases can be more conveniently collected under the heads of the respective exceptions (*ante*, Chaps. X–XV). The proof of the signature of a deceased or absent attesting-witness is in effect the introduction of his testimony to the document's execution; and on this principle it has been considered proper to allow his impeachment in the ways appropriate for other witnesses.[1]]

2. *Cross-examination in general.*

§ 445. **Putting in one's own Case on Cross-examination.** When a witness has been examined in chief, the other party has a right to cross-examine him.[1] But a question often arises, whether the wit-

[1] [See Rector *v.* Rector, 8 Ill. 105, 117; State *v.* Brant, 14 Ia. 182; State *v.* Moore, 25 id. 137; Starks *v.* People, 5 Denio 106, 109; State *v.* Cherry, 63 N. C. 495; Wayne, J., in Gaines *v.* Relf, 12 How. 555.]

[1] [For the use of such a witness' *prior inconsistent statements*, see *post*, § 462. Impeachment by character-evidence is proper: Doe *v.* Harris, 7 C. & P. 330; Lawless *v.* Guelbreth, 8 Mo. 139; Vandyke *v.* Thompson, 1 Harringt. 109; Boylan *v.* Meeker, 28 N. J. L. 274, 294; Chamberlain *v.* Torrance, 14 Grant Ch. 181, 184; Losee *v.* Losee, 2 Hill 609; State *v.* Thomason, 1 Jones L. 274, *semble;* Braddee *v.* Brownfield, 9 Watts 124; Harden *v.* Hays, 9 Pa. St. 158; Gardenhire *v.* Parks, 2 Yerg. 23.]

[1] If the witness dies after he has been examined in chief, and before his cross-examination, it has been held that his testimony is inadmissible: Kissam *v.* Forrest, 25 Wend. 651; [*ante*, § 163 *c*.] But in equity its admissibility is in the discretion

ness has been so examined in chief, as to give the other party this right. If the witness is called merely for the purpose of producing a paper, which is to be proved by another witness, he need not be sworn.[2] Whether the right of cross-examination, that is, of treating the witness as the witness of the adverse party, and of examining him by leading questions, extends to the whole case or is to be limited to the matters upon which he has already been examined in chief, is a point upon which there is some diversity of opinion. In England, when a competent witness is called and sworn, the other party will, ordinarily, and in strictness, be entitled to cross-examine him, though the party calling him does not choose to examine him in chief;[3] unless he was sworn by mistake;[4] or, unless an immaterial question having been put to him, his further examination in chief has been stopped by the judge.[5] And even where a plaintiff was under the necessity of calling the defendant in interest as a witness, for the sake of formal proof only, he not being party to the record, it has been held that he was thereby made a witness for all purposes, and might be cross-examined to the whole case.[6] In some of the American courts the same rule has been adopted;[7] but in others, the contrary has been held;[8] and the rule is now considered by the Supreme Court of the United States to be well established [therein] 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; and that if he wishes to examine

of the Court, in view of the circumstances: Gass *v.* Stinson, 3 Sumn. 104–108; *post*, § 554.

[2] Perry *v.* Gibson, 1 Ad. & El. 48; Davis *v.* Dale, 1 M. & M. 514; Reed *v.* James, 1 Stark. 132; Rush *v.* Smith, 1 C. M. & R. 94; Summers *v.* Moseley, 2 C. & M. 477. {Where the State has summoned a witness, and the witness has been sworn, but not examined, the prisoner has no right to cross-examine him as to the whole case: Austin *v.* State, 14 Ark. 555. If a witness gives no testimony in his examination in chief, he cannot be cross-examined for the purpose of discrediting him: Bracegirdle *v.* Bailey, 1 F. & F. 536. At a preliminary hearing, to determine the competency of evidence, the judge may refuse to permit cross-examination: Com. *v.* Morrell, 99 Mass. 542.}

[3] R. *v.* Brooke, 2 Stark. 472; Phillips *v.* Eamer, 1 Esp. 357; Dickinson *v.* Shee, 4 Esp. 67; R. *v.* Murphy, 1 Armst. Macartn. & Ogle, 204.

[4] Clifford *v.* Hunter, 3 C. & P. 16; Rush *v.* Smith, 1 C. M. & R. 94; Wood *v.* Mackinson, 2 M. & Rob. 273.

[5] Creevy *v.* Carr, 7 C. & P. 64.

[6] Morgan *v.* Brydges, 2 Stark. 314.

[7] Moody *v.* Rowell, 17 Pick. 490, 498; {Blackington *v.* Johnson, 126 Mass. 21; Com. *v.* Morgan, 107 id. 199;} Jackson *v.* Varick, 7 Cowen 238; 2 Wend. 166; Fulton Bank *v.* Stafford, 2 Wend. 483; {Linsley *v.* Lovely, 26 Vt. 123; Mask *v.* State, 32 Miss. 405; State *v.* Sayers, 58 Mo. 585.}

[8] {Bell *v.* Chambers, 38 Ala. 660; Toole *v.* Nichol, 43 id. 406, 419;} [Taggart *v.* Bosch, Cal., 48 Pac. 1092; Thalheim *v.* State, 38 Fla. 169;] {Brown *v.* State, 28 Ga. 199;} [State *v.* Larkins, Ida., 47 Pac. 945; Bonnet *v.* Glattfeldt, 120 Ill. 172; Wheeler & W. M. Co. *v.* Barrett, 172 id. 610; Johnson *v.* Wiley, 74 Ind. 237; Riordan *v.* Guggerty, 74 Ia. 690;] {Lawder *v.* Henderson, 36 Kan. 754; Haynes *v.* Ledyard, 33 Mich. 319; State *v.* Chamberlain, 89 Mo. 132;} [Atwood *v.* Marshall, Nebr., 71 N. W. 1064;] {Buckley *v.* Buckley, 12 Nev. 423;} [State *v* Zellers, 7 N. J. L. 229; State *v.* Pancoast, 5 N. D. 516;] {Fulton *v.* Bank, 92 Pa. 112;} [Wendt *v.* R. Co., S. D., 68 N. W. 749; Miller *v.* Miller, 92 Va. 510; Bishop *v.* Averill, 17 Wash. 209.]

him 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.[9] [A few Courts, however, leave it to the trial judge's discretion to allow the introduction of the cross-examiner's own case at that stage.[10] The rule adopted in the majority of jurisdictions, prohibiting such evidence on cross-examination, seems much inferior to the original and orthodox rule, not only in the matter of fairness and due liberty of procedure, but also in respect to the petty quibbles which it inevitably brings in its train.[11] — Whether a re-cross-examination should be allowed, either after a re-direct examination, or after the witness has left the stand without cross-examination, or as complementary to the original cross-examination and after the witness has left the stand, is generally said to be within the discretion of the trial Court;[12] but in the first case it should cover only the matters dealt with on the re-direct examination.[13]]

§ 446. **Sundries.** The power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious, tests, which the law has devised for the discovery of truth. By means of it the situation of the witness with respect to the parties, and to the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description are all fully investigated and ascertained, and submitted to the consideration of the jury, before whom he has testified, and who have thus had an opportunity of observing his demeanor, and of determining the just weight and value of his testimony. It is not easy for a witness, who is subjected to this test, to impose on a Court or jury; for however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which a cross-examination may be extended.[1]

§ 447. Whether, when a party is once entitled to cross-examine a witness, this right continues through all the subsequent stages of the cause, so that if the party should afterwards recall the same witness, to prove a part of his own case, he may interrogate him by leading questions, and treat him as the witness of the party who first adduced him, is also a question upon which different opinions have been held.

[9] Philadelphia & Trenton Railroad Co. *v.* Stimpson, 14 Peters 448, 461.

[10] [Huntsville R. Co. *v.* Corpening, 97 Ala. 681; Harrington *v.* Mining Co., 19 Mont. 411.]

[11] [For some attempts to frame a definition of the "facts connected with the matters stated in the direct examination," which may be entered into, see Dole *v.* Wooldredge, 142 Mass. 184; Chandler *v.* Allison, 10 Mich. 477.]

[12] [Nixon *v.* Beard, 111 Ind. 142; Chapman *v.* James, 96 Ia. 233; State *v.* Robinson, Or., 48 Pac. 357; People *v.* Thiede, 11 Utah 241; Atl. & D. R. Co. *v.* Rieger, Va., 23 S. E. 590.]

[13] [Moellering *v.* Evans, 121 Ind. 196.]

[1] Starkie, Evidence, I, 160.

Upon the general ground, on which this course of examination is permitted at all, namely, that every witness is supposed to be inclined most favorably towards the party calling him, there would seem to be no impropriety in treating him, throughout the trial, as the witness of the party who first caused him to be summoned and sworn.[1] But as the general course of the examination of witnesses is subject to the discretion of the judge, it is not easy to establish a rule which shall do more than guide, without imperatively controlling, the exercise of that discretion.[2] A party, however, who has not opened his own case, will not be allowed to introduce it to the jury by cross-examining the witnesses of the adverse party,[3] though, after opening it, he may recall them for that purpose.

§ 447 *a* [466]. If the memory of the witness is refreshed by a paper put into his hands, the adverse party may cross-examine the witness upon that paper, without making it his evidence in the cause. But if it be a book of entries, he cannot cross-examine as to other entries in the book without making them his evidence.[1] But if the paper is shown to the witness merely to prove the handwriting, this alone does not give the opposite party a right to inspect it, or to cross-examine as to its contents.[2] And if the paper is shown to the witness upon his cross-examination, and he is cross-examined upon it, the party will not be bound to have the paper read, until he has entered upon his own case.[3]

§ 448. We have already stated it as one of the rules governing the production of testimony, that the evidence offered must correspond with the allegations, and be confined to the point in issue. And we have seen that this rule excludes all evidence of collateral facts, or those which afford no reasonable inference as to the principal matter in dispute.[1] Thus, where a broker was examined to prove the market value of certain stocks, it was held that he was not compellable to state the names of the persons to whom he had sold such stocks.[2] As the plaintiff is bound, in the proof of his case, to confine his evidence to the issue, the defendant is in like manner restricted to the samepoint; and the same rule is applied to the respective parties through all the subsequent stages of the cause, —

[1] [See *ante*, § 444 *a*.]

[2] 1 Stark. Evid. 162; Moody *v.* Rowell, 17 Pick. 498; {Wallace *v.* Taunton Street Railway, 119 Mass. 91; Com. *v.* Lyden, 113 id. 452; Thomas *v.* Loose, 114 Pa. St. 47; Langley *v.* Wadsworth, 99 N. Y. 63.}

[3] Ellmaker *v.* Bulkley, 16 S. & R. 77; 1 Stark. Evid. 164; see § 445, *ante*.

[1] Gregory *v.* Tavernor, 6 C. & P. 280; and see Stephens *v.* Foster, ib. 289.

[2] Russell *v.* Rider, 6 C. & P. 416; Sinclair *v.* Stevenson, 1 id. 582; s. c. 2 Bing. 514.

[3] Holland *v.* Reeves, 7 C. & P. 36. {If, on cross-examination, the examining counsel requests the witness to produce a letter to which the witness refers, and examining counsel reads the letter, he cannot be compelled to put the letter in evidence or to read the letter to the jury: Carradine *v.* Hotchkiss, 120 N. Y. 611.}

[1] *Supra*, §§ 51, 52.

[2] Jonau *v.* Ferrand, 3 Rob. La. 366.

all questions as to collateral facts, except in cross-examination, being strictly excluded. The reasons of this rule have been already intimated. If it were not so, the true merits of the controversy might be lost sight of, in the mass of testimony to other points, in which they would be overwhelmed; the attention of the jury would be wearied and distracted; judicial investigations would become interminable; the expenses might be enormous; and the characters of witnesses might be assailed by evidence which they could not be prepared to repel.[3] It may be added, that the evidence not being to a material point, the witness could not be punished for perjury, if it were false.[4]

§ 449. In cross-examinations, however, this rule is not usually applied with the same strictness as in examinations in chief; but, on the contrary, great latitude of interrogation is sometimes permitted by the judge, in the exercise of his discretion, where, from the temper and conduct of the witness, or other circumstances, such course seems essential to the discovery of the truth, or, where the cross-examiner will undertake to show the relevancy of the interrogatory afterwards, by other evidence.[1] On this head, it is difficult to lay down any precise rule.[2] But it is a well-settled rule that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony;[3] and, if a question is put to a witness which is collateral or irrelevant to the issue, his answer cannot be contradicted by the party who asked the question; but it is conclusive against him.[4, 5]

[3] Phil. & Am. on Evid. 909, 910.

[4] But a question, having no bearing on the matter in issue, may be made material by its relation to the witness' credit, and false swearing thereon will be perjury: R. *v.* Overton, 2 Mood. Cr. Cas. 263.

[1] Haigh *v.* Belcher, 7 C. & P. 389; *supra*, § 52.

[2] Lawrence *v.* Barker, 5 Wend. 305. [For *cross-examination to character*, see *post*, § 461 *b*.]

[3] Spenceley *v.* De Willott, 7 East 108; 1 Stark. Evid. 164; Lee's Case, 2 Lewin's Cr. Cas. 154; Harrison *v.* Gordon, ib. 156.

[4] Harris *v.* Tippett, 2 Campb. 637; Odiorne *v.* Winkley, 2 Gall. 51, 53; Ware *v.* Ware, 8 Greenl. 52; R. *v.* Watson, 2 Stark. 116, 149; Lawrence *v.* Barker, 5 Wend. 301, 305; Meagoe *v.* Simmons, 3 C. & P. 75; Crowley *v.* Page, 7 id. 789; Com. *v.* Buzzell, 16 Pick. 157, 158; Palmer *v.* Trower, 14 Eng. L. & Eq. 470; 8 Exch. 247 [It is the latter part of this process, the contradiction, with which this prohibition is really concerned, — a subject treated *post*, § 461 *e*. As to the former part of it, the cross-examination, it is doubtful if there ever was a rule which forbade it upon collateral points, though such a rule has since been laid down on the faith of the above text. The true view seems to be as stated by Robinson, C. J., in R. *v.* Brown, 21 U. C. Q. B. 324: "He [the cross-examiner] is not in such cases obliged to explain the object of his question, because that might often defeat his object; but he must be content to take the answers."]

[5] [For the last half of this section, dealing with the subject of §§ 461 *f*, 462 *a*, see Appendix II.]

3. *Kinds of Impeaching Evidence.*

§ 450. **Bias.** [The partiality of a witness for one party or side, or his prejudice against the other side, is always regarded as bearing on the trustworthiness of his testimony. One way of showing the existence of such bias is his prior expression of such feelings. Thus, it is always allowable to inquire] [1] of the witness for the prosecution, in cross-examination, whether he has not expressed feelings of hostility towards the prisoner.[2] The like inquiry may be made in a civil action; and if the witness denies the fact, he may be contradicted by other witnesses.[3] [But the use of such evidence is allowable independently of its effect as a contradiction of the witness. In some Courts the limitation is laid down that the details of the quarrel or other exhibition of feeling are not to be gone into; but the phrasing of this limitation varies.[4] The witness may explain away his expressions as not due to real prejudice.[5] Some Courts require, in analogy to the principle described *post*, § 462, that the witness' attention be first called to the alleged utterance before other evidence of it can be offered.[6] Another way of showing the probable existence of such bias is to prove the witness' relationship with a party by blood or marriage or by illicit intercourse;[7]] thus, in assumpsit upon a promissory note, the execution of which was disputed, it was held material to the issue, to inquire of the subscribing witness, she being a servant of the plaintiff, whether she was not his kept mistress;[8] [so also the pendency of litigation with the opponent may tend to show bias against him.[9]]

§ 450 *a*. **Corruption.** [The witness' corrupt readiness to swear

[1] [This sentence originally began: "So, also, it has been held not irrelevant to the guilt or innocence of one charged with a crime, to inquire."]

[2] R. *v.* Yewin, cited 2 Campb. 638.

[3] Atwood *v.* Welton, 7 Conn. 66; {Martin *v.* Farnham, 5 Foster 195; Drew *v.* Wood, 6 id. 363; Cooley *v.* Norton, 4 Cush. 93; Long *v.* Lamkin, 9 id. 361; Newton *v.* Harris, 2 Selden 345; Com. *v.* Byron, 14 Gray 31;} [State *v.* McFarlain, 41 La. An. 687; Consaul *v.* Sheldon, 35 Nebr. 253.]

[4] [Titus *v.* Ash, 24 N. H. 323, 331; Ellsworth *v.* Potter, 41 Vt. 689; Jones *v.* State, 76 Ala. 15; People *v.* Goldenson, 76 Cal. 349.]

[5] [Chadwick's Trial, 18 How. St. Tr. 362; R. *v.* McKenna, Cr. & Dix Abr. 579; Hall *v.* State, 51 Ala. 15; People *v.* Fultz, 109 Cal. 258.]

[6] [The Queen's Case, 2 B. & B. 313; Carpenter *v.* Wall, 11 A. & E. 804; Baker *v.* Joseph, 16 Cal. 177; State *v.* Goodbier, 48 La. An. 770; State *v.* Glynn, 51 Vt. 579; Davis *v.* State, Minn., 70 N. W. 984; State *v.* Ellsworth, 30 Or. 145. *Contra:* Lucas *v.* Flinn, 35 Ia. 14; Cook *v.* Brown, 34 N. H. 471.]

[7] [Smith *v.* State, 143 Ind. 685: Long *v.* Booe, 106 Ala. 570; State *v.* Smith, 8 S. D 547; U. S. *v.* Davis, 33 Fed. 865.]

[8] Thomas *v.* David, 7 C. & P. 350; [Holly *v.* Com., Ky., 36 S. W. 532; State *v.* Johnson, 48 La. An. 437.]

[9] [Hitchcock *v.* Moore, 70 Mich. 115; Pierce *v.* Gilson, 9 Vt. 222; but not necessarily so: Langhorne *v.* Com., 76 Va. 1016, 1024. That the party-witness is protected by liability-insurance cannot be shown: McQuillan *v.* Light Co., Conn., 40 Atl. 928; Demars *v.* Mfg. Co., N. H., 40 Atl. 902; *contra:* Day *v.* Donohue, N. J. L., 41 Atl. 934. Compare § 14 *o*, *ante*.]

falsely is another fact that will tell against his trustworthiness. It may be evidenced by his prior expressions indicative of such general willingness,[1] or by a distinct offer to swear falsely,[2] or by an attempt to suborn another witness,[3] or by his receipt of a bribe; but that he has been offered a bribe and has rejected it is irrelevant,[4] except so far as the opponent's connection can be shown, and then its only effect is that of the party's admission of the weakness of his case.[5]]

§ 450 *b*. **Insanity, Intoxication, etc.** [A witness' insanity, while it may not have sufficed to exclude him from the stand, may nevertheless be used to discredit him.[1] Intoxication also, if it be of such a degree as to deserve the name, is admissible for this purpose.[2] An impairment of the faculties from the use of morphine is equally relevant,[3] as well as an impairment of the memory by disease or old age.[4] But the mere fact of being endowed with a less satisfactory memory than the normal one is a matter too open to misconstruction to be availed of in this way.[5]]

§§ 451–456.[1]

§§ 457–461.[2]

§ 461 *a*. **Character; (1) Kind of Character.** [The fundamental trait desirable in a witness is the disposition to tell truth, and hence the trait of character that should naturally be shown in impeaching him is his bad character for veracity. But there has always been more or less support[1] for the use of bad general character — *i. e*

[1] [De la Motte's Trial, 21 How. St. Tr. 791 ("I swear anything"); Beaubien *v.* Cicotte, 12 Mich. 484 ("I played good Lord and good devil"); Sweet *v.* Gilmore, S. C., 30 S. E. 394; but not merely by his belief as to a religious sanction for false swearing: Freind's Trial, 13 How. St. Tr. 31, 43, 58; Darby *v.* Ouseley, 1 H. & N. 6, 10; Com. *v.* Buzzell, 6 Pick. 156; see Bentham, vol. i, 235, vol. v, 134; though in some Courts by a general atheistic belief: Com. *v.* Burke, 16 Gray 33; State *v.* Turner, 36 S. C. 534, 543; Odell *v.* State, 61 Tenn. 91; *contra:* People *v.* Copsey, 71 Cal. 548.]

[2] [Roberts *v.* Com., Ky., 20 S. W. 267; Alward *v.* Oaks, 63 Minn. 190; Barkly *v.* Copeland, 74 Cal. 1, 5.]

[3] [Lord Stafford's Trial, 7 How. St. Tr. 1401; Maharajah Nuncomar's Trial, 20 id. 1035; Matthews *v.* Lumber Co., Mich., 67 N. W. 1008; State *v.* Stein, 79 Mo. 330; Martin *v.* Barnes, 7 Wis. 242.]

[4] [See The Queen's Case, 2 B. & B. 305; Att'y-Gen'l *v.* Hitchcock, 1 Exch. 91; Com. *v.* Sacket, 22 Pick. 395.]

[5] [See *ante*, § 195 *a*.]

[1] [Fowke's Trial, 20 How. St. Tr. 1175; State *v.* Hayward, 62 Minn. 474.]

[2] [Walker's Trial, 23 How. St. Tr. 1157; Rector *v.* Rector, 8 Ill. 105, 117; Tuttle *v.* Russell, 2 Day 202; Com. *v.* Fitzgerald, 2 All. 297; Mace *v.* Reed, 89 Wis. 440; State *v.* Nolan, 92 Ia. 491; Willis *v.* State, 43 Nebr. 102.]

[3] [McDowell *v.* Preston, 26 Ga. 535; State *v.* Glein, 17 Mont. 17; People *v.* Webster, 139 N. Y. 73, 86; State *v.* Robinson, 12 Wash. 491. *Excluded:* Franklin *v.* Franklin, 90 Tenn. 49; Botkin *v.* Cassady, Ia., 76 N. W. 723.]

[4] [Alleman *v.* Stepp, 52 Ia. 627; People *v.* Genung, 11 Wend. 18; Isler *v.* Dewey, 75 N. C. 466; Lord *v.* Beard, 79 id. 12. *Contra:* Merritt *v.* Merritt, 20 Ill. 65, 80.]

[5] [Bell *v.* Rinner, 16 Oh. St. 46; Ah Tong *v.* Fruit Co., 112 Cal. 679; Goodwyn *v.* Goodwyn, 20 Ga. 620. *Contra:* Com. *v.* Cooper, 5 All. 497.]

[1] [Transferred *post*, to follow § 469.]

[2] [Transferred to Appendix II; the subject is expanded into the ensuing sections, 461 *a* to *g*.]

[1] [The argument is set forth in State *v.* Boswell, 2 Dev. 210; Bakeman *v.* Rose,

the man as a whole, not specifically the trait of veracity — as necessarily involving an impairment of veracity. This was the original English doctrine; but it was replaced, in the early 1800s,[2] by the first-mentioned principle, with the exception that the witness was allowed to base his statement as to the other's veracity upon his knowledge of the other's general character. In this country the better doctrine that the trait of veracity only could be considered was early introduced; and this is the rule in the great majority of jurisdictions.[3] In those jurisdictions allowing the use of general

18 Wend. 146, 151; and is answered in Gilchrist *v.* M'Kee, 4 Watts 381; State *v.* Smith, 7 Vt. 143; Carter *v.* Cavenaugh, 1 Greene Ia. 173; State *v.* Randolph, 24 Conn. 363, 367.]

[2] [See *post*, § 461 *c*.]

[3] [Space does not suffice to analyze the course of rulings in each State: McCutchen's Adm'rs *v.* McCutchen, 9 Port. 650, 655; Sorrelle *v.* Craig, 9 Ala. 540; Nugent *v.* State, 18 id. 526; Ward *v.* State, 28 id. 53, 64; Boles *v.* State, 46 id. 206; DeKalb Co. *v.* Smith, 47 id. 412; Holland *v.* Barnes, 53 id. 86; Motes *v.* Bates, 80 id. 382, 385; Davenport *v.* State, 85 id. 336, 338; McInerny *v.* Irvin, 90 id. 275, 277; B. U. R. Co. *v.* Hale, ib. 8, 11; Mitchell *v.* State, 94 id. 68, 73; Rhea *v.* State, 100 id. 119; Byers *v.* State, 105 id. 31; Yarbrough *v.* State, ib. 43; McCutchen *v.* Loggins, 109 id. 457; Crawford *v.* State, 112 id. 1; White *v.* State, 114 id. 10; Pleasant *v.* State, 15 Ark. 624, 651; Majors *v.* State, 29 id. 112; Hollingsworth *v.* State, 53 id. 387, 394; People *v.* Yslas, 27 Cal. 630, 633; C. C. P. § 2051; People *v.* Markham, 64 id. 157, 163; People *v.* Johnson, 106 id. 289; People *v.* Chin Hane, 108 id. 597; People *v.* Prather, id., 53 Pac. 259; People *v.* Silva, id., 54 Pac. 146; State *v.* Shields, 45 Conn. 256, 263; Robinson *v.* State, 16 Fla. 835, 839; Mercer *v.* State, id., 24 So. 154; Stokes *v.* State, 18 Ga. 17, 37; Smithwick *v.* Evans, 24 id. 463; Weathers *v.* Barkdale, 30 id. 889; Wood *v.* State, 48 id. 192, 292; Frye *v.* Bank, 11 Ill. 367, 378; Crabtree *v.* Kile, 21 id. 183; Cook *v.* Hunt, 24 id. 535, 550; Dimick *v.* Downs, 82 id. 570, 573; Tedens *v.* Schumers, 112 id. 263, 266; Spies *v.* People, 122 id. 1, 208; Ind. C. C. § 242; Walker *v.* State, 6 Blackf. 3; I. P. & C. R. Co. *v.* Anthony, 43 Ind. 183, 193; Rawles *v.* State, 56 id. 439; Smock *v.* Pierson, 68 id. 405; Fletcher *v.* State, 49 id. 131; Farley *v.* State, 57 id. 334; State *v.* Bloom, 68 id. 55; State *v.* Beal, ib. 346; R. S. 1881, § 1803; Wachstetter *v.* State, 99 Ind. 298; Anderson *v.* State, 104 id. 471; Randall *v.* State, 132 id. 543; Carter *v.* Cavenaugh, 1 Greene 171; State *v.* Later, 8 Ia. 420, 424; Kilburn *v.* Mullen, 22 id. 502; State *v.* Vincent, 24 id. 570, 574; State *v.* Egan, 59 id. 637; State *v.* Kirkpatrick, 63 id. 559; Craft *v.* State, 3 Kan. 450, 480; Coates *v.* Sulan, 21 id. 341; Noel *v.* Dickey, 3 Bibb 268; Mobley *v.* Hamit, 1 A. K. Marsh. 591; Hume *v.* Scott, 3 id. 261; Thurman *v.* Virgin, 18 B. Monr. 792; Young *v.* Com., 6 Bush 316; Com. *v.* Wilson, Ky., 82 S. W. 166; State *v.* Parker, 7 La. An. 83, 87; State *v.* Jackson, 44 id. 160, 162; State *v.* Taylor, 45 id. 605, 609; Phillips *v.* Kingfield, 19 Me. 375, 377; State *v.* Bruce, 24 id. 71; Thayer *v.* Boyle, 30 id. 475, 481; Shaw *v.* Emery, 42 id. 59, 64; Sidelinger *v.* Bucklin, 64 id. 371; State *v.* Morse, 67 id. 428; Hutchings *v.* Cavalier, 3 H. & McH. 389; Brown *v.* State, 72 Md. 468, 480; Com. *v.* Murphy, 14 Mass. 387; Com. *v.* Churchill, 11 Pick. 539; Quinsigamond Bank *v.* Hobbs, 11 Gray 257; Pierce *v.* Newton, 13 id. 528; Webber *v.* Hanke, 4 Mich. 198, 203; Hamilton *v.* People, 29 id. 173, 185; Rudsdill *v.* Slingerland, 18 Minn. 380; Moreland *v.* Lawrence, 23 id. 84, 88; Newman *v.* Mackin, 13 Sm. & M. 383, 387; Head *v.* State, 44 Miss. 731, 751; Smith *v.* State, 58 id. 867; French *v.* Sale, 63 id. 386, 393; Tucker *v.* Tucker, 74 id. 93; State *v.* Shields, 13 Mo. 236; Day *v.* State, ib. 422, 426; State *v.* Hamilton, 55 id. 520, 522; State *v.* Breeden, 58 id. 507; State *v.* Clinton, 67 id. 380, 390; State *v.* Miller, 71 id. 591; State *v.* Grant, 79 id. 133; State *v.* Rider, 90 id. 54, 63; 95 id. 474, 486; State *v.* Taylor, 98 id. 240, 245; State *v.* Shroyer, 104 id. 441, 446; State *v.* Smith, 125 id. 2, 6; State *v.* Duffey, 128 id. 549; State *v.* Sibley, 131 id. 519; State *v.* Weeden, 133 id. 70; State *v.* Dyer, 139 id. 199; State *v.* May, 142 id. 135; State *v.* Summar, id., 45 S. W. 254; State *v.* Ferguson, 9 Nev. 106, 120; State *v.* Larkin, 11 id. 314, 330; State *v.* Howard, 9 N. H. 486; Chase *v.* Blodgett, 10 id. 24; Hoitt *v.* Moulton, 21 id. 592; State *v.* Forschner, 43 id. 89; State *v.* Mairs, 1 N. J. L. 456;

character, the question may also arise whether character for any other specific vice than mendaciousness may be shown; the better opinion repudiates such a practice.[4]]

§ 461 *b*. **Character; (2) Proof by Particular Acts of Misconduct.** [One sort of evidence of character is conduct exhibiting that character. How far may the witness' character be exposed by introducing particular instances of conduct throwing light on that character? The important line of distinction here is between proof by outside testimony — *i. e.* by other witnesses — and proof by cross-examination of the witness to be impeached.

(*a*) *By other Witnesses.* It has long been settled[1] that testimony from other witnesses of particular instances of misconduct is an improper mode of discrediting, because of the confusion of issues and waste of time that would thus be involved, and because of the unfair surprise to the witness, who cannot know what variety of false charges may be specified and cannot be prepared to expose their falsity.[2] This rule excluding proof by other witnesses is well settled and everywhere accepted.

(*b*) *Conviction of Crime.* The above reasons cease to be applicable where the discrediting fact is the conviction of a crime, because the proof of this, by the record of conviction or a copy of it, does not lead to confusion of issues and does not operate upon the witness with unfair surprise.[3] (*b'*) Accordingly, proof by the record of conviction of crime is universally conceded to be a proper mode of impeachment.[4] (*b''*) As to what kinds of crimes may here be employed, there is no general agreement. When conviction as a

Atwood *v.* Impson, 20 N. J. Eq. 157; King *v.* Ruckman, ib. 316, 357; Territory *v.* De Guzman, N. M., 42 Pac. 69; Jackson *v.* Lewis, 13 Johns. 505; Troup *v.* Sherwood, 3 Johns. Ch. 558, 566; Bakeman *v.* Rose, 18 Wend. 146; People *v.* Abbott, 19 id. 198; People *v.* Rector, ib. 579; Johnson *v.* People, 3 Hill 178; People *v.* Blakeley, 4 Park. Cr. 182; Carlson *v.* Winterson, N. Y., 42 N. E. 347; State *v.* Stallings, 2 Hayw. 300; State *v.* Boswell, 2 Dev. 209; State *v.* O'Neale, 4 Ired. 88; State *v.* Dove, 10 id. 469, 473; State *v.* Perkins, 66 N. C. 127; Wilson *v.* Runyan, Wright, 652; Bucklin *v.* State, 20 Oh. 18; French *v.* Millard, 2 Oh. St. 50; Craig *v.* State, 5 id. 607; Hillis *v.* Wylie, 26 id. 576; Gilchrist *v.* M'Kee, 4 Watts 380, 381; Anon., 1 Hill S. C. 258; Clark *v.* Bailey, 2 Strobh. Eq. 143, 144; Gilliam *v.* State, 1 Head 38; Merriman *v.* State, 3 Lea 393, 394; Jones *v.* Jones, 13 Tex. 168, 176; Boon *v.* Weathered, 23 id. 675, 678; Ayres *v.* Duprey, 27 id. 593, 599; Johnson *v.* Brown, 51 id. 65, 77; Kennedy *v.* Upshaw, 66 id. 442, 452; U. S. *v.* White, 5 Cr. C. C. 43; U. S. *v.* Vansickle, 2 McLean 219; U. S. *v.* Dickinson, ib. 325, 329; Gaines *v.* Relf, 12 How. 555; Teese *v.* Huntington, 23 How. 2, 13; U. S. *v.* Breedmeyer, 6 Utah 143, 146; State *v.* Marks, id., 51 Pac. 1089; Morse *v.* Pineo, 4 Vt. 281; State *v.* Smith, 7 id. 141; Spears *v.* Forrest, 15 id. 435; Crane *v.* Thayer, 18 id. 168; State *v.* Fournier, 68 id. 262; Ligon *v.* Ford, 5 Munf. 10, 16; Uhl *v.* Com., 6 Gratt. 706, 708; Lemons *v.* State, 4 W. Va. 755; Ketchingman *v.* State, 6 Wis. 426, 431.]

[4] [See the argument *pro* in State *v.* Sibley, 132 Mo. 102; the argument *con* in Bakeman *v.* Rose, 18 Wend. 146. The cases will be found in the preceding note.]

[1] [Beginning with Rookwood's Trial, 13 How. St. Tr. 209, in 1696, and fairly established by the time of Layer's Trial, 16 id. 246, in 1722.]

[2] [These reasons are set forth fully in R. *v.* Watson, 2 Stark. 149; Second Report of Common Law Practice Com'rs, 1853, p. 22; People *v.* Jackson, 3 Park. Cr. 395.]

[3] [People *v.* Jackson, 3 Park. Cr. 396.]

[4] [For the nature of the record required, see *ante*, § 375.]

ground for total disqualification was abolished by statute, the statute usually provided for the use of such evidence in impeachment, and accordingly the statute often indicates the precise range allowable.[5] Where it does not, the question may arise whether the kinds of crime are to be the same as were formerly sufficient to disqualify, or whether they are to be limited to those which affect the trait of veracity. In most jurisdictions the former solution is reached.[6] (*b'''*) Where the conviction is sought to be proved by questioning the witness himself on cross-examination, the objection arises that, by the rule of Primariness (*post*, § 563 *a*; *ante*, § 375), the contents of the record cannot be proved orally; and this objection was originally held fatal. But as there was in truth no danger in accepting the witness' own admission that he was convicted, and as any other method usually involved inordinate expense,[7] the propriety of proving the conviction by cross-examination has come in most jurisdictions to be conceded, usually by statute, but occasionally by judicial decision.[8]

[5] [See the statutes set out in Appendix II.]

[6] [Space does not suffice to analyze the cases: St. 17–18 Vict. c. 125, ss. 25, 103; Campbell *v.* State, 23 Ala. 44, 73; Prior *v.* State, 99 id. 196; Cal. C. C. P. § 2051; People *v.* Reinhart, 39 Cal. 449; People *v.* Amanacus, 50 id. 233, 235; People *v.* Carolan, 79 id. 195; People *v.* Chin Hane, 108 id. 597; State *v.* Randolph, 24 Conn. 363, 365; Johnson *v.* State, 46 Ga. 118; Coleman *v.* State, 94 id. 85; Killian *v.* R. Co., 97 id. 727; Shaw *v.* State, id., 29 S. E. 477; Bartholomew *v.* People, 104 Ill. 601, 607; Harmers *v.* McClelland, 74 Ia. 318, 322; State *v.* O'Brien, 81 id. 96; Burdette *v.* Com, 93 Ky. 76; State *v.* Watson, 63 Me. 128, 136; 65 id. 79; State *v.* Farmer, 84 id. 440; McLaughlin *v.* Mencke, 80 Md. 83; Com. *v.* Bonner, 97 Mass. 587; Com. *v.* Gorham, 99 id. 420; Wilbur *v.* Flood, 16 Mich. 44; Clemens *v.* Conrad, 19 id. 174; Dickinson *v.* Dustin, 21 id. 564; People *v.* Driscoll, 47 id. 416; People *v.* Mausaunan, 60 id. 15, 21; Helwig *v.* Lascowski, 82 id. 621; State *v.* Curtis, 39 Minn. 359; State *v.* Sauer, 42 id. 259; State *v.* Adamson, 43 id. 200; State *v.* Rugan, 68 Mo. 215; State *v.* Taylor, 98 id. 240, 244; State *v.* Miller, 100 id. 622; State *v.* Donnelley, 130 id. 642; State *v.* Smith, 125 id. 2; Gardner *v.* R. Co., 135 id. 90; State *v.* Dyer, 139 id. 199; State *v.* Grant, id., 45 S. W. 1103; State *v.* Black, 15 Mont. 143; Chase *v.* Blodgett, 10 N. H. 22, 24; Clement *v.* Brooks, 13 id. 92, 99; Hoitt *v.* Moulton, 21 id. 592; St. July 13, 1871; Roop *v.* State, 58 N. J. L. 479; Territory *v.* Chavez, N. M., 45 Pac. 1107; Carpenter *v.* Nixon, 5 Hill 260; Newcomb *v.* Griswold, 24 N. Y. 298; Gardner *v.* Bartholomew, 40 Barb. 327; West *v.* Lynch, 7 Daly 246; Sims *v.* Sims, 75 N. Y. 472; P. C. § 714; People *v.* Noelke, 94 id. 137, 144; Spiegel *v.* Hays, 118 id. 660; Coble *v.* State, 31 Oh. St. 102; Anon., 1 Hill S. C. 257; State *v.* Wyse, 33 S. C. 593; Goode *v.* State, 32 Tex. Cr. 505, 508; U. S. *v.* Neverson, 1 Mackie 152, 172; Balt. & O. R. Co. *v.* Rambo, 16 U. S. App. 277, 281; Langhorne *v.* Com., 76 Va. 1016; State *v.* Payne, 6 Wash. 563, 569; Fosdahl *v.* State, 89 Wis. 482.]

[7] [Cooley, C. J., in Clemens *v.* Conrad, 19 Mich. 175.]

[8] [For the state of the law in the various jurisdictions, see the following cases: St. 17–18 Vict. c. 125, ss. 25, 103; Henman *v.* Lester, 12 C. B. N. S. 776; Baker *v.* Trotter, 73 Ala. 277, 281; Code 1897, § 1796; Thompson *v.* State, 100 Ala. 70, 72; Murphy *v.* State, 108 id. 10; Scott *v.* State, 49 Ark. 156, 158; South. Ins. Co. *v.* White, 58 id. 277, 279; People *v.* Reinhart, 39 Cal. 449; People *v.* McDonald, ib. 697; People *v.* Manning, 48 id. 335, 338; C. C. P. § 2051; People *v.* Rodrigo, 69 Cal. 606; People *v.* Dillwood, id., 39 Pac. 439; Johnson *v.* State, 46 Ga. 118; Killian *v.* R. Co., 97 id. 727; Huff *v.* State, id., 30 S. E. 868; Gage *v.* Eddy, 167 Ill. 102; Farley *v.* State, 57 Ind. 334; State *v.* Pfefferle, 36 Kan. 90, 92; Burdette *v.* Com., 93 Ky. 78; McLaughlin *v.* Mencke, 80 Md. 83; Advocate-General *v.* Hancock, 1 Quincy 461; Com. *v.* Quin, 5 Gray 479; Com. *v.* Gorham, 99 Mass. 420, 421; Com. *v.* Sullivan, 161 id. 59; Wilbur *v.* Flood, 16 Mich. 44; Clemens *v.* Conrad, 19 id. 174;

(*c*) *Scope of Cross-examination.* By the reasons above-mentioned, the impeaching party (except when proving a conviction of crime) is relegated exclusively to the cross-examination of the witness to be impeached, as the sole mode, not open to the above objections, of bringing out particular conduct affecting character.[9] Are there here any further limitations upon the scope of his inquiries, or is there absolute freedom for the cross-examiner in this process? (*c'*) There may be, first, a limitation as to relevancy. Not all misconduct indicates a bad character, and not all evil deeds indicate a lack of the truth-telling disposition. On principle, only such misconduct as exposes a lack of veraciousness or honesty should be inquired after (except in jurisdictions where general bad character is regarded as relevant), *e. g.* fraud, forgery, perjury, etc. To this conclusion come a number of Courts. But others (even in jurisdictions treating veracity-character as alone relevant) allow the inquiry to range over all sorts of misconduct, — *e. g.* robbery, assault, or prostitution, — however irrelevant to veracity. But, whatever the attitude of a Court on the above point, it may also make a distinction between the actual misconduct itself and the mere charge of misconduct — as by arrest, indictment, etc., — excluding the latter as not in itself involving any guilt or reproach for the person thus — perhaps falsely — charged.[10] (*c''*) There may, secondly, be a limitation based on the general impropriety of allowing an unrestrained raking-up of the witness' misdeeds and of thus making the witness-box a source of annoyance and terror both to reputable and disreputable persons alike. The utility of such exposures is comparatively so small and the abuse of such cross-examination by unscrupulous counsel is so common that some measures of restriction are highly desirable, and this attitude of the Courts may well be emphasized as the only proper one. The object is attained, in most jurisdictions, by declaring the trial Court to have discretion to set limits to such an examination (irrespective of its relevancy), and to forbid it whenever it seems to be unnecessary or profitless or undesirable;[11] and

Dickinson *v.* Dustin, 21 id. 565; People *v.* Driscoll, 47 id. 416; People *v.* Mausaunan, 60 id. 15, 21; Helwig *v.* Laseowski, 82 id. 621; Jackson *v.* State, Miss., 21 So. 707; State *v.* Rugan, 68 Mo. 215; State *v.* Miller, 100 id. 622; State *v.* Martin, 124 id. 514; State *v.* Black, 15 Mont. 143; Smith *v.* Smith, 43 N. H. 536, 538; People *v.* Herrick, 13 Johns. 82, 84; Hilts *v.* Colvin, 14 id. 182, 184; Newcomb *v.* Griswold, 24 N. Y. 299; Real *v.* People, 42 id. 273, 281; Perry *v.* People, 86 id. 353, 358; Penal Code, § 714; People *v.* Noelke, 94 N. Y. 137, 144; Spiegel *v.* Hays, 118 id. 660; Wroe *v.* State, 20 Oh. St. 471; Asher *v.* Terr., Okl., 54 Pac. 445; Moore *v.* State, 96 Tenn. 209; Dunbar *v.* U. S., 156 U. S. 191; Durland *v.* U. S., id., 16 Sup. 508; Balt. & O. R. Co. *v.* Rambo, 16 U. S. App. 277, 284; State *v.* Slack, 69 Vt. 486; State *v.* Payne, 6 Wash. 563, 568; Kirschner *v.* State, 9 Wis. 140, 144; Ingalls *v.* State, 48 id. 647, 654; McKesson *v.* Sherman, 51 id. 303, 311.]

[9] [Well explained in Oxier *v.* U. S., Ind. Terr., 38 S. W. 331.]

[10] [People *v.* Crapo, 76 N. Y. 288; Ryan *v.* People, 79 id. 597; State *v.* Greenburg, Kan., 53 Pac. 61.]

[11] [The phrasings differ; see the policy of this limitation eloquently set forth in Third Gt. West. T. Co. *v.* Loomis, 32 N. Y. 127, 132; see another good exposition in Terr. *v.* Chavez, N. Mex., 45 Pac. 1107.]

such is the rule now in vogue in the majority of jurisdictions. A few Courts, with courage and wisdom, have taken the step of forbidding entirely such cross-examination to character.[12] A few others, on the contrary, still impose no limitations, other than those of relevancy above referred to. — Unfortunately, not all Courts have steadily and definitely committed themselves to any one of the preceding varieties of rules; and in some jurisdictions — *e. g.* in New York — it is possible to ascertain the state of the law only by a careful comparison of a series of rulings. The above distinctions seem to be substantially all that have been taken — irrespective of trifling local variations — and will serve as a guide to the condition of the law in a given jurisdiction.[13] — It must be added that the witness'

[12] [*E. g.* Elliott *v.* Boyles, 31 Pa. 67; Com. *v.* Schaffner, 146 Mass. 512; Anthony *v.* State, Ida., 55 Pac. 884 (by statute).]

[13] [For the state of the law in the various jurisdictions, see the following cases: Maskall's Trial, 21 How. St. Tr. 667; Rowan's Trial, 22 id. 1115; Watson's Trial, 32 id. 295; R. *v.* Hunt, 1 State Tr. N. S. 171, 220, 234; R. *v.* Duffey, 7 id. 795, 892; Henman *v.* Lester, 12 C. B. N. S. 776; Second Report Common Law Practice Com'rs, 1853, p. 21; R. *v.* Orton (Tichborne Trial), Charge of C. J. Cockburn, II, 720, 722; Stephen Hist. Crim. Law, I, 433; Rules of Court, 1883, Ord. 36, R. 38, and the line of cases cited *post*, § 469 *i*; Boles *v.* State, 46 Ala. 206; Nelms *v.* Steiner, 113 id. 562; Pleasant *v.* State, 13 Ark. 360, 377; 15 id. 624, 649; Hollingsworth *v.* State, 53 id. 387, 389; Holder *v.* State, 58 id. 478; Clark *v.* Reese, 35 Cal. 89, 96; People *v.* Snellie, 48 id. 333; C. C. P. § 2051; People *v.* Manning, 48 Cal. 335, 338; Hinkle *v.* R. Co., 55 id. 627, 632; People *v.* Hamblin, 68 id. 101, 103; People *v.* Carolan, 79 id. 195; Cockrill *v.* Hall, 76 id. 192, 196; Sharon *v.* Sharon, 79 id. 633, 673; Davis *v.* Powder Works, 84 id. 617, 627; People *v.* Tiley, ib. 651, 652; Jones *v.* Duchow, 87 id. 109, 114; People *v.* Wells, 100 id. 459, 462; People *v.* Un Dong, 106 id. 83; People *v.* Chin Hane, 108 id. 597; People *v.* Ross, 115 id. 233; People *v.* Silva, id., 54 Pac. 146; People *v.* Piercy, id., 55 Pac. 141; Steene *v.* Aylesworth, 18 Conn. 244; Kelsey *v.* Ins. Co., 35 id. 225, 233; State *v.* Ward, 49 id. 433, 442; State *v.* Ferguson, id., 41 Atl. 769; Goon Bow *v.* People, Ill., 43 N. E. 593; Walker *v.* State, 6 Blackf. 3; Hill *v.* State, 4 Ind. 112; Townsend *v.* State, 13 id. 358; Bersch *v.* State, ib. 436; South Bend *v.* Hardy, 98 id. 579, 584; Bessette *v.* State, 101 id. 85, 88; Spencer *v.* Robbins, 106 id. 580, 586; Bedgood *v.* State, 115 id. 279; Parker *v.* State, 136 id. 284; Blough *v.* Parry, 144 id. 463; Shears *v.* State, 147 id. 51; Miller *v.* Dill, id., 49 N. E. 272; Vancleave *v.* State, id., 49 N. E. 1060; Ellis *v.* State, id., 52 N. E. 82; Oxier *v.* U. S., Ind. T., 38 S. W. 331; Oats *v.* U. S., id., 38 S. W. 673; Madden *v.* Koester, 52 Ia. 692; State *v.* Osborne, 96 id. 281; State *v.* Watson, 102 id. 651; State *v.* Chingren, id., 74 N. W. 946; State *v.* Pfefferle, 36 Kan. 90, 92; State *v.* Reed, 53 id. 767; State *v.* Greenburg, id., 53 Pac. 61; Burdette *v.* Com., 93 Ky. 77; Roberts *v.* Com., id., 20 S. W. 267; Com. *v.* Wilson, id., 32 S. W. 166; Warren *v.* Com., 99 id. 370; Leslie *v.* Com., id., 42 S. W. 1095; State *v.* Murphy, 45 La. An. 958, 961; State *v.* Dudoussat, 47 id. 977; State *v.* Southern, 48 id. 628; Smith *v.* State, 64 Md. 25; Hathaway *v.* Crocker, 7 Met. 266; Com. *v.* Shaw, 4 Cush. 593; Com. *v.* Savory, 10 id. 535, 537; Com. *v.* Hill, ib. 530, 532; Smith *v.* Castles, 1 Gray 108, 112; Com. *v.* Quin, 5 id. 479, 480; Gardner *v.* Way, 8 id. 189; Holbrook *v.* Dow, 12 id. 357; Prescott *v.* Ward, 10 All. 204, 209; Com. *v.* Regan, 105 Mass. 593; Com. *v.* Mason, ib. 163, 168; Com. *v.* McDonald, 110 id. 405; Jennings *v.* Machine Co., 138 id. 594, 597; Com. *v.* Schaffner, 146 id. 512, 515; Wilbur *v.* Flood, 16 Mich. 43; Arnold *v.* Nye, 23 id. 295; Gale *v.* People, 26 id. 157; Beebe *v.* Knapp, 28 id. 53, 72; Hamilton *v.* People, 29 id. 183; Bissell *v.* Starr, 32 id. 297; Saunders *v.* People, 38 id. 218; People *v.* Knapp, 42 id. 267; People *v.* Whitson, 43 id. 420; People *v.* Niles, 44 id. 608; Hamilton *v.* People, 46 id. 188; Marx *v.* Hilsendegen, ib. 337; Driscoll *v.* People, 47 id. 417; Helwig *v.* Lascowski, 82 id. 621; People *v.* Foote, 93 id. 38; People *v.* Kohler, ib. 625, 630; People *v.* Harrison, ib. 596; People *v.* Mills, 94 id. 630, 637; People *v.* Sutherland, 104 id. 468; Kingston *v.* R. Co., id., 70 N. W. 315; People *v.* Parmelee, id., 70 N. W. 577; McArdle *v.* McArdle,

privilege (if there be one) not to disclose matters disgracing him is a very different question from the present one (though sometimes, in the earlier English cases and in a few modern cases, not distinguished from it); and is treated *post*, § 469 *i*.]

§ 461 *c*. **Character: (3) Proof by Personal Knowledge or Opinion.** [The most natural way to learn what disposition to truth-telling is possessed by a witness would be to receive the estimates of those who are personally and intimately acquainted with him and have had ample opportunity to learn his true character; and such was the original and orthodox practice, both in England and in this country.[1] Such continues to be the rule in England, the inquiry being usually in the form, "Would you believe him on oath?" but permissibly also, "Knowing his general character, would you believe him on oath?"[2] In this country, by a series of misunderstandings,[1] the orthodox practice has been widely departed from, and a variety of rules obtain. (*a*) In a few jurisdictions, personal opinion in any form is absolutely excluded. (*b*) In a few jurisdictions the orthodox permission of it is retained. (*c*) In many jurisdictions, the impeaching witness may be asked, "Knowing his reputation (or,

12 Minn. 98, 107; State *v.* McCartey, 17 id. 76, 86; State *v.* Clinton, 67 Mo. 380, 390; Muller *v.* Hospital Assoc., 73 id. 242; State *v.* Miller, 100 id. 606, 621; State *v.* Martin, 124 id. 514; State *v.* Gesell, ib. 531; Goins *v.* Moberly, 127 id. 116; Hancock *v.* Blackwell, 139 id. 440; State *v.* Grant, id., 45 S. W. 1103; Anon., 37 Miss. 54, 58; Head *v.* State, 44 id. 731, 751; Tucker *v.* Tucker, 74 id. 93; State *v.* Gleim, 17 Mont. 17; Hill *v.* State, 42 Nebr. 503; Myers *v.* State, 51 id. 517; State *v.* Huff, 11 Nev. 17, 26; Clement *v.* Brooks, 13 N. H. 92, 99; State *v.* Staples, 47 id. 113, 117; Gutterson *v.* Morse, 58 id. 165; Fries *v.* Brugler, 12 N. J. L. 79; Paul *v.* Paul, 37 N. J. Eq. 25; Roop *v.* State, 58 N. J. L. 479; Territory *v.* De Gutman, N. M., 42 Pac. 68; Territory *v.* Chavez, id., 45 Pac. 1107; Borrego *v.* Territory, id., 46 Pac. 349; People *v.* Rector, 19 Wend. 573, 582; Carter *v.* People, 2 Hill 317; Howard *v.* Ins. Co., 4 Den. 504, 506; Lohman *v.* People, 1 N. Y. 385; People *v.* Gay, 7 id. 378; Newcomb *v.* Griswold, 24 id. 299; Third G. W. Turnpike Co. *v.* Loomis, 32 id. 127, 138; Lipe *v.* Eisenlerd, 32 id. 238; La Beau *v.* People, 34 id. 230; Shepard *v.* Parker, 36 id. 517; Brandon *v.* People, 42 id. 265, 268; Real *v.* People, ib. 280; Connors *v.* People, 50 id. 240; Stokes *v.* People, 53 id. 176; Southworth *v.* Bennett, 58 id. 659; People *v.* Casey, 72 id. 393, 398; People *v.* Brown, ib. 571; People *v.* Crapo, 76 id. 288; Ryan *v.* People, 79 id. 597; People *v.* Court, 83 id. 436, 460; Nolan *v.* R. Co., 87 id. 63, 68; People *v.* Noelke, 94 id. 137, 143; People *v.* Irving, 95 id. 541; People *v.* Clark, 102 id. 736; People *v.* Giblin, 115 id. 196, 199; Van Bokkelen *v.* Berdell, 130 id. 141, 145; People *v.* McCormack, 135 id. 663; People *v.* Dorthy, id.; 50 N. E. 800; State *v.* Pancoast, 5 N. D. 516; State *v.* Patterson, 2 Ired. 346, 358; State *v.* Garrett, Busbee 358; State *v.* March, 1 Jones L. 526; State *v.* Cherry, 63 N. C. 32; Wroe *v.* State, 20 Oh. St. 460, 469; Lee *v.* State, 21 id. 151; Coble *v.* State, 31 id. 102; Hamilton *v.* State, 34 id. 86; Bank *v.* Slemmons, ib. 142, 147; Hanoff *v.* State, 37 id. 180; Steeples *v.* Newton, 7 Or. 110, 114; Elliott *v.* Boyles, 31 Pa. 65, 67; Hill *v.* State, 91 Tenn. 521, 523; Zanone *v.* State, 97 id. 101; Ryan *v.* State, ib. 206; Exon *v.* State, 33 Tex. Cr. 461; Evansich *v.* R. Co., 61 Tex. 24, 28; Dillingham *v.* Ellis, 86 id. 447; U. S. *v.* Cross, 20 D. C. 373; Thiede *v.* Utah, 159 U. S. 510; Smith *v.* U. S., 161 U. S. 85; Tla-koo-yel-lee *v.* U. S., 167 id. 274; Tingle *v.* U. S., U. S. App., 87 Fed. 320; State *v.* Fournier, 68 Vt. 262; State *v.* Slack, 69 id. 486; State *v.* Conkle, 16 W. Va. 736, 764; Ketchingman *v.* State, 6 Wis. 426, 430; Kirschner *v.* State, 9 id. 140, 143; Ingalls *v.* State, 48 id. 647, 654; McKesson *v.* Sherman, 51 id. 303, 311.]

[1] [The authorities are fully set forth in an article by the present editor in 32 Amer. Law Rev. 713, entitled "Proof of Character by Personal Knowledge or Opinion; its History."]

[2] [R. *v.* Hemp, 5 C. & P. 468; R. *v.* Brown, 10 Cox Cr. 453.]

character)," or "From his reputation (or, character), would you believe him on oath?" (*d*) In many jurisdictions, the same form is used, but the witness' belief is to be taken simply as a way of measuring the quality of the reputation as understood by him.[3] (*e*) In many jurisdictions holding character for veracity to be alone relevant (*ante*, § 461 *a*), the same form is used, except that the reputation or character premised must be solely that for veracity. It is sometimes difficult to ascertain which of these rules is the accepted law of a given jurisdiction, but the above enumeration seems to include all the varieties.[4] It is to be regretted that the orthodox practice has

[3] [See this view explained in Hillis *v.* Wylie, 26 Oh. St. 576; Hamilton *v.* People, 29 Mich. 185.]

[4] [The cases are as follows: McCutchen *v.* McCutchen, 9 Port. 655; Sorrelle *v.* Craig, 9 Ala. 539; Hadjo *v.* Gooden, 13 id. 721; Dave *v.* State, 22 id. 23, 38; Martin *v.* Martin, 25 id. 211; Ward *v.* State, 28 id. 63; Mose *v.* State, 36 id. 211, 230; Bullard *v.* Lambert, 40 id. 210; Artope *v.* Goodall, 53 id. 318, 325; Smith *v.* State, 88 id. 76; Holmes *v.* State, ib. 26; Moulton *v.* State, ib. 116; Jackson *v.* State, 106 id. 12; Crawford *v.* State, 112 id. 1; McAlpine *v.* State, id., 23 So. 130; Pleasant *v.* State, 15 Ark. 624, 653; Snow *v.* Grace, 29 id. 131, 136; Majors *v.* State, ib. 112; Hudspeth *v.* State, 50 id. 534, 543; Stevens *v.* Irwin, 12 Cal. 306, 308; People *v.* Tyler, 35 id. 553; People *v.* Methvin, 53 id. 68; Wise *v.* Wakefield, 118 id. 107; State *v.* Randolph, 24 Conn. 363, 367; Robinson *v.* Burton, 5 Harringt. 335, 339; Long *v.* State, 11 Fla. 295, 297; Robinson *v.* State, 16 id. 835, 840; Stokes *v.* State, 18 Ga. 17, 37; Smithwick *v.* Evans, 24 id. 463; S. F. & W. R. Co. *v.* Wideman, 99 id. 245; Frye *v.* Bank, 11 Ill. 367, 378; Eason *v.* Chapman, 21 id. 33; Crabtree *v.* Kile, ib. 183; Cook *v.* Hunt, 24 id. 535, 550; Crabtree *v.* Hagenbaugh, 25 id. 238; Massey *v.* Bank, 104 id. 327, 334; Bank *v.* Keeler, 109 id. 385, 390; Spies *v.* People, 122 id. 1, 208; Gifford *v.* People, 148 id. 173, 176; I. P. & C. R. Co. *v.* Anthony, 43 Ind. 183, 193; Carter *v.* Cavenaugh, 1 Greene 171, 177; State *v.* Egan, 59 Ia. 636; State *v.* Johnson, 40 Kan. 266, 269; Mobley *v.* Hamit, 1 A. K. Marsh. 591; Thurman *v.* Virgin, 18 B. Monr. 792; Henderson *v.* Haynes, 2 Metc. 342, 348; Young *v.* Com., 6 Bush 316; Stanton *v.* Parker, 5 Rob. 108; Paradise *v.* Ins. Co., 6 La. An. 596, 598; State *v.* Parker, 7 id. 83, 85; State *v.* Christian, 44 id. 950, 952; Phillips *v.* Kingfield, 19 Me. 375; Knight *v.* House, 29 Md. 198; Bates *v.* Barber, 3 Cush. 110; Com. *v.* Lawler, 12 All. 586; Webber *v.* Hanke, 4 Mich. 198; Hamilton *v.* People, 29 id. 173, 185; Keator *v.* People, 32 id. 486; Mason *v.* Phelps, 48 id. 131; Rudsdill *v.* Slingerland, 18 Minn. 380, 383; French *v.* Sale, 63 Miss. 386, 393; Day *v.* State, 13 Mo. 425; State *v.* King, 83 id. 555; State *v.* Howard, 9 N. H. 486; Hoitt *v.* Moulton, 21 id. 592; Kelley *v.* Proctor, 41 id. 139, 145; King *v.* Ruckman, 20 N. J. Eq. 316, 357; Troup *v.* Sherwood, 3 Johns. Ch. 558; Fulton Bank *v.* Benedict, 1 Hall Sup. 493, 499, 558; Bakeman *v.* Rose, 18 Wend. 151; People *v.* Abbot, 19 Wend. 199; People *v.* Davis, 21 id. 309, 315; Johnson *v.* People, 3 Johns. 178; Stacy *v.* Graham, 14 N. Y. 492, 501; Wehrkamp *v.* Willet, 4 Abb. App. 548; Foster *v.* Newbrough, 58 N. Y. 482; Adams *v.* Ins. Co., 70 id. 166, 170; Carlson *v.* Winterson, 147 id. 652, 723; State *v.* Boswell, 2 Dev. 211; Downey *v.* Murphy, 1 Dev. & B. 84; State *v.* O'Neale, 3 Ired. 88; State *v.* Parks, ib. 297; Hooper *v.* Moore, 2 Jones L. 428; State *v.* Caveness, 78 N. C. 486; Wilson *v.* Runyon, Wright 652; Seely *v.* Blair, ib. 685; Bucklin *v.* State, 20 Oh. 18; French *v.* Millard, 2 Oh. St. 44, 50; Craig *v.* State, 5 id. 607; Hillis *v.* Wylie, 26 id. 576; Kimmel *v.* Kimmel, 3 S. & R. 336; Wike *v.* Lightner, 11 id. 199; Bogle *v.* Kreitzer, 46 Pa. 465, 470; Lyman *v.* City, 56 id. 488, 502; Kitchen *v.* Tyson, 3 Murph. 314; Anon., 1 Hill S. C. 256; State *v.* Ford, 3 Strobh. 521; Chapman *v.* Cooley, 12 Rich. 661; State *v.* Turner, 36 S. C. 539; Sweet *v.* Gilmore, id., 30 S. C. 394; Gardenhire *v.* Parks, 2 Yerg. 23; Ford *v.* Ford, 7 Humph. 92, 100; Gilliam *v.* State, 1 Head 38; Merriman *v.* State, 3 Lea 393, 394; Boon *v.* State, 23 Tex. 675, 686; Ayres *v.* Duprey, 27 id. 593, 599; Johnson *v.* Brown, 51 id. 65, 77; U. S. *v.* White, 5 Cr. C. C. 38, 42; Wood *v.* Mann, 2 Sumner 32; Gass *v.* Stinson, ib. 610; U. S. *v.* Vausickle, 2 McLean 221; Gaines *v.* Relf, 13 How. 554; Teese *v.* Huntington, 23 id. 2, 13; State *v.* Marks, Utah,

been departed from, for it furnished the most satisfactory mode of learning a witness' character.[5]

The practice in proving a *defendant's* character was (*ante*, § 14 *b*) originally precisely the same, *i. e.* resort was permissible and usual to those who had a personal acquaintance with his conduct and had been enabled to judge of his character.[6] But in more recent times in England the rule of exclusion has been adopted;[7] and in a majority of American jurisdictions such personal knowledge or opinion is now excluded.[8] There is here also much cause for regret that any change has occurred; for it has deprived accused persons of the most trustworthy and effective testimony to support their character.[9]]

§ 461 *d*. **Character: (4) Proof by Reputation.** [Owing to the prevailing doctrine explained in the preceding section, the chief available source for proving a witness' character is his reputation. The terms "reputation" and "character" thus are often used interchangeably; and occasionally the two ideas themselves are confounded. But they are nevertheless distinct, and should always be thought of as distinct, in order to solve correctly many of the problems that are presented in evidencing character by reputation. The actual character or disposition of the witness is the fact primarily relevant as indicating the probable truthfulness of the witness in his testimony, and the reputation (*i. e.* the estimation of that character by the community) is merely one source (though the chief one) of evidence of that character.[1] The questions that arise depend some-

51 Pac. 1089; Powers *v.* Leach, 26 Vt. 279; Willard *v.* Goodenough, 30 id. 396; Uhl *v.* Com., 6 Gratt. 706, 708; Langhorne *v.* Com., 76 Va. 1022; State *v.* Miles, 15 Wash. 534; Wilson *v.* State, 3 Wis. 798.]

[5] [See the criticisms of Wright, J., in Seely *v.* Blair, Wright 685; Berry, J., in State *v.* Lee, 22 Minn. 209.]

[6] [Davison's Trial, 31 How. St. Tr. 186; Hardy's Trial, 24 id. 999; see other authorities in the article just referred to.]

[7] [R. *v.* Rowton, Leigh & C. 520, 10 Cox Cr. 25, two judges dissenting.]

[8] [The cases on both sides are as follows, ineluding character for a prosecutrix, employee, etc., as well as for a defendant: Jackson *v.* State, 78 Ala. 472; Hussey *v.* State, 87 id. 133; People *v.* Casey, 53 Cal. 361; People *v.* Samonset, 97 id. 448, 450; People *v.* Wade, 118 id. 672; Stow *v.* Converse, 3 Conn. 343; State *v.* Jerome, 33 id. 265, 269; Stamper *v.* Griffin, 12 Ga. 453, 456; Col. & R. R. Co. *v.* Christian, 97 id. 56; Hirschman *v.* People, 101 Ill. 568, 574; Bowlus *v.* State, 130 Ind. 227, 230; State *v.* Starrett, 68 Ia. 76; State *v.* Cross, ib. 180, 195; Butler *v.* R. Co., 87 id. 206, 210; Lacy *v.* Kossuth Co., id., 75 N. W. 689; Baldwin *v.* R. Co., 4 Gray 333; Gahagan *v.* R. Co., 1 All. 190; Com. *v.* O'Brien, 119 Mass. 345; Day *v.* Ross, 154 id. 13; McGuerty *v.* Hale, 161 id. 51; Lewis *v.* Emery, 108 Mich. 641; People *v.* Holmes, 111 id. 364; State *v.* Lee, 22 Minn. 407, 409; Boettger *v.* Iron Co., 136 Mo. 531; Langston *v.* R. Co., id., 48 S. W. 835; Berneker *v.* State, 40 Nebr. 810, 815; Golder *v.* Lund, 50 id. 867; State *v.* Pearce, 15 Nev. 188, 190; Mayer *v.* People, 80 N. Y. 377; People *v.* Greenwall, 180 id. 302; Pierce *v.* Myrick, 1 Dev. 345, 346; Bottoms *v.* Kent, 3 Jones L. 160; Gandolfo *v.* State, 11 Oh. St. 114; Marts *v.* State, 26 id. 162, 168; Zitzer *v.* Merkel, 24 Pa. 408; Frazier *v.* R. Co., 38 id. 104, 111; Hays *v.* Millar, 77 id. 239; Galveston H. & S. A. R. Co. *v.* Davis, Tex., 48 S. W. 570; Dufresne *v.* Weise, 46 Wis. 290, 297.]

[9] [See the unanswerable arguments of Erle, C. J., and Willes, J., diss., in R. *v.* Rowton, Leigh & C. 532, 539; Berry, J., in State *v.* Lee, 22 Minn. 410; Stephen, Digest of Evidence, 3d Eng. ed., note xxv.]

[1] [See the exposition by Woodward, J., in Andre *v.* State, 5 Ia. 389, 394; Caldwell, J., in Bucklin *v.* State, 20 Oh. 23.]

times on the relevancy of the character and sometimes on the nature and formation of a reputation; and the precise nature of the inquiry needs constantly to be kept in mind. The topics that concern this subject (apart from the kind of character that is relevant, treated *ante*, § 461 *a*) are chiefly as follows: (1) The time of the character provable; (2) the nature and formation of a reputation; (3) the persons qualified to testify to reputation; (4) the cross-examination of such witnesses to reputation. The cases dealing with reputation-evidence of a defendant's character will here be considered at the same time, since the questions are usually the same for both classes.

(1) *Time of Character or Reputation.* Character is a continuous quality, not quickly changed or changeable. The character of the witness at the time of testifying is that which affects his truthfulness; but his character at another time may well be considered as evidencing his character at the time of testifying. As regards *prior* character, there are three different views represented among the Courts. One view, and the correct one, is that character at any preceding time is admissible, provided it is not too remote in time to have real probative value.[2] A second view is that prior character is not to be resorted to unless for some reason it is difficult or impossible to show present character.[3] A third view, without foundation in principle or in policy, declines altogether to admit prior character.[4] As to *subsequent* character, the question is a different one. A person's character after a certain time is equally as indicative of his character at that time as is his character at a prior time, and no

[2] [Expounded by Cowen, J., in People *v.* Abbot, 19 Wend. 200; Beardsley, J., in Sleeper *v.* Van Middlesworth, 4 Den. 429.]

[3] [Expounded in Willard *v.* Goodenough, 30 Vt. 397; Brown *v.* Perez, 89 Tex. 282.]

[4] [Set forth in Fisher *v.* Conway, 21 Kan. 25. The cases representing these three attitudes are as follows: Martin *v.* Martin, 25 Ala. 210; Kelly *v.* State, 60 id. 19; Yarbrough *v.* State, 105 id. 43; Prater *v.* State, 107 id. 26; Snow *v.* Grace, 29 Ark. 131, 136; Lawson *v.* State, 32 id. 220, 222; Caldwell *v.* State, 17 Conn. 467, 472; Watkins *v.* State, 82 Ga. 231; Holmes *v.* Stateler, 17 Ill. 453; Blackburn *v.* Mann, 85 id. 222; Kirkham *v.* People, 170 id. 9; Walker *v.* State, 6 Blackf. 3; King *v.* Hersey, 2 Ind. 403; Rucker *v.* Beaty, 3 id. 71; Rogers *v.* Lewis, 19 id. 405; Aurora *v.* Cobb, 21 id. 510; Abshire *v.* Mather, 27 id. 381, 384; Chance *v.* R. Co., 32 id. 475; I. P. & C. R. Co. *v.* Anthony, 43 id. 192; Stratton *v.* State, 45 id. 468, 472; Rawles *v.* State, 56 id. 439; L. N. A. & C. R. Co. *v.* Richardson, 66 id. 50; Smock *v.* Pierson, 68 id. 405; Sage *v.* State, 127 id. 15, 27; Hauk *v.* State, 148 id. 238; Hanners *v.* McClelland, 74 Ia. 318, 322; State *v.* Potts, 78 id. 659; Schoep *v.* Ins. Co., 104 id. 354; Fisher *v.* Conway, 21 Kan. 18, 25; Coates *v.* Sulan, 41 id. 341, 343; Young *v.* Com., 6 Bush 317; Marion *v.* Lambert, 10 id. 295; Mitchell *v.* Com., 78 Ky. 219; Turner *v.* King, 98 id. 253; State *v.* Taylor, 45 La. An. 605, 609; Parkhurst *v.* Ketchum, 6 All. 408; Com. *v.* Billings, 97 Mass. 405; Webber *v.* Hanke, 4 Mich. 198, 204; Hamilton *v.* People, 29 id. 173, 178; Keator *v.* People, 32 id. 485; Wood *v.* Matthews, 73 Mo. 477; Waddingham *v.* Hulett, 92 id. 533; State *v.* Summar, id., 45 S. W. 254; State *v.* Forschner, 43 N. H. 89; Shuster *v.* State, N. J. L., 41 Atl. 701; People *v.* Abbot, 19 Wend. 200; Losee *v.* Losee, 2 Johns. 613; Sleeper *v.* Van Middlesworth, 4 Den. 429; Graham *v.* Chrystal, 2 Abb. App. 265; State *v.* Lanier, 79 N. C. 622; Hamilton *v.* State, 30 Oh. St. 82; Morss *v.* Palmer, 15 Pa. 51, 56; Smith *v.* Hine, 179 id. 203; Miller *v.* Miller, id., 41 Atl. 277; Vaughn *v.* Clarkson, R. I., 34 Atl. 989; State *v.* Fry, Tenn., 35 S. W. 883; Ayres *v.* Duprey, 27 Tex. 593, 599; Johnson *v.* Brown, 51 id. 65, 75; Mynatt *v.* Hudson, 66 id. 66, 67; Brown *v.* Perez, 89 id. 282; Teese *v.* Huntington, 23 How. 2, 14; Willard *v.* Goodenough, 30 Vt. 397; Amidon *v.* Hosley, 54 id. 25.

difficulty on this score arises; and indeed, for witnesses, the situation is not presented except when the testimony is offered by deposition taken some time beforehand. But, from the point of view of the trustworthiness of the reputation used as evidencing the character, an objection may be suggested to a reputation obtaining *post litem motam, i. e.* after trial begun or after controversy started, especially in the case of an accused person's reputation; for unfounded suspicions engendered by the accusation may have contributed to color the reputation and render it untrustworthy, and even a witness' reputation may thus be unfairly affected.[5] For this reason many Courts decline to receive a reputation predicated of a time since trial begun or accusation brought or deed committed. The precise limitations vary in different jurisdictions.[6]

(2) In inquiring into the limitations affecting the *nature and formation of a reputation*, it must be remembered that reputation is used only by way of an exception to the Hearsay rule (*ante*, Chap. XII), and that it must therefore take such a solid and definite shape as to be worthy of attention and to justify the exceptional resort to such evidence. Mere rumors are of course not reputation.[7] A reputation involves the notion of the general estimate of the community as a whole, — not what a few persons say, nor what many say, but what the community generally believes;[8] the phrasings used by Courts are varied, but the principle is unquestioned.[9] It is not necessary that the community as a whole, or a given proportion of them, should have been heard to speak on the subject; it is what they

[5] [See the expositions by Battle, J., in State *v.* Johnson, Winst. 151; Hines, J., in White *v.* Com., 80 Ky. 486.]

[6] [*Excluded:* Brown *v.* State, 46 Ala. 175, 184; White *v.* State, 111 id. 92; White *v.* Com., 80 Ky. 485, 486; People *v.* Brewer, 27 Mich. 133, 135; Reid *v.* Reid, 17 N. J. Eq. 101; State *v.* Forschner, 43 N. H. 89, 90; State *v.* Laxton, 76 N. C. 216, 218; C. & F. M. Ins. Co. *v.* May, 20 Oh. 224; Wroe *v.* State, 20 Oh. St. 472; State *v.* Kenyon, 18 R. I. 217, 223; State *v.* Johnson, Winston 151; State *v.* King, 9 S. D. 628; Moore *v.* State, 96 Tenn. 209; Lea *v.* State, 94 id. 495; Johnson *v.* Brown, 51 Tex. 65, 76; Spurr *v.* U. S., U. S. App., 87 Fed. 701; State *v.* Marks, Utah, 51 Pac. 1089; Carter *v.* Com., 2 Va. Cas. 169; Stirling *v.* Sterling, 41 Vt. 80; Armidon *v.* Hosley, 54 id. 25. *Admitted:* Fisher *v.* Conway, 21 Kan. 18, 25; Mask *v.* State, 36 Miss. 77, 89; State *v.* Howard, 9 N. H. 486; Dollner *v.* Lintz, 84 N. Y. 669; Smith *v.* Hine, 179 Pa. 203.]

[7] [Ford *v.* Ford, 7 Humph. 101; Dame *v.* Kenney, 25 N. H. 320; State *v.* Laxton, 76 N. C. 216; Pleasant *v.* State, 15 Ark. 624, 653.]

[8] [Well explained in Kimmel *v.* Kimmel, 3 S. & R. 337; Pickens *v.* State, 61 Miss. 566.]

[9] [The following rulings deal with a variety of phrasings: Maskall's Trial, 21 How. St. Tr. 684; Sorrelle *v.* Craig, 9 Ala. 539; Hadjo *v.* Gooden, 13 id. 720, 722; Mose *v.* State, 36 id. 211, 229; Haley *v.* State, 63 id. 86; Jackson *v.* State, 78 id. 473; Regnier *v.* Cabot, 7 Ill. 40; Crabtree *v.* Kile, 21 id. 183; Crabtree *v.* Hagenbaugh, 25 id. 233, 238; Fahnestock *v.* State, 23 Ind. 231, 238; Meyncke *v.* State, 68 id. 404; Coates *v.* Sulan, 46 Kan. 341; Vernon *v.* Tucker, 30 Md. 456, 462; Jackson *v.* Jackson, 82 id. 17; Com. *v.* Rogers, 136 Mass. 158; Webber *v.* Hanke, 4 Mich. 198; Lenox *v.* Fuller, 39 id. 271; Sanford *v.* Rowley, 93 id. 119, 122; Powers *v.* Presgroves, 38 Miss. 227, 241; Pickens *v.* State, 61 id. 566; French *v.* Sale, 63 id. 386, 394; Matthewson *v.* Burr, 6 Nebr. 312, 316; Hersom *v.* Henderson, 23 N. H. 498, 506; State *v.* O'Neale, 3 Ired. 68; State *v.* Parks, ib. 296; French *v.* Millard, 2 Oh. St. 44; Kimmel *v.* Kim-

believe that is important.[10] Furthermore, their belief may be as well indicated by their silence as well as by their utterances; and accordingly the fact that no one has been heard to say anything against the person's veracity or honesty or other quality in question is universally deemed to be equivalent to a reputation attributing that virtue to the person,[11] and therefore to be admissible.[12] The reputation, moreover, can be supposed to be trustworthy only so far as it has arisen among those who have had opportunities of ascertaining the person's character, *i. e.* it must be predicated of the persons among whom he dwells, not of persons in a different place or in a place where he has merely sojourned;[13] the form of the question usually refers to the opinion in the "neighborhood" or the "community;" but the sanctioned phrasings vary.[14] Since a person, especially in the conditions of modern society, may have special relations with different classes of persons forming distinct spheres of acquaintance, and may in the one exhibit various qualities which are not brought out in the other, it would seem to be proper to receive reputation from such particular circles, — as a workman's reputation in the factory or a broker's reputation in the exchange;[15] but the Courts here take varying attitudes.[16]

(3) The *witness* to reputation must be one who, by *residence in the community*, or otherwise, has had an opportunity to learn the community's estimate, and the preliminary inquiry, whether he knows the person's reputation, is usually insisted upon.[17] A person who lives out of the neighborhood is therefore not qualified;[18] and

mel, 3 S. & R. 337 ; Wike *v.* Lightner, 11 id. 199 ; Snyder *v.* Com., 85 Pa. 519, 522 ; State *v.* Turner, 36 S. C. 534, 540 ; Gaines *v.* Relf, 12 How. 555 ; State *v.* Marks, Utah, 51 Pac. 1089.]

[10] [Pickens *v.* State, 61 Miss. 567 ; Robinson *v.* State, 16 Fla. 835.]

[11] [See the reasoning in R. *v.* Rowton, Leigh & C. 520, 535, 536 ; Hussey *v.* State, 87 Ala. 130 ; Taylor *v.* Smith, 16 Ga. 10 ; Conkey *v.* Carpenter, 108 Mich. 1 ; Lemons *v.* State, 4 W. Va. 761.]

[12] [Except for Walker *v.* Moors, 122 Mass. 502, apparently not law since Day *v.* Day, 154 id. 14, the cases all hold as above stated. But this form is not applicable in proving a bad character: French *v.* Sale, 63 Miss. 386, 393.]

[13] [Brace, J., in Waddingham *v.* Hulett, 92 Mo. 533.]

[14] [See Boswell *v.* Blackman, 12 Ga. 593 ; Aurora *v.* Cobb, 21 Ind. 510 ; Rawles *v.* State, 56 id. 441 ; Smock *v.* Pierson, 68 id. 405 ; Hanners *v.* McClelland, 74 Ia. 322 ; Henderson *v.* Haynes, 2 Metc. 342, 348 ; Combs *v.* Com., 97 Ky. 24 ; State *v.* Johnson, 41 La. An. 574 ; Powers *v.* Presgroves, 38 Miss. 227, 241 ; French *v.* Sale, 63 id. 386, 394 ; Warlick *v.* Peterson, 58 Mo. 408, 416 ; Waddingham *v.* Hulett, 92 id. 533 ; State *v.* Pettit, 119 id. 410 ; Kelley *v.* Proctor, 41 N. H. 140, 146 ; Griffin *v.* State, 14 Oh. St. 63 ; Boon *v.* Weathered, 23 Tex. 675, 686 ; State *v.* Cushing, 14 Wash. 527.]

[15] [Well expounded by Lumpkin, J., in Keener *v.* State, 18 Ga. 221.]

[16] [See People *v.* Markham, 64 Cal. 157 (police) ; Sage *v.* State, 127 Ind. 15, 27 (prison) ; Keener *v.* State, *supra* (several illustrations) ; State *v.* Clifton, 30 La. An. 951 (boarding-house) ; Thomas *v.* People, 67 N. Y. 224 (prison) ; Williams *v.* U. S., 168 U. S. 382 (custom-house) ; Smith *v.* U. S., 161 U. S. 85 (criminals) ; see Brown *v.* U. S., 164 id. 221.]

[17] [Wetherbee *v.* Norris, 103 Mass. 566 ; Kelley *v.* Proctor, 41 N. H. 139 ; Carlson *v.* Winterson, 147 N. Y. 652, 723 ; State *v.* O'Neale, 4 Ired. 88.]

[18] [Sorrelle *v.* Craig, 9 Ala. 536 ; Buchanan *v.* State, 109 id. 7 ; Wallis *v.* White, 58 Wis. 26.]

it has been doubted whether a person who has merely visited the neighborhood for the express purpose of learning the reputation is qualified.[19]

(4) In *testing a witness* who speaks to *good character*, it will expose the untrustworthiness of his testimony if he admits that rumors of misconduct are known to him; for the knowledge of such rumors may well be inconsistent with his assertion that the person's reputation is good.[20] Accordingly, the propriety of inquiring whether he has not heard that the person whose reputation he has supported has been charged with this or that misdeed has usually been conceded. A few Courts, however, usually through a misunderstanding of the real purpose of the inquiry and supposing it to be in violation of the rule against proving particular acts of misconduct (*ante*, § 461 *b*), have forbidden it.[21] On a similar principle, a witness *impeaching* reputation may be tested on cross-examination by requiring him to specify the sources of his information, and in particular the persons whose remarks have served to give rise to his assertion that the reputation is bad; because there is practically no other effective way of exposing a false or unfounded assertion of a bad reputation.[22] This practice seems to be generally conceded to be proper.[23] The preceding two principles apply in the proof of a defendant's or other person's reputation as well as of a witness' reputation.]

§ 461 *e*. **Contradiction; Collateral Error.** [One way of discrediting a witness is by showing him to have made an erroneous statement, at some one or more points in his testimony. The inference is that if he is in error on one point, he may be or probably is on

[19] [Mawson *v.* Hartsink, 4 Esp. 102; Douglass *v.* Tousey, 2 Wend. 354. *Contra:* Foulkes *v.* Sellway, 3 Esp. 236.]

[20] [Expounded by Parke, B., in R. *v.* Wood, 5 Jur. 225; McClellan, J., in Moulton *v.* State, 88 Ala. 119.]

[21] [The cases on both sides are as follows: R. *v.* Hodgkiss, 7 C. & P. 298; R. *v.* Rogan, 1 Cox Cr. 291; Bullard *v.* Lambert, 40 Ala. 204; Holmes *v.* State, 88 id. 29; Ingram *v.* State, 67 id. 72; De Arman *v.* State, 71 id. 361; Tesney *v.* State, 77 id. 38; Jackson *v.* State, 78 id. 472; Moulton *v.* State, 88 id. 120; Thompson *v.* State, 100 id. 70, 71; Evans *v.* State, 109 id. 11; White *v.* State, 111 id. 92; Terry *v.* State, id., 23 So. 776; People *v.* Mayes, 113 Cal. 618; People *v.* Burns, id., 53 Pac. 1096; Pulliam *v.* Cantrell, 77 Ga. 563, 565; Oliver *v.* Pate, 43 Ind. 134; McDouel *v.* State, 90 id. 324; Wachstetler *v.* State, 99 id. 295; Randall *v.* State, 132 id. 542; Griffith *v.* State, 140 id. 163; Shears *v.* State, 147 id. 51; Gordon *v.* State, 3 Ia. 415; State *v.* Arnold, 12 id. 487; Barr *v.* Hack, 46 id. 310; State *v.* Sterrett, 71 id. 387; Hanners *v.* McClelland, 74 id. 320; State *v.* McGee, 81 id. 19; State *v.* Lee, 95 id. 427; State *v.* McDonald, 57 Kan. 537; State *v.* Donelon, 45 La. An. 744, 754; State *v.* Pain, 48 id. 311; Com. *v.* O'Brien, 119 Mass. 346; Hamilton *v.* People, 29 Mich. 173, 188; Kearney *v.* State, 68 Miss. 233, 236; Olive *v.* State, 11 Nebr. 1, 27; Patterson *v.* State, 41 id. 538; Basye *v.* State, 45 id. 261; Luther *v.* Skeen, 8 Jones L. 356; State *v.* Dill, 48 S. C. 249; U. S. *v.* Whitaker, 6 McLean 342, 344; Davis *v.* Franke, 33 Gratt. 426.]

[22] [Expounded by Church, C. J., in Weeks *v.* Hall, 19 Conn. 377; Cooley, J., in Annis *v.* People, 13 Mich. 517; Fletcher, J., in Bates *v.* Barber, 4 Cush. 109.]

[23] [State *v.* Allen, 100 Ia. 7; Phillips *v.* Kingfield, 19 Me. 375, 381; Bakeman *v.* Rose, 14 Wend. 105, 110, 18 id. 150 (qualified); McDermott *v.* State, 13 Oh. St. 335; Willard *v.* Goodenough, 30 Vt. 396.]

other points, the probability depending largely on the closeness of connection between the error thus exposed and the other parts of his testimony. The fact of his error does not necessarily indicate the source of it; *i. e.*, it may have proceeded from wilful falsehood, or from unconscious prejudice, or from faulty recollection or observation, or from some other source; but whatever its source, the simple fact of error tends to affect the trustworthiness of the rest of his testimony. The demonstration of the error is commonly accomplished by calling other witnesses who testify to the opposite effect, and thus, if their contradiction of him is believed, the error is shown. Thus the process has come usually to be spoken of as *contradicting the witness;* but obviously the contradiction is merely its dramatic feature; it is the fact that the contradicting witnesses are believed, *i. e.* the fact of error by the first witness, that is significant. The chief limitation here laid down is that this process of exposing error by bringing other witnesses to contradict shall not be resorted to on "collateral" matters. The reasons for this are, in part, the reason of unfair surprise (inability to anticipate and prepare; *ante*, § 14 *a*), but mainly the reason of confusion of issues (*ante*, § 14 *a*) by introducing new witnesses and new issues which would tend to prolong the trial and confuse the main issues before the jury.[1] The term "collateral," however, is too indefinite to be of much value as a decisive test in a given case. The reason for the rule supplies a test which further defines the term "collateral" and is more certain in application. Since the reason of the rule excludes witnesses whose testimony would introduce new issues, over and above those which already might be entered into, the test of collateralness should naturally be, Could the fact, for which they are offered in contradiction, have been shown in evidence for any purpose independently of this contradiction?[2] This test has been explicitly adopted for the present rule by a few Courts only;[3] commonly the term "collateral" is used without further definition;[4] but as applied to the subject of the next section, where the considerations and the rule are practically the same, the above test has a much greater vogue. Broadly speaking, then, contradiction by other witnesses may be made (1) on facts relevant to some issue in the case, and (2) on facts otherwise admissible to impeach a witness. For the first sort, the special controversy involved in each case must supply the solution; the variety is of course infinite.[5] For the second sort, we have only

[1] [Expounded by Alderson, B., and Rolfe, B., in Att'y-Gen'l *v.* Hitchcock, 1 Exch. 104; Robinson, C. J., in R. *v.* Brown, 21 U. C. Q. B. 334; Story, J., in Odiorne *v.* Winkley, 2 Gallis. 52; Allen, J., in Charlton *v.* Unis, 4 Gratt. 62; Redfield, C. J., in Powers *v.* Leach, 26 Vt. 277.]

[2] [Att'y-Gen'l *v.* Hitchcock, 1 Exch. 104.]

[3] [People *v.* Chin Mook Sow, 51 Cal. 597; Langhorne *v.* Com., 76 Va. 1019, *semble*.]

[4] [In New Hampshire, peculiarly, the matter is left to the trial Court's discretion: Perkins *v.* Roberge, N. H., 39 Atk. 583.]

[5] [Good illustrations of cases near the dividing line may be found in Com. *v.* Buz-

to ask what facts are otherwise regarded as admissible to impeach, *i. e.* independently of the first witness having already made assertions about them.[6] Of these, facts showing bias or corruption are always material[7] and facts affecting his source of knowledge,[8] but facts affecting character, being otherwise inadmissible (*ante*, § 461 *b*), are here also to be excluded.[9] It was once thought, and is still occasionally said, that the rule applies only to exclude contradiction of statements made on cross-examination, and not of statements "volunteered," *i. e.* made on the direct examination;[10] but this is erroneous.[11]]

§ 461 *f*. **Prior Inconsistent Statements.** [Another mode of discrediting a witness is by showing (either through cross-examination or by other witnesses) that the witness has at another time stated the opposite of what he now states or has otherwise varied from his present story. Here, "that which sets aside his credit and overthrows his evidence," in the words of Chief Baron Gilbert,[1] is "the repugnancy of his evidence," "inasmuch as contraries cannot be true," and therefore he must be in error in at least one of the two statements; and if in error once, then perhaps also in other undetected instances. The probative value of this process — showing error and the capacity to err — is therefore much the same as in that of the preceding section, though the mode is somewhat different. The probative force thus arising merely from the inconsistency and the apparent falsity of one of the two statements, it follows, on the one hand, that the admission of the prior inconsistent statement does not violate the Hearsay rule,[2] and, on the other hand, that it is not to be taken as affirmative evidence of the fact stated in it;[3] for the reason, in both cases, that it is not offered as a testimonial assertion, but only as inconsistent with the present statement.

A limitation here obtains which is practically identical with that enforced for the preceding topic, viz., that the proof of inconsistent (or self-contradictory) statements cannot be made through other

zell, 16 Pick. 158; R. *v.* Brown, 21 U. C. Q. B. 330, 336; Stephens *v.* People, 19 N. Y. 72; Ludtke *v.* Herzog, 30 U. S. App. 637; Chic. C. R. Co. *v.* Allen, 169 Ill. 287.]

[6] [R. *v.* Overton, 2 Moo. Cr. C. 263: "Everything is material that affects the credit of the witness."]

[7] [Thomas *v.* David, 7 C. & P. 350; Melhuish *v.* Collier, 19 L. J. Q. B. 493; Helwig *v.* Lascowski, 82 Mich. 623; State *v.* McKinstry, 100 Ia. 82; State *v.* Twombly, 60 N. H. 491. The ruling in Harris *v.* Tippett, 2 Camp. 637, has always been regarded as erroneous.]

[8] [Whitney *v.* Boston, 98 Mass. 316.]

[9] [Hamilton *v.* People, 46 Mich. 186; Stokes *v.* People, 53 N. Y. 175.]

[10] [People *v.* Roemer, 114 Cal. 51; Un. P. R. Co. *v.* Reese, 56 Fed. 291.]

[11] [As fully explained by Walker, J., in Blakey *v.* Blakey, 33 Ala. 619.]

[1] [Gilbert, Evidence, 147, 150.]

[2] [As was sometimes imagined; but Mr. Starkie disposed of this fallacy: Evidence, I, 206; see *ante*, § 100.]

[3] [Explained by Allen, J., in Charlton *v.* Unis, 4 Gratt. 6; Shaw, C. J., in Gould *v.* Lead Co., 9 Cush. 346. This is universally accepted, and citations are unnecessary.]

witnesses upon matters "*collateral*" to the issue. The reasons of convenience requiring this rule are the same as those explained in the preceding section.[4] The term "collateral" is here of little service in testing a given offer of evidence; and a more careful and useful definition of it (as already explained in the preceding section) is, Could the fact, as to which the inconsistency is predicated, have been shown in evidence by other witnesses, independently of the inconsistency?[5] This definite test has been accepted and applied in a few Courts of this country;[6] though not usually in a correct shape.[7] But most Courts merely apply the indefinite term "collateral" to the particular facts of each case.[8] As pointed out in the topic of the preceding section, the orthodox doctrine[9] regards facts showing bias or corruption as not collateral;[10] and this doctrine is generally accepted in this country;[11] although a few Courts have taken the opposite and clearly erroneous view.[12] The same fallacy referred to in the preceding section, viz., that nothing said on the direct examination is "collateral" in the sense that inconsistent statements cannot be shown, sometimes appears here also,[13] but is generally repudiated.[14]]

§ 462. **Same: Witness' Attention must be called.**[1] Before this can be done, it is generally held necessary, in the case of verbal statements, first to ask him as to the time, place, and person involved in the supposed contradiction. It is not enough to ask him the general question, whether he has ever said so and so, nor

[4] [See the cases cited note 1, § 461 *e*; and the following opinions: Seavy *v.* Dearborn, 19 N. H. 356; Seller *v.* Jenkins, 97 Ind. 436.]

[5] [Pollock, C. B., in Att'y-Gen'l *v.* Hitchcock, 1 Exch. 99.]

[6] [Askew *v.* People, 23 Colo. 446; Staser *v.* Hogan, 120 Ind. 220; Williams *v.* State, 73 Miss. 820; Johnston *v.* Spencer, 16 Nebr. 321; Combs *v.* Winchester, 39 N. H. 16; Hildeburn *v.* Curran, 65 Pa. 63; State *v.* Davidson, 9 S. D. 564; Saunders *v.* R. Co., Tenn., 41 S. W. 1031; Langhorne *v.* Com., 76 Va. 1019, *semble*.]

[7] [*I. e.*, it is usually put, Would the fact be admissible "as a part of his case, tending to establish his plea"? But this obviously does not cover the case of facts showing bias or corruption, which are admissible; see further, *supra*.]

[8] [The rule is universally accepted, and specific rulings are of little use as precedents. It need only be noted that in Massachusetts, beginning with Prescott *v.* Ward, 10 All. 205, and thence leaping over a dozen cases to Phillips *v.* Marblehead, 148 Mass. 328, and thereafter steadily enforced, the doctrine is that the trial Court's discretion determines what is collateral, and whether inconsistencies on collateral matters may be shown.]

[9] [As expressly stated in Att'y-Gen'l *v.* Hitchcock, *supra*.]

[10] [There were originally contradictory rulings in England; Yewin's Case, 2 Camp. 638, note; R. *v.* Barker, 3 C. & P. 590; R. *v.* Robins, 2 Mo. & Rob. 512, being for admission; and Harris *v.* Tippett, 2 Camp. 637; Harrison *v.* Gordon, 2 Lew. 156; Lee's Case, ib. 154, being for exclusion; but this conflict was brought to an end by Att'y-Gen'l *v.* Hitchcock, *supra*. This accounts for the exclusion by a small number of Courts in this country; see note 12, *post*.]

[11] [Johnson *v.* Wiley, 74 Ind. 239; Day *v.* Stickney, 14 All. 258; U. S. *v.* Schindler, 18 Blatch. 230, are leading cases.]

[12] [Clark *v.* Clark, 65 N. C. 661; State *v.* Heacock, Ia., 76 N. W. 654; Langhorne *v.* Com., 76 Va. 1019 (in part).]

[13] [Forde's Case, 16 Gratt. 557.]

[14] [Seller *v.* Jenkins, 97 Ind. 437; Williams *v.* State, 73 Miss. 820.]

[1] [For the original opening sentences, see Appendix II.]

whether he has always told the same story; because it may frequently happen, that, upon the general question, he may not remember whether he has so said; whereas, when his attention is challenged to particular circumstances and occasions, he may recollect and explain what he has formerly said.[2] This course of proceeding is considered indispensable, from a sense of justice to the witness; for as the direct tendency of the evidence is to impeach his veracity, common justice requires that, by first calling his attention to the subject, he should have an opportunity to recollect the facts, and, if necessary, to correct the statement already given, as well as by a re-examination to explain the nature, circumstances, meaning, and design of what he is proved elsewhere to have said.[3] [The inquiry of the witness to be discredited must specify, it is usually said, the time, place, and person (addressee) of the supposed inconsistent statement;[4] but the fixing of this specified form is to be deprecated, for it leads to innumerable petty technicalities; in principle and in policy, the inquiry need merely state enough fairly to recall the statement to the witness' mind if he has made it.[5]

Suppose that it is impossible to make the inquiry, the witness being absent or deceased at the time of the trial; may the inconsistent statement be shown, though the witness' attention has not been called? The argument from policy is substantially the same in all the cases of this sort; but there are four distinct classes of cases, and the law may not be the same for all; namely, (1) a deposition, (2) testimony at a former trial, (3) a dying declaration, (4) the attestation of a deceased or absent attesting witness. (1) Where the witness to be discredited testifies by *deposition*, there is good reason for

[2] Angus *v.* Smith, 1 M. & Malk. 473, per Tindal, C. J.; Crowley *v.* Page, 1 C. & P. 789, per Parke, B.; R. *v.* Shellard, 9 id. 277; R. *v.* Holden, 8 id. 606; Palmer *v.* Haight, 2 Barb. 210; The Queen's Case, 2 B. & B. 313.

[3] R. *v.* St. George, 9 C. & P. 483, 489; Carpenter *v.* Wall, 11 Ad. & El. 803. [It seems fairly clear that no such rule existed in England before the decision in The Queen's Case, *supra*, in 1820; and American judges have repeatedly said that it was not known in the early practice of the Atlantic jurisdictions in this country. This is why the rule never became a part of the common law in several Atlantic jurisdictions. It is still not the law in Maine (New Portland *v.* Kingfield, 55 Me. 176); Massachusetts (Carville *v.* Westford, 163 Mass. 544; Allin *v.* Whittemore, id., 50 N. E. 618; except for one's own witness, by Pub. St. c. 169, § 22); New Hampshire (Cook *v.* Brown, 34 N. H. 471); New Jersey (Fries *v.* Brugler, 12 N. J. L. 80, *semble*); while in Connecticut (Hedge *v.* Clapp, 22 Conn. 266), and Pennsylvania (Sharp *v.* Emmet, 5 Whart. 288, 300; Walden *v.* Finch, 70 Pa. 436; Cronkrite *v.* Trexler, id., 41 Atl. 22), it is to be required only in the trial Court's discretion or subject to exceptions; in all other jurisdictions where the matter has come up, it is required, and citations are unnecessary. As a matter of policy, the discretionary form is unquestionably preferable, for a rigid rule requiring the question to be put becomes too often a mere technicality and leads to quibbles and to unfair hardships; see the criticisms of Davis, J., in Downer *v.* Dana, 19 Vt. 345; and Church, C. J., in Hedge *v.* Clapp, 22 Conn. 266.]

[4] [This phrase appears to have originated in Angus *v.* Smith, Moo. & M. 474; the form varies in different jurisdictions, and even in the same Court; but in substance it is almost universal, where the question is required.]

[5] [South. R. Co. *v.* Williams, 113 Ala. 620 ("The rule is not ironclad"); State *v* Glynn, 51 Vt. 579.]

dispensing with the requirement, since the cross-examiner cannot know beforehand what the witness will answer, and therefore cannot usually be prepared to inquire as to inconsistent statements.[6] The Courts, however, are divided in their views.[7] (2) Where the *testimony* of a witness *at a former trial* is used, the arguments of policy are substantially the same, though there is less reason for favoring the impeaching party; but the precedents thus far are harmonious in making the inquiry indispensable.[8] (3) On the other hand, for impeaching a *dying declarant*, a deceased person's statement against interest, or the like, the precedents are practically unanimous in holding the inquiry not necessary.[9] (4) The case of a deceased or absent *attesting-witness* should be treated in the same way; and this was the early English practice,[10] followed generally in this country;[11] but the original rule was afterwards repudiated in England.[12] — It has sometimes also been said that where the inconsistent statement is itself in a deposition or other sworn statement, the inquiry is unnecessary;[13] but the reasoning seems unsound,[14] and is generally repudiated.[15] In any case, if the witness has left the stand, he may

[6] [See the exposition by Davis, J., in Downer *v.* Dana, 19 Vt. 346; Agnew, J., in Walden *v.* Finch, 70 Pa. 463; Shiras, J., in Mattox *v.* U. S., 156 U. S. 257; and, *contra*, by Daniel, J., in Unis *v.* Charlton, 12 Gratt. 495; Brinkerhoff, C. J., in Runyan *v.* Price, 15 Oh. St. 14.]

[7] [*Not required:* Daggett *v.* Tolman, 8 Conn. 171; Walden *v.* Finch, 70 Pa. 463; Hazard *v.* R. Co., 2 R. I. 62; Downer *v.* Dana, 19 Vt. 346, *semble;* Billings *v.* Ins. Co., id., 41 Atl. 516.

Required: Doe *v.* Wilkinson, 35 Ala. 470; Griffith *v.* State, 37 Ark. 330; Ryan *v.* People, 21 Colo. 119; Wright *v.* Hicks, 15 Ga. 167; Williamson *v.* Peel, 29 Ia. 458; Greer *v.* Higgins, 20 Kan. 424; State *v.* Wiggins, 50 La. An., 23 So. 334 (but see Fletcher *v.* Henley, 13 La. An. 192); Matthews *v.* Dare, 20 Md. 269; Gregory *v.* Cheatham, 36 Mo. 161; Stacy *v.* Graham, 14 N. Y. 498; Fulton *v.* Hughes, 63 Miss. 61; Runyan *v.* Price, 15 Oh. St. 14; Titus *v.* State, 7 Baxt. 132; Weir *v.* McGee, 25 Tex. Suppl. 20, 32; Ayers *v.* Watson, 132 U. S. 394, 401, *semble;* Unis *v.* Charlton, 12 Gratt. 495; State *v.* Carter, 8 Wash. 272, 276.]

[8] [Sharp *v.* Hicks, 94 Ga. 624; Craft *v.* Com., 81 Ky. 252; Hanscom *v.* Burmood, 35 Nebr. 504; Hubbard *v.* Briggs, 31 N. Y. 536; McCullough *v.* Dobson, 133 id. 124; Mattox *v.* U. S., 156 U. S. 237, three judges dissenting; Carver *v.* U. S., 164 id. 694; see Griffith *v.* State, 37 Ark. 324.]

[9] [Aveson *v.* Kinnaird, 6 East 188, 195; Moore *v.* State, 12 Ala. 764; People *v.* Lawrence, 21 Cal. 368; State *v.* Lodge, 9 Houst. 542; Battle *v.* State, 74 Ga. 101; Dunn *v.* People, 172 Ill. 582; Nelms *v.* State, 13 Sm. & M. 505; State *v.* Shaffer, 23 Or. 555; M'Pherson *v.* State, 9 Yerg. 279; Carver *v.* U. S., 164 U. S. 694, two judges dissenting. *Contra:* Wroe *v.* State, 20 Oh. St. 469.]

[10] [Wright *v.* Littler, 3 Burr. 1244, 1255; Durham *v.* Beaumont, 1 Camp. 210.]

[11] [Well expounded by Gibson, C. J., in Hays *v.* Harden, 9 Pa. St. 158; N. Hill (later a judge), in note to Losee *v.* Losee, 2 Hill 609. *Accord:* Reformed Church *v.* Ten Eyck, 25 N. J. L. 40, 47; Boylan *v.* Meeker, 28 id. 274, 294; M'Elwee *v.* Sutton, 2 Bail. 129; Smith *v.* Asbell, 2 Strobh. 141. *Undecided:* Bott *v.* Wood, 56 Miss. 136. Compare § 444 *d*, *ante*.]

[12] [Stobart *v.* Dryden, 1 M. & W. 615, the reasoning is unsatisfactory. *Accord:* Runyan *v.* Price, 15 Oh. St. 6.]

[13] [Thompson *v.* Gregor, 11 Colo. 533; Klug *v.* State, 77 Ga. 736, and prior cases; Robinson *v.* Hutchinson, 31 Vt. 449.]

[14] [Well explained by Wright, J., in Samuels *v.* Griffith, 13 Ia. 106.]

[15] [Doe *v.* Wilkinson, 35 Ala. 471 (qualified), and prior cases; People *v.* Devine, 44 Cal. 458; State *v.* Collins, 32 Ia. 41, and prior cases; Fletcher *v.* Fletcher, 5 La. An. 408; Hammond *v.* Dike, 42 Minn. 27.]

be recalled, in the trial Court's discretion, in order to put the inquiry.[16]

It must be remembered that the substantive statement to be confronted by the inconsistent statement is by hypothesis something said before the inquiry is made of him, and independently of his answer to it. (1) Consequently, it is immaterial that he answers that he does not remember whether he made the inconsistent statement; *e. g.*, if he has testified, "A was at X," a prior statement that "A was at Y" is none the less inconsistent, even though he answers on inquiry that he does not remember saying so; the inquiry is made merely for fairness' sake, and not to secure an answer which shall be contradictory.[17] (2) Consequently, also, if there has been no substantive assertion by the witness, prior to the cross-examiner's calling his attention by the inquiry, there is nothing with which the extra-judicial statement can be inconsistent, and therefore it is inadmissible; *i. e.*, it is inadmissible to prove that he did say "A was at X," when his only testimony on the subject is that he did not say that A was at X, since there is here no inconsistency but merely an error on what is usually a collateral matter, viz., whether he made a certain remark.[18] (3) It is by some maintained that if the witness clearly admits making the inconsistent statement, there is no need of other evidence to prove it;[19] but the better view is that the opponent is still entitled to the advantage of proving it by his own witnesses.[20]]

§ 462 *a*. **Same: What is an Inconsistent Statement.** [It is not necessary that there should be a total opposition or contrariety between the assertion made on the stand and the other statement; the discrediting quality lies in their being substantially variant or inconsistent.[1] The other statement may be oral or in writing; it may be in words or by conduct.[2] Where it is broad and indefinite, and touches only the general merits of the case, difficult instances often arise; thus, A testifies for the prosecution that he saw B near the

[16] [People *v.* Shaw, 111 Cal. 171; State *v.* Reed, 89 Mo. 171.]

[17] [This doubt was raised by Pain *v.* Beeston, 1 Mo. & Rob. 20, and Long *v.* Hitchcock, 9 C. & P. 619; but the opposite view, expressed by Parke, B., in Crowley *v.* Page, 7 C. & P. 789, has always been considered as law; it is well explained by Hemmingway, J., in Billings *v.* State, 52 Ark. 303; other recent cases are South. R. Co. *v.* Williams, 113 Ala. 620; Pickard *v.* Bryant, 92 Mich. 433; State *v.* Kelley, 46 S. C. 55.]

[18] [Good illustrations of this may be found in Bearss *v.* Copley, 10 N. Y. 93; Combs *v.* Winchester, 39 N. H. 18; Williams *v.* State, 73 Miss. 820. Courts have no difference of opinion here; but counsel often make the error.]

[19] [Parke, B., in Crowley *v.* Page, 7 C. & P. 789; Ray *v.* Bell, 24 Ill. 451; State *v.* Goodbier, 48 La. An. 770; State *v.* Cooper, 83 Mo. 698.]

[20] [Lewis *v.* Post, 1 Ala. 69; Hathaway *v.* Croeker, 7 Mete. 264; Fremont B. & E. Co. *v.* Peters, 45 Nebr. 356; Singleton *v.* State, 39 Fla. 520, *semble*.]

[1] [U. S. *v.* Holmes, 1 Cliff. 116; Foster *v.* Worthing, 146 Mass. 607; Seller *v.* Jenkins, 97 Ind. 439.]

[2] [*E. g.* a plaintiff who testified that he had been confined to the house with illness was shown to have been seen out walking: Wallace *v.* R. Co., 119 Mass. 91; other examples in Bonnemort *v.* Gill, 165 id. 493; Daniels *v.* Conrad, 4 Leigh 402.]

scene of the arson; is it admissible to show that A has elsewhere declared that he is sure that B is innocent? It is common with some Courts to say that such statements are inadmissible because mere opinions; but this seems unsound; the true inquiry is, Does the other statement in effect involve an assertion inconsistent with that made on the stand?[3] The precedents are not harmonious, and much depends on the terms of the specific assertion.[4] It must be added that where opinion-testimony has been properly received on the stand (as, from an expert), an inconsistent expression of opinion, as all concede, may be shown.[5] — A failure to assert a fact, when it would have been natural to do so had it existed, may be equivalent to an assertion of its non-existence, and may thus be available on an inconsistent statement; an omission to make a claim or assertion in prior legal proceedings may be thus available;[6] or an omission to make an assertion when formerly upon the stand;[7] and even his failure to take the stand at all where it would have been natural to do so.[8] It ought to follow that where a witness now fails to recollect a matter or says that he knows nothing, his former positive assertion on the point is to be treated as an inconsistency; but the opposite view has usually been taken, probably because the extra-judicial assertion is too likely to be given an improper testimonial force.[9]]

§ 462 *b*. **Same: Explanations; Whole of Statement.** [The witness whose statement is thus offered against him may of course explain it away as best he can, so as to demonstrate that there was no inconsistency or that there was a sufficient reason for it.[1] It follows that

[3] [Well put in Handy *v.* Canning, 166 Mass. 107.]

[4] [See the following cases: Elton *v.* Larkins, 5 C. & P. 89, 390; Gilbert *v.* Gooderham, 6 U. C. C. P. 41, 45; Rucker *v.* Beaty, 3 Ind. 71; Welch *v.* State, 104 id. 349; State *v.* Baldwin, 36 Kan. 14; State *v.* Kingsbury, 58 Me. 241; Emerson *v.* Stevens, 6 All. 112; Com. *v.* Mooney, 110 Mass. 100; Com. *v.* Wood, 111 id. 410; Handy *v.* Canning, 166 id. 107; People *v.* Stackhouse, 49 Mich. 77; McClellan *v.* F. W. & B. I. R. Co., 105 id. 101; Johnston *v.* Spencer, 51 Nebr. 198; Nute *v.* Nute, 41 N. H. 71; City Bank *v.* Young, 43 id. 460; People *v.* Jackson, 3 Park. Cr. 597; Patchin *v.* Ins. Co., 13 N. Y. 270; Schell *v.* Plumb, 55 id. 599; Mayer *v.* People, 80 id. 377; State *v.* Davidson, 9 S. D. 564; Saunders *v.* R. Co., Tenn., 41 S. W. 1031.]

[5] [People *v.* Donovan, 43 Cal. 165; Ware *v.* Ware, 8 Greenl. 44, 55; Liddle *v.* Bank, 158 Mass. 15; Silverstein *v.* O'Brien, 165 id. 512; Beaubien *v.* Cicotte, 12 Mich. 487; Sanderson *v.* Nashua, 44 N. H. 494; Patchin *v.* Ins. Co., 13 N. Y. 270; Brooks *v.* R. Co., N. Y., 50 N. E. 945; Krider *v.* Philadelphia, 180 Pa. 78; Sellars *v.* Sellars, 2 Heisk. 430.]

[6] [See examples in Charles *v.* State, Fla., 18 So. 369; Snyder *v.* Com., 85 Pa. 519.]

[7] [Well explained in Perry *v.* Baird, 117 Mass. 165; examples in Com. *v.* Hawkins, 3 Gray 464; Brigham *v.* Fayerweather, 140 Mass. 412; Alward *v.* Oaks, 63 Minn. 190.]

[8] [See Brock *v.* State, 26 Ala. 106; Com. *v.* Smith, 163 Mass. 411; People *v.* Wirth, 108 Mich. 307; State *v.* Staley, 14 Minn. 117. Compare on these points § 195 *b*, *ante*.]

[9] [*Admitted:* Nute *v.* Nute, 41 N. H. 67. *Excluded:* The Queen's Case, 2 B. & B. 299; People *v.* Dice, Cal., 52 Pac. 477; Saylor *v.* Com., Ky., 33 S. W. 185; State *v.* Reed, 60 Me. 550; Stockton *v.* Demuth, 7 Watts 41.]

[1] [This is not doubted; see the expositions by Gilchrist, J., in State *v.* Winkley, 14 N. H. 491; Danforth, J., in State *v.* Reed, 62 Me. 146.]

where the witness wishes to show that his statement has been distorted by the production of a fragment only, he may add those portions of it which show its true significance and substantial tenor.[2] In this country, however, it is common to say that he may put in, not only such portions, but the whole of it, whether of a conversation[3] or of a deposition.[4]]

§ 463. **Same: Inconsistent Statements in Writing; Rule in The Queen's Case.** [The rule (§ 462) that the witness' attention must first be called] prevails in cross-examining a witness as to the contents of a letter or other paper written by him; [but it is here applied in a peculiar and stringent form.] The counsel will not be permitted to represent, in the statement of a question, the contents of a letter, and to ask the witness whether he 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 him whether he wrote that letter, and his admitting that he wrote it.[1] For the contents of every written paper, according to the ordinary and well-established rules of evidence, are to be proved by the paper itself, and by that alone, if it is in existence.[2] But it is not required that the whole paper should be shown to the witness. Two or three lines only of a letter may be exhibited to him, and he may be asked, whether he wrote the part exhibited. If he denies, or does not admit, that he wrote that part, he cannot be examined as to the contents of such letter, for the reason already given; nor is the opposite counsel entitled, in that case, to look at the paper.[3] And if he admits the letter to be his writing, he cannot be asked whether statements, such as the counsel may suggest, are contained in it, but the whole letter itself must be read, as the only competent evidence of that fact.[4] According to the ordinary rule of proceeding in such cases, the letter is to be read as the evidence of the cross-examining counsel in his turn, when he shall have opened his case; but if he suggests to the Court that he wishes to have the letter read imme-

[2] [Abbott, C. J., in The Queen's Case, 2 B. & B. 294; Lord Denman, C. J., in Prince *v.* Samo, 7 A. & E. 627.]

[3] [Washington *v.* State, 63 Ala. 192; State *v.* Winkley, 14 N. H. 491; Emery *v.* State, 92 Wis. 146.]

[4] [Lowe *v.* State, 97 Ga. 792; Wilkerson *v.* Eilers, 114 Mo. 245, 251; State *v.* Punshon, 133 id. 44; Huntley *v.* Terr., Okl., 54 Pac. 314; Harrison *v.* Rowan, 3 Wash. C. C. 583. The analogous rule in regard to admissions by a party *ante*, § 201, should be consulted.]

[1] The Queen's Case, 2 Brod. & Bing. 286; Bellinger *v.* People, 8 Wend. 595, 598; R. *v.* Edwards, 8 C. & P. 26; R. *v.* Taylor, ib. 726. If the paper is not to be had, a certified copy may be used: R. *v.* Shellard, 9 id. 277. So, where a certified copy is in the case for other purposes, it may be used for this also: Davies *v.* Davies, ib. 253. But the witness, on his own letter being shown to him, cannot be asked whether he wrote it in answer to a letter to him of a certain tenor and import, such letter not being produced; see McDonnell *v.* Evans, 16 Jur. 103, where the rule in question is fully discussed.

[2] [*Post*, Chap. XXX.]

[3] R. *v.* Duncombe, 8 C. & P. 369.

[4] Ibid.; 2 Brod. & Bing. 288.

diately, in order to found certain questions upon its contents, after they shall have been made known to the Court, which otherwise could not well or effectually be done, that becomes an excepted case; and for the convenient administration of justice, the letter is permitted to be read, as part of the evidence of the counsel so proposing it, subject to all the consequences of its being considered.[5]

§ 464. If the paper in question is lost, it is obvious that the course of examination, just stated, cannot be adopted. In such case, it would seem, that regularly the proof of the loss of the paper should first be offered, and that then the witness may be cross-examined as to its contents; after which he may be contradicted by secondary evidence of the contents of the paper. But where this course would be likely to occasion inconvenience, by disturbing the regular progress of the cause, and distracting the attention, it will always be in the power of the judge, in his discretion, to prevent this inconvenience, by postponing the examination, as to this point, to some other stage of the cause.[1]

§ 465. [It follows, from what has just been said, that] a witness cannot be asked on cross-examination, whether he has written such a thing, stating its particular nature or purport; the proper course being to put the writing into his hands, and to ask him whether it is his writing. And if he is asked generally, whether he has made representations, of the particular nature stated to him, the counsel will be required to specify, whether the question refers to representations in writing or in words alone; and if the former is meant, the inquiry, for the reasons before mentioned, will be suppressed, unless the writing is produced.[1] But whether the witness may be asked the general question, whether he has given any account, by letter or otherwise, differing from his present statement, — the question being proposed without any reference to the circumstance, whether the writing, if there be any, is or is not in existence, or whether it has or has not been seen by the cross-examining counsel, — is a point which is considered still open for discussion. But so broad a question, it is conceived, can be of very little use, except to test the strength of the witness' memory, or his confidence in assertion; and, as such, it may well be suffered to remain with other questions of that class, subject to the discretion of the judge.[2]

§ 465 *a*. **Same: Theory and Policy of the Rule.** [The rule in The Queen's Case, examined in the preceding sections, is understood to have come from the Bench as a surprise to the profession, and it did not fail to receive unfavorable criticism from competent writers,[1] —

[5] The Queen's Case, 2 Brod. & Bing. 289, 290; [Romertze *v.* Bank, 49 N. Y. 579; compare Peyton *v.* Morgan Park, 172 Ill. 102; O'Riley *v.* Clampet, 53 Minn. 539.]

[1] See McDonnell *v.* Evans, 16 Jur. 103; 11 Com. B. 930.

[1] The Queen's Case, 2 B. & B. 292–294.

[2] This question is raised and acutely treated in Phil. & Am. on Evid. 932–938. See also R. *v.* Shellard, 9 C. & P. 277; R. *v.* Holden, 8 id. 606.

[1] [Phillipps, Evidence, I, 299; Starkie, Evidence, I, 203; Best, Evidence, § 478; Second Report of Common Law Practice Commission, 1853, p. 20.]

criticism so trenchant and so effective that within a generation in England a statute was enacted which substantially nullified it, and merely left to the trial Court the discretionary power of applying such a rule where needed.[2] The objections to the rule are not difficult to perceive. (1) It does not seem to be required by strict principle. So far as concerns the above rule as to calling the witness' attention to his supposed prior statement, it is entirely satisfied by the counsel's oral inquiry without showing or producing the letter. It is only by virtue of the Primariness rule (*post*, § 563 *a*) that production is required, *i. e.* the rule "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."[3] But this rule is not violated here; for (*a*) the cross-examiner is not seeking to prove the document's contents at this stage, but merely to meet the requirement of the law that the witness must be warned that the inconsistent writing will be produced; (*b*) even where the witness in answer admits executing the document, this does not involve proof of its contents, and so long as the counsel does not try to take the answer as proof of contents, there is no violation of the Primariness rule; (*c*) even if the counsel sought to take the answer as evidence of the writing's contents, the principle of the Primariness rule may well be thought not violated, for that principle is based on the possibility of misrepresentation by the party failing to produce the writing, and if he is willing to take the answer of the adversary's witness as evidence of contents, the reason for applying the Primariness rule falls away. (2) From the point of view of policy, the prohibition against asking the witness without showing him the writing is an unfortunate one; for "one of the best tests of the memory or the veracity of a witness, the trial of his recollection or candor as to what he has himself written on the subject on which he has just been deposing, is entirely destroyed by his being made aware of the existence and contents of the document;"[4] in other words, the chance of showing to the tribunal either that the witness cannot remember or incorrectly remembers or that he is willing to falsify as to the contents, is entirely taken away by the requirement that the writing must be shown to him at that stage. The rule, then, so far as it does not allow the counsel to wait until the putting in of his own case, but requires him in advance, before

[2] [1854, St. 17–18 Vict. c. 125, s. 24; 1865, St. 28–29 Vict. c. 18, s. 5: "A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, *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 [*i. e.* orally, not by showing the writing] 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;" applied in Sladden *v.* Sergeant, 1 F. & F. 322; Ireland *v.* Stiff, ib. 340; Farrow *v.* Blomfield, ib. 653.]

[3] [Abbott, C. J., in The Queen's Case.]

[4] [Report of Com'rs, *ante*, n. 1; see also Starkie, Phillips, and Best, *loc. cit.*]

cross-examining, to produce and to show the writing to the witness, is both unsound in principle and unfair in policy. Its alteration by statute in England must be regarded as a just step, and it is to be regretted that (owing in part to ignorance of this change and of the reasons for it) so many Courts in this country have come to adopt the rule in The Queen's Case long after its repudiation in the jurisdiction of its origin. In almost all the jurisdictions where the matter has come up for adjudication, the rule is followed.[5] It is universally (though perhaps not properly) regarded as applying also to oral statements reported in writing at the time by another person, — as, a deposition or testimony at a former trial.[6]]

§ 466.[7]

[5] [Of the following Courts, it would seem that the rule does not obtain in Vermont, and that it is doubtful or qualified in Iowa, Michigan, and the Federal Supreme Court: Floyd *v.* State, 82 Ala. 22; Wills *v.* State, 74 id. 24; Phœnix Ins. Co. *v.* Moog, 78 id. 310; Gunter *v.* State, 83 id. 106; Cal. C. C. P. § 2052; People *v.* Donovan, 43 Cal. 162, 165; Leonard *v.* Kingsley, 50 id. 628, 630; People *v.* Hong Ah Duck, 61 id. 387, 394; People *v.* Ching Hing Chang, 74 id. 392, 393; People *v.* Dillwood, id., 39 Pac. 438; People *v.* Lambert, id., 52 Pac. 307; Stebbins *v.* Sacket, 5 Conn. 258, 262; Simmons *v.* State, 32 Fla. 387, 391; Stamper *v.* Griffin, 12 Ga. 454; Swift *v.* Madden, 165 Ill. 41; Peyton *v.* Morgan Park, 172 id. 102; Morrison *v.* Myers, 11 Ia. 539; Callanan *v.* Shaw, 24 id. 454; State *v.* Collins, 32 id. 41; State *v.* Callegari, 41 La. An. 580; Com. *v.* Kelley, 112 Mass. 452; Lightfoot *v.* People, 16 Mich. 513; Toohey *v.* Plummer, 69 id. 346; Maxted *v.* Fowler, 94 id. 106, 111; O'Riley *v.* Clampet, 53 Minn. 539; Cavanah *v.* State, 56 Miss. 307; Gregory *v.* Cheatham, 36 Mo. 161; Prewitt *v.* Martin, 59 id. 334; State *v.* O'Brien, 18 Mont. 1; Haines *v.* Ins. Co., 52 N. H. 467, 470; Bellinger *v.* People, 8 Wend. 599; Clapp *v.* Wilson, 5 Den. 286, 288; Newcomb *v.* Griswold, 24 N. Y. 301; Romertze *v.* Bank, 49 id. 578, 580; Gaffney *v.* People, 50 id. 423; State *v.* Steeves, 29 Or. 85; Titus *v.* State, 7 Baxt. 132, 136; Toplitz *v.* Hedden, 146 U. S. 254; Randolph *v.* Woodstock, 35 Vt. 295.]

[6] [In England, the Resolution of Judges, in 1837, printed in 7 C. & P. 676, required this; but peculiar considerations were there involved; see R. *v.* Edwards, 8 C. P. 26, 29; R. *v.* Coveney, ib. 31; R. *v.* Holden, ib. 609; R. *v.* Shellard, 9 id. 279; for certain attempted evasions of this part of the rule, see R. *v.* Newton, 15 L. T. 26; R. *v.* Ford, 5 Cox Cr. 184; R. *v.* Edwards, *supra;* R. *v.* Barnet, 4 Cox Cr. 269; compare *ante*, §§ 97 *d* and 439 *c*. In the United States, this part of the rule is illustrated by the cases in the preceding note in Alabama, California, Florida, Louisiana, Michigan, Mississippi, New Hampshire, New York. In Tennessee alone this application of it seems to be repudiated.]

[7] [Transferred *ante*, as § 447 *a*.]

CHAPTER XXVI.

WITNESSES (CONTINUED): REHABILITATION; RE-EXAMINATION AND REBUTTAL.

1. *Re-examination and Rebuttal, in general.*

§ 466 *a*. Order of Topics; Discretion of Trial Court.

2. *Rehabilitation of a Witness.*

§ 467. Explaining away Discrediting Facts.

§ 468. Re-examination on Irrelevant Matter.

§ 469 *a*. Supporting by Evidence of Good Character.

§ 469 *b*. Corroboration by Evidence of Prior Similar Statements.

§ 469 *c*. Same: Fresh Complaint of Rape; Constancy of Accusation in Bastardy.

1. *Re-examination and Rebuttal, in general.*

§ 466 *a*. **Order of Topics; Discretion of the Trial Court.** [So far as the evidence of the opponent is to be explained away, contradicted, or otherwise refuted, by any process which consists merely in diminishing or negativing its force, the original party has the right to do this, either by a re-examination following immediately upon the cross-examination of his witness, or by new witnesses called in rebuttal after the opponent's own evidence has been put in. But anything beyond this cannot belong to him as of strict right; the reason being that "all questions that are asked are to be asked at the proper time," otherwise, the trial "will be in perpetual confusion;"[1] and the proper time for all matters not rendered material by the course of the opponent's cross-examinations or his own witnesses' testimony is the original party's direct examinations of his witnesses. Nevertheless, "to obviate the effects of inadvertence,"[2] it will often be fair to allow a party to do at a later stage what he might and should have done at an earlier one. The propriety of thus making an exception must depend largely on the circumstances of each case; and for this reason it is universally held, in almost all the varieties of situations thus presented, that the allowance of such evidence out of its natural order is to be determined by the discretion of the trial Court. The line between the evidence which is merely explanatory of and rendered necessary by the opponent's, and evidence which might have been introduced at an earlier stage, is often difficult to draw;[3] but the principle is apparent. A variety of situations for the exercise of the discretion of the trial Court may present themselves. (1) In the re-examination of a witness immediately after

[1] [L. C. Hardwicke, in Lord Lovat's Trial, 18 How. St. Tr. 658.]
[2] [Scott, J., in Rucker *v.* Eddings, 7 Mo. 118.]
[3] [See Simmons *v.* Havens, 101 N. Y. 433; State *v.* Dilley, 15 Or. 75; Schaser *v.* State, 36 Wis. 429.]

his cross-examination, or in the stage of rebuttal after the opponents' own evidence has all been put in, it may be desired to add testimony of new facts, *i. e.* matter which was omitted in the direct examinations as a whole or in that of the particular witness but might have been there put in. This may be done in the trial Court's discretion.[4] (2) In the re-examination of a particular witness or in the general stage of rebuttal, it may be desired to repeat or emphasize or detail more precisely a matter already testified to in chief. This also may be done in the trial Court's discretion,[5] and a re-examination to make corrections should be treated in the same way.[6] (3) After a witness has been cross-examined and dismissed, it may become desirable to re-call him to the stand for further direct examination; this may be granted or refused in the trial Court's discretion.[7] (4) After one re-examination, it may be desired to re-examine the witness a second time, either immediately after a re-cross-examination or after the witness has left the stand; this may be granted or refused in discretion.[8] (5) After the evidence has been put in by each party and the case declared closed, and even after argument or charge begun, it may become important to supply omissions; and here also the discretion of the Court must control.[9] (6) Upon the opponent's side, the whole process of surrebuttal, including a re-cross-examination of a particular witness and the impeachment of re-direct testimony, as well as the explanation or surrebuttal of evidence given in the

[4] [Morehouse *v.* Morehouse, Conn., 39 Atl. 516; A. & S. R. Co. *v.* Randall, 85 Ga. 314; White *v.* State, 100 id. 659; Kidd *v.* State, 101 id. 528; Young *v.* Bennett, 5 Ill. 47; Springfield *v.* Dalby, 139 id. 38; Chytraus *v.* Chicago, 160 id. 18; Wash. Ice Co. *v.* Bradley, 171 id. 255; C. & S. E. R. Co. *v.* Staton, Ind., 43 N. E. 312; State *v.* Ruhl, 8 Ia. 450; State *v.* Pruett, 49 La. An. 283; Wallace *v.* R. Co., 119 Mass. 93; Com. *v.* Kennedy, id. 48, N. E. 770; Maier *v.* Ben. Ass'n, 107 Mich. 687; Minkley *v.* Springwells, id., 71 N. W. 649; Davis *v.* State, Minn., 70 N. W. 894; Winterton *v.* I. C. R. Co., 73 Miss. 831; Fullerton *v.* Fordyce, Mo., 44 S. W. 1053; Murphy *v.* State, 43 Nebr. 34; Ream *v.* State, id., 73 N. W. 227; People *v.* Buchanan, 145 N. Y. 1; People *v.* Koerner, 154 id. 355; Campbell *v.* Brown, 183 Pa. 112; State *v.* Ballou, R. I., 40 Atl. 861; State *v.* Clyburn, 16 S. C. 378; State *v.* Jacobs, 28 id. 30, 37; Baird *v.* Gleckler, 7 S. D. 284; Story *v.* Saunders, 8 Humph. 667; Watkins *v.* Rist, 68 Vt. 486; McManus *v.* Mason, 43 W. Va. 196; McGowan *v.* R. Co., 91 Wis. 147; Stanhilber *v.* Graves, 97 id. 515.]

[5] [Pigg *v.* State, 145 Ind. 560; Dillard *v.* State, 58 Miss. 389; King *v.* State, 74 id. 576; Collins *v.* State, 46 Nebr. 37.]

[6] [Humphrey *v.* State, 78 Wis. 571.]

[7] [People *v.* Mather, 4 Wend. 249; Rucker *v.* Eddings, 7 Mo. 118 (leading cases); Crawford *v.* State, 112 Ala. 1; Boston *v.* State, 94 Ga. 590; Anderson T. Co. *v.* Fuller, Ill., 51 N. E. 251; Louisville Ins. Co. *v.* Monarch, 99 Ky. 578; Robbins *v.* R. Co., 165 Mass. 30; Legore *v.* State, Md., 41 Atl. 60; State *v.* Fitzgerald, 130 Mo. 407; Severance *v.* Hilton, 24 N. H. 147; Faust *v.* U. S., 163 U. S. 452.]

[8] [Brown *v.* State, 72 Md. 468, 475.]

[9] [Dyer *v.* State, 88 Ala. 229; Plummer *v.* Mercantile Co., 23 Colo. 190; Brooke *v.* People, ib. 375; Huff *v.* State, Ga., 30 S. E. 808; Kimball *v.* Saguin, 86 Ia. 186, 192; Froman *v.* Com., Ky., 42 S. W. 728; State *v.* Gaubert, 49 La. An. 1692; State *v.* Eisenhour, 132 Mo. 140; State *v.* Laycock, 141 id. 274; Sweeney *v.* Hjul, 23 Nev. 409; Sutton *v.* Walters, 118 N. C. 495; State *v.* Isenhart, Or., 52 Pac. 569; State *v.* Derrick, 44 S. C. 344; Omaha Bridge Cases, 10 U. S. App. 98, 191; Hart *v.* U. S., U. S. App.; 84 Fed. 799; Bertha Zinc Co. *v.* Martin's Adm'r, 93 Va. 791; Buchanan *v.* Cook, Vt., 40 Atl. 102; Perdue *v.* C. & C. Co., 40 W. Va. 372.]

general stage of rebuttal, seems also to be left to the discretion of the trial court.[10]]

2. *Rehabilitation of a Witness.*

§ 467. **Explaining away Discrediting Facts.** [It has just been noticed that the process of explaining away discrediting evidence belongs naturally in the re-examination. The modes by which such discrediting evidence may be explained away vary largely, of course, with the case in hand; but certain types are constantly recurring. Where expressions or circumstances indicating bias have been brought out by the opponent, they may be explained, and accounted for, so far as possible.[1] The same principle applies to a discrediting by prior inconsistent statements;] after a witness has been cross-examined respecting a former statement made by him, the party who called him has a right to re-examine him to the same matter.[2] The counsel has a right, upon such re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions, used by the witness on cross-examination, if they be in themselves doubtful; and also of the motive by which the witness was induced to use those expressions; but he has no right to go further and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness.[3] This point, after having been much discussed in The Queen's Case, was brought before the Court several years afterwards, when the learned judges held it 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.[4] Therefore, where a witness had been cross-examined as to what the plaintiff said in a particular conversation, it was held that he could not be re-examined as to the other assertions, made by the plaintiff in the same conversation, but not connected with the assertions to which the cross-examination related; although the assertions as to which it was proposed to re-examine him were connected with the subject-matter of the suit.[5]

[10] [See Willard *v.* Pettit, Ind., 39 N. E. 991; Hendron *v.* Robinson, 9 B. Monr. 505; State *v.* Spencer, 45 La. An. 1, 9; Devonshire *v.* Peters, 104 Mich. 501; Argabright *v.* State, Nebr., 76 N. W. 876; Stephens *v.* People, 19 N. Y. 573.]

[1] [See *ante*, § 450.]

[2] In the examination of witnesses in Chancery under a commission to take depositions, the plaintiff is not allowed to re-examine, unless upon a special case, and then only as to matters not comprised in the former interrogatories: King of Hanover *v.* Wheatley, 4 Beav. 78.

[3] Such was the opinion of seven out of eight judges whose opinion was taken in the House of Lords, in The Queen's Case, as delivered by Lord Tenterden, 2 Brod. & Bing. 297. [See this subject treated *ante*, § 462 *b*.]

[4] Prince *v.* Samo, 7 Ad. & El. 627.

[5] Prince *v.* Samo, *supra*. In this case, the opinion of Lord Tenterden, in The Queen's Case, 2 Brod. & Bing. 298, quoted in 1 Stark. Evid. 180, that evidence of the whole conversation, if connected with the suit, was admissible, though it were of matters not touched in the cross-examination, was considered and overruled.

[That a witness who has been discredited by proof of a conviction for crime may show that he was innocent or that the circumstances were extenuating, is obnoxious to the principle that it is the conviction which discredits, and also to the principle forbidding confusion of issues on collateral points;[6] but a few Courts allow the witness himself to make whatever explanation he can, the latter principle not applying to such a process;[7] or to testify that he has reformed.[8] Where the fact of arrest or indictment is allowed to be inquired about on cross-examination (*ante*, § 461 *b*), there seems to be no objection to allowing an explanation of innocence on re-examination.[9] Where on cross-examination of a witness to the good reputation of another witness, derogatory facts of the latter's conduct are brought out (*ante*, § 461 *d*), an explanation here also seems allowable.[10] Where an impeaching witness to reputation, on cross-examination to the sources of his knowledge, has named specific reports and rumors, the principle of confusion of issues forbids an attempt in rebuttal to disprove by other witnesses the existence of such reports.[11]]

§ 468. **Re-examination on Irrelevant Matter.** If the counsel chooses to cross-examine the witness to facts, which were not admissible in evidence, the other party has a right to re-examine him as to the evidence so given. Thus, where issue was joined upon a plea of prescription, to a declaration for trespass in G., and the plaintiff's witnesses were asked, in cross-examination, questions respecting the user in other places than G., which they proved; it was held that the plaintiff, in re-examination, might show an interruption in the user in such other places. But an adverse witness will not be permitted to obtrude such irrelevant matter, in answer to a question not relating to it; and if he should, the other party may either cross-examine to it, or may apply to have it stricken out of the judge's notes.[1]

§ 469.[1]

§ 469 *a*. **Supporting by Evidence of Good Character.** [Since a witness' character for veracity is assumed to be good, there is on principle no reason for proving his good character in his support

[6] [State *v.* Watson, 65 Me. 79; Com. *v.* Gallagher, 126 Mass. 55; Gertz *v.* R. Co., 137 id. 77; Lamoureux *v.* R. Co., 169 id. 338.]

[7] [Chase *v.* Blodgett, 10 N. H. 22; Sims *v.* Sims, 75 N. Y. 473.]

[8] [Holmes *v.* Stateler, 17 Ill. 453; Conley *v.* Meeker, 85 N. Y. 618, *semble;* Tenn. C. I. & R. Co. *v.* Haley, U. S. App., 85 Fed. 534.]

[9] [R. *v.* Noel, 6 C. & P. 336; Driscoll *v.* People, 47 Mich. 417; Hill *v.* State, 91 Tenn. 521; see Ellis *v.* State, Ind., 52 N. E. 82.]

[10] [State *v.* Stearns, 94 N. C. 976, *semble;* Abernethy *v.* Com., 101 Pa. 322, 328.]

[11] [Sonneborn *v.* Bernstein, 49 Ala. 172; Robbins *v.* Spencer, 121 Ind. 596; McDermott *v.* State, 13 Oh. St. 3.]

[1] Blewett *v.* Tregonning, 3 Ad. & El. 554; [State *v.* Cardoza, 11 S. C. 195; Goodman *v.* Kennedy, 10 Neb. 270; see Schaser *v.* State, 36 Wis. 429; Furbush *v.* Goodwin, 5 Fost. 425; Mitchell *v.* Sellman, 5 Md. 376; Shedden *v.* Patrick, 2 Sw. & Tr. 170.]

[1] [Transferred to Appendix II, being insufficient by reason of its brevity; the subject-matter is represented in the following two sections.]

until it has been affected by some of the opponent's discrediting evidence.[1] The question, then, is, When is a witness' character disparaged by the opponent's evidence?

(1) A direct attack upon his general character (by reputation or personal opinion) of course presents such a situation.[2]

(2) Where by evidence of particular misdeeds, brought out on cross-examination, or by proof of conviction for crime, the character is impeached, it is natural to suppose that good character should be received in rebuttal.[3] But, after all, the evidence of good character explains nothing; if the misdeed is admitted on cross-examination or proved by record it remains as a fact, and a good reputation cannot take away this fact nor the inference from it.[4] These opposing views have each found support in the different jurisdictions.[5] (3) Evidence of bias or interest does not reflect on character, and hence the supporting proof of character is unnecessary.[6] (4) Evidence of prior inconsistent statements (*ante*, § 461 *f*) does not necessarily or even probably reflect on character; a defect of memory or observation or a prejudice may account for them; and no support for the character is needed.[7] Nevertheless, it is conceivable that the witness is now falsifying through a wicked disposition, and that this possibility may properly be rebutted.[8] But the former view is the more natural one; as a matter of precedent, the jurisdictions are fairly divided between the two views.[9] (5) Where the impeach-

[1] [This is generally conceded; but in Connecticut an old tradition allows the character of a "stranger" to be supported even before impeachment: State *v.* Ward, 49 Conn. 429, 442.]

[2] [This has never been doubted.]

[3] [Expounded by Nelson, C. J., in People *v.* Rector, 19 Wend. 610.]

[4] [Expounded by Bronson, J., in People *v.* Rector, *supra*.]

[5] [The cases are as follows: Doe *v.* Walker, 4 Esp. 50; Bamfield *v.* Massey, 1 Camp. 460; Dodd *v.* Norris, 3 id. 519; R. *v.* Clarke, 2 Stark. 241; Bate *v.* Hill, 1 C. & P. 100; Provis *v.* Reed, 5 Bing. 435, 438; Doe *v.* Harris, 7 C. & P. 330; Lewis *v.* State, 35 Ala. 386; People *v.* Ah Fat, 48 Cal. 61, 64; C. C. P. § 2053; People *v.* Amanacus, 50 Cal. 233; Rogers *v.* Moore, 10 Conn. 14; State *v.* Ward, 49 id. 429, 442; State *v.* Boyd, 38 La. An. 374; State *v.* Fruge, 44 id. 165; Vernon *v.* Tucker, 30 Md. 456, 462; Russell *v.* Coffin, 8 Pick. 143, 154; Harrington *v.* Lincoln, 4 Gray 563, 567; McCarty *v.* Leary, 118 Mass. 510; People *v.* Rector, 19 Wend. 569, 595; Carter *v.* People, 2 Hill 317; People *v.* Hulse, 3 id. 309, 314; People *v.* Gay, 7 N. Y. 378, 381; Stacy *v.* Graham, 14 id. 492, 501; Webb *v.* State, 29 Oh. St. 351, 358; Braddee *v.* Brownfield, 9 Watts 124; Hoard *v.* State, 15 Lea 318, 323; Paine *v.* Tilden, 20 Vt. 554, 564; Stevenson *v.* Gunning, 64 id. 601, 609; George *v.* Pilcher, 28 Gratt. 299, 315; Reynolds *v.* R. Co., 92 Va. 400.]

[6] [First N. B'k *v.* Com. U. Ass. Co., Or., 52 Pac. 1050.]

[7] [Expounded by Wardlaw, J., in Chapman *v.* Cooley, 12 Rich. 659.]

[8] [Expounded by Cowen, J., in People *v.* Rector, 19 Wend. 583; Frazer, J., in Clem *v.* State, 33 Ind. 427.]

[9] [The cases are as follows: Hadjo *v.* Gooden, 13 Ala. 718, 720; Holley *v.* State, 105 id. 100; Towns *v.* State, 111 id. 1; People *v.* Ah Fat, 48 Cal. 61, 64; People *v.* Bush, 65 id. 129; Rogers *v.* Moore, 10 Conn. 14; Mercer *v.* State, Fla., 24 So. 154; Stamper *v.* Griffin, 12 Ga. 456; McEwen *v.* Springfield, 64 id. 159, 165; Pulliam *v.* Cantrell, 77 id. 563, 568; Paxton *v.* Dye, 26 Ind. 394; Clark *v.* Bond, 29 id. 555; Harris *v.* State, 30 id. 131; Clem *v.* State, 33 id. 418, 427; S. N. A. & C. R. Co. *v.* Frawley, 110 id. 18, 26; State *v.* Archer, 73 Ia. 320, 323; Code, § 663; Vance *v.* Vance, 2 Metc. 581; State *v.* Boyd, 38 La. An. 374; Davis *v.* State, 38 Md. 15, 49; Russell

ment has consisted merely in showing an error by contradiction from other witnesses (§ 461 *e. ante*), the reasoning is the same as for the preceding sort,[10] except that the possibility of a reflection on character is here even more remote; here all but a few Courts agree in considering the supporting evidence unnecessary.[11]]

§ 469 *b*. **Corroboration by Evidence of Prior Similar Statements.** [In the eighteenth century it was considered proper to receive such statements in corroboration, even before the witness had been discredited in any way.[1] But this doctrine has wholly passed away; for it is clear that an untrustworthy story is not made more trustworthy by any number of repetitions of it.[2] There must at least have been some sort of discrediting of the witness, which the consistent statements help to remove. The question is, then, What sort of discrediting evidence is explained away or otherwise answered by proof of similar consistent statements? (1) It is clear that evidence of bad character is in no way answered by such evidence; though a few Courts are able to see value in it.[3] (2) After evidence of a prior

v. Coffin, 8 Pick. 143, 154; Brown *v.* Mooers, 6 Gray 451; Com. *v.* Ingraham, 7 id. 46, 48; State *v.* Cooper, 71 Mo. 436, 442; People *v.* Hulse, 3 Hill 309, 313; Starks *v.* People, 5 Den. 106, 108; Stacy *v.* Graham, 14 N. Y. 492, 501; Isler *v.* Dewey, 71 N. C. 14; Webb *v.* State, 29 Oh. St. 351, 357; Glaze *v.* Whitley, 5 Or. 164, 167; Sheppard *v.* Yocum, 10 id. 402, 413; First Nat'l B'k *v.* Com. U. Ass. Co., id., 52 Pac. 1050; Braddee *v.* Brownfield, 9 Watts 124; Wertz *v.* May, 21 Pa. 274, 279; Farr *v.* Thompson, Cheves S. C. 37, 43; Chapman *v.* Cooley, 12 Rich. 654, 658; State *v.* Jones, 29 S. C. 201, 230; State *v.* Rice, 49 id. 418; Burrell *v.* State, 18 Tex. 713, 730; State *v.* Roe, 12 Vt. 93, 111; Paine *v.* Tilden, 20 id. 554, 564; Sweet *v.* Sherman, 21 id. 23, 29; Stevenson *v.* Gunning, 64 id. 601, 608; George *v.* Pilcher, 28 Gratt. 299, 315.]

[10] [The argument for exclusion has been expounded by Parker, C. J., in Russell *v.* Coffin, 8 Pick. 154; Earle, J., in Farr *v.* Thompson, Cheves 43; Walker, J., in Tedens *v.* Schumers, 112 Ill. 263; Bleckly, C. J., in Miller *v.* R. Co., 93 Ga. 480. No Court taking the contrary view seems to have attempted a justification of it.]

[11] [The cases on both sides are as follows: Durham *v.* Beaumont, 1 Camp. 207; Newton *v.* Jackson, 23 Ala. 335, 344; M. & G. R. Co. *v.* Williams, 54 id. 168, 172; Rogers *v.* Moore, 10 Conn. 14; Sanssy *v.* R. Co., 22 Fla. 327, 330; Bell *v.* State, 100 Ga. 78; Tedens *v.* Schumers, 112 Ill. 263, 266; Pruitt *v.* Cox, 21 Ind. 15; Johnson *v.* State, ib. 329; Braun *v.* Campbell, 86 id. 516; Presser *v.* State, 77 id. 274, 280; L. N. A. & C. R. Co. *v.* Frawley, 110 id. 18, 27; State *v.* Archer, 73 Ia. 320, 323; Code § 663; Vance *v.* Vance, 2 Metc. Ky. 581; State *v.* Desforges, 48 La. An. 73; Vernon *v.* Tucker, 30 Md. 456, 462; Davis *v.* State, 38 id. 15, 74; Russell *v.* Coffin, 8 Pick. 143, 154; Heywood *v.* Reed, 4 Gray 574, 581; Brown *v.* Mooers, 6 id. 451; Com. *v.* Ingraham, 7 id. 46, 48; People *v.* Rector, 19 Wend. 569, 586; People *v.* Hulse, 3 Hill 309, 313; Starks *v.* People, 5 Den. 106, 108; March *v.* Harrell, 1 Jones 329, 331; Isler *v.* Dewey, 71 N. C. 14; Glaze *v.* Whitley, 5 Or. 164, 167; Sheppard *v.* Yocum, 10 id. 402, 413; Braddee *v.* Brownfield, 9 Watts 124; Farr *v.* Thompson, Cheves S. C. 37, 43; Chapman *v.* Cooley, 12 Rich. 654, 660; State *v.* Jones, 29 S. C. 201, 330; Richmond *v.* Richmond, 10 Yerg. 343, 345; Spurr *v.* U. S., U. S. App., 87 Fed. 701; Stevenson *v.* Gunning, 64 Vt. 601, 608; George *v.* Pilcher, 28 Gratt. 299, 315; State *v.* Nelson, 13 Wash. 523.]

[1] [Gilbert, Evidence, 68, 150; Buller, Nisi Prius, 294; Sir John Freind's Trial, 13 How. St. Tr. 270. Lutterell *v.* Reynell, 1 Mod. 282, usually cited for this older doctrine, seems in truth to concern a use of the evidence still recognized as proper.]

[2] [Explained by Story, J., in Ellicott *v.* Pearl, 10 Pet. 439; Reade, J., in State *v.* Parish, 79 N. C. 612. The later view is to-day universally accepted; for the peculiar case of rape complaints, however, see *post*, § 469 *c*.]

[3] [*Excluded:* Mason *v.* Vestal, 88 Cal. 396; State *v.* Vincent, 24 Ia. 570; Stolp *v.*

inconsistent statement (*ante*, § 461 *f*) it is perhaps, at first thought, of value to show other consistent statements.[4] But, on the other hand, the latter in no sense explain away the former; the inconsistency on that occasion is just as damaging, even though the other story has been repeated a score of times.[5] There is, however, one purpose for which such evidence has a legitimate value, viz., to show that the alleged inconsistent statement never was made, since constancy in the story now told makes it less likely that the supposed different one was ever uttered.[6] But this third possibility is rarely noticed;[7] and most Courts decide the question one way or the other, according as they are persuaded by the first or the second argument.[8] By Courts admitting such evidence of consistent statements

Blair, 68 Ill. 541; Sidelinger *v.* Bucklin, 64 Me. 373; Robb *v.* Hackley, 23 Wend. 50 (overruling earlier cases); Scott *v.* State, Tex. Cr., 47 S. W. 531; Gibbs *v.* Linsley, 13 Vt. 208, 215.

Admitted: Sonneborn *v.* Bernstein, 49 Ala. 168; State *v.* Thomason, 1 Jones L. 274; Henderson *v.* Jones, 10 S. & R. 322.

Moreover those Courts admitting this after "any impeaching evidence," *post*, would of course admit it here also.]

[4] [As expounded by Smith, C. J., in Jones *v.* Jones, 79 N. C. 249.]

[5] [As expounded by Gibson, C. J., in Craig *v.* Craig, 5 Rawle 97; Bigelow, C. J., in Cory *v.* Jenkins, 10 Gray 488.]

[6] [Acutely explained by Cooley, J., in Stewart *v.* People, 23 Mich. 74; so also Johnson, J., in Lyles *v.* Lyles, 1 Hill Eq. 78; Brackenridge, J., in Garwood *v.* Dennis, 4 Binn. 314, 339.]

[7] [But certain peculiar cases are perhaps explained by this, or something like it: State *v.* Dennin, 32 Vt. 158; Zell *v.* Com., 94 Pa. 258, 266, 273; Hewitt *v.* Cory, 150 Mass. 445; Brown *v.* People, 17 Mich. 429, 435.]

[8] [The cases on both sides are as follows: Nichols *v.* Stewart, 20 Ala. 358, 361; Sonneborn *v.* Bernstein, 49 id. 168, 171; Jones *v.* State, 107 id. 93; People *v.* Doyell, 48 Cal. 85, 90; Barkley *v.* Vestal, 88 id. 396, 398; McCord *v.* State, 83 Ga. 521, 531; Stolp *v.* Blair, 68 Ill. 541, 543; Coffin *v.* Anderson, 4 Blackf. 395, 398; Beauchamp *v.* State, 6 id. 299, 308; Perkins *v.* State, 4 Ind. 222; Daily *v.* State, 28 id. 285; Brookbank *v.* State, 55 id. 169, 172; Carter *v.* Carter, 79 id. 466; Hodges *v.* Bales, 102 id. 494, 500; L. & P. G. T. Co. *v.* Heil, 118 id. 135; Hobbs *v.* State, 133 id. 404, 407; Hinshaw *v.* State, 147 id. 334; Reynolds *v.* State, ib. 3; State *v.* Vincent, 24 Ia. 570, 574; State *v.* Langford, 45 La. An. 1177; State *v.* Cady, 46 id. 1346, 1349; McAleer *v.* Horsey, 35 Md. 439, 465; St. 1874, c. 386; Mallonee *v.* Duff, 72 Md. 283, 287; State *v.* Reed, 62 Me. 147; Hunt *v.* Roylance, 11 Cush. 117, 121; Com. *v.* Jenkins, 10 Gray 485, 487; Hewitt *v.* Corey, 150 Mass. 445; Stewart *v.* People, 23 Mich. 63, 74; Brown *v.* People, 17 id. 429, 435; Head *v.* State, 44 Miss. 731, 751; State *v.* Taylor, 134 Mo. 109; French *v.* Merrill, 6 N. H. 465, 467; Judd *v.* Brentwood, 46 id. 430; Jackson *v.* Etz, 5 Cow. 314, 320; People *v.* Vane, 12 Wend. 78; People *v.* Moore, 15 id. 420, 423; People *v.* Rector, 19 id. 569, 583; Robb *v.* Hackley, 23 id. 50; Dudley *v.* Bolles, 24 id. 465, 472; Johnson *v.* Patterson, 2 Hawks 183; State *v.* Twitly, ib. 449; State *v.* George, 8 Ire. 324, 328; Hoke's Ex'rs *v.* Fleming, 10 id. 263, 266; State *v.* Dove, ib. 469, 473; March *v.* Harrell, 1 Jones L. 329; State *v.* Thomason, ib. 274; Wallace *v.* Grizzard, 114 N. C. 488; Turnbull *v.* O'Hara, 4 Yeates 446, 451; Packer *v.* Gonsalus, 1 S. & R. 526, 536; Foster *v.* Shaw, 7 id. 156, 162; Henderson *v.* Jones, 10 id. 322; Craig *v.* Craig, 5 Rawle 91; McKee *v.* Jones, 6 Pa. 425, 428; Crooks *v.* Bunn, 136 id. 368, 371; Lyles *v.* Lyles, 1 Hill Eq. S. C. 77; State *v.* Thomas, 3 Strobh. 269, 271; Story *v.* Saunders, 8 Humph. 663, 666; Dosset *v.* Miller, 3 Sneed, 72, 76; Queen *v.* Morrow, 1 Coldw. 123, 134; Third Nat'l Bank *v.* Robinson, 1 Baxt. 479, 484; Hayes *v.* Chatham, 6 Lea 1, 110; Glass *v.* Bennett, 89 Tenn. 478, 481; Graham *v.* McReynolds, 90 id. 673, 694; Goode *v.* State, 32 Tex. Cr. 505, 508; Red *v.* State, id., 46 S. W. 408; Wright *v.* Deklyne, 1 Pet. C. C. 199, 203; Conrad *v.* Griffey, 11 How. 480, 490; Ellicott *v.* Pearl, 1 McLean 206, 211; 10 Pet. 412, 439; Munson *v.* Hastings, 12 Vt. 346, 350; Gibbs *v.* Linsby, 13 id. 208, 215; State *v.* Flint, 60 id. 307, 310, 319.]

it is sometimes said that they must have been uttered before the contradictory one,[9] but this seems unnecessary. (3) Where the impeachment has consisted merely in showing error, by contradicting through other witnesses (*ante*, § 461 *e*), consistency of statement can be of no help; otherwise, the witness who repeated his story to the greatest number of persons would be the most credible; yet a few Courts see value in such evidence.[10] (4) Where the impeachment consists in a charge of bias or interest or corruption, there is value in showing a prior consistent statement before the time when the supposed bias or interest or corruption could have existed; for it thus appears that his present testimony cannot be attributed to bias or the like.[11] (5) Similarly, where it has been shown that the witness failed to speak of the matter at a time when he might have done so, and the inference is suggested that his present story is therefore a matter of recent contrivance, it is useful to show that the witness, on the contrary, has already made the same statement, and thus is not now for the first time making it, the inference of recent contrivance being thus rebutted.[12] (6) It is sometimes said that this sort of evidence is admissible after impeachment of any sort, in particular, after any impeachment by cross-examination;[13] but there is no reason for such a loose rule.[14]]

§ 469 *c*. **Same: Fresh Complaint of Rape; Constancy of Accusation in Bastardy.** [1. The use of a *complaint by the woman*, on a *trial for rape*, may be considered in three aspects; and the apparent confusion of rulings results largely from the fact that the Courts have had these three possible theories to choose from, and have both chosen differently and at the same time failed frequently to indicate their attitude toward the other theories.

[9] [Graham *v.* McReynolds, 90 Tenn. 673, 697; Conrad *v.* Griffey, 11 How. 480, 491.]

[10] [The cases on both sides are as follows: Stolp *v.* Blair, 68 Ill. 541, 543; Carter *v.* Carter, 79 Ind. 466, 468; Hodges *v.* Bales, 102 id. 494, 500; State *v.* Vincent, 24 Ia. 570, 574; State *v.* Dudoussat, 47 La. An. 977; Cooke *v.* Curtis, 6 H. & J. 93; W. Fire Ins. Co. *v.* Davison, 30 Md. 92, 104; McAleer *v.* Horsey, 35 id. 439, 463; Maitland *v.* Bank, 40 id. 540, 559; Bloomer *v.* State, 48 id. 521, 537; Mallonee *v.* Duff, 72 id. 283, 287; Riney *v.* Vanlandingham, 9 Mo. 807, 812; People *v.* Vane, 12 Wend. 78; Robb *v.* Hackley, 23 Wend. 50; Dudley *v.* Bolles, 24 id. 465, 472; March *v.* Harrell, 1 Jones L. 329; Bullinger *v.* Marshall, 70 N. C. 520, 524; Henderson *v.* Jones, 10 S. & R. 322; Hester *v.* Com., 85 Pa. 139, 158; Glass *v.* Bennett, 89 Tenn. 478, 481; United States *v.* Neverson, 1 Mackey 152, 169; Wright *v.* Deklyne, 1 Pet. C. C. 199, 203; Munson *v.* Hastings, 12 Vt. 346, 350.]

[11] [Expounded in Evans, Notes to Pothier, II, 247; good examples in Barkly *v.* Copeland, 74 Cal. 1, 5; Com. *v.* Jenkins, 10 Gray 485; State *v.* Flint, 60 Vt. 304, 307, 316. The rule is nowhere disputed.]

[12] [Good statements are found in Com. *v.* Wilson, 1 Gray 338; Com. *v.* Jenkins, 10 id. 485; Munson *v.* Hastings, 12 Vt. 346, 350; State *v.* Flint, 60 id. 304, 309, 317. The principle is everywhere conceded, though its application is sometimes difficult; see, for instance, State *v.* Cruise, 19 Ia. 312; Balt. C. P. R. Co. *v.* Knee, 83 Md. 77; and the cases in note 7, *supra*.]

[13] [Stolp *v.* Blair, 68 Ill. 541, 543; Cooke *v.* Curtis, 6 H. & J. 93; Com. *v.* Wilson, 1 Gray 338; Davenport *v.* McKee, 98 N. C. 500.]

[14] [This loose form of statement, usually fonnd, if at all, in the early cases, has been expressly repudiated in New York (see the cases *ante*) and Missouri: State *v.* Taylor, 134 Mo. 109; and, apart from North Carolina, it is probably not law anywhere to-day. The proper mode is to decide each of the above situations upon its own merits.]

(1) The complaint may be treated as an exception to the Hearsay rule, and thus admissible as evidence of the facts stated. This view, as explained *ante*, § 102, is adopted by very few Courts. It is to be noted here, however, for comparison with the other theories, that it involves three important consequences, viz., (*a*) the particular terms, and not merely the fact, of the complaint are receivable; (*b*) the woman need not be a witness; (*c*) if a witness, she need not have been impeached. In these points it differs from one or the other of the following theories.

(2) The complaint may be treated from the point of view of prior inconsistent statements. It has already been seen (§ 462 *a*) that a witness' failure to speak when it would have been natural to do so is in effect an inconsistent statement and may be proved in impeachment. When a woman testifies to a rape, and the rape is denied, the fact that the woman made no complaint, at or shortly after the time of the alleged rape, is significant against her in precisely this way. Moreover, if it were not shown that she thus complained, the opponent might well argue and the jury infer that she did not complain. It is therefore only just that the prosecution should forestall this assumption by showing that she did complain, *i. e.* that she did not behave with a silence inconsistent with her present story. This use of the mere fact of the complaint is universally allowed.[1] Moreover, if she did not complain, the reasons for her silence may be shown,[2] just as any other apparently inconsistent statements may be explained away (*ante*, § 462 *b*). By the ancient tradition the complaint must have been made freshly after the alleged assault, and a few Courts preserve this rule,[3] but the better view is that lapse of time does not exclude the fact.[4] Certain special consequences follow from the present theory: (*a*) The fact of the complaint, not its terms or details, is all that is admitted, for the fact alone is needed to rebut the supposed inconsistent silence;[5] this is the marked feature of this theory as distinguished from the ensuing one; the exclusion of the

[1] [The theory is well expounded by Woodruff, J., in Baccio *v.* People, 41 N. Y. 268; Allen, J., in Brogy's Case, 10 Gratt. 729.]

[2] [Expounded by Bellows, J., in State *v.* Knapp, 45 N. H. 155; Woodruff, J., in Baccio *v.* People, 41 N. Y. 268. The rule is not disputed.]

[3] [R. *v.* Lillyman, 1896, 2 Q. B. 167, 170; People *v.* O'Sullivan, 104 N. Y. 481, 490; Dunn *v.* State, 45 Oh. St. 249, 252; Com. *v.* Cleary, Mass., 51 N. E. 746 (undecided; but time is in trial Court's discretion); People *v.* Lambert, Cal., 52 Pac. 307.]

[4] [People *v.* Gage, 62 Mich. 271, *semble;* State *v.* Marcks, 140 Mo. 656; State *v.* Knapp, 45 N. H. 155, *semble;* State *v.* Niles, 47 Vt. 82, 86.]

[5] [Griffin *v.* State, 76 Ala. 29, 31; Pleasant *v.* State, 15 Ark. 649; People *v.* Lambert, Cal., 52 Pac. 307; Stephen *v.* State, 11 Ga. 225, 233; Polson *v.* State, 137 Ind. 519, 523; McMurrin *v.* Rigby, 80 Ia. 322, 325; State *v.* Mulkern, 85 Me. 106, 107; People *v.* Bernor, Mich., 74 N. W. 184; State *v.* Shettleworth, 18 Minn. 208, 212; State *v.* Jones, 61 Mo. 232, 235; Mathews *v.* State, 19 Nebr. 330, 337; State *v.* Knapp, 45 N. H. 148, 155; Baccio *v.* People, 41 N. Y. 265, 271; Harmon *v.* Terr., Okl., 49 Pac. 55; Pefferling *v.* State, 40 Tex. 486, 492; State *v.* Bedard, 65 Vt. 278, 284; Brogy's Case, 10 Gratt. 722, 726; State *v.* Hunter, 18 Wash. 670; Hannon *v.* State, 70 Wis. 448, 452.]

terms of the statement is, by implication or expressly, a repudiation of the theory of an exception to the Hearsay rule and of the theory of corroboration below explained; (*b*) the woman must be a witness, for her silence is supposed to be evidential only as inconsistent with her testimony, and if she does not testify there is no inference to be rebutted;[6] yet only rarely is this requirement made; (*c*) the woman need not have been impeached.[7]

(3) The third theory is that of similar consistent statements (*ante*, § 469 *b*). The testimony of an ordinary witness who has been impeached in certain ways may be corroborated, as we have seen, by evidence of his similar and consistent statements made at other times. It is a legitimate application of that principle to admit the woman's prior complaint in the present instance. Upon this theory, (*a*) it follows that the details or terms of the statement are admissible, as they would be for any other witness;[8] this peculiarly distinguishes this theory from the preceding one. (*b*) It follows, also, that the woman must have testified; for otherwise there is no witness to corroborate.[9] (*c*) It follows, also, that she must have been impeached, for this is a part of the general rule allowing corroboration by consistent statements, the Courts differing as to the precise kind of impeachment that must have occurred (*ante*, § 469 *b*);[10] yet there are Courts which do not carry out the principle to this extent but allow the complaint to be put in evidence on the direct examination and before any impeachment.[11]

The practical result, taken in the rough, of these different possible theories is (1) the fact of complaint is universally admitted; (2) the details or terms of it (*a*) are by a very few Courts admitted under the first theory, (*b*) are by a very few other Courts admitted under the third theory, even on direct examination, (*c*) are by most

[6] [People *v.* O'Sullivan, 104 N. Y. 481, 486; Com. *v.* Cleary, Mass., 51 N. E. 746; undecided in Brogy's Case, 10 Gratt. 722, 727. The English rulings are obscure: R. *v.* Megson, 9 C. & P. 420; R. *v.* Guttridge, ib. 471; R. *v.* Walker, 2 Mo. & Rob. 212.]

[7] [Com. *v.* Cleary, Mass., 51 N. E. 746, *semble*.]

[8] [The cases in the next two notes all accept this.]

[9] [R. *v.* Megson, 9 C. & P. 420; R. *v.* Guttridge, ib. 471, *semble;* People *v.* Graham, 21 Cal. 261; Weldon *v.* State, 32 Ind. 81; Thompson *v.* State, 38 id. 39; State *v.* Meyers, 46 Nebr. 152; People *v.* McGee, 1 Denio 19; Johnson *v.* State, 17 Oh. St. 593; Phillips *v.* State, 9 Humph. 246.]

[10] [The following Courts seem to require impeachment of one sort or another: Griffin *v.* State, 76 Ala. 29; Pleasant *v.* State, 15 Ark. 624, 649; Thompson *v.* State, 38 Ind. 39; McMurrin *v.* Rigby, 80 Ia. 322; State *v.* Langford, 45 La. An. 1177; State *v.* Jones, 61 Mo. 232; Oleson *v.* State, 11 Nebr. 276; Baccio *v.* People, 41 N. Y. 265, 269; State *v.* Marshall, Phillips N. C. 49; State *v.* Sargent, Or., 49 Pac. 889; Phillips *v.* State, 9 Humph. 246; Thompson *v.* State, 33 Tex. Cr. 472.

The English rulings were at first not clear: R. *v.* Eyre, 2 F. & F. 579; R. *v.* Wood, 14 Cox Cr. 47; but in R. *v.* Lillyman, 1896, 2 Q. B. 167, 177, the ruling is the same as in the cases in the next note.]

[11] [These seem to be as follows: State *v.* Byrne, 47 Conn. 465; U. S. *v.* Snowden, 2 D. C. App. 89; People *v.* McGee, 1 Denio 19; Dunn *v.* State, 45 Oh. St. 249, and prior cases; Ellicott *v.* Pearl, 1 McLean, 206, 211.

Most of the rulings prescribe that the complaint should have been recent; but this is strictly unnecessary, under the present theory.]

Courts declared inadmissible by virtue of the first and the second theories, but by a majority within this majority are nevertheless admitted under the third theory, *i. e.* after impeachment.

2. At the time when disqualification by reason of interest prevailed, statutes were passed by which the mother of a bastard became a competent witness in bastardy proceedings provided she had been "constant in her accusation," in that during her travail she had charged the paternity of the child upon the same person now defendant in the bastardy proceedings.[12] Since the abolition of incompetency by interest, these declarations (no longer essential to make the mother competent) present themselves in a new aspect, *i. e.* whether they are admissible in corroboration of the testimony of the mother. It is generally held, in those jurisdictions where their use for the above purpose once prevailed, that they are still admissible in corroboration;[13] but elsewhere their use seems to be repudiated.[14]]

[12] [See Appendix II, § 349.]
[13] [Harty *v.* Malloy, 67 Conn. 339; Leonard *v.* Bolton, 148 Mass. 66 (under statute).]
[14] [State *v.* Spencer, Minn., 75 N. W. 893; Stoppert *v.* Nierle, 45 Nebr. 105.]

CHAPTER XXVII.

WITNESSES (CONTINUED): PRIVILEGE.

§ 469 *d*. Self-crimination; (1) By Testimony on the Stand.
§ 469 *e*. Same: (2) By Exhibition of the Person, or the like.
§ 469 *f*. Same: (3) By Production of Documents.
§ 469 *g*. Civil Liability or Loss.
§ 469 *h*. Forfeiture.
§ 469 *i*. Infamy or Disgrace: (1) Matters Material to the Issue.
§ 469 *j*. Same: (2) Matters Collateral to the Issue.
§ 469 *k*. Same: (3) Indirect Exposure.
§ 469 *l*. Same: Summary.
§ 469 *m*. Corporal Inspection of Civil Party.
§ 469 *n*. Witness' Production of Title-deeds.

§ 469 *d* [451]. **Self-crimination; (1) By Testimony on the Stand.** Where it reasonably appears that the answer will have a tendency to expose the witness to a penal liability, or to any kind of punishment, or to a criminal charge; here the authorities are exceedingly clear that the witness is not bound to answer.[1]

[A number of distinct topics here present themselves. (*a*) The criminality of the matter inquired about. It does not matter that the proceeding is civil in form, so long as it is penal in its nature.[2] But the Courts of a given sovereignty or jurisdiction are concerned only with the laws of that sovereignty; and hence it is immaterial that the matter involves a crime by some other system of law, so long as it is not a crime by the law administered in the Court of the trial.[3] Furthermore, if the matter inquired about has ceased to be the subject of criminal prosecution against the witness, there is no field for the privilege. Thus,] if the prosecution to which he might be exposed is barred by lapse of time, the privilege ceases, and the witness is bound to answer;[4] [and his claim of privilege at a former time,

[1] Southard *v.* Rexford, 6 Cowen 254; 1 Burr's Trial 245; E. India Co. *v.* Campbell, 1 Ves. 247; Paxton *v.* Douglass, 19 Ves. 225; Cates *v.* Hardacre, 3 Taunt. 424; Macbride *v.* Macbride, 4 Esp. 243; R. *v.* Lewis, id. 225; R. *v.* Slaney, 5 C. & P. 213; R. *v.* Pegler, 5 C. & P. 521; Dodd *v.* Norris, 3 Campb. 519; Maloney *v.* Bartley, id. 210. [For the history of this privilege, see an article by the present editor in 5 Harv. L. Rev. 71, entitled "Nemo tenetur seipsum prodere."] This rule is also administered in Chancery, where a defendant will not be compelled to discover that which, if answered, would tend to subject him to a penalty or punishment, or which might lead to a criminal accusation, or to ecclesiastical censures: Story's Eq. Pl. §§ 524, 576, 577, 592–598; McIntyre *v.* Mancius, 16 Johns. 592; Wigram on Discovery, pp. 61, 150, 195 (1st Am. ed.); id. §§ 130–133, 271 (2d Lond. ed.); Mitford's Eq. Pl. 157–163.

[2] [Lees *v.* U. S., 150 U. S. 476 (penalty under alien immigration statute; privilege applies); Thruston *v.* Clark, 107 Cal. 285 (removal from office; privilege applies) Miller *v.* State, 110 Ala. 69 (bastardy; privilege not applicable).]

[3] [King of Sicilies *v.* Wilcox, 7 State Tr. N. S. 1049, 1062; Brown *v.* Walker, 161 U. S. 591.]

[4] Roberts *v.* Allatt, 1 M. & Malk. 192; People *v.* Mather, 4 Wend. 229, 252–255; [Lamson *v.* Boyden, Ill., 43 N. E. 781; South. R. N. Co. *v.* Russell, 91 Ga. 808. But it is usually said that the party opposing the privilege must show that no prosecution was begun or is pending.]

the statutory period having elapsed in the meantime, may be used against him as an admission.[5] So, also, where the witness has received a pardon, or has been by statute indemnified or eased from all prosecution for the offence, there is no crimination involved, and therefore no privilege.[6] On the same principle a legislative pardon or immunity granted in advance to those who testify, and operating by virtue of the act of testifying, renders the privilege no longer applicable to an answer sought under such a statute, because "any evidence that he may give under such a statutory direction will not be 'against himself,' for the reason that by the very act of giving evidence he becomes exempted from any prosecution or punishment for the offence respecting which his evidence is given."[7] But it is clear that the disclosure of the criminal matter, against which his privilege protects him, may be made, not merely by an answer directly involving the charge, but equally by an answer involving a matter connected more or less indirectly with such a charge. In the phrase of Chief Justice Marshall,] if the fact to which he is interrogated forms but one link in the chain of testimony, which is to convict him, he is protected; [in other words, if the matter of the answer would *tend* to criminate him, the privilege applies to it.[8] An important consequence of this is that a statutory immunity which provides merely that the evidence thus given shall not be used against the witness is faulty, so far as its purpose is to render the privilege inapplicable, since the privilege protects him against disclosures which even tend to criminate, and thus, although the precise answer made could not under the statute be offered in evidence against him, nevertheless other facts discovered by means of it could still be so used, and therefore the use of them thus obtained would involve a violation of the privilege to that extent.[9] The only mode by which the privilege can be made inapplicable seems to be by an entire

[5] [Holt *v.* State, Tex. Cr., 45 S. W. 1016; Childs *v.* Merrill, 66 Vt. 302.]

[6] [This is an old expedient; see Bishop Atterbury's Trial, 16 How. St. Tr. 604; Lord Chancellor Macclesfield's Trial, ib. 921, 1147. A promise of pardon to an accomplice cannot suffice, because this gives only an "equitable right" to immunity: *Ex parte* Irvine, 74 Fed. 945, 964.]

[7] [*Ex parte* Cohen, 104 Cal. 524. *Accord:* State *v.* Nowell, 58 N. H. 314; Brown *v.* Walker, 161 U. S. 591; see People *v.* Sharp, 107 N. Y. 427; Frazee *v.* State, 58 Ind. 8; Floyd *v.* State, 7 Tex. 215; Kendrick *v.* Com., 78 Va. 490; People *v.* Sternberg, 111 Cal. 3; Park *v.* Johnson, 86 Ia. 475; Lamson *v.* Boyden, Ill., 43 N. E. 781; Henderson *v.* State, 95 Ga. 326.]

[8] [Parkhurst *v.* Lowten, 2 Swanst. 215; R. *v.* Hulme, L. R. 5 Q. B. 377; People *v.* Mather, 4 Wend. 252; Burr's Trial, I, 244; L. C. Macclesfield's Trial, 16 How. St. Tr. 920 (the former incumbent of an office asked what was the greatest price it was ever sold for; privileged); Smith *v.* Smith, 116 N. C. 386 (divorce; whether the witness had had intercourse with the defendant, a single act not being criminal; privileged).]

[9] [Com. *v.* Emery, 107 Mass. 172; Counselman *v.* Hitchcock, 142 U. S. 547. The variety of phrasing in the constitutional provisions (collected *post*, in Appendix I), *e. g.* exempting one from "being a witness," "furnishing evidence," "giving evidence," against himself, are not usually regarded as affecting the result. The reasoning of the above cases is not beyond criticism.]

immunity granted for the offence itself to which the testimony relates.[10]

(*b*) The making of the claim, and its determination. Being intended solely for the witness' sake,] the privilege is his own, and not that of the party; counsel, therefore, will not be allowed to make the objection;[11] [nor, if the Court erroneously disregards the privilege, may the party complain of the error.[12]] Whether it may tend to criminate or expose the witness is a point upon which the Court are bound to instruct him;[13] and which the Court will determine, under all the circumstances of the case;[14] but without requiring the witness fully to explain how he might be criminated by the answer, which the truth would oblige him to give;[15] for if he were obliged to show how the effect would be produced, the protection which this rule of law is designed to afford him would at once be annihilated. [It is not necessary that the witness should expressly say that the answer would criminate him, if this is clear from the nature of the question.[16]] But the Court will not prevent the witness from answering it, if he chooses: they will only advertise him of his right to decline it.[17]

(*c*) [The waiver of the privilege, by testifying in part. The wit-

[10] [See the cases in note 7, *ante*. The argument, considered and repudiated in Brown *v.* Walker, 161 U. S. 591, that above and beyond the criminality, which may be removed by statute, there is an infamy and disgrace not removable by any statute, but also within the protection of the privilege, is wholly unfounded, and it is a matter of surprise that any support was found for it in a dissenting opinion. It seems to rest upon a confusion of the present privilege with that treated *post*, § 469 *i*, the latter being wholly distinct historically, and not being within the purview of the Constitution. The article referred to *ante*, note 1, will serve to explain this.]

[11] Thomas *v.* Newton, 1 M. & M. 48, note; R. *v.* Adey, 1 M. & Rob. 94; {Com. *v.* Shaw, 4 Cush. 594; State *v.* Wentworth, 65 Me. 234;} [State *v.* Pancoast, 5 N. D. 516; Ingersol *v.* McWillie, 87 Tex. 647; *contra*, as to counsel claiming on witness' behalf: Clifton *v.* Granger, 86 Ia. 573. Nor may counsel even ask that the witness be warned: State *v.* Butler, 47 S. C. 25; *contra:* State *v.* Pancoast, *supra*.]

[12] [R. *v.* Kinglake, 22 L. T. N. S. 335; Samuel *v.* People, 164 Ill. 379; Morgan *v.* Halberstadt, 20 U. S. App. 417, 424;] {except where he is also the witness: People *v.* Brown, 72 N. Y. 571; State *v.* Wentworth, 65 Me. 234.}

[13] Close *v.* Olney, 1 Denio 319. [There is good authority for the contrary view; see Dunn *v.* State, 99 Ga. 211; though the early English practice seems to have favored giving the warning; see L. C. Macclesfield's Trial, 16 How. St. Tr. 850; Bainbridge's Trial, 22 id. 143; Watt's Trial, 23 id. 1265.]

[14] [The earlier English rulings were not harmonious: R. *v.* Garbett, 1 Den. Cr. C. 236; Fisher *v.* Ronalds, 12 C. B. 762; Adams *v.* Lloyd, 3 H. & N. 361; Osborn *v.* Dock Co., 10 Exch. 702; Sidebottom *v.* Adkins, 3 Jur. N. S. 631; *Ex parte* Fernandez, 10 C. B. N. S. 3, 39; but in R. *v.* Boyes, 1 B. & S. 311, it was finally decided that "the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer." *Accord: Ex parte* Senior, 37 Fla. 1; *Ex parte* Irvine, 74 Fed. 954;] {*Ex parte* Schofield, L. R. 6 Ch. D. 230;} [see Brown *v.* Walker, 161 U. S. 591; People *v.* Forbes, N. Y., 38 N. E. 303; Warner *v.* Lucas, 10 Oh. 336; Kirschner *v.* State, 9 Wis. 140.]

[15] People *v.* Mather, 4 Wend. 229; 1 Burr's Trial 245; Southard *v.* Rexford, 6 Cowen 254, 255; Bellinger *v.* People, 8 Wend. 595; [see Janvrin *v.* Scammon, 29 N. H. 280; [Chamberlain *v.* Willson, 12 Vt. 491;] Short *v.* Mercier, 15 Jur. 93.

[16] [Alston *v.* State, 109 Ala. 51; Perkins *v.* Bank, 17 Wash. 100.]

[17] People *v.* Mather, 4 Wend. 252.

ness may, of course, waive the privilege.] In all cases where the witness, after being advertised of his privilege, chooses to answer, he is bound to answer everything relative to the transaction.[18] [But here certain discriminations are necessary. (*c'*) Where the witness is not a party, and has not yet been asked an incriminating question, there has been no waiver, and hence as soon as such a question is reached, the answer may be declined. But where an incriminating question has been answered, he may not refuse to explain the whole of the subject of that answer.[19] (*c''*) Where the witness is a party several situations may arise. A voluntary giving of testimony at a former stage of the case will usually not be treated as a waiver.[20] But the taking of the stand to give testimony in chief, particularly by a defendant in a criminal case, may well be treated as a waiver so far as to oblige him to submit to a cross-examination. Here at least three views may be distinguished; one is that there the party may nevertheless stop at any point he chooses; another is that he is open to cross-examination precisely as any other witness is; still another is that he is open to cross-examination only on facts material to the issue; but the phrasing of the rules differs more or less in various jurisdictions; and in any event it would seem that a distinction ought to be made between a party to a civil case and an accused in a criminal case.[21] Whether the waiver, if any, extends so far as to permit the prosecution to recall the accused to the stand after he has left it is also a matter on which opinions differ.[22]

[18] Dixon *v.* Vale, 1 C. & P. 278; State *v.* K——, 4 N. H. 562; East *v.* Chapman, 1 M. & Malk. 46; s. c. 2 C. & P. 570; Low *v.* Mitchell, 6 Shepl. 372. [The author's text also reads: "He may claim the protection at any stage of the inquiry, whether he has already answered the question in part, or not at all:" R. *v.* Garbett, 1 Den. Cr. C. 236; *Ex parte* Cossens, Buck's Bankr. Cas. 531, 545; but this is obviously misleading in connection with the above passage.]

[19] [But there is some difference of opinion and phrasing here; see R. *v.* Garbett, 1 Den. Cr. C. 236; Norfolk *v.* Gaylord, 28 Conn. 309; Low *v.* Mitchell, 18 Me. 372; Foster *v.* Pierce, 11 Cush. 437; Foster *v.* People, 18 Mich. 266; Amherst *v.* Hollis, 9 N. H. 107; Coburn *v.* Odell, 30 N. H. 540, 554; Chesapeake Club *v.* State, 63 Md. 446;] {Mayo *v.* Mayo, 119 Mass. 290; Com. *v.* Pratt, 126 id. 462.}

[20] [Georg. R. & B. Co. *v.* Lybrend, 99 Ga. 421 (former trial); Samuel *v.* People, 164 Ill. 379 (making affidavit);] {Cullen's Case, 24 Gratt. 624 (testifying before coroner).}

[21] [See, for the various views, Cooley, Const. Limit. 317; Fisher *v.* Fisher, 30 L. J. P. M. A. 24; Buchanan *v.* State, 109 Ala. 7; People *v.* Gallagher, 100 Cal. 466, 476; People *v.* Dole, id., 51 Pac. 945; Bradford *v.* People, 22 Colo. 157; *Ex parte* Senior, 37 Fla. 1; State *v.* Larkins, Ida., 47 Pac. 945; Saylor *v.* Com., 97 Ky. 184;] {State *v.* Witham, 72 Me. 531; Roddy *v.* Finnegan, 43 Md. 490; Com. *v.* Price, 10 Gray 472; Com. *v.* Mullen, 97 Mass. 545; Andrews *v.* Frye, 104 id. 235; Worthington *v.* Scribner, 109 id. 487; Com. *v.* Morgan, 107 id. 199; Com. *v.* Nichols, 114 id. 285; Com. *v.* Tolliver, 119 id. 312;} [Com. *v.* Smith, 163 id. 411; State *v.* Ober, 52 N. H. 459;] {Connors *v.* People, 50 N. Y. 240; People *v.* Brown, 72 id. 571;} [State *v.* Paneoast, 5 N. D. 516; State *v.* Moore, Or., 48 Pac. 468; Clapp *v.* State, 94 Tenn. 186; State *v.* Duncan, 7 Wash. 336; State *v.* O'Hara, 17 id. 525. For the treatment of a defendant merely making a "statement," see Hackney *v.* State, 101 Ga. 512.

The principle that, apart from the privilege against criminating questions, a defendant taking the stand may be impeached like any other witness (*ante*, § 444 *b*), must be carefully distinguished, though the two are occasionally confused in judicial opinions.]

[22] [See Thomas *v.* State, 100 Ala. 53; State *v.* Horne, 9 Kan. 123; State *v.* Lewis, 6 id. 374.]

(*d*) Drawing inferences from the claim of the privilege.] If the witness declines answering, no inference of the truth of the fact is permitted to be drawn from that circumstance.[23] [But some discriminations must here be made. The theory on which it is supposed to be improper to draw inferences from the claim of privilege is that otherwise the privilege would in effect be nullified by making the failure to answer equivalent to an admission of the incriminating circumstance, and thus in truth making the witness testify in spite of his privilege. So far, then, as a defendant's conduct does not consist in a claim of privilege, there is no objection to the drawing of such inferences as would be proper in the ordinary case of a party's conduct. Thus, the defendant's failure to produce witnesses who might well have been produced is (on the principle of §§ 195 *b*, ff., *ante*) a proper subject of comment;[24] or his failure to produce any other presumably available evidence,[25] as, to account for the recent possession of stolen goods;[26] and, on the same principle, where his privilege has ceased by waiver, his refusal to answer particular questions, or failure to make explanations, is a proper subject for inference.[27]]

(*e*) No answer forced from him by the presiding judge, after he has claimed protection, can be afterwards given in evidence against him.[28]

§ 469 *e*. **Same: (2) By Exhibition of the Person, or the like.** [The scope of the privilege, in history and in principle, includes only the

[23] Rose *v.* Blakemore, Ry. &. Mo. 383; [Millman *v.* Tucker, Peake Add. Cas. 222; but there was a difference of opinion on this point in English practice: Bayley, J., in R. *v.* Watson, 2 Stark. 153; Reporter's note to Rose *v.* Blakemore, *supra*. In this country a few jurisdictions do not forbid the inference to be drawn: {State *v.* Bartlett, 55 Me. 200;} Parker *v.* State, N. J., 39 Atl. 651; but the great majority accept the rule stated in the text; the prohibition of course usually finds application in the counsel's argument to the jury; in most States the statute qualifying the accused to testify (*post*, Appendix I) expressly makes this prohibition; see People *v.* Sanders, 114 Cal. 216; Quinn *v.* People, 123 Ill. 333; Long *v.* State, 56 Ind. 182; State *v.* Baldoser, 88 Ia. 55; State *v.* Curnazy, id., 76 N. W. 805; State *v.* Holmes, 65 Minn. 230; Reddick *v.* State, 72 Miss. 1008; {Carne *v.* Litchfield, 2 Mich. 340;} People *v.* Hoch, 150 N. Y. 291; People *v.* Fitzgerald, id., 50 N. E. 846; {Phelin *v.* Kenkerdine, 20 Pa. 354;} State *v.* Hull, 18 R. I. 207; Wilson *v.* U. S., 149 U. S. 60. A question sometimes arises even as to the propriety of the judge so charging the jury; see State *v.* Johnson, 50 La. An., 23 So. 199. Under the English statute of 1898 (*ante*, § 333 *a*) allowing an accused person to testify, but forbidding comment by the prosecution on his silence, it has been held that the judge may nevertheless comment upon it: R. *v.* Rhodes, 1899, 1 Q. B. 77.]

[24] [People *v.* Mills, 94 Mich. 630, 638; *contra*, but wholly unsound in reasoning: State *v.* Hull, 18 R. I. 207. But the non-production of a privileged or incompetent witness is a different matter: Graves *v.* U. S., 150 U. S. 118.]

[25] [Frazer *v.* State, 135 Ind. 38.]

[26] [Jackson *v.* State, 31 Tex. Cr. 342.]

[27] [State *v.* Glave, 51 Kan. 330; Taylor *v.* Com., Ky., 34 S. W. 227; {Com. *v.* Morgan, 107 Mass. 199; State *v.* Ober, 52 N. H. 459; Stover *v.* People, 56 N. Y. 315;} so also, for a claim at a former time, where the offence has been barred by limitation: *ante*, note 5.]

[28] R. *v.* Garbett, 2 C. & K. 474. [That this kind of an objection cannot be taken by a party as such, see *ante*, notes 11, 12. It has been suggested that testimony given in violation of the privilege cannot be made the basis of a charge of perjury; but this seems to involve an entire misapprehension of the principle of the privilege; to mention but one reason, the testimony in that case is not evidence of any offence, but is the offence itself; see U. S. *v.* Bell, 81 Fed. 830, 852; Com. *v.* Turner, 98 Ky. 526; *post*, Vol. III, § 191.]

process of testifying, by word of mouth or in writing, *i. e.* the process of disclosure by utterance. It has no application to such physical, evidential circumstances as may exist on the witness' body or about his person. The privilege does not rest on the extreme notion that a guilty person is entitled to conceal as much as he can of the evidence of his crime; but on the notion that he should not be made to confess it out of his own mouth.[1] Nevertheless, in the last generation a false and sentimental tenderness for the guilty accused has created a tendency in some quarters to extend the privilege in ways unimagined by those who laid its foundations; and the question is now often raised whether the privilege does not protect an accused person from the inspection or search or exhibition of his person. In the great majority of jurisdictions this extension has received no sanction;[2] for example, the accused may be compelled to stand up in court for identification;[3] a physician may be sent to examine him, while in jail, as to his mental condition;[4] a measurement of the accused's feet, for the purpose of identifying footprints, may be taken;[5] the accused may be compelled to place his foot in tracks for the purpose of noting the correspondence.[6] But the opposite view has been taken, for some of these things, by a few Courts.[7]]

§ 469 *f.* **Same: (3) By Production of Documents.** [The purpose of the privilege is to exempt one from testifying, *i. e.* from any mode of disclosure peculiarly that of a witness in the ordinary sense. A witness may testify by the use of writings, and not merely by oral utterances; it is therefore perhaps a consequence of the principle that the production of documents is within the protection of the privilege; and it has been so generally regarded.[1] But the defendant's production of documents after the manner of a witness is a different thing from the official seizure and impounding of incriminating documents. In the latter case, the defendant is not called upon to testify by producing the books; the situation is no different from the carrying away of a bundle of counterfeit bills or of stolen goods or of a murderer's weapon; no doubt the accused is unwilling that

[1] [See the article already referred to, in 5 Harv. Law Rev. 71.]

[2] [See excellent expositions by Rodman, J., in State *v.* Graham, 74 N. C. 648; Cox, J., in U. S. *v.* Cross, 20 D. C. 382.]

[3] [State *v.* Reasby, 100 Ia. 231.]

[4] [People *v.* Kemmler, 119 N. Y. 580.]

[5] [U. S. *v.* Cross, 20 D. C. 382.]

[6] [State *v.* Graham, 74 N. C. 647.]

[7] [For other cases on both sides, see Shields *v.* State, 104 Ala. 35; Day *v.* State, 63 Ga. 669; Blackwell *v.* State, 67 id. 76; Myers *v.* State, 97 id. 76; State *v.* Prudhomme, 25 La. An. 523; People *v.* Mead, 50 Mich. 228; State *v.* Ah Chuey, 14 Nev. 79; State *v.* Garrett, 71 N. C. 85; Johnson *v.* Com., 115 Pa. 369, 395; State *v.* Atkinson, 40 S. C. 363; Stokes *v.* State, 5 Baxt. 619; Lipes *v.* State, 15 Lea 125; Walker *v.* State, 7 Tex. App. 245; State *v.* Nordstrom, 7 Wash. 506. Distinguish the question whether the body, etc., itself *may* voluntarily be shown: *ante*, § 13 *c*.]

[1] [R. *v.* Parnell, 2 T. R. 202, note; R. *v.* Granatelli, 7 State Tr. N. S. 979, 986; Lamson *v.* Boyden, 160 Ill. 613; *Ex parte* Wilson, Tex. Cr., 47 S. W. 996; Boyd *v.* U. S., 116 U. S. 616; U. S. *v.* Lead Co., 75 Fed. 94.]

these things should be taken, but he is not being called upon as a witness; accordingly, the privilege is not violated, whether it is tools or clothing or documents that are taken.[2]]

§ 469 *g* [452]. **Civil Liability or Loss.** Where the witness, by answering, may subject himself to a civil action or pecuniary loss, or charge himself with a debt. This question was very much discussed in England, in Lord Melville's case; and, being finally put to the judges by the House of Lords, eight judges and the chancellor were of opinion that a witness, in such case, was bound to answer, and four thought that he was not. To remove the doubts which were thrown over the question by such a diversity of opinion among eminent judges, a statute was passed,[1] declaring the law to be, that a witness could not legally refuse to answer a question relevant to the matter in issue, merely on the ground that the answer may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, provided the answer has no tendency to accuse himself, or to expose him to any kind of penalty or forfeiture. In the United States, this act is generally considered as declaratory of the true doctrine of the common law; and, accordingly, by the current of authorities, the witness is held bound to answer.[2] But neither is the statute nor the rule of the common law considered as compelling a person interested in the cause as party, though not named on the record, to testify as a witness in the cause, much less to disclose anything against his own interest;[3] [but the abolition of disqualification by reason of being a party or having an interest has taken away this privilege, and made the party compellable as well as competent.[4]]

§ 469 *h* [453]. **Forfeiture.** Where the answer will subject the witness to a forfeiture of his estate. In this case, as well as in the case of an exposure to a criminal prosecution or penalty, it is well

[2] [State *v.* Griswold, 67 Conn. 290; State *v.* Pomeroy, 130 Mo. 489; State *v.* Flynn, 36 N. H. 64 (leading case); State *v.* Atkinson, 40 S. C. 363, 372; State *v.* Nordstrom, 7 Wash. 506; but see People *v.* Spiegel, 143 N. Y. 107; Boyd *v.* U. S., 116 U. S. 616; Hoover *v.* M'Chesney, 81 Fed. 472.

Even supposing the search or capture to be in violation of some law, the illegality in the acquisition of the evidential data does not exclude the evidence: *ante*, § 254 *a*.]

[1] 46 Geo. III, c. 37; 2 Phil. Evid. 420; 1 Stark. Evid. 165.

[2] Bull *v.* Loveland, 10 Pick. 9; Baird *v.* Cochran, 4 S. & R. 397; Nass *v.* Vanswearingen, 7 S. & R. 192; Taney *v.* Kemp, 4 H. & J. 348; Naylor *v.* Semmes, 4 G. & J. 273; City Bank *v.* Bateman, 7 H. & J. 104; Stoddert *v.* Manning, 2 H. & G. 147; Copp *v.* Upham, 3 N. H. 159; Cox *v.* Hill, 3 Ohio 411, 424; Planters' Bank *v.* George, 6 Martin 670; Jones *v.* Lanier, 2 Dev. Law 480; Conover *v.* Bell, 6 Monr. 157; Gorham *v.* Carroll, 3 Littell 221; Zollicoffer *v.* Turney, 6 Yerg. 297; Ward *v.* Sharp, 15 Vt. 115. The contrary seems to have been held in Connecticut: Benjamin *v.* Hathaway, 3 Conn. 528, 532.

[3] R. *v.* Woburn, 10 East 395; Mauran *v.* Lamb, 7 Cowen 174; Appleton *v.* Boyd, 7 Mass. 131; Fenn *v.* Granger, 3 Campb. 177; People *v.* Irving, 1 Wend. 20; White *v.* Everest, 1 Vt. 181.

[4] [See *ante*, § 328 *c*. For discovery in Chancery, see *post*, Vol. III, §§ 273 ff. For the distinction between civil and penal liability, as regards the privilege against self-crimination, see *ante*, § 469 *d*. For the privilege of a party as to documents, see also *post*, Vol. III, §§ 295–307.]

settled that a witness is not bound to answer;[1] and this is an established rule in equity as well as at law.[2]

§ 469 *i* [454]. **Infamy or Disgrace; (1) Matters Material to the Issue.** Where the answer, though it will not expose the witness to any criminal prosecution or penalty, or to any forfeiture of estate, yet has a direct tendency to degrade his character. On this point there has been a great diversity of opinion, and the law still remains not perfectly settled by authorities. But the conflict of opinions may be somewhat reconciled by a distinction, which has been very properly taken between cases where the testimony is relevant and material to the issue, and cases where the question is not strictly relevant, but is collateral, and is asked only under the latitude allowed in a cross-examination. In the former case, there seems great absurdity in excluding the testimony of a witness merely because it will tend to degrade himself when others have a direct interest in that testimony, and it is essential to the establishment of their rights of property, of liberty, or even of life, or to the course of public justice. Upon such a rule, one who had been convicted and punished for an offence, when called as a witness against an accomplice, would be excused from testifying to any of the transactions in which he had participated with the accused, and thus the guilty might escape. And, accordingly, the better opinion seems to be, that where the transaction, to which the witness is interrogated, forms any part of the issue to be tried, the witness will be obliged to give evidence, however strongly it may reflect on his character.[1]

§ 469 *j* [455]. **Same: (2) Matters Collateral to the Issue.** But where the question is not material to the issue, but is collateral and irrelevant, being asked under the license allowed in cross-examination, it stands on another ground. In general, as we have already seen, the rule is, that, upon cross-examination, to try the credit of a witness, only general questions can be put; and he cannot be asked as to any collateral and independent fact, merely with a view to contradict him afterwards by calling another witness. The danger of such a practice, it is said, is obvious, besides the inconvenience of trying as many collateral issues as one of the parties might choose to introduce, and which the other could not be prepared to meet.[1] Whenever, therefore, the question put to the witness is plainly of this character, it is easy to perceive that it falls under this rule, and should be excluded. But the difficulty lies in determining, with precision, the materiality and relevancy of the question when it goes

[1] 6 Corbett's P. D. 167; 1 Hall's Law J. 223; 2 Phil. Evid. 420; [see *ante*, § 469 *d*.]

[2] Mitford's Eq. Pl. 157, 161; Story's Eq. Pl. §§ 607, 846.

[1] 2 Phil. Evid. 421; People *v.* Mather, 4 Wend. 250–254, per Marcy, J.; Peake's Evid. (by Norris) p. 92; Cundell *v.* Pratt, 1 M. & Malk. 108; Swift's Evid. 80. So in Scotland: Alison's Practice, p. 528.

[1] Spencely *v.* De Willott, 7 East 108, 110.

to the *character* of the witness. There is certainly great force in the argument, that where a man's liberty, or his life, depends upon the testimony of another, it is of infinite importance that those who are to decide upon that testimony should know, to the greatest extent, how far the witness is to be trusted. They cannot look into his breast to see what passes there; but must form their opinion on the collateral indications of his good faith and sincerity. Whatever, therefore, may materially assist them in this inquiry is most essential to the investigation of truth; and it cannot but be material for the jury to understand the character of the witness whom they are called upon to believe, and to know whether, although he has not been convicted of any crime, he has not in some measure rendered himself less credible by his disgraceful conduct.[2] The weight of this argument seems to have been felt by the judge in several cases in which questions tending to disgrace the witness have been permitted in cross-examination.

§ 469 *k* [456]. **Same: (3) Indirect Exposure.** It is however, generally conceded, that where the answer, which the witness may give, will not directly and certainly show his infamy, but will only tend to disgrace him, he may be compelled to answer. Such is the rule in equity, as held by Lord Eldon;[1] and its principle applies with equal force at common law; and, accordingly, it has been recognized in the common-law courts.[2] In questions involving a criminal offence, the rule, as we have seen,[3] is different; the witness being permitted to judge for the most part for himself, and to refuse to answer wherever it would tend to subject him to a criminal punishment or forfeiture. But here the Court must see for itself that the answer will directly show his infamy, before it will excuse him from testifying to the fact.[4] Nor does there seem to be any good reason why a witness should be privileged from answering a question touching his present situation, employment, and associates, if they are of his own choice; as, for example, in what house or family he resides, what is his ordinary occupation, and whether he is intimately acquainted and conversant with certain persons, and the like; for, however these may disgrace him, his position is one of his own selection.[5]

The great question, however, [*i. e.* the one referred to in the preceding section,] whether a witness may not be bound in some cases to answer an interrogatory to his own moral degradation, where,

[2] 1 Stark. Evid. 170.

[1] Parkhurst *v.* Lowten, 1 Meriv. 400; s. c. 2 Swanst. 194, 216; Foss *v.* Haynes, 1 Redingt. 81; and see Story Eq. Pl. §§ 585, 596.

[2] People *v.* Mather, 4 Wend. 232, 252, 254; State *v.* Patterson, 2 Ired. 346.

[3] *Supra*, § 469 *d*.

[4] Macbride *v.* Macbride, 4 Esp. 242, per Ld. Alvanley; People *v.* Mather, 4 Wend. 254, per Marcy, J.

[5] Thus, when a witness was asked, whether she was not cohabiting with a particular individual, in a state of incest, Best, C. J., prohibited the question; stating expressly, that he did this only on the ground that the answer would expose her to punishment: Cundell *v.* Pratt, 1 M. & Malk. 108.

though it is collateral to the main issue, it is relevant to his character for veracity, has not yet been brought into direct and solemn judgment, and must therefore be regarded as an open question, notwithstanding the practice of eminent judges at *Nisi Prius*, in favor of the inquiry, under the limitations we have above stated.[6]

§ 469 *l*. **Same: Summary.** [It will be seen from the preceding sections that the supposed privilege against answering questions involving disgrace or infamy was well understood not to exist where the matter inquired about merely tended to expose the infamy, nor where, though directly involving infamy, it was material to the issues of the case; there thus remained in doubt only the case where it was not material to the issues but was "collateral," *i. e.* practically, where it was relevant merely to the witness' character and credibility. This remaining case was for a time the subject of conflicting rulings; and in 1853 the Commissioners for Common Law Practice recommended its statutory recognition;[1] but the ensuing statute[2] failed to give this recognition, and since that time the understanding at the English Bar seems to have been that no such privilege exists.[3] In this country the same difference of opinion existed, two generations ago, in certain jurisdictions, but was generally settled against the existence of the privilege; and its place was practically taken by the discretionary power of the trial Court over cross-examination to character (*ante*, § 461 *b*). In several jurisdictions, however, chiefly the newer States, this result was lost sight of and a sanction was given to the privilege. It has, however, no reason for existence, wherever the trial Court has a discretionary power to limit the cross-examination.[4]]

[6] See 1 Stark. Evid. 167–172; 2 Phil. Evid. 423–428; Peake's Evid. by Norris, pp. 202–204.

[1] [Second Report, p. 22.]

[2] [St. 17–18 Vict., c. 125, §§ 25, 103.]

[3] [See the citations *ante*, § 461 *b*; also, Day, Common Law Procedure Act, 4th ed. 278; Stephen, Digest of Evidence, 3d Eng. ed., art. 129, note xlvi; Rules of Court, 1883, Ord. 36, R. 38.]

[4] [The following cases, including only one or two of the most recent from the various jurisdictions, will show the state of the law; it may be noted, however, that it is not always possible to be certain whether the Court is sanctioning a privilege or is merely setting limits to the subjects of cross-examination (see the precedents *ante*, § 461 *b*): Boles *v.* State, 46 Ala. 204; Polk *v.* State, 40 Ark. 482, 487; Hollingsworth *v.* State, 53 id. 387; Clark *v.* Reese, 35 Cal. 89, 96; Cal. C. C. P. § 2065; State *v.* Ward, 49 Conn. 433, 442; South Bend *v.* Hardy, 98 Ind. 583; Oxier *v.* U. S., Ind. T., 38 S. W. 331; State *v.* Pfefferle, 36 Kan. 90; Burdette *v.* Com., 93 Ky. 76; McCampbell *v.* McCampbell, id., 46 S. W. 18; Com. *v.* Savary, 10 Cush. 535; People *v.* McLean, 71 Mich. 309; State *v.* Bilansky, 3 Minn. 246, 257; Muller *v.* Hospital Assoc., 73 Mo. 242; State *v.* Talbot, ib. 359; Head *v.* State, 44 Miss. 731, 751; State *v.* Black, 15 Mont. 143; Hill *v.* State, 42 Nebr. 503; State *v.* Huff, 11 Nev. 17, 28; State *v.* Staples, 47 N. H. 113, 117; Fries *v.* Brugler, 12 N. J. L. 79; Roop *v.* State, 58 id. 479; Borrego *v.* Terr., N. M., 46 Pac. 349; People *v.* Crapo, 76 N. Y. 290; Coble *v.* State, 31 Oh. St. 102; Elliott *v.* Boyles, 31 Pa. 67; Torre *v.* Summers, 2 Nott & M. 269; Titus *v.* State, 7 Baxt. 134; Morris *v.* State, 38 Tex. 603; State *v.* Johnson, 28 Vt. 515; Kirschner *v.* State, 9 Wis. 140; McKesson *v.* Sherman, 51 id. 303, 311.]

§ 469 *m*. **Corporal Inspection of Civil Party.** [Since the abolition of the disqualification of parties as witnesses, and with it of the parties' privilege against testifying (*ante*, § 328 *c*), the question has often been raised whether a civil plaintiff can be compelled to exhibit his person to the jury, or to submit to an inspection by witnesses of the opponent or by appointees of the Court, for the purpose of affording evidence of a corporal condition material to the case. The need of such evidence as may be thus afforded is most urgent and most common in actions for personal injury, where without such an opportunity the defendant is in many cases practically deprived of the means of disputing the existence and nature of the plaintiff's injury except by cross-examination and impeachment of the latter's own witnesses; and the opportunity of maintaining a false claim is thus materially strengthened and often made impregnable, in cases where an examination of the person would reveal the truth. That no such privilege exists as a matter of principle and precedent seems certain. That every consideration of policy opposes its establishment and requires resort to such a process seems unquestionable.[1] A very few Courts have seen fit to recognize such a privilege.[2] But the great majority of jurisdictions have refused to do so, and, either by decision or by statute, have sanctioned the obtaining of such evidence, usually by providing for an examination by expert witnesses of the opponent or by appointees of the Court, the measure to be taken in the discretion of the trial Court, in such cases as it may seem necessary and useful, under such conditions as do not injure health or offend decency, and upon application made at a seasonable time.[3] Similar measures may with equal appropriateness be taken in other than cases of personal injury.[4]]

[1] [See excellent expositions by Gunnison, P. J., in Hess *v.* R. Co., 7 Penn. Co. Ct. 565; Biddle, J., in Demenstein *v.* Reichelson, 34 W. N. C. Pa. 295; Beck, J., in Schroeder *v.* R. Co., 47 Ia. 379.]

[2] [Mills *v.* R. Co., Del. Super., 40 Atl. 1114; Joliet S. R. Co. *v.* Caul, 143 Ill. 177; Peoria D. & E. R. Co. *v.* Rice, 144 id. 227; Penns. Co. *v.* Newmeyer, 129 Ind. 401, 409; R. Co. *v.* Botsford, 141 U. S. 250; Ill. Cent. R. Co. *v.* Griffin, U. S. App., 80 Fed. 278.]

[3] [Early cases in the following courts are omitted: St. 31–32 Vict., c. 119, s. 26 (injuries in railway accidents); Ontar. St. 54 Vict., c. 11 (personal injuries in general); Clouse *v.* Coleman, 16 Ont. Pr. 541; King *v.* State, 100 Ala. 85; St. Louis S. W. R. Co. *v.* Dobbins, 60 Ark. 485; Sav. F. & W. R. Co. *v.* Wainwright, 99 Ga. 255; Hall *v.* Manson, 99 Ia. 698; South. K. R. Co. *v.* Michaels, 57 Kan. 474; Belt E. L. Co. *v.* Allen, Ky., 43 S. W. 89; Belle N. D. Co. *v.* Riggs, id., 45 S. W. 99; Graves *v.* Battle Creek, 95 Mich. 266; Strudgeon *v.* Sand Beach, 107 id. 496; Shepard *v.* R. Co., 85 Mo. 629; Owens *v.* R. Co., 95 id. 169, 177; N. Y. Laws 1893, c. 721; Lyon *v.* R. Co., 142 N. Y. 298; Miami & M. T. Co. *v.* Baily, 37 Oh. St. 104, 107; Demenstein *v.* Richardson, Hess *v.* R. Co., Pa., *supra;* Chic. R. I. & T. R. Co. *v.* Langston, Tex. Civ. App., 47 S. W. 1027, 48 S. W. 610; Bagley *v.* Mason, 69 Vt. 175; Groundwater *v.* Washington, 92 Wis. 56; O'Brien *v.* La Crosse, id., 75 N. W. 81.

In the following States, the rulings incline against the privilege, without deciding: Hatfield *v.* R. Co., 33 Minn. 130; Stuart *v.* Havens, 17 Nebr. 211; Chadron *v.* Glover, 43 id. 732; Gulf C. & S. F. R. Co. *v.* Norfleet, 78 Tex. 321, 324.]

[4] [*E. g.* Smith *v.* King, 62 Conn. 515, where the plaintiff was required at the Court's discretion to write his signature for comparison. In Martin *v.* Elliot, 106 Mich.

469 *n* [246]. **Witness' Production of Title-deeds.** Where an attorney is called upon, whether by *subpœna duces tecum*, or otherwise, to produce deeds or papers belonging to his client, who is not a party to the suit, the Court will inspect the documents, and pronounce upon their admissibility, according as their production may appear to be prejudicial or not to the client; in like manner as where a witness objects to the production of his own title-deeds.[1] And the same discretion will be exercised by the Courts, where the documents called for are in the hands of solicitors for the assignees of bankrupts;[2] though it was at one time thought that their production was a matter of public duty.[3] So, if the documents called for are in the hands of the agent or steward of a third person, or even in the hands of the owner himself, their production will not be required where, in the judgment of the Court, it may injuriously affect his title.[4] This extension of the rule, which will be more fully treated hereafter,[5] is founded on a consideration of the great inconvenience and mischief which may result to individuals from a compulsory disclosure and collateral discussion of their titles, in cases where, not being themselves parties, the whole merits cannot be tried.

[The remaining rules of exclusion to which the term "privilege" is usually applied have already been dealt with in preceding Chapters.[6]]

130, the refusal to compel a plaintiff to allow an examination of a horse warranted sound seems improper.

In divorce, on an issue of impotence, the examination of either party is compellable: Bishop, Marr. & Div., II, § 590 and cas. cit. "To prevent doubtfulness in heirs," the writ *de ventre inspiciendo* compelled an examination of the widow: Bacon, Abridgm. "Bastard," A; *Re* Blakemore, 14 L. J. Ch. N. S. 336.]

[1] Copeland *v.* Watts, 1 Stark. 95; Amey *v.* Long, 9 East 473; s. c. 1 Campb. 14; Phil. & Am. on Evid. 186; 1 Phil. Evid. 175; Reynolds *v.* Rowley, 3 Rob. La. 201; Travis *v.* January, ib. 227; [as to documents subject to an attorney's lien, see Davis *v.* Davis, 90 Fed. 791; Lewis *v.* Powell, 1897, 1 Ch. 678.]

[2] Bateson *v.* Hartsink, 4 Esp. 43; Cohen *v.* Templar, 2 Stark. 260; Laing *v.* Barclay, 3 id. 38; Hawkins *v.* Howard, Ry. & M. 64; Corsen *v.* Dubois, Holt's Cas. 239; Bull *v.* Loveland, 10 Pick. 9, 14; Volant *v.* Soyer, 22 Law J. C. P. 83; 16 Eng. Law & Eq. 426; 13 C. B. 231.

[3] Pearson *v.* Fletcher, 5 Esp. 90, per Ld. Ellenborough.

[4] R. *v.* Hunter, 3 C. & P. 591; Pickering *v.* Noyes, 1 B. & C. 262; Roberts *v.* Simpson, 2 Stark. 203; Doe *v.* Thomas, 9 B. & C. 288; Bull *v.* Loveland, 10 Pick. 9, 14; and see Doe *v.* Langdon, 12 Q. B. 711; 13 Jur. 96; Doe *v.* Hertford, 13 Jur. 632; [Doe *v.* Clifford, 2 C. & K. 448; Kemp *v.* King, 2 Mo. & Rob. 437; R. *v.* Woodley, 1 id. 390; Thompson *v.* Mosely, 5 C. & P. 501; Goss P. P. Co. *v.* Scott, 89 Fed. 818; and *post*, Vol. III, §§ 295–307.]

[5] [See *post*, Vol. III, §§ 295–307.]

[6] [Chapter XIX, §§ 236 ff. (privileged communications between attorney and client, informer and government, husband and wife, etc.); Chapter XXIII, §§ 334 ff. (testimony of wife or husband against the other).]

CHAPTER XXVIII.

PUBLIC DOCUMENTS.

§ 470. Classification of Writings.

1. *Inspection of Records and Public Documents.*

§§ 471, 472. Records of Royal Courts.
§ 473. Records of Inferior Tribunals.
§ 474. Quasi-public Records.
§ 475. Books of Public Officers.
§ 476. Inspection Injurious to Public Interest.
§§ 477, 478. Procedure in obtaining Inspection.

2. *Mode of Proof of Public Documents.*

§ 479. Acts of State.
§§ 480, 481. Legislative Acts.
§ 482. Legislative Journals.
§§ 483–485. Official Registers.
§ 485 *a*. Registered Conveyances.
§§ 486–488. Foreign Laws.
§ 489. Same: Laws of Domestic States.
§ 490. Same: Judicial Notice.

3. *Admissibility and Effect of Public Documents.*

§ 491. Legislative Recitals and Journals, Proclamations, Diplomatic Correspondence, etc.
§ 492. Government Gazette.
§ 493. Official Registers.
§ 494. Same: Ship's Register.
§ 495. Same: Ship's Log-book.
§ 496. Same: Requisites of Official Character.
§ 497. Same: Historical Works.
§ 498. Official Certificates.

§ 470. **Classification of Writings.** Writings are divisible into two classes; namely, public and private. The former consists of the acts of public functionaries, in the executive, legislative, and judicial departments of government, including, under this general head, the transactions which official persons are required to enter in books or registers, in the course of their public duties, and which occur within the circle of their own personal knowledge and observation; to the same head may be referred the consideration of documentary evidence of the acts of State, the laws and judgments of courts of foreign governments. Public writings are susceptible of another division, they being either (1) judicial, or (2) not judicial; and, with respect to the means and mode of proving them, they may be classed into (1) those which are of record, and (2) those which are not of record. It is proposed to treat, first, of public documents; and, secondly, of those writings which are private. And, in regard to both classes, our inquiries will be directed (1) to the mode of obtaining an inspection of such documents and writings; (2) to the method of proving them; and (3) to their admissibility and effect.

1. *Inspection of Records and Public Documents.*

§ 471. **Records of Royal Courts.** And, first, in regard to the inspection of public documents, it has been admitted, from a very early period, that the inspection and exemplification of the records of the king's courts is the common right of the subject. This right was

extended, by an ancient statute,[1] to cases where the subject was concerned against the king. The exercise of this right does not appear to have been restrained until the reign of Charles II., when, in consequence of the frequency of actions for malicious prosecution, which could not be supported without a copy of the record, the judges made an order for the regulation of the sessions at the Old Bailey prohibiting the granting of any copy of an indictment for felony, without a special order, upon motion in open court, at the general jail delivery.[2] This order, it is to be observed, relates only to indictments for felony. In cases of misdemeanor, the right to a copy has never been questioned.[3] But in the United States, no regulation of this kind is known to have been expressly made; and any limitation of the right to a copy of a judicial record or paper, when applied for by any person having an interest in it, would probably be deemed repugnant to the genius of American institutions.[4]

§ 472. Where writs, or other papers in cause, are officially in the *custody of an officer of the court*, he may be compelled by a rule of court to allow an inspection of them, even though it be to furnish evidence in a civil action against himself. Thus, a rule was granted against the marshal of the King's Bench prison, in an action against him for an escape of one arrested upon mesne process, to permit the plaintiff's attorney to inspect the writ by which he was committed to his custody.[1]

§ 473. **Records of Inferior Tribunals.** In regard to the records of inferior tribunals, the right of inspection is more limited. As all persons have not necessarily an interest in them, it is not necessary that they should be open to the inspection of all, without distinction. The party, therefore, who wishes to inspect the proceedings of any of those Courts, should first apply to that Court, showing that he has some interest in the document, and that he requires it for a proper purpose.[1] If it should be refused, the Court of Chancery,

[1] 46 Ed. III, in the preface to 3 Coke, p. iv.

[2] Orders and Directions, 16 Car. II, prefixed to Sir J. Kelyng's Reports, Order vii. With respect to the general records of the realm, in such cases, copies are obtained upon application to the Attorney-General: Legatt *v.* Tollervey, 14 East 306. But if the copy were obtained without order, it will not, on that account, be rejected: ibid.; Jordan *v.* Lewis, id. 305, n. (*b*); Caddy *v.* Barlow, 1 M. & Ry. 275. But Lord Chief Justice Willes, in R. *v.* Brangan, 1 Leach Cr. Cas. 32, in the case of a prosecution for robbery, evidently vexatious, refused an application for a copy of the record, on the ground that no order was necessary; declaring, that "by the laws of the realm every prisoner, upon his acquittal, had an undoubted right and title to a copy of the record of such acquittal, for any use he might think fit to make of it; and that, after a demand of it had been made, the proper officer might be punished for refusing to make it out." A strong doubt of the legality of the order of 16 Car. II was also raised in Browne *v.* Cumming, 10 B. & C. 70.

[3] Morrison *v.* Kelly, 1 W. Bl. 385.

[4] Stone *v.* Crocker, 24 Pick. 88, per Morton, J. The only case, known to the author, in which the English rule was acted on, is that of People *v.* Poyllon, 2 Caines 202, in which a copy was moved for and granted.

[1] Fox *v.* Jones, 7 B. & C. 732.

[1] If he has no legal interest in the record, the Court may refuse the application: Powell *v.* Bradbury, 4 C. B. 541; *infra*, § 559.

upon affidavit of the fact, may at any time send, by a writ of *certiorari*, either for the record itself, or an exemplification. The King's Bench in England, and the Supreme Courts of common law in America, have the same power by *mandamus*;[2] and this whether an action be pending or not.[3]

§ 474. **Quasi-public Records.** There are other records which partake both of a public and private character, and are treated as the one or the other, according to the relation in which the applicant stands to them. Thus, the books of a corporation are public with respect to its members, but private with respect to strangers.[1] In regard to its members, a rule for inspection of the writings of the corporation will be granted of course, on their application, where such inspection is shown to be necessary, in regard to some particular matter in dispute, or where the granting of it is necessary, to prevent the applicant from suffering injury or to enable him to perform his duties; and the inspection will then be granted, only so far as is shown to be essential to that end.[2] But a stranger has no right to such rule, and it will not be granted, even where he is defendant in a suit brought by the corporation.[3] In this class of records are enumerated parish books,[4] transfer books of the East India Company,[5] public lottery books,[6] the books of incorporated banking companies,[7] a bishop's registry of presentations,[8] and some others of the like kind. If an inspection is wanted by a stranger, in a case not within this rule of the common law, it can only be obtained by a bill for a discovery; a Court of equity permitting a discovery in some cases, and under some circumstances, where Courts of law will not grant an inspection.[9] And an inspection is granted only where civil rights are depending; for it is a constant and invariable rule, that, in criminal cases, the party shall never be obliged to furnish evidence against himself.[10]

[2] Gresley on Evid. pp. 115, 116; Wilson *v.* Rogers, 2 Stra. 1242; R. *v.* Smith, 1 Stra. 126; R. *v.* Tower, 4 M. & S. 162; Herbert *v.* Ashburner, 1 Wils. 297; R. *v.* Allgood, 7 T. R. 746; R. *v.* Sheriff of Chester, 1 Chitty 479.

[3] R. *v.* Lucas, 10 East 235, 236, per Ld. Ellenborough.

[1] Gresley on Evid. 116.

[2] R. *v.* Merchant Tailors' Co., 2 B. & Ad. 115; State of Louisiana, *ex rel.* Hatch, *v.* City Bank of New Orleans, 1 Rob. La. 470; People *v.* Throop, 12 Wend. 183.

[3] Mayor of Southampton *v.* Graves, 8 T. R. 590. The party, in such case, can only give notice to the corporation to produce its books and papers, as in other cases between private persons: see, accordingly, Burrell *v.* Nicholson, 3 B. & Ad. 649; Bank of Utica *v.* Hilliard, 5 Cowen 419; s. c. 6 id. 62; Imperial Gas Co. *v.* Clarke, 7 Bing. 95; R. *v.* Justices of Buckingham, 8 B. & C. 375.

[4] Cox *v.* Copping, 5 Mod. 396; Newell *v.* Simpkin, 6 Bing. 565; Jacocks *v.* Gilliam, 3 Murph. 47.

[5] Geery *v.* Hopkins, 2 Ld. Ray. 851; s. c. 7 Mod. 129; Shelling *v.* Farmer, 1 Str. 646.

[6] Schinotti *v.* Bumstead, 1 Tidd's Pr. 594.

[7] Brace *v.* Ormond, 1 Meriv. 409; People *v.* Throop, 12 Wend. 183; Union Bank *v.* Knapp, 3 Pick. 96; Mortimer *v.* M'Callan, 6 M. & W. 68; {McKavlin *v.* Bresslin, 8 Gray 177.}

[8] R. *v.* Bishop of Ely, 8 B. & C. 112; Finch *v.* Bishop of Ely, 2 M. & Ry. 127.

[9] Gresley on Evid. 116, 117.

[10] Tidd's Pr. 593. Under this rule, an information, in the nature of *quo warranto*,

§ 475. **Books of Public Officers.** Inspection of the books of public officers is subject to the same restriction as in the case of corporation books; and access to them will not be granted in favor of persons who have no interest in the books. Thus, an inspection of the books of the post-office has been refused, upon the application of the plaintiff, in a *qui tam* action against a clerk in the post-office, for interfering in the election of a member of Parliament, because the action did not relate to any transaction in the post-office, for which alone the books were kept.[1] Upon the same ground, that the subject of the action was collateral to the subject-matter and design of the books, an inspection of the books of the custom-house has been refused.[2] Such inspections are also sometimes refused on grounds of public policy, the disclosure sought being considered detrimental to the public interest. Upon the same principle of an interest in the books, the tenants of a manor are generally entitled to an inspection of the court-rolls, wherever their own rights are concerned; but this privilege is not allowed to a stranger.[3]

§ 476. **Inspection injurious to Public Interest.** But, in all cases of public writings, if the disclosure of their contents would, either in the judgment of the Court or of the chief executive magistrate, or the head of department, in whose custody or under whose control they may be kept, be injurious to the public interests, an inspection will not be granted.[1]

§ 477. **Procedure in obtaining Inspection.** The motion for a rule to inspect and take copies of books and writings, when an action is pending, may be made at any stage of the cause, and is founded on an affidavit, stating the circumstances under which the inspection is claimed, and that an application therefor has been made to the proper quarter and refused.[1]

§ 478. But when no action is pending, the proper course is to move for a rule to show cause why a *mandamus* should not issue, commanding the officer having custody of the books to permit the applicant to inspect them, and take copies. The application in this case should state some specific object sought by the inspection, and be supported by an affidavit, as in the case preceding. If a rule is made to show cause why an information in the nature of a *quo warranto* should not be filed, a rule for an inspection will be granted to the prosecutor, immediately upon the granting of a rule to show cause. But if a rule be made to show cause why a *mandamus* should

is considered as merely a civil proceeding: R. *v.* Babb, 3 T. R. 582. See also R. *v.* Dr. Purnell, 1 Wils. 239.

[1] Crew *v.* Blackburn, cited 1 Wils. 240; Crew *v.* Saunders, 2 Str. 1005.

[2] Atherfold *v.* Beard, 2 T. R. 610.

[3] R. *v.* Shelley, 3 T. R. 141; R. *v.* Allgood, 7 id. 746. See R. *v.* Hostmen of Newcastle, 2 Stra. 1223, n. (1), by Nolan.

[1] *Supra*, §§ 250, 251, and cases there cited.

[1] 1 Tidd's Pr. 595, 596; {see Iasigi *v.* Brown, 1 Curt. C. C. 401; *infra*, § 559.}

not be awarded, the rule for an inspection will not be granted, until the *mandamus* has been issued and returned.[1]

2. *Mode of Proof of Public Documents.*[2]

§ 479. **Acts of State.** We proceed now to consider the mode of proof of public documents, beginning with those which are not judicial; and, first, of acts of State.

It has already been seen that Courts will judicially take notice of the political constitution or frame of the government of their own country, its essential political agents, or officers, and its essential ordinary and regular operations. The great Seal of the State and the seals of its judicial tribunals require no proof.[1] Courts also recognize, without other proof than inspection, the seals of State of other nations which have been recognized by their own sovereign.[2] The seals, also, of foreign Courts of admiralty, and of notaries-public, are recognized in the like manner.[3] Public statutes, also, need no proof, being supposed to exist in the memories of all; but, for certainty of recollection, reference is had either to a copy from

[1] 1 Tidd's Pr. 596; R. *v.* Justices of Surrey, Sayer 144; R. *v.* Shelley, 3 T. R. 141; R. *v.* Hollister, Cas. temp. Hardw. 245.

[2] [In the following sections, at least three distinct principles have constantly to be invoked, and must be carefully discriminated. (1) The rule of Primariness requires that the original of a writing be produced or its absence accounted for (*post*, §§ 563 *a*, ff.). Under this rule, public documents usually need not be produced, because of the inconvenience involved in removing them from their places of official custody (§ 563 *f*). (2) The rule against Hearsay requires that a witness to a fact shall give his testimony in court under oath and cross-examination; but one of the exceptions to this rule allows official statements to be receivable without calling the officer himself, if by statute or otherwise a duty exists for him to make the statement (*ante*, § 162 *m*). On this principle official registers, certificates, and the like, are received; and the question arises in each instance whether the principle of the exception sanctions the use of such a hearsay statement. (3) The genuineness of an official document — *i. e.* the fact that it was executed by the officer purporting to execute it — would ordinarily have to be proved as the genuineness of any other document is; but in many cases where a seal is appended, and sometimes even where no seal is appended, this genuineness is assumed. The seal is in such cases usually said to be judicially noticed; but the case seems rather to be one of a real presumption, or of the presence of a purporting official seal being treated as a sufficient evidence of genuineness (*ante*, § 14 *w*). — All three of these principles may have to be applied to the same offered document. Thus, if a paper purporting to be a certified copy of an official marriage-register is offered, it must first be asked why the original is not produced; this objection being satisfied, the question then arises whether the register itself is receivable under the Hearsay exception as testimony to the facts recorded in it, and, again, whether under the same exception the certified copy is receivable to show the register's contents; finally, the genuineness of the certified copy must somehow be indicated.

In the following sections, under the sub-title "Mode of Proof," all three of these principles are involved; under the sub-title "Admissibility and Effect," usually the second principle alone is involved.]

[1] Womack *v.* Dearman, 7 Port. 513.

[2] [*Ante*, § 4.]

[3] *Ante*, §§ 4–6; Story on Confl. of Laws, § 643; Robinson *v.* Gilman, 7 Shepl. 299; Coit *v.* Millikin, 1 Denio 376. A protest of a bill of exchange, in a foreign country, is sufficiently proved by the seal of the foreign notary: Willes 550; Anon., 12 Mod. 345; Bayley on Bills, 515 (Phillips & Sewall's ed.); Story on Bills, §§ 276, 277; La Caygas *v.* Larionda, 4 Mart. 283; [*ante*, § 5.]

the legislative rolls, or to the book printed by public authority.[4] Acts of State may be proved by production of the original printed document from a press authorized by government.[5] Proclamations, and other acts and orders of the executive, of the like character, may be proved by production of the government gazette, in which they were authorized to be printed.[6] Printed copies of public documents, transmitted to Congress by the President of the United States, and printed by the printer to Congress, are evidence of those documents.[7] And here it may be proper to observe, that, in all cases of proof by a copy, if the copy has been taken by a machine, worked by the witness who produces it, it is sufficient.[8] The certificate of the Secretary of State is evidence that a particular person has been recognized as a foreign minister.[9] And the certificate of a foreign governor, duly authenticated, is evidence of his own official acts.[10]

§ 480. **Legislative Acts.** Next, as to legislative acts, which consist of statutes, resolutions, and orders, passed by the legislative body. In regard to private statutes, resolutions, etc., the only mode of proof, known to the common law, is either by means of a copy, proved on oath to have been examined by the roll itself; or, by an exemplification under the Great Seal. But in most if not all of the United States, the printed copies of the laws and resolves of the Legislature, published by its authority, are competent evidence either by statute or judicial decision; and it is sufficient *prima facie*, that the book purports to have been so printed.[1] It is the invariable course of the Legislatures of the several States, as well as of the United States, to have the laws and resolutions of each session printed by authority. Confidential persons are selected to compare the copies with the original rolls, and superintend the printing. The very object of this provision is to furnish the people with authentic copies; and, from their nature, printed copies of this kind, either of public or private laws, are as much to be depended on as the exemplification, verified by an officer who is a keeper of the record.[2]

[4] Bull. N. P. 225; [see § 482.]

[5] R. *v.* Withers, cited 5 T. R. 442; Watkins *v.* Holman, 16 Pet. 25; [*post*, § 492.]

[6] R. *v.* Holt, 5 T. R. 436; Van Omeron *v.* Dowick, 2 Campb. 42; Bull. N. P. 226; Attorney-General *v.* Theakstone, 8 Price 89. An appointment to a commission in the army cannot be proved by the gazette: R. *v.* Gardner, 2 Campb. 513; Kirwan *v.* Cockburn, 5 Esp. 233; see also R. *v.* Forsyth, R. & Ry. 274, 275, [and *post*, § 492.]

[7] Radcliff *v.* United Ins. Co., 7 Johns. 38, per Kent, C. J.; {Whiton *v.* Ins. Co., 109 Mass. 24; Gregg *v.* Forsyth, 24 How. 179;} [and *post*, § 489.]

[8] Simpson *v.* Thoreton, 2 M. & Rob. 433.

[9] U. S. *v.* Benner, 1 Baldw. 238.

[10] U. S. *v.* Mitchell, 3 Wash. 95; [*post*, § 491.]

[1] Young *v.* Bank of Alexandria, 4 Cranch 388; Biddis *v.* James, 6 Binn. 321, 326; R. *v.* Forsyth, Russ. & Ry. 275; see *post*, § 489. {The archives of "the late so-called Confederate Government" must be produced in the original: Schaben *v.* U. S., 6 Ct. Cl. 230.}

[2] Per Tilghman, C. J., 6 Binn. 326. See also Watkins *v.* Holman, 16 Pet. 25; Holt, C. J., held that an act, printed by the king's printers, was always good evidence to a jury; though it was not sufficient upon an issue of *nul tiel record*: Anon., 2 Salk. 566. [See *post*, § 489.]

§ 481. If in a private statute a clause is inserted, that it shall be taken notice of, as if it were a public act; this not only dispenses with the necessity of pleading it specially, but also changes the mode of proof, by dispensing with the production of an exemplified or sworn copy.[1]

§ 482. **Legislative Journals.** In regard to the journals of either branch of the Legislature, a former remark[1] may be here repeated, equally applicable to all other public records and documents; namely, that they constitute an exception to the general rule, which requires the production of the best evidence, and may be proved by examined copies. This exception is allowed, because of their nature, as original public documents, which are not removable at the call of individuals, and because, being interesting to many persons, they might be necessary, as evidence, in different places at the same time.[2] Moreover, these being public records, they would be recognized as such by the Court, upon being produced, without collateral evidence of their identity or genuineness;[3] and it is a general rule, that, whenever the thing to be proved would require no collateral proof upon its production, it is provable by a copy.[4] These journals may also be proved by the copies printed by the government printer, by authority of the House.[5] [Whether the enrolled act, as approved by the Governor or President, signed by the presiding officers of the Legislature, and filed with the Secretary of State, is to be taken as the final and determinative document in ascertaining either the terms of a statute or the validity of its enactment with reference to the number of votes, of readings, etc., has been a subject of much controversy; the opposing view being that resort may be had to the legislative journals for the purpose of overriding or correcting the certificate of enrolment. The arguments both of policy and principle seem clearly to forbid such a resort;[6] this was the orthodox common-law doctrine;[7] and it has been perpetuated in a minority of American jurisdictions;[8] the majority (perhaps justified in part

[1] Beaumont *v.* Mountain, 10 Bing. 404. The contrary seems to have been held in Brett *v.* Beales, 1 M. & Malk. 421; but that case was overruled, as to this point, in Woodward *v.* Cotton, 1 C. M. & R. 44, 47; [see *ante*, § 6 *b*.]

[1] *Supra*, § 91.

[2] Lord Melville's Case, 29 Howell's St. Tr. 683–685; R. *v.* Lord George Gordon, 2 Doug. 593, and n. (3); Jones *v.* Randall, Lofft 383, 428; s. c. Cowp. 17.

[3] [But compare § 6 *a*, *ante*.]

[4] R. *v.* Smith, 1 Stra. 126.

[5] Root *v.* King, 7 Cowen 613, 636; Watkins *v.* Holman, 16 Pet. 25; and see also *post*, § 484.

[6] [The leading opinion is that of Beasley, C. J., in Pangborn *v.* Young, 32 N. J. L. 29, —an arsenal of arguments; for other good opinions, see Nelson, C. J., in Hunt *v.* Van Alstyne, 25 Wend. 605; Zane, C. J., in Ritchie *v.* Richards, 14 Utah 345; Irvine, C. J., in Webster *v.* Hastings, Nebr., 77 N. W. 127; Frazer, J., in Evans *v.* Browne, 30 Ind. 514; the leading opinion on the other side is that of Murray, C. J., in Fowler *v.* Pierce, 2 Cal. 165.]

[7] [Gilbert, Evidence, 7, 10; R. *v.* Arundel, Hob. 109; Bowes *v.* Broadhead, Style 155.]

[8] [Only the latest case or two in each jurisdiction are given: Sherman *v.* Story,

by constitutional phraseology) refuse to treat the enrolment as conclusive.[9]]

§ 483. **Official Registers.** The next class of public writings to be considered consists of official registers, or books kept by persons in public office, in which they are required, whether by statute or by the nature of their office, to write down particular transactions, occurring in the course of their public duties, and under their personal observation. These documents, as well as all others of a public nature, are generally admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth, the obligation of an oath, and the power of cross-examining the persons, on whose authority the truth of the documents depends. The extraordinary degree of confidence, it has been remarked, which is reposed in such documents, is founded principally upon the circumstance, that they have been made by authorized and accredited agents appointed for the purpose; but partly also on the publicity of their subject-matter. Where the particular facts are inquired into and recorded for the benefit of the public, those who are empowered to act in making such investigations and memorials are in fact the agents of all the individuals who compose the State; and every member of the community may be supposed to be privy to the investigation. On the ground, therefore, of the credit due to agents so empowered, and of the public nature of the facts themselves, such documents are entitled to an extraordinary degree of confidence; and it is not necessary that they should be confirmed and sanctioned by the ordinary tests of truth. Besides this, it would always be difficult, and often impossible, to prove facts of a public nature, by means of actual witnesses upon oath.[1]

§ 484. These books, therefore, are recognized by law, because they are required by law to be kept, because the entries in them are of public interest and notoriety, and because they are made under the sanction of an oath of office, or at least under that of official duty. They belong to a particular custody, from which they are not usually

30 Cal. 253 (but see Hale *v.* McGettigan, 114 id. 112); Harwood *v.* Wentworth, Ariz., 42 Pac. 1025; Eld *v.* Gorham, 20 Conn. 8; Evans *v.* Browne, 30 Ind. 514; Mayor *v.* Harwood, 32 Md. 471; Green *v.* Weller, 32 Miss. 650; Pangborn *v.* Young, 32 N. J. L. 29; People *v.* Com'rs, 54 N. Y. 276; Ritchie *v.* Richards, 14 Utah 345; White *v.* Hinton, 3 Wyo. 753; see Gardner *v.* Barney, 6 Wall. 499.]

[9] [*Ex parte* Howard H. I. Co., Ala., 24 So. 516; Chicot Co. *v.* Davies, 40 Ark. 200; State *v.* Hocker, 36 Fla. 358; State *v.* Boise, Ida., 51 Pac. 110, *semble;* Spangler *v.* Jacoby, 14 Ill. 297; Larrison *v.* R. Co., 77 Ill. 11 (construed in Ottawa *v.* Perkins, 94 U. S. 260); Koehler *v.* Hill, 60 Ia. 543; Hart *v.* McElroy, 72 Mich. 446; State *v.* Peterson, 38 Minn. 143; State *v.* Field, 119 Mo. 593; Webster *v.* Hastings, Nebr., 77 N. W. 127; Opinion of the Justices, 52 N. H. 622; Cohn *v.* Kingsley, Or., 49 Pac. 985; State *v.* Platt, 2 S. C. 150. In California and Indiana this view, once maintained, has been repudiated. A series of rulings carrying on the controversy in New York has an historical interest; see Warner *v.* Beers, 23 Wend. 103; Thomas *v.* Dakin, 22 id. 9, 112; People *v.* Purdy, 2 Hill 31; 4 id. 384; People *v.* Supervisors, 8 N. Y. 317.]

[1] Stark. Evid. 195; [*ante*, § 162 *m.*]

taken but by special authority, granted only in cases where inspection of the book itself is necessary, for the purpose of identifying the book, or the handwriting, or of determining some question arising upon the original entry, or of correcting an error which has been duly ascertained. Books of this public nature, being themselves evidence, when produced, their contents may be proved by an immediate copy duly verified.[1] Of this description are parish registers;[2] the books of the Bank of England, which contain the transfers of public stock;[3] the transfer books of the East India Company;[4] the rolls of courts baron;[5] the books which contain the official proceedings of corporations, and matters respecting their property, if the public at large is concerned with it;[6] books of assessment of public rates and taxes;[7] vestry books;[8] bishops' registers, and chapter-house registers;[9] terriers;[10] the books of the post-office, and custom-house, and registers of other public offices;[11] prison registers;[12] enrolment of deeds;[13] the registers of births and of marriages, made pursuant to the statutes of any of the United States;[14]

[1] Lynch *v.* Clerke, 3 Salk. 154, per Holt, C. J.; 2 Doug. 593, 594, n. (3). The handwriting of the recording or attesting officer is *prima facie* presumed genuine: Bryan *v.* Wear, 4 Mo. 106.

[2] 2 Phil. Evid. 183–186; Lewis *v.* Marshall, 5 Pet. 472, 475; 1 Stark. Evid. 205; see Childress *v.* Cutter, 16 Mo. 24, and *post*, § 493.

[3] Breton *v.* Cope, Peake's Cas. 30; Marsh *v.* Collnett, 2 Esp. 665; Mortimer *v.* M'Callan, 6 M. & W. 58.

[4] 2 Doug. 593, n. (3).

[5] Bull. N. P. 247; Doe *v.* Askew, 10 East 520.

[6] Warriner *v.* Giles, 2 Stra. 954; ib. 1223, n. (1); Marriage *v.* Lawrence, 3 B. & Ald. 144, per Abbott, C. J.; Gibbon's Case, 17 How. St. Tr. 810; Moore's Case, ib. 854; Owings *v.* Speed, 5 Wheat. 420; {Loving *v.* Warren County, 14 Bush 316; Butler *v.* Ins. Co., 45 Iowa 93; Fraser *v.* Charleston, 8 S. C. 318.}

[7] Doe *v.* Seaton, 2 Ad. & El. 171, 178, per Patteson, J.; Doe *v.* Arkwright, ib. 182, n., per Denman, C. J.; R. *v.* King, 2 T. R. 234; Ronkendorff *v.* Taylor, 4 Pet. 349, 360; Doe *v.* Cartwright, Ry. & M. 62; [Smith *v.* Andrews, 1891, 2 Ch. 678, 680, 694; White *v.* B. & F. G. Co., Ark., 45 S. W. 1060; Painter *v.* Hall, 75 Ind. 208; Beekman *v.* Hamlin, 23 Or. 313; Hanover Water Co. *v.* Iron Co., 84 Pa. 285; *contra:* Hecht *v.* Eherke, 95 Ia. 757; Anthony *v.* R. Co., 162 Mass. 60. But their use as containing admissions of the opponent may rest on other grounds; see Tolleson *v.* Posey, 32 Ga. 372; Hall *v.* Bishop, 78 Ind. 370.]

[8] R. *v.* Martin, 2 Camp. 100. See, as to church records, Sawyer *v.* Baldwin, 11 Pick. 494.

[9] Arnold *v.* Bishop of Bath and Wells, 5 Bing. 316; Coombs *v.* Coether, 1 M. & Malk. 398.

[10] Bull. N. P. 248; 1 Stark. Evid. 201. See *infra*, § 496.

[11] Bull. N. P. 249; R. *v.* Fitzgerald, 1 Leach Cr. Cas. 24; R. *v.* Rhodes, ib. 29; D'Israeli *v.* Jowett, 1 Esp. 427; Barber *v.* Holmes, 3 id. 190; Wallace *v.* Cook, 5 id. 117; Johnson *v.* Ward, 6 id. 48; Tompkins *v.* Attorney-General, 1 Dow 404; R. *v.* Grimwood, 1 Price 369; Henry *v.* Leigh, 3 Campb. 499; U. S. *v.* Johns, 4 Dall. 412, 415. [For a postmaster's register, see Miller *v.* Boykin, 70 Ala. 469.]

[12] Salte *v.* Thomas, 3 B. & P. 188; R. *v.* Aikles, 1 Leach Cr. Cas. 435; [White *v.* U. S., 164 U. S. 100; U. S. *v.* Cross, 20 D. C. 380.]

[13] Bull. N. P. 229; Kinnersley *v.* Orpe, 1 Doug. 56; Hastings *v.* Blue Hill Turnp. Corp., 9 Pick. 80; [see *post*, § 485 *a*.]

[14] Milford *v.* Worcester, 7 Mass. 48; Com. *v.* Littlejohn, 15 id. 163; Sumner *v.* Sebec, 3 Greenl. 223; Wedgewood's Case, 8 id. 75; Jacocks *v.* Gilliam, 3 Murphy 47; Martin *v.* Gunby, 2 H. & J. 248; Jackson *v.* Boneham, 15 Johns. 226; Jackson *v.* King, 5 Cowen 237; Richmond *v.* Patterson, 3 Ohio 368; [see R. *v.* Weaver, L. R.

the registration of vessels in the custom-house;[15] and the books of record of the transactions of towns, city councils, and other municipal bodies.[16] In short, the rule may be considered as settled, that every document of a public nature, which there would be an inconvenience in removing, and which the party has a right to inspect, may be proved by a duly authenticated copy.[17]

§ 485. It is deemed essential to the official character of these books that the entries in them be made promptly, or at least without such long delay as to impair their credibility, and that they be made by the person whose duty it was to make them, and in the mode required by law, if any has been prescribed.[1] When the books themselves are produced they are received as evidence, without further attestation. But they must be accompanied by proof that they come from the proper repository.[2] Where the proof is by a copy, an examined copy, duly made and sworn to by any competent witness, is always admissible. Whether a copy certified by the officer having legal custody of the book or document, he not being specially appointed by law to furnish copies, is admissible, has been doubted; but though there are decisions against the admissibility, yet the weight of authority seems to have established the rule that a copy given by a public officer, whose duty it is to keep the original, ought to be received in evidence.[3]

2 C. C. R. 85; Hawes *v.* State, 88 Ala. 37, 69; {Tucker *v.* People, 117 Ill. 91;} Com. *v.* Hayden, 163 Mass. 453; Royal Soc. G. F. *v.* McDonald, N. J. L., 35 Atl. 1061; Succession of Justus, 48 La. An. 1096.]

[15] U. S. *v.* Johns, 4 Dall. 415; Colson *v.* Bonzey, 6 Greenl. 474; Hacker *v.* Young, 6 N. H. 95; Coolidge *v.* Ins. Co., 14 Johns. 308; Catlett *v.* Ins. Co., 1 Wend. 561.

[16] Saxton *v.* Nimms, 14 Mass. 320, 321; Thayer *v.* Stearns, 1 Pick. 109; Taylor *v.* Henry, 2 Pick. 401; Denning *v.* Roome, 6 Wend. 651; Dudley *v.* Grayson, 6 Monroe 259; Bishop *v.* Cone, 3 N. H. 513.

[17] Gresley on Evid. 115; *ante*, § 482. [So, also, meteorological records (Huston *v.* Council Bluffs, 101 Ia. 33; Evanston *v.* Gunn, 99 U. S. 660); election-registers (Enfield *v.* Ellington, 67 Conn. 459; Patton *v.* Coates, 41 Ark. 111); and military record-books (Board *v.* May, 67 Ind. 561). In almost every jurisdiction statutes now enact the general principle above stated, or enumerate the chief kinds of official registers admissible. See other examples in {Worcester *v.* Northborough, 140 Mass. 400; The Maria Das Dorias, 32 L. J. Adm. 163;} Daly *v.* Webster, 1 U. S. App. 573, 611.]

[1] Doe *v.* Bray, 8 B. & C. 813; Walker *v.* Wingfield, 18 Ves. 443. A certificate that a certain fact appears of record is not sufficient; the officer must certify a transcript of the entire record relating to the matter: Owen *v.* Boyle, 3 Shepl. 147; [Goodrich *v.* Conrad, 24 Ia. 254; Greer *v.* Fergerson, Ga., 30 S. E. 943.]

[2] 1 Stark. Evid. 202; Atkins *v.* Hatton, 2 Anstr. 387; Armstrong *v.* Hewitt, 4 Price 216; Pulley *v.* Hilton, 12 id. 625; Swinnerton *v.* Marquis of Stafford, 3 Taunt. 91; Baillie *v.* Jackson, 17 Eng. L. & Eq. 131, 10 Sim. 167.

[3] United States *v.* Percheman, 7 Pet. 51, 85; Oakes *v.* Hill, 14 Pick. 442, 448; Abbott on Shipping, p. 63, n. 1 (Story's ed.); United States *v.* Johns, 4 Dall. 412, 415; Judice *v.* Chrétien, 3 Rob. La. 15; Wells *v.* Compton, ib. 171; [Ferguson *v.* Clifford, 37 N. H. 85; Barcello *v.* Hapgood, 118 N. C. 712; Bryant *v.* Kelton, 1 Tex. 436; *contra:* State *v.* Cake, 24 N. J. L. 516.] In accordance with the principle of this rule is the statute of the United States of March 27, 1804 [U. S. R. S. § 906,] by which it is enacted, that "all records and exemplifications of office-books, which are or may be kept in any public office of any State, not appertaining to a court, shall be proved or admitted in any other court or office in any other State, by the attestation of the keeper of the said records or books, and the seal of his office thereunto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept; or of the Gov-

§ 485 *a*. **Registered Conveyances.** [Under the statutes providing for the recording or registration of conveyances of land, the principles here in hand receive frequent application. The phraseology of the local statutes is usually of chief importance; but the general application of the common-law principles and the bearing of the statutory changes may here be briefly noticed.

(1) The rule of Primariness (*post*, § 563 *a*) requires that the original of a writing be produced or accounted for; and the question thus arises whether the original of a recorded deed need be produced. There are in vogue at least three different solutions of this question. (*a*) By one view the situation is no different from the ordinary one; the deed must be accounted for, as any other writing must be, in one of the ways noted *post*, §§ 563 *a*–563 *i*. (*b*) By another and modified view, introduced usually by statute, the party proving the deed need merely show (as commonly provided, an affidavit suffices) that the original is lost (thus not varying the common law) or is out of his control (thus varying the common law to the extent that he need not notify the possessor, if an opponent, to produce, nor *subpœna* him, if a third person).[1] A variation of this view, formulated usually in decisions, is that the party need not account for the deed unless he is the grantee therein (and thus presumably has it in his possession) or his opponent is the grantee (in which case it is presumably available for the former if he gives notice to produce); except in these two cases, the document is presumed to be out of his control, and he need not otherwise account for it.[2] (*c*) A third variation goes to the other

ernor, the Secretary of State, the Chancellor, or the Keeper of the Great Seal of the State, that the said attestation is in due form, and by the proper officer; and the said certificate, if given by the presiding justice of a court, 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 the said certificate be given by the Governor, the Secretary of State, the Chancellor, or Keeper of the Great Seal, it shall be under the Great Seal of the State in which the said certificate is made. And the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of the State from whence the same are or shall be taken." By another section this provision is extended to the records and public books, etc., of all the Territories of the United States; [and in most jurisdictions, statutes now enact a general rule similar to that of the Federal statute, or enumerate the chief kinds of documents provable by certified copy. A good survey of the principles is to be found in Fountain *v.* Lynn, N. J., 31 Atl. 1026.] The earlier American authorities, opposed to the rule in the text, are in accordance with the English rule: 2 Phil. Evid. 130–134; {but now, in England, by 14–15 Vict., c. 99, § 14, whenever any book or other document is of such a public nature as to be admissible in evidence in 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 if it is proved to be an examined copy, or if it purports to be signed and certified as a true copy by the officer who has the custody of the original.} Where the law does not require or authorize an instrument or matter to be recorded, a copy of the record of it is not admissible in evidence: Fitler *v.* Shotwell, 7 Watts & Serg. 14; Brown *v.* Hicks, 1 Pike 232; Haile *v.* Palmer, 5 Mo. 403.

[1] [See examples in Booth *v.* Cook, 20 Ill. 130; Brown *v.* Griffith, 70 Cal. 14. The statutes vary in their phraseology.]

[2] [See examples in Bolton *v.* Cummings, 25 Conn. 410; Eaton *v.* Campbell,

extreme, and treats the registration-acts as intended to relieve entirely any person desiring to prove a deed from the necessity of accounting for the original; this rule is in most instances the creation of statute.[3]

(2) The correctness of the copy offered must somehow be proved, assuming that the original is accounted for. A sworn or examined copy will suffice; but whether a certified copy by the custodian of the original is admissible depends on whether by an exception to the Hearsay rule such an official statement is receivable; this, though covered by the (American) common-law principle referred to in the preceding section, is usually expressly provided for by the registration-statutes.

(3) The due execution of the deed must somehow be proved. Probably no common-law principle would suffice to make by implication the recording officer's certificate of copy receivable also to prove the execution of the deed. But where the statute of registration has provided for preliminary proof (by acknowledgment or by witnesses) to a notary or directly to the recording officer, and the officer is not allowed to record until this preliminary proof has been made, his certificate of record imports a due execution of the deed; this is usually regarded as a necessary implication from such statutes, even where no express provision to that effect is made.[4] Since his certificate, as evidence of the contents and the execution of the deed is received, by exception, as an official statement which he is authorized and required to make, it is not received except where it is thus authorized, *i. e.* where the deed is lawfully recorded.[5]]

§ 486. **Foreign Laws.** In regard to foreign laws, the established doctrine now is, that no Court takes judicial notice of the laws of a foreign country, but they must be proved as facts. And the better opinion seems to be, that this proof must be made to the Court, rather than to the jury. "For," observes Mr. Justice Story, "all matters of law are properly referable to the Court, and the object of the proof of foreign laws is to enable the Court to instruct the jury what, in point of law, is the result of the foreign law to be applied to the matters in controversy before them. The Court are, therefore, to decide what is the proper evidence of the laws of a foreign country; and when evidence is given of those laws, the Court are to judge of their applicability, when proved, to the case in hand."[1]

7 Pick. 10; Com. *v.* Emery, 2 Gray 80; Andrews *v.* Davison, 17 N. H. 413; Pratt *v.* Battles, 34 Vt. 391.]

[3] [See Tully *v.* Canfield, 60 Mo. 99.]

[4] [See good expositions by McCoy, J., in Eady *v.* Shivey, 40 Ga. 684; Mills, J., in Womack *v.* Hughes, Litt. Sel. C. 291; Marshall, J., in Ratcliff *v.* Trimble, 12 B. Monr. 32; Shaw, C. J., in Com. *v.* Emery, 2 Gray 80; Baldwin, J., in Pollard *v.* Lively, 2 Gratt. 216; Reese, J., in Saunders *v.* Harris, 5 Humph. 345; Overton, J., in Smith *v.* Martin, 2 Overt. 208.]

[5] [See good expositions by Handy, J., in Lock *v.* Mayne, 39 Miss. 157; Owsley, J., in Eastland *v.* Jordan, 3 Bibb 186; Sawyer, J., in Landers *v.* Bolton, 26 Cal. 393.]

[1] Story on Conflict of Laws, § 638.

§ 487. "Generally speaking, authenticated copies of the written laws, or of other public instruments of a foreign government, are expected to be produced. For it is not to be presumed that any civilized nation will refuse to give such copies, duly authenticated, which are usual and necessary, for the purpose of administering justice in other countries. It cannot be presumed that an application to a foreign government to authenticate its own edict or law will be refused; but the fact of such a refusal must, if relied on, be proved. But if such refusal is proved, then inferior proofs may be admissible.[1] Where our own government has promulgated any foreign law, or ordinance of a public nature, as authentic, that may, of itself, be sufficient evidence of the actual existence and terms of such law or ordinance.[2]

§ 488. "In general, foreign laws are required to be verified by the sanction of an oath, unless they can be verified by some high authority, such as the law respects, not less than it respects the oath of an individual.[1] The usual mode of authenticating foreign laws (as it is of authenticating foreign judgments), is by an exemplification of a copy, under the great Seal of a State; or by a copy proved to be a true copy, by a witness who has examined and compared it with the original; or by the certificate of an officer properly authorized by law to give the copy; which certificate must itself also be duly authenticated.[2] But foreign unwritten laws, customs, and usages may be proved, and indeed must ordinarily be proved, by parol evidence. The usual course is to make such proof by the testimony of competent witnesses, instructed in the laws, customs, and usages, under oath.[3] Sometimes, however, certificates of persons in high authority have been allowed as evidence, without other proof."[4]

[It will thus be seen that the proof of a foreign law raises several distinct questions of evidence, the respective principles involved having no concern with each other. (1) In the first place, the Court will not take judicial notice of a foreign law; it must be proved, as being a fact, and not a law.[5] (2) To whom should the evidence

[1] Church *v.* Hubbart, 2 Cranch 237.

[2] Story on Conflict of Laws, § 640; Talbot *v.* Seeman, 1 Cranch 38.

[1] Church *v.* Hubbart, 2 Cranch 237; Brackett *v.* Norton, 4 Conn. 517; Hempstead *v.* Reed, 6 Conn. 480; Dyer *v.* Smith, 12 id. 384. But the Court may proceed on its own knowledge of foreign laws, without the aid of other proof; and its judgment will not be reversed for that cause, unless it should appear that the Court was mistaken as to those laws: State *v.* Rood, 12 Vt. 396.

[2] Church *v.* Hubbart, 2 Cranch 238; Packard *v.* Hill, 2 Wend. 411; Lincoln *v.* Battelle, 6 id. 475.

[3] Church *v.* Hubbart, 2 Cranch 237; Dalrymple *v.* Dalrymple, 2 Hagg. Consist. App'x, pp. 115–144; Brush *v.* Wilkins, 4 Johns. Ch. 520; Mostyn *v.* Fabrigas, Cowp. 174. It is not necessary that the witness should be of the legal profession: R. *v.* Dent, 1 C. & K. 97. But whether a woman is admissible as *peritus, quære:* R. *v.* Povey, 14 Eng. Law & Eq. 549; 17 Jur. 120. And see Wilcocks *v.* Phillips, Wall. Jr. 47.

[4] Story on Confl. of Laws, §§ 641, 642; ib. §§ 629–640; *In re* Dormoy, 3 Hagg. Eccl 767, 769; R. *v.* Picton, 30 Howell's State Trials, 515–673; The Diana, 1 Dods. 95, 101, 102.

[5] [*Ante*, § 6 *b*.]

be addressed for determination, to the judge or to the jury? The better opinion is that it should be addressed to the judge, though the opposite view is usually maintained.[6] (3) May the terms of the law, if it is a statute, be proved by an expert witness, instead of by an exemplification or other copy? It is usually said that in such a case a copy must be used. But the argument for the opposite view is that the state of the law at a given time consists not merely of the words of the statute, but of such additional elements as the construction and effect given to them by usage and judicial decision and the repealing or modifying effect of later statutes; so that to testify to the condition of the statute law is not necessarily to testify merely to the terms of a document, and thus (on the principle of § 563 *o*, *post*) may be allowed with producing the statute or a copy of it. This argument has much force, but has rarely prevailed; except that expert testimony to the judicial interpretation of a statute already proven by copy would not be objected to.[7] Where the law is found in usage or judicial precedent, the oral testimony of an expert is concededly receivable.[8] (4) When such testimony from an expert is admissible, the witness offered must be shown to be qualified, by training and by acquaintance with the law in question, to testify; this is a question depending largely on the facts of each case.[9] (5) When proof of a statute is made by copy, the Hearsay rule is encountered. A sworn or examined copy is satisfactory, because the witness is upon the stand. An exemplified copy has always been regarded as an official statement, admissible by exception.[10] The chief question arises as to a printed volume purporting to contain the statute's terms; for it cannot be admitted unless by exception to the Hearsay rule. At common law it was generally held (though there were inharmonious rulings) that a volume printed by official authority was admissible, and that a volume purporting to be so printed would be assumed to be genuine;[11] and in most jurisdic-

[6] [*Ante*, § 81 *g*.]

[7] [See Mostyn *v.* Fabrigas, Cowp. 161, 174; Picton's Trial, 30 How. St. Tr. 509; Lacon *v.* Higgins, 3 Stark. 178; Alivon *v.* Furnival, 1 C. M. & R. 291; Millar *v.* Heinrick, 4 Camp. 155; Baron de Bode's Case, 8 Q. B. 250 (leading case); Cocks *v.* Purday, 2 C. & K. 270; Nelson *v.* Bridport, 8 Beav. 539 (leading case); Sussex Peerage Case, 11 Cl. & F. 115; Bremer *v.* Freeman, 10 Moore P. C. 362; Walker *v.* Forbes, 31 Ala. 10; McDeed *v.* McDeed, 67 Ill. 545; Canale *v.* People, id. 52 N. E. 310; Line *v.* Mack, 14 Ind. 330; Raynham *v.* Canton, 3 Pick. 295; Kline *v.* Baker, 99 Mass. 254; Charlotte *v.* Chouteau, 25 Mo. 465, 473; Emery *v.* Berry, 28 N. H. 473; Chanoine *v.* Fowler, 3 Wend. 177 (leading case); Lincoln *v.* Battelle, 6 id. 482; Hynes *v.* McDermott, 82 N. Y. 52; Barrows *v.* Downs, 9 R. I. 446 (leading case); Church *v.* Hubbart, 2 Cranch 238 (leading case); Pierce *v.* Insdeth, 106 U. S. 551. In some jurisdictions statutes have regulated the matter.]

[8] [Citations in preceding note.]

[9] [Treated *ante*, §§ 430 *b*, 430 *m*.]

[10] [*Ante*, §§ 479, 487.]

[11] [Owen *v.* Boyle, 3 Shepl. 147; Hecla P. Co. *v.* Signa I. Co., N. Y., 53 N. E. 650; U. S. *v.* Glassware, 4 Law Reporter 36; Armstrong *v.* U. S., 6 Ct. Cl. 225; {Ennis *v.* Smith, 14 How. 400;} compare § 489. Printed copies proved by a witness to be currently accepted as correct are also usually admitted: Spaulding *v.* Vincent, 24 Vt. 501; Barrows *v.* Downs, 9 R. I. 453; Dawson *v.* Peterson, 110 Mich. 431.]

tions statutes have made similar provisions (varying more or less), and have sometimes permitted the use of volumes shown to be accepted in the foreign country as correctly containing the laws. (6) A treatise upon the unwritten law of a foreign country is sometimes admitted, by way of exception to the Hearsay rule.[12]]

§ 489. **Same: Laws of Domestic States.** The relations of the United States to each other, in regard to all matters not surrendered to the general government by the national Constitution, are those of foreign States in close friendship, each being sovereign and independent.[1] Upon strict principles of evidence, therefore, the laws and public documents of one State can be proved in the Courts of another only as other foreign laws; and accordingly, in some of the States, such proof has been required.[2] But the Courts of other States, and the Supreme Court of the United States, being of opinion that the connection, intercourse, and constitutional ties which bind together these several States require some relaxation of the strictness of this rule, have accordingly held that a printed volume, purporting on the face of it to contain the laws of a sister State, is admissible as *prima facie* evidence, to prove the statute laws of that State.[3] The act of Congress respecting the exemplification of public office books [4] is not understood to exclude any other modes of authentication which the Courts may deem it proper to admit.[5] And in regard to the laws of the States, Congress has provided,[6] under the power vested for that purpose by the Constitution, that the acts of the Legislatures of the several States shall be authenticated by having the seal of their respective States fixed thereto; but this method, as in the case of public books just mentioned, is not regarded as exclusive of any other which the States may respectively adopt.[7] Under this statute it is held that the seal of the State is a sufficient authentication, without the attestation of any officer or any other proof; and it will be presumed *prima facie* that the seal was affixed by the proper officer.[8]

[12] [*Ante*, § 162 *j*.]

[1] *Infra*, § 504.

[2] Brackett *v.* Norton, 4 Conn. 517, 521; Hempstead *v.* Reed, 6 id. 480; Packard *v.* Hill, 2 Wend. 411.

[3] Young *v.* Bank of Alexandria, 4 Cranch 384, 388; Thompson *v.* Musser, 1 Dall. 458, 463; Biddis *v.* James, 6 Binn. 321, 327; Muller *v.* Morris, 2 Barr 85; Raynham *v.* Canton, 3 Pick. 293, 296; Kean *v.* Rice, 12 S. & R. 203; State *v.* Stade, 1 D. Chipm. 303; Comparet *v.* Jernegan, 5 Blackf. 375; Taylor *v.* Bank of Illinois, 7 Monroe 585; Taylor *v.* Bank of Alexandria, 5 Leigh 471; Clarke *v.* Bank of Mississippi, 5 Eng. 516; Allen *v.* Watson, 2 Hill S. C. 319; Hale *v.* Rose, 2 Pennington 591; *contra:* Van Buskirk *v.* Mulock, 18 N. J. L. 185. [In most jurisdictions statutes now provide for the admission of printed volumes purporting to be printed "by authority;" for instances of the construction of this phrase, see Rogero *v.* Zippel, 33 Fla. 625; {Wilt *v.* Cutler, 38 Mich. 189;} Goodwin *v.* Assur. Soc., id., 66 N. W. 157; Bride *v.* Clark, 161 Mass. 130; Glenn *v.* Hunt, 120 Mo. 330.]

[4] Stat. March 27, 1804, cited *supra*, § 485.

[5] See cases cited *supra*, n. (2).

[6] Stat. May 26, 1790; [U. S. R. S. § 905.]

[7] Lothrop *v.* Blake, 3 Barr 483.

[8] U. S. *v.* Amedy, 11 Wheat. 392; U. S. *v.* Johns, 4 Dall. 412, State *v.* Carr, 5 N. H. 367; [see Warner *v.* Com., 2 Va. Cas. 95.] {The exemplification may be of

§ 490. **Same: Judicial Notice.** The reciprocal relations between the national government and the several States, comprising the United States, are not foreign but domestic. Hence, the Courts of the United States take judicial notice of all the public laws of the respective States whenever they are called upon to consider and apply them. And, in like manner, the Courts of the several States take judicial notice of all public acts of Congress, including those which relate exclusively to the District of Columbia, without any formal proof.[1] But private statutes must be proved in the ordinary mode.[2]

3. *Admissibility and Effect of Public Documents.*

§ 491. **Legislative Recitals and Journals, Proclamations, Diplomatic Correspondence, etc.** We are next to consider the admissibility and effect of the public documents we have been speaking of, as instruments of evidence. And here it may be generally observed, that to render such documents, when properly authenticated, admissible in evidence, their contents must be pertinent to the issue. It is also necessary that the document be made by the person whose duty it was to make it, and that the matter it contains be such as belonged to his province, or came within his official cognizance and observation. Documents having these requisites are, in general, admissible to prove, either *prima facie* or conclusively, the facts they recite. Thus, where certain public statutes recited that great outrages had been committed in a certain part of the country, and a public proclamation was issued, with similar recitals, and offering a reward for the discovery and conviction of the perpetrators, these were held admissible and sufficient evidence of the existence of those outrages, to support the averments to that effect in an information for a libel on the government in relation to them.[1] So, a recital of a state of war, in the preamble of a public statute, is good evidence of its existence, and it will be taken notice of without proof; and this, whether the nation be or be not a party to the war.[2] So, also, legislative resolutions are evidence of the public matters which they recite.[3] The journals, also, of either House are the proper evidence of the action of that House upon all matters before it.[4] The diplomatic correspond-

such part of a statute as bears on the point in dispute, and need not be of the whole statute: Grant *v.* Coal Co., 80 Pa. 208. As to the seal, see Fisk *v.* Woodruff, 15 Ill. 15.}

[1] Owings *v.* Hull, 9 Pet. 607; Hinde *v.* Vattier, 5 id. 398; Young *v.* Bank of Alexandria, 4 Cranch 384, 388; Canal Co. *v.* Railroad Co., 4 G. & J. 1, 63; [treated *ante*, § 6 *b*.]

[2] Leland *v.* Wilkinson, 6 Pet. 317.

[1] R. *v.* Sutton, 4 M. & S. 532.

[2] R. *v.* De Berenger, 3 M. & S. 67, 69. See also Brazen Nose College *v.* Bishop of Salisbury, 4 Taunt. 831; [Lane *v.* Harris, 16 Ga. 217; but recitals in *private* statutes are not admissible: Elmondorff *v.* Carmichael, 3 Litt. 473.] {So also the proclamation of a Governor declaring one elected to Congress: Lurton *v.* Gilliam, 2 Ill. 577;} [but compare Masons' F. A. A. *v.* Riley, Ark., 45 S. W. 684.]

[3] R. *v.* Francklin, 17 How. St. Tr. 637.

[4] Jones *v.* Randall, Cowp. 17; Root *v.* King, 7 Cowen 613; Spangler *v.* Jacoby, 14 Ill. 299; [Woodruff *v.* State, Ark., 32 S. W. 102; compare § 482, *ante*.]

ence communicated by the President to Congress is sufficient evidence of the acts of foreign governments and functionaries therein recited.[5] A foreign declaration of war is sufficient proof of the day when the state of war commenced.[6] Certified copies, under the hand and seal of the Secretary of State, of the letters of a public agent resident abroad, and of the official order of a foreign colonial governor concerning the sale and disposal of a cargo of merchandise, have been held admissible evidence of those transactions.[7] How far diplomatic correspondence may go to establish the facts recited therein does not clearly appear; but it is agreed to be generally admissible in all cases, and to be sufficient evidence, whenever the facts recited come in collaterally, or by way of introductory averment, and are not the principal point in issue before the jury.[8]

§ 492. **Government Gazette.** The government Gazette is admissible and sufficient evidence of such acts of the Executive, or of the Government, as are usually announced to the public through that channel, such as proclamations,[1] and the like. For, besides the motives of self-interest and official duty which bind the publisher to accuracy, it is to be remembered, that intentionally to publish anything as emanating from public authority, with knowledge that it did not so emanate, would be a misdemeanor.[2] But, in regard to other acts of public functionaries, having no relation to the affairs of government, the Gazette is not admissible evidence.[3]

§ 493. **Official Registers.** In regard to official registers, we have already stated[1] the principles on which these books are entitled to credit; to which it is only necessary to add, that where the books possess all the requisites there mentioned, they are admissible as competent evidence of the facts they contain. But it is to be remembered that they are not, in general, evidence of any facts not required to be recorded in them, and which did not occur in the presence of the registering officer.[2] Thus, a parish register is evidence only of

[5] Radcliff *v.* United Ins. Co., 7 Johns. 38, 51; Talbot *v.* Seeman, 1 Cranch 1, 37, 38. {The American State Papers, published by order of Congress, are admissible as evidence; and the copies of documents contained are evidence, like the originals: Doe *v.* Roe, 13 Fla. 602; Nixon *v.* Porter, 34 Miss. 697; Dutillett *v.* Blanchard, 14 La. An. 97; Bryan *v.* Forsyth, 19 How. 334.}

[6] Thelluson *v.* Cosling, 4 Esp. 266; Bradley *v.* Arthur, 4 B. & C. 292, 304. See also Foster, Disc. 1, c. 2, § 12, that public notoriety is sufficient evidence of the existence of war.

[7] Bingham *v.* Cabot, 3 Dall. 19, 23, 39–41.

[8] Radcliff *v.* United Ins. Co., 7 Johns. 51, per Kent, C. J.

[1] R. *v.* Holt, 5 T. R. 436, 443; Attorney-General *v.* Theakstone, 8 Price 89; *supra*, § 479, and cases cited in note; Gen. Picton's Case, 30 How. St. Tr. 493.

[2] 2 Phil. Evid. 108.

[3] R. *v.* Holt, 5 T. R. 443, per Ld. Kenyon; {Brundred *v.* Del Hoyo, 20 N. J. L. 328.}

[1] *Supra*, §§ 483–485.

[2] Fitler *v.* Shotwell, 7 Watts & Serg. 14; Brown *v.* Hicks, 1 Pike 232; Haile *v.* Palmer, 5 Mo. 403; *supra*, § 485. [Thus, a register of deaths is not evidence of the cause of death: Metrop. L. I. Co. *v.* Anderson, 79 Md. 375. For a ruling admitting a register to show illegitimacy, see Glenister *v.* Harding, 29 Ch. D. 991. A register containing an entire family-tree was admitted in Success. of Justus, 48 La. An. 1096.]

the time of the marriage, and of its celebration *de facto;* for these are the only facts necessarily within the knowledge of the party making the entry.[3] So, a register of baptism, taken by itself, is evidence only of that fact; though if the child were proved *aliunde* to have then been very young, it might afford presumptive evidence that it was born in the same parish.[4] Neither is the mention of the child's age in the register of christenings proof of the day of his birth to support a plea of infancy.[5] In all these and similar cases the register is no proof of the identity of the parties there named with the parties in controversy; but the fact of identity must be established by other evidence.[6] It is also necessary, in all these cases, that the register be one which the law requires should be kept, and that it be kept in the manner required by law.[7] Thus, also, the registers kept at the navy office are admissible to prove the death of a sailor, and the time when it occurred,[8] as well as to show to what ship he belonged, and the amount of wages due to him.[9] The prison calendar is evidence to prove the date and fact of the commitment and discharge of a prisoner.[10] The books of assessment of public taxes are admissible to prove the assessment of the taxes upon the individuals, and for the property therein mentioned.[11] The books of municipal corporations

[3] Doe *v.* Barnes, 1 M. & Rob. 386, 389.

[4] R. *v.* North Petherton, 5 B. & C. 508; Clark *v.* Trinity Church, 5 Watts & Serg. 266.

[5] Burghart *v.* Angerstein, 6 C. & P. 690. See also R. *v.* Clapham, 4 C. & P. 29; Huet *v.* Le Mesurier, 1 Cox Eq. 275; Childress *v.* Cutter, 16 Mo. 24; {*Re* Wintle, L. R. 9 Eq. 373.}

[6] Birt *v.* Barlow, 1 Doug. 170; Bain *v.* Mason, 1 C. & P. 202 and n.; Wedgwood's Case, 8 Greenl. 75. As to proof of identity, see *ante*, § 38, n.

[7] See the cases cited *supra*, § 484, n. 14; Newham *v.* Raithby, 1 Phillim. 315. Therefore the books of the Fleet and of a Wesleyan chapel have been rejected: Read *v.* Passer, 1 Esp. 213; Whittuck *v.* Waters, 4 C. & P. 375. It is said that a copy of a register of baptism, kept in the island of Guernsey, is not admissible; for which Huet *v.* Le Mesurier, 1 Cox Eq. 275, is cited; but the report of that case is short and obscure; and, for aught appearing to the contrary, the register was rejected only as not competent to prove the *age* of the person. It is also said, on the authority of Leader *v.* Barry, 1 Esp. 353, that a copy of a register of a foreign chapel is not evidence to prove a marriage; but this point, also, is very briefly reported, in three lines; and it does not appear but that the ground of the rejection of the register was that it was not authorized or required to be kept by the laws of France, where the marriage was celebrated; namely, in the Swedish Ambassador's chapel, in Paris; and such, probably enough, was the fact. Subsequently an examined copy of a register of marriages in Barbadoes has been admitted: Cood *v.* Cood, 1 Curt. 755. In the United States, an authenticated copy of a foreign register, legally kept, is admissible in evidence: Kingston *v.* Lesley, 10 S. & R. 383, 389. [Moreover, in the United States such registers are usually held admissible under the exception for regular entries, *ante*, § 120 *a*.]

[8] Wallace *v.* Cook, 5 Esp. 117; Barber *v.* Holmes, 3 id. 190.

[9] R. *v.* Fitzgerald, 1 Leach Cr. Cas. 24; R. *v.* Rhodes, ib. 29.

[10] Salte *v.* Thomas, 3 B. & P. 188; R. *v.* Aickles, 1 Leach Cr. Cas. 435;] *ante*, § 484, n. 10.]

[11] Doe *v.* Seaton, 2 Ad. & El. 178; Doe *v.* Arkwright, ib. 182, n.; R. *v.* King, 2 T. R. 234; Ronkendorff *v.* Taylor, 4 Pet. 349, 360; {Com. *v.* Heffron, 102 Mass. 148;} [see *ante*, § 484, n. 7; and additional examples of other official registers will be found in that section.] Such books are also *prima facie* evidence of domicile: Doe *v.* Cartwright, Ry. & M. 62; 1 C. & P. 218.

are evidence of the elections of their officers, and of other corporate acts there recorded.[12] The books of private corporations are admissible for similar purposes between members of the corporation, for as between them the books are of the nature of public books;[13] and all the members of a company are chargeable with knowledge of the entries made on their books by their agent, in the course of his business, and with the true meaning of those entries, as understood by him.[14] But the books cannot, in general, be adduced by the corporation in support of its own claims against a stranger.[15]

§ 494. **Same: Ship's Register.** The registry of a ship is not of the nature of the public or official registers now under consideration, the entry not being of any transaction of which the public officer who makes the entry is conusant. Nor is it a document required by the law of nations, as expressive of the ship's national character. The registry acts are considered as institutions purely local and municipal, for purposes of public policy. The register, therefore, is not of itself evidence of property, except so far as it is confirmed by some auxiliary circumstance, showing that it was made by the authority or assent of the person named in it, and who is sought to be charged as owner. Without such connecting proof, the register has been held not to be even *prima facie* evidence, to charge a person as owner; and even with such proof, it is not conclusive evidence of ownership; for an equitable title in one person may well consist with the documentary title at the custom-house in another. Where the question of ownership is merely incidental, the register alone has been deemed sufficient *prima facie* evidence. But in favor of the person claiming as owner it is no evidence at all, being nothing more than his own declaration.[1]

§ 495. **Same: Ship's Log-book.** A ship's log-book, where it is required by law to be kept, is an official register, so far as regards the transactions required by law to be entered in it; but no further. Thus, the act of Congress [1] provides, that if any seaman who has signed the shipping articles shall absent himself from the ship without leave, an entry of that fact shall be made in the log-book, and the seaman will be liable to be deemed guilty of desertion. But of this fact the log-book, though an indispensable document, in making out the proof of desertion, in order to incur a forfeiture of wages,

[12] R. *v.* Martin, 2 Campb. 100; [*ante*, § 484, n. 16;] {Halleck *v.* Boylston, 117 Mass. 469.}

[13] Marriage *v.* Lawrence, 3 B. & Ald. 144; Gibbon's Case, 17 How. St. Tr. 810.

[14] Allen *v.* Coit, 6 Hill N. Y. 318.

[15] London *v.* Lynn, 1 H. Bl. 214, n. (*c*); Com. *v.* Woelper, 3 S. & R. 29; Highland Turnpike Co. *v.* McKean, 10 Johns. 154; [*ante*, § 199.]

[1] 3 Kent Comm. 149, 150; Weston *v.* Penniman, 1 Mason 306, 318, per Story, J.; Bixby *v.* Franklin Ins. Co., 8 Pick. 86; Colson *v.* Bonzey, 6 Greenl. 474; Abbott on Shipping, pp. 63–66 (Story's ed. and notes); Tinkler *v.* Walpole, 14 East 226; McIver *v.* Humble, 16 id. 169; Fraser *v.* Hopkins, 2 Taunt. 5; Jones *v.* Pitcher, 3 Stew. & Port. 135; [Flower *v.* Young, 3 Camp. 240; *post*, Vol. III, § 419.]

[1] Stat. 1790, c. 29, § 5; [see U. S. R. S. §§ 4290–2, 4598.]

is never conclusive, but only *prima facie* evidence, open to explanation, and to rebutting testimony. Indeed, it is in no sense *per se* evidence, except in the cases provided for by statute; and therefore it cannot be received in evidence, in favor of the persons concerned in making it, or others, except by force of a statute making it so; though it may be used against any persons to whom it may be brought home, as concerned either in writing or directing what should be contained therein.[2]

§ 496. **Same: Requisites of Official Character.** To entitle a book to the character of an official register, it is not necessary that it be required by an express statute to be kept; nor that the nature of the office should render the book indispensable. It is sufficient that it be directed by the proper authority to be kept, and that it be kept according to such directions.[1] Thus, a book kept by the secretary of bankrupts by order of the Lord Chancellor, was held admissible evidence of the allowance of a certificate of bankruptcy.[2] Terriers seem to be admitted partly on the same principle; as well as upon the ground that they are admissions by persons who stood in privity with the parties, between whom they are sought to be used.[3]

§ 497. **Historical Works.** Under this head may be mentioned books and chronicles of public history, as partaking in some degree of the nature of public documents, and being entitled on the same principles to a great degree of credit. Any approved public and general history, therefore, is admissible to prove ancient facts of a public nature, and the general usages and customs of the country.[1] But in regard to matters not of a public and general nature, such as the custom of a particular town, a descent, the nature of a particular abbey, the boundaries of a country, and the like, they are not admissible.[2]

§ 498. **Official Certificates.** In regard to certificates given by persons in official station, the general rule is, that the law never

[2] Abbott on Shipping, p. 468, n. 1 (Story's ed.); Orne *v.* Townsend, 4 Mason 544; Cloutman *v.* Tunison, 1 Sumner 373; U. S. *v.* Gibert, 2 id. 19, 78; The Sociedade Feliz, 1 W. Rob. 303, 311; [The Hercules, 1 Sprague 534.]

[1] [White *v.* U. S., 164 U. S. 100; Daly *v.* Webster, 1 U. S. App. 573.]

[2] Henry *v.* Leigh, 3 Campb. 499, 501.

[3] By the ecclesiastical canons, an inquiry is directed to be made, from time to time, of the temporal rights of the clergyman in every parish, and to be returned into the registry of the bishop. This return is denominated a terrier: Cowel, Int. verb. *Terrar*, scil. *catalogus terrarium;* Burrill, Law Dict. verb. *Terrier*. See also *ante*, § 485.

[1] Bull. N. P. 248, 249; Morris *v.* Harmer, 7 Pet. 554; Case of Warren Hastings, referred to in 30 How. St. Tr. 492; Phil. & Am. on Evid. p. 606; Neal *v.* Fry, cited 1 Salk. 281; Lord Bridgewater's Case, cited Skin. 15. The statements of the chroniclers, Stow and Sir W. Dugdale, were held inadmissible as evidence of the fact, that a person took his seat by special summons to Parliament in the reign of Henry VIII: The Vaux Peerage Case, 5 Clark & Fin. 538. [These works seem properly to be admissible, not under the present principle, but under that of § 139, *ante*, where the subject has been already treated.]

[2] Stainer *v.* Droitwich, 1 Salk. 281; s. c. Skin. 623; Piercy's Case, Tho. Jones, 164; Evans *v.* Getting, 6 C. & P. 586 and n.

allows a certificate of a mere matter of fact, not coupled with any matter of law, [or not expressly authorized by law,] to be admitted as evidence.[1] If the person was bound to record the fact, then the proper evidence is a copy of the record, duly authenticated. But as to matters which he was not bound to record, his certificate, being extra-official, is merely the statement of a private person, and will therefore be rejected.[2] So, where an officer's certificate is made evidence of certain facts, he cannot extend its effect to other facts, by stating those also in the certificate; but such parts of the certificate will be suppressed.[3] The same rules are applied to an officer's return.[4] [By statute, however, many kinds of certificates are expressly authorized to be made, and are then usually treated as admissible; for example, certificates of marriage,[5] of birth,[6] of the organization of corporations,[7] and the like. So also a report of official investigations, made in pursuance of official duty, may be receivable, though Courts are here inclined to require an express statutory declaration of admissibility.[8]]

[1] Willes, 549, 550, per Willes, Ld. Ch. J.; {Downing *v.* Haxton, 21 Kan. 178; Bullock *v.* Wallingford, 55 N. H. 619; Hopkins *v.* Millard, 9 R. I. 37; Stoner *v.* Ellis, 6 Ind. 152; Cross *v.* Mill Co., 17 Ill. 54.} [The only certificate admissible at common law seems to have been the *notary's* certificate of protest, which was receivable to show the facts of presentment and non-payment of a foreign bill (see the principle explained in Adams *v.* Wright, 14 Wis. 413; Commercial Bank *v.* Barksdale, 34 Mo. 563); but by statute in most jurisdictions the certificate is now made receivable (1) for inland bills also, and (2) to prove all such facts as are customarily certified in it, in some cases including also the fact and mode of notice, reputed residence of the party, and nearest post-office; for a collection of authorities, see Daniel, Negotiable Instruments, II, § 959; note to 96 Am. Dec. 605.

For the certificate of a *recorded conveyance*, see *ante*, § 485; for the certificate of a *judicial record*, see *post*, §§ 503 ff.]

[2] Oakes *v.* Hill, 14 Pick. 442, 448; Wolfe *v.* Washburn, 6 Cowen 261; Jackson *v.* Miller, ib. 751; Governor *v.* McAffee, 2 Dev. 15, 18; U. S. *v.* Buford, 3 Peters 12, 29; {Hanson *v.* South Scituate, 115 Mass. 336; Wayland *v.* Ware, 109 id. 248; Childress *v.* Cutter, 16 Mo. 24.}

[3] Johnson *v.* Hocker, 1 Dall. 406, 407; Governor *v.* Bell, 3 Murph. 331; Governor *v.* Jeffreys, 1 Hawks 207; Stewart *v.* Allison, 6 S. & R. 324, 329; Newman *v.* Doe, 4 How. Miss. 522; {Wood *v.* Knapp, 100 N. Y. 114.}

[4] Cator *v.* Stokes, 1 M. & S. 599; Arnold *v.* Tourtellot, 13 Pick. 172. [A *sheriff's return* is usually treated as a certificate made under official duty, and therefore admissible to prove the facts certified (Browning *v.* Flanagin, 22 N. J. L. 567); the chief controversies that arise are (1) how far the recitals are binding, — a question depending mainly on the law of judgments, — and (2) whether the recitals of sale are evidence of his authority to sell under an unproduced judgment, — a question of the rule of Primariness; statutes usually regulate both these matters; see good discussions of the common-law principle in Hihn *v.* Peck, 30 Cal. 280; Rollins *v.* Henry, 78 N. C. 342.]

[5] [State *v.* Melton, 120 N. C. 591; State *v.* Isenhart, Or., 52 Pac. 569.]

[6] [Com. *v.* Phillips, Mass., 49 N. E. 632.]

[7] [Nat'l B'k *v.* Galland, 14 Wash. 502.]

[8] [See R. *v.* Labouchere, 14 Cox Cr. 419, 427; State *v.* Krause, 58 Kan. 651; Birmingham *v.* Pettit, 21 D. C. 209; Bardsley *v.* Sternberg, 18 Wash. 612;] {Cushing *v.* R. Co., 143 Mass. 78.} [It is on this principle, apparently, that official *surveys* and *maps* are admissible; see Daniel *v.* Wilkin, 7 Exch. 429;] {Com. *v.* King, 150 Mass. 223; Polhill *v.* Brown, 84 Ga. 342.}

CHAPTER XXIX.

RECORDS AND JUDICIAL WRITINGS.

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§ 551. Decrees in Chancery.
§ 552. Depositions.
§ 553. Same: Cross-examination.
§ 554. Same: In Equity.
§ 555. Same: As involving Reputation.
§ 556. Inquisitions of Lunacy, etc.

§ 499. The next class of written evidence consists of Records and Judicial Writings. And here, also, as in the case of Public Documents, we shall consider, first, the mode of proving them; and, secondly, their admissibility and effect.

1. *Mode of proving Judicial Records.*[1]

§ 500. **Statutes.** The case of statutes, which are records, has already been mentioned under the head of legislative acts, to which

[1] [On the subjects of this chapter, see again note 2, § 478, *ante.*]

they seem more properly to belong, the term *record* being generally taken in the more restricted sense, with reference to judicial tribunals. It will only be observed, in this place, that, though the Courts will take notice of all public statutes without proof, yet private statutes must be proved, like any other legislative documents; namely, by an exemplification under the Great Seal, or by an examined copy, or by a copy printed by authority.

§ 501. **Judicial Records, in general.** As to the proofs of records, this is done either by mere production of the records, without more, or by a copy. Copies of records are, (1) exemplifications; (2) copies made by an authorized officer; (3) sworn copies. Exemplifications are either, first, under the Great Seal; or, secondly, under the seal of the particular Court where the record remains.[1] When a record is the gist of the issue, if it is not in the same Court, it should be proved by an exemplification. By the course of the common law, where an exemplification under the Great Seal is requisite, the record may be removed into the Court of Chancery, by a *certiorari*, for that is the centre of all the Courts, and there the Great Seal is kept. But in the United States, the Great Seal being usually if not always kept by the Secretary of State, a different course prevails; and an exemplified copy, under the seal of the Court, is usually admitted, even upon an issue of *nul tiel record*, as sufficient evidence.[2] When the record is not the gist of the issue, the last-mentioned kind of exemplification is always sufficient proof of the record at common law.[3]

§ 502. **Same: Production of the Record itself.** The record itself is produced only when the cause is in the same Court, whose record it is; or, when it is the subject of proceedings in a superior Court.[1] And in the latter case, although it may by the common law be obtained through the Court of Chancery, yet a *certiorari* may also be issued from a superior Court of common law to an inferior tribunal, for the same purpose, whenever the tenor only of the record will suffice; for in such cases nothing is returned but the tenor, that is,

[1] Bull. N. P. 227, 228. An exemplification under the Great Seal is said to be of itself a record of the greatest validity: 1 Gilb. Evid. by Lofft, p. 19; Bull. N. P. 226. Nothing but a record can be exemplified in this manner: 3 Inst. 173.

[2] Vail *v.* Smith, 4 Cowen 71; [Kingman *v.* Cowles, 103 Mass. 283.] See also Pepoon *v.* Jenkins, 2 Johns. Cas. 119; s. c. Colem. & Cain. Cas. 60. In some of the States, copies of record of the Courts of the same State attested by the clerk, have, either by immemorial usage, or by early statutes, been received as sufficient in all cases: Vance *v.* Reardon, 2 Nott & McCord 299; Ladd *v.* Blunt, 4 Mass. 402; [Ponder *v.* Shumans, 80 Ga. 505.] Whether the seal of the Court to such copies is necessary in Massachusetts, *quære;* and see Com. *v.* Phillips, 11 Pick. 30; {settled in the negative in Com. *v.* Downing, 4 Gray 29;} [Com. *v.* Kennedy, Mass., 48 N. E. 782. The reason for requiring the seal seems to be that otherwise it would be necessary to prove the official character of the signer, as well as his signature; see Chambers *v.* People, 5 Ill. 351.]

[3] 1 Gilb. Evid. 26; {Tillotson *v.* Warner, 3 Gray 574.}

[1] {The original record is always admissible instead of a copy: Folsom *v.* Cressey, 73 Me. 270; State *v.* Bartlett, 47 id. 396; Odiorne *v.* Bacon, 6 Cush. 185; Miller *v.* Hale, 26 Pa. 432; Gray *v.* Davis, 27 Conn. 447; Britton *v.* State, 54 Ind. 535;} [even though the original is unlawfully brought from its place of custody: Stevison *v.* Earnest, 80 Ill. 513.]

a literal transcript of the record, under the seal of the Court; and this is sufficient to countervail the plea of *nul tiel record.*[2] Where the record is put in issue in a superior Court of concurrent jurisdiction and authority, it is proved by an exemplification out of Chancery, being obtained and brought thither by a *certiorari* issued out of Chancery, and transmitted thence by *mittimus.*[3]

§ 503. **Same: Court Seals recognized.** In proving a record by a copy under seal, it is to be remembered that the Courts recognize without proof the seal of State, and the seals of the superior Courts of justice, and of all Courts established by public statutes.[1] And by parity of reason it would seem that no extraneous proof ought to be required of the seal of any department of State, or public office established by law, and required or known to have a seal.[2] And here it may be observed, that copies of records and judicial proceedings, under seal, are deemed of higher credit than sworn copies, as having passed under a more exact critical examination.[3]

§ 504. **Domestic State Records; Proof under Federal Statute.** In regard to the several States composing the United States, it has already been seen, that though they are sovereign and independent, in all things not surrendered to the national government by the Constitution, and, therefore, on general principles, are liable to be treated by each other in all other respects as foreign States, yet their mutual relations are rather those of domestic independence, than of foreign alienation.[1] It is accordingly provided in the Constitution, that "full faith and credit shall be given, in each State, to the public act, 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

[2] Woodcraft *v.* Kinaston, 2 Atk. 317, 318; 1 Tidd's Pr. 398; Butcher & Aldworths' Case, Cro. El. 821. Where a domestic record is put in issue by the plea, the question is tried by the Court, notwithstanding it is a question of fact. And the judgment of a Court of record of a sister State in the Union is considered, for this purpose, as a domestic judgment: Hall *v.* Williams, 6 Pick. 237; Carter *v.* Wilson, 1 Dev. & Bat. 362; {so also of a Federal Circuit Court: Williams *v.* Wilkes, 14 Pa. St. 228.} But if it is a foreign record, the issue is tried by the jury: State *v.* Isham, 3 Hawks 185; Adams *v.* Betz, 1 Watts 425; Baldwin *v.* Hale, 17 Johns. 272. The reason is, that in the former case, the judges can themselves have an inspection of the very record; but in the latter, it can only be proved by a copy, the veracity of which is a mere fact within the province of the jury. And see Collins *v.* Mathews, 5 East 473. In New York, the question of fact, in every case, is now, by statute, referred to the jury: Trotter *v.* Mills, 6 Wend. 512.

[3] 1 Tidd's Pr. 398.

[1] Olive *v.* Guin, 2 Sid. 145, 146, per Witherington, C. B.; 1 Gilb. Evid. 19; 12 Vin. Abr. 132, 133, tit. Evid. A, b, 69; Delafield *v.* Hand, 3 Johns. 310, 314; Den *v.* Vreelandt, 2 Halst. 355. The seals of counties palatine and of the Ecclesiastical Courts are judicially known, on the same general principle. See also, as to Probate Courts, Chase *v.* Hathaway, 14 Mass. 222; Judge *v.* Briggs, 3 N. H. 309.

[2] *Ante*, § 6.

[3] 2 Phil. Evid. 130; Bull. N. P. 227.

[1] Mills *v.* Duryee, 7 Cranch 481; Hampton *v.* McConnell, 3 Wheat. 234; *ante*, §§ 479, 489.

the effect thereof."[2] Under this provision it has been enacted that "the records and judicial proceedings of the Courts of any State 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, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every Court within the United States, as they have by law or usage in the Courts of the State from whence said records are or shall be taken."[3] By a subsequent act, these provisions are extended to the Courts of all Territories subject to the jurisdiction of the United States.[4]

§ 505. **Same: Kind of Record affected.** It seems to be generally agreed that this method of authentication, as in the case of public documents before mentioned, is not exclusive of any other which the States may think proper to adopt.[1] It has also been held that these acts of Congress do not extend to judgments in criminal cases, so as to render a witness incompetent in one State, who has been convicted of an infamous crime in another.[2] The judicial proceedings referred to in these acts are also generally understood to be the proceedings of Courts of general jurisdiction, and not those which are merely of municipal authority; for it is required that the copy of the record shall be certified by the clerk of the Court, and that there shall also be a certificate of the judge, chief justice, or presiding magistrate, that the attestation of the clerk is in due form. This, it is said, is founded on the supposition that the Court, whose proceedings are to be thus authenticated, is so consituted as to admit of such officers; the law having wisely left the records of magistrates, who may be vested with limited judicial authority, varying in its objects and extent in every State, to be governed by the laws of the State into which they may be introduced for the purpose of being carried into effect.[3] Accordingly it has been held that the judgments of justices of the peace are not within the meaning of these constitutional and statutory provisions.[4] But the proceedings of Courts of

[2] Const. U. S. art. iv, § 1.

[3] Stat. U. S. May 26, 1790, 2 LL. U. S. c. 38 (11); [U. S. R. S. § 905.]

[4] Stat. U. S. March 27, 1804, 3 LL. U. S. c. 409 (56); [U. S. R. S. § 905. The construction of this statute in the Federal Court may be best ascertained by consulting Gould & Tucker's Notes to the Revised Statutes, *ad loc.*]

[1] Kean *v.* Rice, 12 S. & R. 203, 208; State *v.* Stade, 1 D. Chipm. 303; Raynham *v.* Canton, 3 Pick. 293; Biddis *v.* James, 6 Binn. 321; *Ex parte* Povall 3 Leigh 816; Pepoon *v.* Jenkins, 2 Johns. Cas. 119; Ellmore *v.* Mills, 1 Hayw. 359; {Otto *v.* Trump, 115 Pa. 430;} [Hawes *v.* State, 88 Ala. 37, 69; Garden City S. Co. *v.* Miller, 157 Ill. 225; Kingman *v.* Cowles, 103 Mass. 283; Ellis's App., 55 Minn. 401.]

[2] Com. *v.* Green, 17 Mass. 515; *supra*, § 376, and cases there cited.

[3] Warren *v.* Flagg, 2 Pick. 450, per Parker, C. J.

[4] Warren *v.* Flagg, 2 Pick. 448; Robinson *v.* Prescott, 4 N. H. 450; Mahurin *v.* Bickford, 6 id. 567; Silver Lake Bank *v.* Harding, 5 Ohio, 545; Thomas *v.* Robinson,

chancery and of probate, as well as of the Courts of common law, may be proved in the manner directed by the statute.[5]

§ 506. **Same: Form of Attestation.** Under these provisions it has been held that the attestation of the copy must be according to the form used in the State from which the record comes; and that it must be certified to be so, by the presiding judge of the same Court, the certificate of the clerk to that effect being insufficient.[1] Nor will it suffice for the judge simply to certify that the person who attests the copy is the clerk of the Court, and that the signature is in his handwriting.[2] The seal of the Court must be annexed to the record with the certificate of the clerk, and not to the certificate of the judge.[3] If the Court, whose record is certified, has no seal, this fact should appear, either in the certificate of the clerk, or in that of the judge.[4] And if the Court itself is extinct, but its records and jurisdiction have been transferred by law to another Court, it seems that the clerk and presiding judge of the latter tribunal are competent to make the requisite attestations.[5] If the copy produced purports to be a record, and not a mere transcript of minutes from the docket, and the clerk certifies "that the foregoing is truly taken from the record of the proceedings" of the Court, and this attestation is certified to be in due form of law, by the presiding judge, it will be presumed that the paper is a full copy of the entire record, and will be deemed sufficient.[6] It has also been held that it must appear from the judge's certificate, that at the time of certifying he is the presiding judge of that Court; a certificate that he is "the judge that presided" at the time of the trial, or that he is "the senior judge of the Courts of law" in the State, being deemed insufficient.[7]

3 Wend. 267; {Bryan *v.* Farnsworth, 19 Minn. 239.} In Connecticut and Vermont, it is held that if the justice is bound by law to keep a record of his proceedings, they are within the meaning of the act of Congress: Bissell *v.* Edwards, 5 Day 363; Starkweather *v.* Loomis, 2 Vt. 573; Blodget *v.* Jordan, 6 id. 580; Scott *v.* Cleveland, 3 Monroe 62.

[5] Scott *v.* Blanchard, 8 Martin N. S. 303; Hunt *v.* Lyle, 8 Yerg. 142; Barbour *v.* Watts, 2 A. K. Marsh. 290, 293; Balfour *v.* Chew, 5 Martin N. S. 517; Johnson *v.* Rannels, 6 id. 621; Ripple *v.* Ripple, 1 Rawle 386; Craig *v.* Brown, 1 Pet. C. C. 352.

[1] Drummond *v.* Magruder, 9 Cranch 122; Craig *v.* Brown, 1 Pet. C. C. 352; {Van Storch *v.* Griffin, 71 Pa. St. 240; see Burnell *v.* Weld, 76 N. Y. 103; Shown *v.* Barr, 11 Ired. 296.} The judge's certificate is the only competent evidence of this fact: Smith *v.* Blagge, 1 Johns. Cas. 238; and it is conclusive: Ferguson *v.* Harwood, 7 Cranch 408.

[2] Craig *v.* Brown, 1 Pet. C. C. 352. {If the certificate states that there is no clerk of the Probate Court, but that the duties of the clerk are discharged by the judge, this is a sufficient attestation, being correct in all the other particulars: Cox *v.* Jones, 52 Ga. 438.}

[3] Turner *v.* Waddington, 3 Wash. 126. And being thus affixed, and certified by the clerk it proves itself: Dunlap *v.* Waldo, 6 N. H. 450.

[4] Craig *v.* Brown, 1 Pet. C. C. 352; Kirkland *v.* Smith, 2 Martin N. S. 497; {see Simons *v.* Cook, 29 Iowa 324.}

[5] Thomas *v.* Tanner, 6 Monroe 52; {Darrah *v.* Watson, 36 Iowa 116.}

[6] Ferguson *v.* Harwood, 7 Cranch 408; Edmiston *v.* Schwartz, 13 S. & R. 135; Goodman *v.* James, 2 Rob. La. 297.

[7] Stephenson *v.* Bannister, 3 Bibb 369; Kirkland *v.* Smith, 2 Martin N. S. 497;

The clerk also who certifies the record must be the clerk himself of the same Court, or of its successor, as above mentioned; the certificate of his under-clerk, in his absence, or of the clerk of any other tribunal, office, or body, being held incompetent for this purpose.[3]

§ 507. **Office Copies.** An office copy of a record is a copy authenticated by an officer intrusted for that purpose; and it is admitted in evidence upon the credit of the officer without proof that it has been actually examined.[1] The rule on this subject is, that an office copy, in the same Court, and in the same cause, is equivalent to the record; but in another Court, or in another cause in the same Court, the copy must be proved.[2] But the latter part of this rule is applied only to copies made out by an officer having no other authority to make them, than the mere order of the particular Court, made for the convenience of suitors; for if it is made his duty by law to furnish copies, they are admitted in all Courts under the same jurisdiction.[3] And we have already seen, that in the United States an officer having the legal custody of public records is *ex officio* competent to certify copies of their contents.[4]

§ 508. **Examined Copies.** The proof of records, by an examined copy, is by producing a witness who has compared the copy with the original, or with what the officer of the Court or any other person read as the contents of the record. It is not necessary for the persons examining to exchange papers, and read them alternately both ways.[1] But it should appear that the record, from which the copy was taken, was found in the proper place of deposit, or in the hands of the officer, in whose custody the records of the Court are kept. And this cannot be shown by any light reflected from the record itself, which may have been improperly placed where it was found. Nothing can be borrowed *ex visceribus judicii*, until the original is proved to have come from the proper Court.[2] And the record itself

{Settle *v.* Allison, 8 Ga. 201; see Van Storch *v.* Griffin, 71 Pa. 240; Bennett *v.* Bennett, Deady 300.}

[3] Attestation by an under-clerk is insufficient: Samson *v.* Overton, 4 Bibb 409; {Morris *v.* Pathin, 24 N. Y. 394.} So, by late clerk not now in office: Donohoo *v.* Brannon, 1 Overton 328. So, by clerk of the council, in Maryland: Schnertzell *v.* Young, 3 H. & McHen. 502. See further, Conkling's Practice, 256; 1 Paine & Duer's Practice, 480, 481.

[1] 2 Phil. Evid. 131; Bull. N. P. 229.

[2] Denn *v.* Fulford, 2 Burr. 1179, per Ld. Mansfield. Whether, upon trial at law of an issue out of Chancery, office copies of depositions in the same cause in Chancery are admissible, has been doubted; but the better opinion is, that they are admissible: Highfield *v.* Peake, 1 M. & Malk. 109; Studdy *v.* Sanders, 2 D. & Ry. 347; Hennell *v.* Lyon, 1 B. & Ald. 182; *contra*, Burnand *v.* Nerot, 1 C. & P. 578.

[3] But his certificate of the substance or purport of the record is inadmissible: McGuire *v.* Sayward, 9 Shepl. 230; {Gest *v.* R. Co., 30 La. An. 28; English *v.* Sprague, 33 Me. 440; Anderson *v.* Nagle, 12 W. Va. 98;} [Lamar *v.* Pearre, 90 Ga. 377; Parker *v.* Cleaveland, 37 Fla. 39.]

[4] *Ante*, § 485.

[1] Reid *v.* Margison, 1 Campb. 469; Gyles *v.* Hill, ib. 471, n.; Fyson *v.* Kemp, 6 C. & P. 71; Rolf *v.* Dart, 2 Taunt. 52; Hill *v.* Packard, 5 Wend. 387; Lynde *v.* Judd, 3 Day 499; [*ante*, § 430 *j*[a].]

[2] Adamthwaite *v.* Synge, 1 Stark. 183; {Woods *v.* Banks, 14 N. H. 101.}

must have been finally completed before the copy is admissible in evidence. The minutes from which the judgment is made up, and even a judgment in paper, signed by the master, are not proper evidence of the record.[3]

§ 509. **Lost Records.** If the record is lost, and is ancient, its existence and contents may sometimes be presumed;[1] but whether it be ancient or recent, after proof of the loss, its contents may be proved, like any other document, by any secondary evidence, where the case does not, from its nature, disclose the existence of other and better evidence.[2]

§ 510. **Verdicts.** A verdict is sometimes admissible in evidence, to prove the finding of some matter of reputation, or custom, or particular right.[1] But here, though it is the verdict, and not the judgment, which is the material thing to be shown, yet the rule is, that, where the verdict was returned to a Court having power to set it aside, the verdict is not admissible, without producing a copy of the judgment rendered upon it; for it may be that the judgment was arrested, or that a new trial was granted. But this rule does not hold in the case of a verdict upon an issue out of Chancery, because it is not usual to enter up judgment in such cases.[2] Neither does it apply where the object of the evidence is merely to establish the fact that the verdict was given, without regard to the facts found by the jury, or to the subsequent proceedings in the cause.[3] And where, after verdict in ejectment, the defendant paid the plaintiff's costs, and yielded up the possession to him, the proof of these facts, and of the verdict, has been held sufficient to satisfy the rule, without proof of a judgment.[4]

[3] Bull. N. P. 228; R. *v.* Smith, 8 B. & C. 341; Godefroy *v.* Jay, 3 C. & P. 192; Lee *v.* Meeeock, 5 Esp. 177; R. *v.* Bellamy, Ry. & M. 171; Porter *v.* Cooper, 6 C. & P. 354; [on this, see *ante*, § 305 *g.*] But the minutes of a judgment in the House of Lords are the judgment itself, which it is not the practice to draw up in form: Jones *v.* Randall, Cowp. 17.

[1] Bull. N. P. 228; Green *v.* Proude, 1 Mod. 117, per Ld. Hale.

[2] See *ante*, § 84, *post*, § 563, and cases there cited. See also Adams *v.* Betz, 1 Watts 425, 428; Stockbridge *v.* West Stockbridge, 12 Mass. 400; Donaldson *v.* Winter, 1 Miller 137; Newcomb *v.* Drummond, 4 Leigh 57; Bull. N. P. 228; Knight *v.* Dauler, Hard. 323; Anon., 1 Salk. 284, cited per Holt, C. J.; Gore *v.* Elwell, 9 Shepl. 442; {Tillotson *v.* Warner, 3 Gray 574; Com. *v.* Roark, 8 Cush. 210; Simpson *v.* Norton, 45 Me. 281; Hall *v.* Manchester, 40 N. H. 410; Burton *v.* Driggs, 20 Wall. 125; Eaton *v.* Hall, 5 Metc. 287; Petrie *v.* Benfield, 3 T. R. 476.}

[1] [See *ante*, § 139.]

[2] Bull. N. P. 234; Pitton *v.* Walter, 1 Stra. 162; Fisher *v.* Kitchingman, Willes 367; Ayrey *v.* Davenport, 2 N. R. 474; Donaldson *v.* Jude, 2 Bibb 60. Hence it is not necessary, in New York, to produce a copy of the judgment upon a verdict given in a justice's Court, the justice not having power to set it aside: Felter *v.* Mulliner, 2 Johns. 181; {see Wells *v.* Stevens, 2 Gray 115; Kendall *v.* Powers, 4 Metc. 553.} In North Carolina, owing to an early looseness of practice in making up the record, a copy of the verdict is received without proof of the judgment; the latter being presumed, until the contrary is shown: Deloach *v.* Worke, 3 Hawks 36. See also Evans *v.* Thomas, 2 Stra. 833; Dayrell *v.* Bridge, ib. 1264; Thurston *v.* Slatford, 1 Salk. 284. If the docket is lost before the record is made up, it will be considered as a loss of the record: Pruden *v.* Alden, 23 Pick. 184; [*ante*, § 305 *g.*]

[3] Barlow *v.* Dupuy, 1 Martin N. s. 442.

[4] Shaeffer *v.* Kreitzer, 6 Binn. 430.

§ 511. **Decrees in Chancery.** A decree in Chancery may be proved by an exemplification, or by a sworn copy, or by a decretal order in paper, with proof of the bill and answer.[1] And if the bill and answer are recited in the order, that has been held sufficient, without other proof of them.[2] But though a former decree be recited in a subsequent decree, this recital is not proper evidence of the former.[3] The general rule is, that, where a party intends to avail himself of a decree, as an adjudication upon the subject-matter, and not merely to prove collaterally that the decree was made, he must show the proceedings upon which the decree was founded. "The whole record," says Chief Baron Comyns, "which concerns the matter in question, ought to be produced."[4] But where the decree is offered merely for proof of the *res ipsa*, namely, the fact of the decree, here, as in the case of verdicts, no proof of any other proceeding is required.[5] The same rules apply to sentences in the admiralty and to judgments in Courts baron, and other inferior Courts.[6]

§ 512. **Answers in Chancery.** The proof of an answer in Chancery may, in civil cases, be made by an examined copy.[1] Regularly, the answer cannot be given in evidence without proof of the bill also, if it can be had.[2] But, in general, proof of the decree is not necessary, if the answer is to be used merely as the party's admission under oath or for the purpose of contradicting him as a witness, or to charge him upon an indictment for perjury. The absence of the bill, in such cases, goes only to the effect and value of the evidence, and not to its admissibility.[3] In an indictment for perjury in an answer, it is considered necessary to produce the original answer, together with proof of the administration of the oath; but of this fact, as well as of the place where it was sworn, the certificate of the master, before whom it was sworn, his signature also being proved, is sufficient *prima facie* evidence.[4] The original must also be produced on a trial for forgery. In civil cases, it will be presumed that the answer was made upon oath.[5] But whether the answer be

[1] Trowel *v.* Castle, 1 Keb. 21, confirmed by Bailey, B., in Blower *v.* Hollis, 1 Cromp. & Mees. 396; 4 Com. Dig. 97, tit. Evidence, C, 1; Gresley on Evid. p. 109.

[2] Bull. N. P. 244; 1 Keb. 21.

[3] Winans *v.* Dunham, 5 Wend. 47; Wilson *v.* Conine, 2 Johns. 280.

[4] 4 Com. Dig. tit. Evidence, A, 4; 2 Phil. Evid. 138, 139. The rule equally applies to decrees of the Ecclesiastical Courts: Leake *v.* Marquis of Westmeath, 2 M. & Rob. 394.

[5] Jones *v.* Randall, Cowp. 17.

[6] 4 Com. Dig. 97, 98, tit. Evidence, C, 1.

[1] Ewer *v.* Ambrose, 4 B. & C. 25.

[2] 1 Gilb. Evid. 55, 56; Gresley on Evid. pp. 108, 109; [see *ante*, § 201.]

[3] Ewer *v.* Ambrose, 4 B. & C. 25; Rowe *v.* Brenton, 8 B. & C. 737, 765; Lady Dartmouth *v.* Roberts, 16 East 334, 339, 340.

[4] Bull. N. P. 238, 239; R. *v.* Morris, 2 Burr. 1189; R. *v.* Benson, 2 Campb. 508; R. *v.* Spencer, Ry. & M. 97. The *jurat* is not conclusive as to the place: R. *v.* Emden, 9 East 437. The same strictness seems to be required in an action on the case for a malicious criminal prosecution: 16 East 340; 2 Phil. Evid. 140; *sed quære.*

[5] Bull. N. P. 238.

proved by production of the original, or by a copy, and in whatever case, some proof of the identity of the party will be requisite. This may be by proof of his handwriting; which was the reason of the order in Chancery requiring all defendants to sign their answers; or it may be by any other competent evidence.[6]

§ 513. **Records of Inferior Courts.** The judgments of inferior Courts are usually proved by producing from the proper custody the book containing the proceedings. And as the proceedings in these Courts are not usually made up in form, the minutes, or examined copies of them, will be admitted, if they are perfect.[1] If they are not entered in books, they may be proved by the officer of the Court, or by any other competent person.[2] In either case, resort will be had to the best evidence, to establish the tenor of the proceedings; and, therefore, where the course is to record them, which will be presumed until the contrary is shown, the record, or a copy, properly authenticated, is the only competent evidence.[3] The caption is a necessary part of the record; and the record itself, or an examined copy, is the only legitimate evidence to prove it.[4]

§ 514. **Foreign Judgments.** The usual modes of authenticating foreign judgments are, either by an exemplification of a copy under the Great Seal of a State;[1] or by a copy, proved to be a true copy by a witness who has compared it with the original; or by the certificate of an officer, properly authorized by law to give a copy, which certificate must itself also be duly authenticated.[2] If the copy is

[6] R. *v.* Morris, 5 Burr. 1189; R. *v.* Benson, 2 Campb. 508. It seems that slight evidence of identity will be deemed *prima facie* sufficient. In Hennell *v.* Lyon, 1 B. & Ald. 182, coincidence of name and character as administrator was held sufficient; and Lord Ellenborough thought that coincidence of name alone ought to be enough to call upon the party to show that it was some other person; see also Hodgkinson *v.* Willis, 3 Campb. 401; [and *ante*, § 43 *a*, *post*, § 575 *a*.]

[1] Arundell *v.* White, 14 East 216; Fisher *v.* Lane, 2 W. Bl. 834; R. *v.* Smith, 8 B. & C. 342, per Ld. Tenterden.

[2] Dyson *v.* Wood, 3 B. & C. 449, 451.

[3] See, as to justices' Court, Matthews *v.* Houghton, 2 Fairf. 377; Holcomb *v.* Cornish, 8 Conn. 375, 380; Wolfe *v.* Washburn, 6 Cowen 261; Webb *v.* Alexander, 7 Wend. 281, 286; {Brown *v.* Edson, 23 Vt. 435; State *v.* Bartlett, 47 Me. 396; Com. *v.* Ford, 14 Gray 399; Goldstone *v.* Davidson, 18 Cal. 41; McGrath *v.* Seagrave, 2 All. 443; Strong *v.* Bradley, 13 Vt. 9; Story *v.* Kimball, 6 id. 541; Pike *v.* Crehore, 40 Me. 503; Day *v.* Moore, 13 Gray 522; Brackett *v.* Hoitt, 20 N. H. 257; Smith *v.* Redden, 5 Har. 321; Lancaster *v.* Lane, 19 Ill. 242; Brush *v.* Blanchard, ib. 31; Magee *v.* Scott, 32 Pa. 539.} As to Probate Courts, Chase *v.* Hathaway, 14 Mass. 222, 227; Judge of Probate *v.* Briggs, 3 N. H. 309. As to justices of the sessions, Com. *v.* Bolkom, 3 Pick. 281.

[4] R. *v.* Smith, 8 B. & C. 341, per Bailey, J.

[1] [*Ante*, § 479.]

[2] Church *v.* Hubbart, 2 Cranch 228, per Marshall, C. J.; *supra*, § 488, and cases there cited. [The matter is usually regulated by statute; see an illustration of the various aspects of the subject in Garden City Sand Co. *v.* Miller, 157 Ill. 225.] Proof by a witness, who saw the clerk affix the seal of the Court, and attest the copy with his own name, the witness having assisted him to compare it with the original, was held sufficient: Buttrick *v.* Allen, 8 Mass. 273; {see also Pickard *v.* Bailey, 6 Foster 152;} so, where the witness testified that the Court had no seal: Packard *v.* Hill, 7 Cowen 434.

certified under the hand of the judge of the Court, his handwriting must be proved.[3] If the Court has a seal, it ought to be affixed to the copy, and proved; even though it be worn so smooth, as to make no distinct impression.[4] And if it is clearly proved that the Court has no seal, it must be shown to possess some other requisites to entitle it to credit.[5] If the copy is merely certified by an officer of the Court, without other proof, it is inadmissible.[6]

§ 515. **Inquisitions.** In cases of *inquisitiones post mortem* and other private offices, the return cannot be read, without also reading the commission. But in cases of more general concern, the commission is of such public notoriety as not to require proof.[1]

§ 516. **Depositions in Chancery.** With regard to the proof of depositions in Chancery, the general rule is, that they cannot be read, without proof of the bill and answer, in order to show that there was a cause depending, as well as who were the parties, and what was the subject-matter in issue. If there were no cause depending, the depositions are but voluntary affidavits; and if there were one, still the depositions cannot be read, unless it be against the same parties, or those claiming in privity with them.[1] But ancient depositions, given when it was not usual to enroll the pleadings, may be read without antecedent proof.[2] They may also be read upon proof of the bill, but without proof of the answer, if the defendant is in contempt, or has had an opportunity of cross-examining, which he chose to forego.[3] And no proof of the bill or answer is necessary, where the deposition is used against the deponent, as his own declaration or admission, or for the purpose of contradicting him as a witness.[4] So, where an issue is directed out of Chancery, and an order is made there, for the reading of the depositions upon the trial of the issue, the Court of law will read them upon the order, without antecedent proof of the bill and answer, provided the witnesses themselves cannot be produced.[5]

§ 517. **Depositions under Commission.** Depositions taken upon interrogatories, under a special commission, cannot be read without proof of the commission under which they were taken, together with

[3] Henry *v.* Adey, 3 East 221; Buchanan *v.* Rucker, 1 Campb. 63. The certificate of a notary public to this fact was deemed sufficient in Yeaton *v.* Fry, 5 Cranch 335.

[4] Cavan *v.* Stewart, 1 Stark. 525; Flindt *v.* Atkins, 3 Campb. 215, n.; Gardere *v.* Ins. Co., 7 Johns. 514.

[5] Black *v.* Lord Braybrook, 2 Stark. 7, per Ld. Ellenborough; Packard *v.* Hill, 7 Cowen 434.

[6] Appleton *v.* Ld. Braybrook, 2 Stark. 6; s. c. 6 M. & S. 34; Thompson *v.* Stewart, 3 Conn. 171.

[1] Bull. N. P. 228, 229; [for their admissibility, see *post*, § 556.]

[1] 2 Phil. Evid. 149; Gresley on Evid. 185; 1 Gilb. Evid. 56, 57; [*ante*, § 163 *a*.]

[2] 1 Gilb. Evid. 64; Gresley on Evid. 185; Bayley *v.* Wylie, 6 Esp. 85.

[3] Cazenove *v.* Vaughan, 1 M. & S. 4; Carrington *v.* Cornock, 2 Sim. 567.

[4] Highfield *v.* Peake, 1 M. & Malk. 109; [*ante*, §§ 178, 201, 512.]

[5] Palmer *v.* Lord Aylesbury, 15 Ves. 176; Gresley on Evid. 185; Bayley *v.* Wylie, 6 Esp. 85.

the interrogatories, if they can be found. The absence of the interrogatories, if it renders the answers obscure, may destroy their effect, but it does not prevent their being read.[1] Both depositions and affidavits, taken in another domestic tribunal, may be proved by examined copies.[2]

§ 518. **Testaments.** Testaments, in England, are proved in the Ecclesiastical Courts; and, in the United States, in those Courts which have been specially charged with the exercise of this branch of that jurisdiction, generally styled Courts of Probate, but in some States known by other designations, as Orphans' Courts, etc. There are two modes of proof, — namely, the common form, which is upon the oath of the executor alone, before the Court having jurisdiction of the probate of wills, without citing the parties interested, and the more solemn form of law, *per testes*, upon due notice and hearing of all parties concerned.[1] The former mode has, in the United States, fallen into general disuse. By the common law, the Ecclesiastical Courts have no jurisdiction of matters concerning the realty; and therefore the probate, as far as the realty is concerned, gives no validity to the will.[2] But in most of the United States, the probate of the will has the same effect in the case of real estate as in that of the personalty; and where it has not, the effect will be stated hereafter.[3] This being the case, the present general course is to deposit the original will in the registry of the Court of Probate, delivering to the executor a copy of the will, and an exemplification of the decree of allowance and probate. And in all cases where the Court of Probate has jurisdiction, its decree is the proper evidence of the probate of the will, and is proved in the same manner as the decrees and judgments of other Courts.[4] A Court of common law will not take notice of a will, as a title to personal property, until it has been thus proved;[5] and where the will is required to be originally proved to the jury as documentary evidence of title, it is not permitted to be read unless it bears the seal of the Ecclesiastical Court, or some other mark of authentication.[6]

§ 519. **Letters of Administration.** Letters of administration are granted under the seal of the Court having jurisdiction of the pro-

[1] Rowe *v.* Brenton, 8 B. & C. 737, 765.

[2] *Supra*, §§ 507, 508; Highfield *v.* Peake, 1 M. & Malk. 110. In criminal cases, some proof of identity of the person is requisite: *supra*, § 512.

[1] 2 Bl. Comm. 508.

[2] Hoe *v.* Nelthrope, 3 Salk. 154; Bull. N. P. 245, 246.

[3] See *infra*, § 550, and Vol. II. tit. Wills, § 672.

[4] *Supra*, §§ 501–509, 513; Chase *v.* Hathaway, 14 Mass. 222, 227; Judge of Probate *v.* Briggs, 3 N. H. 309; Farnsworth *v.* Briggs, 6 id. 561.

[5] Stone *v.* Forsyth, 2 Doug. 707. The character of executor may be proved by the act-book, without producing the probate of the will: Cox *v.* Allingham, Jacob 514; and see Doe *v.* Mew, 7 Ad. & El. 240.

[6] R. *v.* Barnes, 1 Stark. 243; Shumway *v.* Holbrook, 1 Pick. 114. See further, 2 Phil. Evid. 172; Gorton *v.* Dyson, 1 B. & B. 221, per Richardson, J.: [statutes now almost everywhere provide for the terms of admission.]

bate of wills; and the general course in the United States, as in the case of wills, is to pass a formal decree to that effect, which is entered in the book of records of the Court. The letter of administration, therefore, is of the nature of an exemplification of this record, and as such is received without other proof. But where no formal record is drawn up, the book of acts, or the original minutes or memorial of the appointment, or a copy thereof duly authenticated, will be received as competent evidence.[1]

§ 520. **Magistrates' Examinations in Criminal Cases.** Examinations of prisoners in criminal cases are usually proved by the magistrate or clerk who wrote them down.[1] But there must be antecedent proof of the identity of the prisoner and of the examination. If the prisoner has subscribed the examination with his name, proof of his handwriting is sufficient evidence that he has read it; but if he has merely made his mark, or has not signed it at all, the magistrate or clerk must identify the prisoner, and prove that the writing was duly read to him, and that he assented to it.[2]

§ 521. **Writs.** In regard to the proof of writs, the question whether this is to be made by production of the writ itself, or by a copy, depends on its having been returned or not. If it is only matter of inducement to the action, and has not been returned, it may be proved by producing it. But after the writ is returned it has become matter of record, and is to be proved by a copy from the record, this being the best evidence.[1] If it cannot be found after diligent search, it may be proved by secondary evidence, as in other cases.[2] The fact, however, of the issuing of the writ may sometimes be proved by the admission of the party against whom it is to be proved.[3] And the precise time of suing it out may be shown by parol.[4]

[1] The practice on this subject is various in the different States, [and is regulated almost entirely by statute;] see Dickinson *v.* McCraw, 4 Rand. 158; Seymour *v.* Beach, 4 Vt. 493; Jackson *v.* Robinson, 4 Wend. 436; Farnsworth *v.* Briggs, 6 N. H. 561; Hoskins *v.* Miller, 2 Dev. 360; Owings *v.* Beall, 1 Litt. 257, 259; Browning *v.* Huff, 2 Bailey 174, 179; Owings *v.* Hull, 9 Pet. 608, 626. See also Bull. N. P. 246; Elden *v.* Kesdel, 8 East 187; 2 M. & S. 567, per Bailey, J. · 2 Phil. Evid. 172, 173; 1 Stark. Evid. 255.

[1] 2 Hale P. C. 52, 284.

[2] See *supra*, §§ 224, 225, 227, 22..

[1] Bull. N. P. 234; Foster *v.* Trull, 12 Johns. 456; Pigot *v.* Davis, 3 Hawks 25; Frost *v.* Shapleigh, 7 Greenl. 236; Brush *v.* Taggart, 7 Johns. 19; Jenner *v.* Joliffe, 6 id. 9.

[2] *Supra*, § 84.

[3] As, in an action by the officer against the bailee of the goods attached, for which he has given a forthcoming obligation, reciting the attachment: Lyman *v.* Lyman, 11 Mass. 317; Spencer *v.* Williams, 2 Vt. 209; Lowry *v.* Cady, 4 id. 504; Foster *v.* Trull, 12 Johns. 456. So where the sheriff is sued for an escape, and has not returned the precept on which the arrest was made: Hinman *v.* Rees, 13 id. 529.

[4] Lester *v.* Jenkins, 8 B. & C. 339; Morris *v.* Pugh, 3 Burr. 1241; Wilton *v.* Girdlestone, 5 B. & Ald. 847; Michaels *v.* Shaw, 12 Wend. 587; Allen *v.* Portland Stage Co., 8 Greenl. 438; Taylor *v.* Dundass, 1 Wash. 94.

2. *Admissibility and Effect of Judgments and Records.*[1]

§ 522. **In general.** We proceed in the next place to consider the admissibility and effect of records as instruments of evidence. The rules of law upon this subject are founded upon these evident principles or axioms, that it is for the interest of the community that a limit should be prescribed to litigation; and that the same cause of action ought not to be brought twice to a final determination. Justice requires that every cause be once fairly and impartially tried; but the public tranquillity demands that, having been once so tried, all litigation of that question, and between those parties, should be closed forever.

§ 523. **General Principle: Judgments bind Parties and Privies, but not Strangers.** It is also a most obvious principle of justice, that no man ought to be bound by proceedings to which he was a stranger; but the converse of this rule is equally true, that by proceedings to which he was not a stranger he may well be held bound. Under the term *parties*, in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defence, or to control the proceedings, and to appeal from the judgment. This right involves also the right to adduce testimony, and to cross-examine the witnesses adduced on the other side. Persons not having these rights are regarded as strangers to the cause.[1] But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim under them, or in privity with them, are equally concluded by the same proceedings. We have already seen that the term *privity* denotes mutual or successive relationship to the same rights of property.[2] The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party is, that they are identified with him in interest; and wherever this identity is found to exist, all are alike concluded. Hence, all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity.[3] And if one covenants for the re-

[1] [The topics of the ensuing sections are for the most part not concerned with the law of evidence.]

[1] Duchess of Kingston's Case, 20 How. St. Tr. 538, n.; Carter *v.* Bennett, 4 Fla. 352; {Hale *v.* Finch, 104 U. S. 261; Butterfield *v.* Smith, 101 id. 570; Prichard *v.* Farrar, 116 Mass. 213; Vose *v.* Morton, 4 Cush. 27.} Where a father, during the absence of his minor son from the country, commenced an action of crim. con. as his *prochein amy*, the judgment was held conclusive against the son, after his majority; the *prochein amy* having been appointed by the Court: Morgan *v.* Thorne, 9 Dowl. 228.

[2] *Supra*, § 189; see also §§ 19, 20.

[3] Carver *v.* Jackson, 4 Peters 85, 86; Case *v.* Reeve, 14 Johns. 81. See also Kinnersley *v.* Wm. Orpe, 2 Doug. 517, expounded in 14 Johns. 81, 82, by Spencer, J. {Clapp *v.* Herrick, 129 Mass. 292; Ballou *v.* Ballou, 110 N. Y. 402; Parkhurst *v.* Berdell, ib. 392; Chapin *v.* Curtis, 23 Conn. 388; Emery *v.* Fowler, 39 Me. 326; Key *v.* Dent, 14 Md. 86.}

sults or consequences of a suit between others, as if he covenants that a certain mortgage, assigned by him, shall produce a specified sum, he thereby connects himself in privity with the proceedings, and the record of the judgment in that suit will be conclusive evidence against him.[4]

§ 524. **Binding Effect must be Mutual.** But to prevent this rule from working injustice, it is held essential that its operation be mutual. Both the litigants must be alike concluded, or the proceedings cannot be set up as conclusive upon either. For if the adverse party was not also a party to the judgment offered in evidence, it may have been obtained upon his own testimony; in which case, to allow him to derive a benefit from it would be unjust.[1] Another qualification of the rule is, that a party is not to be concluded by a judgment in a prior suit or prosecution, where, from the nature or course of the proceedings, he could not avail himself of the same means of defence, or of redress, which are open to him in the second suit.[2]

§ 525. **Exception for Judgments in Rem.** An apparent exception to this rule, as to the identity of the parties, is allowed in the cases usually termed proceedings *in rem*, which include not only judgments of condemnation of property, as forfeited or as prize, in the Exchequer or Admiralty, but also the decisions of other Courts directly upon the personal status or relations of the party, such as marriage, divorce, bastardy, settlement, and the like.[1] These decisions are binding and conclusive, not only upon the parties actually litigating in the cause, but upon all others; partly upon the ground that, in most cases of this kind, and especially in questions upon property seized and proceeded against, every one who can possibly be affected by the decision has a right to appear and assert his own rights by becoming an actual party to the proceedings; and partly upon the more general ground of public policy and convenience, it being essential to the peace of society that questions of this kind should not be left doubtful, but that the domestic and social relations of every member of the community should be clearly defined and conclusively settled and at rest.[2]

§ 526. **Exception for Judgments on Public Matters.** A further exception is admitted in the case of verdicts and judgments upon subjects of a public nature, such as customs, and the like; in most all of which cases, evidence of reputation is admissible; and also in cases of judgments *in rem*, which may be again mentioned hereafter.[1]

§ 527. **Exception for Judgments on Collateral Facts.** A judgment,

[4] Rapelye *v.* Prince, 4 Hill 119.

[1] Wood *v.* Davis, 7 Cranch 271; Davis *v.* Wood, 1 Wheat. 6.

[2] 1 Stark. Evid. 214, 215.

[1] [As to divorce, see Burlen *v.* Shannon, 3 Gray 387; as to pedigree, see Ennis *v.* Smith, 14 How. 400.]

[2] 1 Stark Evid. 27, 28.

[1] See *infra*, §§ 541, 542, 544, 555.

when used by way of inducement, or to establish a collateral fact, may be admitted, though the parties are not the same. Thus, the record of a conviction may be shown, in order to prove the legal infamy of a witness. So, it may be shown, in order to let in the proof of what was sworn at the trial, or to justify proceedings in execution of the judgment. So, it may be used to show that the suit was determined; or in proper cases, to prove the amount which a principal has been compelled to pay for the default of his agent; or, the amount which a surety has been compelled to pay for the principal debtor; and, in general, to show the fact, that the judgment was actually rendered at such a time, and for such an amount.[1]

§ 527 *a.* **Judgments as Admissions.** A record may also be admitted in evidence in favor of a stranger, against one of the parties, as containing a solemn admission, or judicial declaration by such party, in regard to a certain fact. But in that case it is admitted not as a judgment conclusively establishing the fact, but as the deliberate declaration or admission of the party himself that the fact was so. It is therefore to be treated according to the principles governing admissions, to which class of evidence it properly belongs. Thus, where a carrier brought trover against a person to whom he had delivered the goods intrusted to him, and which were lost, the record in this suit was held admissible for the owner, in a subsequent action brought by him against the carrier, as amounting to a confession in a Court of record, that he had the plaintiff's goods.[1] So, also, where the plaintiff, in an action of trespass *quare clausum fregit*, claimed title by disseisin, against a grantee of the heirs of the disseisee, it was held that the count, in a writ of right sued by those heirs against him, might be given in evidence, as their declaration and admission that their ancestor died disseised, and that the present plaintiff was in possession.[2] So, where two had been sued as partners, and had suffered judgment by default, the record was held competent evidence of an admission of the partnership, in a subsequent action brought by a third person against them as partners.[3] And on the same ground, in a libel by a wife for a divorce, because of the extreme cruelty of the husband, the record of his conviction of an assault and battery upon her, founded upon his plea of guilty, was held good evidence against him, as a judicial admission of the fact. But if the plea had been "not guilty," it would have been otherwise.[4]

[1] See further, *infra*, §§ 538, 539; Locke *v.* Winston, 10 Ala. 849; King *v.* Chase, 15 N. H. 9; Green *v.* New River Co., 4 T. R. 589; {Chamberlain *v.* Carlisle, 26 N. H. 540; Key *v.* Dent, 14 Md. 86.}

[1] Tiley *v.* Cowling, 1 Ld. Raym. 744, per Holt, C. J.; s. c. Bull. N. P. 243; Parsons *v.* Copeland, 33 Me. 370.

[2] Robison *v.* Swett, 3 Greenl. 316; *supra*, § 195; Wells *v.* Compton, 3 Rob. La. 171. And see Kellenberger *v.* Sturtevant, 7 Cush. 465.

[3] Cragin *v.* Carleton, 8 Shepl. 492.

[4] Bradley *v.* Bradley, 2 Fairf. 367; Woodruff *v.* Woodruff, ib. 475.

§ 528. **Judgments bind only for Material Issues.** The principle upon which judgments are held conclusive upon the parties requires that the rule should apply only to that which was directly in issue, and not to everything which was incidentally brought into controversy during the trial. We have seen that the evidence must correspond with the allegations, and be confined to the point in issue. It is only to the material allegations of one party that the other can be called to answer; it is only upon such that an issue can properly be formed; to such alone can testimony be regularly adduced; and upon such an issue only is judgment to be rendered. A record, therefore, is not held conclusive as to the truth of any allegations, which were not material nor traversable; but as to things material and traversable, it is conclusive and final. The general rule on this subject was laid down with admirable clearness, by Lord Chief Justice De Grey, in the Duchess of Kingston's case,[1] and has been repeatedly confirmed and followed, without qualification. "From the variety of cases," said he, "relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: First, that the judgment of a Court of concurrent jurisdiction, directly upon the point is, as a plea, a bar, or, as evidence, conclusive between the same parties, upon the same matter, directly in question in another Court; secondly, that the judgment of a Court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another Court, for a different purpose.[2] But neither the judgment of a concurrent nor exclusive jurisdiction is evidence of any matter, which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment."[3]

§ 529. **Proceedings must have been Final.** It is only where the point in issue has been determined, that the judgment is a bar. If the suit is discontinued, or the plaintiff becomes nonsuit, or for any other cause there has been no judgment of the Court upon the matter in issue, the proceedings are not conclusive.[1]

[1] 20 How. St. Tr. 538; expressly adopted and confirmed in Harvey *v.* Richards, 2 Gall. 229, per Story, J.; and in Hibshman *v.* Dulleban, 4 Watts 183, per Gibson, C. J.; and see King *v.* Chase, 15 N. H. 9.

[2] Thus, a judgment at law against the validity of a bill, as having been given for a gambling debt, is conclusive of that fact in equity also: Pearce *v.* Gray, 2 Y. & C. 322. Plans, and documents referred to in the pleadings, are conclusive upon the parties, if they are adopted by the issues and make part of the judgment; but not otherwise: Hobbs *v.* Parker, 1 Redingt. 143.

[3] See 2 Kent Comm. 119–121; Story on Confl. of Laws, §§ 591–593, 603–610; Arnold *v.* Arnold, 17 Pick. 7; {Lewis *v.* Boston, 130 Mass. 339; Stockwell *v.* Silloway, 113 id. 384; Allen *v.* Trustees, 102 id. 262; United States Felting Co. *v.* Asbestos Felting Co., 18 Blatchf. 310; Price *v.* Dewey, 6 Sawy. 493; Putnam *v.* Clark, 34 N. J. Eq. 532; Jordan *v.* Van Epps, 85 N. Y. 427.}

[1] Knox *v.* Waldoborough, 5 Greenl. 185; Hull *v.* Blake, 13 Mass. 155; Sweigart *v.* Berk, 8 S. & R. 305; Bridge *v.* Sumner, 1 Pick. 371; 3 Bl. Comm. 296, 377;

§ 530. **Judgment must have been on Merits.** So, also, in order to constitute the former judgment a complete bar, it must appear to have been a decision upon the merits; and this will be sufficient, though the declaration were essentially defective, so that it would have been adjudged bad on demurrer.[1] But if the trial went off on a technical defect,[2] or because the debt was not yet due,[3] or because the Court had not jurisdiction,[4] or because of a temporary disability of the plaintiff to sue,[5] or the like,[6] the judgment will be no bar to a future action.

§ 531. **Former Recovery.** It is well settled that a former recovery may be shown in evidence, under the general issue, as well as pleaded in bar; and that when pleaded, it is conclusive upon the parties.[1] But whether it is conclusive when given in evidence is a point which has been much doubted. It is agreed that when there has been no opportunity to plead a matter of estoppel in bar, and it is offered in evidence, it is equally conclusive as if it had been pleaded.[2] And it is further laid down that when the matter to which the estoppel applies is alleged by one party, and the other, instead of pleading the estoppel, chooses to take issue on the fact, he waives the benefit of the estoppel, and leaves the jury at liberty to find according to the fact.[3] This proposition is admitted, in its application to estoppels arising from an act of the party himself, in making a deed or the like; but it has been denied in its application to judgments recovered; for, it is said, the estoppel, in the former case, is allowed for the benefit of the other party, which he may waive; but the whole community have an interest in holding the parties conclusively bound by the results of their own litigation. And it has been well remarked, that it appears inconsistent that the authority of a *res judicata* should govern the Court, when the matter is referred to them by pleading, but that a jury should be at liberty altogether to disregard it, when the matter is referred to them in evidence; and that the operation of so important a principle should be left to depend upon the technical forms of pleading in particular

{Holbert's Est., 57 Cal. 257.} So, if the judgment has been reversed: Wood *v.* Jackson, 8 Wend. 9. If there has been no judgment, it has been ruled that the pleadings are not admissible as evidence of the facts recited in them: Holt *v.* Miers, 9 C. & P. 191.

[1] Hughes *v.* Blake, 1 Mason 515, 519, per Story, J.

[2] Ibid.; Lane *v.* Harrison, 6 Munf. 573; McDonald *v.* Rainor, 8 Johns. 442; Lampen *v.* Kedgewin, 1 Mod. 207.

[3] N. Eng. Bank *v.* Lewis, 8 Pick. 113.

[4] Estill *v.* Taul, 2 Yerg. 467, 470.

[5] Dixon *v.* Sinclear, 4 Vt. 354.

[6] {Homer *v.* Brown, 16 How. 354 (agreed facts).}

[1] Trevivan *v.* Lawrence, 1 Salk. 276; s. c. 3 id. 151; Outram *v.* Morewood, 3 East 346; Kitchen *v.* Campbell, 3 Wils. 304; s. c. 2 W. Bl. 827; {Warren *v.* Comings, 6 Cush. 103; Chamberlain *v.* Carlisle, 26 N. H. 540; Meiss *v.* Gill, 44 Oh. St. 258.}

[2] Howard *v.* Mitchell, 14 Mass. 241; Adams *v.* Barnes, 17 id. 365. So, in equity: Dows *v.* McMichael, 6 Paige 139.

[3] Howard *v.* Mitchell, *supra*; Adams *v.* Barnes, *supra*.

actions.[4] And notwithstanding there are many respectable opposing decisions, the weight of authority, at least in the United States, is believed to be in favor of the position, that where a former recovery is given in evidence, it is equally conclusive, in its effect, as if it were specially pleaded by the way of estoppel.[5]

§ 532. **Same: Identity of Issue.** When a former judgment is shown by way of bar, whether by pleading, or in evidence, it is competent for the plaintiff to reply, that it did not relate to the same property or transaction in controversy in the action, to which it is set up in bar;[1] and the question of identity, thus raised, is to be determined by the jury, upon the evidence adduced.[2] And though the declaration in the former suit may be broad enough to include the subject-matter of the second action, yet if, upon the whole record, it remains doubtful whether the same subject-matter were actually passed upon, it seems that parol evidence may be received to show the truth.[3] So, also, if the pleadings present several distinct propositions, and the evidence may be referred to either or to all with the same propriety, the judgment is not conclusive, but only *prima facie* evidence upon any one of the propositions, and evidence *aliunde* is admissible to rebut it.[4] Thus where the plaintiff in a former action

[4] Phil. & Am. on Evid. 512.

[5] Marsh *v.* Pier, 4 Rawle 288. A similar view, with the like distinction, was taken by Huston, J., in Kilheffer *v.* Herr, 17 S. & R. 325, 326. See also to the point that the evidence is conclusive, Shafer *v.* Stonebraker, 4 G. & J. 345; Cist *v.* Zeigler, 16 S. & R. 282; Betts *v.* Starr, 5 Conn. 550, 553; Preston *v.* Harvey, 2 H. & Mun. 55; Estill *v.* Taul, 2 Yerg. 467, 471; King *v.* Chase, 15 N. H. 9; {Krekeler *v.* Ritter, 62 N. Y. 372; Thompson *v.* Roberts, 24 How. Pr. 233; Perkins *v.* Walker, 19 Vt. 144; Gray *v.* Pingry, 17 id. 419.} In New York, as remarked by Savage, C. J., in Wood *v.* Jackson, 8 Wend. 24, 25, the decisions have not been uniform, nor is it perfectly clear where the weight of authority or of argument lies. But in the later case of Lawrence *v.* Hunt, 10 id. 83, 84, the learned judge, who delivered the opinion of the Court, seemed inclined in favor of the conclusiveness of the evidence. See, to the same point, Hancock *v.* Welsh, 1 Stark. 347; Whately *v.* Menheim, 2 Esp. 608; Strutt *v.* Bovingdon, 5 id. 56–59; R. *v.* St. Pancras, Peake 220; Duchess of Kingston's Case, 20 How. St. Tr. 538; Bird *v.* Randall, 3 Burr. 1353. The contrary decision of Vooght *v.* Winch, 2 B. & Ald. 662, was cited, but without being approved, by Best, C. J., in Stafford *v.* Clark, 1 C. & P. 405, and was again discussed in the same case, 2 Bing. 377; but each of the learned judges expressly declined giving any opinion on the point. This case, however, is reconciled with other English cases by Mr. Smith, on the ground that it means no more than this, that where the party might plead the record by estoppel, but does not, he waives its conclusive character. See 2 Smith's Leading Cases, 434, 444, 445. The learned author, in the note here referred to, has reviewed the doctrine of estoppels in a masterly manner.

The judgment of a *court-martial*, when offered in evidence in support of a justification of imprisonment, by reason of military disobedience and misconduct, is not regarded as conclusive; for the special reasons stated by Lord Mansfield in Wall *v.* McNamara, 1 T. R. 536; *accord*, Hannaford *v.* Hunn, 2 C. & P. 148.

[1] {For a good exposition of the principle, see Bigelow *v.* Winsor, 1 Gray 299.}

[2] So, if a deed is admitted in pleading, proof of the identity may still be required. Johnston *v.* Cottingham, 1 Armst. Macartn. & Ogle 11; and see Garrott *v.* Johnson, 11 G. & J. 173.

[3] It is obvious that, to prove what was the point in issue in a previous action at common law, it is necessary to produce the entire record: Foot *v.* Glover, 4 Blackf. 313. And see Morris *v.* Keyes, 1 Hill 540; Glascock *v.* Hays, 4 Dana 59.

[4] Henderson *v.* Kenner, 1 Rich. 474.

declared upon a promissory note, and for goods sold, but upon executing the writ of inquiry, after judgment by default, he was not prepared with evidence on the count for goods sold, and therefore took his damages only for the amount of the note; he was admitted, in a second action for the goods sold, to prove the fact by parol, and it was held no bar to the second action.[5] And upon the same principle, if one wrongfully take another's horse and sell him, applying the money to his own use, a recovery in trespass, in an action by the owner for the taking, would be a bar to a subsequent action of *assumpsit* for the money received, or for the price, the cause of action being proved to be the same.[6] But where, from the nature of the two actions, the cause of action cannot be the same in both, no averment will be received to the contrary. Therefore, in a writ of right, a plea in bar that the same title had been the sole subject of litigation in a former action of trespass *quare clausum fregit*, or in a former writ of entry, between the same parties, or others privy in estate, was held to be a bad plea.[7] Whether the judgment in an action of trespass, upon the issue of *liberum tenementum*, is admissible in a subsequent action of ejectment between the same parties, is not perfectly clear; but the weight of American authority is in favor of admitting the evidence.[8]

[5] Seddon *v.* Tutop, 6 T. R. 608; Hadley *v.* Green, 2 Tyrwh. 390. See acc. Bridge *v.* Gray, 14 Pick. 55; Webster *v.* Lee, 5 Mass. 334; Ravee *v.* Farmer, 4 T. R. 146; Thorpe *v.* Cooper, 5 Bing. 116; Phillips *v.* Berick, 16 Johns. 136. But if the jury have passed upon the claim, it is a bar, though they may have disallowed it for want of sufficient evidence: Stafford *v.* Clark, 2 Bing. 377, 382, per Best, C. J.; Phillips *v.* Berick, *supra*. So, if the fact constituting the basis of the claim was proved, among other things, before an arbitrator, but he awarded no damages for it, none having been at that time expressly claimed: Dunn *v.* Murray, 9 B. & C. 780. So, if he sues for part only of an entire and indivisible claim; as, if one labors for another a year, on the same hiring, and sues for a month's wages, it is a bar to the whole: Miller *v.* Covert, 1 Wend. 487. But it seems that, generally, a running account for goods sold and delivered does not constitute an entire demand: Badger *v.* Titcomb, 15 Pick. 415; *contra*, Guernsey *v.* Carver, 8 Wend. 492. So, if, having a claim for a greater amount consisting of several distinct particulars, he sues in an inferior Court, and takes judgment for a less amount: Bagot *v.* Williams, 3 B. & C. 235. So, if he obtains an interlocutory judgment for his whole claim, but, to avoid delay, takes a rule to compute on one item only, and enters a *nolle prosequi* as to the other: Bowden *v.* Horne, 7 Bing. 716.

[6] 17 Pick. 13, per Putnam, J.; Yonng *v.* Black, 7 Cranch 565; Livermore *v.* Herschell, 3 Pick. 33; {Norton *v.* Doherty, 3 Gray 372; see Greene *v.* Clarke, 2 Kernan 343; Gilbert *v.* Thompson, 9 Cush. 348, 350; Potter *v.* Baker, 19 N. H. 166.} Whether parol evidence would be admissible, in such case, to prove that the damages awarded in trespass were given merely for the tortions taking, without including the value of the goods, to which no evidence had been offered, *quære;* and see Loomis *v.* Green, 7 Greenl. 386.

[7] Arnold *v.* Arnold, 17 Pick. 4; Bates *v.* Thompson, ib. 14, n.; Bennett *v.* Holmes, 1 Dev. & Bat. 486.

[8] Hoey *v.* Furman, 1 Barr 295. And see Meredith *v.* Gilpin, 6 Price 146; Kerr *v.* Chess, 7 Watts 371; Foster *v.* McDivit, 9 id. 349; {McDowell *v.* Langdon, 3 Gray 513; for other illustrations involving actions about *land*, see Doak *v.* Wiswell, 33 Me. 355; Small *v.* Leonard, 26 Vt. 209; Morgan *v.* Barker, ib. 602; Briggs *v.* Wells, 12 Barb. 567; Wood *v.* Le Baron, 8 Cush. 471, 473; Root *v.* Fellowes, 6 Cush. 29; Washington Steam Packet Co. *v.* Sickles, 24 How. 333; White *v.* Chase, 128 Mass. 158; Clapp *v.* Herrick, 129 id. 292; Drake *v.* Merrill, 2 Jones L. 368; Churchill *v.*

§ 533. **Same: Former Recovery in Tort.** The effect of former recovery has been very much discussed, in the cases where different actions in tort have successively been brought, in regard to the same chattel; as, for example, an action of trover, brought after a judgment in trespass. Here, if title to the property was set up by the defendant in the first action, and it was found for him, it is clearly a bar to a second action for the same chattel;[1] even though brought against one not a party to the former suit, but an accomplice in the original taking.[2] So, a judgment for the defendant in trover, upon trial of the merits, is a bar to an action for money had and received, for the money arising from the sale of the same goods.[3] But, whether the plaintiff, having recovered judgment in trespass, without satisfaction, is thereby barred from afterwards maintaining trover against another person for the same goods, is a point upon which there has been great diversity of opinion. On the one hand, it is said that, by the recovery of judgment in trespass for the full value, the title to the property is vested in the defendant, the judgment being a security for the price; and that the plaintiff cannot take it again, and therefore cannot recover the value of another.[4] On the other hand, it is argued, that the rule of *transit in rem judicatam* extends no farther than to bar another action for the same cause against the same party;[5] that, on principle, the original judgment can imply nothing more than a promise by the defendant to pay the amount, and an agreement by the plaintiff that, upon payment of the money by the defendant, the chattel shall be his own; and that it is contrary to justice and the analogies of the law, to deprive a man of his property without satisfaction, unless by his express consent. "Solutio pretii emptionis loco habetur." The weight of authority seems in favor of the latter opinion.[6]

Holt, 127 Mass. 165; Burke *v.* Miller, 4 Gray 114; Sargent *v.* Fitzpatrick, ib. 511; Buttrick *v.* Holden, 8 Cush. 233; White *v.* Coatsworth, 2 Selden 137.

For other illustrations involving actions about *contracts*, see Burnett *v.* Smith, 4 Gray 50; Staples *v.* Goodrich, 21 Barb. 317; Warren *v.* Comings, 6 Cush. 103; Sage *v.* McAlpin, 11 id. 165; Lehan *v.* Good, 8 id. 302; Harding *v.* Hale, 2 Gray 399; Dutton *v.* Woodman, 9 Cush. 255; Eastman *v.* Cooper, 15 Pick. 276.]

[1] Putt *v.* Roster, 2 Mod. 318; 3 id. 1, s. c. nom. Putt *v.* Rawstern; see 2 Show. 211; Skin. 40, 57; s. c. T. Raym. 472.

[2] Ferrers *v.* Arden, Cro. El. 668; s. c. 6 Co. 7.

[3] Kitchen *v.* Campbell, 3 Wils. 304; s. c. 2 W. Bl. 827; see *ante*, § 532.

[4] Broome *v.* Wooton, Yelv. 67; Adams *v.* Broughton, 2 Stra. 1078: s. c. Andrews 18; White *v.* Philbrick, 5 Greenl. 147; Rogers *v.* Moore, 1 Rice 60.

[5] Drake *v.* Mitchell, 3 East 258; Campbell *v.* Phelps, 1 Pick. 70, per Wilde, J.

[6] Putt *v.* Rawstern, 3 Mod. 1; Jenk. Cent. p. 189; 1 Shep. Touchst. 227; More *v.* Watts, 12 Mod. 428; s. c. 1 Ld. Raym. 614; Lutterell *v.* Reynell, 1 Mod. 282; Bro. Abr. tit. *Judgm.* pl. 98; Morton's Case, Cro. El. 30; Cocke *v.* Jennor, Hob. 66; Livingston *v.* Bishop, 1 Johns. 290; Rawson *v.* Turner, 4 id. 425; 2 Kent Comm. 388; Curtis *v.* Groat, 6 Johns. 168; Corbet *et al.* *v.* Barnes, W. Jones, 377; Cro. Car. 443; s. c. 7 Vin. Abr. 341, pl. 10; Barb *v.* Fish, 5 West. Law Journ. 278. The foregoing authorities are cited as establishing principles in opposition to the doctrine of Broome *v.* Wooton. The following cases are direct adjudications to the contrary of that case: Sanderson *v.* Caldwell, 2 Aiken 195; Osterhout *v.* Roberts, 8 Cowen 43; Elliot *v.* Porter, 5 Dana 299. See also Campbell *v.* Phelps, 1 Pick. 70, per Wilde, J.;

§ 534. **Judgment Conclusive, if Issue necessarily Involved.** It is not necessary, to the conclusiveness of the former judgment, that issue should have been taken upon the precise point which is controverted in the second trial; it is sufficient, if that point was essential to the finding of the former verdict. Thus, where the parish of Islington was indicted and convicted for not repairing a certain highway, and afterwards the parish of St. Pancras was indicted for not repairing the same highway, on the ground that the line dividing the two parishes ran along the middle of the road; it was held, that the former record was admissible and conclusive evidence for the defendants in the latter case, to show that the road was wholly in Islington; for the jury must have found that it was so, in order to find a verdict against the defendants.[1]

§ 535. **Who are Parties.** We have already observed, in general, that parties in the larger legal sense are all persons having a right to control the proceedings, to make defence, to adduce and cross-examine witnesses, and to appeal from the decision, if any appeal lies. Upon this ground, the lessor of the plaintiff in ejectment, and the tenant, are the real parties to the suit, and are concluded in any future action in their own names, by the judgment in that suit.[1] So, if there be a trial between B.'s lessee and E., who recovers judgment; and afterwards another trial of title to the same lands, between E.'s lessee and B., the former verdict and judgment will be admissible in evidence in favor of E.'s lessee against B.; for the real parties in both cases were B. and E.[2]

Claxton *v.* Swift, 2 Show. 441, 494; Jones *v.* McNeil, 2 Bail. 466; Cooper *v.* Shepherd, 2 M. G. & S. 266. The just deduction from all the authorities, as well as the right conclusion upon principle, seems to be this, — that the judgment in trespass or trover will not transfer the title of the goods to the defendant, although it is pleadable in bar of any action afterwards brought by the same plaintiff, or those in privity with him, against the same defendant, or those in privity with him. See 3 Am. Law Mag. pp. 49–57. And as to the original parties, it seems a just rule, applicable to all personal actions, that wherever two or more are liable jointly and not severally, a judgment against one, though without satisfaction, is a bar to another action against any of the others for the same cause; but it is not a bar to an action against a stranger. As far as an action in the form of tort can be said to be exclusively joint in its nature, this rule may govern it, but no farther. This doctrine, as applicable to joint contracts, has been recently discussed in England, in the case of King *v.* Hoare, 13 M. & W. 494, in which it was held that the judgment against one alone was a bar to a subsequent action against the other.

[1] Rex *v.* St. Pancras, Peake 219; 2 Saund. 159, n. 10, by Williams. And see Andrews *v.* Brown, 3 Cush. 130; {Butler *v.* Glass Co., 126 Mass. 512.} So, where, upon a complaint for flowing the plaintiff's lands, under a particular statute, damages were awarded for the past, and a prospective assessment of damages made for the future, flowage; upon a subsequent application for an increase of the assessment, the defendant was precluded from setting up a right in himself to flow the land, for the right must necessarily have been determined in the previous proceedings: Adams *v.* Pearson, 7 Pick. 341.

[1] Doe *v.* Huddart, 2 Cr. M. & R. 316, 322; Doe *v.* Preece, 1 Tyrw. 410; Aslin *v.* Parkin, 2 Burr. 665; Wright *v.* Tatham, 1 Ad. & El. 3, 19; Bull. N. P. 232; Graves *v.* Joice, 5 Cowen 261, and cases there cited.

[2] Bull. N. P. 232; Calhoun *v.* Dunning, 4 Dall. 120. So, a judgment in trespass against one who justifies as the servant of J. S. is evidence against another defendant

§ 536. **Who are Privies.** The case of *privies*, which has already been mentioned, is governed by principles similar to those which have been stated in regard to admissions ;[1] the general doctrine being this, that the person who represents another, and the person who is represented, have a legal identity; so that whatever binds the one, in relation to the subject of their common interest, binds the other also. Thus, a verdict and judgment for or against the ancestor bind the heir.[2] So, if several successive remainders are limited in the same deed, a judgment for one remainder-man is evidence for the next in succession.[3] But a judgment, to which a tenant for life was a party, is not evidence for or against the reversioner, unless he came into the suit upon aid prayer.[4] So, an assignee is bound by a judgment against the assignor, prior to the assignment.[5] There is the like privity between the ancestor and all claiming under him, not only as heir, but as tenant in dower, tenant by the curtesy, legatee, devisee, etc.[6] A judgment of ouster, in a *quo warranto*, against the incumbent of an office, is conclusive evidence against those who derive their title to office under him.[7] Where one sued for diverting water from his works, and had judgment; and afterwards he and another sued the same defendants for a similar injury; the former judgment was held admissible in evidence for the plaintiffs, being *prima facie* evidence of their privity in estate with the plaintiff in the former action.[8] The same rule applies to all grantees, they being in like manner bound by a judgment concerning the same land, recovered by or against their grantor, prior to the conveyance.[9]

§ 537. **Judgments in Criminal Cases.** Upon the foregoing principles, it is obvious that, as a general rule, a verdict and judgment in a criminal case, though admissible to establish the fact of the mere rendition of the judgment, cannot be given in evidence in a civil action, to establish the facts on which it was rendered.[1] If the defendant was convicted, it may have been upon the evidence of the

in another action, it appearing that he also acted by the command of J. S., who was considered the real party in both cases : Kinnersly *v.* Orpe, 2 Doug. 517; 1 id. 56.

[1] *Supra*, §§ 180, 189, 523.

[2] Locke *v.* Norborne, 3 Mod. 141.

[3] Bull. N. P. 232; Pyke *v.* Crouch, 1 Ld. Raym. 730.

[4] Bull. N. P. 232.

[5] Adams *v.* Barnes, 17 Mass. 365.

[6] Locke *v.* Norborne, 3 Mod. 141; Outram *v.* Morewood, 3 East 353.

[7] R. *v.* Mayor, etc. of York, 5 T. R. 66, 72, 76; Bull. N. P. 231; R. *v.* Hebden, 2 Stra. 1109, n. 1.

[8] Blakemore *v.* Glamorganshire Canal Co., 2 C. M. & R. 133.

[9] Foster *v.* E. of Derby, 1 Ad. & El. 787, per Littledale, J.

[1] Mead *v.* Boston, 3 Cush. 404. {But a judgment is admissible and conclusive evidence in another criminal case against the same defendant, as to any facts decided in the judgment : Com. *v.* Evans, 101 Mass. 25; see Dennis's Case, 110 id. 18. The record of the conviction of a thief, on his plea of guilty to an indictment against him alone for stealing certain property, is not admissible in evidence to prove the theft, on the trial of a receiver of that property, upon an indictment against him alone, which indictment does not aver that the thief has been convicted: Com. *v.* Elisha, 3 Gray 460.}

very plaintiff in the civil action; and if he was acquitted, it may have been by collusion with the prosecutor. But beside this, and upon more general grounds, there is no mutuality; the parties are not the same; neither are the rules of decision and the course of proceeding the same. The defendant could not avail himself, in the criminal trial, of any admissions of the plaintiff in the civil action; and, on the other hand, the jury in the civil action must decide upon the mere preponderance of evidence, whereas, in order to a criminal conviction, they must be satisfied of the party's guilt, beyond any reasonable doubt. The same principles render a judgment in a civil action inadmissible evidence in a criminal prosecution.[2]

§ 538. **Judgments as Facts.** But, as we have before remarked,[1] the verdict and judgment in any case are always admissible to prove the fact, that the judgment was rendered, or the verdict given; for there is a material difference between proving the existence of the record and its tenor, and using the record as the medium of proof of the matters of fact recited in it. In the former case, the record can never be considered as *res inter alios acta;* the judgment being a public transaction, rendered by public authority, and being presumed to be faithfully recorded. It is therefore the only proper legal evidence of itself, and is conclusive evidence of the fact of the rendition of the judgment, and of all the legal consequences resulting from that fact, whoever may be the parties to the suit in which it is offered in evidence. Thus, if one indicted for an assault and battery has been acquitted, and sues the prosecutor for malicious prosecution, the record of acquittal is evidence for the plaintiff, to establish that fact, notwithstanding the parties are not the same. But if he were convicted of the offence, and then is sued in trespass for the assault, the record in the former case would not be evidence to establish the fact of the assault; for, as to the matters involved in the issue, it is *res inter alios acta.*

§ 539. The distinction between the admissibility of a judgment as a fact, and as evidence of ulterior facts, may be further illustrated by the instances in which it has been recognized. Thus, a judgment against the sheriff for the misconduct of his deputy is evidence

[2] 1 Bull. N. P. 233; R. *v.* Boston, 4 East 572; Jones *v.* White, 1 Stra. 68, per Pratt, J. Some of the older authorities have laid much stress upon the question, whether the plaintiff in the civil action was or was not a witness on the indictment; but this distinction was repudiated by Parke, B., in Blakemore *v.* Glamorganshire Canal Co., 2 C. M. & R. 139. A record of judgment in a criminal case, upon a plea of guilty, is admissible in a *civil action* against the party, as a solemn judicial confession of the fact; and, according to some authorities, it is conclusive. But its conclusiveness has since been doubted; for the plea may have been made to avoid expense. See Phil. & Am. on Evid. 523, n. 4; 2 Phil. Evid. 25; Bradley *v.* Bradley, 2 Fairf. 367; R. *v.* Morean, 12 Jur. 626; 11 Q. B. 1028; Clark *v.* Irvin, 9 Ham. 131. But the plea of *nolo contendere* is an admission for that trial only, and is not admissible in a subsequent action: Com. *v.* Horton, 9 Pick. 206; Guild *v.* Lee, 3 Law Reporter p. 433; *supra*, §§ 179, 216.

[1] *Supra*, § 527.

against the latter of the fact, that the sheriff has been compelled to pay the amount awarded, and for the cause alleged; but it is not evidence of the fact upon which it was founded, namely, the misconduct of the deputy, unless he was notified of the suit and required to defend it.[1] So it is in other cases, where the officer or party has a remedy over.[2] So, where the record is matter of inducement, or necessarily introductory to other evidence; as, in an action against the sheriff for neglect, in regard to an execution;[3] or to show the testimony of a witness upon a former trial;[4] or where the judgment constitutes one of the muniments of the party's title to an estate, as where a deed was made under a decree in Chancery,[5] or a sale was made by a sheriff, upon an execution.[6] So, where a party has concurrent remedies against several, and has obtained satisfaction upon a judgment against one, it is evidence for the others.[7] So, if one be sued alone, upon a joint note by two, it has been held, that the judgment against him may be shown by the defendants, in bar of a second suit against both, for the same cause, to prove that, as to the former defendant, the note is extinct.[8] So a judgment *inter alios* is admissible, to show the character in which the possessor holds his lands.[9]

§ 539 *a*. **Judgment against Joint and Several Contractors.**[1] But where the contract is several as well as joint, it seems that the judgment in an action against one is no bar to a subsequent action against all; nor is the judgment against all, jointly, a bar to a subsequent action against one alone. For when a party enters into a joint and several obligation, he in effect agrees that he will be liable to a joint action, and to a several action for the debt. In either case, therefore, the bar of a former judgment would not seem to apply; for, in a legal sense, it was not a judgment between the same parties, nor upon the same contract. The contract, it is said, does not merely give the obligee an election of the one remedy or the other, but entitles him at once to both, though he can have but one satisfaction.[2]

§ 540. **Foreign Judgments.** In regard to foreign judgments, they are usually considered in two general aspects: first, as to judgments

[1] Tyler *v.* Ulmer, 12 Mass. 166, per Parker, C. J.

[2] Kip *v.* Brigham, 6 Johns. 158; 7 id. 168; Griffin *v.* Brown, 2 Pick. 304; Weld *v.* Nichols, 17 id. 538; Head *v.* McDonald, 7 Monr. 203.

[3] Adams *v.* Balch, 5 Greenl. 188.

[4] Clarges *v.* Sherwin, 12 Mod. 343; Foster *v.* Shaw, 7 S. & R. 156.

[5] Barr *v.* Gratz, 4 Wheat. 213.

[6] Witmer *v.* Schlatter, 2 Rawle 359; Jackson *v.* Wood, 3 Wend. 27, 34; Fowler *v.* Savage, 3 Conn. 90, 96.

[7] Farwell *v.* Hilliard, 3 N. H. 318.

[8] Ward *v.* Johnson, 13 Mass. 148. See also Lechmere *v.* Fletcher, 1 C. & M. 623, 634, 635, per Bayley, B.

[9] Davis *v.* Lowndes, 1 Bing. N. C. 607, per Tindal, C. J. See further, *supra*, § 527 *a*; Wells *v.* Compton, 3 Rob. La. 171.

[1] [This section seems properly to follow § 536.]

[2] U. S. *v.* Cushman, 2 Sumn. 426, 437–441, per Story, J. See also Sheehy *v.* Mandeville, 6 Cranch 253, 265; Lechmere *v.* Fletcher, 1 C. & M. 623, 634. 635, per Bayley, B.; Kirkpatrick *v.* Stingley, 2 Carter 269.

in rem; and, secondly, as to judgments *in personam.* The latter are again considered under several heads: first, where the judgment is set up by way of defence to a suit in a foreign tribunal; secondly, where it is sought to be enforced in a foreign tribunal against the original defendant, or his property; and, thirdly, where the judgment is either between subjects or between foreigners, or between foreigners and subjects.[1] But, in order to found a proper ground of recognition of a foreign judgment, under whichsoever of these aspects it may come to be considered, it is indispensable to establish, that the Court which pronounced it had a lawful jurisdiction over the cause, over the thing, and over the parties. If the jurisdiction fails as to either, it is treated as a mere nullity, having no obligation, and entitled to no respect beyond the domestic tribunals.[2]

§ 541. **Foreign Judgments in Rem.** As to foreign judgments *in rem*, if the matter in controversy is land, or other immovable property, the judgment pronounced in the *forum rei sitæ* is held to be of universal obligation, as to all the matters of right and title which it professes to decide in relation thereto.[1] "The same principle," observes Mr. Justice Story,[2] "is applied to all other cases of proceedings *in rem*, where the subject is movable property, within the jurisdiction of the Court pronouncing the judgment.[3] Whatever the Court settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country, where the same question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign Courts of admiralty, whether they are causes of prize, or of bottomry, or of salvage, or of forfeiture, or of any of the like nature, over which such Courts have a rightful jurisdiction, founded on the actual or constructive possession of the subject-matter.[4] The same

[1] In what follows on the subject of foreign judgments, I have simply transcribed and abridged what has recently been written by Mr. Justice Story, in his learned Commentaries on the Conflict of Laws, ch. 15 (2d ed.).

[2] Story Confl. Laws, §§ 584, 586; Rose *v.* Himely, 4 Cranch 269, 270, per Marshall, C. J.; Smith *v.* Knowlton, 11 N. H. 191; Rangely *v.* Webster, ib. 299; {Thompson *v.* Whitman, 18 Wall. 457; Guthrie *v.* Lowry, 84 Pa. St. 533. There seems to be no such presumption in favor of the jurisdiction of foreign Courts, or of inferior domestic tribunals, according to the maxim "omnia præsumuntur rite esse acta," as that which exists in favor of the superior Courts, in a State or country, in their own tribunals: Graham *v.* Whitely, 2 Dutcher 254; Goulding *v.* Clark, 34 N. H. 148. But where the question of jurisdiction is established, the same favorable presumption should be applied to all judgments: State *v.* Hinchman, 27 Pa. St. 479.}

[1] Story Confl. Laws, §§ 532, 545, 551, 591.

[2] Story Confl. Laws, § 592. See also id. § 597.

[3] See Kames on Equity, b. 3, ch. 8, § 4.

[4] Croudson *v.* Leonard, 4 Cranch 433; Williams *v.* Armroyd, 7 id. 423; Rose *v.* Himely, 4 id. 241; Hudson *v.* Guestier, ib. 293; The Mary, 9 id. 126, 142–146; 1 Stark. Evid. pp. 246–248; Marshall on Insur. b. 1, ch. 9, § 6, pp. 412, 435; Grant *v.* McLachlin, 4 Johns. 34; Peters *v.* Warren Ins. Co., 3 Sumner, 389; Blad *v.* Bamfield, 3 Swanst. 604, 605; Bradstreet *v.* Neptune Insur. Co., 3 Sumner 600; Magoun *v.* Ins. Co., 1 Story 157. The different degrees of credit given to foreign sentences of

rule is applied to other Courts proceeding *in rem*, such as the Court of Exchequer in England, and to other Courts exercising a like jurisdiction *in rem* upon seizures.[5] And in cases of this sort it is wholly immaterial whether the judgment be of acquittal or of condemnation. In both cases it is equally conclusive.[6] But the doctrine, however, is always to be understood with this limitation, that the judgment has been obtained *bona fide* and without fraud; for if fraud has intervened, it will doubtless avoid the force and validity of the sentence.[7] So it must appear that there have been regular proceedings to found the judgment or decree; and that the parties in interest *in rem* have had notice, or an opportunity, to appear and defend their interests, either personally, or by their proper representatives, before it was pronounced; for the common justice of all nations requires that no condemnation shall be pronounced, before the party has an opportunity to be heard."[8]

§ 542. **Judgments in Garnishment or Trustee Process.** Proceedings also by creditors against the personal property of their debtor, in the hands of third persons, or against debts due to him by such third persons (commonly called the process of foreign attachment, or garnishment, or trustee process), are treated as in some sense proceedings *in rem*, and are deemed entitled to the same consideration.[1] But in this last class of cases we are especially to bear in mind, that, to make any judgment effectual, the Court must possess and exercise a rightful jurisdiction over the *res*, and also over the person, at least so far as the *res* is concerned; otherwise it will be disregarded. And if the jurisdiction over the *res* be well founded, but not over the person, except as to the *res*, the judgment will not be either conclusive or binding upon the party *in personam*, although it may be *in rem*.[2]

§ 543. **Conclusiveness of Foreign Judgments in Rem.** In all these

condemnation in prize causes, by the American State Courts, are stated in 4 Cowen 520, n. 3; 1 Stark. Evid. 232 (6th ed.), notes by Metcalf. See also 2 Kent Comm. 120, 121. If a foreign sentence of condemnation as prize is manifestly erroneous, as if it professes to be made on particular grounds, which are set forth, but which plainly do not warrant the decree: Calvert *v.* Bovill, 7 T. R. 523; Pollard *v.* Bell, 8 T. R. 444; or, on grounds contrary to the laws of nations: 3 B. & P. 215, per Ld. Alvanley, C. J.; or, if there be any ambiguity as to what was the ground of condemnation, it is not conclusive: Dalgleish *v.* Hodgson, 7 Bing. 495, 504.

[5] Ibid.; 1 Stark on Evid. pp. 228–232, 240–248; Gelston *v.* Hoyt, 3 Wheaton 246; Williams *v.* Armroyd, 7 Cranch 423.

[6] Ibid.

[7] Duchess of Kingston's Case, 11 State Trials 261, 262; s. c. 20 How. St. Tr. 355, 538; Bradstreet *v.* Ins. Co., 3 Sumner 600; Magoun *v.* Ins. Co., 1 Story 157. If the foreign Court is constituted by persons interested in the matter in dispute, the judgment is not binding: Price *v.* Dewhurst, 8 Sim. 279.

[8] Sawyer *v.* Ins. Co., 12 Mass. 291; Bradstreet *v.* Ins. Co., 3 Sumner 600; Magoun *v.* Ins. Co., 1 Story 157.

[1] See cases cited in 4 Cowen 520, 521, n.; Story Confl. Laws, § 549; Holmes *v.* Remsen, 20 Johns. 229; Hull *v.* Blake, 13 Mass. 153; McDaniel *v.* Hughes, 3 East 367; Phillips *v.* Hunter, 2 H. Bl. 402, 410.

[2] Story Confl. Laws, § 592 *a*. See also id. § 549 and n.; Bissell *v.* Briggs, 9 Mass. 468; 3 Burge Comm. on Col. & For. Law, pt. 2, ch. 24, pp. 1014–1019.

cases the same principle prevails, that the judgment acting *in rem* shall be held conclusive upon the title and transfer and disposition of the property itself, in whatever place the same property may afterwards be found, and by whomsoever the latter may be questioned; and whether it be directly or incidentally brought in question. But it is not so universally settled that the judgment is conclusive of all points which are incidentally disposed of by the judgment, or of the facts or allegations upon which it professes to be founded. In this respect, different rules are adopted by different States, both in Europe and in America. In England, such judgments are held conclusive, not only *in rem*, but also as to all the points and facts which they professedly or incidentally decide.[1] In some of the American States the same doctrine prevails. While in other American States the judgments are held conclusive only *in rem*, and may be controverted as to all the incidental grounds and facts on which they profess to be founded.[2]

§ 544. **Foreign Judgments affecting Personal Status.** A similar doctrine has been contended for, and in many cases successfully, in favor of sentences which touch the general capacity of persons, and those which concern marriage and divorce. Foreign jurists strongly contend that the decree of a foreign Court, declaring the state (*status*) of a person, and placing him, as an idiot, or a minor, or a prodigal, under guardianship, ought to be deemed of universal authority and obligation. So it doubtless would be deemed, in regard to all acts done within the jurisdiction of the sovereign whose tribunals pronounced the sentence. But in the United States the rights and powers of guardians are considered as strictly local; and no guardian is admitted to have any right to receive the profits or to assume the possession of the real estate, or to control the person of his ward, or to maintain any action for the personalty, out of the States, under whose authority he was appointed, without having received a due appointment from the proper authority of the State, within which the property is situated, or the act is to be done, or to whose tribunals resort is to be had. The same rule is also applied to the case of executors and administrators.[1]

[1] In Blad *v.* Bamfield, decided by Lord Nottingham, and reported in 3 Swanst. 604, a perpetual injunction was awarded to restrain certain suits of trespass and trover for seizing the goods of the defendant (Bamfield) for trading in Iceland, contrary to certain privileges granted to the plaintiff and others; the property was seized and condemned in the Danish Courts; Lord Nottingham held the sentence conclusive against the suits, and awarded the injunction accordingly.

[2] Story Confl. Laws, § 593. See 4 Cowen 522, n., and cases there cited; Vandenheuvel *v.* Ins. Co., 2 Cain. Cas. 217; 2 Johns. Cas. 451, 481; Robinson *v.* Jones, 8 Mass. 536; Maley *v.* Shattuck, 3 Cranch 488; 2 Kent Comm. Lect. 37, pp. 120, 121 (4th ed.), and cases there cited; Tarleton *v.* Tarleton, 4 M. & Selw. 20; Peters *v.* Ins. Co., 3 Summ. 389; Gelston *v.* Hoyt, 3 Wheat. 246.

[1] Story, Confl. Laws, §§ 499, 504, 594; Morrell *v.* Dickey, 1 Johns. Ch. 153; Kraft *v.* Wickey, 4 G. & J. 332; Dixon *v.* Ramsay, 3 Cranch 319. See, as to foreign executors and administrators, Story Confl. Laws, §§ 513–523. *Supra* § 525 and notes.

§ 545. In regard to *marriages*, the general principle is, that between persons *sui juris*, marriage is to be decided by the law of the place where it is celebrated. If valid there, it is valid everywhere. It has a legal ubiquity of obligation. If invalid there, it is invalid everywhere. The most prominent, if not the only known, exceptions to this rule, are marriages involving polygamy and incest; those prohibited by the public law of a country from motives of policy; and those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the benefit of the laws of their own country.[1] As to sentences confirming marriages, some English jurists seem disposed to concur with those of Scotland and America, in giving to them the same conclusiveness, force, and effect. If it were not so, as Lord Hardwicke observed, the rights of mankind would be very precarious. But others, conceding that a judgment of a third country, on the validity of a marriage not within its territories, nor had between subjects of that country, would be entitled to credit and attention, deny that it would be universally binding.[2] In the United States, however, as well as in Scotland, it is firmly held that a sentence of divorce, obtained *bona fide* and without fraud, pronounced between parties actually domiciled in the country, whether natives or foreigners, by a competent tribunal, having jurisdiction over the case, is valid, and ought to be everywhere held a complete dissolution of the marriage, in whatever country it may have been originally celebrated.[3]

§ 546. **Foreign Judgments in Personam.** "In the next place, as to judgments *in personam* which are sought to be enforced by a suit in a foreign tribunal. There has certainly been no inconsiderable fluctuation of opinion in the English Courts upon this subject. It is admitted on all sides, that, in such cases, the foreign judgments are *prima facie* evidence to sustain the action, and are to be deemed right until the contrary is established;[1] and, of course, they may be avoided, if they are founded in fraud, or are pronounced by a Court not having any competent jurisdiction over the cause.[2] But the question is, whether

[1] Story Confl. Laws, §§ 80, 81, 113. See *post*, Vol. II. (7th ed.) §§ 460–464, tit. Marriage.

[2] Roach *v.* Garvan, 1 Ves. 157; Story Confl. Laws, §§ 595, 596; Sinclair *v.* Sinclair, 1 Hagg. Consist. 297; Scrimshire *v.* Scrimshire, 2 id. 395, 410.

[3] Story Confl. Laws, § 597; see also the lucid judgment delivered by Gibson, C. J., in Dorsey *v.* Dorsey, 7 Watts 350. The whole subject of foreign divorces has received a masterly discussion by Mr. Justice Story, in his Commentaries on the Conflict of Laws, c. 7, §§ 200–230 *b*.

[1] See Walker *v.* Witter, 1 Doug. 1, and cases there cited; Arnott *v.* Redfern, 3 Bing. 353; Sinclair *v.* Fraser, cited 1 Doug. 4, 5, n.; Houlditch *v.* Donegal, 2 Cl. & F. 479; s. c. 8 Bligh 301; Don *v.* Lippman, 5 Cl. & F. 1, 19, 20; Price *v.* Dewhurst, 8 Sim. 279; Alivon *v.* Furnival, 1 C. M. & R. 277; Hall *v.* Odber, 11 East 118; Ripple *v.* Ripple, 1 Rawle 386.

[2] See Bowles *v.* Orr, 1 Younge & Coll. 464; Story Confl. Laws, §§ 544–550; Ferguson *v.* Mahon, 3 Perry & Dav. 143; s. c. 11 Ad. & El. 179; Price *v.* Dewhurst, 8 Simons 279, 302; Don *v.* Lippman, 5 Cl. & F. 1, 19–21; Bank of Australasia *v.* Nias, 15 Jur. 967. So, if the defendant was never served with process: ib. And see Henderson *v.* Henderson, 6 Q. B. 288.

they are not deemed conclusive; or whether the defendant is at liberty to go at large into the original merits, to show that the judgment ought to have been different upon the merits, although obtained *bona fide*. If the latter course be the correct one, then a still more embarrassing consideration is, to what extent, and in what manner, the original merits can be properly inquired into."[3] But though there remains no inconsiderable diversity of opinion among the learned judges of the different tribunals, yet the present inclination of the English Courts seems to be, to sustain the conclusiveness of foreign judgments.[4]

§ 547. "The general doctrine maintained in the American Courts, in relation to foreign judgments *in personam*, certainly is, that they are *prima facie* evidence; but that they are impeachable. But how far, and to what extent, this doctrine is to be carried, does not seem to be definitely settled. It has been declared that the jurisdiction of the Court, and its power over the parties and the things in controversy, may be inquired into; and that the judgment may be impeached for fraud. Beyond this, no definite lines have as yet been drawn."[1]

§ 548. **Judgments of Domestic States.** We have already adverted to the provisions of the Constitution and statutes of the United States, in regard to the admissibility and effect of the judgments of one State in the tribunals of another.[1] By these provisions, such judgments, authenticated as the statutes provide, are put upon the same footing as domestic judgments.[2] "But this," observes Mr. Justice Story, "does not prevent an inquiry into the jurisdiction of the Court in which the original judgment was rendered, to pronounce the judgment, nor an inquiry into the right of the State to exercise authority over the parties, or the subject-matter. nor an inquiry whether the

[3] Story Confl. Laws, § 603.

[4] Ib. §§ 604–606. See Guinness *v.* Carroll, 1 B. & Ad. 459; Becquet *v.* McCarthy, 2 B. & A. 951; {and the observations of Judge Redfield, in the notes to his edition of Story on Conflict of Laws, §§ 618 *a*, 618 *k*.} In Houlditch *v.* Donegal, 8 Bligh 301, 337–340, Lord Brougham held a foreign judgment to be only *prima facie* evidence, and gave his reasons at large for that opinion. On the other hand, Sir L. Shadwell, in Martin *v.* Nicolls, 3 Sim. 458, held the contrary opinion, that it was conclusive; and also gave a very elaborate judgment upon the point, in which he reviewed the principal authorities. Of course, the learned judge meant to accept, and did accept in a later case (Price *v.* Dewhurst, 8 Sim. 279, 302), judgments which were produced by fraud. See also Don *v.* Lippman, 5 Cl. & F. 1, 20, 21; Story Confl. Laws, §§ 545–550, 605, 607; Alivon *v.* Furnival, 1 C. M. & R. 277, 284.

[1] Story Confl. Laws, § 608. See also 2 Kent Comm. 119–121, and the valuable notes of Mr. Metcalf to his edition of Starkie on Evid. vol. i. pp. 232, 233 (6th Am. ed.); Wood *v.* Watkinson, 17 Conn. 500. The American cases seem further to agree, that when a foreign judgment comes incidentally in question, as, where it is the foundation of a right or title derived under it, and the like, it is conclusive. If a foreign judgment proceeds upon an error in law, apparent upon the face of it, it may be impeached everywhere; as, if a French Court, professing to decide according to the law of England, clearly mistakes it: Novelli *v.* Rossi, 2 B. & Ad. 757.

[1] *Supra*, §§ 504–506. And see Flourenoy *v.* Durke, 2 Brev. 206.

[2] Taylor *v.* Bryden, 8 Johns. 173. Where the jurisdiction of an inferior Court depends on a fact which such Court must necessarily and directly decide, its decision is taken as conclusive evidence of the fact: Britain *v.* Kinnard, 1 B. & B. 432; Betts *v.* Bagley, 12 Pick. 572, 582, per Shaw, C. J.; Steele *v.* Smith, 7 Law Rep. 461.

judgment is founded in, and impeachable for, a manifest fraud. The Constitution did not mean to confer any new power upon the States; but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other States domestic judgments, to all intents and purposes; but only gave a general validity, faith, and credit to them as evidence.[3] No execution can issue upon such judgments, without a new suit in the tribunals of other States. And they enjoy not the right of priority, or privilege, or lien, which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws, in the character of foreign judgments."[4]

§ 549. **Parties in Foreign Judgments.** The common law recognizes no distinction whatever, as to the effect of foreign judgments, whether they are between citizens or between foreigners, or between citizens and foreigners; deeming them of equal obligation in all cases, whoever are the parties.[1]

§ 550. **Judgments of Ecclesiastical Courts.** In regard to the decrees and sentences of Courts, exercising any branches of the ecclesiastical jurisdiction, the same general principles govern, which we have already stated.[1] The principal branch of this jurisdiction, in existence in the United States, is that which relates to matters of probate and administration. And as to these, the inquiry, as in other cases, is, whether the matter was exclusively within the jurisdiction of the Court, and whether a decree or judgment has been passed directly upon it. If the affirmative be true, the decree is conclusive. Where the decree is of the nature of proceedings *in rem*, as is generally the case in matters of probate and administration, it is conclusive, like those proceedings, against all the world. But where it is a matter of exclusively private litigation, such as, in assignments of dower, and some other cases of jurisdiction conferred by particular statutes, the decree stands upon the footing of a judgment at common law.[2] Thus, the probate of a will, at least as to the personalty, is conclusive in civil cases, in all questions upon its execution and validity.[3] The grant of letters of administration is,

[3] See Story's Comment. on the Constit. U. S. ch. 29, §§ 1297–1307, and cases there cited; Hall *v.* Williams, 6 Pick. 237; Bissell *v.* Briggs, 9 Mass. 462; Shumway *v.* Stillman, 6 Wend. 447; Evans *v.* Tatem, 9 Serg. & R. 260; Benton *v.* Burgot, 10 id. 240; Harrod *v.* Barretto, 1 Hall 155; s. c. 2 id. 302; Wilson *v.* Niles, ib. 358; Hoxie *v.* Wright, 2 Vt. 263; Bellows *v.* Ingham, ib. 575; Aldrich *v.* Kinney, 4 Conn. 380; Bennett *v.* Morley, 1 Wilcox 100. See further, 1 Kent Comm. 260, 261, and n. (*d*); As to the effect of a discharge under a foreign insolvent law, see the learned judgment of Shaw, C. J., in Betts *v.* Bagley, 12 Pick. 572.

[4] Story Confl. Laws, § 609; McElmoyle *v.* Cohen, 13 Pet. 312, 328, 329; Story Confl. Laws, § 582 *a*, n.

[1] Story Confl. Laws, § 610.

[1] 2 Smith's Leading Cases, 446–448.

[2] *Supra*, §§ 525, 528.

[3] Poplin *v.* Hawke, 8 N. H. 124; 1 Jarman on Wills, pp. 22–24, and notes by Perkins; Langdon *v.* Goddard, 3 Story 13; {Crippen *v.* Dexter, 13 Gray 330.} See *post*, Vol. II, §§ 315, 693.

in general, *prima facie* evidence of the intestate's death; for only upon evidence of that fact ought they to have been granted.[4] And if the grant of administration turned upon the question as to which of the parties was next of kin, the sentence or decree upon that question is conclusive everywhere, in a suit between the same parties for distribution.[5] But the grant of administration upon a woman's estate determines nothing as to the fact whether she were a *feme covert* or not; for that is a collateral fact, to be collected merely by inference from the decree or grant of administration, and was not the point directly tried.[6] Where a Court of probate has power to grant letters of guardianship of a lunatic, the grant is conclusive of his insanity at that time, and of his liability, therefore, to be put under guardianship, against all persons subsequently dealing directly with the lunatic, instead of dealing, as they ought to do, with the guardian.[7]

§ 551. **Decrees in Chancery.** Decrees in Chancery stand upon the same principles with judgments at common law, which have already been stated. Whether the statements in the bill are to be taken conclusively against the complainant as admissions by him, has been doubted; but the prevailing opinion is supposed to be against their conclusiveness, on the ground that the facts therein stated are frequently the mere suggestions of counsel, made for the purpose of obtaining an answer, under oath.[1] If the bill has been sworn to, without doubt the party would be held bound by its statements, so far as they are direct allegations of fact. The admissibility and

[4] Thompson *v.* Donaldson, 3 Esp. 63; French *v.* French, 1 Dick. 268; Succession of Homblin, 3 Rob. La. 130; Jeffers *v.* Radcliff, 10 N. H. 242; {see Mutual Benefit Ins. Co. *v.* Tisdale, 91 U. S. 238, 243; Jochumsen *v.* Suffolk Savings Bank, 3 Allen 87, 94; Day *v.* Floyd, 130 Mass. 488; Tisdale *v.* Ins. Co., 26 Iowa 177; s. c. 28 id. 12; Clayton *v.* Gresham, 10 Ves. 288; Leach *v.* Leach, 8 Jur. 211.} But if the fact that the intestate is living, when pleadable in abatement, is not so pleaded, the grant of administration is conclusive: Newman *v.* Jenkins, 10 Pick. 515. In Moons *v.* De Bernales, 1 Russ. 301, the general practice was stated and not denied to be, to admit the letters of administration, as sufficient proof of the death, until impeached; but the Master of the Rolls, in that case, which was a foreign grant of administration, refused to receive them; but allowed the party to examine witnesses to the fact.

[5] Barrs *v.* Jackson, 1 Phil. Ch. 582; 2 Y. & C. 585; Thomas *v.* Ketteriche, 1 Ves. 333.

[6] Blackham's Case, 1 Salk. 290, per Holt, C. J. See also Hibshman *v.* Dulleban, 4 Watts 183.

[7] Leonard *v.* Leonard, 14 Pick. 280. But it is not conclusive against his subsequent capacity to make a will: Stone *v.* Damon, 12 Mass. 488; [see *post*, § 556.]

[1] Doe *v.* Sybourn, 7 T. R. 3. The bill is not evidence against the party in whose name it is filed, until it is shown that he was privy to it. When this privity is established, the bill is evidence that such a suit was instituted, and of its subject-matter; but not of the plaintiff's admission of the truth of the matters therein stated, unless it were sworn to. The proceedings after answer are admissible in evidence of the privity of the party in whose name the bill was filed: Boileau *v.* Rudlin, 12 Jur. 899; 2 Exch. 665; and see Durden *v.* Cleveland, 4 Ala. 225; Bull. N. P. 235. See further, as to the admission of bills and answers, and to what extent, Randall *v.* Parramore, 1 Fla. 409: Roberts *v.* Tennell, 3 Monr. 247; Clarke *v.* Robinson, 5 B. Monr. 55; Adams *v.* McMillan, 7 Port. 73; [*ante*, §§ 178, 201.]

effect of the answer of the defendant is governed by the same rules.[2] But a demurrer in Chancery does not admit the facts charged in the bill; for if it be overruled, the defendant may still answer. So it is, as to pleas in Chancery; these, as well as demurrers, being merely hypothetical statements, that, supposing the facts to be as alleged, the defendant is not bound to answer.[3] But pleadings, and depositions, and a decree, in a former suit, the same title being in issue, are admissible as showing the acts of parties, who had the same interest in it as the present party, against whom they are offered.[4]

§ 552. **Depositions.**[1] In regard to depositions, it is to be observed, that, though informally taken, yet as mere declarations of the witness, under his hand, they are admissible against him, wherever he is a party, like any other admissions; or, to contradict and impeach him, when he is afterwards examined as a witness. But, as secondary evidence, or as a substitute for his testimony *viva voce*, it is essential that they be regularly taken, under legal proceedings duly pending, or in a case and manner provided by law.[2] And though taken in a foreign State, yet if taken to be used in a suit pending here, the forms of our law, and not of the foreign law, must be pursued.[3] But if the deposition was taken *in perpetuam*, the forms of the law under which it was taken must have been strictly pursued, or it cannot be read in evidence.[4] If a bill in equity be dismissed merely as being in its substance unfit for a decree, the depositions, when offered as secondary evidence in another suit, will not on that account be rejected. But if it is dismissed for irregularity, as, if it come before the Court by a bill of revivor, when it should have been by an original bill, so that in truth there was never regularly any such cause in the Court, and consequently no proofs, the depositions cannot be read; for the proofs cannot be exemplified without bill and answer, and they cannot be read at law, unless the bill on which they were taken can be read.[5]

§ 553. **Same: Cross-examination.** We have seen, that in regard to the admissibility of a former judgment in evidence it is generally

[2] *Supra*, §§ 171, 179, 186, 202.

[3] Tomkins *v.* Ashby, 1 M. & Malk. 32, 33, per Abbott, Ld. C. J.

[4] Viscount Lorton *v.* Earl of Kingston, 5 Clark & Fin. 269.

[1] [On the whole subject of the next three sections, see a fuller treatment, *ante*, §§ 163–163 *i*.]

[2] As to the manner of taking depositions, and in what cases they may be taken, see *supra*, §§ 320–325.

[3] Evans *v.* Eaton, 7 Wheat. 426; Farley *v.* King, S. J. Court, Maine, in Lincoln, Oct. Term, 1822, per Preble, J. But depositions taken in a foreign country, under its own laws, are admissible here in proof of probable cause, for the arrest and extradition of a fugitive from justice, upon the preliminary examination of his case before a judge: see Metzger's Case, before Betts, J., 5 N. Y. Legal Obs. 83.

[4] Gould *v.* Gould, 3 Story 516.

[5] Backhouse *v.* Middleton, 1 Ch. Cas. 173, 175; Hall *v.* Hoddesdon, 2 P. Wms. 162; Vaughan *v.* Fitzgerald, 1 Sch. & Lefr. 316.

necessary that there be a perfect mutuality between the parties; neither being concluded, unless both are alike bound.[1] But with respect to depositions, though this rule is admitted in its general principle, yet it is applied with more latitude of discretion; and complete mutuality, or identity of all the parties, is not required. It is generally deemed sufficient, if the matters in issue were the same in both cases, and the party, against whom the deposition is offered, had full power to cross-examine the witness. Thus, where a bill was pending in Chancery, in favor of one plaintiff against several defendants, upon which the Court ordered an issue of *devisavit vel non*, in which the defendants in Chancery should be plaintiffs, and the plaintiff in Chancery defendant; and the issue was found for the plaintiffs; after which the plaintiff in Chancery brought an ejectment on his own demise, claiming as heir-at-law of the same testator, against one of those defendants alone, who claimed as devisee under the will formerly in controversy; it was held, that the testimony of one of the subscribing witnesses to the will, who was examined at the former trial, but had since died, might be proved by the defendant in the second action, notwithstanding the parties were not all the same; for the same matter was in controversy, in both cases, and the lessor of the plaintiff had precisely the same power of objecting to the competency of the witness, the same right of calling witnesses to discredit or contradict his testimony, and the same right of cross-examination, in the one case, as in the other.[2] If the power of cross-examination was more limited in the former suit, in regard to the matters in controversy in the latter, it would seem that the testimony ought to be excluded.[3] The same rule applies to privies, as well as to parties.

§ 554. **Same: In Equity.** But though the general rule, at law, is, that no evidence shall be admitted, but what is or might be under the examination of both parties;[1] yet it seems clear, that, in equity, a deposition is not, of course, inadmissible in evidence because there has been no cross-examination and no waiver of the right. For if the witness, after his examination on the direct interrogatories, should refuse to answer the cross-interrogatories, the party producing the witness will not be deprived of his direct testimony, for, upon application of the other party, the Court would have compelled him

[1] *Supra*, § 524.

[2] Wright *v.* Tatham, 1 Ad. & El. 3; 12 Vin. Abr. tit. Evidence, A. b, 31, pl. 45, 47. As to the persons who are to be deemed parties, see *supra*, §§ 523, 535.

[3] Hardr. 315; Cazenove *v.* Vaughan, 1 M. & S. 4; [see *ante*, §§ 163 *a*, *b*.] It has been held that the deposition of a witness before the coroner, upon an inquiry touching the death of a person killed by a collision of vessels, was admissible in an action for the negligent management of one of them, if the witness is shown to be beyond sea: Sills *v.* Brown, 9 C. & P. 601, 603, per Coleridge, J.; Bull. N. P. 242; R. *v.* Eriswell, 3 T. R. 707, 712, 721; J. Kely. 55.

[1] Cazenove *v.* Vaughan, 1 M. & S. 4, 6; Attorney-General *v.* Davison, 1 McCl. & Y. 160; Gass *v.* Stinson, 3 Sumn. 98, 104, 105.

to answer.[2] So, after a witness was examined for the plaintiff, but before he could be cross-examined, he died; the Court ordered his deposition to stand;[3] though the want of the cross-examination ought to abate the force of his testimony.[4] So, where the direct examination of an infirm witness was taken by the consent of parties, but no cross-interrogatories were ever filed, though the witness lived several months afterwards, and there was no proof that they might not have been answered, if they had been filed; it was held, that the omission to file them was at the peril of the party, and that the deposition was admissible.[5] A new commission may be granted, to cross-examine the plaintiff's witnesses abroad, upon subsequent discovery of matter, for such examination.[6] But where the deposition of a witness, since deceased, was taken, and the direct examination was duly signed by the magistrate, but the cross-examination, which was taken on a subsequent day, was not signed, the whole was held inadmissible.[7]

§ 555. **Depositions as involving Reputation.** Depositions, as well as verdicts, which relate to a *custom*, or prescription, or pedigree, where *reputation* would be evidence, are admissible against strangers; for as the declarations of persons deceased would be admissible in such cases, *a fortiori* their declarations on oath are so.[1] But in all cases at law, where a deposition is offered as secondary evidence, that is, as a substitute for the testimony of the witness *viva voce*, it must appear that the witness cannot be personally produced; unless the case is provided for by statute, or by a rule of the Court.[2]

§ 556. **Inquisitions of Lunacy, etc.** The last subject of inquiry under this head is that of inquisitions. These are the results of inquiries, made under competent public authority, to ascertain matters of public interest and concern. It is said that they are analogous to proceedings *in rem*, being made on 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 rule in regard to hearsay evidence, which we have heretofore considered.[1] Whether, therefore, the adjudication be founded on oath or not the principle of its admissibility is the same; and, moreover, it is distinguished from other hearsay evidence, in having peculiar guaran-

[2] Courteney *v.* Hoskins, 2 Russ. 253.
[3] Arundel *v.* Arundel, 1 Chan. R. 90.
[4] O'Callaghan *v.* Murphy, 2 Sch. & Lef. 158; Gass *v.* Stinson, 3 Sumn. 98, 106, 107; but see Kissam *v.* Forrest, 25 Wend. 651; [*ante*, § 163 *c*.]
[5] Gass *v.* Stinson, 3 Sumn. 98, where this subject is fully examined by Story, J.
[6] King of Hanover *v.* Wheatley, 4 Beav. 78.
[7] R. *v.* France, 2 M. & Rob. 207.
[1] Bull. N. P. 239, 240; [*ante*, § 139.]
[2] [*Ante*, § 163 *h*.]
[1] *Supra*, §§ 127–140.

ties for its accuracy and fidelity.[2] The general rule in regard to these documents is, that they are admissible in evidence, but that they are not conclusive except against the parties immediately concerned, and their privies.[3] Thus, an inquest of office, by the attorney-general, for lands escheating to the government by reason of alienage, was held to be evidence of title, in all cases, but not conclusive against any person, who was not tenant at the time of the inquest, or party or privy thereto, and that such persons, therefore, might show that there were lawful heirs *in esse*, who were not aliens.[4] So, it has been repeatedly held that inquisitions of lunacy may be read; but that they are not generally conclusive against persons not actually parties.[5] But inquisitions, extrajudicially taken, are not admissible in evidence.[6] [A coroner's inquisition of death has been admitted.[7]]

[2] Phil. & Am. on Evid. 578, 579; 1 Stark. Evid. 260, 261, 263.

[3] See *ante*, § 550, that the inquisition is conclusive against persons who undertake subsequently to deal with the lunatic instead of dealing with the guardian, and seek to avoid his authority, collaterally, by showing that the party was restored to his reason.

[4] Stokes *v.* Dawes, 4 Mason 268, per Story, J.

[5] Sergeson *v.* Sealey, 2 Atk. 412; Den *v.* Clark, 5 Halst. 217, per Ewing, C. J.; Hart *v.* Deamer, 6 Wend. 497; Faulder *v.* Silk, 3 Campb. 126; 2 Madd. Chan. 578; [Pflueger *v.* State, 46 Nebr. 493; Rodgers *v.* Rodgers, 56 Kan. 483.]

[6] Glossop *v.* Pole, 3 M. & S. 175; Latkow *v.* Eamer, 2 H. Bl. 437; [in Naanes *v.* State, 143 Ind. 299, a statutory commission's report as to committal to an asylum was excluded on this ground; see also Dewey *v.* Algire, 37 Nebr. 6.]

[7] [Grand Lodge *v.* Wieting, 168 Ill. 408; *contra*, Germania L. I. Co. *v.* Ross-Lewin, 24 Colo. 43.]

CHAPTER XXX.

PRIVATE WRITINGS.

§ 557. In general.

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(d) *Kinds of Secondary Evidence.*

§ 563 *q*. Preferred Copies.
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5. *Proving Execution of Other (Unattested) Writings.*

§ 575 *a*. In general; Identity of Signer.
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§ 578 *a*. Same: Comparison of Specimens by the Jury.
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§§ 579–581. Same: Expert Testifying from Comparison of Specimens.
§ 581 *a*. Discriminations; Comparison of Spelling; Testimony to a Feigned Hand; etc.

6. *Conclusion.*

§ 584. Conclusion.

§ 557. **In general.** The last class of written evidence which we propose to consider is that of private writings. And, in the discus-

sion of this subject, it is not intended separately to mention every description of writings comprised in this class, but to state the principles which govern the proof, admissibility, and effect of them all. In general, all private writings produced in evidence must be proved to be genuine; but in what is now to be said, particular reference is had to solemn obligations and instruments, under the hand of the party, purporting to be evidence of title; such as deeds, bills, and notes. These must be produced, and the execution of them generally be proved, or their absence must be duly accounted for, and their loss supplied by secondary evidence.

§ 558.[1]

1. *Production and Inspection.*

§ 559. **Production by Bill or Order.** The production of private writings, in which another person has an interest, may be had either by a bill of discovery, in proper cases, or in trials at law by a writ of *subpœna duces tecum*,[1] directed to the person who has them in his possession. The Courts of common law may also make an order for the inspection of writings in the possession of one party to a suit in favor of the other. The extent of this power, and the nature of the order, whether it should be peremptory, or in the shape of a rule to enlarge the time to plead, unless the writing is produced, does not seem to be very clearly agreed;[2] and, in the United States, the Courts have been unwilling to exercise the power except where it is given by statute.[3] It seems, however, to be agreed, that where the action is *ex contractu*, and there is but one instrument between the parties, which is in the possession or power of the defendant, to which the plaintiff is either an actual party or a party in interest,

[1] [Transferred *post*, as § 563 *b*.]

[1] See the course in a parallel case, where a witness is out of the jurisdiction, *supra*, § 320. It is no sufficient answer for a witness not obeying this subpœna, that the instrument required was not material: Doe *v.* Kelly, 4 Dowl. 273; but see R. *v.* Lord John Russell, 7 id. 693; and *ante*, § 319.

[2] *Supra*, § 320. If the applicant has no legal interest in the writing, which he requests leave to inspect, it will not be granted: Powell *v.* Bradbury, 4 C. B. 541; 13 Jur. 349; and see *ante*, § 473.

[3] [Such statutes now exist in probably every jurisdiction.] {By the act of Sept. 24, 1789, U. S. R. S. § 724, it is provided that the Courts of the United States "shall have power in all actions at law, on motion and due notice thereof being given, to 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;" and in case of the non-production thereof upon such order the Court may direct a nonsuit or default. Under this statute, an order to produce may be applied for before trial, upon notice. A *prima facie* case of the existence of the paper and its materiality must be made out; and the Court will then pass an order *nisi*, leaving the opposite party to produce or to show cause at the trial, where alone the materiality can be finally decided: Isaigi *v.* Brown, 1 Curtis C. C. 401. For other decisions under this section of the statute, see Hylton *v.* Brown, 1 Wash. C. C. 298; Bas *v.* Steele, 3 id. 381; Dunham *v.* Riley, 4 id. 126; Vasse *v.* Mifflin, id. 519; see also *post*, Vol. III, §§ 902–299. In England, the power was granted by St. 17–18 Vict., c. 125.}

and of which he has been refused an inspection, upon request, and the production of which is necessary to enable him to declare against the defendant, the Court, or a judge at chambers, may grant him a rule on the defendant to produce the document, or give him a copy for that purpose.[4] Such order may also be obtained by the defendant on a special case; such as, if there is reason to suspect that the document is forged, and the defendant wishes that it may be seen by himself and his witnesses.[5] But, in all such cases, the application should be supported by the affidavit of the party, particularly stating the circumstances.[6]

§ 560. When the instrument or writing is in the hands or power of the adverse party, there are, in general, except in the cases above mentioned, no means at law of compelling him to produce it; but the practice in such cases is to give him or his attorney a regular notice to produce the original; not that, on proof of such notice, he is compellable to give evidence against himself, but to lay a foundation for the introduction of secondary evidence of the contents of the document or writing, by showing that the party has done all in his power to produce the original,[1] [as explained in the ensuing sections.]

§§ 561, 562.[1]

§ 563. **Mere Inspection as making Documents Evidence for Party Producing.** The regular time for calling for the production of papers is not until the party who requires them has entered upon his case; until which time the other party may refuse to produce them, and no cross-examination, as to their contents, is usually permitted.[1] The production of papers, upon notice, does not make them evidence in the cause, unless the party calling for them inspects them, so as to become acquainted with their contents; in which case, the English rule is, that they are admitted as evidence for both parties.[2] The reason is, that it would give an unconscionable advantage to enable a party to pry into the affairs of his adversary for the purpose of compelling him to furnish evidence against himself, without, at the same time, subjecting him to the risk of making whatever

[4] 3 Chitty's Gen. Pr. 433, 434; 1 Tidd's Pr. 590–592; 1 Paine & Duer's Pr. 486–488; Graham's Pr. 524; Lawrence *v.* Ocean Ins. Co., 11 Johns. 245, n. (*a*); Jackson *v.* Jones, 3 Cow. 17; Wallis *v.* Murray, 4 id. 399; Denslow *v.* Fowler, 2 id. 592; Davenbagh *v.* M'Kinnie, 5 id. 27; Utica Bank *v.* Hilliard, 6 id. 62.

[5] Brush *v.* Gibbon, 3 Cowen 18, n. (*a*).

[6] 3 Chitty's Gen. Pr. 434.

[1] 2 Tidd's Pr. 802; 1 Paine & Duer's Pr. 483; Graham's Pr. 528.

[1] [Transferred *post*, as §§ 563 *c*, 563 *d*.]

[1] *Supra*, §§ 447, 463, 464.

[2] 2 Tidd's Pr. 804; Calvert *v.* Flower, 7 C. & P. 386; [Wilson *v.* Bowie, 1 id. 8. A contrary ruling is found in Sayer *v.* Kitchen, 1 Esp. 209.] {But where the plaintiff on his examination in chief denies the existence of a written contract, the defendant may interpose, and give evidence upon a collateral issue, whether there was a written contract, before the plaintiff is allowed to give evidence of its terms: Cox *v.* Couveless, 2 F. & F. 139.}

he inspects evidence for both parties. But in the American Courts the rule on this subject is not uniform.[3]

2. *Proving Contents.*

§ 563 *a.* **General Principle.** [One of the most common and most important of the concrete rules subsumed under the general notion that the best evidence must be produced, and that one with which the phrase "best evidence"[1] is now almost exclusively associated, is the rule that, when the contents of a writing are to be proved, the writing itself must be produced before the tribunal, or its absence accounted for before testimony to its contents is admitted. The production of the writing, as a means of proving its contents, is perhaps in strictness to be regarded as rather a case of "real evidence," *i. e.* proof by the tribunal's inspection of the thing itself; in other words, proof without the use of either testimonial or circumstantial evidence;[2] so that proof of the contents without production of the writing would properly be regarded as the first stage of the resort to evidence. Nevertheless, proof by production of the writing is commonly spoken of as using "primary evidence," and proof by witnesses testifying by copy or otherwise is commonly spoken of as using "secondary evidence."

The questions arising under this rule may be grouped under four heads: *a.* The rule itself; *b.* The exceptions to the rule; *c.* The situations to which the rule has no application because they are without its scope; *d.* The further rules as to the kinds of secondary evidence allowable.]

2 (*a*) *General Rule: the Writing itself to be produced or accounted for.*

[The rule may be phrased thus: Where the contents of a writing are desired to be proved, the writing itself must be produced, or its absence sufficiently accounted for before other evidence of its contents can be admitted. The main subject of inquiry and controversy is thus the second branch of the rule, *i. e.* In what situations is the non-production of the original writing to be regarded as sufficiently accounted

[3] 1 Paine & Duer's Pr. 484; Withers *v.* Gillespy, 7 S. & R. 14. The English rule was adopted in Jordan *v.* Wilkins, 2 Wash. C. C. 482, 484, n.; Randel *v.* Chesapeake, & Del. Can. Co., 1 Harringt. 233, 284; Penobscot Boom Corp. *v.* Lamson, 4 Shepl. 224; Anderson *v.* Root, 8 Sm. & M. 362; Com. *v.* Davidson, 1 Cush. 33. [The real question in doubt, and supposed to be settled by Calvert *v.* Flower, *supra*, was whether mere inspection alone made them evidence (as therein decided) or whether nothing short of actually using them in evidence would have that effect. The English rule is adopted in Reed *v.* Anderson, 12 Cush. 481; Clark *v.* Fletcher, 1 All. 53 (leading case); Long *v.* Drew, 114 Mass. 77; Cushman *v.* Coleman, 92 Ga. 772. The other view is accepted in Austin *v.* Thomson, 45 N. H. 113 (leading case); Cal. C. C. P. § 1939.]

[1] [For the various senses of this phrase, and the other rules sometimes denoted by it, see *ante*, Chap. VIII.]

[2] [See *ante*, §§ 13 *a*, 13 *b*.]

for, in order to admit other evidence? These various situations may now be noticed.]

§ 563 *b* [558]. **Loss or Destruction; Diligence of Search.** If the instrument is lost, the party is required to give some evidence that such a paper once existed,[1] though slight evidence is sufficient for this purpose,[2] and that a *bona fide* and diligent search has been unsuccessfully made for it in the place where it was most likely to be found, if the nature of the case admits such proof; after which, his own affidavit is admissible to the fact of its loss.[3] The same rule prevails where the instrument is destroyed; [unless the destruction was by the party wishing to prove the contents, for then no evidence will be received unless the party can show that the destruction was not for the purpose of suppressing evidence or for any other fraudulent purpose.[4]]

[1] [This includes proof of the execution or genuineness of the writing, which would of course equally have to be made even were the original produced:] Jackson *v.* Frier, 16 Johns. 196; Kimball *v.* Morrell, 4 Greenl. 368; Kelsey *v.* Hanmer, 18 Conn. 311; Porter *v.* Ferguson, 4 Fla. 102; [R. *v.* Culpepper, Skinner 673; Comer *v.* Hart, 79 Ala. 389; Hayden *v.* Mitchell, Ga., 30 S. E. 286; Fox *v.* Pedigo, Ky., 40 S. W. 249; Weiler *v.* Monroe Co., 74 Miss. 682; Bachelder *v.* Nutting, 16 N. H. 261. Compare Stowe *v.* Querner, L. R. 5 Ex. Ch. 155.] In regard to the order of the proof, namely, whether the existence and genuineness of the paper, and of course its general character or contents, must be proved before any evidence can be received of its loss, the decisions are not uniform. The earlier and some later cases require that this order should be strictly observed: Goodier *v.* Lake, 1 Atk. 446; Sims *v.* Sims, 2 Rep. Const. Ct. 225; Kimball *v.* Morrell, 4 Greenl. 368; Stockdale *v.* Young, 3 Strobh. 501, n. In other cases, it has been held, that, in the order of proof, the loss or destruction of the paper must first be shown: Wills *v.* McDole, 2 South. 501; Sterling *v.* Potts, ib. 773; Shrowders *v.* Harper, 1 Harringt. 444; Flinn *v.* McGonigle, 9 Watts & Serg. 75; Murray *v.* Buchanan, 7 Blackf. 549; Parke *v.* Bird, 3 Barr 360. But, on the one hand, it is plain, that the proof of the loss of a document necessarily involves some descriptive proof of the document itself, though not to the degree of precision subsequently necessary in order to establish a title under it; and, on the other hand, a strong probability of its loss has been held sufficient to let in the secondary evidence of its contents: Bouldin *v.* Massie, 7 Wheat. 122, 154, 155. These considerations will go far to reconcile most of the cases apparently conflicting. [In Fitch *v.* Bogue, 19 Conn. 285, and Groff *v.* Ramsey, 19 Minn. 44, the order of the proof is left to depend on the circumstances of each case. In Mattocks *v.* Stearns, 9 Vt. 326, the "usual" order is the one first above mentioned.]

[2] [But in Krise *v.* Neason, 66 Pa. 253, it is said that the evidence must be "of the most positive and unequivocal kind."]

[3] *Ante*, § 349, [transferred to Appendix I. This use of affidavits was a partial exception to the rule forbidding parties to testify. But since the abolition of that rule, the party may take the stand as a witness, and thus his affidavit is subject to the Hearsay rule (*ante*, § 163 *a*), and would seem to be no longer admissible except where the older practice has been expressly perpetuated by statute; see Becker *v.* Quigg, 54 Ill. 390. Note that this affidavit was allowable only to prove loss, and not to prove the contents.]

[4] [The phrasing differs, but this seems to be the most usual and satisfactory form; see Johnson's Case, 29 How. St. Tr. 437; 7 East 65; Kensington *v.* Inglis, 8 id. 273, 288; Lewis *v.* Hartley, 7 C. & P. 405; Rodgers *v.* Crook, 97 Ala. 722; Miller *v.* State, 110 id. 69; Bracken *v.* State, 111 id. 68; Bagley *v.* McMickle, 9 Cal. 430 (leading case); Bagley *v.* Eaton, 10 id. 126, 148; Bank *v.* Sill, 5 Conn. 106; Blake *v.* Fash, 44 Ill. 302; Anderson B. Co. *v.* Applegate, 13 Ind. 339; Rudolph *v.* Lane, 57 id. 115; Tobin *v.* Shaw, 45 Me. 331; Joannes *v.* Bennett, 5 All. 169; Stone *v.* Sanborn, 104 Mass. 319; Gage *v.* Campbell, 131 id. 566; Wright *v.* State, Md., 41 Atl. 795; Gugins *v.* Van Gorder, 10 Mich. 523; People *v.* Sharp, 54 id. 523; People *v.* Lange, 90 id. 454; Shrimpton *v.* Netzorg, 104 id. 225; Winona *v.* Huff, 11 Minn. 119, 130;

What degree of diligence in the search is necessary, it is not easy to define, as each case depends much on its peculiar circumstances; and the question, whether the loss of the instrument is sufficiently proved to admit secondary evidence of its contents, is to be determined by the Court and not by the jury.[5] But it seems that, in general, 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.[6] It should be recollected, that the object of the proof is merely to establish a reasonable presumption of the loss of the instrument, and that this is a preliminary inquiry addressed to the discretion of the judge. If the paper was supposed to be of little value, or is ancient, a less degree of diligence will be demanded, as it will be aided by the presumption of loss which these circumstances afford. If it belonged to the custody of certain persons, or is proved or may be presumed to have been in their possession, they must, in general, be called and sworn to account for it, if they are within reach of the process of the Court;[7] and so if it

Skinner *v.* Henderson, 10 Mo. 205; Broadwell *v.* Stiles, 8 N. J. L. (leading case); Vananken *v.* Hornbeck, 14 id. 178; Wyckoff *v.* Wyckoff, 16 N. J. Eq. 401; Clark *v.* Hornbeck, 17 id. 430, 451; Livingston *v.* Rogers, 2 Johns. Cas. 488; Jackson *v.* Lamb, 7 Cow. 431; Blade *v.* Noland, 12 Wend. 173; Clute *v.* Small, 17 id. 238; Enders *v.* Sternbergh, 40 N. Y. 264; Steele *v.* Lord, 70 id. 280; Mason *v.* Libbey, 90 id. 683; McAulay *v.* Earnhart, 1 Jones L. 503; Pollock *v.* Wilcox, 68 N. C. 46; Shortz *v.* Unangst, 3 W. & S. 45; State *v.* Head, 38 S. C. 258; Anderson *v.* Maberry, 2 Heisk. 653; Riggs *v.* Tayloe, 9 Wheat. 483 (leading case); Renner *v.* Bank, ib. 581, 597; State *v.* Marsh, Vt., 40 Atl. 836. For this principle as a reason for the substantive rule of law holding a deed's destruction by the grantee to be a revesting of title in the grantor, see Thompson *v.* Thompson, 9 Ind. 323; Jones, Real Property, II, § 1259.]

[5] [Page *v.* Page, 15 Pick. 368; ¦Smith *v.* Brown, 151 Mass. 339; Walker *v.* Curtis, 116 id. 98; Lindauer *v.* Meyberg, 27 Mo. App. 185; Stratton *v.* Hawks, 43 Kan. 541; Glassell *v.* Mason, 32 Ala. 719; Woodworth *v.* Barker, 1 Hill N. Y. 176; Bachelder *v.* Nutting, 16 N. H. 261;¦ Smith *v.* Mason, 1 C. & K. 48; Tyree *v.* Magness, 1 Sneed 276.]

[6] R. *v.* Morton, 4 M. & S. 48; R. *v.* Castleton, 6 T. R. 236; 1 Stark. Evid. 336-340; Wills *v.* McDole, 2 South. 501; Thompson *v.* Travis, 8 Scott 85; Parks *v.* Dunkle, 3 Watts & Serg. 291; Gathercole *v.* Miall, 15 L. J. Exch. 179; Doe *v.* Lewis, 15 Jur. 512; 5 Eng. L. & Eq. 400. ["I think that we may collect from R. *v.* Morton, 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 R. *v.* Denio, 'a *bona fide* and diligent search was made for the instrument where it was likely to be found;'" Lord Denman, C. J., in R. *v.* Kenilworth, 7 Q. B. 642. The truth is, then, that the detailed rules mentioned later in the paragraph above are to be regarded as hints of caution rather than rules of practice. The tenor of Lord Denman's remark is generally approved; for similar utterances, with varying phrasings of the nature of the search required, see Doe *v.* Biggers, 6 Ga. 188; Simpson *v.* Norton, 45 Me. 281; Glenn *v.* Rogers, 3 Md. 312; Pickard *v.* Bailey, 26 N. H. 152; Johnson *v.* Arnwine, 42 N. J. L. 451; Jackson *v.* Frier, 16 Johns. 193; Flinn *v.* M'Gonigle, 9 W. & S. 75; Congdon *v.* Morgan, 14 S. C. 587; Minor *v.* Tillotson, 7 Pet. 99; Fletcher *v.* Jackson, 23 Vt. 581. Nevertheless, a few Courts occasionally treat such specific cautions as definite rules to be satisfied; *e. g.* Cook *v.* Hunt, 24 Ill. 535, 550. Most Supreme Courts follow the unsatisfactory practice of re-examining the ruling of the trial Court as a matter of law, thus burdening the reports with rulings useless as precedents, instead of leaving the whole question to the trial Court.]

[7] Ralph *v.* Brown, 3 Watts & Serg. 395; [Cook *v.* Hunt, 24 Ill. 535.]

might or ought to have been deposited in a public office, or other particular place, that place must be searched.[8] If the search was made by a third person, he must be called to testify respecting it.[9] And if the paper belongs to his custody, he must be served with a *subpœna duces tecum* to produce it.[10] If it be an instrument which is the foundation of the action, and which, if found, the defendant may be compelled again to pay to a *bona fide* holder, the plaintiff must give sufficient proof of its destruction to satisfy the Court and jury that the defendant cannot be liable to pay it a second time.[11] And if the instrument was executed in duplicate, or triplicate, or more parts, the loss of all the parts must be proved in order to let in secondary evidence of the contents.[12] Satisfactory proof being thus made of the loss of the instrument, the party will be admitted to give secondary evidence of its contents.

§ 563 *c* [561]. **Possession of Opponent; Notice to Produce.** [If the writing is in the hands of the opponent, and the opponent refuses to produce it, the writing itself may be regarded as unavailable and other evidence of its contents be received. But it will be seen that a preliminary showing must first be made of the above two facts, namely, (1) that the writing is in the opponent's possession, and (2) that he refuses to produce it.

(1) For this purpose, it is not necessary to show actual manual custody by the opponent; "it is enough if it is in his power."[1] The presumption of receipt that follows from the mailing of a letter duly

[8] [Howe *v.* Fleming, 123 Ind. 263.]

[9] [But where the searcher himself is called, and wishes to testify that another person of whom he inquired in his search made replies as to the loss or destruction of the document, the question arises whether such replies, being hearsay, are admissible. It seems to have been settled in England (after conflicting rulings: R. *v.* Denio, 7 B. & C. 620; R. *v.* Stourbridge, 8 id. 96; R. *v.* Rawden, 2 A. & E. 156) that the tenor of inquiry and reply may be received, on the sound principle that the replies are not used as themselves hearsay testimony to the loss, but merely as indicating that the search was reasonable in stopping at that point: R. *v.* Kenilworth, 7 Q. B. 642; R. *v.* Saffron Hill, 1 E. & B. 93; R. *v.* Braintree, 1 E. & E. 51; Smith *v.* Smith, 10 Ir. R. Eq. 273. *Accord:* Harper *v.* Scott, 12 Ga. 125; Higgins *v.* Watson, 1 Mich. 428.]

[10] Bull *v.* Loveland, 10 Pick. 14; [for this, see *post*, § 563 *e*.]

[11] Hansard *v.* Robinson, 7 B. & C. 90; Lubbock *v.* Tribe, 3 M. & W. 607. See also Peabody *v.* Denton, 2 Gall. 351; Anderson *v.* Robson, 2 Bay 495; Davis *v.* Dodd, 4 Taunt. 602; Pierson *v.* Hutchinson, 2 Campb. 211; Rowley *v.* Ball, 3 Cowen 303; Kirby *v.* Sisson, 2 Wend. 550; Murray *v.* Carret, 3 Call 373; Mayor *v.* Johnson, 3 Campb. 324; Swift *v.* Stevens, 8 Conn. 431; Ramuz *v.* Crowe, 11 Jur. 715; *post*, Vol. II, § 156; [this is a question of substantive law, which has in many jurisdictions been dealt with by statute.]

[12] Bull. N. P. 254; R. *v.* Castleton, 6 T. R. 236; Doe *v.* Pulman, 3 Q. B. 622; [Alivon *v.* Furnival, 1 Cr. M. & R. 277, 292: Cincinn. N. O. & T. P. R. Co. *v.* Disbrow, 76 Ga. 253; Dyer *v.* Fredericks, 63 Me. 173; compare § 563 *p*, *post*.]

[1] [Parry *v.* May, 1 Moo. & Rob. 280. Thus, it is enough to show custody in an agent: Baldney *v.* Ritchie, 1 Stark. 338; Partridge *v.* Coates, Ry. & Mo. 153; Irwin *v.* Lever, 2 F. & F. 296; for other instances of third persons' custody, see Sinclair *v.* Stevenson, 1 C. & P. 582; Morris *v.* Vanderen, 1 Dall. 64; Gimbel *v.* Hufford, 46 Ind. 125.]

addressed and stamped[2] should suffice to show possession;[3] and the sufficiency of the evidence is a question of law for the judge.[4]

(2) The refusal of the opponent to produce the document is treated as making the document unavailable for the first party, and thus as permitting him to prove its contents otherwise; and this is so even though he might have obtained a statutory order compelling production,[5] and even though the opponent's refusal is made under a just claim of privilege.[6] In order to put the opponent in default as having refused production, it is usually necessary that he should have been notified that the document in question will be needed at the trial. The nature of the notice is considered in § 562, *post;* the situations in which notice is unnecessary may first be considered.]

There are three cases in which such notice to produce is not necessary. First, where the instrument to be produced and that to be proved are duplicate originals; for, in such case, the original being in the hands of the other party, it is in his power to contradict the duplicate original by producing the other, if they vary;[7] secondly, where the instrument to be proved is itself a notice, such as a notice to quit, or notice of the dishonor of a bill of exchange;[8] and, thirdly, where, from the nature of the action, the defendant has notice that the plaintiff intends to charge him with possession of the instrument, as, for example, in trover for a bill of exchange.[9] And the principle

[2] [*Ante*, § 40.]

[3] [Augur S. A. & G. Co. *v.* Whittier, 117 Mass. 451; but sundry distinctions may here be taken; see Dana *v.* Kemble, 19 Pick. 112; Roberts *v.* Spencer, 123 Mass. 397; Dix *v.* Atkins, 128 id. 43; Gage *v.* Meyers, 59 Mich. 300; Rosenthal *v.* Walker, 111 U. S. 185.]

[4] [Harvey *v.* Mitchell, 2 Moo. & Rob. 366;] {Dix *v.* Atkins, 128 Mass. 43; Roberts *v.* Spencer, 123 id. 397.}

[5] [McLain *v.* Winchester, 17 Mo. 49.]

[6] [R. *v.* Barker, 3 C. & P. 591; State *v.* Boomer, 103 Ia. 106.]

[7] Jury *v.* Orchard, 2 B. & P. 39. 41; Doe *v.* Somerton, 7 Q. B. 58; s. c. 9 Jur. 775; Swain *v.* Lewis, 2 C. M. & R. 261; [Philipson *v.* Chase, 2 Campb. 110; Hollenbeck *v.* Stanberry, 38 Ia. 325; Cleveland R. Co. *v.* Perkins, 17 Mich. 296. But this rests in reality upon a different principle; see § 563 *p*, *post.*]

[8] [But this must be taken with qualifications. (1) A notice may often be a duplicate original, as if two copies are written at the same time, and one served and the other retained; no notice would be necessary before using the latter: Jory *v.* Orchard, *supra;* Gottlieb *v.* Danvers, 1 Esp. 455; Johnson *v.* Haight, 13 Johns. 470; Barr *v.* Armstrong, 56 Mo. 577, 586. (2) On the principle of the next note, a notice may sometimes in itself contain warning that it will be needed — as, a notice to quit or a notice to produce, — and thus notice to produce it will not be necessary; see the cases following. (3) A kind of rule-of-thumb has often been advanced that, irrespective of the preceding principles, "a notice to produce a notice is not necessary." But this rule cannot be taken as a safe guide, for such notice is often required. It is not always easy to ascertain which of the preceding rules is in the Court's mind. In the following cases notice to produce a notice was held necessary: Langdon *v.* Hulls, 5 Esp. 156; Jones *v.* Robinson, 11 Ark. 504; Frank *v.* Longstreet, 44 Ga. 178; Rutl. & B. R. R. Co. *v.* Thrall, 35 Vt. 536 (leading case). In the following cases it was held unnecessary: Kine *v.* Beaumont, 3 B. & B. 288 (leading case); Swain *v.* Lewis, 2 C. M. & R. 261; Gethin *v.* Walker, 59 Cal. 502; Brown *v.* Booth, 66 Ill. 419; McLenon *v.* Bank, 7 T. B. Monr. 576; Loranger *v.* Jardine, 56 Mich. 518; Leavitt *v.* Simes, 3 N. H. 14; McMillan *v.* Baxley, 112 N. C. 578; Eisenhart *v.* Slaymaker, 14 S. & R. 153.]

[9] Jolley *v.* Taylor, 1 Campb. 143; Scott *v.* Jones, 4 Taunt. 865; Bucher *v.* Jarratt,

of the rule does not require notice to the adverse party to produce a paper belonging to a third person, of which he has fraudulently obtained possession; as where, after service of a *subpœna duces tecum*, the adverse party had received the paper from the witness in fraud of the *subpœna*.[10] Proof that the adverse party, or his attorney, has the instrument in court, does not, it seems, render notice to produce it unnecessary; for the object of the notice is not only to procure the paper, but to give the party an opportunity to provide the proper testimony to support or impeach it.[11]

§ 563 *d* [562]. **Same; Procedure in giving Notice.** The notice may be directed to the party or to his attorney, and may be served on either;[1] and it must describe the writing demanded, so as to leave no doubt that the party was aware of the particular instrument intended to be called for.[2] But as to the time and place of the service no precise rule can be laid down, except that it must be such as to enable the party, under the known circumstances of the case, to comply with the call.[3] Generally, if the party dwells in another town than that

3 B. & P. 143; Whitehead *v.* Scott, 1 Moo. & R. 2; Ross *v.* Bruce, 1 Day 100; People *v.* Holbrook, 13 Johns. 90; M'Lean *v.* Hertzog, 6 S. & R. 154; [How *v.* Hall, 14 East 274; R. *v.* Elworthy, 10 Cox Cr. 579; Rose *v.* Lewis, 10 Mich. 483. So also on a criminal charge of forgery or larceny: R. *v.* Haworth, 4 C. & P. 254; McGinnis *v.* State, 24 Ind. 500 (leading case); People *v.* Holbrook, 13 Johns. 90; Com. *v.* Messinger, 1 Binn. 273 (leading case). For examples of the principle, see Colling *v.* Treweek, 6 B. & C. 394; Read *v.* Gamble, 10 A. & E. 597; R. *v.* Elworthy, 10 Cox Cr. 579; Columb. & W. R. Co. *v.* Tillman, 79 Ga. 607; Spencer *v.* Boardman, 118 Ill. 553; State *v.* Mayberry, 48 Me. 218; Dade *v.* Ins. Co., 54 Minn. 336; State *v.* Flanders, 118 Mo. 227; Howell *v.* Huyck, 2 Abb. App. 423 (leading case). Compare the principle of § 563 *o*, *post*.]

[10] 2 Tidd's Pr. 803; [Leeds *v.* Cook, 4 Esp. 256; Neally *v.* Greenough, 25 N. H. 325.]

[11] Doe *v.* Grey, 1 Stark. 283; Exall *v.* Partridge, ib.; Knight *v.* Waterford, 4 Y. & C. 284; [Bate *v.* Kinsey, 1 C. M. & R. 38. But this doctrine has been repudiated in England: Dwyer *v.* Collins, 7 Exch. 639 (leading case); for it rests on a misunderstanding of principle; the real purpose of the requirement of notice is to show that the document is not within the power of the first party to obtain, and a notice at the trial, followed by refusal, suffices to show this, where the document is in Court. This is the view universally taken in this country: Ferguson *v.* Miles, 8 Ill. 358, 364; Dana *v.* Boyd, 2 J. J. Marsh. 587; Hanselman *v.* Doyle, 90 Mich. 142 (discretion); Bickley *v.* Bank, 39 S. C. 281.]

[1] [Att'y-Gen'l *v.* Le Merchant, 2 T. R. 201, note; Houseman *v.* Roberts, 5 C. & P. 394; Mattocks *v.* Stearns, 9 Vt. 326. But on the facts it may not be sufficient to serve it upon the attorney: Aflalo *v.* Fourdrinier, M. & M. 334, note; Byrne *v.* Harvey, 2 Mo. & Rob. 89; Lathrop *v.* Mitchell, 47 Ga. 610.]

[2] [Rogers *v.* Custance, 2 Mo. & Rob. 179; Lawrence *v.* Clark, 14 M. & W. 250; Burke *v.* T. M. W. Co., 12 Cal. 403. A general notice to produce all documents relating to the cause would probably be insufficient: Jones *v.* Edwards, 1 McCl. & Y. 139; Smyth *v.* Sandeman, 2 Cox Cr. 239; France *v.* Lucy, Ry. & Mo. 341. But the precise document need not be specified: Jacob *v.* Lee, 2 Mo. & Rob. 33; Morris *v.* Hauser, ib. 392; McDowell *v.* Ins. Co., 164 Mass. 444.]

[3] [Rogers *v.* Custance, 2 Mo. & Rob. 179; Sturge *v.* Buchanan, 10 A. & E. 598; Lloyd *v.* Mostyn, 2 Dowl. Pr. N. S. 476; Littleton *v.* Clayton, 77 Ala. 571; Glenn *v.* Rogers, 3 Md. 312; the sufficiency of time should be left entirely to the trial Court's discretion: George *v.* Thompson, 4 Dowl. Pr. 656; Burke *v.* T. M. W. Co., 12 Cal. 403; Cummings *v.* McKinney, 5 Ill. 57; Brock *v.* Ins. Co., Ia., 75 N. W. 683; Winona *v.* Huff, 11 Minn. 119. It is sometimes said that the notice must be in writing: Cummings *v.* McKinney, 5 Ill. 57; *contra*: Smith *v.* Young, 1 Camp. 440.]

in which the trial is had, a service on him at the place where the trial is had, or after he has left home to attend the Court, is not sufficient.[4] But if the party has gone abroad, leaving the cause in the hands of his attorney, it will be presumed that he left with the attorney all the papers material to the cause, and the notice should therefore be served on the latter.[5] The notice, also, should generally be served previous to the commencement of the trial.[6] [If the opponent, having control of the document, refuses to produce it in response to the notice, he will be prevented, as a penalty, from afterwards offering it on his own behalf to contradict the evidence of contents offered by the first party.[7]]

§ 563 *e*. **Writings in a Third Person's Control; Writings out of the Jurisdiction.** [(1) If the writing is in a third person's control, and the person is within the jurisdiction, it cannot be said to be unavailable for the party desiring to use it, until he has by *subpœna duces tecum* resorted to the power of the law to obtain it; so that the mere fact of the third person's possession, or of notice to him, or demand upon him, is insufficient to excuse non-production.[1] If the person would be privileged from producing the document,[2] it would seem that he ought still to be summoned, since it cannot be assumed that he would not waive his privilege; but upon this point there is a difference of judicial opinion.[3]

(2) If the writing is in the control of a third person without the jurisdiction of the Court, no resort to legal force is of service. But it is possible to maintain that the party desiring to use the document should at least make an effort to obtain the writing by consent of its

[4] George *v.* Thompson, 4 Dowl. 656; Foster *v.* Pointer, 9 C. & P. 718. See also, as to the time of service, Holt *v.* Miers, 9 C. & P. 191; R. *v.* Kitsen, 20 Eng. L. & Eq. 590; Dears. C. C. 187.

[5] [Bryan *v.* Wagstaff, 2 C. & P. 125. As to documents in another jurisdiction but in the party's control, see Ehrensperger *v.* Anderson, 3 Exch. 148; Bushnell *v.* Colony, 28 Ill. 204; Mortlock *v.* Williams, 76 Mich. 568; Dade *v.* Ins. Co., 54 Minn. 336. That the party is confined in jail is no objection: R. *v.* Robinson, 5 Cox Cr. 183.]

[6] 2 Tidd's Pr. 803; Hughes *v.* Budd, 8 Dowl. 315; Firkin *v.* Edwards, 9 C. & P. 478; Gibbons *v.* Powell, ib. 634; Bate *v.* Kinsey, 1 C. M. & R. 38; Emerson *v.* Fisk, 6 Greenl. 200; 1 Paine & Duer's Pr. 485, 486.

[7] {Doon *v.* Donaher, 113 Mass. 151; Gage *v.* Campbell, 131 id. 566;} [Doe *v.* Cockell, 6 C. & P. 525; Doe *v.* Hodgson, 12 A. & E. 135; Bogart *v.* Brown, 5 Pick. 18; McGinness *v.* School District, 39 Minn. 499; Flemming *v.* Lawless, N. J. Eq., 38 Atl. 864; see Helzer *v.* Helzer, Pa., 41 Atl. 40; *contra*, but unsound: Moulton *v.* Mason, 21 Mich. 363.]

[1] [R. *v.* Castleton, 1 T. R. 236; Whitford *v.* Tritin, 10 Bing. 395; Rucker *v.* McNeely, 5 Blackf. 123; Dickerson *v.* Talbot, 14 B. Monr. 60; Chaplain *v.* Briscoe, 5 Sm. & M. 198; *contra, semble*, So. Car. C. C. P. c. 12, § 419; in Bosworth *v.* Clark, 62 Ga. 286, it is left to the trial Court's discretion. It has been ruled in England that even the person's disobedience to the *subpœna* would not be sufficient: Jesus College *v.* Gibbs, 1 Y. & C. 145, 156; R. *v.* Llanfaethly, 2 E. & B. 940; but this would hardly be followed.]

[2] [*Ante*, § 240 ff. (attorney and client); § 469 *n* (title-deeds); § 469 *f* (self-crimination).]

[3] [*Accord:* U. S. *v.* Porter, 3 Day 283; *contra:* Phelps *v.* Prew, 3 E. & B. 430; see Richards *v.* Stewart, 2 Day 328; R. *v.* Leatham, 3 E. & E. 658; State *v.* Durham, N. C., 28 S. E. 26.]

possessor;[4] and upon this point there is much difference of opinion. A number of Courts distinctly insist that some such effort must have been made;[5] the majority of rulings either assume or decide that no effort to obtain is necessary;[6] and in a few rulings the effort actually made was held sufficient on the facts.[7]]

§ 563 *f* [91]. **Public Documents.**[1] Thus, the contents of any record of a judicial Court, and of entries in any other public books or registers, may be proved by an examined copy. This exception extends to all records and entries of a public nature, in books required by law to be kept; and is admitted because of the inconvenience to the public which the removal of such documents might occasion, especially if they were wanted in two places at the same time; and also, because of the public character of the facts they contain, and the consequent facility of detection of any fraud or error in the copy.[2] [The extent to which this principle has been applied, and the kinds of documents which, by statute or by decision, are treated as not necessary to be produced, have already been considered in dealing with the subject of public documents and judicial records.[3]]

§ 563 *g* [92]. **Appointments to Office.** For the same reason, and from the strong presumption arising, from the undisturbed exercise

[4] [It has been ruled in England that the document's being out of the jurisdiction is never an excuse for not producing it: Steinkeller *v.* Newton, 9 C. & P. 313; but this is unsound, and would probably not be followed anywhere.]

[5] [See Boyle *v.* Wiseman, 10 Exch. 647; Townsend *v.* Atwater, 5 Day 298; Waite *v.* High, 96 Ia. 742; Wood *v.* Cullen, 13 Minn. 394; Farrell *v.* Brennan, 32 Mo. 328; Robards *v.* McLean, 8 Ired. 522; Turner *v.* Yates, 16 How. 14, 26; Comstock *v.* Carnley, 4 Blatchf. 58; Dwyer *v.* Dunbar, 5 Wall. 318;] {Beall *v.* Poole, 27 Md. 645; Lowry *v.* Harris, 12 Minn. 255; Leese *v.* Clark, 29 Cal. 664; Peck *v.* Parchen, 52 Iowa 46; Newcomb *v.* Noble, 10 Gray 47.}

[6] [Bruce *v.* Nicolopulo, 11 Exch. 129; Pensacola R. Co. *v.* Schaffer, 76 Ala. 233; Bozeman *v.* Browning, 31 Ark. 364; Zellerbach *v.* Allenberg, 99 Cal. 57, 73; Shepard *v.* Giddings, 22 Conn. 282; Miller *v.* McKinnon, Ga., 29 S. E. 467; Mitchell *v.* Jacobs, 17 Ill. 235; Hall *v.* Bishop, 78 Ind. 370; Waller *v.* Cralle, 8 B. Monr. 11; Knickerbocker *v.* Wilcox, 83 Mich. 201; Kleeberg *v.* Schrader, Minn., 72 N. W. 59; St. Louis P. Ins. Co. *v.* Cohen, 9 Mo. 416, 439; Reed *v.* State, 15 Oh. 217; Otto *v.* Trump, 115 Pa. 425; Hagaman *v.* Gillis, 9 S. D. 61; Burton *v.* Driggs, 20 Wall. 125; Hayward R. Co. *v.* Duncklee, 30 Vt. 29, 39.]

[7] [Beall *v.* Dearing, 7 Ala. 124; Fisher *v.* Greene, 95 Ill. 94; Bullis *v.* Easton, 96 Ia. 513; Combs *v.* Breathitt Co., Ky., 46 S. W. 505; Sayles *v.* Bradley & M. Co., Tex., 49 S. W. 209.]

[1] [The first sentence in the original text read: "The rule rejecting secondary evidence is subject to some exceptions; grounded either on public convenience, or on the nature of the facts to be proved." But, as already pointed out, these various conditions excusing production of the original are not so much exceptions to the rule as parts of the rule itself.]

[2] Buller N. P. 226; 1 Stark. Evid. 189; {Berry *v.* Raddin, 11 Allen 577; Winers *v.* Laird, 27 Tex. 616; Davis *v.* Gray, 17 Ohio St. 330; Camden R. R. *v.* Stewart, 4 Green N. J. 343; Curry *v.* Raymond, 28 Pa. St. 144; Bovee *v.* McLean, 24 Wis. 225; Dunham *v.* Chicago, 55 Ill. 357; Coons *v.* Renick, 11 Tex. 134.}

But this exception does not extend to an answer in Chancery, where the party is indicted for perjury therein; for there the original must be produced, in order to identify the party, by proof of his handwriting; the same reason applies to depositions and affidavits: R. *v.* Howard, 1 M. & Rob. 189.

[3] [*Ante*, Chaps. XXVIII and XXIX; see the explanation in § 478, note 2, as to the relative bearing of various principles on the use of such documents.]

of a public office, that the appointment to it is valid, it is not, in general, necessary to prove the written appointments of public officers. All who are proved to have acted as such are presumed to have been duly appointed to the office, until the contrary appears;[1] and it is not material how the question arises, whether in a civil or criminal case, nor whether the officer is or is not a party to the record;[2] unless, being plaintiff, he unnecessarily avers his title to the office, or the mode of his appointment; in which case, as has been already shown, the proof must support the entire allegation.[3] These and similar exceptions are also admitted, as not being within the reason of the rule, which calls for primary evidence; namely, the presumption of fraud, arising from its non-production.

§ 563 *h* [93]. **Summaries of Voluminous Entries.** A further re-

[1] U. S. *v.* Reyburn, 6 Pet. 352, 367; R. *v.* Gordon, 2 Leach Cr. C. 581, 585, 586; R. *v.* Shelley, 1 id. 381, n.; Jacob *v.* U. S., 1 Brockenb. 520; Milnor *v.* Tillotson, 7 Pet. 100, 101; Berryman *v.* Wise, 4 T. R. 366; Bank of United States *v.* Dandridge, 12 Wheat. 70; Doe *v.* Brawn, 5 B. & A. 243; Cannell *v.* Curtis, 2 Bing. N. C. 228, 234; R. *v.* Verelst, 3 Camph. 432; R. *v.* Howard, 1 M. & Rob. 187; McGahey *v.* Alston, 2 M. & W. 206, 211; R. *v.* Vickery, 12 Q. B. 478; {Webber *v.* Davis, 5 Allen 393; Jacob *v.* U. S., 1 Brock. 520; New Portland *v.* Kingfield, 55 Me. 172; Woolsey *v.* Rondout, 4 Abb. App. Dec. 639;} [State *v.* Findley, 101 Mo. 217; State *v.* Taylor, Vt., 39 Atl. 447; *ante*, §§ 38 *a*, 83.] But there must be some color of right to the office, or an acquiescence on the part of the public for such length of time as will authorize the presumption of at least a colorable election or appointment: Wilcox *v.* Smith, 5 Wend. 231, 234. This rule is applied only to public offices; where the office is private, some proof must be offered of its existence and of the appointment of the agent or incumbent: Short *v.* Lee, 2 Jac. & W. 464, 468.

An officer *de facto* is one who exercises an office under color of right, by virtue of some appointment or election, or of such acquiescence of the public as will authorize the presumption, at least of a colorable appointment or election; being distinguished, on the one hand, from a mere usurper of office, and on the other from an officer *de jure:* Wilcox *v.* Smith, 5 Wend. 231; Plymouth *v.* Painter, 17 Conn. 585; Burke *v.* Elliott, 4 Ired. 355. Evidence is admissible, not only to show that he exercised the office before or at the period in question, but also, limited to a reasonable time, that he exercised it afterwards: Doe *v.* Young, 8 Q. B. 63. [But distinguish from the present question — proof of a *de jure* officer's lawful appointment — the question of substantive law whether a *de facto* officer's acts are valid.]

[2] R. *v.* Gordon, 2 Leach C. C. 581; Berryman *v.* Wise, 4 T. R. 366; M'Gahey *v.* Alston, 2 M. & W. 206, 211; Radford *v.* McIntosh, 3 T. R. 632; Cross *v.* Kaye, 6 id. 663; James *v.* Brawn, 5 B. & Ald. 243; R. *v.* Jones, 2 Camph. 131; R. *v.* Verelst, 3 id. 432; {Com. *v.* McCue, 16 Gray 226; Com. *v.* Kane, 108 Mass. 423; Sawyer *v.* Steele, 3 Wash. C. C. 464.} A commissioner appointed to take affidavits is a public officer, within this exception: R. *v.* Howard, 1 M. & Rob. 187; see also U. S. *v.* Reyburn, 6 Pet. 352, 367; R. *v.* Newton, 1 Car. & Kir. 469; Doe *v.* Barnes, 10 Jur. 520; 8 Q. B. 1037; Plumer *v.* Brisco, 12 Jur. 351; 11 Q. B. 46; Doe *v.* Young, 8 id. 63.

[3] *Supra*, § 56; Cannell *v.* Curtis, 2 Bing. N. C. 228; Moises *v.* Thornton, 8 T. R. 303; The People *v.* Hopson, 1 Denio 574. In an action by the sheriff for his poundage, proof that he has acted as sheriff has been held sufficient *prima facie* evidence that he is so, without proof of his appointment: Bunbury *v.* Matthews, 1 Car. & Kir. 380. But in New York it has been held otherwise: People *v.* Hopson, *supra*. {So, although proof of the legal organization of a corporation requires the production of the record which is required by the statutes, or a certified copy of it, yet the fact that the corporation is *de facto* a corporation and transacts a certain kind of business, may be proved by its officers, or other relevant evidence: Merchants' Bank *v.* Glendon Co., 120 Mass. 97; Miller *v.* Wild Cat, etc. Co., 52 Ind. 51; its corporate acts should be proved by its records: Central Bridge, etc. Corporation *v.* Lowell, 15 Gray 106; Bay View Assoc. *v.* Williams, 50 Cal. 353.}

laxation of the rule has been admitted, where the evidence is the result of voluminous facts, or of the inspection of many books and papers, the examination of which could not conveniently take place in court. Thus, if there be one invariable mode in which bills of exchange have been drawn between particular parties, this may be proved by the testimony of a witness conversant with their habit of business, and speaking generally of the fact, without producing the bills. But if the mode of dealing has not been uniform, the case does not fall within this exception, but is governed by the rule requiring the production of the writings.[1] So, also, a witness who has inspected the accounts of the parties, though he may not give evidence of their particular contents, may be allowed to speak to the general balance, without producing the accounts.[2] And where the question is upon the solvency of a party at a particular time, the general result of an examination of his books and securities may be stated in like manner.[3] [Generally, however, it is said that the offering party must at least have the originals at hand where the opponent can consult them if he chooses.[4]]

§ 563 *i* [94]. **Non-portable Writings.** Under this head may be mentioned the case of inscriptions on walls and fixed tables, mural monuments, gravestones, surveyors' marks on boundary trees, etc., which, as they cannot conveniently be produced in court, may be proved by secondary evidence.[1]

2 (*b*) *Exceptions to the Rule.*

563 *j* [95]. **Voir Dire.** Another exception is made, in the examination of a witness on the *voir dire*, and in preliminary inquiries of

[1] Spencer *v.* Billing, 3 Campb. 310.

[2] Roberts *v.* Doxon, Peake 83. But not as to particular facts appearing on the books or deducible from the entries: Dupuy *v.* Truman, 2 Y. & C. 341; {Hunt *v.* Roylance, 11 Cush. 117; Poor *v.* Robinson, 13 Bush 290.}

[3] Meyer *v.* Sefton, 2 Stark. 274.

[4] [For additional instances of the principle's application, covering the proof of vouchers, account-books, copyright-violations, official entries and records, and the like, see Lewis *v.* Fullerton, 2 Beav. 6; 1 De G. & Sm. 260; Woodruff *v.* State, 61 Ark. 157, 170; San Pedro L. Co. *v.* Reynolds, Cal., 53 Pac. 410; Adams *v.* Board, 37 Fla. 266; Gant *v.* Carmichael, 31 Ga. 737; Thornburgh *v.* R. Co., 14 Ind. 499; Rogers *v.* State, 99 id. 218; Hollingsworth *v.* State, 111 id. 289; Equit. Acc. I. Co. *v.* Stout, 135 id. 444; Chic. S. L. & P. R. Co. *v.* Wolcott, 141 id. 267; State *v.* Caldwell, 79 Ia. 432; State *v.* Brady, 100 id. 191; Lynn *v.* Cumberland, 77 Md. 449; Boston & W. R. Co. *v.* Dana, 1 Gray 83, 89, 104 (leading case); Walker *v.* Curtis, 116 Mass. 98; Bicknell *v.* Mellett, 160 id. 328; Hoffman *v.* Peck, Mich., 71 N. W. 1095; State *v.* Lewenthal, 55 Miss. 589; Ritchie *v.* Kinney, 46 Mo. 298; State *v.* Findley, 101 id. 217; Bartley *v.* State, Nebr., 73 N. W. 744; Shepherd *v.* Hamilton Co., 8 Heisk. 380; Lawrence *v.* Dana, 4 Cliff. 1, 72; Burton *v.* Driggs, 20 Wall. 125; Ludtke *v.* Herzog, 30 U. S. App. 637; West Pub. Co. *v.* Lawyers' Coöp. P. Co., id., 79 Fed. 756; Rollins *v.* Board, id., 90 Fed. 575; North P. R. Co. *v.* Keyes, id., 91 Fed. 47.]

[1] Doe *v.* Cole, 6 C. & P. 360; R. *v.* Fursey, ib. 81; [Cobden *v.* Boulton, 2 Camp. 108; Bartholomew *v.* Stephens, 8 C. & P. 728; Mortimer *v.* McCallan, 6 M. & W. 58; Sayer *v.* Glossop, 2 Exch. 409; Stearns *v.* Doe, 12 Gray 482.] But if they can conveniently be brought into court, their actual production is required; thus, where it was proposed to show the contents of a printed notice, hung up in the office of the party, who was a carrier, parol evidence of its contents was rejected, it not being affixed to the freehold: Jones *v.* Tarlton, 1 Dowl. Pr. N. S. 625. [9 M. & W. 675; see R. *v.* Edge, Wills, Circ. Evid. 5th Am. ed. 212 (coffin-plate).]

the same nature. If, upon such examination, the witness discloses the existence of a written instrument affecting his competency, he may also be interrogated as to its contents. To a case of this kind, the general rule requiring the production of the instrument, or notice to produce it, does not apply; for the objecting party may have been ignorant of its existence, until it was disclosed by the witness; nor could he be supposed to know that such a witness would be produced. So, for the like reason, if the witness on the *voir dire* admits any other fact going to render him incompetent, the effect of which has been subsequently removed by a written document, or even a record, he may speak to the contents of such writing, without producing it; the rule being that where the objection arises on the *voir dire*, it may be removed on the *voir dire*.[1] If, however, the witness produces the writing, it must be read, being the best evidence.[2]

§ 563 *k* [96]. **Admissions of Opponent.** It may be proper, in this place, to consider the question, whether a verbal admission of the contents of a writing, by the party himself, will supersede the necessity of giving notice to produce it; or, in other words, whether such admission, being made against the party's own interest, can be used, as primary evidence of the contents of the writing, against him and those claiming under him. Upon this question, there appears some discrepancy in the authorities at *Nisi Prius*.[1]

[1] Phil. & Am. on Evid. 149; 1 Phil. Evid. 154, 155; Butchers' Co. *v.* Jones, 1 Esp. 160; Botham *v.* Swingler, ib. 164; R. *v.* Gisburn, 15 East 57; Carlisle *v.* Eady, 1 C. & P. 234, n.; Miller *v.* Mariner's Church, 7 Greenl. 51; Sewell *v.* Stubbs, 1 C. & P. 73; [Macdonnell *v.* Evans, 11 C. B. 930, 937; Robertson *v.* Allen, 16 Ala. 106; Babcock *v.* Smith, 31 Ill. 57; Oaks *v.* Weller, 16 Vt. 63.]

[2] Butler *v.* Carver, 2 Stark. 434. A distinction has been taken between cases where the competency appears from the examination of the witness, and those where it is already apparent from the record, without his examination; and it has been held that the latter case falls within the rule, and not within the exception, and that the writing which restores the competency must be produced. See *acc.* Goodhay *v.* Hendry, 1 M. & M. 319, per Best, C. J., and id. 321, n., per Tindal, C. J. But see Carlisle *v.* Eady, 1 C. & P. 234, per Parke, J.; Wandless *v.* Cawthorne, 1 M. & M. 321, n., per Parke, J.; [Lunniss *v.* Row, 10 A. & E. 606,] *contra*. See 1 Phil. Evid. 154, 155.

[1] Phil. & Am. on Evid. 363, 364; 1 Phil. Evid. 346, 347; see the Monthly Law Magazine, vol. v. pp. 175–187, where this point is distinctly treated. [In England the decision in Slatterie *v.* Pooley, 6 M. & W. 664, is in favor of the use of such admissions without the writing's production. Slatterie *v.* Pooley has been followed in England, though sometimes with misgivings: King *v.* Cole, 2 Exch. 628; Murray *v.* Gregory, 5 id. 467; Boulter *v.* Peplow, 9 C. B. 493; R. *v.* Basingstoke, 14 Q. B. 611; Pritchard *v.* Bagshawe, 11 C. B. 459; Sanders *v.* Karnell, 1 F. & F. 356. It is not followed in Ireland: Lawless *v.* Queale, 8 Ir. L. R. 382; Parsons *v.* Purcell, 12 id. 90. In the United States, there are three views represented; the majority of Courts agree with the English doctrine: Morey *v.* Hoyt, 62 Conn. 542; Blackington *v.* Rockland, 66 Me. 332 (in part); Com. *v.* Wesley, 166 Mass. 248; Williams *v.* Brickell, 37 Miss. 682; Edwards *v.* Tracy, 62 Pa. 375, *semble;* Dunbar *v.* U. S., 156 U. S. 185; Taylor *v.* Peck, 21 Gratt. 11; a few Courts repudiate the doctrine: Haliburton *v.* Fletcher, 22 Ark. 453; Grimes *v.* Fall, 15 Cal. 63; Fox *v.* People, 95 Ill. 71; Cornet *v.* Bertelsmann, 61 Mo. 118 (in part); and a few Courts allow such admissions to be used if the document is not in the offeror's power to produce: Flournay *v.* Newton, 8 Ga. 306; Griffith *v.* Huston, 7 J. J. Marsh. 385; Mandeville *v.* Reynolds, 68 N. Y. 528. For the reasons *pro* and *con* upon the policy of using such evidence, see the

But it is to be observed that there is a material difference between proving the execution of an attested instrument, when produced, and proving the party's admission that by a written instrument, which is not produced, a certain act was done. In the former case, the law is well settled, as we shall hereafter show, that when an attested instrument is in court, and its execution is to be proved against a hostile party, an admission on his part, unless made with a view to the trial of that cause, is not sufficient. This rule is founded on reasons peculiar to the class of cases to which it is applied. A distinction is also to be observed between a *confessio juris* and a *confessio facti*. If the admission is of the former nature, it falls within the rule already considered, and is not received;[2] for the party may not know the legal effect of the instrument, and his admission of its nature and effect may be exceedingly erroneous. But where the existence, and not the formal execution, of a writing is the subject of inquiry, or where the writing is collateral to the principal facts, and it is on these facts that the claim is founded, the better opinion seems to be that the confession of the party, precisely identified, is admissible as primary evidence of the facts recited in the writing; though it is less satisfactory than the writing itself.[3] Very great weight ought not to be attached to evidence of what a party has been supposed to have said; as it frequently happens, not only that the witness has misunderstood what the party said, but that, by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party actually did say.[4] Upon this distinction the adjudged cases seem chiefly to turn. Thus, where, in an action by the assignees of a bankrupt for infringing a patent-right standing in his name, the defendant proposed to prove the oral declaration of the bankrupt that by certain deeds an interest in the patent-right had been conveyed by him to a stranger, the evidence was properly rejected; for it involved an opinion of the party upon the legal effect of the deeds.[5] On the other hand, it has been held that the fact of the tenancy of an estate, or that one person, at a certain time, occupied it as the tenant of a cer-

opinions of Parke, B., in Slatterie *v.* Pooley, and Pennefather, C. J., in Lawless *v.* Queale.

Distinguish (1) the question whether a *witness'* admissions on the stand, as to the contents of a writing of his, will suffice on cross-examination without producing the writing, *ante*, § 463; (2) the cases mentioned in §§ 563 *l*, 563 *o*, *post*.]

[2] *Supra*, § 86; Moore *v.* Hitchcock, 4 Wend. 292, 298, 299; Paine *v.* Tucker, 7 Shepl. 138.

[3] Howard *v.* Smith, 3 Scott N. R. 574; Smith *v.* Palmer, 6 Cush. 515. [The author seems here to be dealing with the question noted, *post*, § 563 *o*, *i. e.* the admission of a fact independent of the contents of a document.]

[4] Per Parke, J., in Earle *v.* Picken, 5 C. & P. 542, n. See also 1 Stark. Evid. 35, 36; 2 id. 17; *infra*, §§ 200, 203; Ph. & Am. on Evid. 391, 392; 1 Phil. Evid. 372.

[5] Bloxam *v.* Elsie, 1 C. & P. 558; s. c. Ry. & M. 187. See to the same point, R. *v.* Hube, Peake 132; Thomas *v.* Ansley, 6 Esp. 80; Scott *v.* Clare, 3 Campb. 236; R. *v.* Careinion, 8 East 77; Harrison *v.* More, Phil. & Am. on Evid. 365, n.; 1 Phil. Evid. 347, n.; R. *v.* Inhabitants of Castle Morton, 3 B. & Ald. 588.

tain other person, may be proved by oral testimony. But if the terms of the contract are in controversy, and they are contained in a writing, the instrument itself must be produced.[6]

§ 563 *l* [97]. There is a class of cases, which seem to be exceptions to this rule, and to favor the doctrine that oral declarations of a party to an instrument, as to its contents or effect, may be shown as a substitute for direct proof by the writing itself. But these cases stand on a different principle, namely, that where the admission involves the material fact *in pais*, as well as a matter of law, the latter shall not operate to exclude evidence of the fact from the jury. It is merely placed in the same predicament with mixed questions of law and fact, which are always left to the jury, under the advice and instructions of the Court.[1] Thus, where the plaintiff in ejectment had verbally declared that he had "sold the lease," under which he claimed title, to a stranger, evidence of this declaration was admitted against him.[2] It involved the fact of the making of an instrument called an assignment of the lease, and of the delivery of it to the assignee, as well as the legal effect of the writing. So, also, similar proof has been received, that the party was "possessed of a leasehold,"[3] "held a note,"[4] "had dissolved a partnership," which was created by deed,[5] and that the indorser of a dishonored bill of exchange admitted that it had been "duly protested."[6] What the party has stated in his answer in Chancery is admissible on other grounds; namely, that it is a solemn declaration under oath in a judicial proceeding, and that the legal effect of the instrument is stated under the advice of counsel learned in the law. So, also, where both the existence and the legal effect of one deed are recited in another, the solemnity of the act, and the usual aid of counsel, take the case out of the reason of the general rule, and justify the admission of such recital, as satisfactory evidence of the legal effect of the instrument, as well as conclusive proof of its execution.[7] There are other cases which may seem, at first view, to constitute exceptions to the present rule, but in which the declarations of the party were admissible, either as contemporaneous with the act done,

[6] Brewer *v.* Palmer, 3 Esp. 213; R. *v.* Inhabitants of Holy Trinity, 7 B. & C. 611; s. c. 1 Man. & Ry. 444; Strother *v.* Barr, 5 Bing. 136; Ramsbottom *v.* Tunbridge, 2 M. & S. 434; [see *post*, § 563 *o*.]

[1] U. S. *v.* Battiste, 2 Sumn. 240. And see Newton *v.* Belcher, 12 Q. B. 921.

[2] Doe d. Lowden *v.* Watson, 2 Stark. 230.

[3] Digby *v.* Steel, 3 Campb. 115.

[4] Sewell *v.* Stubbs, 1 C. & P. 73.

[5] Doe d. Waithman *v.* Miles, 1 Stark. 181; 4 Campb. 375.

[6] Gibbons *v.* Coggon, 2 Campb. 188. Whether an admission of the counterfeit character of a bank-note, which the party had passed, is sufficient evidence of the fact, without producing the note, *quære;* and see Com. *v.* Bigelow, 8 Met. 235.

[In all these cases the author seems to be dealing with the question noted *post*, § 563 *o*.]

[7] Ashmore *v.* Hardy, 7 C. & P. 501; Digby *v.* Steel, 3 Campb. 115; Burleigh *v.* Stibbs, 5 T. R. 465; West *v.* Davis, 7 East 363; Paul *v.* Meek, 2 Y. & J. 116; Breton *v.* Cope, Peake 30.

and expounding its character, thus being part of the *res gestæ;* or, as establishing a collateral fact, independent of the written instrument. Of this sort was the declaration of a bankrupt, upon his return to his house, that he had been absent in order to avoid a writ issued against him;[8] the oral acknowledgment of a debt for which an unstamped note had been given;[9] and the oral admission of the party, that he was in fact a member of a society created by deed, and had done certain acts in that capacity.[10]

§ 563 *m*. **Sundry Exceptions.** [In a few other classes of cases, exceptions to the rule have been said to exist. (*a*) It is sometimes said that the rule is not enforced where the document is *collateral* to the issue.[1] There seems to be no genuine and established exception to this effect; the cases in which such an explanation is advanced as the reason may almost all be justified equally well upon the principle of § 563 *o*, *post*, *i. e.* that the rule has no application in cases where the offer is to prove, not the contents of the document, but some other fact independent of the contents. Such a fact may perhaps be termed a "collateral" fact, but the rule in hand does not apply to such facts, and therefore no exception to the rule need be invoked in order to prove them. (*b*) The rule in *The Queen's Case* (*ante*, § 463) denies the propriety of making an exception to the rule in hand where a witness is on cross-examination asked about the contents of a writing of his for the purpose of discrediting him by the writing. The propriety of this ruling and the state of the law is examined under that head. (*c*) The proof of a conviction of crime, for the purpose of discrediting a witness, involves the contents of the record of conviction; and at common law it was therefore usually held that the record or a copy of it must be produced. But by statute, almost universally, this has been changed, and the proof allowed to be made by the testimony of the witness himself on cross-examination (*ante*, § 461 *b*).]

(2) (*c*) *Rule not Applicable.*

[The rule requiring that a writing be itself produced or its absence accounted for, whenever its contents are to be proved, does not apply to an offer to prove a fact other than the contents of a writing; hence, proof of such other fact may be made irrespective of the rule in question, — not because of an exception to the rule, but because such cases are without the scope of the rule. It is thus necessary to examine the scope and boundaries of the rule in these respects. Three general sorts of questions arise: (1) What is to be regarded as a "writing"? (2) When is the object of proof the "contents" of a writing? (3) What is "the" writing whose contents are to be proved?]

[8] Newman *v.* Stretch, 1 M. & M. 338.
[9] Singleton *v.* Barrett, 2 C. & J. 368.
[10] Alderson *v.* Clay, 1 Stark. 405; Harvey *v.* Kay, 9 B. & C. 356.
[1] [See *ante*, §§ 89, 90, 563 *l*, and cases cited.]

§ 563 *n*. **Writings, as distinguished from other Objects.** [The policy of requiring the production of a writing, but not of other things than writings, seems to rest on the possibilities of error in remembering specific words and phrases, and the important effects that may depend upon such errors. As a general policy, there can be no doubt of its propriety; and so far as concerns things not writings, nor bearing writing upon them, it may be regarded as settled that the rule does not apply.[1] But sometimes a thing not a document bears inscribed upon it words or marks communicating intelligence, the inscription being either a mere identifying circumstance or so brief and simple that there can be no greater possibility of error about it than about the other non-inscriptional features of the object. In such cases, should the rule be regarded as applying? Here there is no semblance of agreement in the rulings; perhaps the most satisfactory solution would be to leave the matter to the discretion of the trial Court.[2]]

§ 563 *o*. **Contents of a Writing, as distinguished from other Facts.** [The rule requiring production of the writing applies only where it is desired to prove the contents of the writing. It follows that the proof of other facts, more or less concerned with the writing, but not involving its contents, may be proved without production. This is sometimes expressed by saying that for proof of "collateral" facts production is not required.[1] The difficulty lies in applying the principle, and it is as impossible to reconcile the cases as it is natural to see why there may be difference of opinion in the solution of a given instance.[2] Whether a person may testify, without producing the appropriate document, to the fact of his ownership of property,[3] or of his tenancy,[4]

[1] [R. *v.* Francis, L. R. 2 C. C. R. 128 (counterfeit ring); Lucas *v.* Williams, 1892, 2 Q. B. 113 (painting); Clarke *v.* Robinson, 5 B. Monr. 55 (slave); Com. *v.* Pope, 103 Mass. 440 (clothes); Com. *v.* Welch, 134 id. 473 (liquor-tumbler). Lewis *v.* Hartley, 7 C. & P. 405, is hardly sound.]

[2] [Production not required: Feilding's Trial, 13 How. St. Tr. 1347; Burrell *v.* North, 2 C. & K. 680, *semble;* Com. *v.* Blood, 11 Gray 74. Production required: R. *v.* Johnson, 7 East 65, 29 How. St. Tr. 437; R. *v.* Hinley, 1 Cox Cr. 13; R. *v.* Farr, 4 F. & F. 336; State *v.* Osborn, 1 Root 152; State *v.* Blodget, ib. 534; Whitney *v.* State, 10 Ind. 404; Frazee *v.* State, 58 id. 8; Caldwell *v.* State, 63 id. 283; Wright *v.* State, Md., 41 Atl. 795. The ruling in R. *v.* Hunt, 3 B. & Ald. 566, 1 St. Tr. N. S. 171, 232, 252, that banners bearing alleged treasonable inscriptions need not be produced, seems unsound, and has been disapproved: Butler *v.* Mountgarret, 6 H. L. C. 639; R. *v.* Hinley, *supra*.]

[1] [Such a phrasing, perhaps not incorrect, though not lucid, is to be distinguished from the statement that the rule does not apply where the writing's contents are only "collaterally" or incidentally in issue; this seems unsound, though it is sometimes enforced in rulings.]

[2] [See other citations *ante*, §§ 563 7, 89, 90.]

[3] [*Accord:* Street *v.* Nelson, 67 Ala. 504; Gallagher *v.* Assur. Co., Pa., 24 Atl. 115; *contra:* Westfield Cigar Co. *v.* Ins. Co., 169 Mass. 382; Kirkpatrick *v.* Clark, 132 Ill. 342.]

[4] [*Accord:* Taylor *v.* Peck, 21 Gratt. 11; Central R. Co. *v.* Whitehead, 74 Ga. 441; *contra:* Gilbert *v.* Kennedy, 22 Mich. 5, 18; Putnam *v.* Goodell, 31 N. H. 419. When the terms of the lease are involved, the lease must be produced; but this line of distinction is not easy to apply; compare R. *v.* Holy Trinity, 7 B. & C. 611; Strother *v.* Barr, 5 Bing. 136; R. *v.* Merthyr Tidvil, 1 B. & Ad. 29.]

or of a transfer of land,[5] or of a transfer of personalty,[6] has been variously treated by the Courts. The fact of payment, it is generally said, may be shown without production;[7] so also the fact of a notice's delivery or publication (though not its terms).[8] In an action for conversion of a document, the fact of conversion, it would seem, may be shown without production;[9] though the same result may also be reached on the principle (*ante*, § 563 *c*) that the pleading gives notice to the opponent, and thus the rule requiring production is satisfied.[10]]

§ 563 *p*. **What Writing is the Original to be proved.** [The rule applies to the proof of the contents of whatever writing is desired to be proved. In the course of a transaction more than one document may play a part; and the substantive law determining the issues in the case will usually indicate which one is to be the objective of proof for the purpose in hand; the rule will then apply to that document only, and the others need not be accounted for. Since the solution will thus depend mainly on the issues in the case, and the purpose of the proof under those issues, only a few illustrations of the chief applications of the principle need be given. Where the contents of a telegram are to be proved, it will depend upon the law of contracts and the precise purpose in hand whether the dispatch as given to the operator or the dispatch as delivered to the addressee is the original to be accounted for.[1] Where printed numbers of a book or newspaper are concerned, the number to be proved will depend on the kind of issue, — whether an action against a reporter or a publisher for libel, or against a printer for services, or against a publisher for infringement of copyright, and so on.[2] Where the title to land is in issue, the substantive law will indicate whether a land-grant or land-patent is to be regarded as the original document of title or merely as a certified

[5] [*Accord:* Showman *v.* Lee, 86 Mich. 556; *contra:* Primrose *v.* Browing, 56 Ga. 369.]

[6] [*Accord:* Davis *v.* Reynolds, 1 Stark. 115; Sirrine *v.* Briggs, 31 Mich. 443; *contra:* Price *v.* Wolfer, Or., 52 Pac. 759.]

[7] [Chambers *v.* Hunt, 22 N. J. L. 552; Cramer *v.* Shrimer, 18 Md. 140; Whiteside *v.* Hoskins, 20 Mont. 361; Davidson *v.* Peck, 4 Mo. 438 (leading case). Where payment is by written instrument, a different result may be reached; see Breton *v.* Cope, Peake 30; Coonrod *v.* Madden, 126 Ind. 197.]

[8] [Lingle *v.* Chicago, 172 Ill. 170; Rutl. & B. R. Co. *v.* Thrall, 35 Vt. 536.]

[9] [Scott *v.* Jones, 4 Taunt. 865; Bucher *v.* Jarratt, 3 B. & B. 143 (leading case); so also for an action against a bailee for loss of papers: First N. B'k of B. *v.* First N. B'k of N., Ala., 22 So. 976.]

[10] [See citations in § 563 *c*.]

[1] [See R. *v.* Regan, 16 Cox Cr. 203; Whilden *v.* Bank, 64 Ala. 1, 13, 30; West U. Tel. Co. *v.* Blance, 94 Ga. 431; Anheuser-Busch B. Ass'n *v.* Hutmacher, 127 Ill. 651; Riordan *v.* Guggerty, 74 Ia. 688; West. U. Tel. Co. *v.* Hopkins, 49 Ind. 223; Nickerson *v.* Spindell, 164 Mass. 25; Wilson *v.* R. Co., 31 Minn. 481; Williams *v.* Brickell, 37 Miss. 682; Oregon S. Co. *v.* Otis, 14 Abb. N. C. 388; 100 N. Y. 446; U. S. *v.* Dunbar, 60 Fed. 75; Durkee *v.* R. Co., 29 Vt. 127 (leading case); State *v.* Hopkins, 50 id. 316.]

[2] [See R. *v.* Watson, 2 Stark. 116; Adams *v.* Kelly, Ry. & Mo. 157; Johnson *v.* Morgan, 7 A. & E. 233; Boosey *v.* Davidson, 13 Q. B. 257; McGrath *v.* Cox, 3 U. C. Q. B. 332; compare note 5, *post*.]

copy of the original.[3] It may further be noticed that when documents of title or obligation are made in counterpart, each counterpart is usually to be regarded as an original;[4] that, on the same principle, identical impressions from the same type-setting of a printing-machine will ordinarily (unless a particular copy is fixed upon by the issues) be regarded as equally originals in regard to each other;[5] and that a letter-press copy is never regarded as equivalent to the letter itself.[6]]

2 (*d*) *Kinds of Secondary Evidence.*

§ 563 *q*. **Preferred Copies.**[1] Whether the law recognizes any degrees in the various kinds of secondary evidence, and requires the party offering that which is deemed less certain and satisfactory first to show that nothing better is in his power, is a question which is not yet perfectly settled. On the one hand, the affirmative is urged as an equitable extension of the principle which postpones all secondary evidence, until the absence of the primary is accounted for; and it is said that the same reason which requires the production of a writing, if within the power of a party, also requires that, if the writing is lost, its contents shall be proved by a copy, if in existence, rather than by the memory of a witness who has read it; and that the secondary proof of a lost deed ought to be marshalled into, first, the counterpart; secondly, a copy; thirdly, the abstract, etc.; and, last of all, the memory of a witness.[2] On the other hand, it is said that this argument for the extension of the rule confounds all distinction between the weight of evidence and its legal admissibility; that the rule is founded upon the nature of the evidence offered, and not upon its strength or weakness; and that to carry it to the length of establishing degrees in secondary evidence, as fixed rules of law, would often tend to the subversion of justice, and always be productive of inconvenience. If, for example, proof of the existence of an abstract of a deed will exclude oral evidence of its contents, this proof may be withheld by the adverse party until the moment of trial, and the other

[3] [See Minor *v.* Tillotson, 7 Pet. 99; U. S. *v.* Percheman, ib. 51, 78; U. S. *v.* Sutter, 21 How. 170; U. S. *v.* Castro, 24 id. 346.
See other instructive instances of the general principle, in State *v.* Halstead, 73 Ia. 376; Misso. P. R. Co. *v.* Palmer, Nebr., 76 N. W. 169; Fox *v.* Lambson, 8 N. J. L. 275; Kelly *v.* Elevator Co., N. D., 75 N. W. 264; State *v.* McCauley, 17 Wash. 88.]

[4] [Doe *v.* Palmer, 3 Q. B. 622; {Gardner *v.* Eberhart, 82 Ill. 316; Brown *v.* Woodman, 6 C. & P. 206; Colling *v.* Tremeck, 6 B. & C. 398; Cleveland R. Co. *v.* Perkins, 17 Mich. 296; Hubbard *v.* Russell, 24 Barb. 404; State *v.* Gurnee, 14 Kan. 111; Dyer *v.* Fredericks, 63 Me. 173, 592; Roe *v.* Davis, 7 East 362; Houghton *v.* Koenig, 18 C. B. 235; Mann *v.* Godbold, 3 Bing. 292.} The same principle has been applied to notices made out in duplicate: Philipson *v.* Chase, 2 Campb. 110; Hollenbeck *v.* Stanberry, 38 Ia. 325; compare § 563 *b*, *ante*.]

[5] [See R. *v.* Watson, *supra*, note 2, and other cases in that note.]

[6] [Nodin *v.* Murray, 2 Campb. 228; Spottiswood *v.* Weir, 66 Cal. 525; King *v.* Worthington, 73 Ill. 161; Traber *v.* Hicks, 131 Mo. 180.]

[1] [The following text of the author was originally placed as a note to § 84, *ante*.]

[2] Ludlam, *ex dem.* Hunt, Lofft 362.

side be defeated, or the cause be greatly delayed; and the same mischief may be repeated, through all the different degrees of the evidence. It is therefore insisted, that the rule of exclusion ought to be restricted to such evidence only as upon its face discloses the existence of better proof; and that, where the evidence is not of this nature, it is to be received, notwithstanding it may be shown from other sources that the party might have offered that which was more satisfactory; leaving the weight of the evidence to be judged of by the jury under all the circumstances of the case.[3] Among the cases cited in support of the affirmative side of the question, there is no one in which this particular point appears to have been expressly adjudged, though in several of them [4] it has been passingly adverted to as a familiar doctrine of the law. On the other hand, the existence of any degrees in secondary evidence was doubted by Patterson, J.,[5] and expressly denied by Parke, J.;[6] and in the more recent case of *Doe d. Gilbert* v. *Ross*, in the Exchequer, where proper notice to produce an original document had been given without success, it was held that the party giving the notice was not afterwards restricted as to the nature of the secondary evidence he would produce of the contents of the document; and, therefore, having offered an attested copy of the deed in that case, which was inadmissible in itself for want of a stamp, it was held that it was competent for him to abandon that mode of proof, and to resort to parol testimony, there being no degrees in secondary evidence; for when once the original is accounted for, any secondary evidence whatever may be resorted to by the party seeking to use the same.[7] The American doctrine, as deduced from various authorities, seems to be this, that if, from the nature of the case itself, it is manifest that a more satisfactory kind of secondary evidence exists, the party will be required to produce it; but that, where the nature of the case does not of itself disclose the existence of such better evidence, the objector must not only prove its existence, but also must prove that it was known to the other party in season to have been produced at the trial. Thus, where the record of a conviction was destroyed, oral proof of its existence was rejected, because the law required a transcript to be sent to the Court of Ex-

[3] See 4 Monthly Law Mag. 265–279.

[4] As in Sir E. Seymour's Case, 10 Mod. 8; Villiers *v.* Villiers, 2 Atk. 71; Rowlandson *v.* Wainwright, 1 Nev. & Per. 8; and others.

[5] In Rowlandson *v.* Wainwright, *supra;* tacitly denied by the same judge in Coyle *v.* Cole, 6 C. & P. 359, and by Parke, J., in R. *v.* Fursey, ib. 81; and by the Court in R. *v.* Hunt, 3 B. & Ald. 446.

[6] In Brown *v.* Woodman, 6 C. & P. 206; see also Hall *v.* Ball, 3 Scott N. R. 577.

[7] See Doe *v.* Ross, 8 Dowl. 389; s. c. 7 M. & W. 102; Doe *v.* Jack, 1 Allen 476, 483; {see Hall *v.* Ball, 3 M. & G. 242; Brown *v.* Woodman, 6 C. & P. 206; Jeans *v.* Wheedon, 2 M. & Rob. 486; Brown *v.* Brown, 27 L. J. Q. B. 173; Quick *v.* Quick, 33 L. J. P. & M. 146; Johnson *v.* Lyford, 37 id. 65.} [But the original English doctrine seems to have gone so far as to prefer a certified or examined copy of a record to oral testimony by recollection: Stillingfleet *v.* Parker, 6 Mod. 248; and this seems to be conceded as still the law by Lord Abinger, in Doe *v.* Ross, *supra.*]

chequer, which was better evidence.[8] In all these and the like cases, the nature of the fact to be proved plainly discloses the existence of some evidence in writing, of an official character, more satisfactory than mere oral proof; and therefore the production of such evidence is demanded.[9] But where there is no ground for legal presumption that better secondary evidence exists, any proof is received which is not inadmissible by other rules of law; unless the objecting party can show that better evidence was previously known to the other, and might have been produced; thus subjecting him, by positive proof, to the same imputation of fraud which the law itself presumes when primary evidence is withheld. Thus, where a notarial copy was called for, as the best evidence of the contents of a lost note, the Court held, that it was sufficient for the party to prove the note by the best evidence actually in his power; and that to require a notarial copy would be to demand that of the existence of which there was no evidence, and which the law would not presume was in the power of the party, it not being necessary that a promissory note should be protested.[10] [According, then, to the so-called American rule, (1) a certified or examined copy of a public record is preferred to oral testimony of contents (though this has perhaps not ceased to be the rule in England also);[11] (2) any written copy of a private instrument is, if it exists, preferred to oral testimony (though this is probably the law in only a minority of jurisdictions);[12] but (3) no preference is demanded for a certified copy over a sworn or examined copy.[13]]

§ 563 *r*. **Copy of a Copy.** [It has sometimes been said that a copy of a copy is not admissible; such testimony being, in the language of Baron Alderson,[1] "but the shadow of a shade." But this rule "is correct in itself when properly understood and limited to its true sense."[2] (1) It seems to have effect in two instances, not

[8] Hilts *v.* Colvin, 14 Johns. 182; see also Battles *v.* Holley, 6 Greenl. 145; Cook *v.* Wood, 1 McCord 139; Lyons *v.* Gregory, 3 Hen. & Munf. 237; Lowry *v.* Cady, 4 Vt. 504; Doe *v.* Greenlee, 3 Hawks 281.

[9] Such also is the view taken by Ch. B. Gilbert. See Gilb. Evid. by Lofft, p. 5. See also Collins *v.* Maule, 8 C. & P. 502; Everingham *v.* Roundell, 2 M. & Rob. 138; Harvey *v.* Thomas, 10 Watts 63; [compare note 7, *ante*.]

[10] Renner *v.* Bank of Columbia, 9 Wheat. 582, 587; Denn *v.* McAllister, 2 Halst. 46, 53; U. S. *v.* Britton, 2 Mason 464, 468. But where it was proved that a copy existed of a note, he was held bound to prove it by the copy: U. S. *v.* Britton, *supra*.

[11] [Harvey *v.* Thorpe, 28 Ala. 250 (leading case); Redd *v.* State, Ark., 47 S. W. 119; Bowden *v.* Achor, 95 Ga. 243; Mariner *v.* Saunders, 10 Ill. 113; Horseman *v.* Todhunter, 12 Ia. 230;] {see also Graham *v.* Campbell, 56 Ga. 258; Williams *v.* Waters, 36 id. 454; Illinois Co. *v.* Bonner, 75 Ill. 315; Nason *v.* Jordon, 62 Me. 480; Cornet *v.* Williams, 20 Wall. 226; Winn *v.* Patterson, 9 Pet. 663.}

[12] [*Accord:* Smith *v.* Axtell, 1 N. J. L. 494; Stevenson *v.* Hoy, 43 Pa. 191; *contra*, Jacques *v.* Horton, 76 Ala. 238; Carpenter *v.* Dame, 10 Ind. 125; Eslow *v.* Mitchell, 26 Mich. 500; Minneap. T. Co. *v.* Nimocks, 53 Minn. 381; Goodrich *v.* Weston, 102 Mass. 362.]

[13] [Blackman *v.* Dowling, 57 Ala. 78; Otto *v.* Trump, 115 Pa. 425; compare *ante*, §§ 485, 488, 514.]

[1] [Everingham *v.* Roundell, 2 Moo. & Rob. 138.]

[2] [Story, J., in Winn *v.* Patterson, 9 Pet. 663, 677.]

depending on the same principle: first, when the copy offered is "a copy of a copy from a record, the record being still in existence," [3] and the same rule seems to apply to a copy of a copy of any other original still in existence; [4] secondly, when the copy from which the offered copy is taken is not shown to be correct, in which case the offered copy is defective simply because it does not yet appear to be a copy.[5] (2) But even in these cases the offered copy may be made admissible by directly connecting it with the original, either by having compared it anew with the original,[6] or by using it to refresh one's memory (*ante*, § 439 *b*) of the original.[7] (3) Although the record of a conveyance is usually regarded as only an official copy of an original, the present rule does not forbid the use of a copy of the record [8] or of a re-record.[9]]

3. *Alteration of Documents.*

§ 564. **Presumption as to Time of Alteration.** If, on the production of the instrument, it appears to have been altered, it is incumbent on the party offering it in evidence to explain this appearance.[1] Every alteration on the face of a written instrument detracts from its credit, and renders it suspicious; and this suspicion the party claiming under it is ordinarily held bound to remove.[2] If the alteration is noted in the attestation clause as having been made before the execution of the instrument, it is sufficiently accounted for, and the instrument is relieved from that suspicion. And if it appears in the same handwriting and ink with the body of the instrument, it may suffice. So, if the alteration is against the interest of the party deriving title under the instrument, as, if it be a bond or note, altered to a less sum, the law does not so far presume that it was improperly made as

[3] [Winn *v.* Patterson, *supra;* Cameron *v.* Peck, 37 Conn. 763; Goodrich *v.* Weston, 102 Mass. 362; Drumm *v.* Cessnun, 58 Kan. 331. Thus, if the original record is destroyed, the copy of a certified copy is admissible: Smith *v.* Lindsey, 89 Mo. 76; Howard *v.* Quattlebaum, 46 S. C. 95; see Cornett *v.* Williams, 20 Wall. 226, 245.]

[4] [Winn *v.* Patterson, Cameron *v.* Peck, *supra; contra:* Goodrich *v.* Weston, *supra.*]

[5] [Fowler *v.* Hoffman, 31 Mich. 215; Crane Co. *v.* Tierney, Ill., 51 N. E. 715.]

[6] [Gregory *v.* McPherson, 13 Cal. 562, 574.]

[7] [Dunlap *v.* Berry, 5 Ill. 326; Fowler *v.* Hoffman, *supra.*]

[8] [Stetson *v.* Gulliver, 2 Cush. 494; Winn *v.* Patterson, *supra.*]

[9] [Crispen *v.* Hannavan, 72 Mo. 548, 556.]

[1] The Roman civil law on the subject of alterations agrees in the main with the common law; but the latter, in this as in other cases, has greatly the advantage, in its facility of adaptation to the actual state of the facts. The general rule is the same in both codes: Mascard. vol. iv, Concl. 1261, n. 1–24.

[2] Perk. Conv. 55; Henman *v.* Dickinson, 5 Bing. 183, 184; Knight *v.* Clements, 8 Ad. & El. 215; Newcomb *v.* Presbrey, 8 Met. 406. But where a farm was devised from year to year by parol, and afterwards an agreement was signed, containing stipulations as to the mode of tillage, for breach of which an action was brought, and, on producing the agreement, it appeared that the term of years had been written "seven," but altered to "fourteen;" it was held that this alteration, being immaterial to the parol contract, need not be explained by the plaintiff: Earl of Falmouth *v.* Roberts, 9 M. & W. 469. See further, Cariss *v.* Tattersall, 2 Man. & Gr. 890; Clifford *v.* Parker, ib. 909.

to throw on him the burden of accounting for it.[3] And, generally speaking, if nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument.[4] But if any ground of suspicion is apparent upon the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done as well as that of the person by whom, and the intent with which, the alteration was made, as matters of fact, to be ultimately found by the jury upon proofs to be adduced by the party offering the instrument in evidence. The cases on this subject are not in perfect harmony; but they are understood fully to support the doctrine just stated. They all agree, that where any suspicion is raised as to the genuineness of an altered instrument, whether it be apparent upon inspection, or made so by extraneous evidence, the party producing the instrument, and claiming under it, is bound to remove the suspicion by accounting for the alteration. It is also generally agreed, that inasmuch as fraud is never to be presumed, therefore, if no particular circumstances of suspicion attach to an altered instrument, the alteration is to be presumed innocent, or made prior to its execution.[5] But an exception to this rule of the presumption of innocence seems to be admitted in the case of negotiable paper; it having been held that the party producing and claiming under the paper is bound to explain every apparent and material alteration, the operation of which would be in his own favor.[6] Another exception has been allowed, where the instrument is, by

[3] Bailey *v.* Taylor, 11 Conn. 531; Coulson *v.* Walton, 9 Pet. 62.

[4] Trowel *v.* Castle, 1 Keb. 22; Fitzgerald *v.* Fauconberge, Fitzg. 207, 213; Co. Lit. 225 *b*; Doe *v.* Catamore, 15 Jur. 728; 5 Eng. L. & Eq. 349; Bailey *v.* Taylor, 11 Conn. 531, 534; Gooch *v.* Bryant, 1 Shepl. 386, 390; Crabtree *v.* Clark, 7 id. 337; Vanhorne *v.* Dorrance, 2 Dall. 306; and see Pullen *v.* Hutchinson, 12 Shepl. 249, 254; Wikoff's Appeal, 3 Am. Law Jour. N. S. 493, 503.

The reporter's marginal notes in Burgoyne *v.* Showler, 1 Robb. Eccl. 5, and Cooper *v.* Bockett, 4 Moore P. C. C. 419, state the broad proposition, that alterations in a *will*, not accounted for, are *prima facie* presumed to have been made after its execution. But, on examination of these cases, they are found to turn entirely on the provisions of the Statute of Wills, 1 Vict., c. 26, § 21, which directs that all alterations, made before the execution of the will, be noted in a memorandum upon the will, and attested by the testator and witnesses; if this direction is not complied with, it may well be presumed that the alterations were subsequently made; and so it was held, upon the language of that statute, and of the Statute of Frauds respecting wills, in Doe *v.* Palmer, 15 Jur. 836, 839; in which the case of Cooper *v.* Bockett was cited by Lord Campbell, and approved, upon the ground of the statute.

[5] Gooch *v.* Bryant, 1 Shepl. 386; Crabtree *v.* Clark, 7 id. 337; Wickes *v.* Caulk, 5 H. & J. 41; Gillet *v.* Sweat, 1 Gilm. 475; Doe *v.* Catamore, 15 Jur. 728; 5 Eng. Law & Eq. 349; Co. Lit. 225 *b*, note by Butler; {Boothby *v.* Stanley, 34 Me. 515; North River Meadow Co. *v.* Shrewsbury Church, 2 N. J. Eq. 424.} In Jackson *v.* Osborn, 2 Wend. 555, it was held that the party claiming under a deed was bound to account for the alterations in it, and that no presumption was to be made in its favor; but in Bailey *v.* Taylor, 11 Conn. 531, it was held that nothing was to be presumed either way, but the question was to be submitted freely to the jury.

[6] Knight *v.* Clements, 8 Ad. & El. 215; Clifford *v.* Parker, 2 M. & G. 909; Simpson *v.* Stackhouse, 9 Barr 186; McMicken *v.* Beauchamp, 2 Miller La. 290; see also Henman *v.* Dickinson, 5 Bing. 183; Bishop *v.* Chambre, 3 C. & P. 55; Humphreys *v.* Guillow, 13 N. H. 385; Hills *v.* Barnes, 11 id. 395; Taylor *v.* Mosely, 6 C. & P. 273;

the rules of practice, to be received as genuine, unless its genuineness is denied on oath by the party, and he does so; for his oath is deemed sufficient to destroy the presumption of innocence in regard to the alteration, and to place the instrument in the condition of a suspected paper.[7]

[But the modern tendency is to avoid stating the problem in the form of such a rule with its exceptions, and, in particular, to abandon the so-called presumption against fraud and in favor of innocence, by which the alteration of a deed is presumed to have been made before execution; and to raise no genuine presumption (*ante*, § 14 *w*) in that regard; so that the burden is determined by the pleadings, and the question usually goes to the jury, upon all the evidence, whether the party having the burden under the pleadings has proved his case.[8] Thus, in an action against a woman as surety to a bond, the date being altered from a time during coverture to a time after coverture ended, the burden was held to be upon the plaintiff to show that the alteration was made before execution;[9] while on a bill to foreclose a mortgage, to which a claim of homestead-exemption was set up, the burden was held to be upon the defendant to show that the words "and homestead," interlined in the mortgage, were inserted after execution.[10] Nevertheless, the older form of statement is still often met with.[11]]

It is also clear, that it is for the Court to determine, in the first instance, whether the alteration is so far accounted for, as to permit the instrument to be read in evidence to the jury, who are the ultimate judges of the fact.[12] But whether, in the absence of all other evidence, the jury may determine the time and character of the alteration from inspection alone, is not universally agreed.[13]

Whitfield *v.* Collingwood, 1 Car. & Kir. 325; Davis *v.* Carlisle, 6 Ala. 707; Walters *v.* Short, 5 Gilm. 252; Cariss *v.* Tattersall, 2 M. & G. 890. But in Davis *v.* Jenney, 1 Met. 221, it was held that the burden of proof was on the defendant; {*contra*, Wilde *v.* Armsby, 6 Cush. 314; see Clark *v.* Eckstein, 22 Pa. St. 507; Paine *v.* Edsell, 19 id. 178.}

[7] Walters *v.* Short, 5 Gilm. 252.

[8] [Ely *v.* Ely, 6 Gray 439; Comstock *v.* Smith, 26 Mich. 306; Hayden *v.* Goodnow, 39 Conn. 164; Hagan *v.* Ins. Co., 81 Ia. 321; Magee *v.* Allison, 94 id. 527; Stough *v.* Ogden, 49 Nebr. 291 ("in the end, a question of fact for the jury upon all of the evidence adduced"); Hunt *v.* Gray, 35 N. J. L. 227; Wolferman *v.* Bell, 6 Wash. 84.]

[9] [Nesbitt *v.* Turner, 155 Pa. 429.]

[10] [Rosenberg *v.* Jett, 72 Fed. 90. See also Pough *v.* Mitchell, 3 D. C. App. 321; Kelly *v.* Thuey, 143 Mo. 422; Courcamp *v.* Weber, 39 Nebr. 533.]

[11] [See Bedgood *v.* McLain, 89 Ga. 793; Foley-Wadsworth Co. *v.* Solomon, 9 S. D. 511; House *v.* Robertson, Tex., 34 S. W. 640; Yakima N. B'k *v.* Knipe, 6 Wash. 348.]

[12] Tillou *v.* Clinton, etc. Ins. Co., 7 Barb. 564; Ross *v.* Gould, 5 Greenl. 204; {see Clark *v.* Eckstein, 22 Pa. 507.}

[13] In some cases they have been permitted to do so: Bailey *v.* Taylor, 11 Conn. 531; Gooch *v.* Bryant, 1 Shepl. 386; Crabtree *v.* Clark, 7 id. 337; Doe *v.* Catamore, 15 Jur. 728; 5 Eng. Law & Eq. 349; Vanhorne *v.* Dorrance, 2 Dall. 306; {Printup *v.* Mitchell, 17 Ga. 558;} and see Wickes *v.* Caulk, 5 H. & J. 41; Pullen *v.* Shaw, 3 Dev. 238; in which last case it was held that where the alteration was apparently against the interest of the holder of the instrument, it should be presumed to have been made prior to its execution. But in some other cases the Courts have required

§ 565. **Effect of Alteration as avoiding the Instrument.**[1] Though the effect of the alteration of a legal instrument is generally discussed with reference to deeds, yet the principle is applicable to all other instruments. The early decisions were chiefly upon deeds, because almost all written engagements were anciently in that form; but they establish the general proposition, that written instruments which are altered, in the legal sense of that term, as hereafter explained, are thereby made void.[2] The grounds of this doctrine are twofold. The first is that of public policy, to prevent fraud, by not permitting a man to take the chance of committing a fraud without running any risk of losing by the event when it is detected.[3] The other is, to insure the identity of the instrument, and prevent the substitution of another without the privity of the party concerned.[4] The instrument derives its legal virtue from its being the sole repository of the agreement of the parties, solemnly adopted as such, and attested by the signature of the party engaging to perform it. Any alteration, therefore, which causes it to speak a language different in legal effect from that which it originally spake, is a material alteration.

§ 566. **Same: Alteration and Spoliation.** A distinction, however, is to be observed between the alteration and the spoliation of an instrument as to the legal consequences. An alteration is an act done upon the instrument by which its meaning or language is changed. If what is written upon or erased from the instrument has no tendency to produce this result, or to mislead any person, it is not an alteration. The term is, at this day, usually applied to the act of the party entitled under the deed or instrument, and imports some fraud or improper design on his part to change its effect. But the act of a stranger without the participation of the party inter-

the exhibition of some adminicular proof, being of opinion that the jury ought not to be left to conjecture alone, upon mere inspection of the instrument; see Knight *v.* Clements, Clifford *v.* Parker, and Cariss *v.* Tattersall, *supra.*

Other cases, in accordance with the rules above stated, are the following: Cumberland Bank *v.* Hall, 1 Halst. 215; Sayre *v.* Reynolds, 2 South. 737; Mathews *v.* Coalter, 9 Mo. 705; Herrick *v.* Malin, 22 Wend. 388; Barrington *v.* Bank of Washington, 14 S. & R. 405; Horry District *v.* Hanion, 1 N. & McC. 554; Haffelfinger *v.* Shutz, 16 S. & R. 44; Beaman *v.* Russell, 20 Vt. 205; in this last case the subject of alterations is very fully considered and the authorities classed and examined in the able judgment delivered by Hall, J. Where an alteration is apparent, it has been held that the party impeaching the instrument may prove collateral facts of a general character, such as alterations in other notes, which formed the consideration for the note in question, tending to show that the alteration in it was fraudulent: Rankin *v.* Blackwell, 2 Johns. Cas. 198; [see *ante*, § 14 *q.*] {For entries in books of account, see Adams *v.* Couilliard, 102 Mass. 167; Sheils *v.* West, 17 Cal. 324.}

[1] [The subject of the following five sections is one of substantive law, not of the law of evidence.]

[2] Masters *v.* Miller, 4 T. R. 329, 330; Newell *v.* Mayberry, 3 Leigh 250.

[3] Masters *v.* Miller, *supra*, per Ld. Kenyon.

[4] Sanderson *v.* Symonds, 1 B. & B. 430, per Dallas, C. J. It is on this ground that the alteration of a deed, in an immaterial part, is sometimes fatal, where its identity is put in issue by the pleadings, every part of the writing being then material to the identity; see *supra*, §§ 58, 69; Hunt *v.* Adams, 6 Mass. 521.

ested, is a mere spoliation or mutilation of the instrument, not changing its legal operations so long as the original writing remains legible, and, if it be a deed, any trace remains of the seal. If, by the unlawful act of a stranger, the instrument is mutilated or defaced, so that its identity is gone, the law regards the act, so far as the rights of the parties to the instrument are concerned, merely as an accidental destruction of primary evidence, compelling a resort to that which is secondary; and, in such case, the mutilated portion may be admitted as secondary evidence of so much of the original instrument. Thus, if it be a deed, and the party would plead it, it cannot be pleaded with a profert, but the want of profert must be excused by an allegation that the deed, meaning its legal identity as a deed, has been accidentally, and without the fault of the party, destroyed.[1] And whether it be a deed or other instrument, its original tenor must be substantially shown, and the alteration or mutilation accounted for in the same manner as if it were lost.

§ 567. **Same: Immaterial Alterations.** In considering the effect of alterations made by the party himself, who holds the instrument, a further distinction is to be observed between the insertion of those words which the law would supply and those of a different character. If the law would have supplied the words which were omitted, and were afterwards inserted by the party, it has been repeatedly held, that even his own insertion of them will not vitiate the instrument; for the assent of the obligor will, in such cases, be presumed. It is not an alteration in the sense of the law, avoiding the instrument; although, if it be a deed, and to be set forth *in hæc verba*, it should be recited as it was originally written.[1]

§ 568. It has been strongly doubted whether an immaterial altera-

[1] Powers *v.* Ware, 2 Pick. 451; Read *v.* Brookman, 3 T. R. 152; Morrill *v.* Otis, 12 N. H. 466. The necessity of some fraudulent intent, carried home to the party claiming under the instrument, in order to render the alteration fatal, was strongly insisted on by Buller, J., in Masters *v.* Miller, 4 T. R. 334, 335. And, on this ground, at least tacitly assumed, the old cases, to the effect that an alteration of a deed by a stranger, in a material part, avoids the deed, have been overruled. In the following cases, the alteration of a writing, without fraudulent intent, has been treated as a merely accidental spoliation: Henfree *v.* Bromley, 6 East 309; Cutts, in error, *v.* U. S., 1 Gall. 69; U. S. *v.* Spalding, 2 Mason 478; Rees *v.* Overbaugh, 6 Cowen 746; Lewis *v.* Payn, 8 id. 71; Jackson *v.* Malin, 15 Johns. 297, per Platt, J.; Nichols *v.* Johnson, 10 Conn. 192; Marshall *v.* Gougler, 10 S. & R. 164; Palm. 403; Wilkinson *v.* Johnson, 3 B. & C. 428; Raper *v.* Birkbeck, 15 East 17; {Boyd *v.* McConnell, 10 Humph. 68; Lee *v.* Alexander, 9 B. Monr. 25.} The old doctrine, that every material alteration of a deed, even by a stranger, and without privity of either party, avoided the deed, was strongly condemned by Story, J., in U. S. *v.* Spalding, *supra*, as repugnant to common sense and justice, as inflicting on an innocent party all the losses occasioned by mistake, by accident, by the wrongful acts of third persons, or by the providence of Heaven; and which ought to have the support of unbroken authority before a Court of law was bound to surrender its judgment to what deserved no better name than a technical quibble.

[1] Hunt *v.* Adams, 6 Mass. 519, 522; Waugh *v.* Bussell, 5 Taunt. 707; Paget *v.* Paget, 3 Chan. Rep. 410; Zouch *v.* Clay, 1 Ventr. 185; Smith *v.* Crooker, 5 Mass. 538; Hale *v.* Russ, 1 Greenl. 334; Knapp *v.* Maltby, 13 Wend. 587; Brown *v.* Pinkham, 18 Pick. 172; {see Reed *v.* Kemp, 16 Ill. 445; Arnold *v.* Jones, 2 R. I. 345.}

tion in any matter, though made by the obligee himself, will avoid the instrument, provided it be done innocently, and to no injurious purpose.[1] But if the alteration be fraudulently made by the party claiming under the instrument, it does not seem important whether it be in a material or an immaterial part; for, in either case, he has brought himself under the operation of the rule established for the prevention of fraud; and, having fraudulently destroyed the identity of the instrument, he must take the peril of all the consequences.[2] But here, also, a further distinction is to be observed between deeds of conveyance and covenants; and also between covenants or agreements executed and those which are still executory. For if the grantee of land alter or destroy his title-deed, yet his title to the land is not gone. It passed to him by the deed; the deed has performed its office as an instrument of conveyance, and its continued existence is not necessary to the continuance of title in the grantee; but the estate remains in him until it has passed to another by some mode of conveyance recognized by the law.[3] The same principle applies to contracts executed in regard to the acts done under them. If the estate lies in grant, and cannot exist without deed, it is said that any alteration by the party claiming the estate will avoid the deed as to him, and that therefore the estate itself, as well as all remedy upon the deed, will be utterly gone.[4] But whether it be a deed conveying real estate or not, it seems well settled that any alteration in the instrument, made by the grantee or obligee, if it be made with a fraudulent design, and do not consist in the insertion of words which the law would supply, is fatal to the instrument, as the foundation of any

[1] Hatch *v.* Hatch, 9 Mass. 311, per Sewall, J.; Smith *v.* Dunbar, 8 Pick. 246.

[2] If an obligee procure a person, who was not present at the execution of the bond, to sign his name as an attesting witness,, this is *prima facie* evidence of fraud, and voids the bond: Adams *v.* Frye, 3 Met. 103. But it is competent for the obligee to rebut the inference of fraud by proof that the act was done without any fraudulent purpose; in which case the bond will not be thereby rendered void: ib.; and see Homer *v.* Wallis, 11 Mass. 309; Smith *v.* Dunbar, 8 Pick. 246. But this latter point was decided otherwise in Marshall *v.* Gougler, 10 S. & R. 164. And where the holder of a bond or a note under seal procured a person to alter the date, for the purpose of correcting a mistake in the year and making it conform to the truth, this was held to avoid the bond: Miller *v.* Gilleland, S. C. Pa., 1 Am. Law Reg. 672, Lowrie and Woodward, JJ., dissenting. {The making a note payable at a particular place is a material alteration: Burchfield *v.* Moore, 25 Eng. L. & Eq. 123; 3 El. & Bl. 683; see also Warrington *v.* Early, 22 Eng. L. & Eq. 208; 2 El. & Bl. 763; Meyer *v.* Huneke, 55 N. Y. 412.}

[3] Hatch *v.* Hatch, 9 Mass. 307; Dr. Leyfield's Case, 10 Co. 88; Bolton *v.* Carlisle, 2 H. Bl. 259; Davis *v.* Spooner, 3 Pick. 284; Barrett *v.* Thorndike, 1 Greenl. 73; Lewis *v.* Payn, 8 Cowen 71; Jackson *v.* Gould, 7 Wend. 364; Beckrow's Case, Hetl. 138. Whether the deed may still be read by the party as evidence of title, is not agreed; that it may be read, see Doe *v.* Hirst, 3 Stark. 60; Lewis *v.* Payn, 8 Cowen 71; Jackson *v.* Gould, 7 Wend. 364; that it may not, see Babb *v.* Clemson, 10 S. & R. 419; Withers *v.* Atkinson, 1 Watts 236; Chesley *v.* Frost, 1 N. H. 145; Newell *v.* Mayberry, 3 Leigh 250; Bliss *v.* McIntyre, 18 Vt. 466; [and compare the application of the principle of § 563 *b*, *ante*.]

[4] Moore *v.* Salter, 3 Bulstr. 79, per Coke, C. J.; Lewis *v.* Payn, 8 Cowen 71; *supra*, § 265.

remedy at law, upon the covenants or undertakings contained in it.[5] And, in such case, it seems that the party will not be permitted to prove the covenant or promise by other evidence.[6] But where there are several parties to an indenture, some of whom have executed it, and in the progress of the transaction it is altered as to those who have not signed it, without the knowledge of those who have, but yet in a part not at all affecting the latter, and then is executed by the residue, it is good as to all.[7]

§ 568 *a*. **Same: Alterations by Consent.** In all these cases of alterations, it is further to be remarked, that they are supposed to have been made without the consent of the other party. For, if the alteration is made by consent of parties, such as by filling up of blanks, or the like, it is valid.[1] But here, also, a distinction has been taken between the insertion of matter essential to the existence and operation of the instrument as a deed, and that which is not essential to its operation. Accordingly, it has been held that an instrument which, when formerly executed, was deficient in some material part, so as to be incapable of any operation at all, and was no deed, could not afterwards become a deed by being completed and delivered by a stranger, in the absence of the party who executed it, and unauthorized by an instrument under seal.[2] Yet this rule, again, has its exceptions, in divers cases, such as powers of attorney to transfer stock,[3] navy bills,[4]

[5] Ib.; Davidson *v.* Cooper, 11 M. & W. 778; Jackson *v.* Gould, 7 Wend. 364; Hatch *v.* Hatch, 9 Mass. 307; Barrett *v.* Thorndike, 1 Greenl. 73; Withers *v.* Atkinson, 1 Watts 236; Arrison *v.* Harmstead, 2 Barr 191; Whitmer *v.* Frye, 10 Mo. 348; Mollett *v.* Wackerbarth, 5 C. B. 181; Agriculturist Co. *v.* Fitzgerald, 15 Jur. 489; 4 Eng. L. & Eq. 211.

[6] Martendale *v.* Follett, 1 N. H. 95; Newell *v.* Mayberry, 3 Leigh 250; Blade *v.* Noland, 12 Wend. 173; Arrison *v.* Harmstead, 2 Barr 191. The strictness of the English rule, that every alteration of a bill of exchange, or promissory note, even by consent of the parties, renders it utterly void, has particular reference to the stamp act of 1 Ann. stat. 2, c. 22; Chitty on Bills, pp. 207–214.

[7] Doe *v.* Bingham, 4 B. & Ald. 672, 675, per Bayley, J.; Hibblewhite *v.* McMorine, 6 M. & W. 208, 209.

[1] Markham *v.* Gonaston, Cro. El. 626; Moor 547; Zouch *v.* Clay, 1 Ventr. 185; 2 Lev. 35; {Plank-Road Co. *v.* Wetsel, 21 Barb. 56; Ratcliffe *v.* Planters' Bank, 2 Sneed 425; Shelton *v.* Deering, 10 B. Mon. 405. Where the date of a note under seal was altered from 1836 to 1838, at the request of the payee, and in the presence of the surety, but without his assent, the note was avoided as to the surety: Miller *v.* Gilleland, 19 Pa. St. 119.} So, where a power of attorney was sent to B, with his Christian name in blank, which he filled by inserting it, this was held valid: Eagleton *v.* Gutteridge, 11 M. & W. 468. This consent may be implied: Hale *v.* Russ, 1 Greenl. 334; Smith *v.* Crooker, 5 Mass. 538; 19 Johns. 396 per Kent, C. {A probate bond executed by a principal and two sureties was altered by the judge of probate with the consent of the principal, but without the knowledge of the sureties, by increasing the penal sum, and was then executed by two additional sureties who did not know of the alteration, and was approved by the judge of probate; and it was held that the bond, though binding on the principal, was void as to all the sureties: Howe *v.* Peabody, 2 Gray 556. See Taylor *v.* Johnson, 17 Ga. 521; Phillips *v.* Wells, 2 Sneed 154; Ledford *v.* Vandyke, Busbee L. 480; Burchfield *v.* Moore, 25 Eng. Law & Eq. 123; 3 El. & Bl. 683.}

[2] Hibblewhite *v.* McMorine, 6 M. & W. 200, 216.

[3] Commercial Bank of Buffalo *v.* Kortwright, 22 Wend. 348.

[4] Per Wilson, J., in Masters *v.* Miller, 1 Anstr. 229.

custom-house bonds,[5] appeal bonds,[6] bail bonds,[7] and the like, which have been held good, though executed in blank and afterwards filled up by parol authority only.[8]

4. *Proving Execution of Attested Documents.*

§ 569. **Attesting Witness must be called.** The instrument, being thus produced and freed from suspicion, must be proved by the subscribing witnesses, if there be any, or at least by one of them. Various reasons have been assigned for this rule; but that upon which it seems best founded is, that a fact may be known to the subscribing witness not within the knowledge or recollection of the obligor, and that he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction.[1] [Another reason is that] the party, to whose execution he is a witness, is considered as invoking him, as the person to whom he refers, to prove what passed at the time of attestation.[2]

§ 569 *a*. **Kind of Document affected.**[1] The rule, though originally framed in regard to deeds, is now extended to every species of writing attested by a witness.[2] [But modern legislation has in most ju-

[5] 22 Wend. 366.

[6] *Ex parte* Decker, 6 Cowen 59; *Ex parte* Kerwin, 8 id. 118.

[7] Hale *v.* Russ, 1 Greenl. 334; Gordon *v.* Jeffery, 2 Leigh 410; Vanhook *v.* Barnett, 4 Dev. L. 272. But see Harrison *v.* Tiernans, 4 Rand. 177; Gilbert *v.* Anthony, 1 Yerg. 69.

[8] In Texira *v.* Evans, cited 1 Anstr. 228, where one executed a bond in blank, and sent it into the money market to raise a loan upon, and it was negotiated, and filled up by parol authority only, Lord Mansfield held it a good bond. This decision was questioned by Mr. Preston in his edition of Shep. Touchst. p. 68, and it was expressly overruled in Hibblewhite *v.* McMorine, 6 M. & W. 215. It is also contradicted by McKee *v.* Hicks, 2 Dev. L. 379, and some other American cases. But it was confirmed in Wiley *v.* Moor, 17 S. & R. 438; Knapp *v.* Maltby, 13 Wend. 587; Commercial Bank of Buffalo *v.* Kortwright, 22 Wend. 348; Boardman *v.* Gore, 1 Stew. 517; Duncan *v.* Hodges, 4 McCord 239; and in several other cases the same doctrine has been recognized. Instruments executed in this manner have become very common, and the authorities as to their validity are distressingly in conflict, but upon the principle adopted in Hudson *v.* Revett, 5 Bing. 368, there is very little difficulty in holding such instruments valid, and thus giving full effect to the actual intentions of the parties, without the violation of any rule of law; see West *v.* Steward, 14 M. & W. 47; Hartley *v.* Manson, 4 M. & G. 172; Duncan *v.* Hodges, 4 McCord 239; Parker *v.* Hill, 8 Met. 447; Hope *v.* Harman, 11 Jur. 1097; Goodright *v.* Strapham, Cowp. 201; U. S. *v.* Nelson, 2 Brockenbr. 64; *post*, Vol. II, § 297.

[1] Per Le Blanc, J., in Call *v.* Dunning, 4 East 54; Manners *v.* Postan, 4 Esp. 240, per Ld. Alvanley, C. J.; 3 Preston on Abstracts of Title, 73.

[2] Cussons *v.* Skinner, 11 M. & W. 168, per Ld. Abinger; Hollenback *v.* Fleming, 6 Hill N. Y. 303. [The truth seems to be, however, that these are reasons discovered *a posteriori* to support a rule which had been handed down as a tradition from primitive times; see its origin explained in Thayer, Preliminary Treatise on Evidence, 502.]

[1] [The original § 569 has been subdivided further into §§ 569 *a*, 569 *b*; the original § 569 *a* is now § 569 *c*.]

[2] Doe *v.* Durnford, 2 M. & S. 62, which was a notice to quit; so, of a warrant to distrain: Higgs *v.* Dixon, 2 Stark. 180; a receipt: Heckert *v.* Haine, 6 Binn. 16; Wishart *v.* Downey, 15 S. & R. 77; McMahan *v.* McGrady, 5 S. & R. 314; {see other instances in Barber *v.* Terrell, 54 Ga. 146; Warner *v.* R. Co., 31 Ohio St. 265.}

risdictions limited the scope of the rule to documents for which the law requires attestation as an element of validity, *i. e.* chiefly wills, and, in some jurisdictions, deeds of land.[3]]

§ 569 *b*. **Opponent's Admission, as dispensing with the Rule.** Such being the principle of the rule, its application has been held indispensable, even where it was proved that the obligor had admitted that he had executed the bond,[1] and though the admission was made in answer to a bill of discovery.[2]

§ 569 *c* [569 *a*.] **Who is an Attesting Witness.** A subscribing [or attesting] witness is one who was present when the instrument was executed, and who, at that time, at the request or with the assent of the party, subscribed his name to it as a witness of the execution. If his name is signed, not by himself but by the party, it is no attestation. Neither is it such, if though present at the execution, he did not subscribe the instrument at that time, but did it afterwards, and without request, or by the fraudulent procurement of the other party. But it is not necessary that he should have actually seen the party sign, or have been present at the very moment of signing; for if he is called in immediately afterwards, and the party acknowledges his signature to the witness, and requests him to attest it, this will be deemed part of the transaction, and therefore a sufficient attestation.[1]

[3] [See the reasons well expounded in the Second Report of the Common Law Procedure Commission, 1853, p. 23; the English statute is St. 17–18 Vict., c. 125, s. 26. The American statutes vary in many particulars.

Distinguish those statutes which admit as genuine a document whose genuineness of execution is not denied before trial by a special traverse or is not denied at the trial by the oath of the party charged; these in effect make a rule of pleading.]

[1] Abbot *v.* Plumbe, 1 Doug. 216, referred to by Lawrence, J., in 7 T. R. 267, and again in 2 East 187; and confirmed by Lord Ellenborough as an inexorable rule, in R. *v.* Harringworth, 4 M. & S. 353; the admission of the party may be given in evidence; but the witness must also be produced, if to be had. This rule was broken in upon, in the case of the admitted execution of a promissory note, in Hall *v.* Phelps, 2 Johns. 451; but the rule was afterwards recognized as binding in the case of a deed, in Fox *v.* Reil, 3 Johns. 477, and confirmed in Henry *v.* Bishop, 2 Wend. 575.

[2] Call *v.* Dunning, 4 East 53 (but see Bowles *v.* Langworthy, 5 T. R. 366); Streeter *v.* Bartlett, 5 M. G. & Sc. 562; [Richmond R. Co. *v.* Jones, 92 Ala. 226; Hawkins *v.* Ross, 100 id. 459; McVicker *v.* Conkle, 96 Ga. 584; Brigham *v.* Palmer, 3 All. 450. This is so whether the admission is by the obligor a third person or (in the strict seuse) by the obligor a party-opponent. Moreover, even the opponent's admission as a witness on the stand will not suffice: Whyman *v.* Garth, 8 Exch. 803; McVicker *v.* Conkle, *supra*; compare Barry *v.* Ryan, 4 Gray 523; *contra*, Rayburn *v.* Lumber Co., 57 Mich. 273. But a so-called *judicial admission* (*i. e.* an express waiver for the purposes of the trial; *ante*, § 205) will suffice: Bringloe *v.* Goodson, 8 Scott 71; Whyman *v.* Garth, Hawkins *v.* Ross, Richmond R. Co. *v.* Jones, *supra*. Under statutes which require a denial of execution to be expressly pleaded or made by oath, the rule for calling the attesting witness would not obtain, because the execution, which is the object of such proof, cannot be put in issue except on those conditions.]

[1] Hollenback *v.* Fleming, 6 Hill N. Y. 303; Cussons *v.* Skinner, 11 M. & W. 168; Ledgard *v.* Thompson, ib. 41, per Parke, B. "Si [testes] in confectione chartæ præsentes non fuerint, sufficit si postmodum, in præsentia donatoris et donatorii fuerint recitata et concessa:" Bracton, b. 2, c. 16, § 12, fol. 38, a; Fleta, l. 3, c. 14, § 13, p. 200; and see Brackett *v.* Mountfort, 2 Fairf. 115. [That the person signing is not named as attesting witness does not prevent the application of the rule: Chaplain *v.* Briscoe, 11 Sm. & M. 372. A notary taking the acknowledgment of an affidavit is not an attesting witness: Lavretta *v.* Holcomb, 98 Ala. 503.]

§ 569 *d.* **Number of Witnesses to be called.** [Though there be more than one attesting witness named upon the document, orthodox tradition has always been that only one of them need be called to prove execution.[1] In the case of wills, there was no departure from this rule;[2] though the Chancery Court had here a tradition of its own by which it customarily required all the witnesses to be called.[3] From the statutes requiring wills to be attested by a specified number of witnesses, a special argument for calling all might be thought to arise; but the orthodox rule has in general been perpetuated;[4] though by statute it has sometimes been expressly changed.]

§ 570. **Exceptions: (1) Ancient Instruments.** To this rule, requiring the production of the subscribing witnesses, there are several classes of exceptions.

The first is, where the instrument is thirty years old; in which case, as we have heretofore seen,[1] it is said to prove itself, the subscribing witnesses being presumed to be dead, and other proof being presumed to be beyond the reach of the party. But such documents must be free from just grounds of suspicion, and must come from the proper custody,[2] or have been acted upon, so as to afford some corroborative proof of their genuineness.[3] And, in this case, it is not necessary to call the subscribing witnesses, though they be living.[4] This exception is coextensive with the rule applying to an-

[1] [Holdfast *v.* Dowling, 2 Str. 1254; {Melcher *v.* Flanders, 40 N. H. 139;} O'Sullivan *v.* Overton, 56 Conn. 102; Sowell *v.* Bank, Ala., 24 So. 585; though a Court sometimes claims a discretion: Gelott *v.* Goodspeed, 8 Cush. 411.]

[2] [Buller, Nisi Prius, 264; provided, of course, he can prove all the elements of due execution.]

[3] [See Bootle *v.* Blundell, 19 Ves. Jr. 494, 500, 505, 509; Bullen *v.* Michel, 4 Dow 297, 331; Tatham *v.* Wright, 2 Russ & My. 1, 8, 16, 30.]

[4] [Wright *v.* Tatham, 1 Ad. & E. 3, 22 (leading case); Slinghoff *v.* Bruner, Ill., 51 N. E. 772; Jackson *v.* Legrange, 19 Johns. 386; Cornell *v.* Woolley, 42 N. Y. 378; Lambert *v.* Cooper, 29 Gratt. 61; left undecided: Abbott *v.* Abbott, 41 Mich. 540; *contra, semble:* Jones' Will, Wis., 79 N. W. 684.]

[1] *Supra*, § 21, and cases there cited; see also Doe *v.* Davis, 10 Q. B. 314; Crane *v.* Marshall, 4 Shepl. 27; Green *v.* Chelsea, 24 Pick. 71. [The doctrine about ancient instruments, as applied irrespective of the attesting witness rule, is also treated *post*, § 575 *b*.]

[2] *Supra*, § 142; [transferred *post*, as § 575 *b*;] and see Slater *v.* Hodgson, 9 Q. B. 727.

[3] See *supra*, §§ 21, 142; [transferred *post*, as § 575 *b*;] Doe d. Edgett *v.* Stiles, 1 Kerr New Br. 338; {Goodwin *v.* Jack, 62 Me. 414; Johnson *v.* Shaw, 41 Tex. 428.} Mr. Evans thinks that the antiquity of the deed is alone sufficient to entitle it to be read; and that the other circumstances only go to its effect in evidence: 2 Poth. Obl. App. xvi, § 5, p. 149; see also Doe *v.* Burdett, 4 Ad. & El. 1, 19; Brett *v.* Beales, 1 M. & Malk. 416, 418; Jackson *v.* Laroway, 3 Johns. Cas. 283. In some cases proof of possession, under the deed, or will, seems to have been deemed indispensable; but the principle pervading them all is that of corroboration merely; that is, that some evidence shall be offered, auxiliary to the apparent antiquity of the instrument, to raise a sufficient presumption in its favor; as to this point, see *supra*, § 144; [transferred *post*, as § 575 *b*.]

[4] Marsh *v.* Colnett, 2 Esp. 665; Doe *v.* Burdett, 4 Ad. & El. 1, 19; Doe *v.* Deakin, 3 C. & P. 402; Jackson *v.* Christman, 4 Wend. 277, 282, 283; Doe *v.* Wolley, 8 B. & C. 22; Fetherly *v.* Waggoner, 11 Wend. 603; [Gardner *v.* Granniss, 57 Ga. 539, 555; Shaw *v.* Pershing, 57 Mo. 416; *contra:* Smith *v.* Rankin, 20 Ill. 14, 23.]

cient writings of every description, provided they have been brought from the proper custody and place; for the finding them in such a custody and place is a presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty.[5] But whether it extends to the seal of a private corporation has been doubted, for such a case does not seem clearly to be within the principle of the exception.[6]

§ 571. **Exceptions: (2) Claim by Opponent under the Instrument.** A second exception to this rule is allowed where the instrument is produced by the adverse party, pursuant to notice, the party producing it claiming an interest under the instrument. In this case, the party producing the instrument is not permitted to call on the other for proof of its execution; for, by claiming an interest under the instrument, he has admitted its execution.[1] The same principle is applied where both parties claim similar interests under the same deed; in which case, the fact of such claim may be shown by parol.[2] So, where both parties claim under the same ancestor, his title-deed, being equally presumable to be in the possession of either, may be proved by a copy from the registry.[3] But it seems that the interest claimed in these cases must be of an abiding nature. Therefore, where the defendant would show that he was a partner with the plaintiff, and, in proof thereof, called on the plaintiff to produce a written personal contract, made between them both, as partners of the one part, and a third person of the other part, for labor which had been performed, which was produced accordingly, the defendant was still held bound to prove its execution.[4] The interest, also, which is claimed under the instrument produced on notice, must, in order to dispense with this rule, be an interest claimed in the same cause. Therefore, where in an action by an agent against his principal for his commission due for procuring him an apprentice, the indenture of apprenticeship was produced by the defendant on notice, it was held that the plaintiff was still bound to prove its execution by the subscribing witness; and that, having been nonsuited for want of this evidence, he was not entitled to a new trial on the

[5] 12 Vin. Abr. tit. Evidence, A, b, 5, pl. 7, cited by Ld. Ellenborough, in Roe *v.* Rawlings, 7 East 291; Gov., etc. of Chelsea Waterworks *v.* Cowper, 1 Esp. 275; Forbes *v.* Wale, 1 W. Bl. 532; Wynne *v.* Tyrwhitt, 4 B. & Ald. 376.

[6] R. *v.* Bathwick, 2 B. & Ad. 639, 648.

[1] Pearce *v.* Hooper, 3 Taunt. 60; Carr *v.* Burdiss, 1 C. M. & R. 784, 785; Orr *v.* Morrice, 3 Br. & Bing. 139; Bradshaw *v.* Bennett, 1 M. & Rob. 143. In *assumpsit* by a servant against his master, for breach of a written contract of service, the agreement being produced under notice, proof of it by the attesting witness was held unnecessary: Bell *v.* Chaytor, 1 Car. & Kirw. 162; 5 C. & P. 48; [see other examples in Herring *v.* Rogers, 30 Ga. 615; McGregor *v.* Wait, 10 Gray 72; Gorton *v.* Dyson, 1 B. & B. 219 (will).]

[2] Doe *v.* Wilkins, 4 Ad. & El. 86; s. c. 5 Nev. & M. 434; Knight *v.* Martin, 1 Gow 26.

[3] Burghardt *v.* Turner, 12 Pick. 534; [see *post*, § 573.]

[4] Collins *v.* Bayntum, 1 Q. B. 117.

ground of surprise, though he was not previously aware that there was a subscribing witness, it not appearing that he had made any inquiry on the subject.[5] So, where the instrument was taken by the party producing it, in the course of his official duty, as, for example, a bail bond, taken by the sheriff, and produced by him on notice, its due execution will *prima facie* be presumed.[6] Subject to these exceptions, the general rule is, that where the party producing an instrument on notice is not a party to it, and claims no beneficial interest under it, the party calling for its production and offering it in evidence, must prove its execution.[7]

§ 572. **Exceptions: (3) Attesting Witness Unavailable.** A third class of exceptions to this rule arises from the circumstances of the witnesses themselves, the party, either from physical or legal obstacles, being unable to adduce them.[1] Thus, if the witness is proved or presumed to be dead;[2] or cannot be found after diligent inquiry;[3] or, is resident beyond the sea;[4] or, is out of the jurisdiction of the Court;[5] or, is a fictitious person, whose name has been placed upon

[5] Rearden *v.* Minter, 5 M. & Gr. 204.

[6] Scott *v.* Waithman, 3 Stark. 168; [see *post*, § 573.]

[7] Betts *v.* Badger, 12 Johns. 223; Jackson *v.* Kingsley, 17 id. 158. [It was at one time thought that mere possession of the document by the opponent, and production on notice, dispensed with the present rule: R. *v.* Middlezoy, 2 T. R. 41; but after some fluctuation this doctrine was properly repudiated: Gordon *v.* Secretan, 8 East 548; Pearce *v.* Hooper, Orr *v.* Morrice, *supra*. The old rule is sometimes applied in this country: Stevenson *v.* Dunlap, 7 T. B. Monr. 134, *semble;* Hobby *v.* Alford, 73 Ga. 791. Betts *v.* Badger, *supra*, accepted it; but Jackson *v.* Kingsley, *supra*, took the modern view.]

[1] [This seems not to be an exception to the rule, but rather a satisfaction of it; *i.e.* the rule merely requires that the witness be called if he can be had.]

[2] Anon., 12 Mod. 607; Barnes *v.* Trompowsky, 7 T. R. 265; Adams *v.* Kerr, 1 B. & P. 360; Banks *v.* Farquharson, 1 Dick. 167; Mott *v.* Doughty, 1 Johns. Cas. 230; Dudley *v.* Sumner, 5 Mass. 463. That the witness is sick, even though despaired of, is not sufficient: Harrison *v.* Blades, 3 Campb. 457; [*contra, semble:* Jones *v.* Brewer, 4 Taunt. 46. Statutes often provide for this and the ensuing situations, so far as concerns will-witnesses.]

[3] Coghlan *v.* Williamson, 1 Doug. 93; Cunliffe *v.* Sefton, 2 East 183; Call *v.* Dunning, 5 Esp. 16; 4 East 53; Crosby *v.* Piercy, 1 Taunt. 364; Jones *v.* Brinkley, 1 Hayw. 20; Anon., 12 Mod. 607; Wardell *v.* Fermor, 2 Campb. 282; Jackson *v.* Burton, 11 Johns. 64; Mills *v.* Twist, 8 id. 121; Parker *v.* Haskins, 2 Taunt. 223; Whittemore *v.* Brooks, 1 Greenl. 57; Burt *v.* Walker, 4 B. & Ald. 697; Pytt *v.* Griffith, 6 Moore 538; Austin *v.* Rumsey, 2 C. & K. 736; [Hartford L. Ins. Co. *v.* Gray, 80 Ill. 28.]

[4] Anon., 12 Mod. 607; Barnes *v.* Trompowsky, 7 T. R. 266.

[5] Holmes *v.* Pontin, Peake 99; Banks *v.* Farquharson, 1 Dick. 168; Cooper *v.* Marsden, 1 Esp. 1; Prince *v.* Blackburn, 2 East 250; Sluby *v.* Champlin, 4 Johns. 461; Dudley *v.* Sumner, 4 Mass. 444; Homer *v.* Wallis, id. 309; Cooke *v.* Woodrow, 5 Cranch 13; Baker *v.* Blunt, 2 Hayw. 404; Hodnett *v.* Forman, 1 Stark. 90; Glubb *v.* Edwards, 2 M. & Rob. 300; Engles *v.* Bruington, 4 Yeates 345; Wiley *v.* Bean, 1 Gilman 302; Dunbar *v.* Marden, 13 N. H. 311; {Teall *v.* Van Wyck, 10 Barb. N. Y. 376; Foote *v.* Cobb, 18 Ala. 585; Cox *v.* Davis, 17 id. 714;} [Mariner *v.* Saunders, 10 Ill. 113; Jewell *v.* Chamberlain, 41 Nebr. 254; there is much variance of phrase as to whether residence or mere absence in the other jurisdiction suffices. The instrument's execution abroad raises the presumption that the witness is without the jurisdiction: Valentine *v.* Piper, 22 Pick. 85. It is usually said that no effort to take his deposition is necessary: Settle *v.* Allison, 8 Ga. 201; Allison's Estate, 104 Ia. 130.] If the witness has set out to leave the jurisdiction by sea, but the ship has been beaten

the deed by the party who made it;[6] or, if the instrument is lost, and the name of the subscribing witness is unknown;[7] or, if the witness is insane;[8] or, has subsequently become infamous;[9] or, has become the adverse party;[10] or, has been made executor or administrator to one of the parties, or has otherwise, and without the agency of the party, subsequently become interested, or otherwise incapacitated;[11] or was incapacitated at the time of signing, but the fact was not known to the party;[12] in all these cases, the execution of the instrument may be proved by other evidence. If the adverse party, pending the cause, solemnly agrees to admit the execution, other proof is not necessary.[13] And if the witness, being called, denies, or does not recollect, having seen it executed, it may be established by other evidence.[14] If the witness has become blind, it has been held that this did not excuse the party from calling him; for he may be able still to testify to other parts of the *res gestæ* at the time of signing.[15] If the witness was infamous at the time of attestation, or was interested, and continues so, the party not then knowing the fact, the attestation is treated as a nullity.[16] [If the witness fails to recollect

back, he is still considered absent: Ward *v.* Wells. 1 Taunt. 461. See also Emery *v.* Twombly, 5 Shepl. 65.

[6] Fassett *v.* Brown, Peake 23.

[7] Keeling *v.* Ball, Peake's Ev. App. 78; [Turner *v.* Cates, 90 Ga. 731, 744; Congdon *v.* Morgan, 14 S. C. 587; see R. *v.* St. Giles, 1 E. & B. 642.]

[8] Currie *v.* Child, 3 Campb. 283; see also 3 T. R. 712, per Buller, J.; [Ala. Code 1897, § 4276; Cal. C. C. P. § 1315.]

[9] Jones *v.* Mason, 2 Stra. 833; [Scars *v.* Dillingham, 12 Mass. 358.] If the conviction were previous to the attestation, it is as if not attested at all: 1 Stark. Evid. 325.

[10] Strange *v.* Dashwood, 1 Cooper Ch. Cas. 497.

[11] Goss *v.* Tracy, 1 P. Wms. 289; Godfrey *v.* Norris, 1 Stra. 34; Davison *v.* Bloomer, 1 Dall. 123; Bulkley *v.* Smith, 2 Esp. 697; Cunliffe *v.* Sefton, 2 East 183; Bernett *v.* Taylor, 9 Ves. 381; Hamilton *v.* Marsden, 6 Binn. 45; Hamilton *v.* Williams, 1 Hayw. 139; Hovill *v.* Stephenson, 5 Bing. 493, per Best, C. J.; Saunders *v.* Ferrill, 1 Ired. 97; [Bennet *v.* Robinson, 3 Stew. & P. 227; Jones *v.* Phelps, 5 Mich. 218.]

[12] Nelius *v.* Brickell, 1 Hayw. 19; [see note 16, *infra*.]

[13] Laing *v.* Kaine, 2 B. & P. 85; [*ante*, § 569 *b*, note 2.]

[14] Abbott *v.* Plumbe, 1 Doug. 216; Lesher *v.* Levan, 2 Dall. 96; Ley *v.* Ballard, 3 Esp. 173 [leading case]; Powell *v.* Blackett, 1 id. 97; Park *v.* Mears, 3 id. 171; Fitzgerald *v.* Elsee, 2 Campb. 635; Blurton *v.* Toon, Skin. 639; McCraw *v.* Gentry, 3 Campb. 232; Grellier *v.* Neale, Peake 198; Whitaker *v.* Salisbury, 15 Pick. 534; Quimby *v.* Buzzell, 4 Shepl. 470; [Tarrant *v.* Ware, 25 N. Y. 425 (leading case); Clarke *v.* Dunnavant, 10 Leigh 13, 33 (leading case); Barnewall *v.* Murrell, 108 Ala. 366; Buchanan *v.* Grocery Co., Ga., 31 S. E. 105; Martin *v.* Perkins, 56 Miss. 204; Mays *v.* Mays, 114 Mo. 536; Gable *v.* Ranch, 50 S. C. 95; Simmons *v.* Leonard, 91 Tenn. 183. But in Illinois there is a peculiar rule forbidding the contradiction of the attesting witnesses as to the fact of a testator's sanity on appeal from a grant of probate, though not on appeal from a refusal of probate; see Walker *v.* Walker, 3 Ill. 291; Andrews *v.* Black, 43 id. 256; Hobart *v.* Hobart, 154 id. 610.]

[15] Cronk *v.* Frith, 9 C. & P. 197; s. c. 1 M. & Rob. 262, per Ld. Abinger, C. B.; Rees *v.* Williams, 1 De G. & Sm. 314; in a former case of Pedler *v.* Paige, 1 M. & Rob. 258, Parke, J., expressed himself of the same opinion, but felt bound by the opposite ruling of Ld. Holt, in Wood *v.* Drury, 1 Ld. Raym. 734; [*contra*, Taylor, J., in Baker *v.* Blount, 2 Hayw. 404; *quære* whether the ruling in Wood *v.* Drury was as above stated.]

[16] Swire *v.* Bell, 5 T. R. 371; Honeywood *v.* Peacock, 3 Campb. 196; Amherst Bank *v.* Root, 2 Met. 522; [Doe *v.* Twigg, 5 U. C. Q. B. 167; Harding *v.* Harding, 18 Pa.

anything of the transaction, the rule requiring his production is nevertheless satisfied, and the party may go on to proof of the witness' signature, as if the latter were deceased.[17]]

§ 572 *a* [574]. **Same: Diligent Search.** The degree of diligence in the search for the subscribing witnesses is the same which is required in the search for a lost paper, the principle being the same in both cases.[1] It must be a strict, diligent, and honest inquiry and search, satisfactory to the Court, under the circumstances of the case.[2] It should be made at the residence of the witness, if known, and at all other places where he may be expected to be found; and inquiry should be made of his relatives, and others who may be supposed to be able to afford information.[3] And the answers given to such inquiries may be given in evidence, they being not hearsay, but parts of the *res gestæ*.[4]

If there is more than one attesting witness, the absence of them all must be satisfactorily accounted for, in order to let in the secondary evidence.[5]

§ 573. **Exceptions: (4) Official Bonds; Registered Deeds.** (1) A fourth exception has been sometimes admitted, in regard to office bonds, required by law to be taken in the name of some public functionary, in trust for the benefit of all persons concerned, and to be preserved in the public registry for their protection and use; of the due execution of which, as well as of their sufficiency, such officer must first be satisfied and the bond approved, before the party is qualified to enter upon the duties of his office. Such, for example, are the bonds given for their official fidelity and good conduct, by guardians, executors, and administrators, to the judge of probate.

340; so that the handwriting cannot be proved as an attestation, while, on the other hand, the witness need not be called, and, if the instrument is valid without attestation, its execution may be proved in the ordinary way.]

[17] [Greenough *v.* Greenough, 11 Pa. 489; Kirk *v.* Carr, 54 id. 285; Tyler's Estate, Cal., 53 Pac. 928; Kelly *v.* Sharp S. Co., 99 Ga. 393.] Where one of the attesting witnesses to a will has no recollection of having subscribed it, but testifies that the signature of his name thereto is genuine; the testimony of another attesting witness, that the first did subscribe his name in the testator's presence, is sufficient evidence of that fact: Dewey *v.* Dewey, 1 Met. 349; see also Quimby *v.* Buzzell, 4 Shepl. 470; New Haven Co. Bank *v.* Mitchell, 15 Conn. 206. If the witness to a deed recollects seeing the signature only, but the attesting clause is in the usual formula, the jury will be advised, in the absence of controlling circumstances, to find the sealing and delivery also: Burling *v.* Paterson, 9 C. & P. 570; see *supra*, § 38 *a*.

[1] *Ante*, § 558.

[2] [Woodman *v.* Segar, 12 Shepl. 90; McGennis *v.* Allison, 10 S. & R. 197 ("What is reasonable inquiry? There can be no fixed and settled rule").]

[3] [See a good illustration of the principle in Gallagher *v.* Assur. Co., Pa., 24 Atl. 115.] The cases on this subject are numerous; but as the application of the rule is a matter in the discretion of the judge, under the particular circumstances of each case, it is thought unnecessary to encumber the work with a particular reference to them.

[4] [Compare *ante*, § 563 *b*.]

[5] Cunliffe *v.* Sefton, 2 East 183; Kelsey *v.* Hanmer, 18 Conn. 311; Doe *v.* Hatheway, 2 Allen N. B. 69; [Gelott *v.* Goodspeed, 8 Cush. 411; Howard *v.* Russell, Ga., 30 S. E. 802; this is apparently the universal rule; but in Alabama, by statute, a different result is reached: Barnewall *v.* Murrell, 103 Ala. 366.]

Such documents, it is said, have a high character of authenticity, and need not be verified by the ordinary tests of truth, applied to merely private instruments, namely, the testimony of the subscribing witnesses; but when they are taken from the proper public repository, it is only necessary to prove the identity of the obligor with the party in the action.[1] Whether this exception, recently asserted, will be generally admitted, remains to be seen.[2]

(2) The case of deeds enrolled would require a distinct consideration in this place, were not the practice so various in the different States, as to reduce the subject to a mere question of local law, not falling within the plan of this work. In general, it may be remarked, that, in all the United States, provision is made for the registration and enrolment of deeds of conveyance of lands; and that, prior to such registration, the deed must be acknowledged by the grantor, before the designated magistrate; and, in case of the death or refusal of the grantor, and in some other enumerated cases, the deed must be proved by witnesses, either before a magistrate, or in a court of record. But, generally speaking, such acknowledgment is merely designed to entitle the deed to registration, and registration is, in most States, not essential to passing the estate, but is only intended to give notoriety to the conveyance, as a substitute for livery of seisin. And such acknowledgment is not generally received, as *prima facie* evidence of the execution of the deed, unless by force of some statute, or immemorial usage, rendering it so;[3] but the grantor, or party to be affected by the instrument, may still controvert its genuineness and validity. But where the deed falls under one of the exceptions,[4] and has been proved [to the appropriate official] *per testes*, there seems to be good reason for receiving this probate, duly authenticated, as sufficient *prima facie* proof of the execution [so as thus to dispense with the rule requiring the calling of attesting witnesses]; and such is understood to be the course of practice, as settled by the statutes of many of the United States.[5]

§ 573 *a*.[1]

§ 573 *b*. **Exceptions: (5) Instrument not directly in Issue.** A fifth exception to the rule requiring proof by the subscribing wit-

[1] Kello *v*. Maget, 1 Dev. & Bat. 414.

[2] [An analogous exception may exist where the opponent is an official who cannot deny the execution without admitting that he failed in his duty to secure execution; see Scott *v*. Waithman, 3 Stark. 168.]

[3] [This aspect of the subject, *i. e.* whether a certified copy of the record of conveyance is admissible in proof of execution, has been treated *ante*, § 485 *a*.]

[4] [These exceptions are now the rule.]

[5] See 4 Cruise's Dig. tit. 32, c. 29, § 1, note, and c. 2, §§ 77, 80, notes (Greenleaf's ed.); 2 Lomax's Dig. 353; Morris *v*. Wadsworth, 17 Wend. 103; Thurman *v*. Cameron, 24 id. 87; Brotherton *v*. Livingston, 3 W. & S. 334; Vance *v*. Schuyler, 1 Gilm. Ill. 160; [Doe *v*. Johnson, 3 Ill. 522; Job *v*. Tebbetts, 10 id. 376; Foxworth *v*. Brown, Ala., 24 So. 1; Fletcher *v*. Horne, 75 Ga. 134; Samuel *v*. Borrowscale, 104 Mass. 207.]

[1] [Transferred *post*, as § 575 *b*; it does not concern the attesting-witness rule, and was here clearly out of place.]

ness is admitted, where [the execution of] the instrument is not directly in issue, but comes incidentally in question in the course of the trial; in which case, its execution may be proved by any competent testimony, without calling the subscribing witness;[1] [and also (though here the rule is not subjected to an exception, but is merely not applicable) where not the instrument's execution, but merely its existence or dealings with it, are desired to be shown.[2]]

§ 574.[1]

§ 575. **Witness Unavailable in Person; Proof of Signature.** When secondary evidence of the execution of the instrument is thus rendered admissible, [by reason of the impossibility of obtaining the witness' testimony in person (*ante*, § 572), the next inquiry is as to the requirements if any that attend the use of inferior grades of evidence. Proving the signature of an attesting witness is in effect using his hearsay statement as to the execution of the instrument;[1] and various questions arise in regard to this mode of proof.

(1) In the first place, supposing resort to be had to proof of execution by proof of the attesting witness' signature,] it will not be necessary to prove the handwriting of more than one witness.[2]

(2) And this evidence is in general deemed sufficient to admit the instrument to be read;[3] some Courts have also required proof of the handwriting of the obligor, in addition to that of the subscribing witness; but on this point the practice is not uniform.[4]

(3) [Where proof of the signature of the witness alone is sufficient,

[1] [Curtis *v.* Belknap, 21 Vt. 433; Ayers *v.* Hewitt, 1 Applet. 281; {see Com. *v.* Castles, 9 Gray 121; *Re* Mair, 42 L. J. N. S. Ch. 882;} Demombreun *v.* Walker, 4 Baxt. 199; Heckert *v.* Haine, 6 Binn. 16 (leading case); Steiner *v.* Trainum, 98 Ala. 315; Summerour *v.* Felker, Ga., 29 S. E. 448.]

[2] [Rand *v.* Dodge, 17 N. H. 343, 357; see Skinner *v.* Brigham, 126 Mass. 132.]

[1] [Transferred *ante*, as § 572 *a*, where it clearly belongs.]

[1] [Losee *v.* Losee, 2 Hill N. Y. 609, and note by N. Hill, Esq. (afterwards judge); Hays *v.* Harden, 6 Pa. St. 412; Boylan *v.* Meeker, 28 N. J. L. 274, 295. Stobart *v.* Dryden, 1 M. & W. 615, *contra*, is clearly unsound. Compare § 444 *d*, *ante*.]

[2] Adams *v.* Kerr, 1 B. & P. 360; 3 Preston on Abstracts of Title, pp. 72, 73; [Stebbins *v.* Duncan, 108 U. S. 32. This is generally conceded for deeds. But where attesting witnesses are required by law, as for wills, it may well be argued that the signatures of all the required number should be proved if possible: Hopkins *v.* Albertson, 2 Bay 484; Jones *v.* Arterburn, 11 Humph. 97; *contra:* Jackson *v.* Burton, 11 Johns. 64. Statutes often prescribe such a rule.]

[3] Kay *v.* Brookman, 3 C. & P. 555; Webb *v.* St. Lawrence, 3 Bro. P. C. 640; Mott *v.* Doughty, 1 Johns. Cas. 230; Sluby *v.* Champlin, 4 Johns. 461; Adams *v.* Kerr, 1 B. & P. 360; Cunliffe *v.* Sefton, 2 East 183; Prince *v.* Blackburn, ib. 250; Douglas *v.* Sanderson, 2 Dall. 116; Cooke *v.* Woodrow, 5 Cranch 13; Hamilton *v.* Marsden, 6 Binn. 45; Powers *v.* McFerran, 2 S. & R. 44; McKinder *v.* Littlejohn, 1 Ired. 66.

[4] [Plunket *v.* Bowman, 2 McCord 139 (leading case);] Clark *v.* Courtney, 5 Pet. 319; Hopkins *v.* De Graffenreid, 2 Bay 187; Oliphant *v.* Taggart, 1 id. 255; Irving *v.* Irving, 2 Hayw. 27; Clark *v.* Saunderson, 3 Binn. 192; Jackson *v.* La Grange, 19 Johns. 386; Jackson *v.* Waldron, 13 Wend. 178, 183, 197, 198, *semble;* see also Gough *v.* Cecil, 1 Selw. N. P. 533, n. (7), (10th ed.); Thomas *v.* Turnley, 3 Rob. La. 206; Dunbar *v.* Marden, 13 N. H. 311. [Where the document is required by law to be attested, it would seem that this double proof might be required: Newsom *v.* Luster, 13 Ill. 175; Cram *v.* Ingalls, 18 N. H. 613; left undecided in Hobart *v.* Hobart, 154 Ill. 610; Scott *v.* Hawk, Ia., 75 N. W. 368. In the case of wills, express statutory provisions often exist.]

the effect is merely (it may be argued) to prove a statement of the attesting witness that a person by the name of the maker of the instrument did execute it, leaving open the question whether that person was the same with the party of the same name in the cause, so that such evidence could suffice only on condition of] being accompanied with proof of the identity of the party sued with the person who appears to have executed the instrument; which proof, it seems, is now deemed requisite,[5] especially where the deed on its face excites suspicion of fraud.[6]

(4) The instrument may also in such cases be read, upon proof of the handwriting of the obligor, or party by whom it was executed;[7] but in this case also it is conceived, that the like proof of the identity of the party should be required.

(5) If there be no subscribing witness, the instrument is sufficiently proved by any competent evidence that the signature is genuine.[8]

5. *Proving Execution of Other (Unattested) Writings.*

§ 575 *a*. **In general; Identity of Signer.** [Wherever proof of execution is made by proving the signature of the document to be that of the person whose name it is, the question arises whether something more is not necessary in order to identify the person whose signature is thus proved with the party to the cause. The argument is, in the language of Baron Bayley,[1] that "the utmost effect you can give" "is to consider it as establishing that A. B. of C. in the county of York executed the instrument; but you must go a step further and show that the defendant is A. B. of C. in the county of York." Where the witness to the signature can also testify to identity of person, this requirement is sufficiently fulfilled.

[5] Whitelock *v.* Musgrove, 1 Cr. & M. 511; [followed in Jones *v.* Jones, 9 M. & W. 75; doubted by Patteson, J., in Greenshields *v.* Crawford, ib. 314. The earlier cases seem to have ignored this necessity. The argument against it is that identity of name is always some evidence, and may be sufficient evidence, of identity of person (*ante*, § 43 *a*).]

[6] [Kimball *v.* Davis, 19 Wend. 437, 442; approved, by 11 to 9, in] Brown *v.* Kimball, 25 id. 259, 270; [questioned in Northrop *v.* Wright, 7 Hill 476, 493; see Stebbins *v.* Duncan, 108 U. S. 32; and distinguish the question of § 575 *a*, *post*.]

[7] Valentine *v.* Piper, 22 Pick. 90; *contra*, Jackson *v.* Waldron, 13 Wend. 178. [But this was not the orthodox common-law rule, which required the proof of the witness' signature, unless it was unavailable: Barnes *v.* Trompowsky, 7 T. R. 265; and this is still the rule in the Federal Courts: Clarke *v.* Courtney, 5 Pet. 319, 344; Stebbins *v.* Duncan, 108 U. S. 32. But a number of Courts allow proof of the maker's signature, without that of the witness' signature, if the latter signed by mark: Watt *v.* Kilburn, 7 Ga. 356; Delany *v.* Delany, 24 Ark. 7; or if the document was one not required by law to be attested: Newsom *v.* Luster, 13 Ill. 175 (leading case); Landers *v.* Bolton, 26 Cal. 393; or absolutely and without such restrictions: {Jones *v.* Roberts, 65 Me. 273;} Valentine *v.* Piper, *supra*; Smith Charities *v.* Connolly, 157 Mass. 272; Snider *v.* Burks, 84 Ala. 53; Standback *v.* Thornton, Ga., 31 S. E. 805. Statutes often expressly adopt this last rule.]

[8] Pullen *v.* Hutchinson, 12 Shepl. 249; [this subject is dealt with in the ensuing sections.]

[1] [Whitelocke *v.* Musgrove, 1 Cr. & M. 520; this was said of proving an attesting witness' signature; but the illustration applies here also.]

But where the witness to the signature does not know the party to the cause, some other source of proof must be sought. The presumption from identity of name (*ante*, § 43 *a*) should usually suffice, where it applies; but some Courts have inclined to require additional evidence to an undefined extent.[2]]

§ 575 *b* [141–144]. **Genuineness of Ancient Documents.**[1] (1) A second exception to the rule, rejecting hearsay evidence, is allowed in cases of ancient possession, and in favor of the admission of ancient documents in support of it. In matters of private right, not affecting any public or general interest, hearsay is generally inadmissible. But the admission of ancient documents, purporting to constitute part of the transactions themselves, to which, as acts of ownership, or of the exercise of right, the party against whom they are produced is not privy, stands on a different principle. It is true, on the one hand, that the documents in question consist of evidence which is not proved to be part of any *res gestæ*, because the only proof of the transaction consists in the documents themselves; and these may have been fabricated, or, if genuine, may never have been acted upon. And their effect, if admitted in evidence, is to benefit persons connected in interest with the original parties to the documents, and from whose custody they have been produced. But, on the other hand, such documents always accompany and form a part of every legal transfer of title and possession by act of the parties; and there is, also, some presumption against their fabrication, where they refer

[2] [The cases cited *ante*, § 43 *a*, usually deal with this question also, and ample illustration will there be found.]

A written instrument, not attested by a subscribing witness, is sufficiently proved to authorize its introduction, by competent proof that the signature of the person, whose name is undersigned, is genuine. The party producing it is not required to proceed further upon a mere suggestion of a false date when there are no indications of falsity found upon the paper, and prove that it was actually made on the day of the date. After proof that the signature is genuine, the law presumes that the instrument in all its parts is genuine also, when there are no indications to be found upon it to rebut such a presumption; see Pullen *v.* Hutchinson, 12 Shepl. 254; {Lefferts *v.* State, 49 N. J. L. 27; Brayley *v.* Kelly, 25 Minn. 160.}

[1] [The author's treatment in the following sections embraces two wholly distinct topics, (1) whether the mere execution of an ancient deed or lease is evidence of ancient possession of the land granted or leased; this subject is explained and the more recent cases cited *ante*, § 108, notes 21, 22; (2) whether an ancient document's genuineness (*i. e.* execution), is sufficiently evidenced by its age, custody, etc. The latter subject (already briefly referred to by the author in § 21, *ante*), alone concerns us here; but it is impossible to separate his treatment of the two topics; the parts here numbered (2) and (4) (originally §§ 142, 144) deal chiefly with the present subject. The particularly confusing feature is that for both doctrines there was and is a question whether some acts of possession need be shown; but in the former doctrine this requirement (as said at the end of (3)) asked peculiarly for acts of modern possession.

It is also to be noted that the author refers to the former doctrine (as to the making of the document being evidence of possession) as if it were an exception to the Hearsay rule, and placed the text originally under that head. But this is erroneous; the making of the document, if evidence, is circumstantial evidence; it could only be regarded as hearsay evidence (see *ante*, §§ 99 *a*, 100) by treating it as involving the admission of the recitals in the deed or lease; and not only is this not the way in which the documents were used, but such recitals would usually show only title and not possession.]

to coexisting subjects by which their truth might be examined.[2] On this ground, therefore, as well as because such is generally the only attainable evidence of ancient possession, this proof is admitted, under the qualifications which will be stated.

(2) As the value of these documents depends mainly on their having been contemporaneous, at least, with the act of transfer, if not part of it, care is first taken to ascertain their genuineness; and this may be shown *prima facie*, by proof that the document comes from the proper custody, or by otherwise accounting for it. Documents found in a place in which, and under the care of persons with whom, such papers might naturally and reasonably be expected to be found, or in the possession of persons having an interest in them, are in precisely the custody which gives authenticity to documents found within it. "For it is not necessary," observed Tindal, C. J., "that they should be found in the best and most proper place of deposit. If documents continue in such custody, there never would be any question as to their authenticity: but it is when documents are found in other than their proper place of deposit, that the investigation commences, whether it is reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious, that, while there can be only one place of deposit strictly and absolutely proper, there may be many and various that are reasonable and probable, though differing in degree; some being more so, some less; and, in those cases, the proposition to be determined is, whether the actual custody is so reasonably and probably accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody which is held sufficiently genuine to render a document admissible appears from all the cases."[3]

[2] Phil. Evid. 273; 1 Stark. Evid. 66, 67; Clarkson *v.* Woodhouse, 5 T. R. 413, n., per Lord Mansfield.

[3] Per Tindal, C. J., in Bishop of Meath *v.* Marquess of Winchester, 3 Bing. N. C. 183, 200, 201 [leading case], expounded and confirmed by Parke, B., in Croughton *v.* Blake, 12 M. & W. 205, 208; and in Doe d. Jacobs *v.* Phillips, 10 Jur. 34; 8 Q. B. 158; {Whitman *v.* Heneberry, 73 Ill. 109; U. S. *v.* Castro, 24 How. 346;} [Gibson *v.* Poor, 21 N. H. 440 (leading case); Doe *v.* Eslava, 11 Ala. 1028 (leading case).] See also Lygon *v.* Strutt, 2 Anstr. 601; Swinnerton *v.* Marquis of Stafford, 3 Taunt. 91; Bullen *v.* Michel, 4 Dow 297; Earl *v.* Lewis, 4 Esp. 1; Randolph *v.* Gordon, 5 Price 312; Manby *v.* Curtis, 1 id. 225, 232, per Wood, B.; Bertie *v.* Beaumont, 2 id. 303, 307; Barr *v.* Gratz, 4 Wheat. 213, 221; Winn *v.* Patterson, 9 Pet. 663–675; Clarke *v.* Courtney, 5 id. 319, 344; Jackson *v.* Laroway, 3 Johns. Cas. 283, approved in Jackson *v.* Luquere, 5 Cowen 221, 225; Hewlett *v.* Cock, 7 Wend. 371, 374; Duncan *v.* Beard, 2 Nott & McC. 400; Middleton *v.* Mass, ib. 55; Doe *v.* Beynon, 4 P. & D. 193; Doe *v.* Pearce, 2 M. & Rob. 240; Tolman *v.* Emerson, 4 Pick. 160; *ante*, §§ 570, n. 2; § 21; Doe *v.* Roberts, 11 M. & W. 520; Doe *v.* Keeling, 11 Q. B. 884; [Harlan *v.* Howard, 79 Ky. 373; Whitman *v.* Shaw, 166 Mass. 451; Martin *v.* Bowie, 37 S. C. 102, 110; Templeton *v.* Luckett, 41 U. S. App. 392.] Whether a document comes from the proper custody is a question for the judge and not for the jury to determine: Doe *v.* Keeling, *supra*; Rees *v.* Walters, 3 M. & W. 527, 531.

(3) It is further requisite,[4] where the nature of the case will admit it, that proof be given of some act done in reference to the documents offered in evidence, as a further assurance of their genuineness, and of the claiming of title under them. If the document bears date *post litem motam*, however ancient, some evidence of correspondent acting is always scrupulously required, even in cases where traditionary evidence is receivable.[5] But in other cases where the transaction is very ancient, so that proof of contemporaneous acting, such as possession, or the like, is not probably to be obtained, its production is not required.[6] But where unexceptionable evidence of enjoyment, referable to the document, may reasonably be expected to be found, it must be produced.[7] If such evidence, referable to the document, is not to be expected, still it is requisite to prove some acts of modern enjoyment, with reference to similar documents, or that modern possession or user should be shown, corroborative of the ancient documents.[8]

(4) Under these qualifications, ancient documents, purporting to be a part of the transactions to which they relate, and not a mere narrative of them, are receivable as evidence that those transactions actually occurred. And though they are spoken of as hearsay evidence of ancient possession, and as such are said to be admitted in exception to the general rule; yet they seem rather to be parts of the *res gestæ*, and therefore admissible as original evidence, on the principle already discussed. An ancient deed, by which is meant one more than thirty years old,[9] having nothing suspicious about it,[10] is presumed to be genuine without express proof, the witnesses being presumed dead; and, if it is found in the proper custody,[11] and is corroborated by evidence of ancient or modern corresponding enjoyment,[12] or by other equivalent or explanatory proof, it is to be pre-

[4] [The ensuing paragraph is dealing with the first of the two doctrines above-mentioned in note 1; for the more recent authorities, see *ante*, § 108, notes 21, 22.]

[5] 1 Phil. Evid. 277; Brett *v.* Beales, 1 Mood. & M. 416.

[6] Clarkson *v.* Woodhouse, 5 T. R. 412, 413, n., per Ld. Mansfield.

[7] 1 Phil. Evid. 277; Plaxton *v.* Dare, 10 B. & C. 17.

[8] Rogers *v.* Allen, 1 Campb. 309, 311; Clarkson *v.* Woodhouse, 5 T. R. 412, n.

[9] [The original period seems to have been forty years: Gilbert, Evidence, 100; Benson *v.* Olive, Bunbury 280; Gittings *v.* Hall, 1 H. & J. 14; but the period of thirty years was afterwards taken: R. *v.* Farringdon, 2 T. R. 466; and is now universally accepted. The mere bearing of such a date is not enough; the document's existence must be traced back for that period; see examples in Shaller *v.* Brand, 6 Binn. 435; Quinn *v.* Eagleston, 108 Ill. 248. The computation backwards may begin from the time of production, not merely the time of suit begun: Gardner *v.* Granniss, 57 Ga. 539, 554.] In Jackson *v.* Blanshan, 3 Johns. 392, the question was whether the thirty years should be computed from the date of the will, or from the time of the testator's death; and the Court held, that it should be computed from the time of his death; but on this point Spencer, J., differed from the rest of the Court; and his opinion, which seems more consistent with the principle of the rule, is fully sustained by Doe *v.* Deakin, 3 C. & P. 402; Doe *v.* Wolley, 8 B. & C. 22; McKenire *v.* Fraser, 9 Ves. 5; Gough *v.* Gough, 4 T. R. 707, n.; Man *v.* Ricketts, 7 Beav. 93.

[10] [Hill *v.* Nisbet, 58 Ga. 586 ("It must exhibit an honest face"); Harlan *v.* Howard, 79 Ky. 373 ("unblemished by any alterations").]

[11] [See *ante*, note 3.]

[12] It has been made a question, whether the document may be read in evidence,

sumed that the deed constituted part of the actual transfer of property therein mentioned; because this is the usual and ordinary course of such transactions among men. The residue of the transaction may be as unerringly inferred from the existence of genuine ancient documents, as the remainder of a statue may be made out from an existing *torso*, or a perfect skeleton from the fossil remains of a part.

[So far, then, as concerns the admission of ancient documents without direct proof of their execution, the above rule makes four requirements: (*a*) The document must have been in existence for thirty years or more; (*b*) it must have been found in a proper custody, *i. e.* in a place consistent with its genuineness; (*c*) it must not have a suspicious appearance; and (*d*) there must be, if it purports to convey title to land, some other attendant circumstance corroborating its genuineness, — either possession of the land or some other item of corroboration. The rule may be applied to any kind of a document [13] (though the last requirement is not essential except for documents dealing with land); and if the proper showing as above can be made, a copy may be used where the original is lost.[14] The

before the proof of possession or other equivalent corroborative proof is offered; but it is now stated that the document, if otherwise apparently genuine, may be first read; for the question, whether there has been a corresponding possession, can hardly be raised till the Court is made acquainted with the tenor of the instrument: Doe *v.* Passingham, 2 C. & P. 440. A graver question has been whether, [in the case of a deed or will of land,] the *proof of possession* is *indispensable;* or whether its absence may be supplied by other satisfactory corroborative evidence. In Jackson *v.* Laroway, 3 Johns. Cas. 283, it was held by Kent, J., against the opinion of the other judges, that it was indispensable, on the authority of Fleta, lib. 6, c. 34; Co. Lit. 6 *b;* Isack *v.* Clarke, 1 Roll. 132; James *v.* Trollop, Skin. 239; 2 Mod. 322; Forbes *v.* Wale, 1 W. Bl. 532; and the same doctrine was again asserted by him, in delivering the judgment of the Court, in Jackson *v.* Blanshan, 3 Johns. 292, 298; see also Thompson *v.* Bullock, 1 Bay 364; Middleton *v.* Mass, 2 Nott & McC. 55 [leading case]; Carroll *v.* Norwood, 1 Har. & J. 174, 175; Shaller *v.* Brand, 6 Binn. 439; Doe *v.* Phelps, 9 Johns. 169, 171. But the weight of authority at present seems clearly the other way; and it is now agreed, that, where proof of possession cannot be had, the deed may be read, if its genuineness is satisfactorily established by other circumstances; see Ld. Rancliffe *v.* Parkins, 6 Dow 202, per Ld. Eldon; McKenire *v.* Fraser, 9 Ves. 5; Doe *v.* Passingham, 2 C. & P. 440; Barr *v.* Gratz, 4 Wheat. 213, 221; Jackson *v.* Laroway, 3 Johns. Cas. 283, 287; Jackson *v.* Luquere, 5 Cowen 221, 225; Jackson *v.* Lamb, 7 id. 431; Hewlett *v.* Cock, 7 Wend. 371, 373, 374; Willson *v.* Betts, 4 Denio 201. [The latter view, *i. e.* that possession is merely one circumstance of corroboration, and that its place may equally well be taken by other corroborative circumstances, is the sound view, and is to-day the one generally accepted; see Caruthers *v.* Eldridge, 12 Gratt. 670, 687 (leading case); Pridgen *v.* Green, 80 Ga. 737; Sanger *v.* Merritt, 120 N. Y. 109, 124; Walker *v.* Walker, 67 Pa. 185; Smith *v.* Rankin, 20 Ill. 14; the fact of public registration may suffice: Allison *v.* Little, 88 Ala. 512; some Courts say that possession need not be shown if no evidence of it can be had: Long *v.* McDow, 87 Mo. 197; Harlan *v.* Howard, 79 Ky. 373.]

[13] [See instances in Wynne *v.* Tyrwhitt, 4 B. & Ald. 376; Doe *v.* Turnbull, 5 U. C. Q. B. 129 ("any written documents whatever"); Enfield *v.* Ellington, 67 Conn. 459; Cooney *v.* Packing Co., 169 Ill. 370; Smucker *v.* Penns. R. Co., Pa., 41 Atl. 457; Almy *v.* Church, 18 R. I. 182; Aldrich *v.* Griffith, 66 Vt. 390, 404.]

[14] [Green *v.* Proude, 1 Mod. 117; New York, N. H. & H. R. Co. *v.* Benedict, 169 Mass. 262; Briggs *v.* Henderson, 49 Mo. 531; Townsend *v.* Downer, 32 Vt. 183, 211; *contra:* Trammell *v.* Thurmond, 17 Ark. 203, 218; Patterson *v.* Collier, 75 Ga. 419. This question arises usually for a certified copy of an old deed defectively recorded.]

circumstances above operate as sufficient evidence not merely of the genuineness of signature, but also of all other facts going to constitute a due execution, such as the existence of a power of attorney to make the deed.[15] That these circumstances create a real presumption of genuineness, shifting the burden of producing evidence (*ante*, § 14 *w*), seems not to be the law; they merely amount to sufficient evidence to let the document go to the jury (*ante*, § 14 *y*) to determine its genuineness.[16]]

§ 575 *c* [573 *a*]. **Replies received by Mail.** A further exception to the rule requiring proof of handwriting has been admitted, in the case of letters received in reply to others proved to have been sent to the party. Thus, where the plaintiff's attorney wrote a letter addressed to the defendant at his residence, and sent it by the post, to which he received a reply purporting to be from the defendant; it was held, that the letter thus received was admissible in evidence, without proof of the defendant's handwriting, and that letters of an earlier date in the same handwriting might also be read, without other proof.[1]

§ 576. **Proof by Comparison of Handwriting.**[1] In considering the proof of private writings, we are naturally led to consider the subject of the comparison of hands, upon which great diversities of opinion have been entertained. This expression seems formerly to have been applied to every case where the genuineness of one writing was proposed to be tested before the jury by comparing it with another, even though the latter were an acknowledged autograph;[2] and it was held inadmissible, because the jury were supposed to be too illiterate to judge of this sort of evidence: a reason long since exploded.[3] All evidence of handwriting, except where the witness

[15] [Robinson *v.* Craig, 1 Hill S. C. 389; King *v.* Little, 1 Cush. 436; *contra:* Fell *v.* Young, 63 Ill. 106; compare Tolman *v.* Emerson, 4 Pick. 160.]

[16] [*Accord: ante*, § 81 *e*, note 4; see Scott *v.* Delany, 87 Ill. 146; *contra:* Wisdom *v.* Reeves, 110 Ala. 418, 428, 434.]

[1] Ovenston *v.* Wilson, 2 Car. & Kir. 1; Kinney *v.* Flynn, 2 R. I. 319; McKonkey *v.* Gaylord, 1 Jones L. 94; [Harrington *v.* Fry, 1 C. & P. 290; White *v.* Tolliver 110 Ala. 300; Ragan *v.* Smith, Ga., 29 S. E. 759; Davis *v.* Robinson, 67 Ia. 355; Norwegian Plow Co. *v.* Munger, 52 Kan. 371; Boykin *v.* State, 50 La. An., 24 So. 141; Connecticut *v.* Bradish, 14 Mass. 296; People's Nat'l B'k *v.* Geisthardt, Nebr., 75 N. W. 582; Armstrong *v.* Advance T. Co., 5 S. D. 12; National Acc. Soc. *v.* Spiro, 47 U. S. App. 293; see R. *v.* Saunders, L. R. 1 Q. B. D. 19. The same principle might be applied to a *telegram:* Taylor *v.* Steamer Robert Campbell, 20 Mo. 254. Distinguish the principle of § 40, *ante*, as to the presumption of delivery from the mailing of a letter duly stamped and addressed.]

[1] [For the history of this mode of proof, see an article by the editor in 30 Amer. L. Rev. 481. There are four chief topics of inquiry: (1) Who is qualified as a witness to handwriting; (2) whether experts speaking from a study of standard specimens may testify; (3) whether such specimens may be used by the jury; (4) how a witness to handwriting may be tested on cross-examination.]

[2] [And also to any witness testifying from the similarity of the writing in issue to others which he has seen.]

[3] The admission of evidence by comparison of hands, in Col. Sidney's Case, 9 How. St. Tr. 467, was one of the grounds of reversing his attainder; yet, though it clearly appears that his handwriting was proved by two witnesses, who had seen him

saw the document written, is, in its nature, comparison. It is the belief which a witness entertains, upon comparing the writing in question with its exemplar in his mind, derived from some previous knowledge.[4] The admissibility of some evidence of this kind is now too well established to be shaken. It is agreed that, if the witness has the proper knowledge of the party's handwriting, he may declare his belief in regard to the genuineness of the writing in question. He may also be interrogated as to the circumstances on which he founds his belief.[5] The point upon which learned judges have differed in opinion is, upon the source from which this knowledge is derived, rather than as to the degree or extent of it.

§ 577. **Same: Qualified Witnesses; (1) Ex visu scriptionis; (2) Ex scriptis olim visis.** There are two modes of acquiring this knowledge of the handwriting of another, either of which is universally admitted to be sufficient, to enable a witness to testify to its genuineness.

(1) The first is from having seen him write. It is held sufficient for this purpose, that the witness has seen him write but once, and then only his name.[1] The proof in such case may be very light; but the jury will be permitted to weigh it.[2]

write, and by a third who had paid bills purporting to have been indorsed by him, this was held illegal evidence in a criminal case; [as to this interesting historical question of the real ruling in Sidney's Trial, and the ground for the reversal of his attainder, see 30 Amer. L. Rev. 492. But it must be noted that so far as evidence by comparison was allowed at all, there was originally no objection to showing specimens to the jury: 30 Amer. L. Rev. 491; this exclusion did not grow up till the end of the 1700s.]

[4] Doe *v.* Suckermore, 5 Ad. & El. 730, per Patteson, J.

[5] R. *v.* Murphy, 8 C. & P. 297; Com. *v.* Webster, 5 Cush. 295.

[1] Garrells *v.* Alexander, 4 Esp. 37; {Pepper *v.* Barnett, 22 Gratt. 405; Bowman *v.* Sanborn, 25 N. H. 87; Hopkins *v.* Megquire, 35 Me. 78; West *v.* State, 2 N. J. L. 212;} [State *v.* Goodwin, 37 La. An. 713; Diggins' Estate, 68 Vt. 198; yet a case may arise in which this would be insufficient; see People *v.* Corey, 148 N. Y. 476.] In Powell *v.* Ford, 2 Stark. 164, the witness had never seen the defendant write his Christian name; but only "M. Ford," and then but once; whereas the acceptance of the bill in question was written with both the Christian and surname at full length; and Lord Ellenborough thought it not sufficient, as the witness had no perfect exemplar of the signature in his mind. But in Lewis *v.* Sapio, 1 M. & Malk. 39, where the signature was "L. B. Sapio," and the witness had seen him write several times, but always "Mr. Sapio," Lord Tenterden held it sufficient. A witness has also been permitted to speak as to the genuineness of a person's *mark*, from having seen it affixed by him on several occasions: George *v.* Surrey, 1 M. & Malk. 516; [Carson's Appeal, 59 Pa. 493.] But where the knowledge of the handwriting has been obtained by the witness from seeing the party write his name *for that purpose*, after the commencement of the suit, the evidence is held inadmissible: Strauger *v.* Searle, 1 Esp. 14; see also Page *v.* Homans, 2 Shepl. 478.

[2] In Slaymaker *v.* Wilson, 1 Penn. 216, the deposition of a witness, who swore positively to her father's hand, was rejected, because she did not say how she knew it to be his hand. But in Moody *v.* Rowell, 17 Pick. 490, such evidence was very properly held sufficient, on the ground that it was for the other party to explore the sources of the deponent's knowledge, if he was not satisfied that it was sufficient; [and it seems that a preliminary statement by the witness that he is acquainted with the person's handwriting suffices unless the opponent chooses to inquire further: State *v.* Minton, 116 Mo. 605, 614; Stoddard *v.* Hill, 38 S. C. 385; see Richardson *v.* Stringfellow, 100 Ala. 416; Riggs *v.* Powell, 142 Ill. 453, 456.

The *time* that has elapsed since the witness saw the act of writing is immaterial: Diggins' Estate, *supra*;] {and that the time of this writing seen was subsequent to the date of the writing in issue is also immaterial: Keith *v.* Lathrop, 10 Cush. 453.}

(2) The second mode is, from having seen letters, bills, or other documents, purporting to be the handwriting of the party, and having afterwards personally communicated with him respecting them;[3] or acted upon them as his, the party having known and acquiesced in such acts founded upon their supposed genuineness; or, by such adoption of them [by the party whose writing is in dispute] into the ordinary business transactions of life, as induces a reasonable presumption of their being his own writings;[4] evidence of the identity of the party being of course added *aliunde*, if the witness be not personally acquainted with him. In both these cases, the witness acquires his knowledge by his own observation of facts, occurring under his own eye, and, which is especially to be remarked, without having regard to any particular person, case, or document.

§ 578. **Same: Ancient Writings.** This rule, requiring personal knowledge on the part of the witness, has been relaxed in two cases. Where writings are of such antiquity, that living witnesses cannot be had, and yet are not so old as to prove themselves.[1] Here the course is, to produce other documents, either admitted to be genuine, or proved to have been respected and treated and acted upon as such, by all parties; and to call experts to compare them, and to testify their opinion concerning the genuineness of the instrument in question.[2]

§ 578 *a*. **Same: Comparison of Specimens by the Jury.**[1] Where other writings, admitted to be genuine, are already in the case; here the comparison may be made by the jury, with or without the aid of experts.[2] The reason assigned for this is, that as the jury are [other-

[3] {Pearson *v.* McDaniel, 62 Ga. 100;} [Redd *v.* State, Ark., 47 S. W. 119.]

[4] Doe *v.* Suckermore, 5 Ad. & El. 731, per Patteson, J.; Lord Ferrars *v.* Shirley, Fitzg. 195; Carey *v.* Pitt, Peake's Evid. App. 81; Thorpe *v.* Gisburne, 2 C. & P. 21; Harrington *v.* Fry, Ry. & M. 90; Com. *v.* Carey, 2 Pick. 47; Johnson *v.* Daverne, 19 Johns. 134; Burr *v.* Harper, Holt 420; Pope *v.* Askew, 1 Ired. 16; {Sill *v.* Reese, 47 Cal. 294; Spottiswood *v.* Weir, 80 id. 450;} [Violet *v.* Rose, 39 Nebr. 660.] {So, the teller of a bank who has paid money out upon checks whose genuineness is not afterwards disputed, is competent: Brigham *v.* Peters, 1 Gray 139, 145.} [The mere receiving of a reply, or a series of replies, in course of correspondence, purporting to be signed by the person addressed, should ordinarily be a sufficient foundation of knowledge: Bullis *v.* Eaton, 96 Ia. 513; Redding *v.* Redding's Estate, 69 Vt. 500;] {*contra:* McKeone *v.* Barnes, 108 Mass. 344; see Burress *v.* Com., 27 Gratt. 934.}

[1] *Supra*, § 570.

[2] See 20 Law Mag. 323; Brune *v.* Rawlings, 7 East 282; Morewood *v.* Wood, 14 id. 328; Gould *v.* Jones, 1 W. Bl. 384; Doe *v.* Tarver, Ry. & M. 143; Jackson *v.* Brooks, 8 Wend. 426.

[1] [This originally formed part of the preceding section.]

[2] Griffith *v.* Williams, 1 C. & J. 47; Solita *v.* Yarrow, 1 M. & Rob. 133; R. *v.* Morgan, ib. 134, n.; Doe *v.* Newton, 5 Ad. & El. 514; Bromage *v.* Rice, 7 C. & P. 548; Hammond's Case, 2 Greenl. 33; Waddington *v.* Cousins, 7 C. & P. 595. [This sentence, which contains two important fallacies, and has misled many Courts, needs some examination. (1) *a*. In the first place, the practice of proving handwriting by submitting specimens to the jury was originally orthodox and unquestioned; so far as proof by similarity was allowed at all, no discrimination was made against submitting specimens to the jury; see 30 Amer. L. Rev. 491. *b*. Then doubts grew up about this practice; and the Courts of Exchequer and King's Bench, in 1830 and 1836 (Griffith *v.* Williams, Doe *v.* Newton, *supra*) restricted the use of such comparison to docu-

wise and in any event] entitled to look at such writings for one purpose, it is better to permit them, under the advice and direction of the Court, to examine them for all purposes, than to embarrass them with impracticable distinctions, to the peril of the cause. [Nevertheless, there is to-day much difference of practice in the limitations employed by the various Courts; some follow the orthodox rule and allow the jury's comparison of specimens for documents already in the case; others allow it (in some instances, under statutes) for specimens proved to the Court to be genuine; others apply certain of the distinctions mentioned in the next section as applicable to experts' use of specimens. In England, the limitations were at common law different for comparison by the jury and comparison by experts; but often the same limitations are by American Courts or by statute made applicable to both.[3]

When specimens are allowed to be used, they must of course be *fair specimens*. A specimen written in Court, or after controversy begun, for the express purpose of affording a standard and on behalf of the party offering it, may well be thought untrustworthy, and is usually excluded; although it is occasionally held to be admissible in discretion.[4]

§ 578 *b*. **Same: Testing the Witness.** Where tests are desired to be employed against an opposing witness or party, there is no reason to apprehend that the party seeking to make them can distort the evidence in his favor. Accordingly the use of specimens written *post litem motam* by an opposing party or witness is generally allowed.[1] Where it is desired to test a witness to handwriting by sub-

ments "already in the case," *i. e.* documents whose authenticity had in any event to be established by being material upon some other issue in the case. *c*. Thus, the phrase in the above sentence, "admitted to be genuine," is *not* a restriction applicable to the use of specimens by the jury; such specimens as are already and otherwise in the case may be used, whether or not they have been admitted by the opponent to be genuine. This restriction, "admitted to be genuine," is borrowed from the doctrine about experts' use of specimens (§ 579), and has no application to the jury's use. Nevertheless, the author's statement above has served to introduce it into some American Courts. (2) The concluding clause above, "with or without the aid of experts," is also incorrect. Comparison of specimens by experts was not allowed at common law; see 30 Amer. L. Rev. 495; only by St. 17–18 Vict., c. 125, § 27, in 1854, was such testimony established as admissible; hence comparison by the jury "with the aid of experts" does not represent the English common law; but this phrase has served as authority for some American Courts; see *post*, § 579.]

[3] [For this reason it seems best to marshall the cases dealing with both uses together in the next sections.]

[4] {See Doe *v*. Wilson, 10 Moo. P. C. 502; Cobbett *v*. Kilminster, 4 F. & F. 490; Chandler *v*. LeBarron, 45 Me. 534; King *v*. Donahoe, 110 Mass. 155; Com. *v*. Allen, 128 id. 46; R. *v*. Taylor, 6 Cox Cr. 58; Williams *v*. State, 61 Ala. 33;} [Hickory *v* U. S., 151 U. S. 303.]

{For *press-copies*, as specimens, see Com. *v*. Jeffries, 7 All. 562; Com. *v*. Eastman, 1 Cush. 189.}

[For *photographic copies*, see *ante*, § 439 *h*.]

[1] [See the cases in the preceding note, and also Layer's Trial, 16 How. St. Tr. 192; Smith *v*. King, 62 Conn. 515; Bradford *v*. People, Colo., 43 Pac. 1013.

That no privilege would excuse a person from being subjected to this test, see *ante*, § 469 *c*, and Smith *v*. King, *supra*.]

mitting to him a specimen not already in the case, with the intention of proving the incorrectness of his judgment should it be erroneous, and thus of discrediting his pretended ability to identify the person's handwriting, the objection that such a test would involve too much time and a confusion of issues has occasionally been thought to avail; but there is no reason why it should invariably do so; and such a test may be so useful and telling that it ought always to be allowable, subject to the discretion of the trial Court.[2]]

§ 579. **Same: Expert testifying from Comparison of Specimens.** A third mode of acquiring knowledge of the party's handwriting was proposed to be introduced in the case of *Doe* v. *Suckermore;*[1] upon which, the learned judges being equally divided in opinion, no judgment was given; namely, by first satisfying the witness, by some information or evidence not falling under either of the two preceding heads, that certain papers were genuine, and then desiring the witness to study them, so as to acquire a knowledge of the party's handwriting, and fix an exemplar in his mind; and then asking him his opinion in regard to the disputed paper; or else, by offering such papers to the jury, with proof of their genuineness, and then asking the witness to testify his opinion, whether those and the disputed paper were written by the same person. This method supposes the writing to be generally that of a stranger; for if it is that of the party to the suit, and is denied by him, the witness may well derive his knowledge from papers, admitted by that party to be genuine, if such papers were not selected nor fabricated for the occasion, as has already been stated in the preceding section. It is obvious that if the witness does not speak from his own knowledge, derived in the first or second modes before mentioned, but has derived it from papers shown to him for that purpose, the production of these papers may be called for, and their genuineness contested. So that the third mode of information proposed resolves itself into this question; namely, whether documents, irrelevant to the issues on the record, may be received in evidence at the trial, to enable the jury[2] to institute a comparison of hands, or to enable a witness so to do.

§ 580. In regard to admitting such evidence, upon an examination

[2] [See Bishop Atterbury's Trial, 16 How. St. Tr. 571; Hughes *v.* Rogers, 8 M. & W. 123; Griffits *v.* Ivery, 11 A. & E. 322; Younge *v.* Honner, 1 C. & K. 51; First Nat'l B'k *v.* Allen, 100 Ala. 476, 489; Neal *v.* Neal, 58 Cal. 287; McDonald *v.* McDonald, Ind., 41 N. E. 340; Tucker *v.* Hyatt, id., 42 N. E. 1047; Browning *v.* Gosnell, 91 Ia. 448; Page *v.* Homans, 14 Me. 482; People *v.* Murphy, 135 N. Y. 450. The majority of these rulings, proceeding on the above reasons, confine the testing to questions on cross-examination, and exclude the demonstration by other testimony of the witness' error (on the analogy of § 461 *e*, *post*). But this result seems unnecessary and unsound; that the fair use of such tests is orthodox in precedent, is shown by Bishop Atterbury's Trial, *supra*, an interesting and instructive case.]

[1] 5 A. & E. 703; [it was proposed, and almost uniformly rejected, long before Doe *v.* Suckermore; see cases cited in 30 Amer. L. Rev. 495.]

[2] [The use by the jury, treated in the foregoing section, is not involved in the present question.]

in chief, for the mere purpose of enabling the jury to judge of the handwriting, the modern English decisions are clearly opposed to it.[1] For this, two reasons have been assigned: namely, first, the danger of fraud in the selection of the writings offered as specimens for the occasion; and, secondly, that, if admitted, the genuineness of these specimens may be contested, and others successively introduced, to the infinite multiplication of collateral issues, and the subversion of justice; to which may be added the danger of surprise upon the other party, who may not know what documents are to be produced, and, therefore, may not be prepared to meet the inferences drawn from them. The same mischiefs would follow, if the same writings were introduced to the jury through the medium of experts.

§ 581. But, with respect to the admission of papers irrelevant to the record, for the sole purpose of creating a standard of comparison of handwriting, the American decisions are far from being uniform. If it were possible to extract from the conflicting judgments a rule which would find support from the majority of them, perhaps it would be found not to extend beyond this: that such papers can be offered in evidence to the jury, only when no collateral issue can be raised concerning them; which is only where the papers are either conceded to be genuine, or are such as the other party is estopped to deny; or are papers belonging to the witness, who was himself previously acquainted with the party's handwriting, and who exhibits them in confirmation and explanation of his own testimony.[1] [The fundamental types of rulings are four; by one form, the rule is to exclude altogether expert testimony based on specimens exhibited to the witness (as in England at common law); by another, the rule is to receive such testimony (usually subject to the trial Court's discretion) after the specimens are proved to the Court to be genuine; by another, the rule receives testimony founded on specimens already otherwise in the case; and by a fourth form, the testimony must be based on specimens conceded by the opponent to be genuine; then, besides these, there are other forms involving a combination of some of the above limitations, — as, to receive testimony founded on specimens already in the case *and* conceded by the opponent to be genuine; or, to

[1] Bromage *v.* Rice, 7 C. & P. 548; Waddington *v.* Cousins, ib. 595; Doe *v.* Newton, 5 Ad. & El. 514; Hughes *v.* Rogers, 8 M. & W. 123; Griffits *v.* Ivery, 11 Ad. & El. 322; The Fitzwalter Peerage, 10 Cl. & Fin. 193; R. *v.* Barber, 1 Car. & Kir. 434; see also R. *v.* Murphy, 1 Armstr. Macartn. & Ogle 204; R. *v.* Caldwell, ib. 324. [This statement might perhaps mislead. The cases here cited, with Griffith *v.* Williams, and Doe *v.* Suckermore, *supra*, do admit specimens for the jury's use, but only when they are already in the case. But (this point also being involved in most of the above rulings) they exclude absolutely the testimony of experts based on comparison of specimens; *i. e.*, the two questions were differently decided at common law, as already explained in § 578 *a*. As to the reasons for the above limitations to the jury's use, the chief reasons are correctly stated by the author in the remainder of the section.]

[1] Smith *v.* Fenner, 1 Gallis. 170. [But this last is not a real case of testimony based on comparison; the witness already knows the writing otherwise, as in § 577, *ante*.]

receive testimony founded on specimens already in the case *or* conceded to be genuine; moreover, the same form of rule sometimes is, and sometimes is not, applied to the jury's use and to experts' use. Of the above forms, the first is historically correct according to the English common law, while the second one is in policy and principle the only justifiable one. In view of the varying forms of the rule, it is of little service for the practitioner to seek to use as authorities the precedents established elsewhere than in his own jurisdiction.[2]]

[2] [So far as principle and policy are concerned, the case of Doe *v.* Suckermore, 5 A. & E. 710, contains almost every argument that has ever been advanced on either side. The English statute of 1854 (St. 17–18 Vict., c. 125, § 27), which represents the most satisfactory rule, and has been adopted by statute in several American jurisdictions, is as follows: "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 the witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." The cases in the United States are as follows (and these include, as already noted, rulings as to both jury's use and experts' use): —

Ala.: Little *v.* Beazley, 2 Ala. 703; State *v.* Givens, 5 id. 754; Christ *v.* State, 21 id. 145; Bishop *v.* State, 30 id. 41; Kirksey *v.* Kirksey, 41 id. 636; Bestor *v.* Roberts, 58 id. 333; Williams *v.* State, 61 id. 39; Moon's Adm'r *v.* Crowder, 72 id. 88; Snider *v.* Burks, 84 id. 56; Gibson *v.* Trowbridge, 96 id. 357; Curtis *v.* State, 24 So. 111; *Ark.:* Miller *v.* Jones, 32 Ark. 343; *Cal.:* Sill *v.* Reese, 47 Cal. 343; *Colo.:* Bradford *v.* People, 43 Pac. 1013; *Conn.:* Lyon *v.* Lyman, 9 Conn. 60; Tyler *v.* Todd, 36 id. 222; *Ga.:* Doe *v.* Roe, 16 Ga. 525; Boggus *v.* State, 34 id. 278; McVicker *v.* Conkle, 24 S. E. 23; Axson *v.* Belt, 30 id. 262; *Ill.:* Pate *v.* People, 8 Ill. 664; Jumpertz *v.* People, 21 id. 407; Kernin *v.* Hill, 37 id. 209; Brobston *v.* Cahill, 64 id. 358; Riggs *v.* Powell, 142 id. 453; Rogers *v.* Tyley, 144 id. 652, 665; *Ind.:* Chance *v.* Gravel Road Co., 32 Ind. 474; Burdick *v.* Hunt, 43 id. 386; Jones *v.* State, 60 id. 241; Forgey *v.* Bank, 66 id. 124; Hazzard *v.* Vickery, 78 id. 64; Shorb *v.* Kinzie, 80 id. 502; Walker *v.* Steele, 121 id. 440; Sewing Mach. Co. *v.* Gordon, 124 id. 495; Bowen *v.* Jones, 41 N. E. 400; McDonald *v.* McDonald, 41 N. E. 340; Tucker *v.* Hyatt, 42 N. E. 1047; *Ia.:* Hyde *v.* Woolfolk, 1 Ia. 162; Morris *v.* Sargent, 18 id. 97; Borland *v.* Walrath, 33 id. 132; Wilson *v.* Irish, 62 id. 263; Winch *v.* Norman, 65 id. 188; Riordan *v.* Guggerty, 74 id. 691; State *v.* Farrington, 90 id. 673; *Kan.:* Macomber *v.* Scott, 10 Kan. 339; Joseph *v.* National B'k, 17 id. 260; Abbott *v.* Coleman, 22 id. 252; Ort *v.* Fowler, 31 id. 485; Gilmore *v.* Swisher, 52 Pac. 426; *Ky.:* McAllister *v.* McAllister, 7 B. Monr. 270; Hawkins *v.* Grimes, 13 id. 261; Fee *v.* Taylor, 83 Ky. 263; Froman *v.* Com., 42 S. W. 728; *La.:* State *v.* Fritz, 23 La. An. 56; *Me.:* Chandler *v.* Le Barron, 45 Me. 534; Woodman *v.* Dana, 52 id. 13; State *v.* Thompson, 80 id. 194; *Md.:* Tome *v.* R. Co., 39 Md. 89, 93; Herrick *v.* Swomley, 56 id. 459; *Mass.:* Hall *v.* Huse, 10 Mass. 39; Homer *v.* Wallis, 11 id. 312; Salem B'k *v.* Gloucester B'k, 17 id. 526; Moody *v.* Rowell, 17 Pick. 490; Richardson *v.* Newcomb, 21 id. 317; Com. *v.* Eastman, 1 Cush. 217; Ward *v.* Fuller, 7 Gray 178; Bacon *v.* Williams, 13 id. 527; McKeone *v.* Barnes, 108 Mass. 346; Com. *v.* Coe, 115 id. 503; Demerritt *v.* Randall, 116 id. 331; *Mich.:* Vinton *v.* Peck, 14 Mich. 287; Van Sickle *v.* People, 29 id. 64; Foster's Will, 34 id. 26; First Nat'l B'k *v.* Robert, 41 id. 711; People *v.* Parker, 67 id. 224; *Minn.:* Morrison *v.* Porter, 35 Minn. 425; *Miss.:* Wilson *v.* Beauchamp, 50 Miss. 32; Garvin *v.* State, 52 id. 209; *Mo.:* State *v.* Scott, 45 Mo. 304; State *v.* Clinton, 67 id. 385; State *v.* Tompkins, 71 id. 616; Springer *v.* Hall, 83 id. 697; Rose *v.* First Nat'l B'k, 91 id. 401; State *v.* Minton, 116 id. 605; State *v.* Thompson, 34 S. W. 31; Geer *v.* M. L. & M. Co., 34 S. W. 1099; State *v.* Goddard, 48 S. W. 82; *Mont.:* Davis *v.* Fredericks, 3 Mont. 262; Baxter *v.* Hamilton, 51 Pac. 265; *Nebr.:* Huff *v.* Nims, 11 Nebr. 365; Banking Co. *v.* Shoemaker, 31 id. 134; Bank *v.* Williams, 35 id. 410; First Nat'l B'k *v.* Carson, 67 N. W. 779; *N. H.:* Myers *v.* Toscan, 3 N. H. 47; Bowman *v.* Sanborn, 25 id. 110; Reed *v.* Spaulding, 42 id. 121; State *v.* Shinborn, 46 id. 503; State *v.* Hastings, 53 id. 460; Carter *v.* Jackson, 58 id. 157; *N. J.:* West *v.* State, 22 N. J. L. 241; Rev. St. p. 381, § 9; Mut. Ben. Life Ins. Co. *v.* Brown, 30 N. J. Eq. 201; *N. Y.:* Jackson *v.* Van Dusen, 5 Johns. 155; Jackson *v.* Phillips, 9 Cow. 112; Wilson *v.* Kirkland, 5 Hill,

§ 581 *a*. **Discriminations; Comparison of Spelling; Testimony to a Feigned Hand, etc.** A distinction, however, has been recently taken, between the case of collateral writings offered in evidence to prove the general style or character of the party's autograph, and of similar writings when offered to prove a peculiar mode of spelling another person's name, or other words, in order to show from this fact that the principal writing was his own. Thus where, to an action for a libel, the defendant pleaded that the plaintiff had sent to him a libellous letter, and, to prove this, gave in evidence the envelope, in which the defendant's name was spelt with a superfluous *t*, and then offered in evidence some other letters of the plaintiff, in which he had spelt the defendant's name in the same peculiar manner; which last-mentioned letters Patteson, J., rejected; it was held that the rejection was wrong, and that the letters were admissible.[1]

Experts are received to testify whether the writing is a real or a feigned hand.[2] Where one writing crosses another, an expert may

182; Van Wyck *v.* McIntosh, 14 N. Y. 439; Dubois *v.* Baker, 30 id. 361; Randolph *v.* Loughlin, 48 id. 459; Miles *v.* Loomis, 75 id. 292; Hynes *v.* McDermott, 82 id. 492; Peck *v.* Callaghan, 95 id. 73; People *v.* Murphy, 135 id. 453; People *v.* Corey, 4 N. E. 1066; *N. C.:* Outlaw *v.* Hurdle, 1 Jones L. 165; Otey *v.* Hoyt, 3 id. 410; State *v.* Woodruff, 67 N. C. 91; Yates *v.* Yates, 76 id. 149; McLeod *v.* Bullard, 84 id. 529; Tuttle *v.* Rainey, 98 id. 514; Fuller *v.* Fox, 101 id. 120; Tunstall *v.* Cobb, 109 id. 320; State *v.* De Graff, 113 id. 688; Riley *v.* Hall, 26 S. E. 47; State *v.* Noe, 25 S. E. 812; *N. Dak.:* Dakota *v.* O'Hare, 1 N. D. 43; *Ohio:* Hicks *v.* Person, 19 Oh. 441; Calkins *v.* State, 14 Oh. St. 222; Bragg *v.* Colwell, 19 id. 407; Pavey *v.* Pavey, 30 id. 602; Koons *v.* State, 36 id. 199; Bell *v.* Brewster, 44 id. 696; *Or.:* Osmun *v.* Winters, 46 Pac. 780; Munkers *v.* Ins. Co., 46 Pac. 850; State *v.* Tice, 48 Pac. 367; *Pa.:* McCorkle *v.* Binns, 5 Binney 348; Farmers' Bank *v.* Whitehill, 10 S. & R. 111; Bank *v.* Jacobs, 1 Pa. 180; Callan *v.* Gaylord, 3 Watts 321; Baker *v.* Haines, 6 Whart. 291; Depue *v.* Place, 7 Pa. St. 428; McNair *v.* Com., 26 id. 390; Travis *v.* Brown, 43 id. 9; Haycock *v.* Greup, 57 id. 441; Aumick *v.* Mitchell, 82 id. 211; Berryhill *v.* Kirchner, 96 id. 492; Foster *v.* Collner, 107 id. 313; Rockey's Estate, 155 id. 456; *S. Car.:* Boman *v.* Plunkett, McCord 518; Bird *v.* Miller, 1 McMull. 124; Bennett *v.* Mathewes, 5 S. C. 478; Benedict *v.* Flanagan, 18 id. 506; Weaver *v.* Whilden, 33 id. 190; *Tenn.:* Clark *v.* Rhodes, 2 Heisk. 207; Kannon *v.* Galloway, 2 Baxt. 231; Wright *v.* Hessey, 3 id. 44; Franklin *v.* Franklin, 90 Tenn. 50; Powers *v.* McKenzie, ib. 179; *Tex.:* Hanley *v.* Grandy, 28 Tex. 211; Eborn *v.* Zimpelman, 47 id. 518; Kennedy *v.* Upshaw, 64 id. 420; Matlock *v.* Glover, 63 id. 236; Smyth *v.* Caswell, 67 id. 572; Wagoner *v.* Ruply, 69 id. 703; Jester *v.* Steiner, 86 Tex. 415; *U. S.:* Smith *v.* Fenner, 1 Gall. 175; Strother *v.* Lucas, 6 Pet. 766; Rogers *v.* Ritter, 12 Wall. 321; U. S. *v.* Darnaud, 3 Wall. Jr. 181; Medway *v.* U. S., 6 Ct. of Cl. 428; Moore *v.* U. S., 91 U. S. 270; U. S. *v.* Jones, 10 Fed. 470; U. S. *v.* McMillan, 29 id. 247; Williams *v.* Conger, 125 U. S. 413; U. S. *v.* Mathias, 36 Fed. 893; Holmes *v.* Goldsmith, 147 U. S. 150, 163; Hickory *v.* U. S., 151 id. 303; National Acc. Soc. *v.* Spiro, U. S. App., 78 Fed. 775; Richardson *v.* Green, 15 U. S. App. 488, 507; *Utah:* Durnell *v.* Sowden, 5 Utah 222; *Vt.:* Rich *v.* Trimble, 2 Tyler 349; Gifford *v.* Ford, 5 Vt. 535; Adams *v.* Field, 21 id. 264; State *v.* La Vigne, 39 id. 234; State *v.* Hopkins, 43 id. 20; Rowell *v.* Fuller, 59 id. 692; *Va.:* Gardner's Adm'r *v.* Vidal, 6 Rand. 106; Rowt's Adm'x *v.* Kile's Adm'r, 1 Leigh 216; *Wash.:* Moore *v.* Palmer, 44 Pac. 142; *W. Va.:* Clay *v.* Robinson, 7 W. Va. 359; Clay *v.* Alderson's Adm'r, 10 id. 53; State *v.* Henderson, 29 id. 158; State *v.* Koontz, 31 id. 129; *Wis.:* Pierce *v.* Northey, 14 Wis. 9, 13; Hazleton *v.* Union Bank, 32 id. 47.]

[1] Brookes *v.* Tichbourn, 14 Jur. 1122, 2 Eng. L. & Eq. 374. In Jackson *v.* Phillips, 9 Cowen 94, where the facts were of a similar character, the collateral deed was offered and rejected on the sole ground of comparison of hands; the distinction in the text not having been taken or alluded to.

[2] Goodtitle *v.* Braham, 4 T. R. 497; Hammond's Case, 2 Greenl. 33; Moody *v.*

testify which, in his opinion, was the first made;[3] [and whether or when an alteration was made.[4] The expert whose opinion is receivable for these purposes is not necessarily to be a person following the profession of an expert in handwriting;[5] whether a particular witness is sufficiently qualified can hardly be indicated by any general definition.[6]]

6. *Conclusion.*

§§ 582, 583.[1]

§ 584. **Conclusion.** Having thus completed the original design of this volume, in a view of the principles and rules of the law of evidence, understood to be common to all the United States, this part of the work is here properly brought to a close. The student will not fail to observe the symmetry and beauty of this branch of the law, under whatever disadvantages it may labor from the manner of treatment; and will rise from the study of its principles, convinced, with Lord Erskine, that "they are founded in the charities of religion — in the philosophy of nature — in the truths of history — and in the experience of common life."[1]

Rowell, 17 Pick. 490; Com. *v.* Carey, 2 Pick. 47; Lyon *v.* Lyman, 9 Conn. 55; Hubley *v.* Vanhorne, 7 S. & R. 185; Lodge *v.* Phipher, 11 id. 333; [Com. *v.* Webster, 5 Cush. 301; Fitzwalter Peerage Case, 10 Cl. & F. 193; {Withee *v.* Rowe, 45 Me. 571; Sudlow *v.* Warshing, 108 N. Y. 522;} *contra, semble:* Carey *v.* Pitt, Peake Add. Cas. 131; Gurney *v.* Langlands, 5 B. & Ad. 330.]

[3] Cooper *v.* Bockett, 4 Moore P. C. 433.

[4] [Ross *v.* Sebastian, Ill., 43 N. E. 708; Stevenson *v.* Gunning, 64 Vt. 601.]

[5] [R. *v.* Silverlock, 1894, 2 Q. B. 766; Christman *v.* Pearson, Ia., 69 N. W. 1055.]

[6] [See examples in Birm. N. Bk. *v.* Bradley, Ala., 19 So. 791; Bradford *v.* People, Colo., 43 Pac. 1013; State *v.* David, Mo., 33 S. W. 28; Kornegay *v.* Kornegay, N. C., 23 S. E. 257.]

[1] [Transferred to Appendix II.]

[1] 24 How. St. Tr. 966.

APPENDIX I.

CONSTITUTIONAL PROVISIONS CONCERNING EVIDENCE; STATUTES AFFECTING COMPETENCY OF WITNESSES.[1]

ALABAMA.

Constitution, 1875.

Art. I, § 7. In all criminal prosecutions the accused has a right . . . to be confronted by the witnesses against him; . . . and that he shall not be compelled to give evidence against himself.

§ 19. . . . No person shall be convicted of treason, except on the testimony of two witnesses to the same overt act, or his own confession in open Court.

Code, 1897 (Martin).

§ 1794. In civil suits and proceedings, there must be no exclusion of any witness because he is a party, or interested in the issue tried, except that no person having a pecuniary interest in the result of the suit or the proceeding shall be allowed to testify against the party to whom his interest is opposed, as to any transaction with, or statement by the deceased person whose estate is interested in the result of the suit or proceeding, or when such deceased person, at the time of such transaction or statement, acted in any representative or fiduciary relation whatsoever to the party against whom such testimony is sought to be introduced, unless called to testify thereto by the party to whom such interest is opposed, or unless the testimony of such deceased person in relation to such transaction or statement is introduced in evidence by the party whose interest is opposed to that of the witness, or has been taken and is on file in the cause. No person who is an incompetent witness under this section shall make himself competent by transferring his interest to another.

[1] [The following pages contain two sets of statutory enactments: (1) the enactments in the Constitutions of the various States dealing with any matter of evidence; (2) the enactments in the statutes of the various States dealing with the capacity of witnesses as affected by interest, religious belief, infancy, insanity, infamy, and marital relationship; the selections are confined to this subject, because it is one (and almost the only one) upon which the changes have been so general as to establish new general principles; other statutory changes are chiefly in the nature of local variations.

The date given for the Constitution is the date of its adoption; the date given for the statutes is (so far as possible) the date of the latest compilation, whether officially authorized or not. No attempt has been made to notice session laws enacted since the dates of these compilations.]

§ 1795. No objection must be allowed to the competency of a witness because of his conviction for any crime, except perjury or subornation of perjury; but if he has been convicted of other infamous crime, the objection goes to his credibility.

§ 5297. On the trial of all indictments, complaints, or other criminal proceedings, the person on trial shall, at his own request, but not otherwise, be a competent witness; and his failure to make such request shall not create any presumption against him, nor be the subject of comment by counsel.

§ 5298. There shall be no exclusion of a witness in a criminal case, because, on conviction of the defendant, he may be entitled to a reward, or to a restoration of property, or to the whole or any part of the fine or penalty inflicted; such objection is addressed to the credibility, not to the competency, of the witness.

§ 5301. When two or more defendants are jointly indicted, the Court may, at any time before the evidence for the defence has commenced, order any defendant to be discharged from the indictment, in order that he may be a witness for the prosecution; and such order operates as an acquittal of such defendant, provided he does testify.

§ 5302. When two or more defendants are jointly indicted, the Court may direct a verdict of acquittal to be entered in favor of any one of them, against whom there is not, in the opinion of the Court, evidence sufficient to put him on his defence; and being acquitted, he may be a witness.

Arizona.

Revised Statutes, 1887.

§ 2037. 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.

§ 2038. The following persons cannot be witnesses in a criminal action: —

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.

§ 2039. 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; . . . but this exception does not apply to a criminal action or proceeding, for a crime committed by one against the other.

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.

3. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

§ 2040. A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offer himself as a witness, he may be cross-examined by the counsel for the Territory 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.

ARKANSAS.

Constitution, 1874.

Art. II, § 8. No person shall . . . be compelled in any criminal case to be a witness against himself.

§ 10. In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him.

§ 14. . . . No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open Court.

§ 26. . . . Nor shall any person be rendered incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths or affirmations.

Art. III, § 9. In trials of contested elections and in proceedings for the investigation of elections, no person shall be permitted to withhold his testimony on the ground that it may criminate himself or subject him to public infamy; but such testimony shall not be used against him in any judicial proceeding, except for perjury in giving such testimony.

Art. XIX, § 1. No person who denies the being of a God shall . . . be competent to testify as a witness in any Court.

Schedule, § 2 (same as Gen. St. § 2914, *post*).

Digest of Statutes, 1894 (Sandels and Hill).

§ 2908. No person shall be rendered incompetent to testify in criminal cases by reason of being the person injured or defrauded, or intended to be injured or defrauded, or because he would be en-

titled to satisfaction for the injury, or may be liable to pay the costs of prosecution.

§ 2909. In all cases where two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness in relation to such crime or misdemeanor; but the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offence.

§ 2910. On the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, the person so charged shall, at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him.

§ 2911. When two or more persons are indicted in the same indictment, either may testify in behalf of or against the other defendant or defendants.

§ 2912. All persons now convicted and sentenced, or who may hereafter be convicted and sentenced to the penitentiary of the State of Arkansas, shall be competent witnesses during and after their term of imprisonment, to testify in all prosecutions, suits, or investigations touching the ill treatment of persons convicted of felony and the unsanitary condition of the penitentiary and camps in which said convicts have been or may hereafter be confined, and of the kind and quality of food furnished such convicts.

§ 2913. The competency of such convicts to testify shall be limited to the matters set out in the preceding section, unless such convicts are pardoned by the governor of the State.

§ 2914. In civil actions, no witness shall be excluded because he is a party to a suit or interested in the issue to be tried: provided, in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statements of the testator, intestate, or ward, unless called to testify thereto by the opposite party; Provided further, this section may be amended or repealed by the general assembly.

§ 2915. All persons except those enumerated in the next section shall be competent to testify in a civil action.

§ 2916. The following persons shall be incompetent to testify: —

First. Persons convicted of a capital offence, or of perjury, subornation of perjury, burglary, robbery, larceny, receiving stolen goods, forgery, or counterfeiting, except by consent of the parties.

Second. Infants under the age of ten years, and over that age if incapable of understanding the obligation of an oath.

Third. Persons who are of unsound mind at the time of being produced as witnesses.

Fourth. Husband and wife, for or against each other, or concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsists or afterward, but either shall be allowed to testify for the other in regard to any business transacted by the one for the other in the capacity of agent.

§ 2917. All other objections to witnesses shall go to their credit alone, and be weighed by the jury or tribunal to which their evidence is offered.

California.

Constitution, 1879.

Art. I, § 4. . . . No person shall be rendered incompetent to be a witness or juror on account of his opinions on matters of religious belief.

§ 13. . . . No person shall . . . be compelled, in any criminal case, to be a witness against himself. . . . The Legislature shall have the power to provide for the taking, in the presence of the accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide, when there is reason to believe that the witness, from inability or other cause, will not attend the trial.

§ 20. . . . No person shall be convicted of treason unless on the evidence of two witnesses to the same overt act, or confession in open court.

Penal Code, 1889 (Deering).

§ 1102. The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code.

Code of Civil Procedure, 1889 (Deering).

§ 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.

§ 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 in whose behalf 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.

§ 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.

Colorado.

Constitution, 1876.

Art. II, § 4. . . . No person shall be denied any civil or political right, privilege, or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations.

§ 9. . . . No person can be convicted of treason unless on the testimony of two witnesses to the same overt act, or on his confession in open Court.

§ 16. In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face.

§ 17. . . . Such deposition [of a witness in criminal cases] shall not be used, if, in the opinion of the Court, the personal attendance of the witness might be procured by the prosecution, or is procured by the accused.

§ 18. No person shall be compelled to testify against himself in a criminal case.

Art. VII, § 9. In trials of contested elections, and for offences arising under the election law, no person shall be permitted to withhold his testimony on the ground that it may criminate himself, or subject him to public infamy; but such testimony shall not be used against him in any judicial proceeding, except for perjury in giving such testimony.

Annotated Statutes, 1891 (Mills).

§ 1170. The party or parties injured shall in all cases be competent witnesses, unless he, she, or they shall be rendered incompetent by reason of his, her, or their infamy or other legal incompetency

other than that of interest. The credibility of all such witnesses shall be left to the jury as in other cases.

§ 1171: Hereafter in all criminal cases tried in any Court of this State, the accused, if he so desire, shall be sworn as a witness in the case, and the jury shall give his testimony such weight as they think it deserves; but in no case shall a neglect or refusal of the accused to testify be taken or considered any evidence of his guilt or innocence.

§ 1172. Approvers shall not be allowed to give testimony.

§ 1173. The solemn affirmation of witnesses shall be deemed sufficient.

§ 4816. That 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 [now § 4822] when any adverse party sues or defends as the trustee or conservator of an idiot, lunatic, or distracted person, or as the executor or 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 action, suit, or proceeding, a party or interested person may testify to facts occurring after the death of such deceased person.

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 agent and the opposite party or parties in interest, such party or parties in interest may testify concerning the same conversation or transaction.

Third. When 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 parties in interest, then such opposite party in interest shall also be permitted to testify as to the same conversation or transaction.

Fourth. When 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 parties in interest, occurring before the death and in the absence of such deceased person, such adverse party or parties in interest may also testify to the same admission or conversation.

Fifth. When 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 parties 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.

§ 4818. That in any action, suit, or proceeding, by or against any surviving partner or partners, joint contractor or contractors, no adverse party or person adversely interested in the event thereof, shall, by virtue of section one 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.

§ 4821. No person shall be deemed incompetent to testify as a witness on account of his or her opinion in relation to the Supreme Being or a future state of rewards and punishments; nor shall any witness be questioned in regard to his or her religious opinions.

§ 4822. All persons, without exception, other than those specified in the next three sections, and in the second, third, fourth, seventh, and eighth sections of chapter one hundred and four of the general laws, may be witnesses. Neither parties nor other persons who have an interest in the event or proceeding shall be 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 now provided by law, but the conviction of any person for any crime may be shown for the purpose of affecting the credibility of such witness; and the fact of such conviction may be proved like any other fact not of record, either by the witness himself (who shall be compelled to testify thereto), or by any other person cognizant of such conviction, as impeaching testimony or by any other competent testimony.

§ 4823. The following persons shall not 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.

§ 4824. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore a person shall not be examined as a witness in the following cases: —

1. A husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; . . . 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.

2. An attorney shall not, 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.

3. A clergyman or priest shall not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

4. A physician or surgeon duly authorized to practise his profession under the laws of this State, shall not, without the consent of his patient, be examined as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.

5. A public officer shall not be examined as to communications made to him in official confidence, when the public interests, in the judgment of the Court, would suffer by the disclosure.

District of Columbia.

Compiled Statutes, 1894 (Abert and Lovejoy).

Ch. 71, § 1. . . . The parties thereto, and the persons in whose behalf any such action or proceeding may be brought or defended, and all persons interested in the same, shall, except as provided in the following section, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the Court, on behalf of any of the parties to the action or other proceedings.

§ 2. Nothing in the preceding section shall render any person who is charged with an offence in any criminal proceeding competent or compellable to give evidence for or against himself;

Or render any person compellable to answer any question tending to criminate himself;

Or render a husband competent or compellable to give evidence for or against his wife, or a wife competent or compellable to give evidence for or against her husband, in any criminal proceeding or in any proceeding instituted in consequence of adultery;

Nor shall a husband be compellable to disclose any communication made to him by his wife during the marriage, nor shall a wife be compellable to disclose any communication made to her by her husband during the marriage.

§ 3. The people called Quakers, those called Nicolites or New Quakers, those called Tunkers, and those called Menonists, holding it unlawful to take an oath on any occasion, shall be allowed to make their solemn affirmation as witnesses, in the manner that Quakers have been heretofore allowed to affirm, which affirmation shall be of the same avail as an oath, to all intents and purposes whatever.

§ 4. That before any of the persons aforesaid shall be admitted as a witness in any court of justice in this *District* [State,] the Court shall be satisfied, by such testimony as they may require, that such

person is one of those who profess to be conscientiously scrupulous of taking an oath.

§ 5. 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 to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by opposite party, or required to testify thereto by the Court.

§ 7. In all judicial proceedings in the District there shall be no exclusion of any witness on account of color.

§ 8. In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, in the United States Courts, Territorial Courts, and Courts-martial, and Courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness.

And his failure to make such request shall not create any presumption against him.

Connecticut.

Constitution, 1875.

Art. I, § 9. In all criminal prosecutions, the accused shall have the right . . . to be confronted by the witnesses against him. . . He shall not be compelled to give evidence against himself.

Art. IX, § 4. . . . No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

General Statutes, 1887.

§ 1094. In actions by or against the representatives of deceased persons, the entries, memoranda, and declarations of the deceased, relevant to the matter in issue, may be received as evidence; and in actions by or against the representatives of deceased persons, in which any trustee or receiver is an adverse party, the testimony of the deceased, relevant to the matter in issue, given at his examination, upon the application of said trustee or receiver, shall be received in evidence.

§ 1097. A wife shall be a competent witness against her husband in any action brought against him for necessaries furnished her while living apart from him.

§ 1098. No person shall be disqualified as a witness in any action by reason of his interest in the event of the same as a party or otherwise, or of his disbelief in the existence of a Supreme Being, or of

his conviction of crime; but such interest or conviction may be shown for the purpose of affecting his credit.

§ 1623. Any person on trial for crime shall be a competent witness, and at his or her option may testify or refuse to testify, upon such trial, and if such person has a husband or wife, he or she shall be a competent witness, but may elect or refuse to testify for or against the accused, except that a wife when she has received personal violence from her husband, may, upon his trial therefor, be compelled to testify in the same manner as any other witness. The neglect, or refusal, of an accused party to testify shall not be commented upon to the Court or jury.

DELAWARE.

Constitution, 1831.

Art. I, § 7. In all criminal prosecutions, the accused hath a right . . . to meet the witnesses in their examination face to face; . . . he shall not be compelled to give evidence against himself.

Art. VI, § 16. In civil causes, when pending, the Superior Court shall have the power, before judgment, . . . of directing the examination of witnesses that are aged, very infirm, or going out of the State, upon interrogatories *de bene esse*, to be read in evidence in case of the death or departure of the witnesses before the trial, or inability by reason of age, sickness, bodily infirmity, or imprisonment, then to attend; and also the power of obtaining evidence from places not within the State.

Revised Statutes, 1893.

Ch. 107, § 4. In criminal prosecutions, a free negro or free mulatto, if otherwise competent, may testify, if it shall appear to the Court that no competent white witness was present at the time the fact charged is alleged to have been committed; or that a white witness, being so present, has since died or is absent from the State and cannot be produced: provided, that no free negro or free mulatto shall be admitted as witness to charge a white man with being the father of a bastard child.

Laws (vol. 11), 1859, ch. 598, § 1. A party to the record in any action or judicial proceeding, or a person for whose immediate benefit such proceeding is prosecuted or defended, may be examined as if under cross-examination, at the instance of the adverse party, or any of them, and for that purpose may be compelled in the same manner, and subject to the same rules of examination as any other witness to testify; but the party calling for such examination shall not be excluded [concluded ?] thereby, but may rebut his testimony by other evidence.

§ 2. A party proposing to examine a party adverse in interest may

have the same process and means of compelling attendance and response as the law provides in the case of ordinary witnesses.

§ 3. No person shall be excluded from testifying as a witness by reason of his having been convicted of a felony, but evidence of the fact may be given to affect his credibility.

Laws (vol. 16), 1881, ch. 537, § 1. No person shall be incompetent to testify in any civil action or proceeding whether at law or in equity, because he is a party to the record or interested in the event of the suit or matter to be determined: provided, that in actions or proceedings by or against executors, administrators, or guardians, in which judgment or decree may be rendered for or against them, neither party shall be allowed 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.

Laws (vol. 19), 1893, ch. 777, § 1. . . . Each and every person accused, or who shall be accused, of any felony, misdemeanor, or offence whatsoever, punishable by the laws of this State, now or hereafter in force, shall, upon his or her trial before any tribunal established by the Constitution or laws of this State, have the right to testify in his or her own behalf, and shall also have the right to testify for or against any other person or persons jointly tried with him or her; provided, however, that a refusal to testify shall not be construed or commented upon as an indication of guilt.

Rev. St. ch. 108, § 5. The usual oath in this State shall be by swearing upon the Holy Evangels of Almighty God; the person to whom it is administered laying his right hand upon the book and kissing it.

§ 6. A person may be permitted to swear with the uplifted hand; that is to say, he shall lift up his right hand and swear by the everliving God, the searcher of all hearts, that, etc., and at the end of the oath shall say, "As I shall answer to God at the Great Day."

§ 7. A person conscientiously scrupulous of taking an oath may be permitted, instead of swearing, solemnly, sincerely, and truly to declare and affirm to the truth of the matters to be testified.

§ 8. A person believing in any other than the Christian religion may be sworn according to the peculiar ceremonies of his religion, if there be any such.

Florida.

Constitution, 1887.

Declaration of Rights, § 5. . . . No person shall be rendered incompetent as a witness on account of his religious opinions.

§ 11. In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face.

§ 12. No person shall be . . . compelled in any criminal case to be a witness against himself.

§ 23. . . . No person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or confession in open Court.

Revised Statutes, 1892.

§ 1095. No person, in any Court or before any officer acting judicially, shall be excluded from testifying as a witness, by reason of his interest in the event of the action or proceeding, or because he is a party thereto; provided, however, that no party to such action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom, any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any transaction or communication between such witness and a person at the time 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 committee of such insane person or lunatic; but this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor, or committeeman shall be examined on his own behalf, or as to which the testimony of such deceased person or lunatic shall be given in evidence.

§ 1096. Persons who have been convicted in any Court in this State of murder, perjury, piracy, forgery, larceny, robbery, arson, sodomy, or buggery, shall not be competent witnesses. Even a pardon of a person convicted of perjury shall not render him competent. Such conviction may be proved by questioning the proposed witness, or if he deny it, by producing a record of his conviction.

§ 1097. Testimony as to the general character, and an admission of proof, as provided in § 1096, of the conviction of any witness who shall have been convicted in this State of any crime other than those mentioned in said section, or who shall have been convicted of any crime in any other State, may be given in evidence to affect his credibility.

§ 2863. The provisions of law relative to the competency of witnesses in civil cases shall obtain also in criminal cases.

Ch. 4029. In the trial of civil actions in this State, neither the husband nor the wife shall be excluded as witnesses, where either the said husband or wife is an interested party to the suit pending.

Ch. 4036, § 1. Atheists, agnostics, and all persons who do not believe in the doctrine of future rewards and punishments, shall be permitted to testify in any of the Courts in this State.

§ 2. Said person or persons may solemnly affirm instead of taking an oath.

§ 2908. In all criminal prosecutions the accused shall have the

right of making a statement to the jury, under oath, of the matter of his defence or her defence.

Georgia.

Constitution, 1877.

Art. I, sect. 1, par. 5. Every person charged with an offence against the laws of this State . . . shall be confronted with the witnesses testifying against him.

Par. 6. No person shall be compelled to give testimony tending in any manner to criminate himself.

Sect. 2, par. 2. . . . No person shall be convicted of treason, except on the testimony of two witnesses to the same overt act, or confession in open Court.

Code, 1895.

§ 5268. Religious belief goes only to the credit.

§ 5269. No person offered as a witness shall be excluded by reason of incapacity, for crime or interest, or from being a party, from giving evidence, either in person or by deposition; . . . but every person so offered shall be competent, and compellable to give evidence on behalf of either or any of the parties to the said suit, action, or other proceeding, except as follows: —

1. Where any suit is instituted or defended by a person insane at the time of trial, or by an indorsee, assignee, transferee, or by the personal representative of a deceased person, the opposite party shall not be admitted to testify in his own favor against the insane or deceased person, as to transactions or communications with such insane or deceased person.

2. Where any suit is instituted or defended by partners, persons jointly liable, or interested, the opposite party shall not be admitted to testify in his own favor as to transactions or communications solely with an insane or deceased partner, or person jointly liable or interested.

3. Where any suit is instituted or defended by a corporation, the opposite party shall not be admitted to testify in his own behalf to transactions or communications solely with a deceased or insane officer or agent of the corporation.

4. Where a person not a party, but a person interested in the result of the suit, is offered as a witness, he shall not be competent to testify, if as a party to the cause he would for any cause be incompetent.

5. No agent or attorney-at-law of the surviving or sane party, at the time of the transaction testified about, shall be allowed to testify in favor of a surviving or sane party, under circumstances where the principal, a party to the cause, could not testify; nor can a surviving party or agent testify in his own favor, or in favor of a surviving or sane party, as to transactions or communications with a deceased

or insane agent, under circumstances where such witness would be incompetent if deceased agent had been principal.

6. In all cases where the personal representative of the deceased or insane party has introduced a witness interested in the event of a suit, who has testified as to transactions or communications on the part of the surviving agent or party with a deceased or insane party or agent, the surviving party or his agent may be examined in reference to such facts testified to by said witness.

§ 5270. There shall be no other exceptions allowed under the foregoing paragraphs.

§ 5272. Nothing contained in section 5269 shall apply to any action, suit, or proceeding in any court, instituted in consequence of adultery, or to any action for breach of promise of marriage.

§ 5273. Persons who have not the use of reason, as idiots, lunatics during lunacy, and children who do not understand the nature of an oath, are incompetent witnesses.

§ 5274. Drunkenness, which dethrones reason and memory, incapacitates during its continuance.

§ 5275. No physical defects in any of the senses incapacitates a witness. An interpreter may explain his evidence.

§ 5276. The Court must, by examination, decide upon the capacity of one alleged to be incompetent from idiocy, lunacy or insanity, or drunkenness, or childhood.

§ 5279. The sanction of an oath, or affirmation equivalent thereto, is necessary to the reception of any oral evidence. The Court may frame such affirmation according to the religious faith of the witness.

IDAHO.

Revised Statutes, 1887.

§ 5956. 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, by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.

§ 5957. 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 in whose behalf an action or proceeding is prosecuted, against an executor or an 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.

§ 5958. 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 violence of one against the person of the other.

§ 8141. The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this Code.

§ 8142. Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife are competent witnesses for or against each other in a criminal action or proceeding to which one or both are parties.

§ 8143. A defendant in a criminal action or proceeding to which he is a party, is not, without his consent, a competent witness for or against himself. His neglect or refusal to give such consent shall not in any manner prejudice him nor be used against him on the trial or proceeding.

Illinois.

Constitution, 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.

§ 9. In all criminal prosecutions the accused shall have the right . . . to meet the witnesses face to face.

§ 10. No person shall be compelled in any criminal case to give evidence against himself.

Revised Statutes, 1898 (Hurd).

Ch. 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 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.

Ch. 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.

§ 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.

§ 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.

§ 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 a 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.

§ 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.

§ 7. In any civil action, suit, or proceeding, no person who would, if a party thereto, be incompetent to testify therein, under the provisions of sections 2 or 3, shall become competent by reason of any assignment or release of his claim, made for the purpose of allowing such person to testify.

Indiana.

Constitution, 1851.

Art. I, § 7. No person shall be rendered incompetent as a witness in consequence of his opinions on matters of religion.

§ 8. The mode of administering an oath or affirmation shall be such as may be most consistent with and binding upon the person to whom such oath or affirmation may be administered.

§ 13. In all criminal prosecutions the accused shall have the right . . . to meet the witnesses face to face.

§ 14. . . . No person, in any criminal prosecution, shall be compelled to testify against himself.

§ 29. No person shall be convicted of treason except on the testimony of two witnesses to same overt act, or upon his confession in open court.

Revised Statutes, 1897 (Thornton).

§ 509. All persons, whether parties to or interested in the suit, shall be competent witnesses in a civil action or proceeding, except as herein otherwise provided.

§ 510. The following persons shall not be competent witnesses: —

First. Persons insane at the time they are offered as witnesses, whether they have been so adjudged or not.

Second. Children under ten years of age, unless it appears that they understand the nature and obligation of an oath.

§ 511. In suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate: provided, however, that in cases where a deposition of such decedent has been taken, or he has previously testified as to the matter, and his testi-

mony or deposition can be used as evidence for such executor or administrator, such adverse party shall be a competent witness for himself, but only as to any matters embraced in such deposition or testimony.

§ 512. In all suits by or against heirs or devisees, founded on a contract with or demand against the ancestor, to obtain title to or obtain possession of property, real or personal, of, or in right of, such ancestor, or to affect the same in any manner, neither party to such suit shall be a competent witness as to any matter which occurred prior to the death of the ancestor.

§ 513. When in any case an agent of a decedent shall testify on behalf of an executor, administrator, or heirs, concerning any transaction, as having been had by him, as such agent, with a party to the suit, his assignor or grantor, and in the absence of the decedent; or if any witness shall, on behalf of the executor, administrator, or heirs, testify to any conversation or admission of a party to the suit, his assignor or grantor, as having been had or made in the absence of the deceased; then the party against whom such evidence is adduced, his assignor or grantor, shall be competent to testify concerning the same matter. No person who shall have acted as an agent in the making or continuing of a contract with any person who may have died, shall be a competent witness in any suit upon or involving such contract, as to matters occurring prior to the death of such decedent, on behalf of the principal to such contract, against the legal representatives or heirs of the decedent, unless he shall be called by such heirs or legal representatives. And in such case he shall be a competent witness only as to matters concerning which he is interrogated by such heirs or representatives. When, in any case, a person shall be charged with unlawfully taking or detaining personal property, or having done damage thereto, and such person by his pleading shall defend on the ground that he is executor, administrator, guardian, or heir, and as such has taken or detains the property, or has done the acts charged, then no person shall be competent to testify who would not be competent if the person so defending were the complainant; but when the person complaining cannot testify, then the party so defending shall also be excluded.

§ 514. When the husband or wife is a party, and not a competent witness in his or her own behalf, the other shall also be excluded; except that the husband shall be a competent witness in a suit for the seduction of his wife, but she shall not be competent.

§ 515. In all cases in which executors, administrators, heirs, or devisees are parties, and one of the parties to the suit shall be incompetent, as hereinbefore provided, to testify against them, then the assignor or grantor of a party making such assignment or grant voluntarily shall be deemed a party adverse to the executor or administrator, heir, or devisee, as the case may be: provided, however,

that in all cases referred to in sections 276, 277, 278, and 279 of said act — said sections being numbered in the Revised Statutes of 1881, 498, 499, 500, and 501 — any party to such suit shall have the right to call and examine any party adverse to him as a witness, or the Court may, in its discretion, require any party to a suit, or other person, to testify, and any abuse of such discretion shall be renewable [reviewable ?] on appeal.

§ 516. In all actions by an executor or administrator on contracts assigned to the decedent, when the assignor is alive and a competent witness in the cause, the executor or administrator and the defendant or defendants shall be competent witnesses as to all matters which occurred between the assignor and the defendant or defendants, prior to notice of such assignment.

§ 518. No want of belief in a Supreme Being or in the Christian religion shall render a witness incompetent; but the want of such religious belief may be shown upon the trial. In all questions affecting the credibility of a witness, his general moral character may be given in evidence.

[Criminal cases.] § 1889. The following persons are competent witnesses: —

First. All persons who are competent to testify in civil actions.

Second. The party injured by the offence committed.

Third. Accomplices, when they consent to testify.

Fourth. The defendant, to testify in his own behalf. But if the defendant do not testify, his failure to do so shall not be commented upon or referred to in the argument of the cause, nor commented upon, referred to, or in any manner considered by the jury trying the same; and it shall be the duty of the Court, in such case, in its charge, to instruct the jury as to their duty under the provisions of this section.

§ 1895. When two or more persons are included in one prosecution, the Court may, at any time before the defendant has gone into his defence, direct any defendant to be discharged, that he may be a witness for the State. A defendant may also, when there is not sufficient evidence to put him on his defence, at any time before the evidence is closed, be discharged by the Court for the purpose of giving testimony for a co-defendant.

IOWA.

Constitution, 1857.

Art. I, § 4. . . . No person shall be . . . rendered incompetent to give evidence in any Court of law or equity, in consequence of his opinions on the subject of religion; and any party to any judicial proceeding shall have the right to use as a witness, or take the testimony of, any other person, not disqualified on account of interest, who may be cognizant of any fact material to the case; and parties to suits may be witnesses, as provided by law.

§ 10. In all criminal prosecutions, and in cases involving the life or liberty of an individual, the accused shall have a right . . . to be confronted with the witnesses against him.

§ 16. . . . No person shall be convicted of treason, unless on the evidence of two witnesses to the same overt act, or confession in open court.

Annotated Code, 1897.

§ 4601. Every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases, both civil and criminal, except as herein otherwise declared.

§ 4603. No person offered as a witness in any action or proceeding in any Court, or before any officer acting judicially, shall be excluded by reason of his interest in the event of the action or proceeding, or because he is a party thereto, except as provided in this chapter."

§ 4604. No party to any action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title by assignment or otherwise, and no husband or wife of any said party or person, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at 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. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor, or guardian shall be examined on his own behalf, or as to which the testimony of such deceased or insane person or lunatic shall be given in evidence.

§ 4606. Neither the 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, or in a civil action or proceeding one against the other; but they may in all civil and criminal cases be witnesses for each other.

§ 4607. Neither husband nor wife can be examined in any case as to any communication made to the one by the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted.

§ 5484. Defendants in all criminal proceedings shall be competent witnesses in their own behalf, but cannot be called as witnesses by the State; and should a defendant not elect to become a witness, this fact shall not have any weight against him on the trial, nor shall the attorney or attorneys for the State, during the trial, refer to the fact that the defendant did not testify in his own behalf; and should they

do so, such attorney or attorneys will be guilty of a misdemeanor, and defendant shall for that cause alone be entitled to a new trial.

KANSAS.

Constitution, 1859.

Bill of Rights, § 7. . . . Nor shall any person be incompetent to testify on account of religious belief.

§ 10. In all prosecutions, the accused shall be allowed . . . to meet the witness face to face. . . . No person shall be a witness against himself.

§ 13. . . . No person shall be convicted of treason unless on the evidence of two witnesses to the same overt act, or confession in open court.

General Statutes, 1897 (Webb).

Ch. 95, § 330. No person shall be disqualified as a witness in any civil action or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of a crime; but such interest or conviction may be shown for the purpose of affecting his credibility.

§ 331. Nothing in the preceding section contained shall in any manner affect the laws now existing relating to the settlement of estates of deceased persons, infants, idiots, or lunatics, or the attestation of the execution of last wills and testaments, or of conveyances of real estate, or of any other instrument required by law to be attested.

§ 333. No party shall be allowed to testify in his own behalf in respect to any transaction or communication had personally by such party with a deceased person, when the adverse party is the executor, administrator, heir-at-law, next of kin, surviving partner, or assignee of such deceased person, where they have acquired title to the cause of action immediately from such deceased person; nor shall the assignor of a thing in action be allowed to testify in behalf of such party concerning any transaction or communication had personally by such assignor with a deceased person in any such case; nor shall such party or assignor be competent to testify to any transaction had personally by such party or assignor with a deceased partner or joint contractor in the absence of his surviving partner or joint contractor, when such surviving partner or joint contractor is an adverse party. If the testimony of a party to the action or proceeding has been taken, and he afterward die, and the testimony so taken shall be used after his death in behalf of his executors, administrators, heirs-at-law, next of kin, assignee, surviving partner, or joint contractor, the other party or the assignor shall be competent to testify as to any and all matters to which the testimony so taken relates.

§ 334. The following persons shall be incompetent to testify:

First, persons who are of unsound mind at the time of their production for examination; *second*, 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; *third*, Husband and wife, for or against each other, except concerning transactions in which one acted as the agent of the other, or when they are joint parties and have a joint interest in the action; but in no case shall either be permitted to testify concerning any communication made by one to the other during the marriage, whether called while that relation subsisted or afterward; and provided that in all actions for divorce hereafter to be tried, the parties thereto, or either of them, shall be competent to testify upon all material matters involved in the controversy to the same extent as other witnesses might do.

Ch. 102, § 217. No person shall be rendered incompetent to testify in criminal causes by reason of his being the person injured or defrauded, or intended to be injured or defrauded, or that would be entitled to satisfaction for the injury or is liable to pay the costs of the prosecution; or by reason of his being the person on trial or examination; or by reason of being the husband or wife of the accused; but any such facts may be shown for the purpose of affecting his or her credibility: provided, that no person on trial or examination, nor wife or husband of such person, shall be required to testify except as a witness on behalf of the person on trial or examination.

§ 218. The neglect or refusal of the person on trial to testify, or of a wife to testify on behalf of her husband, shall not raise any presumption of guilt, nor shall that circumstance be referred to by any attorney prosecuting in the case, nor shall the same be considered by the Court or jury before whom the trial takes place.

Kentucky.

Constitution, 1891.

§ 5. . . . The civil rights, privileges, or capacities of no person shall be taken away, or in any wise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma, or teaching.

§ 11. In all criminal prosecutions the accused has the right . . . to meet the witnesses face to face. . . . He cannot be compelled to give evidence against himself.

§ 229. . . . No person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or his own confession in open court.

Statutes, 1899 (Carroll).

§ 1645. In all criminal and parol prosecutions now pending or hereafter instituted in any of the Courts of this Commonwealth, the defendant on trial, on his own request, shall be allowed to testify in

his own behalf, but the failure to do so shall not be commented on or be allowed to create any presumption against him.

§ 1646. The defendant requesting that he be allowed to testify shall not be allowed to testify in chief, after any other witness has testified for the defence.

§ 1648. If a conspiracy is charged in the indictment and proven to the satisfaction of the Court, then each defendant named in the indictment may testify on his own behalf as above provided.

Civil Code of Practice, 1895 (Carroll).

§ 605. Subject to the exceptions and modifications contained in section six hundred and six, every person is competent to testify for himself or another, unless he be found by the Court incapable of understanding the facts concerning which his testimony is offered.

§ 606. (1) Neither a husband nor his wife shall testify, even after the cessation of their marriage, concerning any communication between them during marriage. Nor shall either of them testify against the other. Nor shall either of them testify for the other, except in an action for lost baggage or its value against a common carrier, an innkeeper, or a wrongdoer, and in such action either or both of them may testify; and except in actions which might have been brought by or against the wife, if she had been unmarried, and in such actions either but not both of them may testify.

(2) Subject to the provisions of sub-section seven of this section, no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by, an infant under fourteen years of age, or by one who is of unsound mind or dead when the testimony is offered to be given, except for the purpose and to the extent of affecting one who is living, and who, when above fourteen years of age and of sound mind heard such statement, or was present when such transaction took place, or when such act was done or omitted, unless (*a*) the infant or his guardian shall have testified against such person with reference to such statement, transaction, or act; or (*b*) the person of unsound mind shall, when of sound mind, have testified against such person with reference thereto; or (*c*) the decedent, or a representative of or some one interested in his estate, shall have testified against such person, with reference thereto; or (*d*) an agent of the decedent or person of unsound mind, with reference to such act or transaction, shall have testified against such person with reference thereto, or be living when such person offers to testify with reference thereto.

(3) No person shall testify for himself against a party who is not before the Court otherwise than by constructive service of a summons.

(4) No person shall testify for himself in chief in an ordinary

action, after introducing other evidence for himself in chief; nor in an equitable action after taking other testimony for himself in chief.

(5) No attorney shall testify concerning a communication made to him, in his professional character, by his client, or his advice thereon, without the client's consent; nor shall a clergyman or priest testify to any confession made to him, in his professional character, in the course of discipline enjoined by the church to which he belongs, without the consent of the person confessing.

(6) If the right of a person to testify for himself be founded upon the fact that one who is dead or of unsound mind has testified against him, the testimony of such person shall be confined to the facts or transactions to which the adverse testimony related.

(7) A person may testify for himself as to the correctness of original entries made by him against persons who are under no disability — other than coverture, or infancy and coverture combined — in an account-book according to the usual course of business, though the person against whom they were made may have died or become of unsound mind; but no person shall testify for himself concerning entries in a book, or the contents or purport of any writing, under the control of himself, or of himself and others jointly, if he refuse or fail to produce such book or writing and to make it subject to the order of the Court for the purposes of the action, if required to do so by the party against whom he offers to testify.

(8) No prisoner in a penitentiary of this State or of any other country shall testify; nor shall any person testify for himself against such prisoner.

(9) The assignment of a claim by a person who is incompetent to testify for himself shall not make him competent to testify for another.

(10) A party may compel an adverse party to testify as any other witness.

(11) None of the preceding provisions of this section apply to affidavits for provisional remedies, or to affidavits of claimants against the estates of deceased or insolvent persons, or affect the competency of attesting witnesses of instruments which are required by law to be attested.

§ 607. All other objections to witnesses shall go to their credit alone, and be weighed by the jury or tribunal to which their evidence is offered.

§§ 608, 609 (admits party's testimony in rebuttal of new testimony by opponent since deceased or become unsound in mind).

Louisiana.

Constitution, 1879.

Art. 6. No person shall be compelled to give evidence against himself in a criminal case or in any proceeding that may subject

him to criminal prosecution, except where otherwise provided in this constitution.

Art. 8. In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him.

Art. 151. . . . No person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or on his confession in open court.

Art. 174. Any person may be compelled to testify in any lawful proceeding against any one who may be charged with having committed the offence of bribery, and shall not be permitted to withhold his testimony upon the ground that it may criminate him or subject him to public infamy; but such testimony shall not afterwards be used against him in any judicial proceeding, except for perjury in giving such testimony.

Code of Practice, 1894 (Garland).

§ 479. If the religious opinions of a witness are opposed to his taking an oath, his affirmation of the truth of his testimony shall suffice.

§ 482. If the witness be objected to on the ground of his having a direct or indirect interest in the event of the suit, the party making the objections may examine such witness on oath as to the existence of such interest, and the witness must be sworn to answer the truth on the questions which shall be put to him on that head: provided, that the competent witness of any covenant or fact, whatever it may be, in civil matters, is a person of proper understanding: provided further, that the husband cannot be a witness for or against his wife, nor the wife for or against her husband, but that in any case where the husband and wife may be joined as plaintiffs or defendants and have a separate interest, they shall be competent witnesses for or against their separate interest therein.

Maine.

Constitution, 1819.

Art. I, § 6. In all criminal prosecutions, the accused shall have a right . . . to be confronted by the witnesses against him. . . . He shall not be compelled to furnish or give evidence against himself.

§ 12. . . . No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or confession in open court.

Revised Statutes, 1883.

Ch. 82, § 92. No person is an incompetent witness on account of his religious belief; but he is subject to the test of credibility; and a person who does not believe in the existence of a Supreme Being may testify under solemn affirmation and is subject to the pains and penalties of perjury.

§ 93. No person is excused or excluded from testifying in any civil suit or proceeding at law or in equity, by reason of his interest in the event thereof as a party or otherwise, except as hereinafter provided, but such interest may be shown to affect his credibility; and the husband or wife of either party may be a witness.

§ 94. No defendant shall be compelled to testify in any suit when the cause of action implies an offence against the criminal law on his part. If he offers himself as a witness, he waives his privilege of not criminating himself, but his testimony shall not be used against him in any criminal prosecution involving the same subject-matter.

§ 98. The five preceding sections do not apply to cases where at the time of taking testimony or at the time of trial the party prosecuting or the party defending or any one of them is an executor or an administrator or is made a party as heir of a deceased party; except in the following cases: —

1. The deposition of a party or his testimony given at a former trial may be used at any trial after his death; if the opposite party is then alive, and in that case the latter may also testify. 2. In all cases in which an executor, administrator, or other legal representative of a deceased person is a party, such party may testify to any facts admissible upon the rules of evidence, happening before the death of such person; and when such person so testifies, the adverse party is neither excluded nor excused from testifying in reference to such facts, and any such representative party or heir of a deceased party may testify to any fact admissible upon general rules of evidence, happening after the decease of the testator, intestate, or ancestor; and in reference to such matters the adverse party may testify. 3. If the representative party is nominal only, both parties may be witnesses; if the adverse party is nominal only, and had parted with his interest, if any, during the lifetime of the representative party's testator or intestate, he is not excluded from testifying, if called by either party; and in an action against an executor or administrator, if the plaintiff is nominal only, or, having had an interest, disposed of it in the lifetime of the defendant's testator or intestate, neither party to the record is excused or excluded from testifying. 4. In an action by or against an executor, administrator, or other legal representative of a deceased person, in which his account books or other memoranda are used as evidence on either side, the other party may testify in relation thereto. 5. In actions where an executor, administrator, or other legal representative is a party, and the opposite party is an heir of the deceased, said heir may testify when any other heir of the deceased testifies at the instance of such executor, administrator, or other legal representative.

§ 99. The rules of evidence which apply to actions by or against executors or administrators apply in actions where a person shown to the Court to be insane is solely interested as a party.

§ 103. A person to whom an oath is administered shall hold up his hand, unless he believes that an oath administered in that form is not binding, and then it may be administered in a form believed by him to be binding. One believing in any other than the Christian religion may be sworn according to the ceremonies of his religion.

§ 104. Persons conscientiously scrupulous of taking an oath may affirm as follows: "I affirm under the pains and penalties of perjury," which affirmation is of the same force and effect as an oath.

§ 105. No person is incompetent to testify in any Court or legal proceeding in consequence of having been convicted of an offence; but such conviction may be shown to affect his credibility.

Ch. 134, § 19. . . . In all criminal trials the accused shall, at his own request, but not otherwise, be a competent witness. He shall not be compelled to testify on cross-examination to facts that would convict or furnish evidence to convict him of any other crime than that for which he is on trial; and the fact that he does not testify in his own behalf shall not be taken as evidence of his guilt. The husband or wife of the accused is a competent witness.

Maryland.

Constitution, 1867.

Declaration of Rights, Art. 21. In all criminal prosecutions every man hath a right . . . to be confronted with the witnesses against him, . . . to examine the witnesses for and against him on oath.

Art. 22. No man ought to be compelled to give evidence against himself in a criminal case.

Art. 36. . . . Nor shall any person, otherwise competent, be deemed incompetent as a witness or juror on account of his religious belief; provided he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts and be rewarded or punished therefor either in this world or the world to come.

Art. 39. That the manner of administering an oath or affirmation to any person ought to be such as those of the religious persuasion, profession, or denomination of which he is a member, generally esteem the most effectual confirmation by the attestation of the Divine Being.

Public General Laws, 1888 (Poe).

Art. 35, § 1. No person offered as a witness shall hereafter be excluded, by reason of incapacity from crime or interest, from giving evidence, either in person or by deposition, according to the practice of the Courts, in the trial of any issue joined or hereafter to be joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any Court, or before any

judge, jury, justice of the peace, or other person having, by law or by consent of the parties, authority to hear, receive, and examine evidence; but every person so offered may and shall be admitted to give evidence, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence; but no person who has been convicted of the crime of perjury shall be admitted to testify in any case or proceeding whatever; and the parties litigant, and all persons in whose behalf any suit, action, or other proceeding may be brought or defended, themselves, and their wives and husbands, shall be competent and compellable to give evidence in the same manner as other witnesses, except as hereinafter excepted.

§ 2. When an original party to a contract or cause of action is dead or shown to be a lunatic or insane, or when an executor or administrator is a party to the suit, action, or other proceedings, either party may be called as a witness by his opponent; but shall not be admitted to testify on his own offer, or upon the call of his co-plaintiff or co-defendant, otherwise than now by law allowed, unless a nominal party, merely, except in case where the party to such suit, action, or other proceeding has died, or become lunatic or insane, after having testified in his own behalf, then the opposite party shall be a competent witness on his own behalf in such case, notwithstanding the executor or administrator of such deceased person, or committee of such lunatic or insane person, has become a party to such suit, action, or other proceeding, but shall only testify as to matters upon which such deceased, lunatic, or insane person was examined and testified to: provided, that when an executor, administrator, guardian, or committee of a lunatic or insane person is a party to the suit, action, or proceeding, when the cause of action has arisen on a contract made with such executor, administrator, guardian, or committee, or out of transactions between such executor, administrator, guardian, or committee and the other party, or when the executor, administrator, guardian, or committee testifies as to any conversation had with the other party, either party may be examined as a witness as provided for in the other sections of this article: and provided further, that it shall not be competent for any party to the cause, who has been examined therein as a witness, to corroborate his testimony when impeached by proof of his own declaration or statement made to third persons out of the presence and hearing of the adverse party: and provided further, that whenever the contract or cause of action in issue and on trial was made or contracted with an agent, the death or insanity of his principal shall not prevent any party to the suit or proceeding from being a

witness in the case: provided, such agent shall be living and competent to testify.

§ 3. In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes and offences, and in all proceedings in the nature of criminal proceedings in any Court of this State, and before a justice of the peace or other person acting judicially, the person so charged shall at his own request, but not otherwise, be deemed a competent witness; but the neglect or refusal of any such person to testify shall not create any presumption against him. In all criminal proceedings the husband or wife of the accused party shall be competent to testify; but in no case, civil or criminal, shall any husband or wife be competent to disclose any confidential communication made by the one to the other during the marriage; and in suits, actions, bills, or other proceedings instituted in consequence of adultery, or for the purpose of obtaining a divorce, or for damages for breach of promise of marriage, no verdict shall be permitted to be recovered, nor shall any judgment or decree be rendered, upon the testimony of the plaintiff alone; but in all such cases testimony in corroboration of that of the plaintiff shall be necessary.

Massachusetts.

Constitution, 1780.

Declaration of Rights, Art. 12. No subject shall . . . be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face.

Public Statutes, 1882; *and Supplements of* 1888 *and* 1895.

Ch. 169, § 13. The usual mode of administering oaths now practised in this Commonwealth, with the ceremony of holding up the hand, shall be observed in all cases in which an oath may be administered by law, except as hereinafter provided.

§ 14. When a person to be sworn before a Court or magistrate declares that a peculiar mode of swearing is in his opinion more solemn and obligatory than by holding up the hand, the oath may be administered in such mode.

§ 15. Every Quaker when called on to take an oath shall be permitted, instead of swearing, solemnly and sincerely to affirm, under the pains and penalties of perjury.

§ 16. 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.

§ 17. Every person believing in any other than the Christian relig-

ion 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.

§ 18. 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.

§ 19. The conviction of a witness of a crime may be shown to affect his credibility.

Michigan.

Constitution, 18[illegible]

Art. IV, § 41. The Legislature shall not diminish or enlarge the civil or political rights, privileges, and capacities of any person on account of his opinion or belief concerning matters of religion.

Art. VI, § 28. In every criminal prosecution, the accused shall have the right . . . to be confronted with the witnesses against him.

§ 30. . . . No person shall be convicted of treason unless upon the testimony of two witnesses to the same overt act, or on confession in open court.

§ 32. No person shall be compelled, in any criminal case, to be a witness against himself.

§ 34. No person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief.

Compiled Laws, 1897 (Miller).

Ch. 282, § 93. The usual mode of administering oaths now practised in this State, by the person who swears holding up the right hand, shall be observed in all cases in which an oath may be administered by law, except in the cases herein otherwise provided.

§ 94. When the Court, magistrate, or other officer before whom any person is to be sworn shall be satisfied that such person has any particular mode of swearing which is in his opinion more solemn or

obligatory than holding up the hand, such Court or officer may adopt that mode of administering the oath.

§ 95. Every person conscientiously opposed to taking an oath shall, when called on to take an oath, be permitted, instead of swearing, solemnly and sincerely to affirm, under the pains and penalties of perjury.

§ 96. No person shall be deemed incompetent as a witness in any Court, matter, or proceeding, on account of his opinions on the subject of religion; nor shall any witness be questioned in relation to his opinions thereon, either before or after he shall be sworn.

§ 99. No person shall be excluded from giving evidence in any matter, civil or criminal, by reason of crime, or for any interest of such person in the matter, suit, or proceeding in which such testimony may be offered, or by reason of marital or other relationship to any party thereto; but such interest, relationship, or conviction of crime may be shown for the purpose of drawing in question the credibility of such witness, except as is hereafter provided.

§ 100. On the trial of any issue joined, or in any matter, suit, or proceeding, in any Court, or before any officer or person having, by law or by consent of parties, authority to hear, receive, and examine evidence, the parties to any such suit or proceeding named in the record, and persons for whose benefit such suit is prosecuted or defended, may be witnesses therein, in their own behalf or otherwise, in the same manner as otherwise, except as hereinafter otherwise provided; and the deposition of any such party or person may be taken and used in evidence under the rules and statutes governing depositions, and any such party or person may be proceeded against, and compelled to attend and testify, as provided by law for other witnesses. No person shall be disqualified 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 witness, and his neglect to testify shall not raise any presumption against him, nor shall the Court permit any reference or comment to be made to or upon such neglect.

§ 101. That when a suit or proceeding is prosecuted or defended by the heirs, assignees, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness on his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person; and when any suit or proceeding is prosecuted or defended by any surviving partner or partners, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all in relation to matters which, if true, must

have been equally within the knowledge of the deceased partner and not within the knowledge of any one of the surviving partners. And when any suit or proceeding is prosecuted or defended by any corporation, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of a deceased officer or agent of the corporation and not within the knowledge of any surviving officer or agent of the corporation, nor when any suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person against a corporation, shall any person who is or has been an officer or agent of any such corporation be allowed to testify at all in relation to matters which, if true, must have been equally within the knowledge of such deceased person; provided, that whenever the words "the opposite party" occur in this section, it shall be deemed to include the assignors or assignees of the claim or any part thereof in controversy.

§ 102. A husband shall not be examined as a witness, for or against his wife, without her consent; nor a wife, for or against her husband, without his consent, except in cases where the cause of action grows out of a personal wrong or injury done by one to the other, or grows out of the refusal or neglect to furnish the wife or children with suitable support within the meaning of Act No. 136 of the Session Laws of 1883, and except in cases where the husband or wife shall be a party to the record in a suit, action, or proceeding where the title to the separate property of the husband or wife so called or offered as a witness, or where the title to property derived from, through, or under the husband or wife so called or offered as a witness, shall be the subject-matter in controversy or litigation in such suit, action, or proceeding, in opposition to the claims or interest of the other of said married persons who is a party to the record in such suit, action, or proceeding; and in all such cases, such husband or wife who makes such claim of title, or under or from whom such title is derived, shall be as competent to testify in relation to said separate property and the title thereto, without the consent of said husband or wife, who is a party to the record in such suit, action, or proceeding, as though such marriage relation did not exist; nor shall either, during the marriage or afterwards, without the consent of both, be examined as to any communication made by one to the other during the marriage; but in any action or proceeding instituted by the husband or wife in consequence of adultery the husband and wife shall not be competent to testify.

Act 1887, No. 82. 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 separate and apart, ascertain to its own satisfac-

tion 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.

Acts 1897, No. 212. A husband may testify for or against his wife without her consent, and a wife may testify for or against her husband without his consent, in all criminal prosecutions for bigamy; provided, however, that nothing herein contained shall be so construed as to permit a husband or wife to testify against the other without the consent of both concerning any communications made by one to the other during the marriage.

Minnesota.

Constitution.

Art. I, § 6. In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him.

§ 7. No person . . . shall be compelled in any criminal case to be witness against himself.

§ 9. . . . No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act or on confession in open court.

§ 17. . . . Nor shall any person be rendered incompetent to give evidence in any court of law or equity in consequence of his opinion upon the subject of religion.

General Statutes, 1894 (Wenzell, Lane, Tiffany).

§ 5658. All persons, except as hereinafter provided, having the power and faculty to perceive and make known their perceptions to others, may be witnesses; neither parties nor other persons who have an interest in the event of an action are excluded, nor those who have been convicted of crime, nor persons on account of their religious opinions or belief; although in every case the credibility of the witnesses may be drawn in question. And on the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall at his request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against the defendant, nor shall such neglect be alluded to or commented upon by the prosecuting attorney or by the Court.

§ 5659. A party to the record of any civil action or proceeding, or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent, or managing agents of any corporation which is a party to the record

in such action or proceeding, may be examined upon the trial thereof as if under cross-examination at the instance of the adverse party or parties or any of them, and for that purpose may be compelled in the same manner and subject to the same rules for examination as any other witness to testify, but the party calling for such examination shall not be concluded thereby, but may rebut it by counter-testimony.

§ 5660. It shall not be competent for any party to an action, or interested in the event thereof, to give evidence therein of and concerning any conversation with or admission of a deceased or insane party or person, relative to any matter at issue between the parties.

§ 5661. The following persons are not competent to testify in any action or proceeding: First, those who are of unsound mind or intoxicated at the time of their production for examination; Second, 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.

§ 5662. There are particular relations in which it is the policy of the law to encourage confidence, and preserve it inviolate; therefore a person cannot be examined as a witness in the following cases: —

First. 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 afterward, 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, nor to proceedings supplementary to execution.

Second. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon, in the course of professional duty.

Third. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to the confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

Fourth. A regular physician or surgeon cannot, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.

Fifth. A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure.

§ 5663. Every person who declares that he has conscientious scruples against taking an oath, or swearing in any form, shall be permitted to make his solemn declaration or affirmation.

§ 5664. Whenever the Court before which any person is offered as witness is satisfied that such person has any peculiar mode of swearing, which is more solemn and obligatory, in the opinion of such person, than the usual mode, the Court may, in its discretion, adopt such mode of swearing such person.

§ 5665. Every person believing in any other than the Christian religion shall be sworn according to the peculiar ceremonies of his religion, if there are any such ceremonies.

§ 5666. The Court before whom an infant, or a person apparently of weak intellect, is produced as a witness, may examine such person to ascertain his capacity, and whether he understands the nature and obligations of an oath; and any Court may inquire of any person what are the peculiar ceremonies observed by him in swearing, which he deems most obligatory.

§ 6841. A person heretofore or hereafter convicted of any crime is, notwithstanding, a competent witness in any case or proceeding, civil or criminal, 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 proper question relevant to that inquiry; and the party cross-examining is not concluded by the answer to such question.

§ 2216. Whenever in any action in any court the defendant shall plead or answer the defence of usury, either party to the action may be a witness on his own behalf on the trial, except in actions in which the opposite party sues or defends as administrator or personal representative of a deceased person; except, also, actions in which the opposite party claims as assignee and the original assignor is deceased.

MISSISSIPPI.

Constitution, 1890.

Art. III, § 10. . . . No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court.

§ 26. In all criminal prosecutions the accused shall have a right . . . to be confronted by the witnesses against him; . . . and he shall not be compelled to give evidence against himself.

General Statute Laws, 1892 (Thompson, Dillard, and Campbell).

§ 1738. Every person, whether a party to the suit or not, shall be competent to give evidence in any suit at law or in equity, and shall not be incompetent by reason of any interest in the result thereof, or in the record as an instrument of evidence in other suits; and such weight shall be given to the evidence of parties and interested witnesses as, in view of the situation of the witnesses and other

circumstances, it may fairly be entitled to. Any party may, by subpœna, as in other cases, compel any other party to the suit to appear and give evidence.

§ 1739. Husband and wife may be introduced by each other as witnesses in all cases, civil or criminal, and shall be competent witnesses in their own behalf, as against each other, in all controversies between them.

§ 1740. A person shall not testify as a witness to establish his own claim or defence against the estate of a deceased person which originated during the lifetime of such deceased person, or any claim he has transferred since the death of such decedent. But such person shall be permitted to give evidence in support of his claim or defence against the estate of a deceased person which originated after the death of such deceased person in the course of administering his estate.

§ 1741. The accused shall be a competent witness for himself in any prosecution for crime against him; but the failure of the accused in any case to testify shall not operate to his prejudice or be commented on by counsel.

§ 1742. A person shall not be incompetent as a witness because of religious belief or the want of it.

§ 1743. A conviction of a person for any offence, except perjury and subornation of perjury, shall not disqualify such person as a witness, but such conviction may be given in evidence to impeach his credibility. A person convicted of perjury or subornation of perjury shall not afterwards be a competent witness in any case, although pardoned or punished for the same.

§ 1744. Any witness, being scrupulous of taking an oath, may give testimony upon his solemn affirmation, which shall be as good and effectual as an oath. The form of affirmation shall be, in substance, as follows, to wit: "You do solemnly and truly declare and affirm," etc. In all cases where an oath or affidavit is required by law, it shall be sufficient if the same be made or given on the solemn affirmation of the party.

Missouri.

Constitution, 1875.

Art. II, § 5. . . . No person can, on account of his religious opinions, . . . be disqualified from testifying.

§ 13. . . . No person can be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on his confession in open court.

§ 22. In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face.

§ 23. No person shall be compelled to testify against himself in a criminal cause.

Revised Statutes, 1889.

§ 4216. No person shall be rendered incompetent to testify in criminal causes by reason of his being the person injured or defrauded or intended to be injured or defrauded, or that would be entitled to satisfaction for the injury, or is liable to pay the costs of the prosecution.

§ 4217. When two or more persons shall be jointly indicted or prosecuted, the Court may, at any time before the defendants have gone into their defence, direct any defendant to be discharged, that he may be a witness for the State. A defendant shall also, when there is not sufficient evidence to put him on his defence, at any time before the evidence is closed, be discharged by the Court for the purpose of giving his testimony for a co-defendant.

§ 4218. No person shall be incompetent to testify as a witness in any criminal cause or prosecution by reason of being the person on trial or examination, or by reason of being the husband or wife of the accused; but any such facts may be shown for the purpose of affecting the credibility of such witness: provided, that no person on trial or examination, nor wife or husband of such person, shall be required to testify, but any such person may, at the option of the defendant, testify in his behalf, or on behalf of a co-defendant, and shall be liable to cross-examination, as to any matter referred to in his examination in chief, and may be contradicted and impeached as any other witness in the case: provided, that in no case shall husband or wife, when testifying under the provisions of this section for a defendant, be permitted to disclose confidential communications had or made between them in the relation of such husband and wife.

§ 8918. No person shall be disqualified as a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his credibility: provided, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the Court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him, and no party to such suit or proceeding whose right of action or defence is derived to him from one who is, or if living would be, subject to the foregoing disqualification, shall be admitted to testify in his own favor, except as in this section is provided; and where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator: provided, further, that in

actions for the recovery of any sum or balance due on account, and when the matter at issue and on trial is proper matter of book account, the party living may be a witness in his own favor, so far as to prove in whose handwriting his charges are, and when made, and no farther.

§ 8920. Any party to any civil action or proceeding may compel any adverse party, or any person for whose immediate and adverse benefit such action or proceeding is instituted, prosecuted, or defended, to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses; provided that the party so called may be examined by the opposite party, under the rules applicable to the cross-examination of witnesses.

§ 8922. No married woman shall be disqualified as a witness in any civil suit or proceeding prosecuted in the name of or against her husband, whether joined or not with her husband as a party, in the following cases, to wit: First, 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; second, in actions against carriers, so far as relates to the loss of the property and the amount and value thereof; third, in all matters of business transactions when the transaction was had and conducted by such married woman as the agent of her husband; and no married man shall be disqualified in any such civil suit or proceeding prosecuted in the name of or against his wife, whether he be joined with her or not as a party, when such suit or proceeding is based upon, grows out of, or is connected with any matter of business or business transaction where the transaction or business was had with or was conducted by such married man as the agent of his wife: provided, that nothing in this section shall be construed to authorize or permit any married woman, while the relation exists or subsequently, to testify to any admission or conversation of her husband, whether made to herself or to third parties.

§ 8925. The following persons shall be incompetent to testify: First, a person of unsound mind at the time of his production for examination; second, a child under ten years of age, who appears incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly; third, an attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the consent of such client; fourth, a minister of the gospel or priest of any denomination, concerning a confession made to him in his professional character, in the course of discipline enjoined by the rules of practice of such denomination; fifth, 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.

Montana.

Constitution, 1889.

Art. III, § 4. . . . No person shall be denied any civil or political right or privilege on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations.

§ 9. . . . No person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or on his confession in open court.

§ 16. In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face.

§ 17. . . . [In criminal proceedings, if a witness] cannot give security, his deposition shall be taken in the manner prescribed by law, and in the presence of the accused and his counsel, or without their presence, if they shall fail to attend the examination after reasonable notice of the time and place thereof. Any deposition authorized by this section may be received as evidence on the trial, if the witness shall be dead or absent from the State.

§ 18. No person shall be compelled to testify against himself in a criminal proceeding.

Codes and Statutes, 1895 (Sanders).

Code of Civil Procedure, § 3160. A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination or by deposition or affidavit.

§ 3161. 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 3123.

§ 3162. 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.

§ 3163. 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 afterward, 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.

Penal Code, § 2440. The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this Code.

§ 2441. 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.

§ 2442. A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but he may be sworn, and may testify in his own behalf, and the jury in judging of his credibility and the weight to be given to his testimony, may take into consideration the fact that he is the defendant, and the nature and enormity of the crime of which he is accused. If the defendant does not claim the right to be sworn, or does not testify, it must not be used to his prejudice, and the attorney prosecuting must not comment to the Court or jury on the same.

§ 2443. When two or more persons are jointly or otherwise concerned in the commission of an offence, any one of such persons may testify for or against the other in relation to the offence committed, but the testimony of such witness must not be used against him in any criminal action or proceeding.

Nebraska.

Constitution, 1875.

Art. 1, § IV. No person shall . . . be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations.

§ XI. In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face.

§ XII. No person shall be compelled, in any criminal case, to give evidence against himself.

§ XIV. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court.

Compiled Statutes, 1897 (Brown and Wheeler).

§ 5902. Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, civil and

criminal, except as otherwise herein declared. The following persons shall be incompetent to testify: First, persons of unsound mind at the time of their production; second, Indians and negroes who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them intelligently and truly; third, husband and wife, concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsists or afterward; fourth, an attorney, concerning any communication made to him by his client during that relation or his advice thereon, without the client's consent in open court or in writing produced in court; fifth, a clergyman or priest, concerning any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession.

§ 5903. No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation.

§ 5905. The husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by the one against the other, but they may in all criminal prosecutions be witnesses for each other.

§ 5906. Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal, in testimony, any such communication made while the marriage subsisted.

§ 5908. The prohibitions in the preceding sections do not apply to cases where the party in whose favor the respective provisions are enacted waives the rights thereby conferred.

§ 7199. No person shall be disqualified as a witness in any criminal prosecution by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of any crime, but such interest or conviction may be shown for the purpose of affecting his credibility. In the trial of all indictments, complaints, and other proceedings against persons charged with the commissions of crimes or offences, the person so charged shall, at his own request,

but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against him, nor shall any reference be made to, nor any comment upon, such neglect or refusal.

§ 7200. When two or more persons shall be indicted together, the Court may, at any time before the defendant has gone into his defence, direct any one of the defendants to be discharged, that he may be a witness for the State.

Nevada.

Constitution, 1864.

Art. I, § 4. . . . No person shall be rendered incompetent to be a witness on account of his opinions on matters of his religious belief.

§ 8. . . . No person shall . . . be compelled, in any criminal case, to be a witness against himself.

§ 19. . . . No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

General Statutes, 1885 (Baily and Hammond).

§ 3398. All persons, without exception, otherwise than as specified in this chapter, who, having organs of sense, can perceive, and perceiving can make known their perceptions to others, may be witnesses in any action or proceeding in any court of the State. Facts which by the common law would cause the exclusion of witnesses may still be shown for the purpose of affecting their credibility.

§ 3399. No person shall be disqualified as a witness in any action or proceeding on account of his opinions on matters of religious belief, or by reason of his conviction of felony, but such conviction may be shown for the purpose of affecting his credibility, and the jury is to be the exclusive judges of his credibility, or by reason of his interest in the event of the action or proceeding as a party thereto or otherwise, but the party or parties thereto, and the person in whose behalf such action or proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and be compellable to give evidence, either *viva voce* or by deposition or upon a commission, in the same manner and be subject to the same rules of examination as other witnesses on behalf of himself, or either or any of the parties to the action or proceeding.

§ 3401. No person shall be allowed to testify under the provisions of § 377 [3399] when the other party to the transaction is dead, or when the opposite party to the action, or the person for whose immediate benefit the action or proceeding is prosecuted or defended, is the representative of a deceased person, when the facts to be proved transpired before the death of such deceased person: provided, that

when such deceased person was represented in the transaction in question by any agent who is living, and who testifies as a witness in favor of the representative of such deceased person, in such case the other party may also testify in relation to such transaction, and nothing contained in such section shall affect the laws in relation to any instrument required to be attested; provided, further, that when husband or wife is insane and has been so declared by a commission of lunacy, or in due form of law, the other shall be a competent witness to testify as to any fact which transpired before or during such insanity, but the privilege of so testifying shall cease on the restoration to soundness of the insane husband or wife, unless upon the consent of both, in which case they shall be competent witnesses.

§ 3402. The following persons cannot be witnesses: First, those who are of unsound mind at the time of their production for examination; second, 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.

§ 3403. A husband cannot be examined as a witness 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 shall not apply to an action or proceeding by one against the other.

§ 4562. In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall, at his own request but not otherwise, be deemed a competent witness; the credit to be given to his testimony being left solely to the jury, under the instructions of the Court.

§ 4563. Nothing herein contained shall be construed as compelling any such person to testify; and in all cases wherein the defendant to a criminal action declines to testify, the Court shall specially instruct the jury that no inference of guilt is to be drawn against him for that cause.

New Hampshire.

Constitution, 1793.

Part I, art. 15. No subject shall . . . be compelled to accuse or furnish evidence against himself. And every subject shall have a right . . . to meet the witnesses against him face to face.

Public Statutes, 1891.

Ch. 224, § 10. No other ceremony shall be necessary in swearing than holding up the right hand, but any other form or ceremony

may be used which the person to whom the oath is administered professes to believe more binding upon the conscience.

§ 11. Persons scrupulous of swearing may affirm; the word "affirm" being used in administering the oath, instead of the word "swear," and the words "this you do under the pains and penalties of perjury," instead of the words "so help you God."

§ 12. No person who believes in the existence of a Supreme Being shall be excluded from testifying on account of his opinions on matters of religion.

§ 13. No person shall be excused or excluded from testifying or giving his deposition in any civil cause by reason of his interest therein, as a party or otherwise.

§ 16. When one party to a cause is an executor, administrator, or the guardian of an insane person, neither party shall testify in respect to facts which occurred in the lifetime of the deceased or prior to the ward's insanity, unless the executor, administrator, or guardian elects so to testify, except as provided in the following section.

§ 17. When it clearly appears to the Court that injustice may be done without the testimony of the party in such case, he may be allowed to testify; and the ruling of the Court, admitting or rejecting his testimony, may be excepted to and revised.

§ 18. When either party of record is not the party in interest, and the party whose interest is represented by the party of record is an executor, administrator, or insane, the adverse party shall not testify, unless the executor, administrator, or guardian of the insane person elects to testify himself, or to offer the testimony of such party of record.

§ 19. In an action brought by an indorsee or assignee of a bill of exchange, promissory note, or mortgage against an original party thereto, the defendant shall not testify in his own behalf if either of the original parties to the bill, note, or mortgage is dead or insane, unless the plaintiff elects to testify himself or to offer the testimony of an original party thereto.

§ 20. Husband and wife are competent witnesses for or against each other in all cases civil and criminal, except that neither shall be allowed to testify as to any statement, conversation, letter, or other communication made to the other or to another person, nor as to any matter which in the opinion of the Court would lead to a violation of marital confidence.

§ 24. In the trial of indictments, complaints, and other proceedings against persons charged with the commission of crimes and offences, the person so charged shall, at his own request, but not otherwise, be a competent witness.

§ 25. Nothing herein contained shall be construed as compelling any such person to testify, nor shall any inference of his guilt result

if he does not testify, nor shall the counsel for the prosecution comment thereon in case the respondent does not testify.

§ 26. No person shall be incompetent to testify on account of his having been convicted of an infamous crime, but the record of such conviction may be used to affect his credit as a witness.

New Jersey.

Constitution, 1844.

Art. I, § 4. . . . No person shall be denied the enjoyment of any civil right merely on account of his religious principles.

§ 8. In all criminal prosecutions the accused shall have the right . . . to be confronted with the witnesses against him.

§ 14. . . . No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

General Statutes, 1896.

Evidence, § 1. No person offered as a witness in any action or proceeding of a civil or criminal nature shall be excluded by reason of his having been convicted of crime, but such conviction may be shown on cross-examination of the witness, or, by the production of the record thereof, for the purpose of affecting his credit.

§ 2. In all civil actions in any court of record in this State the parties thereto shall be admitted to be sworn and give evidence therein, when called as witnesses by the adverse party in such action; and when any party is called as a witness by the opposite party, he shall be subject to the same rules as to examination and cross-examination as other witnesses; provided, that no party to a suit shall be compelled to be sworn or give evidence in any action brought to recover a penalty or to enforce a forfeiture; and provided, also, that this section shall not apply to suits for divorce.

§ 3. No person shall be disqualified as a witness in any suit or proceedings at law or in equity by reason of his or her interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his or her credit; provided, nevertheless, that no party shall be sworn in any case when the opposite party is prohibited by any legal disability from being sworn as a witness, or either of the parties in a cause sue or are sued in a representative capacity, except as hereinafter provided.

§ 4. A party to a suit in a representative capacity may be admitted, as a witness therein, and if called as a witness in his own behalf, and admitted, the opposite party may in like manner be admitted as a witness.

§ 5. In any trial or inquiry in any suit, action, or proceeding in any court, or before any person having by law or consent of parties

authority to examine witnesses or hear evidence, the husband or wife of any person interested therein as a party or otherwise, shall be competent and compellable to give evidence the same as other witnesses, on behalf of any party to such suit, action, or proceeding; provided, that nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any criminal action or proceeding, or in any action or proceeding for divorce on account of adultery, except to prove the fact of marriage, or in any action for criminal conversation; nor shall any husband or wife be compellable to disclose any confidential communication made by one to the other during the marriage.

§ 6. The complainant or petitioner in any action, or proceeding of an equitable nature in any court, shall be a competent witness to disprove so much of the defendant's answer as may be responsive to the allegations contained in the bill of complaint or petition, and any defendant in any such action or proceeding shall be a competent witness for or against any other defendant not jointly interested with him in the matter in controversy.

§ 7. Upon the trial of any indictment for falsely making, altering, forging, or counterfeiting, or for uttering or publishing as true, any record, deed, or other instrument or writing, no person named in such record, deed, or other instrument or writing, or whose name or any part of whose name is or purports to be written or signed therein or thereto, shall on that account be deemed so taken to be an incompetent witness.

§ 8. Upon the trial of any indictment, allegation, or accusation of any person charged with crime, the person indicted or accused shall be admitted to testify as a witness upon such trial, if he shall offer himself as a witness therein in his own behalf.

§ 51. . . . [*Ante*, § 5, declared to] authorize husband or wife in any criminal action against either, to give evidence to prove the fact of marriage.

§ 53. In all civil actions in any court of law or equity of this State, any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity; provided, nevertheless, that this supplement shall not extend so as to permit testimony to be given as to any transaction with or statement by any testator or intestate represented in said action.

§ 54. Upon any trial hereafter had, of any indictment of any person charged with the crime of murder or manslaughter, the husband or wife of the person so charged shall be admitted to testify as a witness upon such trial, if he or she offer himself or herself as a witness therein on behalf of the person so charged.

§ 57. Upon the trial of any indictment, allegation, or accusation of any person charged with crime, the wife or husband of the person

indicted or accused shall be admitted to testify as a witness in behalf of such person upon such trial, if he or she shall be offered and produced as a witness therein by the person so indicted or accused.

§ 73. Any husband or wife may give evidence on their own behalf, or for or against each other, in any proceedings in this State for divorce on account of adultery, any law of this State to the contrary, notwithstanding.

NEW MEXICO.

Compiled Laws, 1897.

§ 3014. No person offered as a witness shall hereinafter be excluded by reason of any alleged incapacity from interest, from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter in question or on any inquiry arising in any civil suit, action, or proceeding in any court, or before any judge, coroner, justice of the peace, officer, or person having, by law or by consent of parties, authority to hear, receive, and examine evidence in this Territory.

§ 3015. Every person so offered shall be admitted to give evidence on oath or solemn affirmation in those cases wherein affirmation is by law receivable; notwithstanding that such person has an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding in which he is offered as a witness.

§ 3016. Hereafter, in the courts of this Territory no person offered as a witness shall be disqualified to give evidence on account of any disqualification known to the common law, but all such common-law disqualifications may be shown for the purpose of affecting the credibility of any such witness and for no other purpose; provided, however, that the presiding judge, in his discretion, may refuse to permit a child of tender years to be sworn, if, in the opinion of the judge, such child has not sufficient mental capacity to understand the nature and obligation of an oath.

§ 3017. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any civil suit, action, or other proceeding in any court of law or equity in this Territory, or before any person having, by law or by consent of parties, authority to hear, receive, and examine evidence, the parties to such proceedings, and the persons in whose behalf any such suit, action, or other proceeding is brought or instituted, or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of themselves or of either of the parties to the suit, action, or proceeding, and the husbands and wives of such parties and persons shall except as hereinafter excepted, be competent to

give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or proceeding.

§ 3019. Nothing herein contained shall apply to the trial, in any action, suit, or other civil proceeding, of the question of the adultery of any party, or the husband or wife of any party to such action, suit, or proceeding.

§ 3020. No husband shall be compelled to disclose any communication made by his wife during the marriage, and no wife shall be compelled to disclose any communication made to her by her husband during the marriage.

§ 3201. In a suit by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the suit shall not obtain a verdict, judgment, or decision therein, on his own evidence, in respect to any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

§ 3431. In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors in the courts of this Territory, the person so charged shall, at his own request, but not otherwise, be a competent witness; and his failure to make such request shall not create any presumption against him.

§ 3432. Hereafter the husband or wife of any defendant in any trial on a prosecution for crime before any Court or officer authorized to hear or try said prosecution shall be a competent witness to testify in favor of, but not against, such defendant; provided, that such husband or wife shall be a competent witness to testify against any such defendant where the prosecution is for any unlawful assault or violence forcibly committed by the defendant on the person of such witness.

New York.

Constitution, 1895.

Art. I, § 3. . . . No person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief.

§ 6. No person shall . . . . be compelled in any criminal case to be a witness against himself.

Art. XIII, § 4. Any person charged with receiving a bribe, or with offering or promising a bribe, shall be permitted to testify in his own behalf in any civil or criminal prosecution therefor.

Code of Civil Procedure (Birdseye's Revised Statutes, 1896).

§ 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 pro-

ceeding; 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.

§ 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.

§ 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.

§ 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 concluded by that inquiry.

§ 845. The usual mode of administering an oath, now practised, by the person who swears laying his hand upon and kissing the Gospels, must be observed, where an oath is administered, except as otherwise herein specially prescribed in this article.

§ 846. The oath must be administered in the following form, to a person who so desires, the laying of the hand upon and kissing

the Gospels being omitted: "You do swear, in the presence of the ever-living God." While so swearing, he may or may not hold up his right hand, at his option.

§ 847. A solemn declaration or affirmation, in the following form, must be administered to a person who declares that he has conscientious scruples against taking an oath, or swearing in any form: "You do solemnly, sincerely, and truly declare and affirm."

§ 848. If the Court or the officer, before which or whom a person is offered as a witness, is satisfied that any peculiar mode of swearing, in lieu of, or in addition to laying the hand upon and kissing the Gospels, is, in his opinion, more solemn and obligatory, the Court or officer may, in its or his discretion, adopt that mode of swearing the witness.

§ 849. A person believing in a religion, other than the Christian, may be sworn according to the peculiar ceremonies, if any, of his religion, instead of as prescribed in § 845 or § 846 of this act.

§ 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; and may inquire of a person, produced as a witness, what peculiar ceremonies in swearing he deems most obligatory.

L. 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.

Penal Code.

§ 714 (substantially the same as § 832, C. C. P.).

§ 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.

§ 10. No person can be compelled in a criminal action to be a witness against himself.

NORTH CAROLINA.

Constitution, 1875.

Art. I, § 11. In all criminal prosecutions, every man has the right . . . to confront the accusers and witnesses with other testimony, . . . and not to be compelled to give evidence against himself.

Code, 1883.

§ 1192. No person shall be deemed to be an incompetent witness by reason of any interest which a person may have, or be supposed

to have, in respect to any deed, writing, instrument, or other matter whatsoever, in support of any prosecution, wherein shall be questioned the fact of forging such deed, writing, instrument, or other matter whatsoever, or the fact of uttering, showing forth in evidence, or disposing thereof, knowing the same to be forged.

§ 1350. No person offered as a witness shall be excluded by reason of incapacity from interest or crime, from giving evidence either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit or proceeding, civil or criminal, in any court, or before any judge, justice, jury, or other person having, by law, authority to hear, receive, and examine evidence; and every person so offered shall be admitted to give evidence, notwithstanding such person may or shall have an interest in the matter in question, or in the event of the trial of the issue, or of the suit or other proceeding in which he is offered as a witness. This section shall not be construed to apply to attesting witnesses to wills.

§ 1351. On the trial of any issue, or of any matter or question, or on any inquiry arising in any action, suit, or other proceeding in court, or before any judge, justice, jury, or other person having, by law, authority to hear and examine evidence, the parties themselves and the person in whose behalf any suit, or other proceeding may be brought or defended, shall, except as hereinafter provided, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, in behalf of either or any of the parties to said action, suit, or other proceeding. Nothing in this section shall be construed to apply to any action or other proceeding in any court instituted in consequence of adultery, or to any action for criminal conversation.

§ 1353. In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, the person so charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him. The husband, or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defence. But every such person examined as a witness shall be subject to be cross-examined as are other witnesses.

§ 1354. Nothing in this chapter, except as provided in the preceding section, shall render any person, who in any criminal proceeding is charged with the commission of a criminal offence competent or compellable to give evidence against himself, nor shall render any person compellable to answer any question tending to criminate himself, nor shall in any criminal proceeding render any husband competent or compellable to give evidence against himself,

nor any wife competent or compellable to give evidence against her husband: provided, that in all criminal prosecutions of a husband for an assault and battery upon the person of his wife, or for abandoning his wife, or for neglecting to provide for her support, it shall be lawful to examine the wife in behalf of the State against her husband.

North Dakota.

Constitution, 1889.

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.

§ 13. . . . No person shall . . . be compelled in any criminal case to be a witness against himself.

§ 19. . . . No person shall be convicted of treason unless on the evidence of two witnesses to the same overt act, or confession in open court.

Revised Codes, 1895.

§ 5653. No person offered as a witness in any action or 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 proceeding; or because such person is a party thereto, or because such person is the husband or wife of a party thereto, or of any person in whose behalf such action or proceeding is commenced, prosecuted, opposed, or defended, except as hereinafter provided: —

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 afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this subdivision 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.

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 order entered for or against them, neither party shall be allowed to testify against the other as to any transaction 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.

§ 8188. When two or more persons are included in the same information or indictment, the Court may, at any time before the defendants have gone into their defence, on the application of the State's attorney, direct any defendant to be discharged from the information or indictment, that he may be a witness for the State.

§ 8189. When two or more persons are included in the same information or indictment, and the Court is of the opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defence, it must order him to be discharged before the evidence is closed that he may be a witness for his co-defendant.

§ 8190. In the trial of a criminal action or proceeding before any Court or magistrate of this State, whether prosecuted by information, indictment, complaint, or otherwise, the defendant shall, at his own request and not otherwise, be deemed a competent witness; but his neglect or refusal to testify shall not create or raise any presumption of guilt against him; nor shall such neglect or refusal be referred to by any attorney prosecuting the case, or considered by the Court or jury before whom the trial takes place.

OHIO.

Constitution, 1851.

Art. I, § 7. . . . Nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations.

§ 10. . . . In any trial, in any court, the party accused shall be allowed . . . to meet the witnesses face to face; . . . nor shall any person be compelled, in any criminal case, to be a witness against himself.

Annotated Revised Statutes, 1898 (Bates).

§ 5240. All persons are competent witnesses except those of unsound mind, and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.

§ 5241. The following persons shall not testify in certain respects: —

1. An attorney, concerning a communication made to him by his client in that relation, or his advice to his client; or a physician, concerning a communication made to him by his patient in that relation, or his advice to his patient; but the attorney or physician may testify by express consent of the client or patient; and if the client or patient voluntarily testify, the attorney or physician may be compelled to testify on the same subject.

2. A clergyman or priest, concerning a confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

3. Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness; and the rule shall be the same if the marital relation has ceased to exist.

4. A person who assigns his claim or interest, concerning any matter in respect to which he would not, if a party, be permitted to testify.

5. A person who, if a party, would be restricted in his evidence under § 5242, shall, where the property or thing is sold or transferred by an executor, administrator, guardian, trustee, heir, devisee, or legatee, be restricted in the same manner in any action or proceeding concerning such property or thing.

§ 5242. A party shall not testify where the adverse party is a guardian or trustee of either a deaf and dumb or an insane person, or of a child of a deceased person, or is an executor or administrator, or claims or defends as heir, grantee, assignee, devisee, or legatee of a deceased person, except —

1. To facts which occurred subsequent to the appointment of the guardian or trustee of an insane person, and, in the other cases, subsequent to the time the decedent, grantor, assignor, or testator died.

2. When the action or proceeding relates to a contract made through an agent by a person since deceased, and the agent is competent to testify as a witness, a party may testify on the same subject.

3. If a party, or one having a direct interest, testify to transactions or conversations with another party, the latter may testify as to the same transactions or conversations.

4. If a party offer evidence of conversations or admissions of the opposite party, the latter may testify concerning the same conversations or admissions.

5. In an action or proceeding by or against a partner or joint contractor, the adverse party shall not testify to transactions with or admissions by a partner or joint contractor since deceased, unless the same were made in the presence of the surviving partner or joint contractor; and this rule shall be applied without regard to the character in which the parties sue or are sued.

6. If the claim or defence is founded on a book account, a party may testify that the book is his account-book, that it is a book of original entries, that the entries therein were made by himself, a person since deceased, or a disinterested person, non-resident of the county; whereupon the book shall be competent evidence, and such book may be admitted in evidence, in any case, without regard to the parties, upon like proof by any competent witness.

7. If a party, after testifying orally, die, the evidence may be proved by either party on a further trial of the case, whereupon the opposite party may testify to the same matters.

8. If a party die, and his deposition be offered in evidence, the opposite party may testify as to all competent matters therein. Nothing in this section contained shall apply to actions for causing death, or actions or proceedings involving the validity of a deed, will, or codicil; and when a case is plainly within the reason and spirit of the last three sections, though not within the strict letter, their principles shall be applied.

§ 7284. No person shall be disqualified as a witness in any criminal prosecution by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of any crime; and husband and wife shall be competent witnesses to testify in behalf of each other in all criminal prosecutions; but such interest, conviction, or relationship may be shown for the purpose of affecting his or her credibility. But husband or wife shall not testify concerning any communication made by one to the other, or act done by either in the presence of each other during coverture, unless the communication was made or act done in the known presence or hearing of a third person competent to be a witness, or unless in case of personal injury by either the husband and [or ?] wife to the other, or in case of neglect or cruelty of either to their minor children under ten years of age. And the rule shall be the same if the marital relation has ceased to exist; provided, that the presence or whereabouts of the husband or wife shall not be construed to be an act under this section.

§ 7285. On the trial of all indictments, complaints, and other proceedings, against a person charged with the commission of an offence, the person so charged shall, at his own request, but not otherwise, be a competent witness; but his neglect or refusal to testify shall not create any presumption against him, nor shall any reference be made to, nor any comment be made upon, such neglect or refusal.

OKLAHOMA.

Statutes, 1893.

Ch. 66, § 331. No person shall be disqualified as a witness in any civil action or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of a crime; but such interest or conviction may be shown for the purpose of affecting his credibility.

§ 333. Any party to a civil action or proceeding may compel any adverse party or person for whose benefit such action is instituted, prosecuted, or defended, at the trial or by deposition, to testify as

a witness in the same manner and subject to the same rules as other witnesses.

§ 334. No party shall be allowed to testify in his own behalf, in respect to any transaction or communication had personally by such party with a deceased person, when the adverse party is the executor, administrator, heir-at-law, next of kin, surviving partner, or assignee of such deceased person, where they have acquired title to the cause of action immediately from such deceased person; nor shall the assignor of a thing in action be allowed to testify in behalf of such party concerning any transaction or communication had personally by such assignor with a deceased person in any such case; nor shall such party or assignor be competent to testify to any transaction had personally by such party or assignor with a deceased partner or joint contractor in the absence of his surviving partner or joint contractor, when such surviving partner or joint contractor is an adverse party. If the testimony of a party to the action or proceeding has been taken, and he afterwards die, and the testimony so taken shall be used after his death, in behalf of executors, administrators, heirs-at-law, next of kin, assignee, surviving partner, or joint contractor, the other party or the assignor shall be competent to testify as to any and all matters to which the testimony so taken relates.

§ 335. The following persons shall be incompetent to testify: —

First, persons who are of unsound mind at the time of their production for examination.

Second, 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.

Third, husband and wife, for or against each other, except concerning transactions in which one acted as the agent of the other, or when they are joint parties and have a joint interest in the action; but in no case shall either be permitted to testify concerning any communication made by one to the other during marriage, whether called while that relation subsisted or afterwards.

Fourth, an attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the client's consent.

Fifth, a clergyman or priest concerning any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession.

Sixth, a physician or surgeon concerning any communication made to him by his patient with reference to any physical or supposed physical disease, or any knowledge obtained by a personal examination of any such patient: provided, that if a person offer himself as a witness, that is to be deemed a consent to the examination; also,

if [also of ?] an attorney, clergyman or priest, physician or surgeon on the same subject, within the meaning of the last three subdivisions of this section.

Ch. 68, § 9. When two or more persons are included in the indictment, the Court may, at any time before the defendants have gone into their defence, on the application of the district attorney, direct any defendant to be discharged from the indictment, that he may be a witness for the Territory.

§ 10. When two or more persons are included in the same indictment, and the Court is of opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defence, it must, before the evidence is closed, in order that he may be a witness for his co-defendant, submit its said opinion to the jury, who, if they so find, may acquit the particular defendant for the purpose aforesaid.

§ 11. On the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of a crime, offences, and misdemeanors before any Court or committing magistrate in this Territory, the person charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him, nor be mentioned on the trial; if commented upon by counsel, it shall be ground for a new trial.

§ 12. The rules of evidence in civil cases are applicable also to criminal cases, except as otherwise provided in this chapter.

Oregon.

Constitution, 1859.

Art. I, § 6. No person shall be rendered incompetent as a witness or juror in consequence of his opinions on matters of religion, nor be questioned in any court of justice, touching his religious belief, to affect the weight of his testimony.

§ 7. The mode of administering an oath or affirmation shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath or affirmation may be administered.

§ 11. In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face.

§ 12. No person shall . . . be compelled in any criminal prosecution to testify against himself.

§ 24. . . . No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or confession in open court.

Codes and General Laws, 1892 (Hill).

§ 710. All persons without exception, except as otherwise provided in this title, 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, suit, 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, except the latter, the credibility of the witness may be drawn in question, as provided in § 683.

§ 711. The following persons are not admissible: —

1. Those 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.

§ 712. 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 shall not 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 marriage. But the exception does not apply to a civil action, suit, or proceeding, by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.

§ 713. If a party to the suit, action, or proceeding offer himself as a witness, that is to be deemed a consent to the examination also of a wife, husband, attorney, clergyman, physician, or surgeon on the same subject, within the meaning of subdivisions 1, 2, 3, and 4 of the last section.

§ 1361. When two or more persons are charged in the same indictment, the Court may, at any time before the defendant has gone into his defence, on the application of the district attorney, direct any defendant to be discharged from the indictment, so that he may be a witness for the State.

§ 1362. When two or more persons are charged in the same indictment, and the Court is of opinion that, in regard to a particular defendant, there is not sufficient evidence to put him on his defence, it must, if requested by another defendant then on trial, order him to be discharged from the indictment, before the evidence is closed, that he may be a witness for his co-defendant.

§ 1364. The law of evidence in civil actions is also the law of evidence in criminal actions and proceedings, except as otherwise specially provided in this Code.

§ 1365. On the trial of or examination upon all indictments, complaints, information, and other proceedings before any Court, magis-

trate, jury, grand jury, or other tribunal, against persons accused or charged with the commission of crimes or offences, the person so charged or accused shall, at his own request but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the Court, or to the discrimination of the magistrate, grand jury, or other tribunal before which such testimony may be given: provided, his waiver of such right shall not create any presumption against him; that such defendant or accused, when offering his testimony as a witness in his own behalf, shall be deemed to have given to the prosecution a right to cross-examination upon all facts to which he has testified, tending to his conviction or acquittal.

§ 1366. In all criminal actions, where the husband is the party accused, the wife shall be a competent witness, and when the wife is the party accused, the husband shall be a competent witness; but neither husband nor wife, in such cases, shall be compelled or allowed to testify in such case unless by consent of both of them; provided, that in all cases of personal violence upon either by the other, the injured party, husband or wife, shall be allowed to testify against the other.

Pennsylvania.

Constitution, 1874.

Art. I, § 9. In all criminal prosecutions, the accused hath a right . . . to meet the witnesses face to face; . . . he cannot be compelled to give evidence against himself.

Art. III, § 32. Any person may be compelled to testify, in any lawful investigation or judicial proceeding, against any person who may be charged with having committed the offence of bribery or corrupt solicitation, or practices of solicitation, and shall not be permitted to withhold his testimony upon the ground that it may criminate himself or subject him to public infamy; but such testimony shall not afterwards be used against him in any judicial proceeding, except for perjury in giving such testimony.

Art. VIII, § 10. In trials of contested elections and in proceedings for the investigation of elections, no person shall be permitted, etc. [as in Art. III, § 32].

Digest of Laws, 1896 (Pepper & Lewis).

Title "*Witnesses*," § 1. Except upon a preliminary hearing before a magistrate for the purpose of determining whether a person charged with a criminal offence triable in the Court of Oyer and Terminer ought to be committed for trial, and except also upon a hearing under *habeas corpus* for the purpose of determining whether bail ought to be taken upon a commitment for murder in the first

degree, or for the purpose of determining in any case how much bail ought to be required, or for the purpose of determining in any case whether a person committed for trial ought to be further held, and except, also, upon hearings before a grand jury, in none of which cases shall evidence for the defendant be heard, and except, also, as provided in § 2 of this act, all persons shall be fully competent witnesses in any criminal proceeding before any tribunal.

§ 2. In such criminal proceedings, a person who has been convicted in a court of this Commonwealth of perjury, which term is hereby declared to include subornation of perjury, shall not be a competent witness for any purpose, although his sentence may have been fully complied with, unless the judgment of conviction be judicially set aside or reserved [reversed ?], or unless the proceeding be one to punish or prevent injury or violence attempted, done, or threatened to his person or property, in which cases he shall be competent to testify.

§ 3. Nor shall husband and wife be competent or permitted to testify against each other, or in support of a criminal charge of adultery alleged to have been committed by or with the other, except that, in proceedings for desertion and maintenance, and in any criminal proceeding against either for bodily injury or violence attempted, done, or threatened upon the other, each shall be a competent witness against the other, and except, also, that either shall be competent merely to prove the fact of marriage in support of a criminal charge of adultery alleged to have been committed by or with the other.

§ 4. Nor shall either husband or wife be competent or permitted to testify to confidential communications made by one to the other, unless this privilege be waived upon the trial.

§ 8. In any civil proceeding before any tribunal of this Commonwealth, or conducted by virtue of its order or direction, no liability merely for costs nor the right to compensation possessed by an executor, administrator, or other trustee, nor any interest merely in the question on trial, nor any other interest or policy of law, except as is provided in § 5 [11] of this act, shall make any person incompetent as a witness.

§ 9. (Provisions of § 2, *supra*, applied to civil proceedings.)

§ 10. (Provisions of § 4, *supra*, applied to civil proceedings.)

§ 11. Nor shall husband or wife be competent or permitted to testify against each other, except in those proceedings for divorce in which personal service of the subpœna or of a rule to take depositions has been made upon the opposite party, or in which the opposite party appears and defends, in which case either party may testify fully against the other, and except also that in any proceeding for divorce either party may be called merely to prove the fact of marriage.

§ 12. In any proceedings brought by either under the provisions of section three [*aliubi*] to protect or recover the separate property of either, both shall be fully competent witnesses, except that neither may testify to confidential communications made by one to the other, unless this privilege be waived upon the trial.

§ 14. Nor, where any party to a thing or contract in action is dead, or has been adjudged a lunatic, and his right thereto or therein has passed, either by his own act or by the act of the law, to party on the record who represents his interest in the subject in controversy, shall any surviving or remaining party to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased or lunatic party, be a competent witness to any matter occurring before the death of said party or the adjudication of his lunacy; unless the proceeding is by or against the surviving or remaining partners, joint promisors, or joint promisees, of such deceased or lunatic party, and the matter occurred between such surviving or remaining partners, joint promisors, or joint promisees and the other party on the record, or between such surviving or remaining partners, promisors, or promisees and the person having an interest adverse to them, in which case any person may testify to such matters; or, unless the action be ejectment against several defendants, and one or more of said defendants disclaims of record any title to the premises in controversy at the time the suit was brought and also pays into court the costs accrued at the time of his disclaimer, or gives security therefor as the Court in its discretion may direct, in which case such disclaiming defendant shall be a fully competent witness; or, unless the issue or inquiry be *devisavit vel non*, or be any other issue or inquiry respecting the property of a deceased owner, and the controversy be between parties respectively claiming such property by devolution on the death of such owner, in which case all persons shall be fully competent witnesses.

§ 15. But no person who is incompetent under clauses (*a*), (*b*), (*c*), and (*d*) [§§ 9, 10, 11, 13, *supra*] of this section shall become competent by the general language of clause (*e*) [§ 14, *supra*.]

§ 16. Any person, who is incompetent under clause (*e*) [§ 14, *supra*] of section five by reason of interest, may, nevertheless, be called to testify against his interest, and in that event he shall become a fully competent witness for either party; and such person shall also become fully competent for either party by a release or extinguishment in good faith of his interest, upon which good faith the trial judge shall decide as a preliminary question.

§ 18. Hereafter, in any civil proceeding before any tribunal of this Commonwealth, or conducted by virtue of its order or direction, although a party to the thing or contract in action may be dead or may have been adjudged a lunatic, and his right thereto or therein may have passed, either by his own act or by the act of the law, to a

party on a record who [re]presents his interest in the subject in controversy, nevertheless, any surviving or remaining party to such thing or contract or any other person whose interest is adverse to the said right of such deceased or lunatic party, shall be a competent witness to any relevant matter, although it may have occurred before the death of said party or the adjudication of his lunacy; if and only if such relevant matter occurred between himself and another person who may be living at the time of the trial and may be competent to testify, and who does so testify upon the trial, against such surviving or remaining party or against the person whose interest may be thus adverse, or if such relevant matter occurred in the presence or hearing of such other living or competent person.

§ 21. In any civil proceeding, whether or not it be brought or defended by a person representing the interests of a deceased or lunatic assignor of any thing or contract in action, a party to the record or a person for whose immediate benefit such proceeding is prosecuted or defended, or any other person whose interest is adverse to the party calling him as a witness, may be compelled by the adverse party to testify as if under cross-examination, subject to the rules of evidence applicable to witnesses under cross-examination, and the adverse party calling such witnesses shall not be concluded by his testimony; but such person so cross-examined shall become thereby a fully competent witness for the other party as to all relevant matters, whether or not these matters were touched upon in his cross-examination; and also where one of several plaintiffs or defendants, or the person for whose immediate benefit such proceeding is prosecuted or defended, or such other person having an adverse interest, is cross-examined under this section, his co-plaintiffs or co-defendants shall thereby become fully competent witnesses on their own behalf as to all relevant matters, whether or not these matters were touched upon in such cross-examination.

§ 22. Except defendants actually upon trial in a criminal court, any competent witness may be compelled to testify in any proceeding, civil or criminal; but he may not be compelled to answer any question which, in the opinion of the trial judge, would tend to criminate him; nor may the neglect or refusal of any defendant, actually upon trial in a criminal court, to offer himself as a witness be treated as creating any presumption against him, or be adversely referred to by Court or counsel during the trial.

Rhode Island.

Constitution, 1842.

Art. I, § 3. . . . [One's opinion in matters of religion] shall in no wise diminish, enlarge, or affect his civil capacity.

§ 10. In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

§ 13. No man in a court of common law shall be compelled to give evidence criminating himself.

General Laws, 1896.

Ch. 244, § 35. No person shall be disqualified from testifying in any action at law, suit in equity, or other proceeding at law or in equity, by reason of his being interested therein or being a party thereto.

§ 37. In the trial of every civil cause, the husband or wife of either party shall be deemed a competent witness: provided, that neither shall be permitted to give any testimony tending to criminate the other or to disclose any communication made to him or her by the other, during their marriage, except on trials of petitions for divorce between them.

§ 40. No person shall be deemed an incompetent witness because of his conviction of any crime, or sentence to imprisonment therefor; but shall be admitted to testify like any other witness, except that conviction or sentence for any crime or misdemeanor may be shown to affect his credibility.

§ 41. No respondent in a criminal prosecution, offering himself as a witness, shall be excluded from testifying because he is such respondent; and neglect or refusal so to testify shall create no presumption nor be used in argument against him.

§ 42. The husband or wife of any respondent in a criminal prosecution, offering himself or herself as a witness, shall not be excluded from testifying therein because he or she is the husband or wife of such respondent.

SOUTH CAROLINA.

Constitution, 1882.

Art. I, § 12. No person shall be disqualified as a witness . . . or be subjected in law to any other restraints or disqualifications in regard to any personal rights than such as are laid upon others under like circumstances.

§ 13. No person shall . . . be compelled to accuse or furnish evidence against himself; and every person shall have a right . . . to meet the witnesses against him face to face.

General Statutes, 1882.

§ 2231. In the trial of all criminal cases, the defendant shall be allowed to testify (if he desires to do so, and not otherwise) as to the facts and circumstances of the case.

Code of Civil Procedure, 1882.

§ 391. A party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse

parties, and for that purpose may be compelled, in the same manner and subject to the same rules of examination as any other witness, to testify, either at the trial, or conditionally, or upon commission.

§ 397. A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner and subject to the same rules of examination as if he were named as a party.

§ 399. No person offered as a witness shall be excluded by reason of his interest in the event of the action.

§ 400. A party to an action or special proceeding in any and all courts, and before any and all officers and persons acting judicially, may be examined as a witness in his own behalf, or in behalf of any other party, conditionally, on commission, and upon the trial or hearing in the case, in the same manner and subject to the same rules of examination as any other witness: provided, however, that no party to the action or proceeding, nor any person who has a legal or equitable interest which may be affected by the event of the action or proceeding, nor any person who previous to such examination has had such an interest, however the same may have been transferred to or come to the party to the action or proceeding, nor any assignor of anything in controversy in the action, shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane, or lunatic, as a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or as assignee or committee of such insane person or lunatic, when such examination, or any judgment or determination in such action or proceeding, can in any manner affect the interest of such witness or the interest previously owned or represented by him. But when such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor, or committee shall be examined on his own behalf in regard to such transaction or communication, or the testimony of such deceased or insane person or lunatic, in regard to such transaction or communication (however the same may have been perpetuated or made competent), shall be given in evidence on the trial or hearing in behalf of such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor, or committee, then all persons not otherwise rendered incompetent shall be made competent witnesses in relation to such transaction or communication on said trial or hearing. Nothing contained in section 8 of this Code of Procedure shall be held or construed to affect or restrain the operation of this section.

1. In any trial or inquiry in any suit, action, or proceeding in any court or before any person having, by law, or consent of parties, authority to examine witnesses or hear evidence, the husband or

wife of any party thereto, or of any person in whose behalf any such suit, action, or proceeding is brought, prosecuted, opposed, or defended, shall, except as hereinafter stated, be competent and compellable to give evidence, the same as any other witness, on behalf of any party to such suit, action, or proceeding.

2. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during marriage.

South Dakota.[1]

Tennessee.

Constitution, 1870.

Art. I, § 9. In all criminal prosecutions, the accused hath the right . . . to meet the witnesses face to face, . . . and shall not be compelled to give evidence against himself.

Annotated Code, 1896 (Shannon).

§ 5592. Every person of sufficient capacity to understand the obligation of an oath is competent to be a witness.

§ 5593. Persons who do not believe in a God and a future state of rewards and punishments may be witnesses in any cause pending in any of the courts of this State. Said unbelievers may solemnly affirm instead of taking an oath, and false testifying by such persons shall be punished as perjury, as [provided] by law under such circumstances. Such unbelief in God and a future state of rewards and punishments shall go only to the credibility of the witness.

§ 5595. Persons are rendered incompetent by conviction and sentence for the following crimes, unless they have been restored to full citizenship, under the law provided for that purpose, viz.: abuse of female child, arson and felonious burning, bigamy, burglary, felonious breaking and entering mansion house, bribery, buggery, counterfeiting, or violating any of the provisions to suppress the same, destroying will, forgery, housebreaking, incest, larceny, perjury, robbery, receiving stolen property, rape, sodomy, stealing bills of exchange or other valuable papers, subornation of perjury.

§ 5596. In all civil actions in the courts of this State, no person shall be incompetent to testify because he or she is a party to or interested in the issue tried, or because of the disabilities of coverture, but all persons, including husband and wife, shall be competent witnesses, though neither husband nor wife shall testify to any matter

[1] [The Codes of the Territory of Dakota, last revised in 1877, and last compiled in 1887, were adopted by the State of South Dakota upon its formation in 1889; but as changes have since the revision of 1877 been made by session-laws, and as a new official revision of the Codes is now in press, it has not been thought necessary to set out here the terms of the Territorial Codes.]

that occurred between them by virtue of or in consequence of the marital relation.

§ 5597. It shall not be lawful for any party to any action, suit, or proceeding in any court of this State to testify as to any transaction or conversation with or statement by any opposite party in interest, if such opposite [party] is incapacitated or disqualified to testify thereto, by reason of idiocy, lunacy, or insanity, unless called by the opposite side, and then [only] in the discretion of the Court.

§ 5598. In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed 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.

§ 5600. In the trial of all indictments, presentments, and other criminal proceedings, in any of the courts of this State, the party defendant thereto may, at his own request but not otherwise, be a competent witness to testify therein.

§ 5601. The failure of the party defendant to make such request and to testify in his own behalf shall not create any presumption against him. But the defendant desiring to testify shall do so before any other testimony for the defence is heard by the Court trying the case.

Texas.

Constitution, 1876.

Art. I, § 5. No person shall be disqualified to give evidence in any of the courts of this State on account of his religious opinions or for want of any religious belief, but all oaths or affirmations shall be administered in the mode most binding upon the conscience, and shall be taken subject to the pains and penalties of perjury.

§ 10. In all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself, . . . shall be confronted with the witnesses against him.

§ 22. . . . No person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or on confession in open court.

Revised Civil Statutes, 1895.

§ 2300. No person shall be incompetent to testify on account of color, nor because he is a party to the suit or proceeding or interested in the issue tried.

§ 2301. The husband or wife of a party to a suit or proceeding, or who is interested in the issue to be tried, shall not be incompetent to testify therein, except as to confidential communications between such husband and wife.

§ 2302. In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with or statement by the testator intestate, or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent.

§ 2303. No person shall be incompetent to testify on account of his religious opinions or for want of any religious belief.

Penal Code, 1895.

§ 768. All persons are competent to testify in criminal actions except the following: —

1. Insane persons, who are in an insane condition of mind at the time when they are offered as witnesses, or who were in that condition when the events happened of which they are called to testify.

2. Children or other persons who, after being examined by the Court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath.

3. All persons who have been or may be convicted of felony in this State, or in any other jurisdiction, unless such conviction has been legally set aside, or unless the convict has been legally pardoned for the crime of which he was convicted. But no person who has been convicted of the crime of perjury, or false swearing, and whose conviction has not been legally set aside, shall have his competency as a witness restored by a pardon, unless such pardon by its terms specifically restore his competency to testify in a court of justice.

§ 770. Any defendant in a criminal action shall be permitted to testify in his own behalf therein; but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause: provided, that where there are two or more persons jointly charged or indicted, and a severance is had, the privilege of testifying shall be extended only to the person on trial.

§ 771. Persons charged as principals, accomplices, or accessories, whether in the same indictment or different indictments, cannot be introduced as witnesses for one another, but they may claim a severance; and if any one or more be acquitted, or the prosecution against them be dismissed, they may testify in behalf of the others.

§ 773. All other persons except those enumerated in articles 768 and 775, whatever may be the relationship between the defendant and witness, are competent to testify, except that an attorney at law shall not disclose a communication made to him by his client

during the existence of that relationship, nor disclose any other fact which came to the knowledge of such attorney by reason of such relationship.

§ 774. Neither husband nor wife shall in any case testify as to communications made by one to the other while married; nor shall they, after the marriage relation ceases, be made witnesses as to any such communication made while the marriage relation subsisted, except in a case where one or the other is prosecuted for an offence, and a declaration or communication made by the wife to the husband, or by the husband to the wife, goes to extenuate or justify an offence for which either is on trial.

§ 775. The husband and wife may in all criminal actions be witnesses for each other, but they shall in no case testify against each other except in a criminal prosecution for an offence committed by one against the other.

§ 776. No person is incompetent to testify on account of his religious opinion or for the want of any religious belief.

§ 777. A defendant jointly indicted with others, and who has been tried and convicted, and whose punishment was fine only, may testify for the other defendant after he has paid the fine and costs.

§ 782. In trials for forgery, the person whose name is alleged to have been forged is a competent witness, and in all cases not otherwise specially provided for, the person injured or attempted to be injured is a competent witness.

United States.

Constitution, 1787.

Art. III, § 3. . . . No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

Amendment V. No person . . . shall be compelled in any criminal case to be a witness against himself.

Amendment VI. In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

Revised Statutes, 1878; *Supplements*, 1891, 1895.

§ 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 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.

§ 1078. No witness shall be excluded in any suit in the Court of Claims on account of color.

§ 1079. No claimant, nor any person from or through whom any such claimant derives his alleged title, claim, or right against the United States, nor any person interested in any such title, claim, or right, shall be a competent witness in the Court of Claims in supporting the same, and no testimony given by such claimant or person shall be used except as provided in the next section [*i. e.* when taken and offered by the government attorney].

St. 1874, June 22, ch. 391, § 8. No officer, or other person entitled to or claiming compensation under any provision of this act [against evading customs laws] shall be thereby disqualified from becoming a witness in any action, suit, or proceeding for the recovery, mitigation, or remission thereof . . . [and the defendant may testify].

St. 1878, March 16, ch. 37. In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, in the United States Courts, Territorial Courts, and Courts martial, and Courts of inquiry, in any State or Territory including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.

St. 1887, March 3, ch. 397, § 1. In any proceeding or examination before a grand jury, a judge, justice, or a United States commissioner, or a Court, in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, the lawful husband or wife of the accused shall be a competent witness, and may be called, but shall not be compelled to testify in such proceeding, examination, or prosecution, without the consent of the husband or wife, as the case may be. And such witness shall not be permitted to testify as to any statement or communication made by either husband or wife to each other, during the existence of the marriage relation, deemed confidential at common law.

Utah.

Constitution, 1895.

Art. I, § 4. . . . Nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof.

§ 12. In criminal prosecutions the accused shall have the right . . . to testify in his own behalf, to be confronted by the witnesses against him. . . . The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife.

§ 19. . . . No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act.

Revised Statutes, 1898.

Code of Civil Procedure, § 3412. 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, by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.

§ 3413. 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. A party to any civil action, suit, or proceeding, and any person directly interested in the event thereof, and any person from, through, or under whom such party or interested person derives his interest or title or any part thereof, when the adverse party in such action, suit, or proceeding, claims or opposes, sues or defends, as guardian of any insane or incompetent person, or as the executor or administrator, heir, legatee, or devisee of any deceased person, or as guardian, or assignee, or grantee, directly or remotely, of such heir, legatee, or devisee, as to any statement by or transaction with such deceased, insane, or incompetent person, or matter of fact, whatever, which must have been equally within the knowledge of both the witness and such insane, incompetent, or deceased person, unless such witness be called to testify thereto by such adverse party, so claiming or opposing, suing or defending, in such action, suit, or proceeding.

§ 3414. 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 afterward, 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 or against the other, nor to a criminal action or proceeding for a crime committed by one against the other.

Code of Criminal Procedure, § 5011. The rules for determining the competency of witnesses in civil actions shall be applicable also to criminal actions and proceedings except as otherwise provided in this Code.

§ 4515. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife.

§ 5014. Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife shall be a competent witness for or against the other in a criminal action or proceeding to which one or both shall be parties.

§ 5015. If the defendant offers himself as a witness he may be cross-examined by the counsel for the State the same as any other witness. His neglect or refusal to be a witness shall not in any manner prejudice him, nor be used against him on the trial or proceeding.

§ 5016. When two or more persons are jointly or otherwise concerned in the commission of an offence, any one of such persons may testify for or against the other in relation to the offence committed, but the testimony of such witness must not be used against him in any criminal action or proceeding.

§ 4851. When two or more persons shall be included in the same charge, the Court may, at any time before the defendants have gone into their defence, on the application of the county attorney, or other counsel for the State, direct any defendant to be discharged, that he may be a witness for the State.

§ 4852. When two or more persons shall be included in the same charge, and the Court shall be of the opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defence, it must order him to be discharged before the evidence is closed, that he may be a witness for his co-defendant.

VERMONT.

Constitution, 1793.

Chap. I, Art. 3. . . . Nor can any man be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculia[r] mode of religious worship.

Art. 10. In all prosecutions for criminal offences, a person hath a right . . . to be confronted with the witnesses; . . . nor can he be compelled to give evidence against himself.

Statutes, 1894.

§ 1236. No person shall be disqualified as a witness in a civil suit or proceeding, at law or in equity, by reason of his interest in the event of the same, as a party or otherwise; but such interest may be shown for the purpose of affecting his credit.

§ 1237. In actions, except actions of book account, where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the Court to be insane, the other party shall not be admitted to testify in his own favor except to meet or explain the testimony of living witnesses produced against him as to facts or circumstances taking place after the death or insanity of the other party; or upon a question upon which the testimony of the party afterward deceased or insane has been taken in writing or by a stenographer in open court, to be used in such action, and is used therein.

§ 1238. When an executor or administrator is a party, the other party shall not be permitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to acts and contracts done or made since the probate of the will or the appointment of the administrator, and to meet or explain the testimony of living witnesses produced against him, as to facts or circumstances taking place after the death of the other party.

§ 1239. In actions of book account, and when the matter in issue and on trial is proper matter of book account, the party living may be a witness in his own favor, so far as to prove in whose handwriting his charges are and when made, and no further, except to meet or explain the testimony of living witnesses produced against him as to facts or circumstances taking place after death of the other party.

§ 1240. No married woman shall be disqualified as a witness in a civil suit or proceeding at law or in equity, prosecuted in the name of or against her husband, whether joined or not with her husband as a party,

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,

In actions against carriers, so far as relates to the loss of the property, and the amount and value thereof, and to personal injury alleged to have been sustained by the wife in consequence of the wrongful act or neglect of such carriers,

In a suit brought against the husband for the maintenance of the wife;

Nothing in this section shall authorize or permit a married woman

to testify to admissions or conversations of her husband whether made to herself or to third persons.

§ 1241. In actions where the husband and wife are properly joined, either as plaintiffs or as defendants, or where either has acted as the agent of the other in business transactions, they shall be competent witnesses, except that neither shall be permitted to testify as to conversations or admissions of the other.

§ 1242. A married man shall not be disqualified as a witness in a civil suit or proceeding at law or in equity, brought by his wife upon a policy of insurance of property so far as relates to the amount and value of property alleged to be injured or destroyed.

§ 1243. The libellant and libellee shall be competent witnesses in divorce cases.

§ 1244. No person shall be incompetent as a witness in any court, matter, or proceeding, on account of his opinions on matters of religious belief; nor shall a witness be questioned, nor testimony taken or received, in relation thereto.

§ 1245. No person shall be incompetent as a witness in any court, matter, or proceeding, by reason of his conviction of a crime other than perjury, subornation of perjury, or endeavoring to incite or procure another to commit the crime of perjury; but the conviction of a crime involving moral turpitude may be given in evidence to affect the credibility of a witness.

§ 1246. A party to a civil action or proceeding at law or in equity may compel an adverse party, or person for whose immediate and adverse benefit such action or proceeding is instituted, prosecuted, or defended, to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses. But the party so called to testify may be examined by the opposite party under the rules applicable to the cross-examination of witnesses.

§ 1915. In the trial of complaints, informations, indictments, and other proceedings against persons charged with crimes or offences, the person so charged shall, at his own request and not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the Court; but the refusal of such person to testify shall not be considered by the jury as evidence against him.

§ 4089. In actions against a savings bank, savings institution, or trust company, by a husband to recover for moneys deposited by his wife in her name or as her money, the wife may be a witness as if she were an unmarried woman.

§ 4510. [In actions for injury caused by the sale of liquor] . . . nor shall a person be disqualified as a witness therein by reason of the marriage relation.

Virginia.

Constitution, 1869.

Art. I, § 10. In all capital or criminal prosecutions, a man hath a right . . . to be confronted with the accusers and witnesses; . . . nor can he be compelled to give evidence against himself.

Art. V, § 14. . . . [Men's opinions in matters of religion] shall in no wise affect, diminish, or enlarge their civil capacities.

Code, 1887; *Supplement to Code*, 1898.

§ 3345. No person shall be incompetent to testify because of interest; or because of his being a party to any action, suit, or proceeding of a civil nature; but he shall, if otherwise competent to testify, and subject to the rules of evidence and practice applicable to other witnesses, be competent to give evidence in his own behalf and be competent and compellable to attend and give evidence on behalf of any other party to such action, suit, or proceeding; but in any case at law, the Court, for good cause shown, may require any such person, to attend and testify *ore tenus*, and, upon his failure to so attend and testify, may exclude his deposition.

§ 3346. The preceding section is subject to the following qualifications: —

The competency of husband and wife as witnesses for or against each other during the coverture or after its termination, and the competency of attesting witnesses to wills, deeds, and other instruments, shall be determined by the law in force the day before this Code takes effect.[1]

Where one of the original parties to the contract or other transaction, which is the subject of investigation, is incapable of testifying by reason of death, insanity, infancy, or other legal cause, the other party to such contract or transaction shall not be admitted to testify in his own favor or in favor of any other person whose interest is adverse to that of the party so incapable of testifying, unless he be first called to testify in behalf of such last mentioned party, or unless some person, having an interest in or under such contract or transaction, derived from the party so incapable of testifying, has testified in behalf of the latter or of himself to such contract or transaction; or unless the said contract or transaction was personally made or had with an agent of the party so incapable of testifying and such agent is alive and capable of testifying.

§ 3347. But where any of the original parties to the contract or other transaction which is the subject of investigation are partners or other joint contractors, or jointly entitled or liable, and some of them have died or otherwise become incapable of testifying, the

[1 See amendment, *post*.]

others, or such of them as there may be, with whom the contract or transaction was personally had or made, or in whose presence and with whose privity it was made or had, shall not, nor shall the adverse party, be incompetent to testify because some of the partners or joint contractors, or of those jointly entitled or liable, have died or otherwise become incapable of testifying.

§ 3348. And where such contract or transaction was personally and solely made with an agent of one of the parties thereto, and such agent is dead or otherwise incapable of testifying, the other party shall not be admitted to testify in his own favor or in favor of a person having an interest adverse to that of the principal of such agent, unless he be first called to testify on behalf of said principal or some person claiming under him, or the testimony of such agent be first read or given in evidence by his principal or other person claiming under him, or unless the said principal has first testified.

§ 3349. If an original party to such contract or transaction, with whom it was personally and solely made or had, or his agent, be examined as a witness orally or in writing, at a time when he is competent to testify, and he afterwards die or become otherwise legally incapable of testifying, his testimony may be proved or read in evidence, and in such case the adverse party may testify as to the same matters.

§ 3742. [A person convicted of perjury or subornation of perjury shall] . . . be forever adjudged incapable . . . of giving evidence as a witness.

§ 3896. Approvers shall not be admitted in any case.

§ 3897. In any case of felony or misdemeanor, the accused may be sworn and examined in his own behalf, and be subject to cross-examination as any other witness; but his failure to testify shall create no presumption against him, nor be the subject of any comment before the Court or jury by the prosecuting attorney.

§ 3898. Except where it is otherwise expressly provided, a person convicted of felony shall not be a witness, unless he has been pardoned or punished therefor, and a person convicted of perjury shall not be a witness, although pardoned or punished.

§ 3899. No person prosecuted for unlawful gaming shall be competent to testify against a witness for the Commonwealth in such prosecution, touching any unlawful gaming committed by him prior to the commencement of such prosecution.

§ 3900. No person who is not jointly tried with the defendant shall be incompetent to testify in any prosecution by reason of interest in the subject-matter thereof.

§ 4187. In any such prosecution [against a convict], any convict in the penitentiary shall be a competent witness for or against the accused.

§ 3346 *a* [St. 1897–8, p. 753]. 1. Husband and wife shall be com-

petent to testify for or against each other in all civil cases except as is hereinafter provided: First, neither husband nor wife shall be competent to testify for or against each other in any proceeding by a creditor to avoid or impeach any conveyance, gift, or sale from the one to the other on the ground of fraud or want of consideration, but as to said transaction the existing rules of evidence shall remain unchanged; second, where one of the original parties to a contract, matter, or other transaction which is the subject of investigation, is incapable of testifying by reason of death, insanity, infancy, or other legal cause, and the other party to such contract, matter, or transaction is made incompetent to testify by sub-section 2 of section 3346 of the Code of Virginia, then in such case the consort of either party shall be incompetent to testify in relation to such contract, matter, or transaction: and provided, further, that nothing herein contained shall be deemed or construed to alter the existing rules of evidence as to proceedings for divorce.

2. In criminal cases husband and wife shall be allowed to testify on behalf of each other; but neither shall be compelled to testify against the other. If either, however, be examined in any case as a witness in behalf of the other, the one so examined shall be deemed competent to testify in such case as well against as in behalf of such other, but the failure of either husband or wife to testify shall create no presumption against the accused nor be the subject of any comment before the Court or jury by the prosecuting attorney.

3. Neither husband nor wife shall without the consent of the other be examined in any case as to any communication made by one to the other while married, nor shall either of them be permitted without such consent to reveal in testimony after the marriage relation ceases any such communication made while the marriage subsisted: provided, that this exclusion shall not apply to a criminal proceeding for a criminal offence committed by one against the other, but as to such proceeding the existing rules of evidence shall remain unchanged.

Washington.

Constitution, 1889.

Art. I, § 9. No person shall be compelled in any criminal case to give evidence against himself.

§ 6. The mode of administering an oath or affirmation shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath or affirmation may be administered.

§ 11. . . . Nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

§ 22. In criminal prosecutions, the accused shall have the right . . . to testify in his own behalf, to meet the witnesses against him face to face.

§ 27. . . . No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or confession in open court.

Annotated Code and Statutes, 1897 (Ballinger).

§ 5990. Every person of sound mind and suitable age and discretion, except as hereinafter provided, may be a witness in any action or proceeding.

§ 5991. No person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his credibility: provided, however, that in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, or as the guardian or conservator of the estate of any insane person, or of any minor under the age of fourteen years, then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any such deceased or insane person or by any such minor under the age of fourteen years: provided, further, that this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity and who have no other or further interest in the action.

§ 5992. No person offered as a witness shall be excluded from giving evidence by reason of conviction of crime, but such conviction may be shown to affect his credibility: provided, that any person who shall have been convicted of the crime of perjury shall not be a competent witness in any case, unless such conviction shall have been reversed, or unless he shall have received a pardon.

§ 5993. The following person[s] shall not be competent to testify: —

1. Those who are of unsound mind, or intoxicated 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.

§ 5994. The following persons shall not be examined as witnesses: —

1. A husband shall not be examined for or against his wife without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor shall either, during mar-

riage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during marriage. But this exception shall 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.

§ 6056. Whenever the Court or officer before which a person is offered as a witness is satisfied that he has a peculiar mode of swearing connected with or additional to the usual form of administration, which, in witness' opinion, is more solemn and obligatory, the Court or other officer may, in its discretion, adopt that mode.

§ 6057. When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the ceremonies of his religion, if there be any such.

§ 6058. Any person who has conscientious scruples against taking an oath may make his solemn affirmation, by assenting, when addressed, in the following manner: "You do solemnly affirm that," etc., as in section 6055.

§ 6940. Witnesses competent to testify in civil cases shall be competent in criminal prosecutions; but no regular physicians or surgeons, clergymen or priest[s], shall be protected from testifying as to confessions, or information received from any defendant, by virtue of their profession and character; Indians shall be competent as hereinbefore provided [?], or in any prosecutions in which an Indian may be a defendant.

§ 6941. . . . Any person accused of any crime in this State by indictment, information, or otherwise, may, in the examination or trial of the cause, offer himself or herself as a witness in his or her own behalf, and shall be allowed to testify as other witnesses in such case, and when accused shall so testify, he or she shall be subject to all the rules of law relating to cross-examinations of other witnesses; provided, that nothing in this Code shall be construed to compel such accused persons to offer himself or herself as a witness in such case; and provided, further, that it shall be the duty of the Court to instruct the jury that no inference of guilt shall arise against the accused if the accused shall fail or refuse to testify as a witness in his or her own behalf.

West Virginia.

Constitution, 1872.

Art. II, § 6. . . . No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

Art. III, § 5. . . . Nor shall any person, in any criminal case, be compelled to be a witness against himself.

§ 14. . . . In all such trials [of crimes and misdemeanors], the accused shall . . . be confronted with the witnesses against him.

§ 15. . . . [Men's opinions in matters of religion] shall in no wise affect, diminish, or enlarge their civil capacities.

Code, Third Edition, 1891.

Ch. 130, § 22. In any civil action, suit, or proceeding, the husband or wife of any party thereto, or of any person in whose behalf any such action, suit, or proceeding is brought, prosecuted, opposed, or defended, shall be competent to give evidence the same as any other witness on behalf of any party to such action, suit, or proceeding, except that no husband or wife shall disclose any confidential communication made by one to the other during their marriage.

§ 23. No person offered as a witness in any civil action, suit, or proceeding shall be excluded by reason of his interest in the event of the action, suit, or proceeding, or because he is a party thereto, except as follows: No party to any action, suit, or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of 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 committee of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor, or committee shall be examined on his own behalf, nor as to which the testimony of such deceased person or lunatic shall be given in evidence.

§ 24. No person shall be incompetent as a witness on account of race or color.

Ch. 152, § 17. Except where it is otherwise expressly provided, a person convicted of felony shall not be a witness, unless he has been pardoned or punished therefor, but a person convicted of felony and sentenced therefor, except it be for perjury, may by leave of Court be examined as a witness in any criminal prosecution, though he has not been pardoned or punished therefor, but a person convicted of perjury shall not be a witness in any case, although he may have been pardoned or punished.

§ 18 (analogous to § 3899, Virginia Code, but covering a number of offences).

§ 19. In any trial or examination in or before any Court or officer for a felony or misdemeanor, the accused shall, at his or her own request, but not otherwise, be a competent witness on such trial and

examination. The wife or husband of the accused shall also, at the request of the accused, but not otherwise, be a competent witness on such trial and examination. But a failure to make such request shall not create any presumption against him or her, nor shall any reference be made to nor comment upon such failure by any one during the progress of the trial in the hearing of the jury.

Wisconsin.

Constitution, 1848.

Art. I, § 7. In all criminal prosecutions the accused shall enjoy the right . . . to meet the witnesses face to face.

§ 8. No person . . . shall be compelled in any criminal case to be a witness against himself.

§ 10. . . . No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

§ 19. . . . No person shall be rendered incompetent to give evidence in any Court of law or equity in consequence of his opinions on the subject of religion.

Statutes, 1898.

§ 4068. No person shall be disqualified in any action or proceeding, civil or criminal, by reason of his interest in the event of the same, as a party or otherwise; and every party shall be in every such case a competent witness except as otherwise provided in this chapter. But such interest or connection may be shown to affect the credibility of the witness. Any party to the record in any civil action or proceeding, or any person for whose immediate benefit any such action or proceeding is prosecuted or defended, or the president, secretary, or other principal officer or general managing agent of any corporation which is such a party or for whose benefit the action or proceeding is prosecuted or defended, may be examined upon the trial of any such action or proceeding as if under cross-examination, at the instance of the adverse party or parties or any of them, and for that purpose may be compelled, in the same manner and subject to the same rules for examination as any other witness, to testify; but the party calling for such examination shall not be concluded thereby and may rebut the evidence given thereon by counter or impeaching testimony.

§ 4069. No party, and no person from, through, or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him personally with a deceased person or with a person then insane in any civil action or proceeding in which the opposite party derives his title or sustains

his liability, to the cause of action from, through, or under such deceased person or such insane person, or in which such insane person is a party prosecuting or defending by guardian, unless such opposite party shall first be examined or examine some other witness in his behalf to such transaction or communication between the deceased or insane and such party or person, or unless the testimony of such deceased person given in his lifetime or of such insane person be first read or given in evidence by the opposite party; and then, in either case respectively, only in respect to such transaction or communication of which testimony is so given or to the matters to which such testimony relates.

§ 4070. No party, and no person from, through, or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him personally with an agent of the adverse party or an agent of the person from, through, or under whom such adverse party derives his interest or title, when such agent is dead or insane or otherwise legally incompetent as a witness, unless the opposite party shall first be examined or examine some other witness in his behalf in respect to some transaction or communication between such agent and such other party or person; or unless the testimony of such agent, at any time taken, be first read or given in evidence by the opposite party; and then, in either case respectively, only in respect to such transaction or communication of which testimony is so given or to the matters to which such testimony relates.

§ 4071. In all criminal actions and proceedings the party charged shall, at his own request, but not otherwise, be a competent witness; but his refusal or omission to testify shall create no presumption against him or any other party thereto.

§ 4072. A husband or wife shall not be allowed to disclose a confidential communication made by one to the other during their marriage, without the consent of the other. In an action for criminal conversation the plaintiff's wife is a competent witness for the defendant as to any matter in controversy except as aforesaid.

§ 4073. A person who has been convicted of a criminal offence 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.

§ 4081. In all cases in which an oath or affidavit is required or authorized by law, the same may be taken in any of the usual forms.

§ 4082. Whenever the Court before which any person shall be offered as a witness shall be satisfied that such person has any peculiar mode of swearing which is more solemn and obligatory, in the opinion of such person, than the usual mode, the Court may, in

its discretion, adopt such mode of swearing such person; and any Court may inquire of any person what are the peculiar ceremonies, observed in swearing, which he deems most obligatory.

§ 4083. Every person believing in any other than the Christian religion shall be sworn according to the peculiar ceremonies of his religion, if there be any such ceremonies.

§ 4084. Every person who shall declare that he has conscientious scruples against taking any oath or swearing in any form shall be permitted to make his solemn declaration or affirmation.

Wyoming.

Revised Statutes, 1887.

[Civil Procedure.] § 2588. All persons are competent witnesses, except those of unsound mind and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.

§ 2589. The following persons shall not testify in certain respects: —

First, an attorney, concerning a communication made to him by his client in that relation, or his advice to his client; or a physician, concerning a communication made to him by his patient in that relation, or his advice to his patient; but the attorney or physician may testify by express consent of the client or patient; and if the client or patient voluntarily testify, the attorney or physician may be compelled to testify on the same subject.

Second, a clergyman or priest, concerning a confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

Third, husband or wife, concerning any communication made by one to the other during coverture, unless the communication was made in the known presence or hearing of a third person competent to be a witness; and the rule shall be the same if the marital relation has ceased to exist.

Fourth, a person who assigns his claim or interest, concerning any matter in respect to which he would not, if a party, be permitted to testify.

Fifth, a person who, if a party, would be restricted in his evidence under § 2590, shall, where the property or thing is sold or transferred by an executor, administrator, guardian or trustee, heir, devisee, or legatee, be restricted in the same manner in any action or proceeding concerning such property or thing.

§ 2590. A party shall not testify where the adverse party is the guardian or trustee of either a deaf and dumb or an insane person, or of a child of a deceased person, or is an executor or administrator,

or claims or defends as heir, grantee, assignee, devisee, or legatee of a deceased person; except,

First, to facts which occurred subsequent to the appointment of the guardian or trustee of an insane person, and, in other cases, subsequent to the time the decedent, grantor, assignor, or testator died;

Second, when the action or proceeding relates to a contract made through an agent, by a person since deceased, and the agent testifies, a party may testify on the same subject;

Third, if a party, or one having a direct interest, testify to transactions or conversations with another party, the latter may testify to the same transactions or conversations;

Fourth, if a party offer evidence of conversations or admissions of the opposite party, the latter may testify concerning the same conversations or admissions;

Fifth, in an action or proceeding by or against a partner or joint contractor, the adverse party shall not testify to transactions with or admissions by a partner or joint contractor since deceased; unless the same were made in the presence of the surviving partner or joint contractor; and this rule shall be applied without regard to the character in which the parties sue or are sued;

Sixth, if the claim or defence is founded on a book account, a party may testify that the book is his account book, that it is a book of original entries, that the entries therein were made by himself, a person since deceased, or a disinterested person non-resident of the county; whereupon the book shall be competent evidence; and such book may be admitted in evidence in any case, without regard to the parties, upon like proof by any competent witness;

Seventh, if a party, after testifying orally, die, the evidence may be proved by either party, on a further trial of the case, whereupon the opposite party may testify as to the same matters;

Eighth, if a party die, and his deposition be offered in evidence, the opposite party may testify as to all competent matters therein;

Nothing in this section contained shall apply to actions for causing death, or actions or proceedings involving the validity of a deed, will, or codicil; and when a case is plainly within the reason and spirit of the last three sections, though not within the strict letter, their principles shall be applied.

§ 2591. A party may compel the adverse party to testify orally or by deposition, as any other witness may be thus compelled.

[Criminal Procedure.] § 3288. The defendant in all criminal cases, in all the courts in this Territory, may be sworn and examined as a witness, if he so elect, but shall not be required to testify in any case. If the defendant so elect, he may make a statement to the jury without being sworn, but the neglect or refusal to make a statement shall not create any presumption against him, nor shall

any reference be made to nor shall any comment be made upon such neglect or refusal.

§ 3295. When two or more persons shall be indicted together, the Court may, at any time before the defendant has gone into his defence, direct any one of the defendants to be discharged, that he may be a witness for the Territory. An accused party may, also, when there is not sufficient evidence to put him upon his defence, be discharged by the Court, or, if not discharged by the Court, shall be entitled to the immediate verdict of the jury, for the purpose of giving evidence for others accused with him.

APPENDIX II.

PASSAGES OMITTED FROM THE ORIGINAL TEXT.[1]

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§ 13 *a*. **Kinds of Circumstantial Evidence.** Circumstantial evidence is of two kinds, namely, *certain*, or that from which the conclusion in question necessarily follows; and *uncertain*, or that from which the conclusion does not necessarily follow, but is probable only, and is obtained by process of reasoning. Thus, if the body of a person of mature age is found dead, with a recent mortal wound, and the mark of a bloody left hand is upon the left arm, it may well be concluded that the person once lived, and that another person was present at or since the time when the wound was inflicted. So far the conclusion is certain; and the jury would be bound by their oaths to find accordingly. But whether the death was caused by suicide or by murder, and whether the mark of the bloody hand was that of the assassin, or of a friend who attempted, though too late, to afford relief, or to prevent the crime, is a conclusion which does not necessarily follow from the facts proved, but is obtained, from these and other circumstances, by probable deduction. The conclusion, in the latter case, may be more or less satisfactory or stringent, according to the circumstances. In civil cases, where the mischief of an erroneous conclusion is not deemed remediless, it is not necessary that the minds of the jurors be freed from all doubt; it is their duty to decide in favor of the party on whose side the weight of evidence preponderates, and according to the reasonable probability of truth. But in criminal cases, because of the more serious and irreparable nature of the consequences of a wrong decision, the jurors are required to be satisfied, beyond any reasonable doubt, of the guilt of the accused, or it is their duty to acquit him; the charge not being proved by that higher degree of evidence which the law demands. In civil cases, it is sufficient if the evidence, on the whole, agrees with and supports the hypothesis which it is adduced to prove; but

[1] [The following sections are those which have been omitted from the original text; they are chiefly such as deal with obsolete topics (variance, disqualification of witnesses by interest, etc.); but a few of them concern topics not properly belonging to the law of evidence (Statute of Frauds, etc.), or have been omitted in order to give place to a more detailed treatment of the subjects rendered necessary by the modern development of the principles involved.]

in criminal cases it must exclude every other hypothesis but that of the guilt of the party. In both cases, a verdict may well be founded on circumstances alone; and these often lead to a conclusion far more satisfactory than direct evidence can produce.

. . . . . .

§ 51. (I) **Evidence must be directed to the Allegations in Issue.** The pleadings at common law are composed of the written allegations of the parties, terminating in a single proposition, distinctly affirmed on one side, and denied on the other, called the *issue*. If it is a proposition of fact, it is to be tried by the jury, upon the evidence adduced. And it is an established rule, which we state as the first rule, governing in the production of evidence, that the evidence offered must correspond with the allegations, and be confined to the point in issue.[1] This rule supposes the allegations to be material and necessary. Surplusage, therefore, need not be proved; and the proof, if offered, is to be rejected The term *surplusage* comprehends whatever may be stricken from the record, without destroying the plaintiff's right of action; as if, for example, in suing the defendant for breach of warranty upon the sale of goods, he should set forth, not only that the goods were not such as the defendant warranted them to be, but that the defendant well knew that they were not.[2] But it is not every immaterial or unnecessary allegation that is surplusage; for if the party, in stating his title, should state it with unnecessary particularity, he must prove it as alleged. Thus, if, in justifying the taking of cattle damage-feasant, in which case it is sufficient to allege that they were doing damage in his freehold, he should state a seisin in fee, which is traversed, he must prove the seisin in fee;[3] for if this were stricken from the declaration, the plaintiff's entire title would be destroyed. And it appears that in determining the question, whether a particular averment can be rejected, regard is to be had to the nature of the averment itself, and its connection with the substance of the charge, or chain, rather than to its grammatical collocation or structure.[4]

§ 51 *a*. It is not necessary, however, that the evidence should bear directly upon the issue. It is admissible if it tends to prove the issue, or constitutes a link in the chain of proof; although, alone, it might not justify a verdict in accordance with it.[1] Nor is

[1] See Best's Principles of Evidence, §§ 229–249.

[2] Williamson *v.* Allison, 2 East 446; Peppin *v.* Solomons, 5 T. R. 496; Bromfield *v.* Jones, 4 B. & C. 380.

[3] Sir Francis Leke's Case, Dyer 365; 2 Saund. 206 *a*, n. 22; Stephen on Pleading, 261, 262; Bristow *v.* Wright, Doug. 640; Miles *v.* Sheward, 8 East 7, 8, 9; 1 Smith's Leading Cases, 328, n.

[4] 1 Stark. Evid. 386.

[1] McAllister's Case, 11 Shepl. 139; Haughey *v.* Strickler, 2 Watts & Serg. 411; Jones *v.* Vanzandt, 2 McLean, 596; Lake *v.* Munford, 4 Sm. & Marsh. 312; Belden *v.* Lamb, 17 Conn. 441. Where the plaintiff's witness denied the existence of a material fact, and testified that persons connected with the plaintiff had offered him money to assert its existence, the plaintiff was permitted, not only to prove the fact, but to dis-

it necessary that its relevancy should appear at the time when it is offered; it being the usual course to receive, at any proper and convenient stage of the trial, in the discretion of the judge, any evidence which the counsel shows will be rendered material by other evidence which he undertakes to produce. If it is not subsequently thus connected with the issue, it is to be laid out of the case.[2]

§ 52. **Collateral Facts inadmissible.** This rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute; and the reason is, that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice and mislead them; and moreover the adverse party having had no notice of such a course of evidence, is not prepared to rebut it.[1] Thus, where the question between landlord and tenant was, whether the rent was payable quarterly, or half-yearly, evidence of the mode in which other tenants of the same landlord paid their rent was held inadmissible.[2] And where, in covenant, the issue was whether the defendant, who was a tenant of the plaintiff, had committed waste, evidence of bad husbandry, not amounting to waste, was rejected.[3] So, where the issue was, whether the tenant had permitted the premises to be out of repair, evidence of voluntary waste was held irrelevant.[4] This rule was adhered to, even in the cross-examination of witnesses; the party not being permitted, as will be shown hereafter,[5] to ask the witness a question in regard to a matter not relevant to the issue, for the purpose of afterwards contradicting him.[6]

§ 53. **Exceptions.** In some cases, however, evidence has been received of facts which happened before or after the principal transaction, and which had no direct or apparent connection with it; and therefore their admission might seem, at first view, to constitute an exception to this rule. But those will be found to have been

prove the subornation, on the ground that this latter fact had become material and relevant, inasmuch as its truth or falsehood may fairly influence the belief of the jury as to the whole case: Melhuish *v.* Collier, 15 Q. B. 878.

[2] McAllister's Case, *supra;* Van Buren *v.* Wells, 19 Wend. 203; Crenshaw *v.* Davenport, 6 Ala. 390; Tuggle *v.* Barclay, ib. 407; Abney *v.* Kingsland, 10 id. 355; Yeatman *v.* Hart, 6 Humph. 375.

[1] *Infra*, § 448. But counsel may, on cross-examination, inquire as to a fact apparently irrelevant, if he will undertake afterwards to show its relevancy by other evidence: Haigh *v.* Belcher, 7 C. & P. 389.

[2] Carter *v.* Pryke, Peake 95.

[3] Harris *v.* Mantle, 3 T. R. 307. See also Balcetti *v.* Serani, Peake 142; Furneaux *v.* Hutchins, Cowp. 807; Doe *v.* Sisson, 12 East 62; Holcombe *v.* Hewson, 2 Campb. 391; Viney *v.* Brass, 1 Esp. 292; Clothier *v.* Chapman, 14 East 331, n.

[4] Edge *v.* Pemberton, 12 M. & W. 187.

[5] See *infra*, §§ 448, 449, 450.

[6] Crowley *v.* Page, 7 C. & P. 789; Harris *v.* Tippett, 2 Campb. 637; R. *v.* Watson, 2 Stark. 116; Com. *v.* Buzzell, 16 Pick. 157, 158; Ware *v.* Ware, 8 Greenl. 42. A further reason may be, that the evidence, not being to a material point, cannot be the subject of an indictment for perjury. Odiorne *v.* Winkley, 2 Gall. 51, 53.

cases in which the knowledge or intent of the party was a material fact, on which the evidence, apparently collateral, and foreign to the main subject, had a direct bearing, and was therefore admitted. Thus, when the question was, whether the defendant, being the acceptor of a bill of exchange, either knew that the name of the payee was fictitious, or else had given a general authority to the drawer to draw bills on him payable to fictitious persons, evidence was admitted to show that he had accepted other bills, drawn in like manner, before it was possible to have transmitted them from the place at which they bore date.[1] So, in an indictment for knowingly uttering a forged document, or a counterfeit bank-note, proof of the possession, or of the prior or subsequent utterance of other false documents or notes, though of a different description, is admitted, as material to the question of guilty knowledge or intent.[2] So, in actions for defamation, evidence of other language, spoken or written by the defendant at other times, is admissible under the general issue in proof of the spirit and intention of the party in uttering the words or publishing the libel charged; and this, whether the language thus proved be in itself actionable or not.[3] Cases of this sort, therefore, instead of being exceptions to the rule, fall strictly within it.

§ 53 *a*. **Title to Lands.** In proof of the ownership of lands, by acts of possession, the same latitude is allowed. It is impossible, as has been observed, to confine the evidence to the precise spot on which a supposed trespass was committed; evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question, as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the party, if the other parts did. The evidence of such acts is admissible *proprio vigore*, as tending to prove that he who did them is the owner of the soil; though if they were done in the absence of all persons interested to dispute them, they are of less weight.[1]

§ 54. **General Character.** To this rule may be referred the admissibility of evidence of the general character of the parties. In civil cases, such evidence is not admitted, unless the nature of the action

[1] Gibson *v.* Hunter, 2 H. Bl. 288; Minet *v.* Gibson, 3 T. R. 481; 1 H. Bl. 569.

[2] R. *v.* Wylie, 1 New Rep. 92, 94. See other examples in McKenney *v.* Dingley, 4 Greenl. 172; Bridge *v.* Eggleston, 14 Mass. 245; R. *v.* Ball, 1 Campb. 324; R. *v.* Roberts, ib. 399; R. *v.* Hough, Russ. & Ry. 130; R. *v.* Smith, 4 C. & P. 411; Rickman's Case, 2 East P. C. 1035; Robinson's Case, ib. 1110, 1112; R. *v.* Northampton, 2 M. & S. 262; Com. *v.* Turner, 3 Metc. 19. See also Bottomley *v.* U. S., 1 Story 143, 145, where this doctrine is clearly expounded by Story, J.

[3] Pearson *v.* Le Maitre, 5 M. & Gr. 700; s. c. 6 Scott N. R. 607; Rustell *v.* Macquister, 1 Campb. 49. n.; Saunders *v.* Mills, 6 Bing. 213; Warwick *v.* Foulkes, 12 M. & W. 507; Long *v.* Barrett, 7 Ir. Law 439; s. c. 8 id. 331, on error.

[1] Jones *v.* Williams, 2 M. & W. 326, per Parke, B. And see Doe *v.* Kemp, 7 Bing. 332; 2 Bing. N. C. 102.

involves the general character of the party, or goes directly to affect it.[1] Thus, evidence impeaching the previous general character of the wife or daughter, in regard to chastity, is admissible in an action by the husband or father for seduction; and this, again, may be rebutted by counter proof.[2] But such evidence, referring to a time subsequent to the act complained of, is rejected.[3] And, generally, in actions of tort, wherever the defendant is charged with fraud from mere circumstances, evidence of his general good character is admissible to repel it.[4] So, also, in criminal prosecutions, the charge of a

[1] Attorney-General *v.* Bowman, 2 B. & P. 532, expressly adopted in Fowler *v.* Ætna Fire Ins. Co., 6 Cowen 673, 675; Anderson *v.* Long, 10 S. & R. 55; Humphrey *v.* Humphrey, 7 Conn. 116; Nash *v.* Gilkeson, 5 S. & R. 352; Jeffries *v.* Harris, 3 Hawks 105.

[2] Bate *v.* Hill, 1 C. & P. 100; Verry *v.* Watkins, 7 id. 308; Carpenter *v.* Wall, 11 Ad. & El. 803; s. c. 3 P. & D. 457; Elsam *v.* Faucett, 2 Esp. 562; Dodd *v.* Norris, 3 Campb. 519. See *contra*, McRae *v.* Lilly, 1 Iredell 118.

[3] Elsam *v.* Faucett, 2 Esp. 562; Coot *v.* Berty, 12 Mod. 232. The rule is the same in an action by a woman for a breach of promise of marriage. See Johnston *v.* Caulkins, 1 Johns. Cas. 116; Boynton *v.* Kellogg, 3 Mass. 189; Foulkes *v.* Sellway, 3 Esp. 236; Bamfield *v.* Massey, 1 Campb. 460; Dodd *v.* Norris, 3 id. 519.

[4] Ruan *v.* Perry, 3 Caines 120. See also Walker *v.* Stephenson, 3 Esp. 284. This case of Ruan *v.* Perry has sometimes been mentioned with disapprobation; but, when correctly understood, it is conceived to be not opposed to the well-settled rule, that evidence of general character is admissible only in cases where it is involved in the issue. In that case the commander of a national frigate was sued in trespass for seizing and detaining the plaintiff's vessel, and taking her out of her course, by means whereof she was captured by an enemy. The facts were clearly proved; but the question was, whether the defendant acted in honest obedience to his instructions from the navy department, which were in the case, or with a *fraudulent intent*, and in *collusion* with the captors, as the plaintiff alleged to the jury, and attempted to sustain by some of the circumstances proved. It was to repel this imputation of fraudulent *intent*, inferred from slight circumstances, that the defendant was permitted to appeal to his own "fair and good reputation." And in confirming this decision in bank, it was observed that, "in actions of tort, and especially charging a defendant with gross depravity and fraud, upon circumstances merely, evidence of uniform integrity and good character is oftentimes the only testimony which a defendant can oppose to suspicious circumstances." On this ground this case was recognized by the Court as good law, in Fowler *v.* Ætna Fire Ins. Co., 6 Cowen 675. And five years afterwards, in Townsend *v.* Graves, 3 Paige 455, 456, it was again cited with approbation by Chancellor Walworth, who laid it down as a general rule of evidence, "that if a party is charged with a crime, or any other act involving moral turpitude, which is endeavored to be fastened upon him by circumstantial evidence, or by the testimony of witnesses of doubtful credit, he may introduce proof of his former good character for honesty and integrity, to rebut the presumption of guilt arising from such evidence, which it may be impossible for him to contradict or explain." In Gough *v.* St. John, 16 Wend. 646, the defendant was sued in an action on the case, for a false representation as to the solvency of a third person. The representation itself was in writing, and verbal testimony was offered, tending to show that the defendant knew it to be false. To rebut this charge, proof that the defendant sustained a good character for honesty and fairness in dealing was offered and admitted. Cowen, J., held, that the fraudulent intent was a necessary inference of law from the falsity of the representation; and that the evidence of character was improperly admitted. He proceeded to cite and condemn the case of Ruan *v.* Perry, as favoring the general admissibility of evidence of character in civil actions, for injuries to property. But such is manifestly not the doctrine of that case. It only decides, that where intention (not knowledge) is the point in issue, and the proof consists of slight circumstances, evidence of character is admissible. The other judges agreed that the evidence was improperly admitted in that case, but said nothing as to the case of Ruan *v.* Perry. They denied, however, that fraud was in such cases an inference of law.

The ground on which evidence of good character is admitted in criminal prosecu-

rape, or of an assault with intent to commit a rape, is considered as involving not only the general character of the prosecutrix for chastity, but the particular fact of her previous criminal connection with the prisoner, though not with other persons.[5] And in all cases, where evidence is admitted touching the general character of the party, it ought manifestly to bear reference to the nature of the charge against him.[6]

§ 55. It is not every allegation of fraud that may be said to put the character in issue; for, if it were so, the defendant's character would be put in issue in the ordinary form of declaring in *assumpsit*. This expression is technical, and confined to certain actions, from the nature of which, as in the preceding instances, the character of the parties, or some of them, is of particular importance. This kind of evidence is therefore rejected, whenever the general character is involved by the plea only, and not by the nature of the action.[1] Nor is it received in actions of assault and battery;[2] nor in *assumpsit*;[3] nor in trespass on the case of malicious prosecution;[4] nor in an information for a penalty for violation of the civil, police, or revenue laws;[5] nor in ejectment, brought in order to set aside a will for fraud committed by the defendant.[6] Whether evidence impeaching the plaintiff's previous general character is admissible in an action of slander, as affecting the question of damages, is a point which has been much controverted; but the weight of authority is in favor of admitting such evidence.[7] But it seems that the charac-

tions is this, that the intent with which the act, charged as a crime, was done, is of the essence of the issue; agreeably to the maxim, "Nemo reus est, nisi *mens* sit rea;" and the prevailing character of the party's mind, as evinced by the previous habit of his life, is a material element in discovering that intent in the instance in question. Upon the same principle, the same evidence ought to be admitted in all other cases, whatever be the form of proceeding, where the intent is material to be found as a fact involved in the issue.

[5] R. *v.* Clarke, 2 Stark. 241; 1 Phil. & Am. on Evid. 490; Low *v.* Mitchell, 6 Shepl. 372; Com. *v.* Murphy, 14 Mass. 387; 2 Stark. Evid. (by Metcalf) 369, n. (1); R. *v.* Martin, 6 C. & P. 562; R. *v.* Hodgson, Russ. & Ry. 211; R. *v.* Clay, 5 Cox Cr. Cas. 146. But in an action on the case for seduction, evidence of particular acts of unchastity with other persons is admissible: Verry *v.* Watkins, 7 C. & P. 308. Where one is charged with keeping a house of ill fame *after* the statute went into operation, evidence of the bad reputation of the house *before* that time, was held admissible, as conducing to prove that it sustained the same reputation afterwards: Cadwell *v.* State, 17 Conn. 467.

[6] Douglass *v.* Tousey, 2 Wend. 352.

[1] Anderson *v.* Long, 10 S. & R. 55; Potter *v.* Webb *et al*, 6 Greenl. 14; Gregory *v.* Thomas, 2 Bibb 286.

[2] Givens *v.* Bradley, 3 Bibb 192. But in the Admiralty Courts, where a seaman sues against the master for damages, for illegal and unjustifiable punishment, his general conduct and character during the voyage are involved in the issue: Pettingill *v.* Dinsmore, Daveis 208, 214.

[3] Nash *v.* Gilkeson, 5 S. & R. 352.

[4] Gregory *v.* Thomas, 2 Bibb 286.

[5] Attorney-General *v.* Bowman, 2 B. & P. 532, n.

[6] Goodright *v.* Hicks, Bull. N. P. 296.

[7] 2 Starkie on Slander, 88, 89–95, n.; Root *v.* King, 7 Cowen 613; Bailey *v.* Hyde, 3 Conn. 463; Bennett *v.* Hyde, 6 id. 24; Douglass *v.* Tousey, 2 Wend. 353; Inman

ter of the party, in regard to any particular trait, is not in issue, unless it be the trait which is involved in the matter charged against him; and of this it is only evidence of general reputation, which is to be admitted, and not positive evidence of general bad conduct.[8]

§ 56. (II) **Substance of the Issue need alone be proved.** A second rule which governs in the production of evidence is, that it is sufficient, if the substance of the issue be proved. In the application of this rule, a distinction is made between allegations of matter of substance, and allegations of matter of essential description. The former may be substantially proved; but the latter must be proved with a degree of strictness, extending in some cases even to literal precision. No allegation, descriptive of the identity of that which is legally essential to the claim or charge, can ever be rejected.[1] Thus in an action of malicious prosecution, the plaintiff alleges that he was acquitted of the charge on a certain day; here the substance of the allegation is the acquittal, and it is sufficient, if this fact be proved on any day, the time not being material. But if the allegation be, that the defendant drew a bill of exchange of a certain date and tenor, here every allegation, even to the precise day of the date, is descriptive of the bill, and essential to its identity, and must be literally proved.[2] So also, as we have already seen, in justifying the

v. Foster, 8 id. 602; Larned *v.* Buffington, 3 Mass. 552; Walcott *v.* Hall, 6 id. 514; Ross *v.* Lapham, 14 id. 275; Bodwell *v.* Swan, 3 Pick. 378; Buford *v.* M'Luny, 1 Nott & McCord 268; Sawyer *v.* Eifert, 2 id. 511; King *v.* Waring, *et ux.*, 5 Esp. 14; Rodriguez *v.* Tadmire, 2 id. 721; —— *v.* Moor, 1 M. & S. 284; Earl of Leicester *v.* Walter, 2 Campb. 251; Williams *v.* Callender, Holt's Cas. 307; 2 Stark. Evid. 216. In Foot *v.* Tracy, 1 Johns. 46, the Supreme Court of New York was equally divided upon this question; Kent and Thompson, JJ., being in favor of admitting the evidence, and Livingston and Tompkins, JJ., against it. In England, according to the later authorities, evidence of the general bad character of the plaintiff seems to be regarded as irrelevant, and therefore inadmissible: Phil. & Am. on Evid. 488, 489; Cornwall *v.* Richardson, Ry. & Mood. 305; Jones *v.* Stevens, 11 Price 235. In this last case it is observable, that though the reasoning of the learned judges, and especially of Wood, B., goes against the admission of the evidence, even though it be of the most general nature, in any case, yet the record before the Court contained a plea of justification aspersing the professional character of the plaintiff in general averments, without stating any particular acts of bad conduct; and the point was, whether, in support of this plea, as well as in contradiction of the declaration, the defendant should give evidence that the plaintiff was of general bad character and repute, in his practice and business of an attorney. The Court strongly condemned the pleading as reprehensible, and said that it ought to have been demurred to, as due to the Court and to the judge who tried the cause. See J'Anson *v.* Stuart, 1 T. R. 748; 2 Smith's Leading Cases 37. See also Rhodes *v.* Bunch, 3 McCord 66. In Williston *v.* Smith, 3 Kerr 443, which was an action for slander by charging the defendant with larceny, the defendant, in mitigation of damages, offered evidence of the plaintiff's general bad character; which the judge at *Nisi Prius* rejected; and the Court held the rejection proper; observing that, had the evidence been to the plaintiff's general character for honesty, it might have been admitted.

[8] Swift's Evid. 140; Ross *v.* Lapham, 14 Mass. 275; Douglass *v.* Tousey, 2 Wend. 352; Andrews *v.* Vanduzer, 11 Johns. 38; Root *v.* King, 7 Cowen 613; Newsam *v.* Carr, 2 Stark. 69; Sawyer *v.* Eifert, 2 Nott & McCord 511.

[1] Stark. Evid. 373; Purcell *v.* Macnamara, 9 East 160; Stoddart *v.* Palmer, 3 B. & C. 4; Turner *v.* Eyles, 3 B. & P. 456; Ferguson *v.* Harwood, 7 Cranch 408, 413.

[2] 3 B. & C. 4, 5; Glassford on Evid. 309.

taking of cattle damage feasant, because it was upon the close of the defendant, the allegation of a general freehold title is sufficient; but if the party states, that he was seised of the close in fee, and it be traversed, the precise estate, which he has set forth, becomes an essentially descriptive allegation, and must be proved as alleged. In this case the essential and non-essential parts of the statement are so connected as to be incapable of separation, and therefore both are alike material.[3]

§ 57. **Matter of Description.** Whether an allegation is or is not so essentially descriptive, is a point to be determined by the judge in the case before him; and it depends so much on the particular circumstances, that it is difficult to lay down any precise rules by which it can in all cases be determined. It may depend, in the *first* place, on the nature of the averment itself, and the subject to which it is applied. But *secondly*, some averments the law pronounces formal which otherwise would, on general principles, be descriptive. And *thirdly*, the question, whether others are descriptive or not, will often depend on the technical manner in which they are framed.

§ 58. In the *first* place, it may be observed that any allegation which narrows and limits that which is essential is necessarily descriptive. Thus, in contracts, libels in writing, and written instruments in general, every part operates by way of description of the whole. In these cases, therefore, allegations of names, sums, magnitudes, dates, durations, terms, and the like, being essential to the identity of the writing set forth, must, in general, be precisely proved.[1] Nor is it material whether the action be founded in contract or in tort; for in either case, if a contract be set forth, every allegation is descriptive. Thus, in an action on the case for deceit in the sale of lambs by two defendants, jointly, proof of sale and warranty by one only, as his separate property, was held to be a fatal variance.[2] So also, if the contract described be absolute, but the contract proved be conditional, or in the alternative, it is fatal.[3] The consideration is equally descriptive and material, and must be strictly

[3] Stephen on Pleading, 261, 262, 419; Turner *v.* Eyles, 3 B. & P. 456; 2 Saund. 206 *a*, n. 22; Sir Francis Leke's Case, Dyer 364 *b*. Perhaps the distinction taken by Lord Ellenborough, in Purcell *v.* Macnamara, and recognized in Stoddart *v.* Palmer, 3 B. & C. 4, will, on closer examination, result merely in this, that matters of description are matters of substance, when they go to the identity of anything material to the action. Thus the rule will stand, as originally stated, that the substance, and this alone, must be proved.

[1] Bristow *v.* Wright, Doug. 665, 667; Churchill *v.* Wilkins, 1 T. R. 447; 1 Stark. Evid. 386, 388.

[2] Weall *v.* King *et al.*, 12 East 452.

[3] Penny *v.* Porter, 2 East 2; Lopes *v.* De Tastet, 1 Brod. & Bing. 538; Higgins *v.* Dixon, 10 Jur. 376; Hilt *v.* Campbell, 6 Greenl. 109; Stone *v.* Knowlton, 3 Wend. 374. See also Saxton *v.* Johnson, 10 Johns. 418; Snell *v.* Moses, 1 Johns. 96; Crawford *v.* Morrell, 8 Johns. 253; Baylies *v.* Fettyplace, 7 Mass. 325; Robbins *v.* Otis, 1 Pick. 368; Harris *v.* Rayner, 8 id. 541; White *v.* Wilson, 2 Bos. & Pul. 116; Whitaker *v.* Smith, 4 Pick. 83; Lower *v* Winters, 7 Cowen 263; Alexander *v.* Harris, 4 Cranch 299.

proved as alleged.[4] Prescriptions, also, being founded in grants presumed to be lost from lapse of time, must be strictly proved as laid; for every allegation, as it is supposed to set forth that which was originally contained in a deed, is of course descriptive of the instrument, and essential to the identity of the grant.[5] An allegation of the character in which the plaintiff sues, or of his title to damages, though sometimes superfluous, is generally descriptive in its nature, and requires proof.[6]

§ 59. *Secondly*, as to those averments which the law pronounces formal, though, on general principles, they seem to be descriptive and essential, these are rather to be regarded as exceptions to the rule already stated, and are allowed for the sake of convenience. Therefore, though it is the nature of a traverse to deny the allegation in the manner and form in which it is made, and, consequently, to put the party to prove it to be true in the manner and form, as well as in general effect;[1] yet where the issue goes to the point of the action, these words, *modo et formâ*, are but words of form.[2] Thus, in trover, for example, the allegation that the plaintiff lost the goods and that the defendant found them is regarded as purely formal, requiring no proof; for the *gist* of the action is the conversion. So, in indictments for homicide, though the death is alleged to have been caused by a particular instrument, this averment is but formal; and it is sufficient if the manner of death agree in substance with that which is charged, though the instrument be different; as, if a wound alleged to have been given with a sword be proved to have been inflicted with an axe.[3] But, where the traverse is of a collateral point in pleading, there the words *modo et formâ*, go to the substance of the issue, and are descriptive, and strict proof is required; as, if a feoffment is alleged by deed, which is traversed *modo et formâ*, evidence of a feoffment without deed will not suffice.[4] Yet, if in issues upon a collateral point, where the affirmative is on the defendant, partial and defective proof on his part should show that the plaintiff had no cause of action, as clearly as strict and full proof would do, it is sufficient.[5]

[4] Swallow *v.* Beaumont, 2 B. & Ald. 765; Robertson *v.* Lynch, 18 Johns. 451.

[5] Morewood *v.* Wood, 4 T. R. 157; Rogers *v.* Allen, 1 Campb. 309, 314, 315, note (a). But proof of a more ample right than is alleged will be regarded as mere redundancy: Johnson *v.* Thoroughgood, Hob. 64; Bushwood *v.* Pond, Cro. El. 722; Bailiffs of Tewkesbury *v.* Bricknell, 1 Taunt. 142; Burges *v.* Steer, 1 Show. 347; s. c. 4 Mod. 89.

[6] 1 Stark. Evid. 390; Moises *v.* Thornton, 8 T. R. 303, 308; Berryman *v.* Wise, 4 T. R. 366.

[1] Stephen on Pleading, 213.

[2] Trials *per pais*, 308 (9th ed.); Co. Lit. 281 *b*.

[3] 2 Russell on Crimes, 711; 1 East P. C. 341.

[4] Bull. N. P. 301; Co. Lit. 281 *b*. Whether *virtute cujus*, in a sheriff's pleas in justification, is traversable, and in what cases is discussed in Lucas *v.* Nockells, 7 Bligh N. S. 140.

[5] Ib.; 2 Stark. Ev. 394.

§ 60. *Thirdly*, as to those averments, whose character, as being descriptive or not, depends on the manner in which they are stated. Every allegation, essential to the issue, must, as we have seen, be proved, in whatever form it be stated; and things immaterial in their nature to the question at issue may be omitted in the proof, though alleged with the utmost explicitness and formality. There is, however, a middle class of circumstances, not essential in their nature, which may become so by being inseparably connected with the essential allegations. These must be proved as laid, unless they are stated under a *videlicet;* the office of which is to mark, that the party does not undertake to prove the precise circumstances alleged; and in such cases he is ordinarily not holden to prove them.[1] Thus in a declaration upon a bill of exchange, the date is in its nature essential to the identity of the bill, and must be precisely proved, though the form of allegation were, "of a certain date, to wit," such a date. On the other hand, in the case before cited, of an action for maliciously prosecuting the plaintiff for a crime whereof he was acquitted on a certain day, the time of acquittal is not essential to the charge, and need not be proved, though it be directly and expressly alleged.[2] But where, in an action for breach of warranty upon the sale of personal chattels, the plaintiff set forth the price paid for the goods, without a *videlicet*, he was held bound to prove the exact sum alleged, it being rendered material by the form of allegation;[3] though, had the averment been that the sale was for a valuable consideration, *to wit*, for so much, it would have been otherwise. A *videlicet* will not avoid a variance, or dispense with exact proof, in an allegation of material matter; nor will the omission of it always create the necessity of proving, precisely as stated, matter which would not otherwise require exact proof. But a party may, in certain cases, impose upon himself the necessity of proving precisely what is stated, if not stated under a *videlicet*.[4]

[1] Stephen on Pleading, 309; 1 Chitty on Pl. 261, 262, 348 (6th ed.); Stukley *v.* Butler, Hob. 168, 172; 2 Saund. 291, note (1); Gleason *v.* McVickar, 7 Cowen 42.

[2] *Supra*, § 56; Purcell *v.* Macnamara, 9 East 160; Gwinnet *v.* Phillips, 3 T. R. 643; Vail *v.* Lewis, 4 Johns. 450.

[3] Durston *v.* Tuthan, cited in 3 T. R. 67; Symmons *v.* Knox, ib. 65; Arnfield *v.* Bate, 3 M. & S. 173; Sir Francis Leke's Case, Dyer 364 *b;* Stephen on Pleading, 419, 420; 1 Chitty on Pl. 340 (6th ed.).

[4] Crispin *v.* Williamson, 8 Taunt. 107, 112; Attorney-General *v.* Jeffreys, M'Cl. 277; 2 B. & C. 3, 4; 1 Chitty on Plead. 348 *a;* Grimwood *v.* Barrit, 6 T. R. 460, 463; Bristow *v.* Wright, 2 Doug. 667, 668. These terms, "immaterial" and "impertinent," though formerly applied to two classes of averments, are now treated as synonymous (3 D. & R. 209); the more accurate distinction being between these and unnecessary allegations. Immaterial or impertinent averments are those which need neither be alleged nor proved if alleged. Unnecessary averments consist of matters which need not be alleged; but, being alleged, must be proved. Thus, in an action of *assumpsit* upon a warranty on the sale of goods, an allegation of deceit on the part of the seller is impertinent, and need not be proved: Williamson *v.* Allison, 2 East 446; Panton *v.* Holland, 17 Johns. 92; Twiss *v.* Baldwin, 9 Conn. 292. So, where the action was for an injury to the plaintiff's reversionary interest in land, and it was

§ 61. But, in general, the allegations of *time*, *place*, *quantity*, *quality*, and *value*, when not descriptive of the identity of the subject of the action, will be found immaterial, and need not be proved strictly as alleged. Thus, in trespass to the person, the material fact is the assault and battery; the time and place not being material, unless made so by the nature of the justification, and the manner of pleading. And, in an action on a policy of insurance, the material allegation is the loss; but whether total or partial is not material; and if the former be alleged, proof of the latter is sufficient. So, in assumpsit, an allegation that a bill of exchange was made on a certain day is not descriptive, and therefore strict proof, according to the precise day laid, is not necessary; though, if it were stated that the bill bore date on that day, it would be otherwise.[1] Thus, also, proof of cutting the precise number of trees alleged to have been cut, in trespass; or, of the exact amount of rent alleged to be in arrear in replevin; or the precise value of the goods taken, in trespass or trover, is not necessary.[2] Neither is matter of aggravation, namely, that which only tends to increase the damages, and does not concern the right of action itself, of the substance of the issue. But, if the matter, alleged by way of aggravation, is essential to the support of the charge or claim, it must be proved as laid.

§ 62. But in *local actions* the allegation of place is material, and must strictly be proved, if put in issue. In *real actions*, also, the statement of quality, as arable or pasture land, is generally descriptive, if not controlled by some other and more specific designation. And in these actions, as well as in those for injuries to real property, the abuttals of the close in question must be proved as laid; for if one may be rejected, all may be equally disregarded, and the identity of the subject be lost.[1]

§ 63. **Variance.** It being necessary to prove the substance of the issue, it follows that any departure from the substance, in the evidence adduced, must be fatal; constituting what is termed in the law

alleged that the close, at the time of the injury, was, and "continually from thence hitherto hath been, and still is," in the possession of one J. V., this latter part of the averment was held superfluous, and not necessary to be proved: Vowles *v.* Miller, 3 Taunt. 137. But if, in an action by a lessor against his tenant, for negligently keeping his fire, a demise for *seven years* be alleged, and the proof be of a lease at will only, it will be a fatal variance; for though it would have sufficed to have alleged the tenancy generally, yet having unnecessarily qualified it, by stating the precise term, it must be proved as laid: Cudlip *v.* Rundel, Carth. 202. So, in debt against an officer for extorting illegal fees on a *fieri facias*, though it is sufficient to allege the issuing of the writ of *fieri facias*, yet if the plaintiff also unnecessarily allege the judgment on which it was founded, he must prove it, having made it descriptive of the principal thing: Savage *v.* Smith, 2 W. Bl. 1101; Bristow *v.* Wright, Doug. 668; Gould's Pl. 160–165; Draper *v.* Garratt, 2 B. & C. 2.

[1] Gardiner *v.* Croasdale, 2 Burr. 904; Coxon *v.* Lyon, 2 Campb. 307, n.

[2] Harrison *v.* Barnby, 5 T. R. 248; Co. Lit. 282 *a*; Stephen on Pleading, 318; Hutchins *v.* Adams, 3 Greenleaf 174.

[1] Mersey & Irwell Nav. Co. *v.* Douglas, 2 East 497, 502: Bull. N. P. 89; Vowles *v.* Miller, 3 Taunt. 139, per Lawrence, J.; R. *v.* Cranage, 1 Salk. 385.

a *variance*. This may be defined to be a disagreement between the allegation and the proof, in some matter which, in point of law, is essential to the charge or claim.[1] It is the legal, and not the natural, identity which is regarded; consisting of those particulars only, which are in their nature essential to the action, or to the justification, or have become so by being inseparably connected, by the mode of statement, with that which is essential; of which an example has already been given,[2] in the allegation of an estate in fee, when a general averment of freehold would suffice. It is necessary, therefore, in these cases, first to ascertain what are the essential elements of the legal proposition in controversy, taking care to include all which is indispensable to show the right of the plaintiff, or party affirming. The rule is, that whatever cannot be stricken out without getting rid of a part essential to the cause of action, must be retained, and of course must be proved, even though it be described with unnecessary particularity.[3] The defendant is entitled to the benefit of this rule, to protect himself by the verdict and judgment, if the same rights should come again in controversy. The rule, as before remarked, does not generally apply to allegations of number, magnitude, quantity, value, time, sums of money, and the like, provided the proof in regard to these is sufficient to constitute the offence charged, or to substantiate the claim set up; except in those cases where they operate by way of limitation, or description of other matters, in themselves essential to the offence or claim.[4]

§ 64. A few examples will suffice to illustrate this subject. Thus, in tort, for removing earth from the defendant's land, whereby the foundation of the plaintiff's house was injured, the allegation of bad intent in the defendant is not necessary to be proved, for the cause of action is perfect, independent of the intention.[1] So, in trespass, for driving

[1] Stephen on Pl. 107, 108.

[2] *Supra*, §§ 51–56.

[3] Bristow *v.* Wright, Doug. 668; Peppin *v.* Solomons, 5 T. R. 496; Williamson *v.* Allison, 2 East 446, 452.

[4] *Supra*, § 61; Rickets *v.* Salwey, 2 B. & Ald. 363; May *v.* Brown, 3 B. & C. 113, 122. It has been said that allegations, which are merely matters of inducement, do not require such strict proof as those which are precisely put in issue between the parties: Smith *v.* Taylor, 1 New Rep. 210, per Chambre, J. But this distinction, as Mr. Starkie justly observes, between that which is the gist of the action and that which is inducement, is not always clear in principle: 1 Stark. Evid. 391, n. (*b*); 3 ib. 1551, n. (*x*) Metcalf's ed. Certainly that which may be traversed, must be proved, if it is not admitted; and some facts, even though stated in the form of inducement, may be traversed, because they are material; as, for example, in action for slander, upon a charge for perjury, where the plaintiff alleged, by way of inducement that he was sworn before the Lord Mayor: Stephen on Pleading, 258. The question whether an allegation must be proved, or not, turns upon its materiality to the case, and not upon the form in which it is stated, or its place in the declaration. In general, every allegation in an inducement, which is material, and not impertinent, and foreign to the case, and which consequently cannot be rejected as surplusage, must be proved as alleged: 1 Chitty on Pl. 262, 320. It is true that those matters which need not be alleged with particularity, need not be proved with particularity, but still, all allegations, if material, must be proved substantially *as alleged*.

[1] Panton *v.* Holland, 17 Johns. 92; Twiss *v.* Baldwin, 9 Conn. 291.

against the plaintiff's cart, the allegation that he was in the cart need not be proved.[2] But, if the allegation contains matter of description, and is not proved as laid, it is a variance, and is fatal. Thus, in an action for malicious prosecution of the plaintiff, upon a charge of felony, before Baron Waterpark of *Waterfork*, proof of such a prosecution before Baron Waterpark of *Waterpark* was held to be fatally variant from the declaration.[3] So, in an action of tort founded on a contract, every particular of the contract is descriptive, and a variance in the proof is fatal. As, in an action on the case for deceit, in a contract of sale, made by the two defendants, proof of a sale by one of them only, as his separate property, was held insufficient; for the joint contract of sale was the foundation of the joint warranty laid in the declaration, and essential to its legal existence and validity.[4]

§ 65. In *criminal prosecutions*, it has been thought that greater strictness of proof was required than in civil cases, and that the defendant might be allowed to take advantage of nicer exceptions.[1] But whatever indulgence the humanity and tenderness of judges may have allowed in practice, in favor of life or liberty, the better opinion seems to be that the rules of evidence are in both cases the same.[2] If the averment is divisible, and enough is proved to constitute the offence charged, it is no variance, though the remaining allegations are not proved. Thus, an indictment for embezzling two bank-notes of equal value is supported by proof of the embezzlement of one only.[3] And in an indictment for obtaining money upon several false pretences, it is sufficient to prove any material portion of them.[4] But where a person or thing, necessary to be mentioned in an indictment, is described with unnecessary particularity, all the circumstances of the description must be proved; for they are all made essential to the identity. Thus, in an indictment for stealing a black horse, the animal is necessarily mentioned, but the color need not be stated; yet if it is stated, it is made descriptive of the particular animal stolen, and a variance in the proof of the color is fatal.[5] So, in an indictment for stealing a bank-note, though it would be sufficient to describe it generally as a bank-note of such a denomination or value, yet, if the name of the officer who signed it be also stated, it must be strictly proved.[6] So,

[2] Howard *v.* Peete, 2 Chitty 315.

[3] Walters *v.* Mace, 2 B. & Ald. 756.

[4] Weall *v.* King, 12 East 452; Lopes *v.* De Tastet, 1 B. & B. 538.

[1] Beech's Case, 1 Leach's Cas. (3d ed.) 158; United States *v.* Porter, 3 Day 283, 286.

[2] Roscoe's Crim. Evid. 73; 1 Deacon's Dig. Crim. Law, 459, 460. And see 2 East P. C. 785, 1021; 1 Phil. Evid. 506; R. *v.* Watson, 2 Stark. 116, 155, per Abbott, J.; Lord Melville's Case, 29 How. St. Tr. 1376; 2 Russell on Crimes, 588; U. S. *v.* Britton, 2 Mason 464, 468.

[3] Carson's Case, Russ. & Ry. 303; Furneaux's Case, ib. 335; Tyer's Case, ib. 402.

[4] Hill's Case, Russ. & Ry. 190.

[5] 1 Stark. Evid. 374.

[6] Craven's Case, Russ. & Ry. 14. So, where the charge in an indictment was of stealing 70 pieces of the current coin called sovereigns, and 140 pieces called half

also, in an indictment for murder, malicious shooting, or other offence to the person, or for an offence against the habitation, or goods, the name of the person who was the subject of the crime, and of the owner of the house or goods, are material to be proved as alleged.[7] But where the time, place, person, or other circumstances are not descriptive of the fact or degree of the crime, nor material to the jurisdiction, a discrepancy between the allegation and the proof is not a variance. Such are statements of the house or field where a robbery was committed, the time of the day, the day of the term in which a false answer in chancery was filed, and the like.[8] In an indictment for murder, the substance of the charge is that the prisoner feloniously killed the deceased by means of shooting, poisoning, cutting, blows, or bruises, or the like; it is, therefore, sufficient, if the proof agree with the allegation in its substance and general character without precise conformity in every particular. In other words, an indictment describing a thing by its generic term is supported by proof of a species which is clearly comprehended within such description. Thus, if the charge be of poisoning by a certain drug, and the proof be of poisoning by another drug; or the charge be of felonious assault with a staff, and the proof be of such assault with a stone; or the charge be of a wound with a sword, and the proof be of a wound with an axe; yet the charge is substantially proved, and there is no variance.[9] But where the matter, whether introductory or otherwise, is descriptive, it must be proved as laid, or the variance will be fatal. As, in an indictment for perjury in open Court, the term of the Court must be truly stated and strictly proved.[10] So, in an indictment for perjury before a select committee of the House of Commons, in a contested election, it was stated that an election was holden by virtue of a pre-

sovereigns, and 500 pieces called crowns; it was held, that it was not supported by evidence of stealing a *sum of money* consisting of some of the coins mentioned in the indictment, without proof of some one or more of the specific coins charged to have been stolen: R. *v.* Bond, 1 Den. C. C. 517; 14 Jur. 390.

[7] Clark's Case, Russ. & Ry. 358; White's Case, 1 Leach Cr. L. 286; Jenk's Case, 2 East P. C. 514; Durore's Case, 1 Leach Cr. L. 390. But a mistake in spelling the name is no variance, if it be *idem sonans* with the name proved: Williams *v.* Ogle, 2 Str. 889; Foster's Case, Russ. & Ry. 412; Tannett's Case, ib. 351; Bingham *v.* Dickie, 5 Taunt. 814. So, if one be indicted for an assault upon A B, a deputy-sheriff, and in the officer's commission he is styled A B junior, it is no variance if the person is proved to be the same: Com. *v.* Beckley, 3 Metcalf 330.

[8] Wardle's Case, 2 East P. C. 785; Pye's Case, ib.; Johnstone's Case, ib. 786; Minton's Case, ib. 1021; R. *v.* Waller, 2 Stark. Evid. 623; R. *v.* Hucks, 1 Stark. 521.

[9] 1 East P. C. 341; Martin's Case, 5 Car. & P. 128; Culkin's Case, ib. 121; *supra*, § 58. An indictment for stealing "a sheep" is supported by proof of the stealing of any sex or variety of that animal; for the term is *nomen generalissimum:* M'Cully's Case, 2 Lew. C. C. 272; R. *v.* Spicer, 1 Den. C. C. 82. So, if the charge be of death by suffocation, by the hand over the mouth, and the proof be that respiration was stopped, though by some other violent mode of strangulation, it is sufficient: R. *v.* Waters, 7 C. & P. 250.

[10] Where the term is designated by the day of the month, as in the Circuit Courts of the United States, the precise day is material: U. S. *v.* McNeal, 1 Gall. 387.

cept duly issued to the bailiff of the borough of New Malton, and that A and B were returned to serve as members for the said borough of New Malton; but the writ appeared to be directed to the bailiff of Malton. Lord Ellenborough held this not matter of description; and the precept being actually issued to the bailiff of the borough of New Malton, it was sufficient. But the return itself was deemed descriptive; and the proof being that the members were in fact returned as members of the borough of Malton, it was adjudged a fatal variance.[11] So, a written contract, when set out in an indictment, must be strictly proved.[12]

§ 66. Thus, also, in *actions upon contract*, if any part of the contract proved should vary materially from that which is stated in the pleadings, it will be fatal; for a contract is an entire thing, and indivisible. It will not be necessary to state all the parts of a contract which consists of several distinct and collateral provisions; the *gravamen* is, that a certain act which the defendant engaged to do has not been done; and the legal proposition to be maintained is, that, for such a consideration, he became bound to do such an act, including the time, manner, and other circumstances of its performance. The entire consideration must be stated, and the entire act to be done, in virtue of such consideration, together with the time, manner, and circumstances; and with all the parts of the proposition, as thus stated, the proof must agree.[1] If the allegation be of an absolute contract, and the proof be of a contract in the alternative, at the option of the defendant; or a promise be stated to deliver merchantable goods, and the proof be of a promise to deliver goods of a second quality; or the contract stated be to pay or perform in a reasonable time, and the proof be to pay or perform on a day certain, or on the happening of a certain event; or the consideration stated be one horse, bought by the plaintiff of the defendant, and the proof be of two horses; in these and the like cases, the variance will be fatal.[2]

§ 67. **Redundancy of Allegation, and of Proof.** There is, however, a material distinction to be observed between the redundancy in the allegation, and redundancy only in the proof. In the former case, a variance between the allegations and the proof will be fatal, if the redundant allegations are descriptive of that which is essential. But in the latter case, redundancy cannot vitiate, merely because more is proved than is alleged; unless the matter superfluously proved goes to contradict some essential part of the allegation. Thus, if the alle-

[11] R. *v.* Leefe, 2 Campb. 134, 140.

[12] 2 East P. C. 977, 978, 981, 982; Com. *v.* Parmenter, 5 Pick. 279; People *v.* Franklin, 3 Johns. Cas. 299.

[1] Clarke *v.* Gray, 6 East 564, 567, 568; Gwinnet *v.* Phillips, 3 T. R. 643, 646; Thornton *v.* Jones, 2 Marsh. 287; Parker *v.* Palmer, 4 B. & A. 387; Swallow *v.* Beaumont, 2 B. & A. 765.

[2] Penny *v.* Porter, 2 East 2; Bristow *v.* Wright, 2 Doug. 665; Hilt *v.* Campbell, 6 Greenl. 109; Symonds *v.* Carr, 1 Campb. 361; King *v.* Robinson, Cro. El. 79. See *post*, Vol. II, § 11 *d*.

gation were that, in consideration of £100, the defendant promised to go to Rome, and also to deliver a certain horse to the plaintiff, and the plaintiff should fail in proving the latter branch of the promise, the variance would be fatal, though he sought to recover for the breach of the former only, and the latter allegation was unnecessary. But, if he had alleged only the former branch of the promise, the proof of the latter along with it would be immaterial. In the first case, he described an undertaking which he has not proved; but in the latter, he has merely alleged one promise, and proved that, and also another.[1]

§ 68. But where the subject is entire, as, for example, the consideration of a contract,[1] a variance in the proof, as we have just seen, shows the allegation to be defective, and is, therefore, material. Thus, if it were alleged that the defendant promised to pay £100, in consideration of the plaintiff's going to Rome, and also delivering a horse to the defendant, an omission to prove the whole consideration alleged would be fatal. And if the consideration had been alleged to consist of the going to Rome only, yet if the agreement to deliver the horse were also proved, as forming part of the consideration, it would be equally fatal; the entire thing alleged, and the entire thing proved, not being identical.[2] Upon the same principle, if the consideration alleged be a contract of the plaintiff to build a ship, and the proof be of one to finish a ship partly built;[3] or the consideration alleged be the delivery of pine timber, and the proof be of spruce timber;[4] or the consideration alleged be, that the plaintiff would indorse a note, and the proof be of a promise in consideration that he had indorsed a note;[5] the variance is equally fatal. But though no part of a valid consideration may be safely omitted, yet that which is merely frivolous need not be stated;[6] and, if stated, need not be proved; for the court will give the same construction to the declaration as to the contract itself, rejecting that which is nonsensical or repugnant.[7]

§ 69. In the case of *deeds*, the same general principles are applied. If the deed is declared upon, every part stated in the pleadings, as

[1] 1 Stark. Evid. 401. Where the agreement, as in this case, contains several distinct promises, and for the breach of one only the action is brought, the consequences of a variance may be avoided by alleging the promise, as made *inter alia*. And no good reason, in principle, is perceived, why the case mentioned in the following section might not be treated in a similar manner; but the authorities are otherwise. In the example given in the text, the allegation is supposed to import that the undertaking consisted of neither more nor less than is alleged.

[1] Swallow *v.* Beaumont, 2 B. & A. 765; White *v.* Wilson, 2 B. & P. 116: *supra* § 58.

[2] 1 Stark. Evid. 401; Lansing *v.* M'Killip, 3 Caines 286; Stone *v.* Knowlton, 3 Wend. 374.

[3] Smith *v.* Barker, 3 Day 312.

[4] Robbins *v.* Otis, 1 Pick. 368.

[5] Bulkley *v.* Landon, 2 Conn. 404.

[6] Brooks *v.* Lowrie, 1 Nott & McCord 342.

[7] Ferguson *v.* Harwood, 7 Cranch 408, 414.

descriptive of the deed, must be exactly proved, or it will be a variance; and this whether the parts set out at length were necessary to be stated or not.[1] If a qualified covenant be set out in the declaration as a general covenant, omitting the exception or limitation, the variance between the allegation and the deed will be fatal. If the condition, proviso, or limitation affects the original cause of action itself, it constitutes an essential element in the original proposition to be maintained by the plaintiff; and, therefore, must be stated, and as laid; but, if it merely affects the amount of damages to be recovered, or the liability of the defendant as affected by circumstances occurring after the cause of action, it need not be alleged by the plaintiff, but properly comes out in the defence.[2] And where the deed is not described according to its tenor, but according to its legal effect, if the deed agrees in legal effect with the allegation, any verbal discrepancy is not a variance. As, in covenant against a tenant for not repairing, the lease being stated to have been made by the plaintiff, and the proof being of a lease by the plaintiff and his wife, she having but a chattel interest; or, if debt be brought by the husband alone, on a bond as given to himself, the bond appearing to have been given to the husband and wife; yet, the evidence is sufficient proof of the allegation.[3] But, where the deed is set out, *on oyer*, the rule

[1] Bowditch *v.* Mawley, 1 Campb. 195; Dundass *v.* Ld. Weymouth, Cowp. 665; *supra*, § 55; Ferguson *v.* Harwood, 7 Cranch 408, 413; Sheehy *v.* Mandeville, ib. 208, 217.

[2] 1 Chitty Pl. 268, 269 (5th Am. ed.); Howell *v.* Richards, 11 East 633; Clarke *v.* Gray, 6 id. 564, 570.

[3] Beaver *v.* Lane, 2 Mod. 217; Arnold *v.* Revoult, 1 Brod. & Bing. 443; Whitlock *v.* Ramsey, 2 Munf. 510; Ankerstein *v.* Clarke, 4 T. R. 616. It is said that an allegation that J. S., otherwise R. S., made a deed, is not supported by evidence, that J. S. made a deed by the name of R. S.: 1 Stark. Evid. 513, citing Hyckman *v.* Shotbolt, Dyer 279, pl. 9. The doctrine of that case is very clearly expounded by Parke, B., in Williams *v.* Bryant, 5 M. & W. 447. In regard to a discrepancy between the name of the obligor in the body of a deed, and in the signature, a distinction is to be observed between transactions which derive their efficacy wholly from the deed, and those which do not. Thus, in a feoffment at the common law, or a sale of personal property by deed, or the like, livery being made in the one case, and possession delivered in the other, the transfer of title is perfect, notwithstanding any mistake in the name of the grantor; for it takes effect by delivery, and not by the deed: Perk. §§ 38–42. But where the efficacy of the transaction depends on the instrument itself, as in the case of a bond for the payment of money, or any other executory contract by deed, if the name of the obligor in the bond is different from the signature, as if it were written John and signed William, it is said to be void at law for uncertainty, unless helped by proper averments on the record. A mistake in this matter, as in any other, in drawing up the contract, may be reformed by bill in equity. At law, where the obligor has been sued by his true name, signed to the bond, and not by that written in the body of it, and the naked fact of the discrepancy, unexplained, is all which is presented by the record, it has always been held bad. This rule was originally founded in this, that a man cannot have two names of baptism at the same time; for whatever name was imposed at his baptism, whether single or compounded of several names, he being baptized but once, that and that alone was his baptismal name; and by that name he declared himself bound. So it was held in Serchor *v.* Talbot, 3 Hen. VI, 25, pl. 6, and subsequently in Thornton *v.* Wikes, 34 Hen. VI, 19, pl. 36; Field *v.* Winlow, Cro. El. 897; Oliver *v.* Watkins, Cro. Jac. 558; Maby *v.* Shepherd, Cro. Jac. 640; Evans *v.* King, Willes 554; Clerke *v.* Isted, Nelson's Lutw. 275; Gould *v.* Barnes, 3 Taunt. 504. "It appears from these cases to be a settled point," said Parke, B., in Williams

is otherwise; for to have *oyer* is, in modern practice, to be furnished with an exact and literal copy of the deed declared on, every word and part of which is thereby made descriptive of the deed to be offered in evidence. In such case, if the plaintiff does not produce in evidence a deed literally corresponding with the copy, the defendant may well say it is not the deed in issue, and it will be rejected.[4]

v. Bryant, "that if a declaration against a defendant by one Christian name, as, for instance, Joseph, state that he executed a bond by the name of Thomas, and there be no averment to explain the difference, such as that he was known by the latter name at the time of the execution, such a declaration would be bad on demurrer, or in arrest of judgment, even after issue joined on a plea of *non est factum*. And the reason appears to be, that in bonds and deeds, the efficacy of which depends on the instrument itself, and not on matter *in pais*, there must be a certain *designatio personæ* of the party, which regularly ought to be by the true first name or name of baptism, and surname; of which the first is the most important." "But, on the other hand," he adds, "it is certain, that a person may at this time sue or be sued, not merely by his true name of baptism, but by any first name which he has acquired by usage or reputation." "If a party is called and known by any proper name, by that name he may be sued, and the misnomer could not be pleaded in abatement; and not only is this the established practice, but the doctrine is promulgated in very ancient times. In Bracton, 188, *b*, it is said, 'Item si quis *binonimis* fuerit, *sive* in nomine *proprio* sive in *cognomine*, illud nomen tenendum erit, quo solet frequentius appellari, quia adeo imposita sunt, ut demonstrent voluntatem dicentis, et utimur notis in vocis ministerio.' And if a party may sue or be sued by the proper name by which he is known, it must be a sufficient designation of him, if he enter into a bond by that name. It by no means follows, therefore, that the decision in the case of Gould *v.* Barnes, and others before referred to, in which the question arose on the record, would have been the same, if there had been an averment on the face of the declaration that the party was known by the proper name in which the bond was made at the time of making it. We find no authorities for saying, that the declaration would have been bad with such an averment, even if there had been a total variance of the first names; still less, where a man, having two proper names, or names of baptism, has bound himself by the name of one. And on the plea of 'non est factum,' where the difference of name does not appear on the record, and there is evidence of the party having been known, at the time of the execution, by the name on the instrument, there is no case, that we are aware of, which decides that the instrument is void." The name written in the body of the instrument is that which the party, by the act of execution and delivery, declares to be his own, and by which he acknowledges himself bound. By this name, therefore, he should regularly be sued; and if sued with an *alias dictus* of his true name, by which the instrument was signed, and an averment in the declaration that at the time of executing the instrument he was known as well by the one name as the other, it is conceived that he can take no advantage of the discrepancy; being estopped by the deed to deny this allegation: Evans *v.* King, Willes 555, n. (*b*); Reeves *v.* Slater, 7 B. & C. 486, 490; Cro. El. 897, n. (*a*). See also R. *v.* Wooldale, 6 Q. B. 549; Wooster *v.* Lyons, 5 Blackf. 60. If sued by the name written in the body of the deed, without any explanatory averment, and he pleads a misnomer in abatement, the plaintiff, in his replication, may estop him by the deed: Dyer 279 *b*, pl. 9, n.; Story's Pleadings, 43; Willes 555, n. And if he should be sued by his true name, and plead *non est factum*, wherever this plea, as is now the case in England, since the rule of Hilary Term, 4 Wm. IV, R. 21, "operates as a denial of the deed in point of fact only," all other defences against it being required to be specially pleaded, the difficulty occasioned by the old decisions may now be avoided by proof that the party, at the time of the execution, was known by the name on the face of the deed. In those American States which have abolished special pleading, substituting the general issue in all cases, with a brief statement of the special matter of defence, probably the new course of practice thus introduced would lead to a similar result.

[4] Waugh *v.* Bussell, 5 Taunt. 707, 709, per Gibbs, C. J.; James *v.* Walruth, 8 Johns. 410; Henry *v.* Cleland, 14 id. 400; Jansen *v.* Ostrander, 1 Cowen 670, acc. In Henry *v.* Brown, 19 Johns. 49, where the condition of the bond was "without fraud or *other* delay," and in the oyer the word "other" was omitted, the defendant moved to set aside a verdict for the plaintiff, because the bond was admitted in evidence with-

§ 70. Where a *record* is mentioned in the pleadings, the same distinction is now admitted in the proof, between allegations of matter of substance, and allegations of matter of description; the former require only substantial proof, the latter must be literally proved. Thus, in an action for malicious prosecution, the day of the plaintiff's acquittal is not material. Neither is the term in which the judgment is recovered a material allegation in an action against the sheriff for a false return on the writ of execution. For in both cases, the record is alleged by way of inducement only, and not as the foundation of the action; and therefore literal proof is not required.[1] So, in an indictment for perjury in a case in chancery, where the allegation was, that the bill was addressed to Robert, Lord Henly, and the proof was of a bill addressed to Sir Robert Henly, Kt., it was held no variance; the substance being, that it was addressed to the person holding the great seal.[2] But where the record is the foundation of the action, the term in which the judgment was rendered, and the number and names of the parties, are descriptive, and must be strictly proved.[3]

§ 71. In regard to *prescriptions*, it has been already remarked that the same rules apply to them which are applied to contracts; a prescription being founded on a grant supposed to be lost by lapse of time.[1] If, therefore, a prescriptive right be set forth as the foundation of the action, or be pleaded in bar and put in issue, it must be proved to the full extent to which it is claimed; for every fact alleged is descriptive of the supposed grant. Thus, if in trespass, for breaking and entering a several fishery, the plaintiff, in his replication, prescribes for a sole and exclusive right of fishing in four places, upon which issue is taken, and the proof be of such right in only three of the places, it is a fatal variance. Or, if in trespass the defendant justify under a prescriptive right of common on five hundred acres, and the proof be that his ancestor had released five of them, it is fatal. Or if, in replevin of cattle, the defendant avow the taking damage feasant, and the plaintiff plead in bar a prescriptive right of common for all the cattle, on which issue is taken, and the proof be of such right for only a part of the cattle, it is fatal.[2]

§ 72. But a distinction is to be observed between cases where the prescription is the foundation of the claim, and is put in issue, and

out regard to the variance; but the Court refused the motion, partly on the ground that the variance was immaterial, and partly that the oyer was clearly amendable. See also Dorr *v.* Fenno, 12 Pick. 521.

[1] Purcell *v.* Macnamara, 9 East 157; Stoddart *v.* Palmer, 4 B. & B. 2; Phillips *v.* Shaw, 4 B. & A. 435; 5 id. 964.

[2] Per Buller, J., in R. *v.* Pippett, 1 T. R. 240; Rodman *v.* Forman, 8 Johns. 29; Brooks *v.* Bemiss, ib. 455; State *v.* Caffey, 2 Murphy 320.

[3] Rastall *v.* Stratton, 1 H. Bl. 49; Woodford *v.* Ashley, 11 East 508; Black *v.* Braybrook, 2 Stark. 7; Baynes *v.* Forest, 2 Str. 892; U. S. *v.* McNeal, 1 Gall. 387.

[1] *Supra*, § 58.

[2] Rogers *v.* Allen, 2 Campb. 313, 315; Rotherham *v.* Green, Noy 67; Conyers *v.* Jackson, Clayt. 19; Bull. N. P. 539.

cases where the action is founded in tort, for a disturbance of the plaintiff in his enjoyment of a prescriptive right. For in the latter cases it is sufficient for the plaintiff to prove a right of the same nature, with that alleged, though not to the same extent; the gist of the action being the wrongful act of the defendant, in disturbing the plaintiff in his right, and not the extent of that right. Therefore, where the action was for the disturbance of the plaintiff in his right of common, by opening stone quarries there, the allegation being of common, by reason both of a messuage and of land, whereof the plaintiff was possessed, and the proof, in a trial upon a general issue, being of common by reason of the land only, it was held no variance; the Court observing, that the proof was not of a different allegation, but of the same allegation in part, which was sufficient, and that the damages might be given accordingly.[1] Yet in the former class of cases, where the prescription is expressly in issue, proof of a more ample right than is claimed will not be a variance; as, if the allegation be of a right of common for sheep, and the proof be of such right, and also of common for cows.[2]

§ 73. **Amendments to remedy Variance.** But the party may now, in almost every case, avoid the consequences of a variance between the allegation in the pleadings and the state of facts proved, by amendment of the record. This power was given to the Courts in England by Lord Tenterden's Act[1] in regard to variances between matters in writing or in print, produced in evidence, and the recital thereof upon the record: and it was afterwards extended[2] to all other matters, in the judgment of the Court or judge not material to the merits of the case, upon such terms as to costs and postponement as the Court or judge may deem reasonable. The same power, so essential to the administration of substantial justice, has been given by statutes to the Courts of most of the several States as well as of the United States; and in both England and America these statutes have, with great propriety, been liberally expounded, in furtherance of their beneficial design.[3] The judge's discretion, in allowing or refusing

[1] Rickets *v.* Salwey, 2 B. & A. 360; Eardley *v.* Turnock, Cro. Jac. 629; Manifold *v.* Pennington, 4 B. & C. 161.

[2] Bushwood *v.* Pond, Cro. El. 722; Tewkesbury *v.* Bricknell, 1 Taunt. 142; *supra*, §§ 58, 67, 68.

[1] 9 Geo. IV, c. 15.

[2] By Stat. 3 & 4 Wm. IV, c. 42, § 23.

[3] See Hanbury *v.* Ella, 1 Ad. & El. 61; Parry *v.* Fairhurst, 2 Cr. M. & R. 190, 196; Doe *v.* Edwards, 1 M. & Rob. 319; s. c. 6 C. & P. 208; Hemming *v.* Parry, 6 C. & P. 580; Mash *v.* Densham, 1 M. & Rob. 442; Ivey *v.* Young, ib. 545; Howell *v.* Thomas, 7 C. & P. 342; Mayor, &c. of Carmarthen *v.* Lewis, 6 id. 608; Hill *v.* Salt, 2 C. & M. 420; Cox *v.* Painter, 1 Nev. & P. 581; Doe *v.* Long, 9 C. & P. 777; Ernest *v.* Brown, 2 M. & Rob. 13; Storr *v.* Watson, 2 Scott 842; Smith *v.* Brandram, 9 Dowl. 430; Whitwell *v.* Scheer, 8 Ad. & El. 301; Read *v.* Dunsmore, 9 C. & P. 588; Smith *v.* Knowelden, 8 Dowl. 40; Norcutt *v.* Mottram, 7 Scott 176; Legge *v.* Boyd, 5 Bing. N. C. 240. Amendments were refused in Doe *v.* Errington, 1 Ad. & El. 750; Cooper *v.* Whitehouse, 6 C. & P. 545; John *v.* Currie, ib. 618; Watkins *v.* Morgan, ib. 661; Adams *v.* Power, 7 id. 76; Brashier *v.* Jackson, 6 M. & W. 549; Doe *v.* Rowe, 8 Dowl. 444; Empson *v.* Griffin, 3 P. & D. 160. The following are cases of variance, arising under Lord Tenterden's Act: Bentzing *v.* Scott, 4 C. & P. 24;

amendments, like the exercise of judicial discretion in other cases, cannot, in general, be reviewed by any other tribunal.[4] It is only in the cases and in the manner mentioned in the statutes, that the propriety of its exercise can be called in question.

. . . . . .

§ 115. **Regular Entries by Third Persons.** It is upon the same ground that certain entries, made by third persons, are treated as original evidence. Entries by third persons are divisible into two classes: first, those which are made in the discharge of official duty, and in the course of professional employment; and, secondly, mere private entries. Of these latter we shall hereafter speak. In regard to the former class, the entry, to be admissible, must be one which it was the person's duty to make, or which belonged to the transaction as part thereof, or which was its usual and proper concomitant.[1] It must speak only to that which it was his duty or business to do, and not to extraneous and foreign circumstances.[2] The party making it must also have had competent knowledge of the fact, or it must have been part of his duty to have known it; there must have been no particular motive to enter that transaction falsely, more than any other; and the entry must have been made at or about the time of the transaction recorded. In such cases, the entry itself is admitted as original evidence, being part of the *res gestæ*. The general interest of the party, in making the entry, to show that he has done his official

Moilliet *v.* Powell, 6 id. 233; Lamey *v.* Bishop, 4 B. & Ad. 479; Briant *v.* Eicke, M. & M. 359; Parks *v.* Edge, 1 C. & M. 429; Masterman *v.* Judson, 8 Bing. 224; Brooks *v.* Blanshard, 1 C. & M. 779; Jelf *v.* Oriel, 4 C. & P. 22. The American cases, which are very numerous, are stated in 1 Metcalf & Perkins's Digests, pp. 145–162, and in Putnam's Supplement, vol. ii, pp. 727–730.

[4] Doe *v.* Errington, 1 M. & Rob. 344, n.; Mellish *v.* Richardson, 9 Bing. 125; Parks *v.* Edge, 1 C. & M. 429; Jenkins *v.* Phillips, 9 C. & P. 766; Merriam *v.* Langdon, 10 Conn. 460, 473; Clapp *v.* Balch, 3 Greenl. 216, 219; Mandeville *v.* Wilson, 5 Cranch 15; Marine Ins. Co. *v.* Hodgson, 6 id. 206; Walden *v.* Craig, 9 Wheat. 576; Chirac *v.* Reinicker, 11 id. 302; U. S. *v.* Buford, 3 Pet. 12, 32; Benner *v.* Frey, 1 Binn. 366; Bailey *v.* Musgrave, 2 S. & R. 219; Bright *v.* Sugg. 4 Dever. 492. But if the judge exercises his discretion in a manner clearly and manifestly wrong, it is said that the Court will interfere and set it right: Hackman *v.* Fernie, 3 M. & W. 505; Geach *v.* Ingall, 9 Jur. 691; 14 M. & W. 95.

[1] The doctrine on the subject of contemporaneous entries is briefly but lucidly expounded by Mr. Justice Parke, in Doe d. Patteshall *v.* Turford, 3 B. & Ad. 890. See also Poole *v.* Dicas, 1 Bing. N. C. 654; Pickering *v.* Bishop of Ely, 2 Y. & C. 249; R. *v.* Worth, 4 Q. B. 132.

[2] Chambers *v.* Bernasconi, 1 C. & J. 451; s. c. 1 Tyrwh. 335; s. c. 1 Cr. M. & R. 347, in error. This limitation has not been applied to private entries against the interest of the party. Thus, where the payee of a note against A, B, & C, indorsed a partial payment as received from B, adding that the whole sum was originally advanced to A only; in an action by B against A, to recover the money thus paid for his use, the indorsement made by the payee, who was dead, was held admissible to prove not only the payment of the money, but the other fact as to the advancement to A: Davies *v.* Humphreys, 6 M. & W. 153; Marks *v.* Lahee, 3 Bing. N. C. 408. And in a subsequent case, it was held, that, where an entry is admitted as being against the interest of the party making it, it carries with it the whole statement; but that, if the entry is made merely in the course of a man's duty, then it does not go beyond those matters which it was his duty to enter: Percival *v.* Nanson, 7 Eng. Law & Eq. 538; 21 Law J. Exch. N. s. 1; s. c. 7 Exch. 1.

duty, has nothing to do with the question of its admissibility;[3] nor is it material whether he was or was not competent to testify personally in the case.[4] If he is living, and competent to testify, it is deemed necessary to produce him.[5] But, if he is called as a witness to the fact, the entry of it is not thereby excluded. It is still an independent and original circumstance, to be weighed with others, whether it goes to corroborate or to impeach the testimony of the witness who made it. If the party who made the entry is dead, or, being called, has no recollection of the transaction, but testifies to his uniform practice to make all his entries truly, and at the time of each transaction, and has no doubt of the accuracy of the one in question; the entry, unimpeached, is considered sufficient, as original evidence, and not hearsay, to establish the fact in question.[6]

§ 116. **Same.** One of the earliest reported cases, illustrative of this subject, was an action of *assumpsit*, for beer sold and delivered, the plaintiff being a brewer. The evidence given to charge the defendant was, that, in the usual course of the plaintiff's business, the draymen came every night to the clerk of the brewhouse, and gave him an account of the beer delivered during the day, which he entered in a book kept for that purpose, to which the draymen set their hands; and this entry, with proof of the drayman's handwriting and of his death, was held sufficient to maintain the action.[1] In another case,[2] before Lord Kenyon, which was an action of trover for a watch, where the question was, whether the defendant had delivered it to a third person, as the plaintiff had directed; an entry of the fact by the defendant himself in his shop-book, kept for that purpose, with proof that such was the usual mode, was held admissible in

[3] Per Tindal, C. J., in Poole *v.* Dicas, 1 Bing. N. C. 654; Dixon *v.* Cooper, 3 Wils. 40; Benjamin *v.* Porteus, 2 H. Bl. 590; Williams *v.* Geaves, 8 C. & P. 592; Augusta *v.* Windsor, 1 Appleton 317. And see Doe *v.* Wittcomb, 15 Jur. 778.

[4] Gleadow *v.* Atkin, 1 C. & M. 423, 424; s. c. 3 Tyrwh. 302, 303; Short *v.* Lee, 2 Jac. & Walk. 489.

[5] Nichols *v.* Webb, 8 Wheat. 326; Welsh *v.* Barrett, 15 Mass. 380; Wilbur *v.* Selden, 6 Cowen 162; Farmers' Bank *v.* Whitehill, 16 S. & R. 89, 90; Stokes *v.* Stokes, 6 Martin N. S. 351; Herring *v.* Levy, 4 Martin N. S. 383; Brewster *v.* Doane, 2 Hill N. Y. 537; Davis *v.* Fuller, 12 Vt. 178.

[6] Bank of Monroe *v.* Culver, 2 Hill 531; New Haven County Bank *v.* Mitchell, 15 Conn. 206; Bank of Tennessee *v.* Cowan, 7 Humph. 70. See *infra*, §§ 436, 437, n. (4). But upon a question of the infancy of a Jew, where the time of his circumcision, which by custom is on the eighth day after his birth, was proposed to be shown by an entry of the fact made by a deceased rabbi, whose duty it was to perform the office and to make the entry; the entry was held not receivable: Davis *v.* Lloyd, 1 Car. & Kir. 275; perhaps because it was not made against the pecuniary interest of the rabbi.

[1] Price *v.* Lord Torrington, 1 Salk. 285; s. c. Ld. Raym. 873; 1 Smith's Lead. Cas. 139. But the Courts are not disposed to carry the doctrine of this case any farther. Therefore, where the coals sold at a mine were reported daily by one of the workmen to the foreman, who, not being able to write, employed another person to enter the sales in a book; it was held, the foreman and the workman who reported the sale both being dead, that the book was not admissible in evidence in an action for the price of the coals: Brain *v.* Preece, 11 M. & W. 773.

[2] Digby *v.* Stedman, 1 Esp. 328.

evidence. One of the shopmen had sworn to the delivery, and his entry was offered to corroborate his testimony; but it was admitted as competent original evidence in the cause. So, in another case, where the question was upon the precise day of a person's birth, the account-book of the surgeon who attended his mother on that occasion, and in which his professional services and fees were charged, was held admissible, in proof of the day of the birth.[3] So where the question was, whether a notice to quit had been served upon the tenant, the indorsement of service upon a copy of the notice by the attorney who served it, it being shown to be the course of business in his office to preserve copies of such notices, and to indorse the service thereon, was held admissible in proof of the fact of service.[4] Upon the same ground of the contemporaneous character of an entry made in the ordinary course of business, the books of the messenger of a bank, and of a notary-public, to prove a demand of payment from the maker, and notice to the indorser of a promissory note, have also been held admissible.[5] The letter-book of a merchant, party in the cause, is also admitted as *prima facie* evidence of the contents of a letter addressed by him to the other party, after notice to such party to produce the original; it being the habit of merchants to keep such a book.[6] And, generally, contemporaneous entries made by third persons in their own books, in the ordinary course of business, the matter being within the peculiar knowledge of the party making the entry, and there being no apparent and particular motive to pervert the fact, are received as original evidence;[7] though the

[3] Higham *v.* Ridgway, 10 East 109. See also 2 Smith's Lead. Cas. 183–197, n. and the comments of Bayley, B., and of Vaughan, B., on this case, in Gleadow *v.* Atkin, 1 Cr. & M. 410, 423, 424, 427, and of Professor Parke, in the London Legal Observer for June, 1832, p. 229. It will be seen, in that case, that the fact of the surgeon's performance of the service charged was abundantly proved by other testimony in the cause; and that nothing remained but to prove the precise time of performance; a fact in which the surgeon had no sort of interest. But, if it were not so, it is not perceived what difference it could have made, the principle of admissibility being the contemporaneous character of the entry, as part of the *res gestæ*. See also Herbert *v.* Tuckal, T. Raym. 84; Augusta *v.* Windsor, 1 Appleton 317.

[4] Doe *v.* Turford, 3 Barn. & Ad. 890; Champneys *v.* Peck, 1 Stark. 404; R. *v.* Cope, 7 C. & P. 720.

[5] Nicholls *v.* Webb, 8 Wheat. 326; Welsh *v.* Barrett, 15 Mass. 380; Poole *v.* Dicas, 1 Bing. N. C. 649; Halliday *v.* Martinet, 20 Johns. 168; Butler *v.* Wright, 2 Wend. 369; Hart *v.* Wilson, ib. 513; Nichols *v.* Goldsmith, 7 id. 160; New Haven Co. Bank *v.* Mitchell, 15 Conn. 206; Sheldon *v.* Benham, 4 Hill N. Y. 129.

[6] Pritt *v.* Fairclough, 3 Campb. 305; Hagedorn *v.* Reid, ib. 377. The letter-book is also evidence that the letters copied into it have been sent. But it is not evidence of any other letters in it, than those which the adverse party has been required to produce: Sturge *v.* Buchanan, 2 P. & D. 573; s. c. 10 Ad. & El. 598.

[7] Doe *v.* Turford, 3 B. & Ad. 890, per Parke, J.; Doe *v.* Robson, 15 East 32; Goss *v.* Watlington, 3 Brod. & Bing. 132; Middleton *v.* Melton, 10 B. & C. 317; Marks *v.* Lahee, 3 Bing. N. C. 408, 420, per Parke, J.; Poole *v.* Dicas, 1 Bing. N. C. 649, 653, 654; Dow *v.* Sawyer, 16 Shepl. 117. In Doe *v.* Vowles, 1 M. & Rob. 261, the tradesman's bill, which was rejected, was not contemporaneous with the fact done: Haddow *v.* Parry, 3 Taunt. 303; Whitnash *v.* George, 8 B. & C. 556; Barker *v.* Ray, 2 Russ. 63, 76; Patton *v.* Craig, 7 S. & R. 116, 126; Farmers' Bank *v.* Whitehill, 16 S. & R. 89; Nourse *v.* M'Cay, 2 Rawle 70; Clarke *v.* Magruder, 2 H. & J. 77; Richardson *v.* Carey, 2 Rand. 87; Clark *v.* Wilmot, 1 Y. & Col. N. S. 53.

person who made the entry has no recollection of the fact at the time of testifying; provided he swears that he should not have made it, if it were not true.[8] The same principle has also been applied to receipts and other acts contemporaneous with the payment, or fact attested.[9]

§ 117. **Same: Entries by Clerk.** The admission of the party's own shop-books, in proof of the delivery of goods therein charged, the entries having been made by his clerk, stands upon the same principle which we are now considering. The books must have been kept for the purpose; and the entries must have been made contemporaneous with the delivery of the goods, and by the person whose duty it was, for the time being, to make them. In such cases the books are held admissible, as evidence of the delivery of the goods therein charged, where the nature of the subject is such as not to render better evidence attainable.[1]

§ 118. **Party's Shop-books.** In the United States, this principle has been carried farther, and extended to entries made by the party himself in his own shop-books.[1] Though this evidence has some-

[8] Bunker *v.* Shed, 8 Met. 150.

[9] Sherman *v.* Crosby, 11 Johns. 70; Holladay *v.* Littlepage, 2 Munf. 316; Prather *v.* Johnson, 3 H. & J. 487; Shearman *v.* Akins, 4 Pick. 283; Carroll *v.* Tyler, 2 H. & G. 54; Cluggage *v.* Swan, 4 Binn. 150, 154. But the letter of a third person, acknowledging the receipt of merchandise of the plaintiff, was rejected in an action against the party who had recommended him as trustworthy, in Longenecker *v.* Hyde, 6 Binn. 1; and the receipts of living persons were rejected in Warner *v.* Price, 3 Wend. 397; Cutbush *v.* Gilbert, 4 S. & R. 551; Spargo *v.* Brown, 9 B. & C. 935. See *infra*, § 120.

[1] Pitman *v.* Maddox, 2 Salk. 690; s. c. Ld. Raym. 732; Lefebure *v.* Worden, 2 Ves. 54, 55; Glynn *v.* Bank of England, ib. 40; Sterret *v.* Bull, 1 Binn. 234. See also Tait on Evid. p. 176. An interval of one day, between the transaction and the entry of it in the book, has been deemed a valid objection to the admissibility of the book in evidence: Walter *v.* Bollman, 8 Watts 544. But the law fixes no precise rule as to the moment when the entry ought to be made. It is enough if it be made "at or near the time of the transaction:" Curren *v.* Crawford, 4 S. & R. 3, 5. Therefore, where the goods were delivered by a servant during the day, and the entries were made by the master at night, or on the following morning, from the memorandums made by the servant, it was held sufficient: Ingraham *v.* Bockius, 9 S. & R. 285. But such entries, made later than the succeeding day, have been rejected: Cook *v.* Ashmead, 2 Miles, 268. Where daily memoranda were kept by workmen, but the entries were made by the employer sometimes on the day, sometimes every two or three days, and one or two at longer intervals, they were admitted: Morris *v.* Briggs, 3 Cush. 342. Whether entries transcribed from a slate or card into the book are to be deemed original entries is not universally agreed. In Massachusetts, they are admitted: Faxon *v.* Hollis, 13 Mass. 427. In Pennsylvania, they were rejected in Ogden *v.* Miller, 1 Browne 147; but have since been admitted, where they were transcribed forthwith into the book: Ingraham *v.* Bockius, 9 S. & R. 285; Patton *v.* Ryan, 4 Rawle 408; Jones *v.* Long, 3 Watts 325; and not later, in the case of a mechanic's charges for his work, than the evening of the second day: Hartley *v.* Brooks, 6 Whart. 189. But where several intermediate days elapsed before they were thus transcribed, the entries have been rejected: Forsythe *v.* Norcross, 5 Watts 432. But see Koch *v.* Howell, 6 Watts & Serg. 350.

[1] In the following States, the admission of the party's own books and his own entries has been either expressly permitted, or recognized and regulated by statute; namely, Vermont, 1 Tolman's Dig. 185: Connecticut, Rev. Code, 1849, tit. 1, § 216; Delaware, St. 25 Geo. II, Rev. Code, 1829, p. 89; Maryland, as to sums under ten pounds in a year, 1 Dorsey's Laws of Maryland, 73, 203; Virginia, Stat. 1819, 1 Rev.

times been said to be admitted contrary to the rules of the common law, yet in general its admission will be found in perfect harmony with those rules, the entry being admitted only where it was evidently contemporaneous with the fact, and part of the *res gestæ*. Being the act of the party himself, it is received with greater caution; but still it may be seen and weighed by the jury.[2]

Code, c. 128, §§ 7–9; North Carolina, Stat. 1756, c. 57, § 2, 1 Rev. Code, 1836, c. 15; South Caroliua, St. 1721, Sept. 20; see Statutes at Large, vol. iii, p. 799, Cooper's ed. 1 Bay 43; Tennessee, Statutes of Tennessee, by Carruthers and Nicholson, p. 131. In Louisiana and in Maryland (except as above), entries made by the party himself are not admitted. Civil Code of Louisiana, arts. 2244, 2245; Johnston *v.* Breedlove, 2 Martin N. S. 508; Herring *v.* Levy, 4 id. 383; Cavelier *v.* Collins, 3 Martin 188; Martinstein *v.* Creditors, 8 Rob. 6; Owings *v.* Henderson, 5 Gill & Johns. 134, 142. In all the other States, they are admitted at common law, under various degrees of restriction. See Coggswell *v.* Dolliver, 2 Mass. 217; Poultney *v.* Ross, 1 Dall. 239; Lynch *v.* McHugo, 1 Bay 33; Foster *v.* Sinkler, ib. 40; Slade *v.* Teasdale, 2 id. 173; Lamb *v.* Hart, ib. 362; Thomas *v.* Dyott, 1 Nott & McC. 186; Burnham *v.* Adams, 5 Vt. 313; Story on Confl. of Laws, 526, 527.

[2] The rules of the several States in regard to the admission of this evidence are not perfectly uniform; but, in what is about to be stated, it is believed that they concur. Before the books of the party can be admitted in evidence, they are to be submitted to the inspection of the Court, aud if they do not appear to be a register of the daily business of the party, and to have been honestly and fairly kept, they are excluded. If they appear manifestly erased and altered, in a material part, they will not be admitted until the alteration is explained: Churchman *v.* Smith, 6 Whart. 146. The form of keeping them, whether it be that of a journal or ledger, does not affect their admissibility, however it may go to their credit to the jury: Coggswell *v.* Dolliver, 2 Mass. 217; Prince *v.* Smith, 4 id. 455, 457; Faxon *v.* Hollis, 13 id. 427; Rodman *v.* Hoops, 1 Dall. 85; Lynch *v.* McHugo, 1 Bay 33; Foster *v.* Sinkler, ib. 40; Slade *v.* Teasdale, 2 Bay 173; Thomas *v.* Dyott, 1 Nott & McC. 186; Wilson *v.* Wilson, 1 Halst. 95; Swing *v.* Sparks, 2 id. 59; Jones *v.* De Kay, 2 Pennington 695; Cole *v.* Anderson, 3 Halst. 68; Mathes *v.* Robinson, 8 Met. 269. If the books appear free from fraudulent practices, and proper to be laid before the jury, the party himself is then required to make oath, in open court, that they are the books in which the accounts of his ordinary business transactions are usually kept: Frye *v.* Barker, 2 Pick. 65; Taylor *v.* Tucker, 1 Kelly 233, and that the goods therein charged were actually sold and delivered to, aud the services actually performed for, the defendant: Dwinel *v.* Pottle, 3 Me. 167. An affidavit to an account, or bill of particulars, is not admissible: Wagoner *v.* Richmond, Wright 173; unless made so by statute. Whether, if the party is abroad, or is unable to attend, the Court will take his oath under a commission, is not perfectly clear. The opinion of Parker, C. J., in 2 Pick. 67, was against it; and so is Nicholson *v.* Withers, 2 McCord 428; but in Spence *v.* Sanders, 1 Bay 119, even his affidavit was deemed sufficient, upon a writ of inquiry, the defendant having suffered judgment by default. See also Douglass *v.* Hart 4 McCord, 257; Furman *v.* Peay, 2 Bail. 394. He must also swear that the articles therein charged were actually delivered, and the labor and services actually performed; that the entries were made at or about the time of the transactions, and are the original entries thereof; and that the sums charged and claimed have not been paid: 3 Dane's Abr. c. 81, art. 4, §§ 1, 2; Coggswell *v.* Dolliver, 2 Mass. 217; Ives *v.* Niles, 5 Watts 324. If the party is dead, his books, though rendered of much less weight as evidence, may still be offered by the executor or administrator, he making oath that they came to his hands as the genuine and only books of account of the deceased; that, to the best of his knowledge and belief, the entrics are original and contemporaneous with the fact, and the debt unpaid; with proof of the party's handwriting: Bentley *v.* Hollenback, Wright 169; McLellan *v.* Crofton, 6 Greenl. 307; Prince *v.* Smith, 4 Mass. 455; Odell *v.* Culbert, 9 W. & S. 66. If the party has since become insane, the book may still be admitted in evidence, on proof of the fact, and that the entries are in his handwriting, with the suppletory oath of his guardian. And whether the degree of insanity, in the particular case, is such as to justify the admissiou of the book, is to be determined by the judge in his discretion: Holbrook *v.* Gay, 6 Cush. 215. The book itself must be the registry of business actually done, aud not of orders, executory

§ 119. But, if the American rule of admitting the party's own entries in evidence for him, under the limitations mentioned below,

contracts, and things to be done subsequent to the entry: Fairchild *v.* Dennison, 4 Watts 258; Wilson *v.* Wilson, 1 Halst. 95; Bradley *v.* Goodyear, 1 Day 104, 106; Terrill *v.* Beecher, 9 Conn. 344, 348, 349; and the entry must have been made for the purpose of charging the debtor with the debt; a mere memorandum, for any other purpose, not being sufficient. Thus, an invoice-book, and the memorandums in the margin of a blank check-book, showing the date and tenor of the checks drawn and cut from the book, have been rejected: Cooper *v.* Morrell, 4 Yates 342; Wilson *v.* Goodin, Wright 219. But the time-book of a day laborer, though kept in a tabular form, is admissible; the entries being made for the apparent purpose of charging the person for whom the work was done: Mathes *v.* Robinson, 8 Met. 269. If the book contains marks, or there be other evidence showing that the items have been transferred to a journal or ledger, these books also must be produced: Prince *v.* Swett, 2 Mass. 569. The entries, also, must be made contemporaneously with the fact entered, as has been already stated in regard to entries made by a clerk: *supra*, § 117, and n. (1). Entries thus made are not, however, received in all cases as satisfactory proof of the charges; but only as proof of things which, from their nature, are not generally susceptible of better evidence: Watts *v.* Howard, 7 Met. 478. They are satisfactory proof of goods sold and delivered from a shop, and of labor and services personally performed: Case *v.* Potter, 8 Johns. 211; Vosburgh *v.* Thayer, 12 id. 461; Wilmer *v.* Israel, 1 Browne 257; Ducoign *v.* Schreppel, 1 Yeates 347; Spence *v.* Sanders, 1 Bay 119; Charlton *v.* Lawry, Martin N. C. 26; Mitchell *v.* Clark, ib. 25; Easly *v.* Eakin, Cooke 388; and, in some States, of small sums of money: Coggswell *v.* Dolliver, 2 Mass. 217; Prince *v.* Smith, 4 id. 455; 3 Dane's Abr. c. 81, art. 4, §§ 1, 2; Craven *v.* Shaird, 2 Halst. 345. The amount, in Massachusetts and Maine, is restricted to forty shilings: Dunn *v.* Whitney, 1 Fairf. 9; Burns *v.* Fay, 14 Pick. 8; Union Bank *v.* Knapp, 3 Pick. 109. While in North Carolina, it is extended to any article or articles, the amount whereof shall not exceed the sum of sixty dollars. Stat. 1837, c. 15, §§ 1, 5. But they have been refused admission to prove the fact of advertising in a newspaper: Richards *v.* Howard, 2 Nott & McC. 474; Thomas *v.* Dyott, 1 id. 186; of a charge of dockage of a vessel: Wilmer *v.* Israel, 1 Browne 257; commissions on the sale of a vessel: Winsor *v.* Dillaway, 4 Met. 221; labor of servants: Wright *v.* Sharp, 1 Browne 344; goods delivered to a third person, Kerr *v.* Love, 1 Wash. 172; Tenbroke *v.* Johnson, Coxe 288; Townley *v.* Wooly, ib. 377; or to the party, if under a previous contract for their delivery at different periods: Lonergan *v.* Whitehead, 10 Watts 249; general damages, for value: Swing *v.* Sparks, 2 Halst. 59; Terrill *v.* Beecher, 9 Conn. 348, 349; settlement of accounts: Prest *v.* Mercereau, 4 Halst. 268; money paid and not applied to the purpose directed: Bradley *v.* Goodyear, 1 Day 104; a special agreement: Pritchard *v.* M'Owen, 1 Nott & McC. 131, n.; Dunn *v.* Whitney, 1 Fairf. 9; Green *v.* Pratt, 11 Conn. 205; or a delivery of goods under such agreement: Nickle *v.* Baldwin, 4 Watts & Serg. 290; an article omitted by mistake in a prior settlement: Punderson *v.* Shaw, Kirby 150; the use and occupation of real estate, and the like: Beach *v.* Mills, 5 Conn. 493. See also Newton *v.* Higgins, 2 Vt. 366; Dunn *v.* Whitney, 1 Fairf. 9. But after the order to deliver goods to a third person is proved by competent evidence *aliunde*, the delivery itself may be proved by the books and suppletory oath of the plaintiff, in any case where such delivery to the defendant in person might be so proved: Mitchell *v.* Belknap, 10 Shepl. 475. The charges, moreover, must be specific and particular; a general charge for professional services, or for work and labor by a mechanic, without any specification but that of time, cannot be supported by this kind of evidence: Lynch *v.* Petrie, 1 Nott & McC. 130; Hughes *v.* Hampton, 2 Const. 745. And regularly the prices ought to be specified; in which case the entry is *prima facie* evidence of the value: Hagaman *v.* Case, 1 South, 370; Ducoign *v.* Schreppel, 1 Yeates 347. But whatever be the nature of the subject, the transaction, to be susceptible of this kind of proof, must have been directly between the original debtor and the creditor; the book not being admissible to establish a collateral fact: Mifflin *v.* Bingham, 1 Dall. 276, per McKean, C. J.; Kerr *v.* Love, 1 Wash. 172; Deas *v.* Darby, 1 Nott & McC. 436; Poultney *v.* Ross, 1 Dall. 238. Though books, such as have been described, are admitted to be given in evidence, with the suppletory oath of the party, yet his testimony is still to be weighed by the jury, like that of any other witness in the cause, and his reputation for truth is equally open to be questioned: Kitchen *v.* Tyson,

were not in accordance with the principles of the common law, yet it is in conformity with those of other systems of jurisprudence. In the administration of the Roman law, the production of a merchant's or tradesman's book of accounts, regularly and fairly kept in the usual manner, has been deemed presumptive evidence (*semiplena probatio*[1]) of the justice of his claim; and, in such cases, the suppletory oath of the party (*juramentum suppletivum*) was admitted to make up the *plena probatio* necessary to a decree in his favor.[2] By the law of France, too, the books of merchants and tradesmen, regularly kept and written from day to day, without any blank, when the tradesman has the reputation of probity, constitute a semi-proof, and with his suppletory oath are received as full proof to establish his demand.[3] The same doctrine is familiar in the law of Scotland, by which the books of merchants and others, kept with a certain reasonable degree of regularity, satisfactory to the Court, may be received in evidence, the party being allowed to give his own oath "in supplement" of such imperfect proof. It seems, however, that a course of dealing, or other "pregnant circumstances," must in general be first shown by evidence *aliunde*, before the proof can be regarded as amounting to the degree of *semiplena probatio*, to be rendered complete by the oath of the party.[4]

3 Murph. 314; Elder *v.* Warfield, 7 Har. & Johns. 391. In some States, the books thus admitted are only those of shopkeepers, mechanics, and tradesmen; those of other persons, such as planters, scriveners, schoolmasters, &c., being rejected: Geter *v.* Martin, 2 Bay 173; Pelzer *v.* Cranston, 2 McCord 328; Boyd *v.* Ladson, 4 id. 76. The subject of the admission of the party's own entries, with his suppletory oath, in the several American States, is very elaborately and fully treated in Mr. Wallace's note to American edition of Smith's Leading Cases, vol. i, p. 142.

[1] This degree of proof is thus defined by Mascardus: "Non est ignorandum, probationem semiplenam eam esse, per quam rei gestæ *fides aliqua* fit judici; non tamen tanta ut jure debeat in pronuncianda sententia eam sequi:" De Prob. vol. i, Quæst. 11 n. 1, 4.

[2] "Juramentum (suppletivum) defertur ubicunque actor habet pro se — aliquas conjecturas, per quas judex inducatur ad suspicionem vel ad opinandum pro parte actoris:" Mascardus, de Prob. vol. 3, Concl. 1230, n. 17. The civilians, however they may differ as to the degree of credit to be given to books of accounts, concur in opinion that they are entitled to consideration at the discretion of the judge. They furnish, at least, the *conjecturæ* mentioned by Mascardus; and their admission in evidence, with the suppletory oath of the party, is thus defended by Paul Voet, De Statutis, § 5, c. 2, n. 9: "An ut credatur libris rationem, seu registris uti loquuntur, mercatorum et artificum, licet probationibus testium non juventur? Respondeo, quamvis exemplo pernitiosum esse videatur, quemque sibi privata testatione, sive adnotatione facere debitorem. Qui tamen hæc est mercatorum cura et opera, ut debiti et crediti rationes diligenter conficiant. Etiam in eorum foro et causis, ex æquo et bono est judicandum. Insuper non admisso aliquo (litium acceleraudarum) remedio, commerciorum ordo et usus evertitur. Neque enim omnes præsenti pecunia merces sibi comparant, neque cujusque rei venditioni testes adheberi, qui pretia mercium noverint, aut expedit aut congruum est. Non iniquum videbitur illud statutum, quo domesticis talibus instrumentis additur fides, modo aliquibus adminiculis juventur." See also Hertius, De Collisione Legum, § 4, n. 68; Strykius, tom. 7, De Semiplena Probat. Dis. 1, c. 4, § 5; Menochius, De Presump. lib. 2, Presump. 57, n. 20, and lib. 3, Presump. 63, n. 12.

[3] 1 Pothier on Obl., Part iv, c. 1, art. 2, § 4. By the Code Napoleon, merchants' books are required to be kept in a particular manner therein prescribed, and none others are admitted in evidence: Code de Commerce, Liv. 1, tit. 2, art. 8–12.

[4] Tait on Evidence, pp. 273–277. This degree of proof is there defined as "not

§ 120. **Entries by Third Persons.** Returning now to the admission of entries made by clerks and third persons, it may be remarked that in most of, if not all, the reported cases, the clerk or person who made the entries was dead; and the entries were received upon proof of his handwriting. But it is conceived that the fact of his death is not material to the admissibility of this kind of evidence. There are two classes of admissible entries, between which there is a clear distinction, in regard to the principle on which they are received in evidence. The one class consists of entries made against the interest of the party making them; and these derive their admissibility from this circumstance alone. It is, therefore, not material when they were made. The testimony of the party who made them would be the best evidence of the fact; but, if he is dead, the entry of the fact made by him in the ordinary course of his business, and against his interest, is received as secondary evidence in a controversy between third persons.[1] The other class of entries consists of those which constitute parts of a chain or combination of transactions between the parties, the proof of one raising a presumption that another has taken place. Here, the value of the entry, as evidence, lies in this, that it was contemporaneous with the principal fact done, forming a link in the chain of events, and being part of the *res gestæ*. It is not merely the declaration of the party, but it is a verbal contemporaneous act, belonging, not necessarily indeed, but ordinarily and naturally, to the principal thing. It is on this ground, that this latter class of entries is admitted; and therefore it can make no difference, as to their admissibility, whether the party who made them be living or dead, nor whether he was, or was not, interested in making them, his interest going only to affect the credibility or weight of the evidence when received.[2]

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§ 123. **Summary.** Thus, we have seen that there are *four classes of declarations*, which, though usually treated under the head of hearsay, are in truth original evidence; the *first* class consisting of cases where the fact that the declaration was made, and not its truth or falsity, is the point in question; the *second*, including expres-

merely a suspicion, but such evidence as produces a reasonable belief, though not complete evidence." See also Glassford on Evid. p. 550; Bell's Digest of Laws of Scotland, pp. 378, 898.

[1] Warren *v.* Greenville, 3 Str. 1129; Middleton *v.* Melton, 10 B. & C. 317; Thompson *v.* Stevens, 2 Nott & McC. 493; Chase *v.* Smith, 5 Vt. 556; Spiers *v.* Morris, 9 Bing. 687; Alston *v.* Taylor, 1 Hayw. 381, 395.

[2] This distinction was taken and clearly expounded by Mr. Justice Parke in Doe d. Patteshall *v.* Turford, 3 B. & Ad. 890; cited and approved in Poole *v.* Dicas, 1 Bing. N. C. 654. See also, *supra*, §§ 115, 116; Cluggage *v.* Swan, 4 Binn. 154; Sherman *v.* Crosby, 11 Johns. 70; Holladay *v.* Littlepage, 2 Munf. 316; Prather *v.* Johnson, 3 H. & J. 487; Shearman *v.* Akins, 4 Pick. 283; Carroll *v.* Tyler, 2 H. & G. 54; James *v.* Wharton, 3 McLean 492. In several cases, however, letters and receipts of third persons, living and within the reach of process, have been rejected: Longenecker *v.* Hyde, 6 Binn. 1; Spargo *v.* Brown, 9 B. & C. 935; Warner *v.* Price, 3 Wend. 397; Cutbush *v.* Gilbert, 4 S. & R. 551.

sions of bodily or mental feelings, where the existence or nature of such feelings is the subject of inquiry; the *third*, consisting of cases of pedigree, and including the declaration of those nearly related to the party whose pedigree is in question; and the *fourth*, embracing all other cases where the declaration offered in evidence may be regarded as part of the *res gestæ*. All these classes are involved in the principle of the last; and have been separately treated, merely for the sake of greater distinctness.

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§ 125. **Declarations under Oath.** The rule applies, though the declaration offered in evidence was made upon oath, and in the course of a judicial proceeding, if the litigating parties are not the same. Thus, the deposition of a pauper, as to the place of his settlement, taken *ex parte* before a magistrate, was rejected, though the pauper himself had since absconded, and was not to be found.[1] The rule also applies, notwithstanding no better evidence is to be found, and though it is certain, that, if the declaration offered is rejected, no other evidence can possibly be obtained; as, for example, if it purports to be the declaration of the only eye-witness of the transaction, and he is since dead.[2]

§ 126. **Exception for Attesting Witness.** An exception to this rule has been contended for in the admission of the declarations of a deceased attesting witness to a deed or will, in disparagement of the evidence afforded by his signature. This exception has been asserted, on two grounds: first, that as the party offering the deed used the declaration of the witness, evidenced by his signature, to prove the execution, the other party might well be permitted to use any other declaration of the same witness to disprove it; and, secondly, that such declaration was in the nature of a substitute for the loss of the benefit of a cross-examination of the attesting witness; by which, either the fact confessed would have been proved, or the witness might have been contradicted, and his credit impeached. Both these grounds were fully considered in a case in the exchequer, and were overruled by the Court: the first, because the evidence of the handwriting, in the attestation, is not used as a declaration by the witness, but is offered merely to show the fact that he put his name there, in the manner in which attestations are usually placed to genuine signatures; and the second, chiefly because of the mischiefs which would ensue, if the general rule excluding hearsay were thus broken in upon. For the security of solemn instruments would thereby become much impaired, and the rights of parties under them would be liable to be affected at remote periods, by loose declarations of the attesting witnesses, which could neither be explained nor con-

[1] R. *v.* Nuneham Courtney, 1 East 373; R. *v.* Ferry Frystone, 2 id. 54; R *v.* Eriswell, 3 T. R. 707–725, per Lord Kenyon, C. J., and Grose, J., whose opinions are approved and adopted in Mima Queen *v.* Hepburn, 7 Cranch 296.

[2] Phil. & Am. on Evid. 220, 221; 1 Phil. Evid. 209, 210.

tradicted by the testimony of the witnesses themselves. In admitting such declarations, too, there would be no reciprocity; for, though the party impeaching the instrument would thereby have an equivalent for the loss of his power of cross-examination of the living witness, the other party would have none for the loss of his power of re-examination.[1]

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§ 134. **Declarations as to Pedigree; post litem motam.** It has sometimes been laid down, as an exception to the rule excluding declarations made *post litem motam*, that declarations concerning pedigree will not be invalidated by the circumstance that they were made during family discussions, and for the purpose of preventing future controversy; and the instance given, by way of illustration, is that of a solemn act of parents, under their hands, declaring the legitimacy of a child. But it is conceived that evidence of this sort is admissible, not by way of exception to any rule, but because it is, in its own nature, original evidence; constituting part of the fact of the recognition of existing relations of consanguinity or affinity; and falling naturally under the head of the expression of existing sentiments and affections, or of declarations against the interest, and peculiarly within the knowledge of the party making them, or of verbal acts, part of the *res gestæ*.[1]

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§ 164. **Former Testimony.** The admissibility of this evidence seems to turn rather on the right to cross-examine than upon the precise nominal identity of all the parties. Therefore, where the witness testified in a suit, in which A and several others were plaintiffs, against B alone, his testimony was held admissible, after his death, in a subsequent suit, relating to the same matter, brought by B against A alone.[1] And, though the two trials were not between the parties, yet if the second trial is between those who represent the parties to the first, by privity in blood, in law, or in estate, the evidence is admissible. And if, in a dispute respecting lands, any fact comes directly in issue, the testimony given to that fact is admissible to prove the same point or fact in another action between the same parties or their privies, though the last suit be for other lands.[2] The principle on which, chiefly, this evidence is admitted, namely, the right of cross-examination, requires that its admission be carefully

[1] Stobart *v.* Dryden, 1 M. & W. 615.

[1] *Supra*, §§ 102–108, 131; Goodright *v.* Moss, Cowp. 591; Monkton *v.* Attorney-General, 2 Russ. & My. 147, 160, 161, 164; Slaney *v.* Wade, 1 My. & Cr. 338; Berkeley Peerage Case, 4 Campb. 418, per Mansfield, C. J.

[1] Wright *v.* Tatham, 1 Ad. & El. 3. But see Matthews *v.* Colburn, 1 Strob. 258.

[2] Outram *v.* Morewood, 3 East 346, 354, 355, per Ld. Ellenborough; Peake, Evid. (3d ed.) p. 37; Bull. N. P. 232; Doe *v.* Derby, 1 Ad. & El. 873; Doe *v.* Foster, ib. 791 n.; Lewis *v.* Clerges, 3 Bac. Abr. 614; Sheldon *v.* Barbour, 2 Wash. 64; Rushworth *v.* Countess of Pembroke, Hard. 472; Jackson *v.* Lawson, 15 Johns. 544; Jackson *v.* Bailey, 2 id. 17; Powell *v.* Waters, 17 id. 176. See also Ephraims *v.* Murdoch, 7 Blackf. 10; Harper *v.* Burrow, 6 Ired. 30; Clealand *v.* Huey, 18 Ala. 343.

restricted to the extent of that right; and that where the witness incidentally stated matter, as to which the party was not permitted by the law of trials to cross-examine him, his statement as to that matter ought not afterwards to be received in evidence against such party. Where, therefore, the point in issue in both actions was not the same, the issue in the former action having been upon a common or free fishery, and, in the latter, it being upon a several fishery, evidence of what a witness, since deceased, swore upon the former trial, was held inadmissible.[3]

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§ 167. **Interest subsequently acquired; Former Testimony.** The effect of an interest subsequently acquired by the witness, as laying a foundation for the admission of proof of his former testimony, remains to be considered. It is in general true, that if a person who has knowledge of any fact, but is under no obligation to become a witness to testify to it, should afterwards become interested in the subject-matter in which that fact is involved, and his interest should be on the side of the party calling him, he would not be a competent witness until the interest is removed. If it is releasable by the party, he must release it. If not, the objection remains: for neither is the witness nor a third person compellable to give a release; though the witness may be compelled to receive one. And the rule is the same in regard to a subscribing witness, if his interest was created by the act of the party calling him. Thus, if the charterer of a ship should afterwards communicate to the subscribing witness of the charter-party an interest in the adventure, he cannot call the witness to prove the execution of the charter-party: nor will proof of his handwriting be received; for it was the party's own act to destroy the evidence.[1] It is, however, laid down, that a witness cannot, by the subsequent voluntary creation of an interest, without the concurrence or assent of the party, deprive him of the benefit of his testimony.[2] But this rule admits of a qualification, turning upon the manner in which the interest was acquired. If it were acquired wantonly, as by a wager, or fraudulently, for the purpose of taking off his testimony, of which the participation of the adverse party would generally be proof, it would not disqualify him.

But "the pendency of a suit cannot prevent third persons from transacting business, *bona fide*, with one of the parties; and, if an interest in the event of the suit is thereby acquired, the common

[3] Melvin *v.* Whiting, 7 Pick. 79. See also Jackson *v.* Winchester, 4 Dall. 206; Ephraims *v.* Murdoch, 7 Blackf. 10.

[1] Hovil *v.* Stephenson, 5 Bing. 493; Hamilton *v.* Williams, 1 Hayw. 139; Johnson *v.* Knight, 1 N. C. Law 93; 1 Murph. 293; Bennet *v.* Robison, 3 Stew. & Port. 227, 237; Schall *v.* Miller, 5 Whart. 156.

[2] 1 Stark. Evid. 118; Barlew *v.* Vowell, Skin. 586; George *v.* Pearce, cited by Buller, J., in 3 T. R. 37; R. *v.* Fox, 1 Str. 652; Long *v.* Bailie, 4 Serg. & R. 222; Burgess *v.* Lane, 3 Greenl. 165; Jackson *v.* Rumsey, 3 Johns. Cas. 234, 237; *infra*, § 418.

consequence of law must follow, — that the person so interested cannot be examined as a witness for that party, from whose success he will necessarily derive an advantage." [3] Therefore, where, in an action against one of several underwriters on a policy of insurance, it appeared that a subsequent underwriter had paid, upon the plaintiff's promise to refund the money, if the defendant in the suit should prevail; it was held, that he was not a competent witness for the defendant to prove a fraudulent concealment of facts by the plaintiff, it being merely a payment, by anticipation, of his own debt, in good faith, upon a reasonable condition of repayment.[4] And as the interest which one party acquires in the testimony of another is liable to the contingency of being defeated by a subsequent interest of the witness in the subject-matter, created *bona fide*, in the usual and lawful course of business, the same principle would seem to apply to an interest arising by operation of law, upon the happening of an uncertain event, such as the death of an ancestor, or the like. But though the interest which a party thus acquires in the testimony of another is liable to be affected by the ordinary course of human affairs, and of natural events, the witness being under no obligation, on that account, either to change the course of his business, or to abstain from any ordinary and lawful act or employment; yet it is a right of which neither the witness nor any other person can by voluntary act and design deprive him. Wherefore, therefore, the subsequent interest of the witness has been created either wantonly, or in bad faith, it does not exclude him; and doubtless the participation of the adverse party in the creation of such interest would, if not explained by other circumstances, be very strong *prima facie* evidence of bad faith; as an act of the witness, uncalled for, and out of the ordinary course of business would be regarded as wanton.[5]

§ 168. **Same: Deposition.** If, in cases of disqualifying interest, the witness has previously given a deposition in the cause, the deposition may be read in chancery, as if he were since deceased, or insane, or

[3] 3 Campb. 381, per Ld. Ellenborough. The case of Bent *v.* Baker, 3 T. R. 27, seems to have been determined on a similar principle, as applied to the opposite state of facts; the subsequent interest, acquired by the broker, being regarded as affected with bad faith, on the part of the assured, who objected to his admission. The distinction taken by Lord Ellenborough was before the Supreme Court of the United States in Winship *v.* Bank of the United States, 5 Pet. 529, 541, 542, 545, 546, 552, but no decision was had upon the question, the Court being equally divided. But the same doctrine was afterwards discussed and recognized, as "founded on the plainest reasons," in Eastman *v.* Winship, 14 Pick. 44; 10 Wend. 162, 164, acc.

[4] Forrester *v.* Pigou, 3 Campb. 380; s. c. 1 M. & S. 9; Phelps *v.* Riley, 3 Conn. 266. In Burgess *v.* Lane, 3 Greenl. 165, the witness had voluntarily entered into an agreement with the defendant, against whom he had an action pending in another Court, that that action should abide the event of the other, in which he was now called as a witness for the plaintiff; and the Court held, that it did not lie with the defendant, who was party to that agreement, to object to his admissibility. But it is observable, that that agreement was not made in discharge of any real or supposed obligation, as in Forrester *v.* Pigou; but was on a new subject, was uncalled for, and purely voluntary; and therefore subjected the adverse party to the imputation of bad faith in making it.

[5] See *infra*, § 418, where the subject is again considered.

otherwise incapacitated. It may also be read in the trial, at law, of an issue out of chancery. In other trials at law no express authority has been found for reading the deposition; and it has been said, that the course of practice is otherwise; but no reason is given, and the analogies of the law are altogether in favor of admitting the evidence.[1] And, as it is hardly possible to conceive a reason for the admission of prior testimony given in one form which does not apply to the same testimony given in any other form, it would seem clearly to result that where the witness is subsequently rendered incompetent by interest, lawfully acquired, in good faith, evidence may be given of what he formerly testified orally, in the same manner as if he were dead; and the same principle will lead us farther to conclude, that in all cases where the party has, without his own fault or concurrence, irrecoverably lost the power of producing the witness again, whether from physical or legal causes, he may offer the secondary evidence of what he testified in the former trial. If the lips of the witness are sealed, it can make no difference in principle, whether it be by the finger of death, or the finger of the law. The interest of the witness, however, is no excuse for not producing him in Court; for perhaps the adverse party will waive any objection on that account. It is only when the objection is taken and allowed, that a case is made for the introduction of secondary evidence.

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§ 261. **Written Evidence required.** There are also certain sales, for the proof of which the law requires a deed, or other written document. Thus, by the statutes of the United States,[1] and of Great Britain,[2] the "grand bill of sale" is made essential to the complete transfer of any ship or vessel; though, as between the parties themselves, a title may be acquired by the vendee without such document. Whether this documentary evidence is required by the law of nations or not, is not perfectly settled; but the weight of opinion is clearly on the side of its necessity, and that without this, and the other usual documents, no national character is attached to the vessel.[3]

[1] This is now the established practice in chancery, Gresley on Evid. 366, 367; and in Chess *v.* Chess, 17 Serg. & R. 412, it was conceded by Tod, J., that the reason and principle of the rule applied with equal force in trials at law; though it was deemed in that case to have been settled otherwise, by the course of decisions in Pennsylvania. See also 1 Stark. Evid. 264, 265; 1 Smith's Chan. Pr. 344; Gosse *v.* Tracy, 1 P. W. 287; s. c. 2 Vern. 699; Andrews *v.* Palmer, 1 Ves. & B. 21; Luttrell *v.* Reynell, 1 Mod. 284; Jones *v.* Jones, 1 Cox, Ch. R. 184; Union Bank *v.* Knapp, 3 Pick. 108, 109, per Putnam, J.; Wafer *v.* Hemken, 9 Rob. La. 203. See also Scammon *v.* Scammon, 33 N. H. 52, 58.

[1] United States Navigation Act of 1792, c. 45, § 14; Stat. 1793, c. 52; Stat. 1793, c. 1; ib. c. 8, vol. i, U. S. Statutes at Large (Little & Brown's ed.), pp. 294, 305; Abbott on Shipping, by Story, p. 45, n. (2); 3 Kent Comm. 143, 149. See also Stat. 1850, c. 27, 9 U. S. Statutes at Large (L. & B.'s ed.), 440.

[2] Stat. 6 Geo. IV, c. 109; 4 Geo. IV, c. 48; 3 & 4 W. IV, c. 55, § 31; Abbott on Shipping, by Shee, pp. 47–52.

[3] Abbott on Shipping, by Story, p. 1, n. (1), and cases there cited; ib. p. 27, n. (1);

§ 262. **Statute of Frauds.** Written evidence is also required of the several transactions mentioned in the Statute of Frauds, passed in the reign of Charles II, the provisions of which have been enacted, generally in the same words, in nearly all of the United States.[1] The rules of evidence contained in this celebrated statute are calculated for the exclusion of perjury, by requiring, in the cases therein mentioned, some more satisfactory and convincing testimony than mere oral evidence affords. The statute dispenses with no proof of consideration which was previously required, and gives no efficacy to written contracts which they did not previously possess.[2] Its policy is to impose such requisites upon private transfers of property as, without being hindrances to fair transactions, may be either totally inconsistent with dishonest projects, or tend to multiply the chances of detection.[3] The object of the present work will not ad-

ib. p. 45, n. (2); Ohl *v.* Eagle Ins. Co., 4 Mason 172; Jacobsen's Sea Laws, b. 1, c. 2, p. 17; 3 Kent Comm. 130.

[1] 29 Car. II, c. 3; 4 Kent Comm. 95, and n. (*b*), (4th ed.). The Civil Code of Louisiana, art. 2415, without adopting in terms the provisions of the Statute of Frauds, declares generally that all verbal sales of immovable property or slaves shall be void. 4 Kent Comm. 450, n. (*a*), (4th ed.).

[2] 2 Stark. Evid. 341.

[3] Roberts on Frauds, pref. xxii. This statute introduced no new principle into the law; it was new in England only in the mode of proof which it required. Some protective regulations, of the same nature, may be found in the early codes of most of the northern nations, as well as in the laws of the Anglo-Saxon princes; the prevention of frauds and perjuries being sought, agreeably to the simplicity of those unlettered times, by requiring a certain number of witnesses to a valid sale, and sometimes by restricting such sales to particular places. In the Anglo-Saxon laws, such regulations were quite familiar; and the Statute of Frauds was merely the revival of obsolete provisions, demanded by the circumstances of the times, and adapted, in a new mode of proof, to the improved condition and habits of the trading community. By the laws of Lotharius and Edric, Kings of Kent, § 16, if a Kentish man purchased anything in London, it must be done in the presence of two or three good citizens or of the mayor of the city (Canciani, Leges Barbarorum Atiquæ, vol. iv, p. 231). The laws of King Edward the Elder (De jure et lite, § 1) required the testimony of the mayor, or some other credible person, to every sale, and prohibited all sales out of the city. Cancian. ub. sup. p. 256. King Athelstan prohibited sales in the country, above the value of twenty pence; and, for those in the city, he required the same formalities as in the laws of Edward (ib. pp. 261, 262, LL. Athelstani, § 12). By the laws of King Ethelred, every freeman was required to have his surety (fidejussor), without whom, as well as other evidence, there could be no valid sale or barter. "Nullus homo faciat alterutrum, nec emat, nec permutet, nisi fidejussorem habeat, et testimonium" (ib. p. 287, LL. Ethelredi, §§ 1, 4). In the Concilium Seculare of Canute, § 22, it was provided, that there should be no sale, above the value of four pence, whether in the city or country, without the presence of four witnesses (ib. p. 305). The same rule, in nearly the same words, was enacted by William the Conqueror (ib. p. 357, LL. Guil. Conq. § 43). Afterwards, in the charter of the Conqueror (§ 60), no cattle ("nulla viva pecunia," scil. animalia) could be legally sold, unless in the cities, and in the presence of three witnesses (Cancian. ub. sup. p. 360; Leges Anglo-Saxonicæ, p. 198 (*o*)). Among the ancient Sueones and Goths, no sale was originally permitted but in the presence of witnesses, and (per mediatores) through the medium of brokers. The witnesses were required in order to preserve the evidence of the sale; and the brokers, or mediators (ut pretium moderarentur), to prevent extortion, and see to the title. But these formalities were afterwards dispensed with, except in the sale of articles of value (res pretiosæ), or of great amount (Cancian. ub. sup. p. 231, n. 4). Alienations of lands were made only (publicis literis) by documents legally authenticated. By the Danish law, lands in the city or country might be exchanged without judicial appraisement (per tabulas manu signoque permutantis affixas), by deed, under the hand and seal of the party (ib. p. 261, n. 4). The Roman

mit of an extended consideration of the provisions of this statute, but will necessarily restrict us to a brief notice of the rules of evidence which it has introduced.

§ 263. **Interest in Lands.** By this statute, the necessity of some writing is universally required, upon all conveyances of lands, or interest in lands, for more than three years; all interests, whether of freehold or less than freehold, certain or uncertain, created by parol without writing, being allowed only the force and effect of estates at will; except leases, not exceeding the term of three years from the making thereof, whereon the rent reserved shall amount to two-thirds of the improved value. The term of three years, for which a parol lease may be good, must be only three years from the making of it; but if it is to commence *in futuro*, yet if the term is not for more than three years, it will be good. And if a parol lease is made to hold from year to year, during the pleasure of the parties, this is adjudged to be a lease only for one year certain, and that every year after it is a new springing interest, arising upon the first contract, and parcel of it; so that if the tenant should occupy ten years, still it is prospectively but a lease for a year certain, and therefore good, within the exception of the statute; though as to the time past it is considered as one entire and valid lease for so many years as the tenant has enjoyed it.[1] But though a parol lease for a longer period than the statute permits is void for the excess, and may have only the effect of a lease for a year, yet it may still have an operation, so far as its terms apply to a tenancy for a year. If, therefore, there be a parol lease for seven years for a specified rent, and to commence and end on certain days expressly named; though this is void as to duration of the lease, yet it must regulate all the other terms of the tenancy.[2]

law required written evidence in a great variety of cases, embracing, among many others, all those mentioned in the Statute of Frauds; which are enumerated by N. De Lescut, De Exam. Testium, Cap. 26 (Farinac. Oper. Tom. ii, App. 243). See also Brederodii Repertorium Juris, col. 984, *verb.* Scriptura. Similar provisions, extending in some cases even to the proof of payment of debts, were enacted in the statutes of Bologna (A. D. 1454), Milan (1498), and Naples, which are prefixed in Danty's Traité de la Preuve par Temoins. By a perpetual edict in the Archduchy of Flanders (A. D. 1611), all sales, testaments, and contracts whatever, above the value of three hundred livres Artois, were required to be in writing. And in France, by the Ordonnance de Moulins (A. D. 1566) confirmed by that of 1667, parol or verbal evidence was excluded in all cases, where the subject-matter exceeded the value of one hundred livres. See Danty de la Preuve, &c., *passim;* 7 Poth. Œuvres, &c., 4to, p. 56; Traité de la Procéd. Civ. c. 3, art. 4, Règle 3me; 1 Poth. on Obl. part 4, c. 2, arts. 1, 2, 3, 5; Commercial Code of France, art. 109. The dates of these regulations, and of the Statute of Frauds, and the countries in which they were adopted, are strikingly indicative of the revival and progress of commerce. Among the Jews, lands were conveyed by deed only, from a very early period, as is evident from the transaction mentioned in Jer. xxxii, 10–12, where the principal document was "sealed according to the law and custom," in the presence of witnesses; and another writing, or "open evidence," was also taken, probably, as Sir John Chardin thought, for common use, as is the manner in the East at this day.

[1] Roberts on Frauds, pp. 241–244.

[2] Doe *v.* Bell, 5 T. R. 471.

§ 264. **Leases.** By the same statute, no leases, estates, or interests, either of freehold, or terms of years, or an uncertain interest, other than copyhold or customary interests in lands, tenements, or hereditaments, can be assigned, granted, or surrendered, unless by deed or writing, signed by the party, or his agent authorized by writing,[1] or by operation of law. At common law, surrenders of estates for life or years in things corporeal were good, if made by parol; but things incorporeal, lying in grant, could neither be created nor surrendered but by deed.[2] The effect of this statute is not to dispense with any evidence required by the common law, but to add to its provisions somewhat of security, by requiring a new and more permanent species of testimony. Wherever, therefore, at common law, a deed was necessary, the same solemnity is still requisite; but with respect to lands and tenements in possession, which before the statute might have been surrendered by parol, that is, by words only, some note in writing is now made essential to a valid surrender.[3]

§ 265. **Cancellation of Deeds.** As to the effect of the cancellation of a deed to divest the estate, operating in the nature of a surrender, a distinction is taken between things lying in livery, and those which lie only in grant. In the latter case, the subject being incorporeal, and owing its very existence to the deed, it appears that at common law the destruction of the deed by the party, with intent to defeat the interest taken under it, will have that effect. Without such intent, it will be merely a case of casual spoliation. But where the thing lies in livery and manual occupation, the deed being, at common law, only the authentication of the transfer, and not the operative act of conveying the property, the cancellation of the instrument will not involve the destruction of the interest conveyed.[1] It has been thought, that, since writing is now by the statute made essential to certain leases of hereditaments lying in livery, the destruction of the lease would necessarily draw after it the loss of the interest itself.[2] But the better opinion seems to be, that it will not; because the intent of the statute is to take away the mode of transferring interests in lands by symbols and words alone, as formerly used, and therefore a surrender by cancellation, which is but a sign, is also taken away at law; though a symbolical surrender may still

[1] In the statutes of some of the United States, the words "authorized by writing" are omitted; in which case it is sufficient that the agent be authorized by parol, in order to make a binding *contract* of sale, provided the contract itself be made in writing; but his authority to *convey* must be by deed: Story on Agency, § 50; Alna *v.* Plummer, 4 Greenl. 258.

[2] Co. Lit. 337 *b*, 338 *a*; 2 Shep. Touchst. (by Preston), p. 300.

[3] Roberts on Frauds, p. 248.

[1] Roberts on Frauds, pp. 248, 249; Bolton *v.* Bp. of Carlisle, 2 H. Bl. 263, 264; Doe *v.* Bingham, 4 B. & A. 672; Holbrook *v.* Tirrell, 9 Pick. 105; Botsford *v.* Morehouse, 4 Conn. 550; Gilbert *v.* Bulkley, 5 id. 262; Jackson *v.* Chase, 2 Johns. 86. See *infra*, § 568.

[2] 4 Bac. Abr. 218, tit. Leases and Terms for Years, T.

be recognized in chancery as the basis of relief.[3] The surrender in law, mentioned in the statute, is where a tenant accepts from his lessor a new interest, inconsistent with that which he previously had; in which case a surrender of his former interest is presumed.[4]

§ 266. **Declarations of Trust.** This statute further requires that the declaration or creation of trusts of lands shall be manifested and proved only by some writing, signed by the party creating the trust; and all grants and assignments of any such trust or confidence are also to be in writing, and signed in the same manner. It is to be observed, that the same statute does not require that the trust itself be created by writing, but only that it be manifested and proved by writing; plainly meaning that there should be evidence in writing, proving that there was a trust, and what the trust was. A letter acknowledging the trust, and, *a fortiori*, an admission, in an answer in chancery, has therefore been deemed sufficient to satisfy the statute.[1] Resulting trusts, or those which arise by implication of law, are specially excepted from the operation of the statute. Trusts of this sort are said by Lord Hardwicke to arise in three cases: first, where the estate is purchased in the name of one person, but the money paid for it is the property of another; secondly, where a conveyance is made in trust, declared only as to part, and the residue remains undisposed of, nothing being declared respecting it; and, thirdly, in certain cases of fraud.[2] Other divisions have been suggested;[3] but they all seem to be reducible to these three heads. In all these cases, it seems now to be generally conceded that parol evidence, though received with great caution, is admissible to establish the collateral facts (not contradictory to the deed, unless in the

[3] Roberts on Frauds, pp. 251, 252; Magennis *v.* McCullogh, Gilb. Eq. 235; Natchbolt *v.* Porter, 2 Vern. 112; 4 Kent Comm. 104; 4 Cruise's Dig. p. 85 (Greenleaf's ed.), tit. 32, c. 7, §§ 5–7 (2d ed.), (1856), vol. ii, p. 413 *et seq.*; Roe *v.* Archb. of York, 6 East 86. In several of the United States, where the owner of lands which he holds by an unregistered deed is about to sell his estate to a stranger, it is not unusual for him to surrender his deed to his grantor, to be cancelled, the original grantor thereupon making a new deed to the new purchaser. This re-delivery is allowed to have the practical effect of a surrender, or reconveyance of the estate, the first grantee and those claiming under him not being permitted to give parol evidence of the contents of the deed, thus surrendered and destroyed with his consent, with a view of passing a legal title to his own alienee: Farrar *v.* Farrar, 4 N. H. 191; Com. *v.* Dudley, 10 Mass. 403; Holbrook *v.* Tirrell, 9 Pick. 105; Barrett *v.* Thorndike, 1 Greenl. 78. See 4 Cruise's Dig. tit. 32, c. 1, § 15, n. (Greenleaf's ed.) [2d ed. (1856), vol. ii, p. 300].

[4] Roberts on Frauds, pp. 259, 260.

[1] Forster *v.* Hale, 3 Ves. 696, 707, per Ld. Alvanley; 4 Kent Comm. 305; Roberts on Frauds, p. 95; 1 Cruise's Dig. (by Greenleaf) tit. 12, c. 1; §§ 36, 37, p. 390 (2d ed.) (1856), vol. i, p. 369; Lewin on Trusts, p. 30. Courts of equity will receive parol evidence, not only to explain an imperfect declaration of a testator's intentions of trust, but even to add conditions of trust to what appears a simple devise or bequest. But it must either be fairly presumable, that the testator would have made the requisite declaration, but for the undertaking of the person whom he trusted, or else it must be shown to be an attempt to create an illegal trust: Gresley on Evid. in Equity, p. 108 [292]; Strode *v.* Winchester, 1 Dick. 397. See White & Tudor's Leading Cases in Equity, vol. ii, part 1, p. 591.

[2] Lloyd *v.* Spillet, 2 Atk. 148, 150.

[3] 1 Lomax's Digest, p. 200.

cause of fraud) from which a trust may legally result; and that it makes no difference as to its admissibility whether the supposed purchaser be living or dead.[4]

§ 267. **Executors and Administrators.** Written evidence, signed by the party to be charged therewith, or by his agent, is by the same statute required in every case of contract by an executor or administrator, to answer damages out of his own estate; every promise of one person to answer for the debt, default, or miscarriage of another; every agreement made in consideration of marriage, or which is not to be performed within a year from the time of making it; and every contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them. The like evidence is also required in every case of contract for the sale of goods, for the price of £10 sterling or upwards[1] unless the buyer shall receive part of the goods at time of sale, or give something in earnest, to bind the bargain, or in part payment.[2]

§ 268. **Evidence may be collected from Several Writings.** It is not necessary that the written evidence required by the Statute of Frauds should be comprised in a single document, nor that it should be drawn up in any particular form. It is sufficient, if the contract can be plainly made out, in all its terms, from any writings of the party, or even from his correspondence. But it must all be collected from the writings; verbal testimony not being admissible to supply any defects or omissions in the written evidence.[1] For the policy of

[4] 3 Sugden on Vendors, 256–260 (10th ed.); 2 Story Eq. Jurisp. § 1201, n.; Lench *v.* Lench, 10 Ves. 517; Boyd *v.* McLean, 1 Johns. Ch. 582; 4 Kent Comm. 305; Pritchard *v.* Brown, 4 N. H. 397. See also an article in 3 Law Mag. p. 131, where the English cases on this subject are reviewed. The American decisions are collected in Mr. Rand's note to the case of Goodwin *v.* Hubbard, 15 Mass. 218. In Massachusetts, there are *dicta* apparently to the effect that parol evidence is not admissible in these cases; but the point does not seem to have been directly in judgment, unless it is involved in the decision in Bullard *v.* Briggs, 7 Pick. 533, where parol evidence was admitted. See Storer *v.* Batson, 8 Mass. 431, 442; Northampton Bank *v.* Whiting, 12 id. 104, 109; Goodwin *v.* Hubbard, 15 id. 210, 217.

[1] The sum here required is different in the several States of the Union, varying from thirty to fifty dollars. But the rule is everywhere the same. By the statute of 9 Geo. IV, c. 14, this provision of the Statute of Frauds is extended to contracts executory, for goods to be manufactured at a future day, or otherwise not in a state fit for delivery at the time of making the contract. Shares in a joint-stock company, or a projected railway, are held not to be goods or chattels, within the meaning of the statute: Humble *v.* Mitchell, 11 Ad. & El. 205; Tempest *v.* Kilner, 3 C. B. 251; Bowlby *v.* Bell, ib. 284.

[2] 2 Kent Comm. 493–495.

[1] Boydell *v.* Drummond, 11 East 142; Chitty on Contracts, pp. 314–316 (4th Am. ed.); 2 Kent Comm. 511; Roberts on Frauds, p. 121; Tawney *v.* Crowther, 3 Bro. Ch. 161, 318; 4 Cruise's Dig. (by Greenleaf) pp. 33, 35–37, tit. 32, c. 3, §§ 3, 16–26 [Greenleaf's 2d ed. (1856) vol. ii, pp. 344–351 and notes]; Cooper *v.* Smith, 15 East 103; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. 280–282; Abeel *v.* Radcliff, 13 Johns. 297; Smith *v.* Arnold, 5 Mason 414; Ide *v.* Stanton, 15 Vt. 685; Sherburne *v.* Shaw, 1 N. H. 157; Adams *v.* McMillan, 7 Port. 73; Gale *v.* Nixon, 6 Cowen 445; Meadows *v.* Meadows, 3 McCord 458; Nichols *v.* Johnson, 10 Conn. 192. Whether the Statute of Frauds, in requiring that, in certain cases, the "agreement" be proved by writing, requires that the "consideration" should be expressed in the writing, as part of the

the law is to prevent fraud and perjury, by taking all the enumerated transactions entirely out of the reach of any verbal testimony whatever. Nor is the place of signature material. It is sufficient if the vendor's name be printed, in a bill of parcels, provided the vendee's name and the rest of the bill are written by the vendor.[2] Even his signature, as a witness to a deed, which contained a recital of the agreement, has been held sufficient, if it appears that in fact he knew of the recital.[3] Neither is it necessary that the agreement or memorandum be signed by both parties, or that both be legally bound to the performance; for the statute only requires that it be signed "by the party to be charged therewith," that is, by the defendant against whom the performance or damages are demanded.[4]

§ 269. **Writings executed by Attorney.** Where the act is done by procuration, it is not necessary that the agent's authority should be in writing; except in those cases where, as in the first section of the statute of 29 Car. II, c. 3, it is so expressly required. These excepted cases are understood to be those of an actual conveyance, not of a contract to convey; and it is accordingly held, that though the agent to make a deed must be authorized by deed, yet the agent to enter into an agreement to convey is sufficiently authorized by parol only.[1] An auctioneer is regarded as the agent of both parties, whether the subject of the sale be lands or goods; and if the whole contract can be made out from the memorandum and entries signed by him, it is sufficient to bind them both.[2]

agreement, is a point which has been much discussed, and upon which the English and some American cases are in direct opposition. The English Courts hold the affirmative. See Wain *v.* Warlters, 5 East 10, reviewed and confirmed in Saunders *v.* Wakefield, 4 B. & Ald. 595; and their construction has been followed in New York, Sears *v.* Brink, 3 Johns. 210; Leonard *v.* Vredenburg, 8 id. 29. In New Hampshire, in Neelson *v.* Sanborne, 2 N. H. 413, the same construction seems to be recognized and approved. But in Massachusetts, it was rejected by the whole Court, upon great consideration, in Packard *v.* Richardson, 17 Mass. 122. So in Maine, Levy *v.* Merrill, 4 Greenl. 180; in Connecticut, Sage *v.* Wilcox, 6 Conn. 81; in New Jersey, Buckley *v.* Beardslee, 2 South. 570; and in North Carolina, Miller *v.* Irvine, 1 Dev. & Batt. 103; and now in South Carolina, Fyler *v.* Givens, Riley's Law Cas. pp. 56, 62, overruling Stephens *v.* Winn, 2 N. & McC. 372, n.; Woodward *v.* Pickett, Dudley 30. See also Violett *v.* Patton, 5 Cranch 142; Taylor *v.* Ross, 3 Yerg. 330; 3 Kent Comm. 122; 2 Stark. Evid. 350 (6th Am. ed.).

[2] Saunderson *v.* Jackson, 2 B. & P. 238, as explained in Champion *v.* Plummer, 1 N. R. 254; Roberts on Frauds, pp. 124, 125; Penniman *v.* Hartshorn, 13 Mass. 87.

[3] Welford *v.* Beezely, 1 Ves. 6; s. c. 1 Wils. 118. The same rule, with its qualification, is recognized in the Roman law, as applicable to all subscribing witnesses, except those whose official duty obliges them to subscribe, such as notaries, &c. Menochius, De Præsump. lib. 3; Præsump. 66, *per tot.*

[4] Allen *v.* Bennet, 3 Taunt. 169; 3 Kent Comm. 510, and cases there cited; Shirley *v.* Shirley, 7 Blackf. 452; Davis *v.* Shields, 26 Wend. 341; Douglass *v.* Spears, 2 N. & McC. 207.

[1] Story on Agency, § 50; Coles *v.* Trecothick, 9 Ves. 250; Clinan *v.* Cooke, 1 Sch. & Lef. 22; Roberts on Frauds, p. 113, n. (54). If an agent, having only a verbal authority, should execute a bond in the name of his principal, and afterwards, he be regularly constituted by letter of attorney, bearing date prior to that of the deed, this is a subsequent ratification, operating by estoppel against the principal, and rendering the bond valid in law: Milliken *v.* Coombs, 1 Greenl. 343; and see Ulen *v.* Kittredge, 7 Mass. 233.

[2] Emmerson *v.* Heelis, 2 Taunt. 38; White *v.* Proctor, 4 id. 209; Long on Sales,

§ 270. **Meaning of the Word "Lands."** The word *lands*, in this statute, has been expounded to include every claim of a permanent right to hold the lands of another, for a particular purpose, and to enter upon them at all times, without his consent. It has accordingly been held, that a right to enter upon the lands of another, for the purpose of erecting and keeping in repair a milldam embankment, and canal, to raise water for working a mill, is an interest in land, and cannot pass but by deed or writing.[1] But where the interest is vested in a corporation, and not in the individual corporators, the shares of the latter in the stock of the corporation are deemed personal estate.[2]

§ 271. The main difficulties under this head have arisen in the application of the principle to cases where the subject of the contract is trees, growing crops, or other things annexed to the freehold. It is well settled that a contract for the sale of fruits of the earth, ripe, but not yet gathered, is not a contract for any interest in lands and so not within the Statute of Frauds, though the vendee is to enter and gather them.[1] And subsequently it has been held, that a contract for the sale of a crop of potatoes was essentially the same, whether they were covered with earth in a field, or were stored in a box; in either case, the subject-matter of the sale, namely, potatoes, being but a personal chattel, and so not within the Statute of Frauds.[2] The latter cases confirm the doctrine involved in this decision, namely, that the transaction takes its character of realty or personalty from the principal subject-matter of the contract, and the intent of the parties; and that, therefore, a sale of any growing produce of the earth, reared by labor and expense, in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in or concerning land.[3] In regard to things produced annually by the labor of man, the question is sometimes solved by reference to the law of emblements; on the ground, that whatever will go to the executor, the tenant being dead, cannot be considered as an interest in land.[4] But

p. 38 (Rand's ed.); Story on Agency, § 27, and cases there cited; Cleaves *v.* Foss, 4 Greenl. 1; Roberts on Frauds, pp. 113, 114, n. (56); 2 Stark. Evid. 352 (6th Am. ed.); Davis *v.* Robertson, 1 Mills (S. C.) 71; Adams *v.* McMillan, 7 Port. 73; 4 Cruise's Dig. tit. 32, c. 3, § 7, n. (Greenleaf's ed.) [2d ed. (1856) vol. ii, p. 346.]

[1] Cook *v.* Stearns, 11 Mass. 533.

[2] Bligh *v.* Brent, 2 Y. & Col. 268, 295, 296; Bradley *v.* Holdsworth, 3 M. & W. 422.

[1] Parker *v.* Staniland, 11 East 362; Cutler *v.* Pope, 1 Shepl. 377.

[2] Warwick *v.* Bruce, 2 M. & S. 205. The contract was made on the 12th of October, when the crop was at its maturity; and it would seem that the potatoes were forthwith to be digged and removed.

[3] Evans *v.* Roberts, 5 B. & C. 829; Jones *v.* Flint, 10 Ad. & El. 753.

[4] See observations of the learned judges, in Evans *v.* Roberts, 5 B. & C. 829. See also Rodwell *v.* Phillips, 9 M. & W. 501, where it was held, that an agreement for the sale of growing *pears* was an agreement for the sale of an interest in land, on the principle, that the fruit would not pass to the executor, but would descend to the heir. The learned Chief Baron distinguished this case from Smith *v.* Surman, 9 B. & C. 561, the

the case seems also to be covered by a broader principle of distinction, namely, between contracts conferring an exclusive right to the land for a time, for the purpose of making a profit of the growing surface, and contracts for things annexed to the freehold, in prospect of their immediate separation; from which it seems to result, that where timber, or other produce of the land, or any other thing annexed to the freehold, is specifically sold, whether it is to be severed from the soil by the vendor, or to be taken by the vendee, under a special license to enter for that purpose, it is still, in the contemplation of the parties, evidently and substantially a sale of goods only, and so is not within the statute.[5]

latter being the case of a sale of growing timber by the foot, and so treated by the parties as if it had been actually felled, — a distinction which confirms the view subsequently taken in the text.

[5] Roberts on Frauds, p. 126; 4 Kent Comm. 450, 451; Long on Sales (by Rand), pp. 76–81, and cases there cited; Chitty on Contracts, p. 241 (2d ed.); Bank of Lansingburg *v.* Crary, 1 Barb. 542. On this subject neither the English nor the American decisions are quite uniform; but the weight of authority is believed to be as stated in the text, though it is true of the former, as Ld. Abinger remarked in Rodwell *v.* Phillips, 9 M. & W. 505, that "no general rule is laid down in any one of them, that is not contradicted by some others." See also Poulter *v.* Killingbeck, 1 B. & P. 398; Parker *v.* Staniland, 11 East 362, distinguishing and qualifying Crosby *v.* Wadsworth, 6 id. 611; Smith *v.* Surman, 9 B. & C. 561; Watts *v.* Friend, 10 id. 446. The distinction taken in Bostwick *v.* Leach, 3 Day 476, 484, is this, that when there is a sale of property, which would pass by a deed of land, as such, without any other description, if it can be separated from the freehold, and by the contract is to be separated, such contract is not within the statute. See, accordingly, Whipple *v.* Foot, 2 Johns. 418, 422; Frear *v.* Hardenbergh, 5 id. 276; Stewart *v.* Doughty, 9 id. 108, 112; Austin *v.* Sawyer, 9 Cowen 39; Erskine *v.* Plummer, 7 Greenl. 447; Bishop *v.* Doty, 1 Vt. 38; Miller *v.* Baker, 1 Met. 27; Whitmarsh *v.* Walker, ib. 313; Claflin *v.* Carpenter, 4 Met. 580. Mr. Rand, who has treated this subject, as well as all others on which he has written, with great learning and acumen, would reconcile the English authorities, by distinguishing between those cases in which the subject of the contract, being part of the inheritance, is to be severed aud delivered by the vendor, as a chattel, and those in which a right of entry by the vendee to cut and take it is bargained for. "The authorities," says he, "all agree in this, that a bargain for trees, grass, crops, or any such like thing, when severed from the soil, which are growing, at the time of the contract, upon the soil, but to be severed and delivered by the vendor, as chattels, separate from any interest in the soil, is a contract for the sale of goods, wares, or merchandise, within the meaning of the seventeenth section of the Statute of Frauds (Smith *v.* Surman, 9 B. & C. 561; Evans *v.* Roberts, 5 id. 836; Watts *v.* Friend, 10 id. 446; Parker *v.* Staniland, 11 East 362; Warwick *v.* Bruce, 2 M. & S. 205). So, where the subject-matter of the bargain is *fructus industriales*, such as corn, garden-roots, and such like things, which are emblements, and which have already grown to maturity, and are to be taken immediately, and no right of entry forms absolutely part of the contract, but a mere license is given to the vendee to enter and take them, it will fall within the operation of the same section of the statute (Warwick *v.* Bruce, 2 M. & S. 205; Parker *v.* Staniland, 11 East 362; Parke, B., Carrington *v.* Roots, 2 M. & W. 256; Bayley, B., Shelton *v.* Livius, 2 Tyrw. 427, 429; Bayley, J., Evans *v.* Roberts, 5 B. & C. 831; Scorell *v.* Boxall, 1 Y. & J. 398; Mayfield *v.* Wadsley, 3 B. & C. 357). But where the subject-matter of the contract constitutes a part of the inheritance, and is not to be severed and delivered by the vendor as a chattel, but a right of entry to cut and take it is bargained for, or where it is emblements growing, and a right in the soil to grow and bring them to maturity, and to enter and take them, that makes part of the bargain, the case will fall within the fourth section of the Statute of Frauds (Carrington *v.* Roots, 2 M. & W. 257; Shelton *v.* Livius, 2 Tyrw. 429; Scorell *v.* Boxall, 1 Y. & J. 398; Earl of Falmouth *v.* Thomas, 1 Cr. & M. 89; Teal *v.* Auty, 2 B. & Bing. 99; Emmerson *v.* Heelis, 2 Taunt. 38; Waddington *v.* Bristow, 2 B. & P. 452; Crosby *v.* Wadsworth, 6 East 602)." See Long on Sales (by Rand),

§ 272. **Devises of Lands and Tenements.** Devises of lands and tenements are also required to be in writing, signed by the testator, and attested by credible, that is, by competent witnesses. By the statutes 32 Hen. VIII, c. 1, and 34 & 35 Hen. VIII, c. 5, devises were merely required to be in writing. The Statute of Frauds, 29 Car. II, c. 3, required the attestation of "three or four credible witnesses;" but the statute 1 Vict. c. 26, has reduced the number of witnesses to two. The provisions of the Statute of Frauds on this subject have been adopted in most of the United States.[1] It requires that the witnesses should attest and subscribe the will in the testator's presence. The attestation of marksmen is sufficient; and, if they are dead, the attestation may be proved by evidence, that they lived near the testator, that no others of the same name resided in the neighborhood, and that they were illiterate persons.[2] One object of this provision is, to prevent the substitution of another instrument for the genuine will. It is therefore held, that to be present, within the meaning of the statute, though the testator need not be in the same room, yet he must be near enough to see and identify the instrument, if he is so disposed, though in truth he does not attempt to do so; and that he must have mental knowledge and consciousness of the fact.[3] If he be in a state of insensibility at the moment of attestation, it is void.[4] Being in the same room is held *prima facie* evidence of an attestation in his presence, as an attestation, not made in the same room, is *prima facie* not an attestation in his presence.[5] It is not necessary, under the Statute of Frauds, that the witnesses should attest in the presence of each other, nor that they should all attest at the same time;[6] nor is it requisite

pp. 80, 81. But the later English and the American authorities do not seem to recognize such distinction.

[1] In New Hampshire alone the will is required to be sealed. Three witnesses are necessary to a valid will in Vermont, New Hampshire, Maine, Massachusetts, Rhode Island, Connecticut, New Jersey, Maryland, South Carolina, Georgia, Florida, Alabama, and Mississippi. Two witnesses only are requisite in New York, Delaware, Virginia, Ohio, Illinois, Indiana, Missouri, Tennessee, North Carolina, Michigan, Wisconsin, Arkansas, and Kentucky. In some of the States, the provision as to attestation is more special. In Pennsylvania, a devise is good, if properly signed, though it is not subscribed by any attesting witness, provided it can be proved by two or more competent witnesses; and if it be attested by witnesses, it may still be proved by others: 4 Kent Comm. 514. See *post*, Vol. II, tit. Wills [7th ed. (1858) §§ 673–678. and notes]. See further, as to the execution of Wills, 6 Cruise's Dig. tit. 38, c. 5. Greenleaf's notes [2d ed. (1857) pp. 47–80, and notes]; 1 Jarman on Wills, c. 6, by Perkins.

[2] Doe *v.* Caperton, 9 C. & P. 112; Jackson *v.* Van Dusen, 5 Johns. 144; Doe *v.* Davis, 11 Jur. 182.

[3] Shires *v.* Glascock, 2 Salk. 688 (by Evans), and cases cited in notes; 4 Kent Comm. 515, 516; Casson *v.* Dade, 1 Bro. Ch. 99; Doe *v.* Manifold, 1 M. & S. 294; Tod *v.* E. of Winchelsea, 1 M. & M. 12; 2 C. & P. 488; Hill *v.* Barge, 12 Ala. 687.

[4] Right *v.* Price, Doug. 241.

[5] Neil *v.* Neil, 1 Leigh 6, 10–21, where the cases on this subject are ably reviewed by Carr, J. If the two rooms have a communication by folding-doors, it is still to be ascertained whether, in fact, the testator could have seen the witnesses in the act of attestation: In the Goods of Colman, 3 Curt. 118.

[6] Cook *v.* Parsons, Prec. in Chan. 184; Jones *v.* Lake, 2 Ath. 177, in n.; Grayson

that they should actually have seen the testator sign, or known what the paper was, provided they subscribed the instrument in his presence and at his request.[7] Neither has it been considered necessary, under this statute, that the testator should subscribe the instrument, it being deemed sufficient that it be signed by him in any part, with his own name or mark, provided it appear to have been done *animo perficiendi*, and to have been regarded by him as completely executed.[8] Thus, where the will was signed in the margin only, or where, being written by the testator himself, his name was written only in the beginning of the will, I, A. B., &c., this was held a sufficient signing.[9] But where it appeared that the testator intended to sign each several sheet of the will, but signed only two of them, being unable, from extreme weakness, to sign the others, it was held incomplete.[10]

v. Atkinson, 2 Ves. 455 ; Dewey *v.* Dewey, 1 Met. 349 ; 1 Williams on Executors (by Troubat), p. 46, n. (2). The statute of 1 Vict. c. 26, § 9, has altered the law in this respect, by enacting that no will shall be valid unless it be in writing, signed by the testator in the presence of two witnesses at one time. See Moore *v.* King, 3 Curt. 243 ; In the Goods of Simmonds, ib. 79.

[7] White *v.* Trustees of the British Museum, 6 Bing. 310; Wright *v.* Wright, 7 Bing. 457 ; Dewey *v.* Dewey, 1 Met. 349 ; Johnson *v.* Johnson, 1 C. & M. 140. In these cases, the Court certainly seem to regard the knowledge of the witnesses, that the instrument was a will, as a matter of no importance ; since in the first two cases only one of the witnesses knew what the paper was. But it deserves to be considered whether, in such case, the attention of the witness would probably be drawn to the state of the testator's mind, in regard to his sanity ; for if not, one object of the statute would be defeated. See Rutherford *v.* Rutherford, 1 Den. 33 ; Brinkerhoof *v.* Remsen, 8 Paige 488 ; 26 Wend. 325 ; Chaffee *v.* Baptist Miss. Convention, 10 Paige 85 ; 1 Jarm. on Wills (by Perkins), p. 114 ; 6 Cruise's Dig. tit. 38, c. 5, § 14, n. (Greenleaf's ed.), 2d ed. (1857), vol. iii, p. 53, and n. See further, as to proof by subscribing witnesses, *infra*, §§ 569, 569 *a*, 572.

[8] That the party's *mark* or *initials* is a sufficient signature to any instrument, being placed there with intent to bind himself, in all cases not otherwise regulated by statute, see Baker *v.* Dening, 8 Ad. & El. 94 ; Jackson *v.* Van Dusen, 5 Johns. 144 ; Palmer *v.* Stephens, 1 Den. 471, and the cases cited in 6 Cruise's Dig. tit. 38, c. 5, §§ 7, 19, notes (Greenleaf's ed.), 2d ed. (1857), vol. iii, pp. 50–56 ; *post*, vol. ii, § 677.

[9] Lemayne *v.* Stanley, 3 Lev. 1 ; Morison *v.* Turnour, 18 Ves. 183. But this also is now changed by the statute 1 Vict. c. 26, § 9, by which no will is valid unless it be signed at the foot or end thereof, by the testator, or by some other person, in his presence and by his direction ; as well as attested by two witnesses, subscribing their names in his presence : see In the Goods of Carver, 3 Curt. 29.

[10] Right *v.* Price, Doug. 241. The Statute of Frauds, which has been generally followed in the United States, admitted exceptions in favor of nuncupative or verbal wills, made under certain circumstances therein mentioned, as well as in favor of parol testamentary dispositions of personalty, by soldiers in actual service, and by mariners at sea ; any further notice of which would be foreign from the plan of this treatise. The latter exceptions still exist in England ; but nuncupative wills seem to be abolished there, by the general terms of the statute of 1 Vict. c. 26, § 9, before cited. The common law, which allows a bequest of personal estate by parol, without writing, has been altered by statute in most, if not all, of the United States ; the course of legislation having tended strongly to the abolition of all distinctions between the requisites for the testamentary disposition of real and of personal property. See 4 Kent Comm. 516–520 ; Lovelass on Wills, pp. 315–319 ; 1 Williams on Executors (by Troubat), pp. 46–48, notes ; 1 Jarman on Wills (by Perkins), p. [90] 132, n. ; 6 Cruise's Dig. (by Greenleaf), tit. 38, c. 5, § 14, n., 2d ed. (1857), vol. iii, p. 53, and note. See also *post*, vol. ii, § 674 *et seq.*

§ 273. **Revocation of Wills.** By the Statute of Frauds, the revocation of a will, by the direct act of the testator, must be proved by some subsequent will or codicil, inconsistent with the former, or by some other writing, declaring the same, and signed in the presence of three witnesses, or by burning, tearing, cancelling, or obliterating the same by the testator, or in his presence, and by his direction and consent.[1] It is observable that this part of the statute only requires that the instrument of revocation, if not a will or codicil, be signed by the testator in presence of the witnesses, but it does not, as in the execution of a will, require that the witnesses should sign in his presence. In regard to the other acts of revocation here mentioned, they operate by one common principle; namely, the intent of the testator. Revocation is an act of the mind, demonstrated by some outward and visible sign or symbol of revocation;[2] and the words of the statute are satisfied by any act of spoliation, reprobation, or destruction, deliberately done upon the instrument, *animo revocandi*.[3] The declarations of the testator, accompanying the act, are of course admissible in evidence as explanatory of his intention.[4] Accordingly, where the testator rumpled up his will and threw it into the fire with intent to destroy it, though it was saved entire without his knowledge, this was held to be a revocation.[5] So, where he tore off a superfluous seal.[6] But where, being angry with the devisee, he began to tear his will, but being afterwards pacified, he fitted the pieces carefully together, saying he was glad it was no worse, this was held to be no revocation.[7]

§ 274. **Apprenticeship.** Documentary evidence is also required in proof of the contract of apprenticeship; there being no legal binding, to give the master coercive power over the person of the apprentice, unless it be by indentures, duly executed in the forms prescribed by the various statutes on this subject. The general features of the English statutes of apprenticeship, so far as the mode of binding is concerned, will be found in those of most of the United States. There are various other cases, in which a deed, or other documentary evidence, is required by statutes, a particular enumeration of which would be foreign from the plan of this treatise.[1]

[1] Stat. 29 Car. II, c. 3, § 6. The statute of 1 Vict. c. 26, § 20, mentions "burning, tearing, or otherwise destroying the same," &c. And see further, as to the evidence of revocation, 6 Cruise's Dig. (by Greenleaf), tit. 38, c. 6, §§ 18, 19, 29, notes [2d ed. (1857) vol. iii, p. 81 *et seq.*; 2 Greenl. Evid. (7th ed.) §§ 680–687]; 1 Jarman on Wills (by Perkins), c. 7, § 2, notes.

[2] Bibb *v.* Thomas, 2 W. Bl. 1043.

[3] Burtenshaw *v.* Gilbert, Cowp. 49, 52; Burns *v.* Burns, 4 S. & R. 567; 6 Cruise's Dig. (by Greenleaf) tit. 38, c. 6, § 54; Johnson *v.* Brailsford, 2 Nott & McC. 272; Winsor *v.* Pratt, 2 B. & B. 650; Lovelass on Wills, pp. 346–350; Card *v.* Grinman, 5 Conn. 168; 4 Kent Comm. 531, 532.

[4] Dan *v.* Brown, 4 Cowen 490.

[5] Bibb *v.* Thomas, 2 W. Bl. 1043.

[6] Avery *v.* Pixley, 4 Mass. 462.

[7] Doe *v.* Perkes, 3 B. & Ald. 489.

[1] In several of the United States, two subscribing witnesses are necessary to the

§ 329. **Disqualification, as Witnesses, of Parties to the Record.** And, first, in regard to parties, the general rule of the common law is, that a party to the record, in a civil suit, cannot be a witness either for himself, or for a co-suitor in the cause.[1] The rule of the Roman law was the same. "Omnibus in re propria dicendi testimonii facultatem jura submoverunt."[2] This rule of the common law is founded, not solely in the consideration of interest, but partly also in the general expediency of avoiding the multiplication of temptations to perjury. In some cases at law, and generally by the course of proceedings in equity, one party may appeal to the conscience of the other, by calling him to answer interrogatories upon oath. But this act of the adversary may be regarded as an emphatic admission, that, in that instance, the party is worthy of credit, and that his known integrity is a sufficient guaranty against the danger of falsehood. But where the party would volunteer his own oath, or a co-suitor, identified in interest with him, would offer it, this reason for the admission of the evidence totally fails; "and it is not to be presumed that a man, who complains without cause, or defends without justice, should have honesty enough to confess it."[3]

§ 330. The rule of the common law goes still further in regard to parties to the record in not compelling them, in trials by jury, to give evidence for the opposite party, against themselves, either in civil or in criminal cases. Whatever may be said by theorists, as to the policy of the maxim, *Nemo tenetur seipsum prodere*, no inconvenience has been felt in its practical application. On the contrary, after centuries of experience, it is still applauded by judges, as, "a rule founded in good sense and sound policy;"[1] and it certainly preserves the party from temptation to perjury. This rule extends to all the actual and real parties to the suit, whether they are named on the record as such or not.[2]

§ 331. **Corporators.** Whether *corporators* are parties within the meaning of this rule is a point not perfectly clear. Corporations, it is to be observed, are classed into public or municipal, and private, corporations. The former are composed of all the inhabitants of any of the local or territorial portions into which the country is divided in its political organization. Such are counties, towns, boroughs,

execution of a deed of conveyance of lands to entitle it to registration; in others, but one. In some others, the testimony of two witnesses is requisite, when the deed is to be proved by witnesses. See *supra*, § 260, n.; 4 Cruise's Dig. tit. 32, c. 2, § 77, n. (Greenleaf's ed.), 2d ed. (1856) vol. ii, p. 341; 4 Kent Comm. 457. See also *post*, vol. ii, tit. Wills, *passim*, where the subject of Wills is more amply treated.

[1] 3 Bl. Comm. 371; 1 Gilb. Evid. by Lofft, 221; Frear *v.* Evertson, 20 Johns. 142.

[2] Cod. lib. 4, tit. 20, l. 10. Nullus idoneus testis in re sua intelligitur: Dig. lib. 22, tit. 5, l. 10.

[3] 1 Gilb. Evid. by Lofft, p. 243.

[1] Worrall *v.* Jones, 7 Bing. 395, per Tindal, C. J.; R. *v.* Woburn, 10 East 403, per Lord Ellenborough, C. J.; Commonwealth *v.* Marsh, 10 Pick. 57; *post*, § 353.

[2] R. *v.* Woburn, 10 East 395; Mauran *v.* Lamb, 7 Cowen, 174; Appleton *v.* Boyd, 7 Mass. 131; Fenn *v.* Granger, 3 Camp. 177.

local parishes, and the like. In these cases, the attribute of individuality is conferred on the entire mass of inhabitants, and again is modified, or taken away, at the mere will of the legislature, according to its own views of public convenience, and without any necessity for the consent of the inhabitants, though not ordinarily against it. They are termed *quasi* corporations; and are dependent on the public will, the inhabitants not, in general, deriving any private and personal rights under the act of incorporation; its office and object being not to grant private rights, but to regulate the manner of performing public duties.[1] These corporations sue and are sued by the name of "the Inhabitants of" such a place; each inhabitant is directly liable in his person to arrest, and in his goods to seizure and sale, on the execution, which may issue against the collective body, by that name; and of course each one is a party to the suit; and his admissions, it seems, are receivable in evidence, though their value, as we have seen, may be exceedingly light.[2] Being parties, it would seem naturally to follow, that these inhabitants were neither admissible as witnesses for themselves, nor compellable to testify against themselves; but considering the public nature of the suits, in which they are parties, and of the interest generally involved in them, the minuteness of the private and personal interest concerned, its contingent character, and the almost certain failure of justice, if the rule were carried out to such extent in its application, these inhabitants are admitted as competent witnesses in all cases, in which the rights and liabilities of the corporation only are in controversy. But where the inhabitants are individually and personally interested, it is otherwise.[3]

[1] Angell & Ames on Corp. 16, 17; Rumford *v.* Wood, 13 Mass. 192. The observations in the text are applied to American corporations of a political character. Whether a municipal corporation can in every case be dissolved by an act of the legislature, and to what extent such act of dissolution may constitutionally operate, are questions which it is not necessary here to discuss. See Willcock on Municipal Corporations, pt. 1, § 852; Terrett *v.* Taylor, 9 Cranch 43, 51; Dartmouth College *v.* Woodward, 4 Wheat. 518, 629, 663.

[2] *Supra*, § 175, and n.

[3] Swift's Evid. 57; R. *v.* Mayor of London, 2 Lev. 231. Thus an inhabitant is not competent to prove a way by prescription for all the inhabitants: Odiorne *v.* Wade, 8 Pick. 518; nor a right in all the inhabitants to take shell-fish: Lufkin *v.* Haskell, 3 Pick. 356; for in such cases, by the common law, the record would be evidence of the custom, in favor of the witness. This ground of objection, however, is now removed in England, by Stat. 3 & 4 W. IV, c. 42. The same principle is applied to any private, joint, or common interest: Parker *v.* Mitchell, 11 Ad. & El. 788. See also Prewit *v.* Tilly, 1 C. & P. 140; Ang. & Ames on Corp. 390–394; Connecticut *v.* Bradish, 14 Mass. 296; Gould *v.* James, 6 Cowen 369; Jacobson *v.* Fountain, 2 Johns. 170; Weller *v.* Governors of the Foundling Hospital, Peake 153; *infra*, § 405. In the English courts, a distinction is taken between *rated* and *ratable* inhabitants, the former being held inadmissible as witnesses, and the latter being held competent; and this distinction has been recognized in some of our own Courts; though, upon the grounds stated in the text, it does not seem applicable to our institutions, and is now generally disregarded. See Com. *v.* Baird, 4 S. & R. 141; Falls *v.* Belknap, 1 Johns. 486, 491; Corwein *v.* Hames, 11 id. 76; Bloodgood *v.* Jamaica, 12 id. 285; *supra*, § 175, n., and the cases above cited. But in England, rated inhabitants are now by statutes made competent witnesses on indictments for non-repair of bridges in actions against the hundred, under the statute of Winton; in actions for riotous assemblies; in actions against church-wardens for misapplication of funds; in summary convictions under 7 &

Whether this exception to the general rule was solely created by the statutes, which have been passed on this subject, or previously existed at common law, of which the statutes are declaratory, is not perfectly agreed.[4] In either case, the general reason and necessity, on which the exception is founded, seem to require, that where inhabitants are admissible as witnesses for the corporation, they should also be compellable to testify against it. But the point is still a vexed question.[5]

§ 332. *Private corporations*, in regard to our present inquiry, may be divided into two classes; namely, pecuniary or moneyed institutions, such as banks, insurance, and manufacturing companies, and the like, and institutions or societies for religious and charitable purposes. In the former, membership is obtained by the purchase of stock or shares, without the act or assent of the corporation, except prospectively and generally, as provided in its charter and by-laws; and the interest thus acquired is private, pecuniary, and vested, like ownership of any other property. In the latter, membership is conferred by special election; but the member has no private interest in the funds, the whole property being a trust for the benefit of others. But all these are equally corporations proper; and it is the corporation, and not the individual member, that is party to the record in all suits by or against it.[1] Hence it follows that the declarations of the members are not admissible in evidence in such actions as the declarations of parties,[2] though where a member or an officer is an

8 Geo. IV, c. 29, 30; on the trial of indictments under the general highway act and the general turnpike act; and in matters relating to rates and cesses: Phil. & Am. on Evid. 133–138, 395; 1 Phil. Evid. 138–144. In the Province of New Brunswick, rated inhabitants are now made competent witnesses in all cases where the town or parish may in any manner be affected, or where it may be interested in a pecuniary penalty, or where its officers, acting in its behalf, are parties: Stat. 9 Vict. c. 4, March 7, 1846. In several of the United States, also, the inhabitants of counties and other municipal, territorial, or *quasi* corporations are expressly declared by statutes to be competent witnesses, in all suits in which the corporation is a party. See Maine, Rev. Stat. 1840, c. 115, § 75; Massachusetts, Rev. Stat. c. 94, § 54; Vermont, Rev. Stat. 1839, c. 31, § 18; New York, Rev. Stat. vol. i, pp. 408, 439 (3d ed.); Pennsylvania, Dunl. Dig. pp. 215, 913, 1019, 1165; Michigan, Rev. Stat. 1846, c. 102, § 81; Wisconsin, Rev. Stat. 1849, c. 10, § 21; ib. c. 98, § 49; Virginia, Rev. Stat. 1849, c. 176, § 17; Missouri, Rev. Stat. 1845, c. 34, art. 1, § 25. In New Jersey, they are admissible in suits for moneys to which the county or town is entitled: Rev. Stat. 1846, tit. 34, c. 9, § 5. See Stewart *v.* Saybrook, Wright 374; Barada *v.* Carondelet, 8 Mo. 644.

[4] *Supra*, § 175, and the cases cited in note. See also Phil. & Am. on Evid. p. 395, n. (2); 1 Phil. Evid. 375; City Council *v.* King, 4 McCord 487; Marsden *v.* Stansfield, 7 B. & C. 815; R. *v.* Kirdford, 2 East 559.

[5] In R. *v.* Woburn, 10 East 395, and R. *v.* Hardwick, 11 id. 578, 584, 586, 589, it was said that they were not compellable. See, accordingly, Plattekill *v.* New Paltz, 16 Johns. 305.

[1] Merchants' Bank *v.* Cook, 4 Pick. 405. It has been held in Maine, that a corporator, or shareholder in a moneyed institution, is substantially a party, and therefore is not compellable to testify where the corporation is party to the record: Bank of Oldtown *v.* Houlton, 8 Shepl. 501, Shepley, J., dissenting.

[2] City Bank *v.* Bateman, 7 Har. & Johns. 104, 109; Hartford Bank *v.* Hart, 3 Day 491, 495; Magill *v.* Kauffman, 4 S. & R. 317; Stewart *v.* Huntingdon Bank, 11 S. &

agent of the corporation, his declarations may be admissible, as part of the *res gestæ*.[3]

§ 333. **Corporators excluded from Interest.** But the members or stockholders, in institutions created for private emolument, though not parties to the record, are not therefore admissible as witnesses; for, in matters in which the corporation is concerned, they of course have a direct, certain, and vested interest which necessarily excludes them.[1] Yet the members of charitable and religious societies, having no personal and private interest in the property holden by the corporation, are competent witnesses in any suit in which the corporation is a party. On this ground, a mere trustee of a savings bank, not being a stockholder or a depositor,[2] and a trustee of a society for the instruction of seamen,[3] and trustees of many other eleemosynary institutions, have been held admissible witnesses in such suits. But where a member of a private corporation is inadmissible as a witness generally, he may still be called upon to produce the corporate documents, in an action against the corporation; for he is a mere depositary, and the party objecting to his competency is still entitled to inquire of him concerning the custody of the documents.[4] And if the trustee, or other member of an eleemosynary corporation, is liable

R. 267; Atlantic Ins. Co. *v.* Conard, 4 Wash. C. C. 663, 677; Fairfield Co. Turnpike Comp. *v.* Thorp, 13 Conn. 173.

[3] *Supra*, §§ 108, 113, 114.

[1] This rule extends to the members of all corporations, having a common fund distributable among the members, and in which they therefore have a private interest; the principle of exclusion applying to all cases where that private interest would be affected: Doe d. Mayor and Burgesses of Stafford *v.* Tooth, 3 Younge & Jer. 19; City Council *v.* King, 4 McCord 487, 488; Davies *v.* Morgan, 1 Tyrwh. 457. Where a corporation would examine one of its members as a witness, he may be rendered competent, either by a sale of his stock or interest, where membership is gained or lost in that way; or by being disfranchised; which is done by an information in the nature of a *quo warranto* against the member, who confesses the information, on which the plaintiff obtains judgment to disfranchise him: Mayor of Colchester *v.* ——, 1 P. Wms. 595. Where the action is against the corporation for a debt, and the stockholders are by statute made liable for such debt, and their property is liable to seizure upon the execution issued against the corporation, a member, once liable, remains so, notwithstanding his alienation of stock or disfranchisement, and therefore is not a competent witness for the corporation in such action: Mill-Dam Foundry *v.* Hovey, 21 Pick. 453. But where his liability to the execution issued against the corporation is not certain, but depends on a special order to be granted by the Court, in its discretion, he is a competent witness: Needham *v.* Law, 12 M. & W. 560. The clerk of a corporation is a competent witness to identify its books and verify its records, although he be a member of the corporation and interested in the suit: Wiggin *v.* Lowell, 8 Met. 301. In several of the United States, however, the members of private corporations are made competent witnesses by express statutes; and in others, they are rendered so by force of general statutes, removing the objection of interest from all witnesses: *supra*, § 331.

[2] Middletown Savings Bank *v.* Bates, 11 Conn. 519.

[3] Miller *v.* Mariner's Church, 7 Greenl. 51. See also Anderson *v.* Brock, 3 id. 243; Wells *v.* Lane, 8 Johns. 462; Gilpin *v.* Vincent, 9 id. 219; Nayson *v.* Thatcher, 7 Mass. 398; Cornwell *v.* Isham, 1 Day 35; Richardson *v.* Freeman, 6 Greenl. 57; Weller *v.* Foundling Hospital, Peake 153.

[4] R. *v.* Netherthong, 2 M. & S. 337; Willcock on Municipal Corp. 309; Wiggin *v.* Lowell, 8 Met. 301.

to costs, this is an interest which renders him incompetent, even though he may have an ultimate remedy over.[5]

. . . . . .

§ 347. **Parties Disqualified.** The rule, excluding parties from being witnesses, applies to all cases where the party has any interest at stake in the suit, although it be only a liability to costs. Such is the case of a *prochein ami*,[1] a guardian, an executor or administrator, and so also of trustees and the officers of corporations, whether public or private, wherever they are liable in the first instance for the costs, though they may have a remedy for reimbursement out of the public or trust funds.[2]

§ 348. **Parties may testify in certain excepted Cases.** But to the general rule, in regard to parties, there are some exceptions in which the party's own oath may be received as competent testimony. One class of these exceptions, namely, that in which the oath *in litem* is received, has long been familiar in courts administering remedial justice, according to the course of the Roman law, though in the common-law tribunals its use has been less frequent and more restricted. The oath *in litem* is admitted in two classes of cases: first, where it has been already proved that the party against whom it is offered has been guilty of some fraud or other tortious and unwarrantable act of intermeddling with the complainant's goods, and no other evidence can be had of the amount of damages; and, secondly, where, on general grounds of public policy, it is deemed essential to the purposes of justice.[1] An example of the former class is given in the case of the bailiffs, who, in the service of an execution, having discovered a sum of money secretly hidden in a wall, took it away and embezzled it, and did great spoil to the debtor's goods; for which they were holden not only to refund the money, but to make good such other damage as the plaintiff would swear he had sustained.[2]

[5] R. *v.* St. Mary Magdalen Bermondsey, 3 East 7.

[1] In Massachusetts, by force of the statutes respecting costs, a *prochein ami* is not liable to costs, Crandall *v.* Slaid, 11 Met. 288; and would therefore seem to be a competent witness. And by Stat. 1839, c. 107, § 2, an executor, administrator, guardian, or trustee, though a party, if liable only to costs, is made competent to testify to any matter known to him, "before he assumed the trust of his appointment." In Virginia, any such trustee is admissible as a witness, generally, provided some other person shall first stipulate in his stead for the costs to which he may be liable: Rev. Stat. 1849, c. 176, § 18.

[2] Hopkins *v.* Neal, 2 Stra. 1026; James *v.* Hatfield, 1 id. 548; 1 Gilb. Evid. by Lofft, p. 225; R. *v.* St. Mary Magdalen Bermondsey, 3 East 7; Whitmore *v.* Wilks, 1 Mood. & M. 220, 221; Gresley on Evid. 242, 243, 244; Bellew *v.* Russel, 1 Ball & Beat. 99; Wolley *v.* Brownhill, 13 Price 513, 514, per Hullock, B.; Barret *v.* Gore, 3 Atk. 401; Fountain *v.* Coke, 1 Mod. 107; Goodtitle *v.* Welford, 1 Doug. 139. In this country, where the party to the record is, in almost every case, liable to costs in the first instance, in suits at law, he can hardly ever be competent as a witness: Fox *v.* Whitney, 16 Mass. 118, 121; Sears *v.* Dillingham, 12 Mass. 360. See also Willis on Trustees, pp. 227–229; Frear *v.* Evertson, 20 Johns. 142; Bellamy *v.* Cains, 3 Rich. 354; *supra*, § 329 and n.

[1] Tait on Evid. 280.

[2] Childrens *v.* Saxby, 1 Vern. 207; s. c. 1 Eq. Ca. Ab. 229.

So, where a man ran away with a casket of jewels, he was ordered to answer in equity, and the injured party's oath was allowed as evidence, *in odium spoliatoris*.[3] The rule is the same at law. Thus, where a shipmaster received on board his vessel a trunk of goods, to be carried to another port, but on the passage he broke open the trunk and rifled it of its contents, in an action by the owner of the goods against the shipmaster, the plaintiff, proving *aliunde* the delivery of the trunk and its violation, was held competent as a witness, on the ground of necessity, to testify to the particular contents of the trunk.[4] And, on the same principle, the bailor, though a plaintiff, has been admitted a competent witness to prove the contents of a trunk, lost by the negligence of the bailee.[5] Such evidence is admitted not solely on the ground of the just odium entertained, both in equity and at law, against spoliation, but also because, from the necessity of the case and the nature of the subject, no proof can otherwise be expected; it not being usual even for the most prudent persons, in such cases, to exhibit the contents of their trunks to strangers, or to provide other evidence of their value. For, where the law can have no force but by the evidence of the person in interest, there the rules of the common law, respecting evidence in general, are presumed to be laid aside; or rather, the subordinate are silenced by the most transcendent and universal rule, that in all cases that evidence is good, than which the nature of the subject presumes none better to be attainable.[6]

§ 349. Upon the same necessity, the party is admitted in divers other cases to prove the facts, which, from their nature, none but a party could be likely to know. But in such cases, a foundation must first be laid for the party's oath, by proving the other facts of the case down to the period to which the party is to speak. As, for example, if a deed or other material instrument of evidence is lost,

[3] Anon., cited per the Lord Keeper, in E. Ind. Co. *v.* Evans, 1 Vern. 308. On the same principle, in a case of gross fraud, chancery will give costs, to be ascertained by the party's own oath: Dyer *v.* Tymewell, 2 Vern. 122.

[4] Herman *v.* Drinkwater, 1 Greenl. 27. See also Sneider *v.* Geiss, 1 Yeates 34; Anon., *coram* Montague, B., 12 Vin. Abr. 24, Witnesses, I, pl. 34. *Sed vid.* Bingham *v.* Rogers, 6 Watts & Serg. 495. The case of Herman *v.* Drinkwater was cited and tacitly reaffirmed by the Court in Gilmore *v.* Bowden, 3 Fairf. 412; the admissibility of the party as a witness being placed on the ground of necessity. But it is to be observed that, in Herman *v.* Drinkwater, the defendant was guilty of gross fraud, at least, if not of larceny. It was on this ground of gross fraud and misconduct that the rule in this case was agreed to in Snow *v.* Eastern Railroad Co., 12 Met. 44; the Court denying its application in cases of necessity alone, and in the absence of fraud. Therefore, where an action on the case was brought by a passenger against a railway company, for the loss of his trunk by their negligence, there being no allegation or proof of fraud or tortious act, the Court held, that the plaintiff was not admissible as a witness, to testify to the contents of his trunk; ibid.; this decision, reported since the last edition of this work, is at variance with that of Clark *v.* Spence, cited in the next note.

[5] Clark *v.* Spence, 10 Watts 335; Story on Bailm. § 454, n. (3d ed.). See also, *accord*, David *v.* Moore, 2 Watts & Serg. 230; Whitesell *v.* Crane, 8 id. 369 · McGill *v.* Rowand, 3 Barr 451; County *v.* Leidy, 10 id. 45.

[6] Gilb. Evid. by Lofft, pp. 244, 245, *supra*, § 82.

it must first be proved, as we shall hereafter show, that such a document existed; after which the party's own oath may be received to the fact and circumstances of its loss, provided it was lost out of his own custody.[1] To this head of necessity may be referred the admission of the party robbed, as a witness for himself, in an action against the hundred, upon the statute of Winton.[2] So, also, in questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, and which in their nature are preliminary to the principal subject of controversy, and are addressed to the Court, the oath of the party is received.[3] Of this nature his affidavit of the materiality of a witness; of diligent search made for a witness, or for a paper; of his inability to attend; of the death of a subscribing witness; and so of other matters, of which the books of practice abound in examples.

§ 350. The second class of cases, in which the oath *in litem* is admitted, consists of those in which public necessity or expediency has required it. Some cases of this class have their foundation in the edict of the Roman Prætor; "Nautæ, caupones, stabularii, quod cujusque salvum fore receperint, nisi restituent, in eos judicium dabo."[1] Though the terms of the edict comprehended only ship-masters, innkeepers, and stablekeepers, yet its principle has been held to extend to other bailees, against whom, when guilty of a breach of the trust confided to them, damages were awarded upon the oath of the party injured, *per modum pœnæ* to the defendant, and from the necessity of the case.[2] But the common law has not

[1] *Infra*, § 558; Tayloe *v.* Riggs, 1 Pet. 591, 596; Patterson *v.* Winn, 5 id. 240, 242; Riggs *v.* Tayloe, 9 Wheat. 486; Taunton Bank *v.* Richardson, 5 Pick. 436, 442; Poignard *v.* Smith, 8 id. 278; Page *v.* Page, 15 id. 368, 374, 375; Chamberlain *v.* Gorham, 20 Johns. 144; Jackson *v.* Frier, 16 id. 193; Douglass *v.* Sanderson, 2 Dall. 116; s. c. 1 Yeates 15; Meeker *v.* Jackson, 3 id. 442; Blanton *v.* Miller, 1 Hayw. 4; Seekright *v.* Bogan, ib. 178, n.; Smiley *v.* Dewey, 17 Ohio 156. In Connecticut, the party has been adjudged incompetent: Coleman *v.* Wolcott, 4 Day 388. But this decision has since been overruled; and it is now held, that a party to the suit is an admissible witness, to prove to the Court that an instrument, which it is necessary to produce at the trial, is destroyed or lost, so as to let in secondary evidence; that there is no distinction, in this respect, between cases where the action is upon the instrument, and those where the question arises indirectly; and that it is of no importance, in the order of exhibiting the evidence, which fact is first proved, whether the fact of the existence and contents of the instrument, or the fact of its destruction or loss: Fitch *v.* Bogue, 19 Conn. 285. In the prosecutions for bastardy, whether by the female herself, or by the town or parish officers, she is competent to testify to facts within her own exclusive knowledge, though in most of the United States the terms of her admission are prescribed by statute: Browne *v.* Stimpson, 2 Mass. 441; Judson *v.* Blanchard, 4 Conn. 557; Davis *v.* Salisbury, 1 Day 278; Mariner *v.* Dyer, 2 Greenl. 172; Anon., 3 N. H. 135; Mather *v.* Clark, 2 Aik. 209; State *v.* Coatney, 8 Yerg. 210.

[2] Bull. N. P. 187, 289.

[3] 1 Pet. 596, 597, per Marshall, C. J. See also Anon., Cro. Jac. 429; Cook *v.* Remington, 6 Mod. 237; Ward *v.* Apprice, ib. 264; Soresby *v.* Sparrow, 2 Stra. 1186; Jevens *v.* Harridge, 1 Saund. 9; Forbes *v.* Wale, 1 W. Bl. 532; s. c. 1 Esp. 278; Fortescue and Coake's Case, Godb. 193; Anon., ib. 326; 2 Stark. Evid. 580, n. (2), 6th Am. ed.; *infra*, § 558.

[1] Dig. lib. 4, tit. 9, l. 1.

[2] This head of evidence is recognized in the Courts of Scotland, and is fully ex-

admitted the oath of the party upon the ground of the Prætor's edict; but has confined its admission strictly to those cases where, from their nature, no other evidence was attainable.[3] Thus, in cases of necessity, where a statute can receive no execution, unless the party interested be a witness, there he must be allowed to testify; for the statute must not be rendered ineffectual by the impossibility of proof.[4]

§ 351. **Answer in Equity.** Another exception is allowed in equity, by which the answer of the defendant, so far as it is strictly responsive to the bill, is admitted as evidence in his favor as well as against him. The reason is, that the plaintiff, by appealing to the conscience of the defendant, admits that his answer is worthy of credit, as to the matter of the inquiry. It is not conclusive evidence; but is treated like the testimony of any other witness, and is decisive of the question only where it is not outweighed by other evidence.[1]

§ 352. **Oath diverso intuitu.** So also the oath of the party, taken *diverso intuitu*, may sometimes be admitted at law in his favor. Thus, in considering the question of the originality of an invention, the letters-patent being in the case, the oath of the inventor, made prior to the issuing of the letters-patent, that he was the true and first inventor, may be opposed to the oath of a witness, whose testimony is offered to show that the invention was not original.[1] So, upon the trial of an action for malicious prosecution, in causing the plaintiff to be indicted, proof of the evidence given by the defendant on the trial of the indictment is said to be admissible in proof of probable cause.[2] And, generally, the certificate of an officer, when by law it is the evidence for others, is competent evidence for himself, if, at the time of making it, he was authorized to do the act therein certified.[3]

plained in Tait on Evid. pp. 280–287. In Lower Canada, the Courts are bound to admit the decisory oath (*serment décisoire*) of the parties, in commercial matters, whenever either of them shall exact it of the other: Rev. Stat. 1845, p. 143.

[3] Wager of law is hardly an exception to this rule of the common law, since it was ordinarily allowed only in cases where the transaction was one of personal and private trust and confidence between the parties: see 3 Bl. Comm. 345, 346.

[4] U. S. *v.* Murphy, 16 Peters 203. See *infra*, § 412.

[1] 2 Story on Eq. Jur. § 1528; Clark *v.* Van Riemsdyk, 9 Cranch 160. But the answer of an infant can never be read against him; nor can that of a *feme covert*, answering jointly with her husband: Gresley on Evid. p. 24. An arbitrator has no right to admit a party in the cause as a witness, unless he has specific authority so to do: Smith *v.* Sparrow, 11 Jur. 126.

[1] Alden *v.* Dewey, 1 Story 336; s. c. 3 Law Reporter 383; Pettibone *v.* Derringer, 4 Wash. C. C. 215.

[2] Bull. N. P. 14; Johnson *v.* Browning, 6 Mod. 216. "For otherwise," said Holt, C. J., "one that should be robbed, &c., would be under an intolerable mischief; for if he prosecuted for such robbery, &c., and the party should at any rate be acquitted, the prosecutor would be liable to an action for a malicious prosecution, without a possibility of making a good defence, though the cause of prosecution were never so pregnant."

[3] McKnight *v.* Lewis, 5 Barb. 681; McCully *v.* Malcolm, 9 Humph. 187. So, the

§ 353. **Party not compellable to testify.** The rule which excludes the party to the suit from being admitted as a witness is also a rule of protection, no person who is a party to the record being compellable to testify.[1] It is only when he consents to be examined, that he is admissible in any case; nor then, unless under the circumstances presently to be mentioned. If he is only a nominal party, the consent of the real party in interest must be obtained before he can be examined.[2] Nor can one who is substantially a party to the record be compelled to testify, though he be not nominally a party.[3]

§ 354. **Co-plaintiffs incompetent.** It has been said, that where one of several co-plaintiffs voluntarily comes forward as a witness for the adverse party, he is admissible, without or even against the consent of his fellows; upon the ground, that he is testifying against his own interest, that the privilege of exemption is personal and several, and not mutual and joint, and that his declarations out of Court being admissible, *a fortiori*, they ought to be received, when made in Court under oath.[1] But the better opinion is, and so it has been resolved,[2] that such a rule would hold out to parties a strong temptation to perjury; that it is not supported by principle or authority, and that therefore the party is not admissible, without the consent of all parties to the record, for that the privilege is mutual and joint, and not several. It may also be observed, that the declarations of

account of sales, rendered by a consignee, may be evidence for some purposes, in his favor, against the consignor: Mertens *v.* Nottebohms, 4 Grant 163.

[1] R. *v.* Woburn, 10 East 395; Worrall *v.* Jones, 7 Bing. 395; Fenn *v.* Granger, 3 Campb. 177; Mant *v.* Mainwaring, 8 Taunt. 139; *ante*, § 330.

[2] Frear *v.* Evertson, 20 Johns. 142. And see People *v.* Irving, 1 Wend. 20; Commonwealth *v.* Marsh, 10 Pick. 57, per Wilde, J.; Columbian Manuf. Co. *v.* Dutch, 13 id. 125; Bradlee *v.* Neal, 16 id. 501. In Connecticut and Vermont, where the declarations of the assignor of a *chose in action* are still held admissible to impeach it in the hands of the assignee, in an action brought in the name of the former for the benefit of the latter, the defendant is permitted to read the deposition of the nominal plaintiff, voluntarily given, though objected to by the party in interest: Woodruff *v.* Westcott, 12 Conn. 134; Johnson *v.* Blackman, 11 id. 342; Sargeant *v.* Sargeant, 18 Vt. 371. See *supra*, § 190.

[3] Mauran *v.* Lamb, 7 Cowen 174; R. *v.* Woburn, 10 East 403, per Ld. Ellenborough. In several of the United States it is enacted that the parties, in actions at law, as well as in equity, may interrogate each other as witnesses. See Massachusetts, Stat. 1852, c. 312, §§ 61–75; New York, Code of Practice, §§ 344, 349, 350; Texas, Hartley's Dig. arts. 735, 739; California, Rev. Stat. 1850, c. 142, §§ 296–303. See vol. iii, § 317.

[1] Phil. & Am. on Evid. 158; 1 Phil. Evid. 60. The cases which are usually cited to support this opinion are Norden *v.* Williamson, 1 Taunt. 377; Fenn *v.* Granger, 3 Campb. 177; and Worrall *v.* Jones, 7 Bing. 395. But in the first of these cases, no objection appears to have been made on behalf of the other co-plaintiff, that his consent was necessary; but the decision is expressly placed on, the ground, that neither party objected at the time. In Fenn *v.* Granger, Ld. Ellenborough would have rejected the witness, but the objection was waived. In Worrall *v.* Jones, the naked question was, whether a defendant who has suffered judgment by default, and has no interest in the event of the suit, is admissible as a witness for the plaintiff, by his own consent, where "the *only* objection to his admissibility is this, that he is party to the record." See also Willings *v.* Consequa, 1 Pet. C. C. 307, per Washington, J.; Paine *v.* Tilden, 20 Vt. 554.

[2] Scott *v.* Lloyd, 12 Pet. 149. See also 2 Stark. Evid. 580, n. *e*; Bridges *v.* Armour, 5 How. 91; Evans *v.* Gibbs, 6 Humph. 405; Sargeant *v.* Sargeant, 18 Vt. 371.

one of several parties are not always admissible against his fellows, and that, when admitted, they are often susceptible of explanation or contradiction, where testimony under oath could not be resisted.

§ 355. **Effect of Default, Nolle Prosequi, and Verdict.** Hitherto, in treating of the admissibility of parties to the record as witnesses, they have been considered as still retaining their original situation, assumed at the commencement of the suit. But as the situation of some of the defendants, where there are several in the same suit, may be essentially changed in the course of its progress, by default, or *nolle prosequi*, and sometimes by verdict, their case deserves a distinct consideration. This question has arisen in cases where the testimony of a defendant, thus situated, is material to the defence of his fellows. And here the general doctrine is, that where the suit is ended as to one of several defendants, and he has no direct interest in its event as to the others, he is a competent witness for them, his own fate being at all events certain.[1]

§ 356. **Actions of Contract.** In actions on contracts, the operation of this rule was formerly excluded; for the contract being laid jointly, the judgment by default against one of several defendants, it was thought, would operate against him, only in the event of a verdict against the others; and accordingly he has been held inadmissible in such actions, as a witness in their favor.[1] On a similar principle, a defendant thus situated has been held not a competent witness for the plaintiff; on the ground that, by suffering judgment by default, he admitted that he was liable to the plaintiff's demand, and was therefore directly interested in throwing part of that burden on another person.[2] But in another case, where the action was upon a bond, and the principal suffered judgment by default, he was admitted as a witness for the plaintiff, against one of the other defendants, his surety; though here the point submitted to the Court was narrowed to the mere abstract question, whether a party to the record was, on that account alone, precluded from being a witness, he having no interest in the event.[3] But the whole subject has more

[1] *Infra*, §§ 358–368, 363.

[1] Mant *v.* Mainwaring, 8 Taunt. 139; Brown *v.* Brown, 4 id. 752; Schermerhorn *v.* Schermerhorn, 1 Wend. 119; Columbian Man. Co. *v.* Dutch, 13 Pick. 125; Mills *v.* Lee, 4 Hill 549.

[2] Green *v.* Sutton, 2 M. & Rob. 269.

[3] Worrall *v.* Jones, 7 Bing. 395. See Foxcroft *v.* Nevens, 4 Greenl. 72, *contra*. In a case before Le Blanc, J., he refused to permit one defendant, who had suffered judgment to go by default, to be called by the plaintiff to inculpate the others, even in an action of trespass: Chapman *v.* Graves, 2 Campb. 333, 334, n. See acc. Supervisors of Chenango *v.* Birdsall, 4 Wend. 456, 457. The general rule is, that a party to the record can, in no case, be examined as a witness; a rule founded principally on the policy of preventing perjury, and the hardship of calling on a party to charge himself: Frazier *v.* Laughlin, 1 Gilm. Ill. 347; Flint *v.* Allyn, 12 Vt. 615; Kennedy *v.* Niles, 2 Shepl. 54; Stone *v.* Bibb, 2 Ala. 100. And this rule is strictly enforced against plaintiffs, because the joining of so many defendants is generally their own act, though sometimes it is a matter of necessity: 2 Stark. Evid. 581, n. *a*; Blackett *v.* Weir, 5 B. & C. 387; Barret *v.* Gore, 3 Atk. 401; Bull. N. P. 285; Cas. temp. Hardw. 163.

recently been reviewed in England, and the rule established, that where one of two joint defendants in an action on contract has suffered judgment by default, he may, if not otherwise interested in procuring a verdict for the plaintiff, be called by him as a witness against the other defendant.[4] So, if the defence, in an action *ex contractu* against several, goes merely to the personal discharge of the party pleading it, and not to that of the others, and the plaintiff thereupon enters a *nolle prosequi* as to him, which in such cases he may well do, such defendant is no longer a party upon the record, and is therefore competent as a witness, if not otherwise disqualified. Thus, where the plea by one of several defendants is bankruptcy,[5] or, that he was never executor, or, as it seems by the latter and better opinions, infancy or coverture,[6] the plaintiff may enter a *nolle prosequi* as to such party, who, being thus disengaged from the record, may be called as a witness, the suit still proceeding against the others.[7] The mere pleading of the bankruptcy, or other matter of personal discharge, is not alone sufficient to render the party a competent witness; and it has been held, that he is not entitled to a previous verdict upon that plea, for the purpose of testifying for the others.[8]

[4] Pipe *v.* Steel, 2 Q. B. 733; Cupper *v.* Newark, 2 C. & K. 24. Thus, he has been admitted, with his own consent, as a witness to prove that he is the principal debtor, and that the signatures of the other defendants, who are his sureties, are genuine: Mevey *v.* Matthews, 9 Barr 112. But generally he is interested; either to defeat the action against both, or to throw on the other defendant a portion of the demand, or to reduce the amount to be recovered: Bowman *v.* Noyes, 12 N. H. 302; George *v.* Sargent, ib. 313; Vinal *v.* Burrill, 18 Pick. 29; Bull *v.* Strong, 8 Met. 8; Walton *v.* Tomlin, 1 Ired. 593; Turner *v.* Lazarus, 6 Ala. 875.

[5] Noke *v.* Ingham, 1 Wils. 89; 1 Tidd's Pr. 602; 1 Saund. 207 *a*. But see Mills *v.* Lee, 4 Hill 549.

[6] 1 Paine & Duer's Pr. 642, 643; Woodward *v.* Newhall, 1 Pick. 500; Hartness *v.* Thompson, 5 Johnson 160; Pell *v.* Pell, 20 Johns. 126; Burgess *v.* Merrill, 4 Taunt. 468. The ground is, that these pleas are not in bar of the entire action, but only in bar as to the party's pleading; and thus the case is brought within the general principle, that where the plea goes only to the personal discharge of the party pleading it, the plaintiff may enter a *nolle prosequi*: 1 Pick. 501, 502; see also Minor *v.* Mechanics' Bank of Alexandria, 1 Pet. 74. So, if the cause is otherwise adjudicated in favor of one of the defendants, upon a plea personal to himself, whether it be by the common law, or by virtue of a statute authorizing a separate finding in favor of one defendant, in an action upon a joint contract, the result is the same: Blake *v.* Ladd, 10 N. H. 190; Essex Bank *v.* Rix, ib. 201; Brooks *v.* M'Kinney, 4 Scam. 309; and see Campbell *v.* Hood, 6 Mo. 211.

[7] McIver *v.* Humble, 16 East 171, per Le Blanc, J., cited 7 Taunt. 607, per Park, J.; Moody *v.* King, 2 B. & C. 558; Aflalo *v.* Fourdrinier, 6 Bing. 306. But see Irwin *v.* Shumaker, 4 Barr 199.

[8] Raven *v.* Dunning, 8 Esp. 25; Emmet *v.* Butler, 7 Taunt. 599; s. c. 1 Moore 322; Schermerhorn *v.* Schermerhorn, 1 Wend. 119. But, in a later case, since the 49 G. III, c. 121, Park, J., permitted a verdict to be returned upon the plea, in order to admit the witness: Bate *v.* Russell, 1 Mood. & M. 332. Where, by statute, the plaintiff, in an action on a parol contract against several, may have judgment against one or more of the defendants, according to his proof, there it has been held, that a defendant who has been defaulted is, with his consent, a competent witness in favor of his co-defendants: Bradlee *v.* Neal, 16 Pick. 501. But this has since been questioned, on the ground that his interest is to reduce the demand of the plaintiff against the others to nominal damages, in order that no greater damages may be assessed against him upon his default: Vinal *v.* Burrill, 18 Pick. 29.

§ 357. **Actions of Tort.** In actions on torts, these being in their nature and legal consequences several, as well as ordinarily joint, and there being no contribution among wrong-doers, it has not been deemed necessary to exclude a material witness for the defendants, merely because the plaintiff has joined him with them in the suit, if the suit, as to him, is already determined, and he has no longer any legal interest in the event.[1] Accordingly, a defendant in an action for a tort, who has suffered judgment to go by default, has uniformly been held admissible as a witness for his co-defendants.[2] Whether, being admitted as a witness, he is competent to testify to the amount of damages, which are generally assessed entire against all who are found guilty,[3] may well be doubted.[4] And indeed the rule, admitting a defendant as witness for his fellows in any case, must, as it should seem, be limited strictly to the case where his testimony cannot directly make for himself; for if the plea set up by the other defendants is of such a nature as to show that the plaintiff has no cause of action against any of the defendants in the suit, the one who suffers judgment by default will be entitled to the benefit of the defence, if established, and therefore is as directly interested as if the action were upon a joint contract. It is, therefore, only where the plea operates solely in discharge of the party pleading it, that another defendant, who has suffered judgment to go by default, is admissible as a witness."[5]

§ 358. **Misjoinder of Parties.** If the person who is a material witness for the defendants has been improperly joined with them in the suit, for the purpose of excluding his testimony, the jury will be directed to find a separate verdict in his favor; in which case, the cause being at an end with respect to him, he may be admitted a

[1] As, if one had been separately tried and acquitted: Carpenter *v.* Crane, 5 Blackf. 119.

[2] Ward *v.* Haydon, 2 Esp. 552, approved in Hawkesworth *v.* Showler, 12 M. & W. 48; Chapman *v.* Graves, 2 Campb. 334, per Le Blanc, J.; Com. *v.* Marsh, 10 Pick. 57, 58. A defendant, in such case, is also a competent witness for the plaintiff: Hadrick *v.* Heslop, 12 Jur. 600; 17 L. J. Q. B. N. S. 313; 12 Q. B. 267. The wife of one joint trespasser is not admissible as a witness for the other, though the case is already fully proved against her husband, if he is still a party to the record: Hawkesworth *v.* Showler, 12 M. & W. 45.

[3] 2 Tidd's Pr. 896.

[4] In Mash *v.* Smith, 1 C. & P. 577, Best, C. J., was of opinion, that the witness ought not to be admitted at all, on the ground that his evidence might give a different complexion to the case, and thus go to reduce the damages against himself; but on the authority of Ward *v.* Haydon, and Chapman *v.* Graves, he thought it best to receive the witness, giving leave to the opposing party to move for a new trial. But the point was not moved; and the report does not show which way was the verdict. It has, however, more recently, been held in England, that a defendant in trespass, who has suffered judgment by default, is not a competent witness for his co-defendant, where the jury are summoned as well to try the issue against the one as to assess damages against the other: Thorpe *v.* Barber, 5 M. G. & Sc. 675; 17 L. J. N. S. C. P. 113. And see Ballard *v.* Noaks, 2 Pike 45.

[5] 2 Tidd's Pr. 895; Briggs *v.* Greenfield *et al.*, 1 Str. 610; 8 Mod. 217; s. c. 2 Ld. Raym. 1372; Phil. & Am. on Evid. 53, n. (3); 1 Phil. Evid. 52, n. (1); Bowman *v.* Noyes, 12 N. H. 302.

witness for the other defendants. But this can be allowed only where there is no evidence whatever against him, for then only does it appear that he was improperly joined through the artifice and fraud of the plaintiff. But if there be any evidence against him, though, in the judge's opinion, not enough for his conviction, he cannot be admitted as a witness for his fellows, because his guilt or innocence must wait the event of the verdict, the jury being the sole judges of the fact.[1] In what stage of the cause the party, thus improperly joined, may be acquitted, and whether before the close of the case on the part of the other defendants, was formerly uncertain; but it is now settled, that the application to a judge, in the course of a cause, to direct a verdict for one or more of several defendants in trespass, is strictly to his discretion; and that discretion is to be regulated, not merely by the fact that, at the close of the plaintiff's case, no evidence appears to affect them, but by the probabilities whether any such will arise before the whole evidence in the cause closes.[2] The ordinary course, therefore, is to let the cause go on to the end of the evidence.[3] But if, at the close of the plaintiff's case, there is one defendant against whom no evidence has been given, and none is anticipated with any probability, he instantly will be acquitted.[4] The mere fact of mentioning the party in the *simul cum*, in the declaration, does not render him incompetent as a witness; but, if the plaintiff can prove the person so named to be guilty of the trespass, and party to the suit, which must be by producing the original process against him, and proving an ineffectual endeavor to arrest him, or that the process was lost, the defendant shall not have the benefit of his testimony.[5]

[1] 1 Gilb. Evid. by Lofft, p. 250; Brown *v.* Howard, 14 Johns. 119, 122; Van Deusen *v.* Van Slyck, 15 id. 223. The admission of the witness, in all these cases, seems to rest in the discretion of the judge: Brotherton *v.* Livingston, 3 Watts & Serg. 334.

[2] Sowell *v.* Champion, 6 Ad. & El. 407; White *v.* Hill, 6 Q. B. 487, 491; Com. *v.* Eastman, 1 Cush. 189; Over *v.* Blackstone, 8 Watts & Serg. 71; Prettyman *v.* Dean, 2 Harringt. 494; Brown *v.* Burrus, 8 Mo. 26.

[3] 6 Q. B. 491, per Ld. Denman.

[4] Child *v.* Chamberlain, 6 C. & P. 213. It is not easy to perceive why the same principle should not be applied to actions upon contract, where one of the defendants pleads a matter in his own personal discharge, such as infancy or bankruptcy, and establishes his plea by a certificate, or other affirmative proof, which the plaintiff does not pretend to gainsay or resist; see Bate *v.* Russell, 1 Mood. & M. 332. Upon Emmet *v.* Butler, 7 Taunt. 599, where it was not allowed, Mr. Phillips very justly observes, that the plea was not the common one of bankruptcy and certificate; but that the plaintiffs *had proved* (under the commission), and thereby made their election; and that where a plea is special, and involves the consideration of many facts, it is obvious that there would be much inconvenience in splitting the case, and taking separate verdicts; but there seems to be no such inconvenience where the whole proof consists of the bankrupt's certificate: Phil. & Am. on Evid. p. 29, n. (3).

[5] Bull. N. P. 286; 1 Gilb. Evid. by Lofft, p. 251; Lloyd *v.* Williams, Cas. temp. Hardw. 123; Cotton *v.* Luttrell, 1 Atk. 452. "These cases appear to have proceeded upon the ground, that a co-trespasser, who had originally been made a party to the suit upon sufficient grounds, ought not to come forward as a witness to defeat the plaintiff, after he had prevented the plaintiff from proceeding effectually against him, by his own

§ 359. **Witness made Party by Mistake.** If the plaintiff, in trespass, has by mistake made one of his own intended witnesses a defendant, the Court will, on motion, give leave to omit him, and have his name stricken from the record, even after issue joined.[1] In criminal informations the same object is attained by entering a *nolle prosequi* as to the party intended to be examined; the rule that a plaintiff can in no case examine a defendant being enforced in criminal as well as in civil cases.[2]

§ 360. If a material witness for a defendant in ejectment be also made a defendant, he may let judgment go by default, and be admitted as a witness for the other defendant. But if he plead, thereby admitting himself tenant in possession, the Court will not afterwards, upon motion, strike out his name.[1] But where he is in possession of only a part of the premises, and consents to the return of a verdict against him for as much as he is proved to have in possession, Mr. Justice Buller said, he could see no reason why he should not be a witness for another defendant.[2]

§ 361. **Rule in Chancery.** In Chancery, parties to the record are subject to examination as witnesses much more freely than at law. A plaintiff may obtain an order, as of course, to examine a defendant, and a defendant a co-defendant, as a witness, upon affidavit that he is a material witness, and is not interested on the side of the applicant, in the matter to which it is proposed to examine him, the order being made subject to all just exceptions.[1] And it may be obtained

wrongful act in eluding the process: Phil. & Am. on Evid. p. 60, n. (2); but see Stockham *v.* Jones, 10 Johns. 21, *contra;* see also 1 Stark. Evid. 132. In Wakely *v.* Hart, 6 Bin. 316, all the defendants, in trespass, were arrested, but the plaintiff went to issue with some of them only, and did not rule the others to plead, nor take judgment against them by default; and they were held competent witnesses for the other defendants. The learned Chief Justice placed the decision partly upon the general ground, that they were not interested in the event of the suit; citing and approving the case of Stockham *v.* Jones, *supra.* But he also laid equal stress upon the fact that the plaintiff might have conducted his cause so as to have excluded the witnesses, by laying them under a rule to plead, and taking judgment by default. In Purviance *v.* Dryden, 3 S. & R. 402, and Gibbs *v.* Bryant, 1 Pick. 118, both of which were actions upon contract, where the process was not served as to one of the persons named as defendant with the other, it was held that he was not a party to the record, not being served with process, and so was not incompetent as a witness on that account. Neither of these cases, therefore, except that of Stockham *v.* Jones, touches the ground of public policy for the prevention of fraud in cases of tort, on which the rule in the text seems to have been founded: *ideo quære.* See also Curtis *v.* Graham, 12 Mart. 289; Heckert *v.* Fegely, 6 Watts & Serg. 139.

[1] Bull. N. P. 285; Berrington d. Dormer *v.* Fortescue, Cas. temp. Hardw. 162, 163.

[2] Ibid.

[1] Ibid.

[2] Bull. N. P. 286. But where the same jury are also to assess damages against the witness, it seems he is not admissible: see Mash *v.* Smith, 1 C. & P. 577; *supra,* § 356.

[1] 2 Daniel's Chan. Pr. 1035, n. (Perkin's ed.); ib. 1043; Ashton *v.* Parker, 14 Sim. 632. But where there are several defendants, one of whom alone has an interest in defeating the plaintiff's claim, the evidence of the defendant so interested, though taken in behalf of a co-defendant, is held inadmissible: Clarke *v.* Wyburn, 12 Jur. 613. It has been held in Massachusetts, that the answer of one defendant, so far as it is

ex parte, as well after as before decree.[2] If the answer of the defendant has been replied to, the replication must be withdrawn before the plaintiff can examine him. But a plaintiff cannot be examined by a defendant, except by consent, unless he is merely a trustee, or has no beneficial interest in the matter in question.[3] Nor can a co-plaintiff be examined by a plaintiff without the consent of the defendant. The course in the latter of such cases is, to strike out his name as plaintiff, and make him a defendant; and, in the former, to file a cross-bill.[4]

§ 362. **Rule in Criminal Cases ; Prosecutor.** The principles which govern in the admission or exclusion of parties as witnesses in civil cases are in general applicable, with the like force, to criminal prosecutions, except so far as they are affected by particular legislation, or by considerations of public policy. In these cases, the State is the party prosecuting, though the process is usually, and in some cases always, set in motion by a private individual, commonly styled the *prosecutor*. In general, this individual has no direct and certain interest in the event of the prosecution; and therefore he is an admissible witness. Formerly, indeed, it was supposed that he was incompetent, by reason of an indirect interest arising from the use of the record of conviction as evidence in his favor in a civil suit; and this opinion was retained down to a late period as applicable to cases of forgery, and especially to indictments for perjury. But it is now well settled, as will hereafter more particularly be shown,[1] that the record in a criminal prosecution cannot be used as evidence in a civil suit, either at law or in equity, except to prove the mere fact of the adjudication, or a judicial confession of guilt by the party indicated.[2] The prosecutor, therefore, is not incompetent on the ground

responsive to the bill, may be read by another defendant, as evidence in his own favor: Mills *v.* Gore, 20 Pick. 28.

[2] Steed *v.* Oliver, 11 Jur. 365; Paris *v.* Hughes, 1 Keen 1; Van *v.* Corpe, 3 My. & K. 269.

[3] The reason of this rule has often been called in question; and the opinion of many of the profession is inclined in favor of making the right of examination of parties in equity reciprocal, without the intervention of a cross-bill: see 1 Smith's Ch. Pr. 459, n. (l); Report on Chancery Practice, App. p. 153, Q. 49. Sir Samuel Romilly was in favor of such change in the practice: ib. p. 54, Q. 266; 1 Hoffman's Ch. Pr. 345. In some of the United States this has already been done by statute; see New York, Code of Practice, §§ 390, 395, 396 (Blatchford's ed.); Ohio, Rev. Stat. 1841, c. 87, § 26; Missouri, Rev. Stat. 1845, c. 137, art. 2, §§ 14, 15; New Jersey, Rev. Stat. 1846, tit. 23, c. 1, § 40; Texas, Hartley's Dig. arts. 735, 739; Wisconsin, Rev. Stat. 1849, c. 84, § 30; California, Rev. Stat. 1850, c. 142, §§ 296–303.

[4] 1 Smith's Ch. Pr. 343, 344; 1 Hoffman's Ch. Pr. 485–488. See further, Gresley on Evid. 242–244; 2 Mad. Chan. 415, 416; Neilson *v.* McDonald, 6 Johns. Ch. 201; Souverbye *v.* Arden, 1 id. 240; 2 Daniel's Ch. Pr. 455, 456; Piddock *v.* Brown, 3 P.W. 288; Murray *v.* Shadwell, 2 V. & B. 401; Hoffm. Master in Chanc. 18, 19; Cotton *v.* Luttrell, 1 Atk. 451.

[1] *Infra*, § 537.

[2] R. *v.* Boston, 4 East 572; Bartlett *v.* Pickersgill, ib. 577, n.; Gibson *v.* McCarty, Cas. temp. Hardw. 311; Richardson *v.* Williams, 12 Mod. 319; R. *v.* Moreu, 36 Leg. Obs. 69; 11 Ad. & El. 1028; *infra*, § 537. The exception which had grown up in the case of forgery was admitted to be an anomaly in the law, in 4 East 582, per Lord

that he is a party to the record; but whether any interest which he may have in the conviction of the offender is sufficient to render him incompetent to testify will be considered more appropriately under the head of incompetency from interest.[3]

§ 363. **Same; Defendant.** In regard to defendants in criminal cases, if the State would call one of them as a witness against others in the same indictment, this can be done only by discharging him from the record; as, by the entry of a *nolle prosequi*[1] or, by an order for his dismissal and discharge, where he has pleaded in abatement as to his own person, and the plea is not answered;[2] or, by a verdict of acquittal, where no evidence, or not sufficient evidence, has been adduced against him. In the former case, where there is no proof, he is entitled to the verdict; and it may also be rendered at the request of the other defendants, who may then call him as a witness for themselves, as in civil cases. In the latter, where there is some evidence against him, but it is deemed insufficient, a separate verdict of acquittal may be entered, at the instance of the prosecuting officer, who may then call him as a witness against the others.[3] On the same principle, where two were indicted for assault, and one submitted and was fined, and paid the fine, and the other pleaded "not guilty," the former was admitted as a competent witness for the latter, because as to the witness the matter was at an end.[4] But the matter is not considered as at an end, so as to render one defendant a competent witness for another, by anything short of a final judgment or a plea of guilty.[5] Therefore, where two were jointly indicted for uttering a forged note, and the trial of one of them was postponed, it was held, that he could not be called as a witness for the other.[6] So, where two, being jointly indicted for an assault, pleaded separately "not guilty," and elected to be tried separately, it was held, that the one tried first could not call the other as a witness for him.[7]

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Ellenborough, and in 4 B. & Ald. 210, per Abbott, C. J.; and was finally removed by the declaratory act, for such in effect it certainly is, of 9 Geo. IV, c. 32, § 2. In this country, with the exception of a few early cases, the party to the forged instrument has been held admissible as a witness, on the general principles of the criminal law; see Com. *v.* Snell, 3 Mass. 82; People *v.* Dean, 6 Cowen 27; Furber *v.* Hilliard, 2 N. H. 480; Respublica *v.* Ross, 2 Dall. 239; State *v.* Foster, 3 McCord 442.

[3] *Infra*, §§ 412–414.

[1] Bull. N. P. 285; Cas. temp. Hardw. 163.

[2] R. *v.* Sherman, Cas. temp. Hardw. 303.

[3] R. *v.* Rowland, Ry. & M. 401; R. *v.* Mutineers of the "Bounty," cited arg. 1 East 312. 313.

[4] R. *v.* Fletcher, 1 Stra. 633; R. *v.* Lyons, 9 C. & P. 555; R. *v.* Williams, 8 id. 285; *supra*, § 358; Com. *v.* Eastman, 1 Cush. 189.

[5] R. *v.* Hinks, 1 Denis. C. C. 84.

[6] Com. *v.* Marsh, 10 Pick. 57.

[7] People *v.* Bill, 10 Johns. 95. In R. *v.* Lafone, 5 Esp. 154, where one defendant suffered judgment by default, Lord Ellenborough held him incompetent to testify for the others; apparently on the ground, that there was a community of guilt, and that the offence of one was the offence of all. But no authority was cited in the case, and the decision is at variance with the general doctrine in cases of tort. The reason given, moreover, assumes the very point in dispute, namely, whether there was any

§ 365. **Competency of Witnesses; Mental Deficiencies.** We proceed now to consider the second class of persons incompetent to testify as witnesses; namely, that of persons deficient in understanding. We have already seen,[1] that one of the main securities, which the law has provided for the purity and truth of oral evidence, is, that it be delivered under the sanction of an oath; and that this is none other than a solemn invocation of the Supreme Being, as the Omniscient Judge. The purpose of the law being to lay hold on the conscience of the witness by this religious solemnity, it is obvious, that persons incapable of comprehending the nature and obligation of an oath ought not to be admitted as witnesses. The repetition of the words of an oath would, in their case, be but an unmeaning formality. It makes no difference from what 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. But if the cause be temporary, and a lucid interval should occur, or a cure be effected, the competency also is restored.[2]

§ 366. **Deaf and Dumb Persons.** In regard to persons deaf and

guilt at all. The indictment was for a misdemeanor, in obstructing a revenue officer in the execution of his duty. See 1 Phil. Evid. 68. But where two were jointly indicted for an assault and battery, and one of them, on motion, was tried first, the wife of the other was held a competent witness in his favor: Moffit *v.* State, 2 Humph. 99. And see Jones *v.* State, 1 Kelly Ga. 610; Com. *v.* Manson, 2 Ashm. 31; *supra*, § 335, n.; State *v.* Worthing, 1 Reddingt. (31 Me.) 62.

[1] *Supra*, § 327.

[2] 6 Com. Dig. 351, 352, *Testmoigne*, A, 1; Livingston *v.* Kiersted, 10 Johns. 362; Evans *v.* Hettich, 7 Wheat. 453, 470; White's Case, 2 Leach Cr. Cas. 430; Tait on Evid. pp. 342, 343. The fact of want of understanding is to be proved by the objecting party, by testimony *aliunde:* Robinson *v.* Dana, 16 Vt. 474. See, as to intoxication, Hartford *v.* Palmer, 16 Johns. 143; Gebhart *v.* Shindle, 15 S. & R. 235; Heinec. ad Pandect Par. 3, § 14. Whether a *monomaniac* is a competent witness is a point not known to have been directly decided; and upon which text-writers differ in opinion: Mr. Roscoe deems it the safest rule to exclude their testimony: Rosc. Crim. Evid. p. 128; Mr. Best considers this "hard measure:" Best, Princ. Evid. p. 168. In a recent case before the Privy Council, where a will was contested on the ground of incapacity in the mind of the testator, it was held, that if the mind is unsound on one subject, and this unsoundness is at all times existing upon that subject, it is erroneous to suppose the mind of such a person really sound on other subjects; and that therefore the will of such a person, though apparently ever so rational and proper, was void: Waring *v.* Waring, 12 Jur. 947, Priv. C. Here, the power of perceiving facts is sound, but the faculty of comparing and of judging is impaired. But where, in a trial for manslaughter, a lunatic patient was admitted as a witness, who had been confined in a lunatic asylum, and who labored under the delusion, both at the time of the transaction and of the trial, that he was possessed by twenty thousand spirits, but whom the medical witness believed to be capable of giving an account of any transaction that happened before his eyes, and who appeared to understand the obligation of an oath, and to believe in future rewards and punishments, — it was held, that his testimony was properly received; and that where a person, under an insane delusion, is offered as a witness, it is for the judge at the time to decide upon his competency as a witness, and for the jury to judge of the credibility of his evidence: R. *v.* Hill, 15 Jur. 470; 5 Eng. Law & Eq. 547; 5 Cox C. C. 259.

dumb from their birth, it has been said that, in presumption of law, they are idiots. And though this presumption has not now the same degree of force which was formerly given to it, that unfortunate class of persons being found by the light of modern science to be much more intelligent in general, and susceptible of far higher culture, than was once supposed; yet still the presumption is so far operative, as to develop the burden of proof on the party adducing the witness, to show that he is a person of sufficient understanding. This being done, a deaf mute may be sworn and give evidence, by means of an interpreter.[1] If he is able to communicate his ideas perfectly by writing, he will be required to adopt that, as the more satisfactory, and therefore the better method;[2] but if his knowledge of that method is imperfect, he will be permitted to testify by means of signs.[3]

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§ 372. **Competency of Witnesses; Infamy.** Under this general head of exclusion, because of insensibility to the obligation of an oath, may be ranked the case of persons infamous; that is, persons who, whatever may be their professed belief, have been guilty of those heinous crimes which men generally are not found to commit, unless when so depraved as to be unworthy of credit for truth.

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§ 383. **Competency of Parties to testify to their own Fraud.** Whether a party to a negotiable instrument, who has given it credit and currency by his signature, shall afterwards be admitted as a witness, in a suit between other persons, to prove the instrument originally *void*, is a question upon which judges have been much divided in opinion. The leading case against the admissibility of the witness is that of Walton *v.* Shelley,[1] in which the indorser of a promissory note was called to prove it void for usury in its original concoction. The security was in the hands of an innocent holder. Lord Mansfield and the other learned judges held that upon general grounds of public policy the witness was inadmissible; it being "of consequence to mankind that no person should hang out false colors to deceive them, by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it." And, in corroboration of this opinion, they referred to the spirit of that maxim of the Roman law, "Nemo, allegans suam turpitudinem, est audiendus."[2]

[1] Ruston's Case, 1 Leach Cr. Cas. 408; Tait on Evid. 343; 1 Russ. on Crimes, p. 7; 1 Hale P. C. 34. Lord Hale refers, for authority as to the ancient presumption, to the Laws of Knight Alfred, c. 14, which is in these words: "Si quis mutus vel surdus natus sit, ut peccata sua confiteri nequeat, nec inficiari, emendet pater scelera ipsius." Vid. Leges Barbaror. Antiq. vol. iv, p. 249; Ancient Laws and Statutes of England, vol. i, p. 71.

[2] Morrison *v.* Lennard, 3 C. & P. 127.

[3] State *v.* De Wolf, 8 Conn. 93; Com. *v.* Hill, 14 Mass. 207; Snyder *v.* Nations, 5 Blackf. 295.

[1] 1 T. R. 296.

[2] This maxim, though it is said not to be expressed, in terms, in the text of the

§ 384. The doctrine of this case afterwards came under discussion in the equally celebrated case of Jordaine *v.* Lashbrooke.[1] This was an action by the indorsee of a bill of exchange against the acceptor. The bill bore date at Hamburg; and the defence was, that it was drawn in London, and so was void at its creation, for want of a stamp, the statute[2] having declared that unstamped bills should neither be pleaded, given in evidence, nor allowed to be available in law or equity. The indorser was offered by the defendant as a witness to prove this fact, and the Court held that he was admissible. This case might, perhaps, have formed an exception to the general rule adopted in Walton *v.* Shelley, on the ground that the general policy of the law of commerce ought to yield to the public necessity in matters of revenue; and this necessity was relied upon by two or three learned judges who concurred in the decision. But they also concurred with Lord Kenyon in reviewing and overruling the doctrine of that case. The rule, therefore, now received in England is, that the party to any instrument, whether negotiable or not, is a competent witness to prove any fact to which any other witness would be competent to testify, provided he is not shown to be legally infamous, and is not directly interested in the event of the suit. The objection, that thereby he asserts that to be false which he has solemnly attested or held out to the world as true, goes only to his credibility with the jury.[3]

§ 385. The Courts of some of the American States have adopted the later English rule, and admitted the indorser, or other party to an instrument, as a competent witness to impeach it in all cases where he is not on other grounds disqualified. In other States, decisions are found which go to the exclusion of the party to an instrument in every case, when offered as a witness to defeat it, in the hands of a

Corpus Juris (see Gilmer's Rep. p. 275, n.), is exceedingly familiar among the civilians; and is found in their commentaries on various laws in the Code; see Corpus Juris Glossatum, tom. iv, col. 461, 1799; Corp. Juris Gothofredi (fol. ed.) Cod. lib. 7, tit. 8, l. 5, in margine; Codex Justiniani (4to Parisiis, 1550), lib. 7, tit. 16, l. 1; ib. tit. 8, l. 5, in margine; 1 Mascard. De Prob. Concl. 78, n. 42. And see 4 Inst. 279. It seems formerly to have been deemed sufficient to exclude witnesses, testifying to their own turpitude; but the objection is now held to go only to the credibility of the testimony: 2 Stark. Evid. 9, 10; 2 Hale P. C. 280; 7 T. R. 609, per Grose, J.; ib. 611, per Lawrence, J. Thus, a witness is competent to testify that his former oath was corruptly false: R. *v.* Teal, 11 East 309; Rands *v.* Thomas, 5 M. & S. 244.

[1] 7 T. R. 599.

[2] 31 Geo. III, c. 25, §§ 2, 16. This act was passed subsequent to the decision of Walton *v.* Shelley, 1 T. R. 296.

[3] 1 Phil. Evid. 39, 40. On this ground, parties to other instruments, as well as subscribing witnesses, if not under some other disability, are, both in England and in the United States, held admissible witnesses to impeach the original validity of such instruments: 7 T. R. 611, per Lawrence, J.; Heward *v.* Shipley, 4 East 180; Lowe *v.* Jolliffe, 1 W. Bl. 365; Austin *v.* Willes, Bull. N. P. 264; Howard *v.* Braithwaite, 1 Ves. & B. 202, 208; Title *v.* Grevett, 2 Ld. Raym. 1008; Dickinson *v.* Dickinson, 9 Met. 471; Twambly *v.* Henley, 4 Mass. 441. It has, however, been held in Louisiana, that a notary cannot be examined as a witness, to contradict a statement made by him in a protest; and that the principle extends to every public officer, in regard to a certificate given by him in his official character: Peet *v.* Dougherty, 7 Rob. La. 85.

third person; thus importing into the Law of Evidence the maxim of the Roman law in its broadest extent. In other States, the Courts, referring the rule of exclusion to the ground of public convenience, have restricted its application to the case of negotiable security actually negotiated and put into circulation before its maturity, and still in the hands of an innocent indorsee, without notice of the alleged original infirmity, or any other defect in the contract. And in this case the weight of American authority may now be considered as against the admissibility of the witness to impeach the original validity of the security; although the contrary is still holden in some Courts, whose decisions, in general, are received with the highest respect.[1]

[1] The rule, that the indorser of a negotiable security, negotiated before it was due, is not admissible as a witness to prove it originally void, when in the hands of an innocent indorsee, is sustained by the Supreme Court of the United States, in Bank of the United States *v.* Dunn, 6 Pet. 51, 57, explained and confirmed in Bank of the Metropolis *v.* Jones, 8 id. 12, and in the United States *v.* Leffler, 11 id. 86, 94, 95; Scott *v.* Lloyd, 12 id. 149; Henderson *v.* Anderson, 3 How. 73; Taylor *v.* Luther, 2 Sumner 235, per Story, J. It was also adopted in Massachusetts: Churchill *v.* Suter, 4 Mass. 156; Fox *v.* Whitney, 16 id. 118; Packard *v.* Richardson, 17 id. 122; see also the case of Thayer *v.* Crossman, 1 Metcalf 416, in which the decisions are reviewed, and the rule clearly stated and vindicated by Shaw, C. J.; and in New Hampshire: Bryant *v.* Rittersbush, 2 N. H. 212; Hadduck *v.* Wilmarth, 5 id. 187; and in Maine: Deering *v.* Sawtel, 4 Greenl. 191; Chandler *v.* Morton, 5 id. 374; and in Pennsylvania: O'Brien *v.* Davis, 6 Watts 498; Harrisburg Bank *v.* Forster, 8 Watts 304, 309; Davenport *v.* Freeman, 3 Watts & Serg. 557. In Louisiana, the rule was stated and conceded by Porter, J., in Shamburg *v.* Commagere, 10 Martin 18; and was again stated, but an opinion withheld, by Martin, J., in Cox *v.* Williams, 5 Martin N. S. 139. In Vermont, the case of Jordaine *v.* Lashbrooke was followed, in Nichols *v.* Holgate, 2 Aik. 138; but the decision is said to have been subsequently disapproved by all the judges, in Chandler *v.* Mason, 2 Vt. 198, and the rule in Walton *v.* Shelley approved. In Ohio, the indorser was admitted to prove facts *subsequent* to the indorsement; the Court expressing no opinion upon the general rule, though it was relied upon by the opposing counsel: Stone *v.* Vance, 6 Ohio 246; but subsequently the rule seems to have been admitted: Rohrer *v.* Morningstar, 18 id. 579. In Mississippi, the witness was admitted for the same purpose; and the rule in Walton *v.* Shelley was approved: Drake *v.* Henly, Walker 541. In Illinois, the indorser has been admitted, where, in taking the note, he acted as the agent of the indorsee, to whom he immediately transferred it, without any notice of the rule: Webster *v.* Vickers, 2 Scam. 295. But the rule of exclusion has been rejected, and the general doctrine of Jordaine *v.* Lashbrooke followed in New York: Stafford *v.* Ricc, 5 Cowen 23; Bank of Utica *v.* Hillard, ib. 153; Williams *v.* Walbridge, 3 Wend. 415; and in Virginia: Taylor *v.* Beck, 3 Randolph 316; and in Connecticut: Townsend *v.* Bush, 1 Conn. 260; and in South Carolina: Knight *v.* Packard, 3 McCord 71; and in Tennessee: Stump *v.* Napier, 2 Yerger 35. In Maryland, it was rejected by three judges against two in Ringgold *v.* Tyson, 3 H. & J. 172. It was also rejected in New Jersey, in Freeman *v.* Brittin, 2 Harrison 192; and in North Carolina: Guy *v.* Hall, 3 Murphy 151; and in Georgia: Slack *v.* Moss Dudley 161; and in Alabama: Todd *v.* Stafford, 1 Stew. 199; Griffing *v.* Harris, 9 Porter 226. In Kentucky, in the case of Gorham *v.* Carroll, 3 Littell 221, where the indorsee was admitted as a witness, it is to be observed, that the note was indorsed without recourse to him, and thereby marked with suspicion; and that the general rule was not considered. More recently in New Hampshire, doctrine of Walton *v.* Shelley has been denied, and the rule of the Roman law has been admitted only as a rule of estoppel upon the parties to the transaction and in regard to their rights, and not as a rule of evidence, affecting the competency of witnesses; and therefore the maker of a note, being released by his surety, was held competent in an action by an indorsee against the surety, to testify to an alteration of the note, made by himself and the payee, which rendered it void as to the surety: Haines *v.* Dennett, 11 N. H. 180. See further, 2 Stark. Evid. 179 n. (*a*); Bayley on Bills, p. 586, n. *b* (Phillips and Sewall's ed.). But all these decisions against

§ 386. **Witness's Disqualification by Interest.** Another class of persons incompetent to testify in a cause consists of those who are interested in its result.[1] The principle on which these are rejected is the same with that which excludes the parties themselves, and which has already been considered;[2] namely, the danger of perjury, and the little credit generally found to be due to such testimony, in judicial investigations. This disqualifying interest, however, must be some legal, certain, and immediate interest, however minute, either in the event of the cause itself, or in the record, as an instrument of evidence, in support of his own claims, in a subsequent action.[3] It must be a legal interest, as distinguished from the prejudice or bias resulting from friendship or hatred, or from consanguinity, or any other domestic or social or any official relation, or any other motives by which men are generally influenced; for these go only to the credibility. Thus, a servant is a competent witness for his master, a child for his parent, a poor dependant for his patron, an accomplice for the government, and the like. Even a wife has been held admissible against a prisoner, though she believed that his conviction would save her husband's life.[4] The rule of the Roman law — "Idonei non videntur esse testes, quibus imperari potest ut

the rule in Walton *v.* Shelley, except that in New Jersey and the last cited case in New Hampshire, were made long before that rule was recognized and adopted by the Supreme Court of the United States. The rule itself is restricted to cases where the witness is called to prove that the security was actually void at the time when he gave it currency as good; and this in the ordinary course of business, and without any mark or intimation to put the receiver of it on his guard. Hence the indorser is a competent witness, if he indorsed the note "without recourse" to himself (Abbott *v.* Mitchell, 6 Shepl. 355); or, is called to prove a fact not going to the original infirmity of the security (Buck *v.* Appleton, 2 Shepl. 284; Wendell *v.* George, R. M. Charlton, 51); or, if the instrument was negotiated out of the usual course of business (Parke *v.* Smith, 4 Watts & Serg. 287). So, the indorser of an accommodation note, made for his benefit, being released by the maker, is admissible as a witness for the latter, to prove that it has subsequently been paid: Greenough *v.* West, 8 N. H. 400; and see Kinsley *v.* Robinson, 21 Pick. 327.

[1] In Connecticut, persons interested in the cause are now, by statute, made competent witnesses, the objection of interest going only to their credibility: Rev. Stat. 1849, tit. 1, § 141. In New York, persons interested are admissible, except those for whose immediate benefit the suit is prosecuted or defended, and the assignor of a thing in action, assigned for the purpose of making him a witness: Rev. Stat. vol. iii, p. 769 (3d ed.). In Ohio, the law is substantially the same: Stat. March 23, 1850, § 3. In Michigan, all such persons are admissible, except parties to the record, and persons for whose immediate benefit the suit is prosecuted or defended; and their husbands and wives: Rev. Stat. 1846, c. 102, § 99. In Virginia, persons interested are admissible in criminal cases, when not jointly tried with the defendant: Rev. Stat. 1849, c. 199, § 21. In Massachusetts, the objection of interest no longer goes to the competency of any witnesses, except witnesses to wills: Gen. Stat. c. 131, § 14. See *supra*, §§ 327, 329, notes.

[2] *Supra*, §§ 326, 327, 329. And see the observations of Best, C. J., in Hovill *v.* Stephenson, 5 Bing. 493.

[3] 1 Stark. Evid. 102; Bent *v.* Baker, 3 T. R. 27; Doe *v.* Tyler, 6 Bing. 390, per Tindal, C. J.; Smith *v.* Prager, 7 T. R. 62; Wilcox *v.* Farrell, 1 H. L. C. 93; Bailey *v.* Lumkin, 1 Kelly 392.

[4] R. *v.* Rudd, 1 Leach Cr. Cas. 115, 131. In weighing the testimony of witnesses naturally biased, the rule is to give credit to their statements of facts, and to view their deductions from facts with suspicion: Dillon *v.* Dillon, 3 Curt. 96.

teste fient," [5] — has never been recognized in the common law, as affecting the competency; but it prevails in those countries in whose jurisprudence the authority of the Roman law is recognized. Neither does the common law regard as of binding force the rule that excludes an advocate from testifying in the cause for his client, — "Mandatis cavetur, ut Præsides attendant, ne patroni, in causa cui patrocinium præstiterunt, testimonium dicant." [6] But on grounds of public policy, and for the purer administration of justice, the relation of lawyer and client is so far regarded by the rules of practice in some Courts, as that the lawyer is not permitted to be both advocate and witness of his client in the same cause.[7]

§ 387. **Nature of Disqualifying Interest.** The interest, too, must be real, and not merely apprehended, by the party. For it would be exceedingly dangerous to violate a general rule, because in a particular case an individual does not understand the nature or extent of his rights and liabilities. If he believes and states that he has no interest, the very statement of the objection to his competency may inform him that he has; and, on the other hand, if he erroneously thinks and declares that he is interested, he may learn, by the decision of the Court, that he is not. Indeed, there would be danger in resting the rule on the judgment of a witness, and not on the fact itself; for the apprehended existence of the interest might lead his judgment to a wrong conclusion. And, moreover, the inquiry which would be necessary into the grounds and degree of the witness's belief would always be complicated, vague, and indefinite, and productive of much inconvenience. For these reasons, the more simple and practicable rule has been adopted of determining the admissibility of the witness by the actual existence, or not, of any disqualifying interest in the matter.[1]

§ 388. **Honorary Obligation.** If the witness believes himself to be under an honorary obligation, respecting the matter in controversy, in favor of the party calling him, he is nevertheless a com-

[5] Dig. lib. 22, tit. 5, l. 6; Poth. Obl. [793]. In Lower Canada, the incompetency of the relations and connections of the parties, in civil cases, beyond the degree of cousins-german, is removed by Stat. 41 Geo. III, c. 8. See Rev. Code, 1845, p. 144.

[6] Dig. Lib. 22, tit. 5, l. 25; Poth. Obl. [793].

[7] Stones *v.* Byron, 4 Dowl. & L. 393; Dunn *v.* Packwood, 11 Jur. 242; Reg. Gen. Sup. Court, N. H. Reg. 23, 6 N. H. 580; Mishler *v.* Baumgardner, 1 Amer. Law Jour. N. S. 304. But see *contra*, Little *v.* Keon, 1 N. Y. Code Rep. 4; Sandf. 607; Potter *v.* Ware, 1 Cush. 519, 524, and cases cited by Metcalf, J.

[1] 1 Phil. Evid. 127, 128; 1 Stark. Evid. 102; Gresley on Evid. p. 253; Tait on Evid. p. 351. In America and in England, there are some early but very respectable authorities to the point, that a witness believing himself interested is to be rejected as incompetent. See Fotheringham *v.* Greenwood, 1 Stra. 129; Trelawney *v.* Thomas, 1 H. Bl. 307, per Ld. Loughborough, C. J., and Gould, J.; L'Amitie, 6 Rob. Adm. 269, n. (*a*); Plumb *v.* Whiting, 4 Mass. 518; Richardson *v.* Hunt, 2 Munf. 148; Freeman *v.* Luckett, 2 J. J. Marsh 390. But the weight of modern authority is clearly the other way. See Commercial Bank of Albany *v.* Hughes, 17 Wend. 94, 101, 102; Stall *v.* Catskill Bank, 18 id. 466, 475, 476; Smith *v.* Downs, 6 Conn. 371; Long *v.* Bailie, 4 S. & R. 222; Delloue *v.* Rehmer, 4 Watts 9; Stimmel *v.* Underwood, 3 G. & J. 282; Havis *v.* Barkley, 1 Harper's Law Rep. 63; and *infra*, § 423, n.

petent witness, for the reasons already given; and his credibility is left with the jury.[2]

§ 389. **Interest must be in the Event of the Suit.** The disqualifying interest of the witness must be in the event of the cause itself, and not in the question to be decided. His liability to a like action, or his standing in the same predicament with the party, if the verdict cannot be given in evidence for or against him, is an interest in the question only, and does not exclude him.[1] Thus, one underwriter may be a witness for another underwriter upon the same policy;[2] or, one seaman for another, whose claim for wages is resisted, on grounds equally affecting all the crew;[3] or, one freeholder for another, claiming land under the same title, or by the same lines and corners;[4] or one devisee for another, claiming under the same will;[5] or, one trespasser for his co-trespasser;[6] or a creditor for his debtor;[7] or a tenant by the courtesy; or tenant in dower, for the heir at law, in a suit concerning the title.[8] And the purchaser of a license to use a patent may be a witness for the patentee, in an action for infringing the patent.[9]

§ 390. **Test of Interest.** The true test of the interest of a witness is, that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him, in some other action.[1] It must be a present, certain, and vested interest, and not an interest uncertain, remote, or contingent. Thus the heir apparent to an estate is a competent witness in support of the claim of his ancestor; though one, who has a vested interest in remainder, is not competent.[2] And if the interest is of a doubtful nature, the objection goes to the credit of the witness, and not to his competency. For, being always presumed to be

[2] Pederson *v.* Stoffles, 1 Campb. 144; Solarte *v.* Melville, 1 Man. & Ryl. 198; Gilpin *v.* Vincent, 9 Johns. 219; Moore *v.* Hitchcock, 4 Wend. 292; Union Bank *v.* Knapp, 3 Pick. 96, 108; Smith *v.* Downs, 6 Conn. 365; Stimmel *v.* Underwood, 3 Gill & Johns. 282; Howe *v.* Howe, 10 N. H. 88.

[1] Evans *v.* Eaton, 7 Wheat. 356, 424, per Story, J.; Van Nuys *v.* Terhune, 3 Johns. Cas. 82; Stewart *v.* Kip, 5 Johns. 256; Evans *v.* Hettich, 7 Wheat. 453; Clapp *v.* Mandeville, 5 How. Miss. 197.

[2] Bent *v.* Baker, 3 T. R. 27.

[3] Spurr *v.* Pearson, 1 Mason 104; Hoyt *v.* Wildfire, 3 Johns. 518.

[4] Richardson *v.* Carey, 2 Rand. 87; Owings *v.* Speed, 5 Wheat. 423.

[5] Jackson *v.* Nelson, 6 Cowen 248.

[6] Per Ashurst, J., in Walton *v.* Shelley, 1 T. R. 301. See also Blackett *v.* Weir, 5 B. & C. 387, per Abbott, C. J.; Duncan *v.* Meikleham, 3 C. & P. 172; Curtis *v.* Graham, 12 Martin 289.

[7] Paul *v.* Brown, 6 Esp. 34; Nowell *v.* Davies, 5 B. & Ad. 368.

[8] Jackson *v.* Brooks, 8 Wend. 426; Doe *v.* Maisey, 1 B. & Ad. 439.

[9] De Rosne *v.* Fairlie, 1 M. & Rob. 457.

[1] 1 Gilb. Evid. by Lofft, p. 225; Bull. N. P. 284; Bent *v.* Baker, 3 T. R. 27; 6 Bing. 394, per Tindal, C. J.; *supra*, § 386; R. *v.* Boston, 4 East 581, per Ld. Ellenborough.

[2] Smith *v.* Blackham, 1 Salk. 283; Doe *v.* Tyler, 6 Bing. 390. But in an action for waste, brought by a landlord, who is tenant for life, the remainder-man is a competent witness for the plaintiff; for the damages would not belong to the witness, but to the plaintiff's executor: Leach *v.* Thomas, 7 C. & P. 327.

competent, the burden of proof is on the objecting party, to sustain his exception to the competency; and if he fails satisfactorily to establish it, the witness is to be sworn.[3]

§ 391. **Degree of Interest Immaterial.** The magnitude or degree of the interest is not regarded in estimating its effect on the mind of the witness; for it is impossible to measure the influence which any given interest may exert. It is enough, that the interest which he has in the subject is direct, certain, and vested, however small may be its amount;[1] for, interest being admitted as a disqualifying circumstance in any case, it must of necessity be so in every case, whatever be the character, rank, or fortune, of the party interested. Nor is it necessary that the witness should be interested in that which is the subject of the suit; for, if he is liable for the costs, as in the case of a *prochein amy*, or a guardian, or the like, we have already seen,[2] that he is incompetent. And though, where the witness is equally interested on both sides, he is not incompetent; yet if there is a certain excess of interest on one side, it seems that he will be incompetent to testify on that side; for he is interested, to the amount of the excess, in procuring a verdict for the party, in whose favor his interest preponderates.[3]

§ 392. **Nature of Interest.** The nature of the direct interest in the event of the suit which disqualifies the witness may be illustrated by reference to some adjudged cases. Thus, persons having become bail for the defendant have been held incompetent to testify as witnesses on his side; for they are immediately made liable, or discharged, by the judgment against or in favor of the principal. And if the bail have given security for the appearance of the defendant, by depositing a sum of money with the officer, the effect is the same.[1]

[3] Bent *v.* Baker, 3 T. R. 27, 32; Jackson *v.* Benson, 2 Y. & J. 45; R. *v.* Cole 1 Esp. 169; Duel *v.* Fisher, 4 Denio 515; Comstock *v.* Rayford, 12 S. & M. 369; Story *v.* Saunders, 8 Humph. 663.

[1] Burton *v.* Hinde, 5 T. R. 174; Butler *v.* Warren, 11 Johns. 57; Doe *v.* Tooth, 3 Y. & J. 19.

[2] *Supra*, § 347. See also *infra*, §§ 401, 402.

[3] Larbalestier *v.* Clark, 1 B. & Ad. 899. Where this preponderance arose from a liability to costs only, the rule formerly was to admit the witness; because of the extreme difficulty which frequently arose, of determining the liability of his question to pay the costs; see Ilderton *v.* Atkinson, 7 T. R. 480; Birt *v.* Kershaw, 2 East 458. But these cases were broken in upon, by Jones *v.* Brooke, 4 Taunt. 464; and the witness is now held incompetent, wherever there is a preponderancy of interest on the side of the party adducing him, though it is created only by the liability to costs: Townsend *v.* Downing, 14 East 565; Hubbly *v.* Brown, 16 Johns. 70; Scott *v.* McLellan, 2 Greenl. 199; Bottomley *v.* Wilson, 3 Stark. 148; Harman *v.* Lasbrey, 1 Holt's Cas. 390; Edmonds *v.* Lowe, 8 B. & C. 407. And see Mr. Evans's observations, in 2 Poth. Obl. p. 269, App. No. 16; and *post*, § 401. The existence of such a rule, however, was regretted by Mr. Justice Littledale, in 1 B. & Ad. 903; and by some it is still thought the earlier cases, above cited, are supported by the better reason. See further Barretto *v.* Snowden, 5 Wend. 181; Hall *v.* Hale, 8 Conn. 336.

[1] Lacon *v.* Higgins, 3 Stark. 182; 1 T. R. 164, per Buller, J. But in such cases, if the defendant wishes to examine his bail, the Court will either allow his name to be stricken out, on the defendant's adding and justifying another person as his bail; or, even at the trial, will permit it to be stricken out of the bail-piece, upon the defend-

If an underwriter, who has paid his proportion, is to be repaid in the event of the plaintiff's success in a suit against another underwriter upon the same policy, he cannot be a witness for the plaintiff.[2] A creditor, whether of a bankrupt, or of an etsate, or of any other person, is not admissible as a witness to increase or preserve the fund, out of which he is entitled to be paid, or otherwise benefited.[3] Nor is a bankrupt competent, in an action by his assignees to prove any fact tending to increase the fund; though both he and his creditors may be witnesses to diminish it.[4] The same is true of a legatee, without a release, and also of an heir or distributee, in any action affecting the estate.[5] So, where the immediate effect of the judg-

ant's depositing a sufficient sum with the proper officer: 1 Tidd's Pr. 259; Baillie *v.* Hole, 1 Mood. & M. 289; s. c. 3 C. P. 560; Whartley *v.* Fearnley, 2 Chitty, 103. And in like manner the surety in a replevin bond may be rendered a competent witness for the plaintiff: Bailey *v.* Bailey, 1 Bing. 92. And so of the indorser of a writ, who thereby becomes surety for payment of the costs: Robert *v.* Adams, 9 Greenl. 9. So in Indiana, of a *prochein amy:* Harvey *v.* Coffin, 5 Blackf. 566. See further, Salmon *v.* Rance, 3 S. & R. 311, 314; Hall *v.* Baylies, 15 Pick. 51, 53; Beckley *v.* Freeman, ib. 468; Allen *v.* Hawks, 13 Pick. 79; McCulloch *v.* Tyson, 2 Hawks 336; *infra*, § 430; Comstock *v.* Paie, 3 Rob. La. 440.

[2] Forrester *v.* Pigou, 3 Campb. 380; s. c. 1 M. & S. 9.

[3] Craig *v.* Cundell, 1 Campb. 381; Williams *v.* Stephens, 2 id. 301; Shuttleworth *v.* Bravo, 1 Stra. 507; Powel *v.* Gordon, 2 Esp. 735; Stewart *v.* Kip, 5 Johns. 256; Holden *v.* Hearn, 1 Beav. 445. But to disqualify the witness, he must be legally entitled to payment out of the fund: Phœnix *v.* Ingraham, 5 Johns. 427; Peyton *v.* Hallett, 1 Caines 363, 379; Howard *v.* Chadbourne, 3 Greenl. 461; Marland *v.* Jefferson, 2 Pick. 240; Wood *v.* Braynard, 9 id. 322. A mere expectation of payment, however strong, if not amounting to a legal right, has been deemed insufficient to render him incompetent: Seaver *v.* Bradley, 6 Greenl. 60.

[4] Butler *v.* Cooke, Cowp. 70; Ewens *v.* Gold, Bull. N. P. 43; Green *v.* Jones, 2 Campb. 411; Loyd *v.* Stretton, 1 Stark. 40; Rudge *v.* Ferguson, 1 C. & P. 253; Masters *v.* Drayton, 2 T. R. 496; Clay *v.* Kirkland, 4 Martin 405. In order to render the bankrupt competent, in such cases, he must release his allowance and surplus; and he must also have obtained his certificate, without which he is in no case a competent witness for his assignees: Masters *v.* Drayton, 2 T. R. 496; Goodhay *v.* Hendry, 1 Mood. & M. 319. And though his certificate has been allowed by the competent number of creditors, and no opposition to its final allowance is anticipated, yet until its allowance by the Lord Chancellor, he is still incompetent; nor will the trial for that purpose be postponed · Tennant *v.* Strachan, 1 Mood. & M. 377. So, if his certificate has been finally obtained, yet, if his future effects remain liable (as in the case of a second bankruptcy, where he has not yet paid the amount necessary to exempt his future acquisitions), he is still incompetent as a witness for the assignees, being interested to increase the fund: Kennett *v.* Greenwollers, Peake's Cas. 3. The same rules apply to the case of insolvent debtors: Delafield *v.* Freeman, 6 Bing. 294; s. c. 4 C. & P. 67; Rudge *v.* Ferguson, 1 C. & P. 253. But upon grounds of public policy and convenience, a bankrupt is held inadmissible to prove any fact which is material to support or to defeat the fiat issued against him. Nor is a creditor competent to support the fiat, whether he has or has not availed himself of the right of proving under the bankruptcy: see 1 Phil. Ev. 94–96, and cases there cited.

[5] Helliard *v.* Jennings, 1 Ld. Raym. 505; 1 Burr. 424; 2 Stark. 546; Green *v.* Salmon, 3 N. & P. 388; Bloor *v.* Davies, 7 M. & W. 235. And if he is a residuary legatee, his own release of the debt will not render him competent for the executor, in an action against the debtor; for he is still interested in supporting the action, in order to relieve the estate from the charge of the costs: Baker *v.* Tyrwhitt, 4 Campb. 27; 6 Bing. 294, per Tindal, C. J.; Matthews *v.* Smith, 2 Y. & J. 426; Allington *v.* Bearcroft, Peake Add. Cas. 212; West *v.* Randall, 2 Mason 181; Randall *v.* Phillips, 3 id. 378; Campbell *v.* Tousey, 7 Cowen 64; Carlisle *v.* Burley, 3 Greenl. 250. Nor is a legatee competent to testify against the validity of the will, if it is, on the whole, for his interest to defeat it: Robert *v.* Trawick, 13 Ala. 68.

ment for the plaintiff is to confirm the witness in the enjoyment of an interest in possession,[6] or, to place him in the immediate possession of a right,[7] he is not a competent witness for the plaintiff. Neither can a lessor be admitted as a witness, to prove a right of possession in his lessee to a portion of land claimed as part of the premises leased.[8]

§ 393. So where the event of the suit, if it is adverse to the party adducing the witness, will render the latter liable either to a third person, or to the party himself, whether the liability arise from an express or implied legal obligation to indemnify, or from an express or implied contract to pay money upon that contingency, the witness is in like manner incompetent. The cases under this branch of the rule are apparently somewhat conflicting; and therefore it may deserve a more distinct consideration. And here it will be convenient to distinguish between those cases where the judgment will be evidence of the material facts involved in the issue, and those where it will be evidence only of the amount of damages recovered, which the defendant may be compelled to pay. In the former class, which will hereafter be considered, the interest of the party is in the record, to establish his entire claim; in the latter, which belongs to the present head, it is only to prove the amount of the injury he has suffered.

§ 394. Thus, in an action against the principal for damage occasioned by the neglect or misconduct of his agent or servant, the latter is not a competent witness for the defendant without a release; for he is, in general, liable over to his master or employer, in a subsequent action, to refund the amount of damages which the latter may have paid. And though the record will not be evidence against the agent, to establish the fact of misconduct, unless he has been duly and seasonably informed of the pendency of the suit, and required to defend it, in which case it will be received as evidence of all the facts found;[1] yet it will always be admissible to show the amount of damages recovered against his employer.[2] The principle of this rule applies to the relation of master and servant, or employer and agent, wherever that relation in its broadest sense may be found to exist; as, for example, to the case of a pilot, in an action against the captain and owner of a vessel for mismanagement, while the pilot was in charge;[3] or, of the guard of a coach, implicated in the like mis-

[6] Doe *v.* Williams, Cowp. 621.

[7] R. *v.* Williams, 9 B. & C. 549.

[8] Smith *v.* Chambers, 4 Esp. 164.

[1] Hamilton *v.* Cutts, 4 Mass. 349; Tyler *v.* Ulmer, 12 id. 163. See *infra*, §§ 523, 527, 538, 539.

[2] Green *v.* New River Co., 4 T. R. 589.

[3] Hawkins *v.* Finlayson, 3 C. & P. 305. But the pilot has been held admissible in an action by the owners against the underwriters, for the loss of the vessel while in his charge, on the ground that his interest was balanced: Vairin *v.* Canal Ins. Co., 10 Ohio 223.

management, in an action against the proprietor;[4] or, of a broker, in an action against the principal for misconduct in the purchase of goods, which he had done through the broker;[5] or, of a sheriff's officer, who had given security for the due execution of his duty, in an action against the sheriff for misconduct in the service of process by the same officer;[6] or, of a shop-master, in an action by his owner against underwriters, where the question was, whether there had been a deviation;[7] neither of whom is competent to give testimony, the direct legal effect of which will be, to place himself in a situation of entire security against a subsequent action. But the liability must be direct and immediate to the party; for if the witness is liable to a third person, who is liable to the party, such circuity of interest is no legal ground of exclusion.[8] The liability also must be legal; for if the contract be against law, as for example, if it be a promise to indemnify an officer for a violation of his duty in the service of process, it is void; and the promisor is a competent witness, the objection going only to his credibility.[9]

§ 395. The same principle applies to other cases, where the direct effect of the judgment will be to create any other legal claim against the witness. Thus, if he is to repay a sum of money to the plaintiff, if he fails in the suit he is incompetent to be sworn for the plaintiff.[1] So, in an action on a policy of insurance, where there has been a consolidation rule, an underwriter, who is a party to such rule, is not a competent witness for others.[2] The case is the same, wherever a rule is entered into, that one action shall abide the event of another; for in both these cases all the parties have a direct interest in the result. And it makes no difference in any of these cases, whether the witness is called by the plaintiff or by the defendant; for, in either case, the test of interest is the same; the question being, whether a judgment, in favor of the party calling the witness, will procure a direct benefit to the witness. Thus, in *assumpsit*, if the non-joinder of a co-contractor is pleaded in abatement, such person is not a competent witness for the defendant to support the plea,

[4] Whitamore *v.* Waterhouse, 4 C. & P. 383.

[5] Field *v.* Mitchell, 6 Esp. 71; Gevers *v.* Mainwaring, 1 Holt 139; Boorman *v.* Browne, 1 P. & D. 364; Morish *v.* Foote, 8 Taunt. 454.

[6] Powel *v.* Hord, 1 Stra. 650; s. c. 2 Ld. Raym. 1411; Whitehouse *v.* Atkinson, 3 C. & P. 344; Groom *v.* Bradley, 8 id. 500. So, the creditor is incompetent to testify for the officer, where he is liable over to the latter, if the plaintiff succeeds: Keightley *v.* Birch, 3 Campb. 521. See also Jewett *v.* Adams, 8 Greenl. 30; Turner *v.* Austin, 16 Mass. 181; Rice *v.* Wilkins, 8 Shepl. 558.

[7] De Symonds *v.* De la Cour, 2 N. R. 374.

[8] Clark *v.* Lucas, Ry. & M. 32.

[9] Hodsdon *v.* Wilkins, 7 Greenl. 113.

[1] Fotheringham *v.* Greenwood, 1 Stra. 129; Rogers *v.* Turner, 5 West. Law Journ. 406.

[2] The same principle also applies where the underwriter, offered as a witness for the defendant, has paid the loss, upon an agreement with the assured that the money should be repaid, if he failed to recover against the other underwriters: Forrester *v.* Pigou, 1 M. & S. 9; s. c. 3 Campb. 380.

unless he is released; for though, if the defence succeed, the witness will still be liable to another action, yet he has a direct interest to defeat the present action, both to avoid the payment of costs, and also to recover the costs of the defence.[3] The case is the same, where, in a defence upon the merits, a witness is called by the defendant, who is confessedly, or by his own testimony, a co-contractor, or partner with him in the subject of the action.[4] So, in a suit against one on a joint obligation, a co-obligor, not sued, is not a competent witness for the plaintiff, to prove the execution of the instrument by the defendant; for he is interested to relieve himself of part of the debt, by charging it on the defendant.[5] And upon a similar principle, where an action was brought upon a policy of insurance, averred in the declaration to have been effected by the plaintiffs, as agents, for the use and benefit and on the account of a third person, it was held that this third person was not a competent witness for the plaintiffs; and that his release to the plaintiffs, prior to the action, of all actions, claims, &c., which he might have against them by reason of the policy, or for any moneys to be recovered of the underwriters, did not render him competent; neither could his assignment to them, after action brought, of all his interest in the policy, have that effect; for the action being presumed to have been brought by his authority, he was still liable to the attorney for the costs.[6] So, in an action on a joint and several bond against the surety, he cannot call the principal obligor to prove the payment of money by the latter in satisfaction of the debt; for the witness has an interest in favor of his surety to the extent of the costs.[7] So, also, where a legatee sued the executor, for the recovery of a specific legacy, namely, a bond; it was held, that the obligor, having a direct interest in preventing its being enforced, was not a competent witness to prove that the circumstances, under which the bond was given, were such as to show that it was irrecoverable.[8]

§ 396. **Interest as Agent or Servant.** It may seem, at the first view, that where the plaintiff calls his own servant or agent to prove an injury to his property, while in the care and custody of the servant, there could be no objection to the competency of the witness

[3] Young *v.* Bairner, 1 Esp. 103; Lefferts *v.* DeMott, 21 Wend. 136.

[4] Birt *v.* Hood, 1 Esp. 20; Goodacre *v.* Breame, Peake 174; Cheyne *v.* Koops, 4 Esp. 112; Evans *v.* Yeatherd, 2 Bing. 133; Hall *v.* Cecil, 6 Bing. 181; Russell *v.* Blake, 2 M. & G. 374, 381, 382; Vanzant *v.* Kay, 2 Humph. 106, 112. But this point has in some cases been otherwise decided; see Cossham *v.* Goldney, 2 Stark. 414; Blackett *v.* Weir, 5 B. & C. 385; see also Poole *v.* Palmer, 9 M. & W. 71.

[5] Marshall *v.* Thrailkill, 12 Ohio 275; Ripley *v.* Thompson, 12 Moore 55; Brown *v.* Brown, 4 Taunt. 752; Marquand *v.* Webb, 16 Johns. 89; Purviance *v.* Dryden, 3 S. & R. 402, 407; and see Latham *v.* Kenniston, 13 N. H. 203.

[6] Bell *v.* Smith, 5 B. & C. 188.

[7] Townsend *v.* Downing, 14 East 565, 567, per Ld. Ellenborough. In an action against the sheriff, for a negligent escape, the debtor is not a competent witness for the defendant, he being liable over to the defendant for the damages and costs: Griffin *v.* Brown, 2 Pick. 304.

[8] Davies *v.* Morgan, 1 Beav. 405.

to prove misconduct in the defendant; because, whatever might be the result of the action, the record would be no evidence against him in a subsequent action by the plaintiff. But still the witness, in such case, is held inadmissible; upon the general principle already mentioned,[1] in cases where the master or principal is defendant, namely, that a verdict for the master would place the servant or agent in a state of security against any action, which, otherwise, the master might bring against him; to prevent which he is directly interested to fix the liability on the defendant. Thus, in an action for an injury to the plaintiff's cart, or coach, or horses, by negligently driving against them, the plaintiff's own driver or coachman is not a competent witness for him without a release.[2] So, in an action by the shipper of goods, on a policy of insurance, the owner of the ship is not a competent witness for the plaintiff to prove the seaworthiness of the ship, he having a direct interest to exonerate himself from liability to an action for the want of seaworthiness, if the plaintiff should fail to recover of the underwriter.[3] The only difference between the case where the master is plaintiff and where he is defendant, is this, that in the latter case he might claim of the servant both the damages and costs which he had been compelled to pay; but in the former, he could claim only such damages as directly resulted from the servant's misconduct, of which the costs of an unfounded suit of his own would not constitute a part.[4]

§ 397. **Interest from Liability Over.** Where the interest of the witness arises from liability over, it is sufficient that he is bound to indemnify the party calling him against the consequence of some fact essential to the judgment. It is not necessary that there should be an engagement to indemnify him generally against the judgment itself, though this is substantially involved in the other; for a covenant of indemnity against a particular fact, essential to the judgment, is in effect a covenant of indemnity against such a judgment. Thus, the warrantor of title to the property which is in controversy is generally incompetent as a witness for his vendee, in an action concerning the title. And it makes no difference in what manner the liability arises, nor whether the property is real or personal estate. If the title is in controversy, the person who is bound to

[1] *Supra*, § 393. This principle is applied to all cases, where the testimony of the witness, adduced by the plaintiff, would discharge him from the plaintiff's demand by establishing it against the defendant. Thus, in an action by A against B for the board of C, the latter is not a competent witness for the plaintiff to prove the claim: Emerton *v.* Andrews, 4 Mass. 653; Hodson *v.* Marshall, 7 C. & P. 16; *infra*, § 416.

[2] Miller *v.* Falconer, 1 Camph. 251; Morish *v.* Foote, 8 Taunt. 454; Kerrison *v.* Coatsworth, 1 C. & P. 645; Wake *v.* Lock, 5 id. 454. In Sherman *v.* Barnes, 1 M. & Rob. 69, the same point was so ruled by Tindal, C. J., upon the authority of Morish *v.* Foote, though he seems to have thought otherwise upon principle, and perhaps with better reason.

[3] Rotheroe *v.* Elton, Peake 84, cited and approved, per Gibbs, C. J., in 8 Taunt 457.

[4] Per Tindal, C. J., in Fancourt *v.* Bull, 1 Bing. N. C. 688, 691.

make it good to one of the litigating parties against the claim of the other is identified in interest with that party, and therefore cannot testify in his favor.[1] And if the quality or soundness is the subject of dispute, and the vendee with warranty has resold the article with similar warranty, the principle is still the same. If the effect of the judgment is certainly to render him liable, though it be only for costs, he is incompetent,[2] but if it is only to render it more or less probable that he will be prosecuted, the objection goes only to his credibility. But whatever the case may be, his liability must be direct and immediate to the party calling him, and not circuitous and to some other person, as, if a remote vendor with warranty is called by the defendant as a witness, where the article has been successively sold by several persons with the same warranty, before it came to the defendant.[3]

§ 398. **Warrantor.** In order to render the witness liable, and therefore incompetent, as warrantor of the title, it is not necessary to show an express contract to that effect; for an implied warranty is equally binding. Thus, the vendor of goods, having possession and selling them as his own, is held bound in law to warrant the title to the vendee;[1] and therefore he is generally not competent as a witness for the vendee in support of the title.[2] This implied war-

[1] Serle *v.* Serle, 2 Roll. Abr. 685; 21 Vin. Abr. 362, tit. Trial, G, f, pl. 1; Steers *v.* Carwardine, 8 C. & P. 570. But if the vendor sold without any covenant of title, or with a covenant restricted to claims set up under the vendor himself alone, the vendor is a competent witness for his vendee: Busby *v.* Greenslate, 1 Stra. 445; Twambly *v.* Henley, 4 Mass. 441; Beidelman *v.* Foulk, 5 Watts 308; Adams *v.* Cuddy, 13 Pick. 460; Bridge *v.* Eggleston, 14 Mass. 245; Davis *v.* Spooner, 3 Pick. 284; Lothrop *v.* Muzzy, 5 Greenl. 450.

[2] Lewis *v.* Peake, 7 Taunt. 153. In this case the buyer of a horse with warranty resold him with a similar warranty, and, being sued thereon, he gave notice of the action to his vendor, offering him the option of defending it; to which having received no answer, he defended it himself, and failed; it was holden, that he was entitled to recover of his vendor the costs of defending that action, as part of the damages he had sustained by the false warranty. In the later case of Baldwin *v.* Dixon, 1 M. & Rob. 59, where the defendant, in an action on a warranty of a horse, called his vendor, who had given a similar warranty, Lord Tenterden, after examining authorities, admitted the witness. A vendor was admitted, under similar circumstances, by Lord Alvanley, in Briggs *v.* Crick, 5 Esp. 99. But in neither of these cases does it appear that the witness had been called upon to defend the suit. In the still more recent case of Biss *v.* Mountain, 1 M. & Rob. 302, after an examination of various authorities, Alderson, J., held the vendor incompetent, on the ground that the effect of the judgment for the defendant would be to relieve the witness from an action at his suit.

[3] Clark *v.* Lucas, R. Y. & M. 32; 1 C. & P. 156; Briggs *v.* Crick, 5 Esp. 99; Martin *v.* Kelly, 1 Stew. Ala. 198. Where the plaintiff's goods were on the wagon of a carrier, which was driven by the carrier's servant; and the goods were alleged to be injured by reason of a defect in the highway; it was held, in an action against the town for this defect, that the carrier's servant was a competent witness for the owner of the goods: Littlefield *v.* Portland, 13 Shepl. 37.

[1] Bl. Comm. 451; see also 2 Kent Comm. 478, and cases there cited; see also Emerson *v.* Brigham, 10 Mass. 203 (Rand's ed.) n.

[2] Heermance *v.* Vernoy, 6 Johns. 5; Hale *v.* Smith, 6 Greenl. 416; Baxter *v.* Graham, 5 Watts 418. In the general doctrine, stated in the text, that where the vendor is liable over, though it be only for costs, he is not a competent witness for the vendee, the English and American decisions agree. And it is believed that the weight of English authority is on the side of the American doctrine, as stated in the text:

ranty of title, however, in the case of sales by sheriffs, executors, administrators and other trustees, is understood to extend no farther than this, that they do not know of any infirmity in their title to sell in such capacity, and therefore they are in general competent witnesses.[3]

§ 399. **Parties to Negotiable Instruments: Commercial Paper.** In regard to parties to bills of exchange and negotiable promissory notes, we have already seen that the persons who have put them into circulation by indorsements are sometimes held incompetent witnesses, to prove them originally void.[1] But, subject to this exception, which is maintained on grounds of public policy, and of the interest of trade, and the necessity of confidence in commercial transactions, and which, moreover, is not everywhere conceded, parties to these instruments are admitted or rejected, in suits between other parties, like any other witnesses, according as they are interested or not in the event of the suit. In general, their interest will be found to be equal on both sides; and in all cases of balanced interest, the witness, as we shall hereafter see, is admissible.[2] Thus, in an action against one of several makers of a note, another maker is a competent witness for the plaintiff as he stands indifferent; for if the plaintiff should recover in that action, the witness will be liable to pay his contributory share; and if the plaintiff should fail in that action, and force the witness to pay the whole, in another suit, he will still be entitled to contribution.[3] So, in an action against the acceptor of a bill, the drawer is in general a competent witness for either party; for if the plaintiff recovers, the witness pays the bill by the hands of the

namely, that the vendor in possession stipulates that his title is good. But where the witness claims to have derived from the plaintiff the same title which he conveyed to the defendant, and so is accountable for the value to the one party or the other, in either event of the suit, unless he can discharge himself by other proof, he is a competent witness for the defendant; unless he has so conducted as to render himself accountable to the latter for the costs of the suit, as part of the damages to be recovered against him. Thus, where, in trover for a horse, the defendant called his vendor to prove that the horse was pledged to him for a debt due from the plaintiff, with authority to sell him after a certain day, and that he sold him accordingly to the defendant; he was held a competent witness: Nix *v.* Cutting, 4 Taunt. 18. So, in *assumpsit*, for the price of wine sold to the defendant, where the defence was, that he bought it of one Faircloth, and not of the plaintiff, Faircloth was held a competent witness for the defendant to prove that he himself purchased the wine of the plaintiff, and sold it to the defendant, who had paid him the price: Larbalastier *v.* Clark, 1 B. & Ad. 899. So, the defendant's vendor has been held competent, in trover, to prove that the goods were his own, and had been fraudulently taken from him by the plaintiff: Ward *v.* Wilkinson, 4 B. & Ald. 410, where Nix *v.* Cutting is explained by Holroyd, J. See also Baldwin *v.* Dixon, 1 M. & Rob. 59; Briggs *v.* Crick, 5 Esp. 99, and Mr. Starkie's observations on some of these cases: 1 Stark. Evid. 109, n. *n*; 2 Stark Evid. 894, n. *d*.

[3] Peto *v.* Blades, 5 Taunt. 657; Mockbee *v.* Gardner, 2 Har. & Gill. 176; Petersmans *v.* Laws, 6 Leigh 523, 529.

[1] *Supra*, §§ 384, 385.

[2] *Infra*, § 420.

[3] York *v.* Blott, 5 M. & S. 71. He has also been held admissible for the defendant: Thompson *v.* Armstrong, 5 Ala. 383. But see the cases cited *supra*, § 395, notes, and 12 Ohio 279.

acceptor; if not, he is liable to pay it himself.[4] And in an action by the indorsee of a note against the indorser, the maker is a competent witness for the plaintiff; for if the plaintiff prevails, the witness will be liable to pay the note to the defendant; and if the defendant prevails, the witness will be liable, to the same extent, to the plaintiff.[5]

§ 400. And though the testimony of the witnesses, by defeating the present action on the bill or note, may probably deter the holder from proceeding in another action against the witness, yet this only affords matter of observation to the jury, as to the credit to be given to his testimony. Thus, in an action by the indorsee of a note against the indorser, the maker is a competent witness for the defendant, to prove that the date has been altered.[6] And in an action by the indorsee of a bill against the drawer or acceptor, an indorser is, in general, a competent witness for either party; for the plaintiff, because, though his success may prevent him from calling on the indorser, it is not certain that it will; and whatever part of the bill or note he may be compelled to pay, he may recover again of the drawer or acceptor; and he is competent for the defendant, because, if the plaintiff fails against the drawer or acceptor, he is driven either to sue the indorser or abandon his claim.[7]

§ 401. **Liability for Costs.** But if the verdict would necessarily benefit or affect the witness, as if he would be liable, in one event, to the costs of the action, then, without a release, which will annul his interest in the event, he will not be admissible as a witness on the side of the party in whose favor he is so interested. Thus, the party for whose use and accommodation note or bill has been drawn or accepted, is incompetent as a witness, when adduced by him who has lent his own name and liability for the accommodation of the witness.[1] So, in an action against the drawer of a bill of exchange, it has been held, that the acceptor is not a competent witness for the defendant, to prove a set-off; because he is interested in lessening the balance, being answerable to the defendant only for the amount which the plaintiff may recover against him.[2]

[4] Dickinson *v.* Prentice, 4 Esp. 32; Lowber *v.* Shaw, 5 Mason 241, per Story, J.; Rich *v.* Topping, Peake 224. But if he is liable in one event for the costs, he has an interest on that side, and is inadmissible: Scott *v.* McLellan, 2 Greenl. 199; *supra*, § 391, and n. (3).

[5] Venning *v.* Shuttleworth, Bayley on Bills, p. 593; Hubbly *v.* Brown, 16 Johns. 70. But the maker of an accommodation note, made for his own benefit, is incompetent: Pierce *v.* Butler, 14 Mass. 303, 312; *infra*, 401.

[6] Levi *v.* Essex, MSS., 2 Esp. Dig. 708, per Ld. Mansfield; Chitty on Bills, p. 654, n. (*b*). (8th ed.)

[7] Bayley on Bills, 594, 595 (2d Am. ed. by Phillips & Sewall). And see Bay *v.* Gunn, 1 Denio 108.

[1] Jones *v.* Brooke, 4 Taunt. 463; *supra*, § 391, and n. See also Bottomley *v.* Wilson, 3 Stark. 148; Harman *v.* Lasbrey, Holt's Cas. 390; Edmonds *v.* Lowe, 8 B. & C. 407; Hall *v.* Cecil, 6 Bing. 181; Scott *v.* McLellan, 2 Greenl. 199; Peirce *v.* Butler, 14 Mass. 303, 312; Southard *v.* Wilson, 8 Shepl. 494.

[2] Mainwaring *v.* Mytton, 1 Stark. 83. It is deemed unnecessary any further to

§ 402. Where a liability to costs in the suit arises in any other manner, it is still an interest sufficient to render the witness incompetent.[1] Thus, where the witness called by the plaintiff had himself employed the attorney, to whom he had made himself liable for the costs, he was held incompetent, without a release from the attorney.[2] So, where he had given the plaintiff a bond of indemnity against the costs of the suit, he was held incompetent as a witness for the plaintiff, as to any point arising in the action; even such as the service of a notice on the defendant, to produce certain papers at the trial.[3] Thus, also, where an attorney,[4] or an executor,[5] or the tenant, on whose premises the goods of the plaintiff in replevin had been distrained for rent,[6] or the principal in an administration bond, the action being only against the surety,[7] have been found personally liable for the costs of the suit, they have been held incompetent as witnesses on the side of the party in whose favor they were thus interested. But if the contract of indemnity is illegal, as, for example, if it be a contract to bear each other harmless in doing wrong, it creates no legal liability to affect the witness.[8]

§ 403. **Criminal Cases.** This doctrine is applied in the same manner in criminal cases, where the witness has a direct, certain, and immediate interest in the result of the prosecution. Thus, in cases of summary convictions, where a penalty is imposed by statute, and the whole or a part is given to the informer or prosecutor, who becomes entitled to it forthwith upon the conviction, he is not, at the common law, a competent witness for the prosecution.[1] So, in a prosecution under the statutes for forcible entry, where the party injured is entitled to an award of immediate restitution of the lands, he is not a competent witness.[2] This rule, however, is subject to many exceptions, which will hereafter be stated.[3] But it may be proper here to

pursue this subject in this place, or particularly to mention any of the numerous cases, in which a party to a bill or note has been held competent, or otherwise, on the ground of being free from interest, or interested, under the particular circumstances of the case. It will suffice to refer the reader to the cases collected in Bayley on Bills, pp. 586–599 (2d Am. ed. by Phillips & Sewall), with the notes of the learned editors; Chitty on Bills, 654–659 (8th ed.); 2 Stark. Evid. 179, 182 (6th Am. ed. with Metcalf's, Ingraham's, and Gerhard's notes); Thayer *v.* Crossman, 1 Metcalf 416.

[1] See *supra*, § 395.

[2] York *v.* Gribble, 1 Esp. 319; Marland *v.* Jefferson, 2 Pick. 240; Handley *v.* Edwards, 1 Curt. 722.

[3] Butler *v.* Warren, 11 Johns. 57.

[4] Chadwick *v.* Upton, 3 Pick. 442.

[5] Parker *v.* Vincent, 3 C. & P. 38.

[6] Rush *v.* Flickwire, 17 S. & R. 82.

[7] Owens *v.* Collinson, 3 Gill & Johns. 26. See also Cannon *v.* Jones, 4 Hawks 368; Riddle *v.* Moss, 7 Cranch 206.

[8] Humphreys *v.* Miller, 4 C. & P. 7, per Ld. Tenterden; Hodson *v.* Wilkins, 7 Greenl. 113.

[1] R. *v.* Williams, 9 B. & C. 549; Com. *v.* Paull, 4 Pick. 251; R. *v.* Tilly, 1 Stra. 316; 2 Russ. on Crimes, 601, 602. But where the penalty is to be recovered by the witness in a subsequent civil action, he is not an incompetent witness upon the indictment: R. *v.* Luckup, Willes, 425, n.; 9 B. & C. 557, 558.

[2] R. *v.* Beavan, Ry. & M. 242.

[3] See *infra*, § 412.

remark, that, in general, where the penalty or provision for restitution is evidently introduced for the sake of the party injured, rather than to insure the detection and punishment of the offender, the party is held incompetent.[4]

§ 404. **Interest in the Record.** Having thus briefly considered the subject of disqualification, resulting from a direct, certain, and immediate interest in the event of the suit, we come now to the second branch of the general rule, namely, that of interest in the record, as an instrument of evidence in some other suit, to prove a fact therein alleged. The record of a judgment, as hereafter will be seen, is always admissible, even in an action between strangers, to prove the fact that such a judgment was rendered, and for such a sum; but it is not always and in all cases admissible to prove the truth of any fact, on which the judgment was founded. Thus the record of a judgment against the master, for the negligence of his servant, would be admissible in a subsequent action by the master against the servant to prove the fact, that such a judgment had been recovered against the master for such an amount, and upon such and such allegations; but not to prove that either of those allegations was true; unless in certain cases, where the servant or agent has undertaken the defence, or, being bound to indemnify, has been duly required to assume it. But under the present head are usually classed only those cases in which the record is admissible in evidence for or against the witness, to establish the facts therein alleged or involved, in order to acquire a benefit or repel a loss;[1] and it is in this view alone that the subject will now be considered.

§ 405. **Claims of Customary Right.** The usual and clearest illustration of this branch of the rule is the case of an action brought by or against one of several persons, who claim a customary right of common, or some other species of customary right. In general, in all cases depending on the existence of a particular custom, a judgment establishing that custom is evidence, though the parties are different. Therefore, no person is a competent witness in support of such custom, who would derive a benefit from its establishment; because the record would be evidence for him in another suit, in which his own right may be controverted. Thus, where the plaintiff prescribed for common of pasture upon Hampton Common, as appurtenant to his ancient messuage, and charged the defendant with neglect to repair the fence; it was held, that another commoner, who claimed a similar prescription in right of another tenement, was not a competent witness to prove the charge;[1] and *a fortiori* he is not, where the prescription is, that all the inhabitants of the place have common there.[2]

[4] R. *v.* Williams, 9 B. & C. 549, per Bayley, J.

[1] 1 Stark. Evid. 114, 115; Hunter *v.* King, 4 B. & Ald. 210.

[1] Anscomb *v.* Shore, 1 Taunt. 261. See also Parker *v.* Mitchell, 11 Ad. & El. 788.

[2] Hockley *v.* Lamb, 1 Ld. Raym. 731.

Thus, also, an inhabitant of a town is not a competent witness to prove a prescription for all the inhabitants to dig clams in a certain place;[3] nor to prove a prescriptive right of way for all the inhabitants.[4] So where the right to a seat in the common council of a borough was in controversy, and it was insisted that by prescription no person was entitled, unless he was an inhabitant and also had a burgage tenure; it was held, that, though a person having but one of these qualifications was a competent witness to prove the prescription, one who had them both was not; for he would thereby establish an exclusive right in favor of himself.[5] So, where a corporation was lord of a manor, and had approved and leased a part of the common, a freeman was held incompetent to prove that a sufficiency of common was left for the commoners.[6] So, one who has acted in breach of an alleged custom by the exercise of a particular trade, is not a competent witness to disprove the existence of such custom.[7] Nor is the owner of property within a chapelry a competent witness to disprove an immemorial usage, that the land-owners there ought to repair the chapel.[8] And it is proper here to add, that in order to exclude a witness, where the verdict depends on a custom, which he is interested to support, it seems to be necessary that the custom should be stated on the record;[9] for it is said, that the effect of the verdict to support the custom may be aided by evidence.[10]

§ 406. **Interest both in Suit and Record.** There are some cases, in which the interest of the witness falls under both branches of this rule, and in which he has been rejected, sometimes on the ground of immediate interest in the event of the suit, and sometimes on the ground of interest in the record, as an instrument of evidence. Such is the case of the tenant in possession in an action of ejectment; who is held incompetent either to support his landlord's title,[1] or, to prove that himself, and not the defendant, was the tenant in possession of the land.[2] And where a declaration was served on two tenants, in possession of different parts of the premises, and a third person entered into a rule to defend alone as landlord, it was held, that neither of the tenants was a competent witness for the landlord,

[3] Lufkin *v.* Haskell, 3 Pick. 356; Moore *v.* Griffin, 9 Shepl. 350.

[4] Odiorne *v.* Wade, 8 Pick. 518. The statutes which render the inhabitants of towns competent witnesses, where the corporation is a party, or is interested, apply only to cases of corporate rights or interest, and not to cases of individual and private interest, though these may extend to every inhabitant. See *supra*, § 331.

[5] Stevenson *v.* Nevinson, Mayor, &c., 2 Ld. Raym. 1353.

[6] Burton *v.* Hinde, 5 T. R. 174.

[7] The Carpenters, &c. of Shrewsbury *v.* Hayward, 1 Dong. 374.

[8] Rhodes *v.* Ainsworth, 1 B. & Ald. 87. See also Lord Falmouth *v.* George, 5 Bing. 286.

[9] Lord Falmouth *v.* George, 5 Bing. 286, Stevenson *v.* Nevinson *et al.*, 2 Ld. Raym 1353.

[10] 1 Stark. Evid. 115, n. *c*.

[1] Doe *v.* Williams, Cowp. 621; Bourne *v.* Turner, 1 Stra. 632.

[2] Doe *v.* Wilde, 5 Taunt. 183; Doe *v.* Bingham, 4 B. & Ald. 672.

to prove an adverse possession by the other of the part held by him; for as they were identified with the landlord in interest, the judgment for the plaintiff would be evidence of his title, in a future action against them for the mesne profits.[3]

§ 407. **Criminal Cases; Interest in Record.** So, in criminal cases, a person interested in the record is not a competent witness. Thus an accessory, whether before or after the fact, is not competent to testify for the principal.[1] And where several were indicted for a conspiracy, the wife of one was held not admissible as a witness for the others; a joint offence being charged, and an acquittal of all the others being a ground of discharge for her husband.[2] Nor is the wife of one joint trespasser a competent witness for another, even after the case is already clearly proved against her husband.[3]

§ 408. **Illustrations of Competency for Want of Interest; Remote Interest.** The extent and meaning of the rule, by which an interested witness is rejected as incompetent, may be further illustrated by reference to some cases, in which the witness has been deemed not disqualified. We have already seen that mere wishes or bias on the mind of the witness in favor of the party producing him, or strong hopes or expectations of benefit, or similarity of situation, or any other motive, short of an actual and legal interest in the suit, will not disqualify the witness.[1] Such circumstances may influence his mind, and affect his opinions, and perhaps may tempt him at least to give a false color to his statements; and therefore they should be carefully considered by the jury, in determining the weight or credibility to be given to his testimony; but they are not deemed sufficient to justify its utter exclusion from the jury. It may now be further observed, that a *remote, contingent, and uncertain interest*, does not disqualify the witness. Thus, a paid legatee of a specific sum, or of a chattel, is a competent witness for the executor; for though the money paid to a legatee may sometimes be recovered back, when necessary for the payment of paramount claims, yet it is not certain that it will be needed for such purpose; nor is it certain, if

[3] Doe *v.* Preece, 1 Tyrwh. 410. Formerly, it was not material in England, as it still is not in the United States, to determine with precision in which of these modes the witness was interested. But by Stat. 3 & 4 W. IV, c. 42, §§ 26, 27, the objection arising from interest in the record, as a future instrument of evidence, is done away; the Court being directed, whenever this objection is taken, to indorse the name of the witness on the record or document on which the trial shall be had, and of the party on whose behalf he was called to testify; after which the verdict or judgment in that action shall never be evidence for or against the witness, or any one claiming under him. The practice under this statute seems to be not yet completely settled; but the cases which have arisen, and which it is deemed unnecessary here to examine, are stated and discussed in Phil. & Am. on Evid. pp. 108–113; 1 Phil. Evid. 114–117. See also Poole *v.* Palmer, 9 M. & W. 71.

[1] 1 Stark. Evid. 130. But the principal is a competent witness against the accessory: People *v.* Lohman, 2 Barb. S. C. 216.

[2] R. *v.* Locker, 5 Esp. 107; 2 Russ. on Crimes, 602; *supra*, 403; Com. *v.* Robinson, 1 Gray 555.

[3] Hawkesworth *v.* Showler, 12 M. & W. 45.

[1] *Supra*, §§ 387, 389.

the legacy has not been paid, that there are not other funds sufficient to pay it.[2] So, also, a creditor of an estate, not in a course of liquidation as an insolvent estate, is a competent witness for the administrator; for he stands in the same relation to the estate now as he did to the debtor in his lifetime; and the probability that his testimony may be beneficial to himself, by increasing the fund out of which he is to be paid, is equally remote and contingent in both cases.[3] It is only where his testimony will certainly have that effect, as in the case of a creditor to an insolvent estate, or a residuary legatee, or a distributee, that the witness is rendered incompetent.[4] Yet in these cases, and in the case of a creditor to a bankrupt estate, if the legatee, distributee, or creditor has assigned his interest to another person, even equitably, his competency is restored.[5] In an action of covenant against a lessee, for not laying the stipulated quantity of manure upon the land; upon a plea of performance, a sub-lessee of the defendant is a competent witness for him, to support the plea;[6] for it does not appear that he is under the like duty to the defendant, or that a recovery by the latter would place the witness in a state of security against a similar action.[7] Upon the same principle, a defendant against whom a civil action is pending is a competent witness for the government on the trial of an indictment for perjury, against one who has been summoned as a witness for the plaintiff in the civil action.[8]

§ 409. Thus, also, the tenant in possession is a competent witness to support an action on the case, brought by the reversioner, for an injury done to the inheritance.[1] So, in an action against an administrator for a debt due by the intestate, a surety in the administrator's bond in the ecclesiastical Court is a competent witness for him, to prove a tender; for it is but a bare possibility that an action may be brought upon the bond.[2] So, in an action against a debtor, who pleads the insolvent debtor's act in discharge, another creditor is a competent witness for the plaintiff, to prove that, in fact, the defendant is not within the operation of the act.[3] An executor or

[2] Clarke *v.* Gannon, R. & M. 31.

[3] Paull *v.* Brown, 6 Esp. 34; Davies *v.* Davies, 1 Mood. & M. 345; Carter *v.* Pearce, 1 T. R. 164. An annuitant under the will is also a competent witness for the executor, in an action against him for the debt of the testator: Nowell *v.* Davies, 5 B. & Ad. 368.

[4] *Supra*, § 392.

[5] Heath *v.* Hall, 4 Taunt. 326; Boynton *v.* Turner, 13 Mass. 391.

[6] Wishaw *v.* Barnes, 1 Campb. 341.

[7] *Supra*, § 394.

[8] Hart's Case, 2 Rob. Va. 819.

[1] Doddington *v.* Hudson, 1 Bing. 257. Where the defence rested on several cognizances, it was held, that the person under whom one of the cognizances was made, was competent to prove matters distinct from and independent of that particular cognizance: Walker *v.* Giles, 2 C. & K. 671.

[2] Carter *v.* Pearce, 1 T. R. 163.

[3] Norcot *v.* Orcott, 1 Stra. 650.

trustee under a will, taking no beneficial interest under the will, is a good attesting witness.[4] And in an action against an administrator upon a bond of the intestate, and a plea of *plene administravit* by the payment of another bond debt, the obligee in the latter bond is a competent witness to support the plea.[5] A trespasser, not sued, is a competent witness for the plaintiff, against his co-trespasser.[6] In a *qui tam* action, for the penalty for taking excessive usury, the borrower of the money is a competent witness for the plaintiff.[7] A person who has been arrested on mesne process, and suffered to escape, is a competent witness for the plaintiff, in an action against the sheriff for the escape;[8] for though the whole debt may be recovered against the sheriff, yet, in an action on the judgment against the original debtor, the latter can neither plead in bar, nor give in evidence, in mitigation of damages, the judgment recovered against the sheriff. And one who has been rescued is a competent witness for the defendant, in an action against him for the rescue.[9] So, a mariner, entitled to a share in a prize, is a competent witness for the captain in an action brought by him for part of the goods taken.[10] In all these cases, it is obvious that whatever interest the witness might have, it was merely contingent and remote; and on this ground, the objection has been held to go only to his credibility.

§ 410. **Witness may testify against his Interest.** It is hardly necessary to observe that, where a witness is produced to testify against his interest, the rule, that interest disqualifies, does not apply, and the witness is competent.

§ 411. **Exceptions to Rule disqualifying by Interest.** The general rule, that a witness interested in the subject of the suit, or in the record, is not competent to testify on the side of his interest, having been thus stated and explained, it remains for us to consider some of the exceptions to the rule, which, for various reasons, have been allowed. These exceptions chiefly prevail either in criminal cases, or in the affairs of trade and commerce, and are admitted on grounds

[4] Phipps *v.* Pitcher, 6 Taunt. 220; Comstock *v.* Hadlyme, 8 Conn. 254. In Massachusetts, the executor has been held incompetent to prove the will in the Court of probate, he being party to the proceedings, and liable to the cost of the trial: Sears *v.* Dillingham, 12 Mass. 358. But the will may be proved by the testimony of the other witnesses, he having been a competent witness at the time of attestation: ibid. Generally speaking, any trustee may be a witness, if he has no interest in the matter; but not otherwise: Main *v.* Newson, Anthon 11; Johnson *v.* Cunningham, 1 Ala. 249; George *v.* Kimball, 24 Pick. 234; Norwood *v.* Marrow, 4 Dev. & Bat. 442.

[5] Bull. N. P. 143; 1 Ld. Raym. 745.

[6] Morris *v.* Daubigny, 5 Moore 319. In an action against the printer of a newspaper for a libel, a proprietor of the paper is a competent witness, as he is not liable to contribution: Moscati *v.* Lawson, 7 C. & P. 32.

[7] Smith *v.* Prager, 7 T. R. 60.

[8] Cass *v.* Cameron, Peake 124; Hunter *v.* King, 4 B. & Ald. 210. If the escape was committed while the debtor was at large, under a bond for the prison liberties, the jailer who took the bond is a competent witness for the sheriff: Stewart *v.* Kip, 5 Johns. 256.

[9] Wilson *v.* Gary, 6 Mod. 211.

[10] Anon., Skin. 403.

of public necessity and convenience, and to prevent a failure of justice. They may be conveniently classed thus: (1) Where the witness, in a criminal case, is entitled to a reward, upon conviction of the offender; (2) Where, being otherwise interested, he is made competent by statute; (3) The case of agents, carriers, factors, brokers, or servants, when called to prove acts done for their principals, in the course of their employment; and (4) The case of a witness, whose interest has been acquired after the party had become entitled to his testimony. To these a few others may be added, not falling under any of these heads.

§ 412. **Witnesses entitled to Reward.** And in the first place, it is to be observed, that the circumstance that a witness for the prosecution will be entitled to a reward from the government upon conviction of the offender, or to a restoration, as owner of the property stolen, or to a portion of the fine or penalty inflicted, is not admitted as a valid objection to his competency. By the very statute, conferring a benefit upon a person, who, but for that benefit, would have been a witness, his competency is virtually continued, and he is as much a witness after that benefit, as he would have been before. The case is clear upon grounds of public policy, with a view to the public interest, and because of the principle on which rewards are given. The public has an interest in the suppression of crime, and the conviction of criminals; it is with a view to stir up greater vigilance in apprehending, that rewards are given; and it would defeat the object of the legislature to narrow the means of conviction, by means of those rewards, and to exclude testimony, which otherwise would have been admissible.[1] The distinction between these excepted cases, and those which fall under the general rule, is, that in the latter, the benefit resulting to the witness is created chiefly for his own sake, and not for public purposes. Such is the case of certain summary convictions heretofore mentioned.[2] But where it is plain, that the infliction of a fine or penalty is intended as a punishment, in furtherance of public justice, rather than as an indemnity to the party injured, and that the detection and conviction of the offender are the objects of the legislature, the case will be within the exception, and the person benefited by the conviction will, notwithstanding his interest, be competent.[3] If the reward to which the witness will be entitled has been offered by a private in-

[1] R. *v.* Williams, 9 B. & C. 549, 556, per Bayley, J. See also 1 Gilb. Evid. by Lofft, 245–250.

[2] *Supra*, § 403.

[3] R. *v.* Williams, 9 B. & C. 549, 560, per Bayley, J. See also the case of the Rioters, 1 Leach Cr. Cas. 314, n. *a*, where the general question of the admissibility of witnesses, to whom a reward was offered by the government, being submitted to the twelve judges, was resolved in the affirmative: McNally's Evid. p. 61, Rule 12; U. S. *v.* Murphy, 16 Pet. 203; U. S. *v.* Wilson, 1 Baldw. 99; Com. *v.* Moulton, 9 Mass. 30; R. *v.* Teasdale, 3 Esp. 68. and the cases cited in Mr. Day's note; Salisbury *v.* Connecticut, 6 Conn. 101.

dividual, the rule is the same, the witness being still competent; but the principle on which it stands is different; namely, this, that the public have an interest upon public grounds, in the testimony of every person who knows anything as to a crime; and that nothing which private individuals can do will take away the public right.[4] The interest, also, of the witness is contingent; and, after all, he may not become entitled to the reward.

§ 413. **Pardon.** The reason of this exception extends to, and accordingly it has been held to include, the cases where, instead of a pecuniary reward, a pardon or exemption from prosecution is offered by statute to any person participating in a particular offence, provided another of the parties should be convicted upon his evidence. In such cases, Lord Ellenborough remarked, that the statute gave a parliamentary capacitation to the witness, notwithstanding his interest in the cause; for it was not probable that the legislature would intend to discharge one offender, upon his discovering another, so that the latter might be convicted, without intending that the discoverer should be a competent witness.[1]

§ 414. **Other Benefit.** And in like manner, where the witness will directly derive any other benefit from the conviction of the offender, he is still a competent witness for the government, in the cases already mentioned. Formerly, indeed, it was held that the person whose name was alleged to be forged was not admissible as a witness against the prisoner, on an indictment for the forgery, upon the notion that the prosecution was in the nature of a proceeding *in rem*, and that the conviction warranted a judicial cancellation of the instrument. And the prosecutor in an indictment for perjury has been thought incompetent, where he had a suit pending, in which the person prosecuted was a material witness against him, or was defendant against him in a suit in equity in which his answer might be evidence. But this opinion as to cases of perjury has since been exploded; and the party is, in all such cases, held admissible as a witness, his credibility being left to the jury. For wherever the party offers as evidence, even to a collateral point, a record which has been obtained on his own testimony, it is not admitted; and, moreover, the record in a criminal prosecution is generally not evidence of the facts in a civil suit, the parties not being the same.[1] And as to the person whose name has been forged, the unsoundness of the rule by which he was held incompetent was tacitly conceded in several of the more recent cases, which were held not to be within the rule; and at length it was repealed in England by an

[4] 9 B. & C. 556, per Bayley, J.

[1] Heward *v.* Shipley, 4 East 180, 183. See also R. *v.* Rudd, 1 Leach, Cr. Cas. 115; Bush *v.* Ralling, Sayer 289; Mead *v.* Robinson, Willes 422; Sutton *v.* Bishop, 4 Burr 2283.

[1] Gilb. Evid. by Lofft, pp. 33, 34; Bull. N. P. 232, 245; R. *v.* Boston, 4 East 572; Arahams *v.* Bunn, 4 Burr. 2251. See further, *infra*, § 537.

express statute,[2] which renders the party injured a competent witness in all criminal prosecutions for forgery. In America, though in some of the earlier cases the old English rule of exclusion was followed, yet the weight of authority, including the later decisions, is quite the other way, and the witness is now almost universally held admissible.[3]

§ 415. **Informers.** The second class of cases in which the general rule of incompetency by reason of interest does not apply, consists of exceptions created by express statutes, and which otherwise would not fall within the reason of the first exception. Of this sort are cases where the informer and prosecutor, in divers summary convictions and trials for petty offence, is, by the statutes of different States, expressly made a competent witness, notwithstanding his interest in the fine or forfeiture; but of which the plan of this Treatise does not require a particular enumeration.

§ 416. **Agents, Factors, Brokers, &c.** The third class of cases excepted out of the general rule, is that of agents, carriers, factors, brokers, and other servants, when offered to prove the making of contracts, the receipt or payment of money, the receipt or delivery of goods, and other acts done within the scope of their employment. This exception has its foundation in public convenience and necessity;[1] for otherwise affairs of daily and ordinary occurrence could not be proved, and the freedom of trade and commercial intercourse would be inconveniently restrained. And it extends, in principle, to every species of agency or intervention, by which business is transacted; unless the case is overborne by some other rule. Thus, where the acceptor of a bill of exchange was also the agent of the defendant, who was both drawer and indorser, he was held incompetent, in an action by the indorsee, to prove the terms on which he

[2] 9 Geo. IV, c. 32.

[3] Respublica *v.* Keating, 1 Dall. 110; Pennsylvania *v.* Farrel, Addis. 246; People *v.* Howell, 4 Johns. 296, 302; People *v.* Dean, 6 Cowen 27; Com. *v.* Frost, 5 Mass. 53; Com. *v.* Waite, ib. 261; State *v.* Stanton, 1 Ired. 424; Simmons *v.* State, 7 Ham. Ohio 116. Lord Denman is reported to have ruled, at *Nisi Prius*, that where the prosecutor, in an indictment for perjury, expected that the prisoner would be called as a witness against him in a civil action about to be tried, he was incompetent as a witness to support the indictment: R. *v.* Hulme, 7 C. & P. 8. But *quære*, and see R. *v.* Boston, 4 East 572; *supra*, § 362. In several of the United States, the party injured, or intended to be injured, or entitled to satisfaction for the injury, or liable to pay the costs of the prosecution, is by statute made a competent witness upon a criminal prosecution for the offence: see Missouri, Rev. Stat. 1845, c. 148, § 22; Illinois, Rev. Stat. 1833, Crim. Code, §§ 154, 169, pp. 208, 212; California, Rev. Stat. 1850, c. 99, § 13. In New Hampshire, no person is disqualified as a witness in a criminal prosecution by reason of interest, "except the respondent:" Rev. Stat. 1842, c. 225, § 17. As to the mode of examining the prosecutor, in a trial for forgery, see *post*, vol. iii, § 106, n.

[1] Bull. N. P. 289; 10 B. & C. 864, per Parke, J.; Benjamin *v.* Porteus, 2 H. Bl. 591; Matthews *v.* Haydon, 2 Esp. 509. This necessity, says Mr. Evans, is that which arises from the general state and order of society, and not that which is merely founded on the accidental want or failure of evidence in the particular case: Poth. on Obl. by Evans, App. No. 16, pp. 208, 267. In all the cases of this class, there seems also to be enough of contingency in the nature of the interest, to render the witness admissible under the general rule.

negotiated the bill to the indorsee, in order to defeat the action, though the facts occurred in the course of his agency for the defendant, for whose use the bill was negotiated; it being apparent that the witness was interested in the costs of the suit.[2] But in cases not thus controlled by other rules, the constant course is to admit the witness notwithstanding his apparent interest in the event of the suit.[3] Thus, a porter, a journeyman, or salesman, is admissible to prove the delivery of goods.[4] A broker, who has effected a policy, is a competent witness for the assured, to prove any matters connected with the policy; even though he has an interest in it arising from his lien.[5] A factor, who sells for the plaintiff, and is to have a poundage on the amount, is a competent witness to prove the contract of sale.[6] So, though he is to have for himself all he has bargained for beyond a certain amount, he is still a competent witness for the seller.[7] A clerk, who has received money, is a competent witness for the party who paid it, to prove the payment, though he is himself liable on the receipt of it.[8] A carrier is admissible for the plaintiff, to prove that he paid a sum of money to the defendant by mistake, in an action to recover it back.[9] So of a bankers' clerk.[10] A servant is a witness for his master, in an action against the latter for a penalty; such, for example, as for selling coals without measure by the bushel, though the act were done by the servant.[11] A carrier's book-keeper is a competent witness for his master, in an action for not safely carrying goods.[12] A shipmaster is a competent witness for the defendant in an action against his owner, to prove the advancement of moneys for the purposes of the voyage, even though he gave the plaintiff a bill of exchange on his owner for the amount.[13] The cashier or teller of a bank is a competent witness for the bank, to charge the defendant on a promissory note,[14] or for money lent, or overpaid,[15] or obtained from the officer without the security which he should have received; and even though the officer has given bond to the bank for his official good conduct.[16]

[2] Edmonds *v.* Lowe, 8 B. & C. 407.
[3] Theobald *v.* Tregott, 11 Mod. 262, per Holt, C. J.
[4] Bull. N. P. 289; 4 T. R. 590; Adams *v.* Davis, 3 Esp. 48.
[5] Hunter *v.* Leathley, 10 B. & C. 858.
[6] Dixon *v.* Cooper, 3 Wils. 40; Shepard *v.* Palmer, 6 Conn. 95; Depeau *v.* Hyams, 2 McCord 146; Scott *v.* Wells, 6 Watts & Serg. 357.
[7] Benjamin *v.* Porteus, 2 H. Bl. 590; Caune *v.* Sagory, 4 Martin 81.
[8] Matthews *v.* Haydon, 2 Esp. 509.
[9] Barker *v.* Macrae, 3 Campb. 144.
[10] Martin *v.* Horrell, 1 Stra. 647.
[11] E. Ind. Co. *v.* Gosling, Bull. N. P. 289, per Lee, C. J.
[12] Spencer *v.* Goulding, Parke's Cas. 129.
[13] Descadillas *v.* Harris, 8 Greenl. 398; Milward *v.* Hallett, 2 Caines 77. And see Martineau *v.* Woodland, 2 C. & P. 65.
[14] Strafford Bank *v.* Cornell, 1 N. H. 192.
[15] O'Brien *v.* Louisiana State Bank, 5 Martin N. S. 305; U. S. Bank *v.* Johnson, ib. 310.
[16] Franklin Bank *v.* Freeman, 16 Pick. 535; U. S. Bank *v.* Stearns, 15 Wend. 314.

And an agent is also a competent witness to prove his own authority, if it be by parol.[17]

§ 417. This exception being thus founded upon considerations of public necessity and convenience, for the sake of trade and the common usage of business, it is manifest that it cannot be extended to cases where the witness is called to testify to facts out of the usual and ordinary course of business, or to contradict or deny the effect of those acts which he has done as agent. He is safely admitted, in all cases, to prove that he acted according to the directions of his principal, and within the scope of his duty; both on the ground of necessity, and because the principal can never maintain an action against him for any act done according to his own directions, whatever may be the result of the suit in which he is called as a witness. But if the cause depends on the question, whether the agent has been guilty of some tortious act or some negligence in the course of executing the orders of his principal, and in respect of which he would be liable over to the principal if the latter should fail in the action pending against him, the agent, as we have seen, is not a competent witness for his principal, without a release.[1]

§ 418. **Subsequently Acquired Interest.** In the fourth class of exceptions to the rule of incompetency by reason of interest, regard is paid to the time and manner in which the interest was acquired. It has been laid down in general terms, that where one person becomes entitled to the testimony of another, the latter shall not be rendered incompetent to testify by reason of any interest subsequently acquired in the event of the suit.[1] But though the doctrine is not now universally admitted to that extent, yet it is well settled and agreed, that in all cases where the interest has been subsequently created by the fraudulent act of the adverse party, for the purpose of taking off his testimony, or by any act of mere wantonness and aside from the ordinary course of business on the part of the witness, he is not thereby rendered incompetent. And where the person was the original witness of the transaction or agreement between the parties, in whose testimony they both had a common interest, it seems also agreed, that it shall not be in the power, either of the witness or of one of the parties, to deprive the other of his testimony by reason of any interest subsequently acquired, even though it were acquired without any such intention on the part of

[17] Lowber *v.* Shaw, 5 Mason 242, per Story, J. ; McGunnagle *v.* Thornton, 10 S. & R. 251 ; Ilderton *v.* Atkinson, 7 T. R. 480; Birt *v.* Kershaw, 2 East 458.

[1] *Supra*, §§ 394–396 ; Miller *v.* Falconer, 1 Camph. 251 ; Theobald *v.* Tregott, 11 Mod. 262 ; Gevers *v.* Mainwaring, 1 Holt 139 ; McBrain *v.* Fortune, 3 Camph. 317 ; 1 Stark. Evid. 113 ; Fuller *v.* Wheelock, 10 Pick. 135, 138 ; McDowell *v.* Simpson, 3 Watts 129, 135, per Kennedy, J.

[1] See Bent *v.* Baker, 3 T. R. 27, per Ld. Kenyon, and Ashhurst, J. ; Barlow *v.* Vowell, Skin. 586, per Ld. Holt ; s. c. Cowp. 736 ; Jackson *v.* Rumsey, 3 Johns. Cas. 234, 237 : *supra*, § 167.

the witness or of the party.[2] But the question upon which learned judges have been divided in opinion is, whether, where the witness was not the agent of both parties, or was not called as a witness of the original agreement or transaction, he ought to be rendered incompetent by reason of an interest subsequently acquired in good faith and in the ordinary course of business. On this point it was held by Lord Ellenborough that the pendency of a suit could not prevent third persons from transacting business *bona fide* with one of the parties; and that, if an interest in the event of the suit is thereby acquired, the common consequence of law must follow, that the person so interested cannot be examined as a witness for that party from whose success he will necessarily derive an advantage.[3] And therefore it was held, that where the defence to an action on a policy of insurance was that there had been a fraudulent concealment of material facts, an underwriter, who had paid on a promise of repayment if the policy should be determined invalid, and who was under no obligation to become a witness for either party, was not a competent witness for another underwriter who disputed the loss.[4] This doctrine has been recognized in the Courts of several of the United States as founded in good reason,[5] but, the question being presented to the Supreme Court of the United States, the learned judges were divided in opinion, and no judgment was given upon the point.[6] If the subsequent interest has been created by the agency of the party producing the witness, he is disqualified; the party having no right to complain of his own act.[7]

§ 419. **Witness may divest himself of Interest.** It may here be added, that where an interested witness does all in his power to divest himself of his interest, by offering to surrender or release it, which the surrenderee or releasee, even though he be a stranger, refuses to accept, the principle of the rule of exclusion no longer applies, and the witness is held admissible. Thus, in an ejectment, where the lessors of the plaintiff claimed under a will, against the heir at law, and the executor was called by the plaintiff to prove the sanity of the testator, and was objected to by the defendant, because by the same will he was devisee of the reversion of certain copyhold lands, to obviate which objection he had surrendered his

[2] Forrester *v.* Pigou, 3 Campb. 381 ; 1 Stark. Evid. 118 ; Long *v.* Bailie, 4 S. & R. 222 ; 14 Pick. 47 ; Phelps *v.* Riley, 3 Conn. 266, 272 ; R. *v.* Fox, 1 Stra. 652 ; *supra*, § 167.

[3] Forrester *v.* Pigou, 3 Campb. 381 ; s. c. 1 M. & S. 9 ; Hovill *v.* Stephenson, 5 Bing. 493 ; *supra*, § 167.

[4] Forrester *v.* Pigou, 3 Campb. 381 ; s. c. 1 M. & S. 9.

[5] Phelps *v.* Riley, 3 Conn. 266, 272 ; Eastman *v.* Winship, 14 Pick. 44, 47 ; Long *v.* Bailie, 4 Serg. & R. 222 ; Manchester Iron Manufacturing Co. *v.* Sweeting, 10 Wend. 162. In Maine, the Court seems to have held the witness admissible in all cases, where the party objecting to the witness is himself a party to the agreement by which his interest is acquired : Burgess *v.* Lane, 3 Greenl. 165, 170 ; *supra*, 167.

[6] Winship *v.* Bank of United States, 5 Pet. 529, 552.

[7] Hovill *v.* Stephenson, 5 Bing. 493 ; *supra*, § 167.

estate in the copyhold lands to the use of the heir at law, but the heir had refused to accept the surrender, — the Court held him a competent witness.[8] So, if the interest may be removed by the release of one of the parties in the suit, and such party offers to remove it, but the witness refuses, he cannot thereby deprive the party of his testimony.[9]

§ 420. **Equal Interest no Disqualification.** Where the witness, though interested in the event of the cause, is so situated that the event is to him a matter of indifference, he is still a competent witness. This arises where he is equally interested on both sides of the cause, so that his interest on one side is counterbalanced by his interest on the other.[1] But if there is a preponderance in the amount or value of the interest on one side, this seems, as we have already seen, to render him an interested witness to the amount of the excess, and therefore to disqualify him from testifying on that side.[2] Whether the circumstance that the witness has a remedy over against another, to indemnify him for what he may lose by a judgment against the party calling him, is sufficient to render him competent by equalizing his interest, is not clearly agreed. Where his liability to costs appears from his own testimony alone, and in the same mode it is shown that he has funds in his hands to meet the charge, it is settled that this does not render him incompetent.[3] So, where he stated that he was indemnified for the costs, and considered that he had ample security.[4] And where, upon this objection being taken to the witness, the party calling him forthwith executed a bond to the adverse party, for the payment of all costs, with sureties, whom the counsel for the obligee admitted to be abundantly responsible, but at the same time he refused to receive the bond, the Court held the competency of the witness to be thereby restored; observing, however, that if the solvency of the sureties had been denied, it might have presented a case of more embarrassment, it being very questionable whether the judge could determine upon the sufficiency of the obligors so as to absolve the witness from liability to costs.[5] The point upon which the authorities seem to be conflicting is where

[8] Goodtitle *v.* Welford, 1 Doug. 139; 5 T. R. 35, per Buller, J. The legatee in a will, who has been paid, is considered a competent witness to support the will in a suit at law: Wyndham *v.* Chetwynd, 1 Burr. 414.

[9] 1 Phil. Evid. 149.

[1] *Supra*, § 399. See also Cushman *v.* Loker, 2 Mass. 108; Emerson *v.* Providence Hat Manuf. Co., 12 id. 237; Roberts *v.* Whiting, 16 id. 186; Rice *v.* Austin, 17 id. 197; Prince *v.* Shepard, 9 Pick. 176; Lewis *v.* Hodgdon, 5 Shepl. 267.

[2] *Supra*, §§ 391, 399, and cases there cited. Where the interest of the witness is *prima facie* balanced between the parties, the possibility of a better defence against one than the other will not prevent his being sworn: Starkweather *v.* Mathews, 2 Hill 131.

[3] Collins *v.* Crummen, 3 Martin N. S. 166; Allen *v.* Hawks, 13 Pick. 79.

[4] Chaffee *v.* Thomas, 7 Cowen 358; *contra*, Pond *v.* Hartwell, 17 Pick. 272, per Shaw, C. J.

[5] Brandigee *v.* Hale, 13 Johns. 125; S. P. Lake *v.* Auburn, 17 Wend. 18; *supra*, § 392.

there is merely a right of action over, irrespective of the solvency of the party liable; the productiveness of the remedy, in actual satisfaction, being wholly contingent and uncertain. But in such cases the weight of authority is against the admissibility of the witness. Thus, in an action against the sheriff for taking goods, his officer, who made the levy, being called as a witness for the defence, stated upon the *voir dire* that he gave security to the sheriff, and added that he was indemnified by the creditor, meaning that he had his bond of indemnity. But Lord Tenterden held him not a competent witness; observing that if the result of the action were against the sheriff, the witness was liable to a certainty, and he might never get repaid on his indemnity; therefore it was his interest to defeat the action.[6] So, where the money with which the surety in a replevin bond was to be indemnified, had been deposited in the hands of a receiver designated by the judge, it was held that this did not restore the competency of the surety as a witness in the cause for the principal; for the receiver might refuse to pay it over, or become insolvent, or, from some other cause, the remedy over against him might be unproductive.[7] The true distinction lies between the case where the witness must resort to an action for his indemnity, and that in which the money is either subject to the order of the Court, and within its actual control and custody, or is in the witness's own hands. Therefore it has been laid down by a learned judge, that where a certain sum of money can be so placed, either with the witness himself or with the Court and its officers, under a proper rule directing and controlling its application according to the event, as that the interest creating the disability may be met and extinguished before the witness is or can be damnified, it shall be considered as balancing or extinguishing that interest, so as to restore the competency of the witness.[8]

§ 421. **Mode of Objecting on Account of Interest.** In regard to the time of taking the objection to the competency of a witness, on the ground of interest, it is obvious that, from the preliminary nature of the objection, it ought in general to be taken before the witness is examined in chief. If the party is aware of the existence of the interest, he will not be permitted to examine the witness, and afterwards to object to his competency if he should dislike his testimony. He has his election, to admit an interested person to testify against him or not; but in this, as in all other cases, the election

[6] Whitehouse *v.* Atkinson, 3 C. & P. 344; Jewett *v.* Adams, 8 Greenl. 30; Paine *v.* Hussey, 5 Shepl. 274.

[7] Wallace *v.* Twyman, 3 J. J. Marsh. 459–461. See also Owen *v.* Mann, 2 Day 399, 404; Brown *v.* Lynch, 1 Paige 147, 157; Allen *v.* Hawks, 13 Pick. 85, per Shaw, C. J.; Schillinger *v.* McCann, 6 Greenl. 364; Kendall *v.* Field, 2 Shepl. 30; Shelby *v.* Smith, 2 A. K. Marsh. 504. The cases in which a mere remedy over seems to have been thought sufficient to equalize the interest of the witness, are Martineau *v.* Woodland, 2 C. & P. 65; Banks *v.* Kain, ib. 597; Gregory *v.* Dodge, 14 Wend. 593.

[8] Pond *v.* Hartwell, 17 Pick. 269, 272, per Shaw, C. J.

must be made as soon as the opportunity to make it is presented; and failing to make it at that time, he is presumed to have waived it forever.[1] But he is not prevented from taking the objection at any time during the trial, provided it is taken as soon as the interest is discovered.[2] Thus, if discovered during the examination in chief by the plaintiff, it is not too late for the defendant to take the objection.[3] But if it is not discovered until after the trial is concluded, a new trial will not, for that cause alone, be granted;[4] unless the interest was known and concealed by the party producing the witness.[5] The rule on this subject, in criminal and civil cases, is the same.[6] Formerly, it was deemed necessary to take the objection to the competency of a witness on the *voir dire;* and if once sworn in chief, he could not afterwards be objected to, on the ground of interest. But the strictness of this rule is relaxed; and the objection is now usually taken after he is sworn in chief, but previous to his direct examination. It is in the discretion of the judge to permit the adverse party to cross-examine the witness, as to his interest, after he has been examined in chief; but the usual course is not to allow questions to be asked upon the cross-examination, which properly belong only to an examination upon the *voir dire.*[7] But if, notwithstanding every ineffectual endeavor to exclude the witness on the ground of incompetency, it afterwards should appear incidentally, in the course of the trial, that the witness is interested, his testimony will be stricken out, and the jury will be instructed wholly to disregard it.[8] The rule in equity is the same as at

[1] Donelson *v.* Taylor, 8 Pick. 390, 392; Belcher *v.* Magnay, 1 New Pr. Cas. 110.

[2] Stone *v.* Blackburn, 1 Esp. 37; 1 Stark. Evid. 124; Shurtleff *v.* Willard, 19 Pick. 202; Monfort *v.* Rowland, 38 N. J. Eq. 183. Where a party has been fully apprised of the grounds of a witness's incompetency by the opening speech of counsel, or the examination in chief of the witness, doubts have been entertained at *Nisi Prius* whether an objection to the competency of a witness can be postponed: 1 Phil. Evid. 154, n. (3).

[3] Jacobs *v.* Layborn, 11 M. & W. 685. And see Yardley *v.* Arnold, 10 M. & W. 141; 6 Jur. 718.

[4] Turner *v.* Pearte, 1 T. R. 717; Jackson *v.* Jackson, 5 Cowen 173.

[5] Niles *v.* Brackett, 15 Mass. 378.

[6] Com. *v.* Green, 17 Mass. 538; Roscoe's Crim. Evid. 124.

[7] Howell *v.* Lock, 2 Campb. 14; Odiorne *v.* Winkley, 2 Gallis. 51; Perigal *v.* Nicholson, 1 Wightw. 64. The objection that the witness is the real plaintiff, ought to be taken on the *voir dire:* Dewdney *v.* Palmer, 4 M. & W. 664; s. c. 7 Dowl. 177.

[8] Davis *v.* Barr, 9 S. & R. 137; Schillinger *v.* McCann, 6 Greenl. 364; Fisher *v.* Willard, 13 Mass. 379; Evans *v.* Eaton, 1 Peters C. C. 338; Butler *v.* Tufts, 1 Shepl. 302; Stout *v.* Wood, 1 Blackf. 71; Mitchell *v.* Mitchell, 11 G. & J. 388. The same rule seems applicable to all the instruments of evidence, whether oral or written: Scribner *v.* McLaughlin, 1 Allen N. B. 379; and see Swift *v.* Dean, 6 Johns. 523, 536; Perigal *v.* Nicholson, Wightw. 63; Howell *v.* Lock, 2 Campb. 64; Needham *v.* Smith, 2 Vern. 464. In one case, however, where the examination of a witness was concluded, and he was dismissed from the box, but was afterwards recalled by the judge, for the purpose of asking him a question, it was ruled by Gibbs, C. J., that it was then too late to object to his competency: Beeching *v.* Gower, 1 Holt's Cas. 313; and see Heely *v.* Barnes, 4 Denio 73. And in chancery it is held, that where a witness has been cross-examined by a party, with full knowledge of an objection to his competency,

law;[9] and the principle applies with equal force to testimony given in a deposition in writing, and to an oral examination in Court. In either case, the better opinion seems to be, that if the objection is taken as soon as may be after the interest is discovered, it will be heard; but after the party is *in mora*, it comes too late.[10] One reason for requiring the objection to be made thus early is, that the other party may have opportunity to remove it by a release; which is always allowed to be done, when the objection is taken at any time before the examination is completed.[11] It is also to be noted as a rule, applicable to all objections to the reception of evidence, that the ground of objection must be distinctly stated at the time, or it will be held vague and nugatory.[12]

§ 422. Where the objection to the competency of the witness arises from *his own examination*, he may be further interrogated to facts tending to remove the objection, though the testimony might, on other grounds, be inadmissible. When the whole ground of the objection comes from himself only, what he says must be taken together as he says it.[1] Thus, where his interest appears, from his own testimony, to arise from a written instrument, which is not produced, he may also testify to the contents of it; but if he produces the instrument, it must speak for itself.[2] So where the witness for a chartered company stated that he had been a member, he was permitted also to testify that he had subsequently been disfranchised.[3] So, where a witness called by an administrator testified that he was one of the heirs at law, he was also permitted to testify

the Court will not allow the objection to be taken at the hearing: Flagg *v.* Mann, 2 Sumn. 487.

[9] Swift *v.* Dean, 6 Johns. 523, 538; Needham *v.* Smith, 2 Vern. 463; Vaughan *v.* Worral, 2 Swanst. 400. In this case, Lord Eldon said, that no attention could be given to the evidence, though the interest were not discovered until the last question, after he has been "cross-examined to the bone." See Gresley on Evid. 234–236; Rogers *v.* Dibble, 3 Paige 238; Town *v.* Needham, ib. 545, 552; Harrison *v.* Courtauld, 1 Russ. & M. 428; Moorhouse *v.* De Passou, G. Cooper Ch. Cas. 300; s. c. 19 Ves. 433. See also Jacobs *v.* Laybourn, 7 Jur. 562.

[10] Donelson *v.* Taylor, 8 Pick. 390. Where the testimony is by deposition, the objection, if the interest is known, ought regularly to be taken *in limine*; and the cross-examination should be made *de bene esse*, under protest, or with an express reservation of the right of objection at the trial; unless the interest of the witness is developed incidentally, in his testimony to the merits. But the practice on this point admits of considerable latitude, in the discretion of the judge: U. S. *v.* One Case of Hair Pencils, 1 Paine 400; Talbot *v.* Clark, 8 Pick. 51; Smith *v.* Sparrow, 11 Jur. 126; Mohawk Bank *v.* Atwater, 2 Paige 54; Ogle *v.* Paleski, 1 Holt 485; 2 Tidd's Pr. 812. As to the mode of taking the objection in chancery, see 1 Hoffm. Chan. 489; Gass *v.* Stinson, 3 Sumn. 605.

[11] Tallman *v.* Dutcher, 7 Wend. 180; Doty *v.* Wilson, 14 Johns. 378; Wake *v.* Lock, 5 C. & P. 454.

[12] Camden *v.* Doremus, 3 How. 515, 530; Elwood *v.* Deifendorf, 5 Barb. 398; Carr *v.* Daveis, ib. 337.

[1] Abrahams *v.* Bunn, 4 Burr. 2256, per Ld. Mansfield; Bank of Utica *v.* Mersereau, 3 Barb. Ch. 528.

[2] Butler *v.* Carver, 2 Stark. 433. See also R. *v.* Gisburn, 15 East 57.

[3] Butchers' Company *v.* Jones, 1 Esp. 160. And see Botham *v.* Swingler, Peake 218.

that he had released all his interest in the estate.[4] And, generally, a witness upon an examination in Court as to his interest may testify to the contents of any contracts, records, or documents not produced, affecting the question of his interest.[5] But if the testimony of the witness is taken upon interrogatories in writing, previously filed and served on the adverse party, who objects to his competency on the ground of interest, which the witness confesses, but testifies that it has been released; the release must be produced at the trial, that the Court may judge of it.[6]

§ 423. **Mode of Proving Interest.** The mode of proving the interest of a witness is either by his own examination, or by evidence *aliunde*. But whether the election of one of these modes will preclude the party from afterwards resorting to the other is not clearly settled by the authorities. If the evidence offered *aliunde* to prove the interest is rejected as inadmissible, the witness may then be examined on the *voir dire*.[1] And if the witness on the *voir dire* states that he does not know, or leaves it doubtful whether he is interested or not, his interest may be shown by other evidence.[2] It has also been held, that a resort to one of these modes to prove the interest of the witness on one ground does not preclude a resort to the other mode, to prove the interest on another ground.[3] And where the objection to the competency of the witness is founded upon the evidence already adduced by the party offering him, this has been adjudged not to be such an election of the mode of proof, as to preclude the objector from the right to examine the witness on the *voir dire*.[4] But, subject to these modifications, the rule recognized and adopted by the general current of authorities is, that where the objecting party has undertaken to prove the interest of the witness, by interrogating him upon the *voir dire*, he shall not, upon failure of that mode, resort to the other to prove facts, the existence of which was known when the witness was interrogated.[5] The party appealing to

[4] Ingram *v.* Dada, Lond. Sittings after Mich. T. 1817; 1 C. & P. 234, n.; Wandless *v.* Cawthorne, B. R. Guildhall, 1829; 1 M. & M. 321, n.

[5] Miller *v.* Mariner's Church, 7 Greenl. 51; Fifield *v.* Smith, 8 Shepl. 383; Sewell *v.* Stubbs, 1 C. & P. 73; Quarterman *v.* Cox, 8 id. 97; Lunnis *v.* Row, 2 P. & D. 538; Hays *v.* Richardson, 1 Gill & J. 366; Stebbins *v.* Sackett, 5 Conn. 258; Baxter *v.* Rodman, 3 Pick. 435. The case of Goodhay *v.* Hendry, 1 M. & M. 319, apparently *contra*, is opposed by Carlisle *v.* Eady, 1 C. & P. 234, and by Wandless *v.* Cawthorne, 1 M. & M. 321, n.

[6] Southard *v.* Wilson, 8 Shepl. 494; Hobart *v.* Bartlett, 5 id. 429.

[1] Main *v.* Newson, Anthon's Cas. 18. But a witness cannot be excluded by proof of his own admission that he was interested in the suit: Bates *v.* Ryland, 6 Ala. 668; Pierce *v.* Chase, 8 Mass. 487, 488; Com. *v.* Waite, 5 id. 261; George *v.* Stubbs, 13 Shepl. 243.

[2] Shannon *v.* Com., 8 S. & R. 444; Galbraith *v.* Galbraith, 6 Watts 112; Bank of Columbia *v.* Magruder, 6 Har. & J. 172.

[3] Stebbins *v.* Sackett, 5 Conn. 258.

[4] Bridge *v.* Wellington, 1 Mass. 221, 222.

[5] In the old books, including the earlier editions of Mr. Starkie's and Mr. Phillips's Treatise on Evidence, the rule is clearly laid down, that, after an examination upon the *voir dire*, no other mode of proof can in any case be resorted to; excepting only the

the conscience of the witness, offers him to the Court as a credible witness; and it is contrary to the spirit of the law of evidence to permit him afterwards to say, that the witness is not worthy to be believed. It would also violate another rule, by its tendency to raise collateral issues. Nor is it deemed reasonable to permit a party to sport with the conscience of a witness, when he has other proof of his interest. But if evidence of his interest has been given *aliunde*, it is not proper to examine the witness, in order to explain it away.[6]

§ 424. **Examination upon the voir dire.** A witness is said to be examined upon the *voir dire*, when he is sworn and examined as to the fact whether he is not a party interested in the cause.[1] And though this term was formerly and more strictly applied only to the case where the witness was sworn to make true answers to such questions as the Court might put to him, and before he was sworn in chief, yet it is now extended to the preliminary examination to his interest, whatever may have been the form of the oath under which the inquiry is made.

§ 425. **Question of Interest for the Court.** The question of interest, though involving facts, is still a preliminary question, preceding, in its nature, the admission of the testimony to the jury. It is therefore to be determined by the Court alone, it being the province of the judge and not of the jury, in the first instance, to pass upon its efficiency.[1] If, however, the question of fact, in any preliminary inquiry, — such, for instance, as the proof of an instrument by subscribing witnesses, — is decided by the judge, and the same question of fact afterwards recurs in the course of the trial upon the merits, the jury are not precluded by the decision of the judge, but may, if they are satisfied upon the evidence, find the fact the other way.[2]

case where the interest was developed in the course of trial of the issue. But in the last editions of those works, it is said, that, "if the witness discharged himself on the *voir dire*, the party who objects may still support his objection by evidence;" but no authority is cited for the position: 1 Stark. Evid. 124; Phil. & Am. on Evid. 149; 1 Phil. Evid. 154. Mr. Starkie had previously added these words: "as part of his own case" (see 2 Stark. Evid. p. 756, 1st ed.); and with this qualification the remark is supported by authority, and is correct in principle. The question of competency is a collateral question; and the rule is, that when a witness is asked a question upon a collateral point, his answer is final, and cannot be contradicted; that is, no collateral evidence is admissible for that purpose: Harris *v.* Tippett, 2 Campb. 637; Philadelphia & Trenton Co. *v.* Stimpson, 14 Pet. 448, 461; Harris *v.* Wilson, 7 Wend. 57; Odiorne *v.* Winkley, 2 Gallis. 53; R. *v.* Watson, 2 Stark. 149–157. But if the evidence, subsequently given upon the matter in issue, should also prove the witness interested, his testimony may well be stricken out, without violating any rule: Brockbank *v.* Anderson, 7 M. & G. 295, 313. The American Courts have followed the old English rule, as stated in the text: Butler *v.* Butler, 3 Day 214; Stebbins *v.* Sackett, 5 Conn. 258, 261; Chance *v.* Hine, 6 id. 231; Welden *v.* Buck, Anthon's Cas. 15; Chatfield *v.* Lathrop, 6 Pick. 418; Evans *v.* Eaton, 1 Pet. C. C. 322; Stuart *v.* Lake, 33 Maine 87.

[6] Mott *v.* Hicks, 1 Cowen 513; Evan *v.* Gray, 1 Martin N. S. 709.

[1] Termes de la Ley, Verb. *Voier dire*. And see Jacobs *v.* Layborn, 11 M. & W. 685, where the nature and use of an examination upon the *voir dire* are stated and explained by Ld. Abinger, C. B.

[1] Harris *v.* Wilson, 7 Wend. 57; *supra*, § 49.

[2] Ross *v.* Gould, 5 Greenl. 204.

In determining the question of interest, where the evidence is derived *aliunde*, and it depends upon the decision of intricate questions of fact, the judge may, in his discretion, take the opinion of the jury upon them.[2] And if a witness, being examined on the *voir dire*, testifies to facts tending to prove that he is not interested, and is thereupon admitted to testify; after which opposing evidence is introduced, to the same facts, which are thus left in doubt, and the facts are material to the issue, — the evidence must be weighed by the jury, and if they thereupon believe the witness to be interested, they must lay his testimony out of the case.[4]

§ 426. **Disqualification removed by a Release.** The competency of a witness, disqualified by interest, may always be restored by a proper release.[1] If it consists in an interest vested in himself, he may divest himself of it by a release, or other proper conveyance. If it consists in a liability over, whether to the party calling him, or to another person, it may be released by the person to whom he is liable. A general release of all actions and causes of action for any matter or thing, which has happened previous to the date of the release, will discharge the witness from all liability consequent upon the event of a suit then existing. Such a release from the drawer to the acceptor of a bill of exchange was therefore held sufficient to render him a competent witness for the drawer, in an action then pending by the payee against him; for the transaction was already passed, which was to lay the foundation of the future liability; and upon all such transactions and inchoate rights such a release will operate.[2] A release, to qualify a witness, must be given before the testimony is closed, or it comes too late. But if the trial is not over, the Court will permit the witness to be re-examined, after he is released; and it will generally be sufficient to ask him if his testimony, already given, is true; the circumstances under which it has been given going only to the credibility.[3]

§ 427. **Who must release.** As to the person by whom the release should be given, it is obvious that it must be by the party holding the interest to be released, or by some person duly authorized in his be-

[2] See *supra*, § 49.

[4] Walker *v.* Sawyer, 13 N. H. 191.

[1] Where the witness produces the release from his own possession, as part of his testimony, in answer to a question put to him, its execution needs not to be proved by the subscribing witnesses; but it is to be taken as a part of his testimony. If the question is asked by the party calling the witness, who thereupon produce the release, the party is estopped to deny that it is a valid and true release. But where the release is produced or set up by the party to the suit, to establish his own title, he must prove its execution by the subscribing witness: Citizens' Bank *v.* Nantucket Steamboat Co., 2 Story 16, 42. And see Moises *v.* Thornton, 8 T. R. 303; Jackson *v.* Pratt, 10 Johns. 381; Carlisle *v.* Eady, 1 C. & P. 234; Ingram *v.* Dada, ib. n.; Goodhay *v.* Hendry, 1 M. & M. 319. See also Southard *v.* Wilson, 8 Shepl. 494; Hall *v.* Steamboat Co., 13 Conn. 319.

[2] Scott *v.* Lifford, 1 Camph. 249, 250; Cartwright *v.* Williams, 2 Stark. 340.

[3] Wake *v.* Lock, 5 C. & P. 545; Tallman *v.* Dutcher, 7 Wend. 180; Doty *v.* Wilson, 14 Johns. 378. And see Clark *v.* Carter, 4 Moore 207.

half. A release of a bond debt by one of several obligees, or to one of several obligors, will operate as to them all.[1] So, where several had agreed to bear the expense of a joint undertaking, in preferring a petition to Parliament, and an action was brought against one of them, another of the contractors was held a competent witness for the defendant, after being released by him; for the event of the suit could at most only render him liable to the defendant for his contributory share.[2] But if there is a joint fund or property to be directly affected by the result, the same reason would not decisively apply; and some act of divestment, on the part of the witness himself, would be necessary.[3] Thus, in an action on a charter-party, a joint-owner with the plaintiff, though not a registered owner, is not a competent witness for the plaintiff, unless cross-releases are executed between them.[4] A release by an infant is generally sufficient for this purpose; for it may be only voidable, and not void; in which case, a stranger shall not object to it.[5] But a release by a guardian *ad litem*,[6] or by a *prochein amy*, or by an attorney of record,[7] is not good. A surety may always render the principal a competent witness for himself, by a release.[8] And it seems sufficient, if only the costs are released.[9]

§ 428. **Interests not removed by a Release.** Though there are no interests of a disqualifying nature but what may, in some manner, be annihilated,[1] yet there are some which cannot be reached by a release.

[1] Co. Lit. 232*a*; Cheetham *v.* Ward, 1 B. & P. 630. So, by one of several partners, or joint proprietors, or owners: Whitamore *v.* Waterhouse, 4 C. & P. 383; Hoekless *v.* Mitchell, 4 Esp. 86; Bulkley *v.* Dayton, 14 Johns. 387; Haley *v.* Godfrey, 4 Shepl. 305. But where the interest of the parties to the record is several, a release by one of them only is not sufficient: Betts *v.* Jones, 9 C. & P. 199.

[2] Duke *v.* Pownall, 1 M. & Malk. 430; Ransom *v.* Keyes, 9 Cowen 128. So, in other cases of liability to contribution: Bayley *v.* Osborn, 2 Wend. 527; Robertson *v.* Smith, 18 Johns. 459; Gibbs *v.* Bryant, 1 Pick. 118; Ames *v.* Withington, 3 N. H. 115; Carleton *v.* Whiteher, 5 id. 196. One of several copartners, not being sued with them, may be rendered a competent witness for them by their release: Lefferts *v.* De Mott, 21 Wend. 136 (*sed vide* Cline *v.* Little, 5 Blackf. 486); but *quære*, if he ought not also to release to them his interest in the assets of the firm, so far as they may be affected by the demand in controversy: ib.

[3] Waite *v.* Merrill, 4 Greenl. 102; Richardson *v.* Freeman, 6 Greenl. 57; 1 Holt's Cas. 430, n.; Anderson *v.* Broek, 3 Greenl. 243. The heir is rendered a competent witness for the administrator, by releasing to the latter all his interest in the action; provided it does not appear, that there is any real estate to be affected by the result: Boynton *v.* Turner, 13 Mass. 391.

[4] Jackson *v.* Galloway, 8 C. & P. 480.

[5] Rogers *v.* Berry, 10 Johns. 132; Walker *v.* Ferrin, 4 Vt. 523.

[6] Fraser *v.* Marsh, 2 Stark. 41; Walker *v.* Ferrin, *ub. sup.*

[7] Murray *v.* House, 11 Johns. 464; Walker *v.* Ferrin, *ub. sup.*

[8] Reed *v.* Boardman, 20 Pick. 441; Harmon *v.* Arthur, 1 Bail. 83; Willard *v.* Wiekham, 7 Watts 292.

[9] Perryman *v.* Steggall, 5 C. & P. 197. See also Van Shaack *v.* Stafford, 12 Pick. 565.

[1] In a writ of entry by a mortgagee, the tenant claimed under a deed from the mortgagor, subsequent in date, but prior in registration, and denied notice of the mortgage. To prove that he purchased with notice, the mortgagor was admitted a competent witness for the mortgagee, the latter having released him from so much of the debt as should not be satisfied by the land mortgaged, and covenanted to resort to the land as the sole fund for payment of the debt: Howard *v.* Chadbourne, 5 Greenl. 15.

Such is the case of one having a common right, as an inhabitant of a town; for a release by him, to the other inhabitants, will not render him a competent witness for one of them, to maintain the common right.[2] So where, in trover, the plaintiff claimed the chattel by purchase from B, and the defendant claimed it under a purchase from W, who had previously bought it from B, it was held that a release to B, from the defendant would not render him a competent witness for the latter; for the defendant's remedy was not against B, but against W alone.[3] And in the case of a covenant real, running with the land, a release by the covenantee, after he has parted with the estate, is of no avail; no person but the present owner being competent to release it.[4] Where the action is against the surety of one who has since become bankrupt, the bankrupt is not rendered a competent witness for the surety, by a release from him alone; because a judgment against the surety would still give him a right to prove under the commission. The surety ought also to release the assignees from all claim on the bankrupt's estate, it being vested in them; and the bankrupt should release his claim to the surplus.[5] So, a residuary legatee is not rendered a competent witness for the executor, who sues to recover a debt due to the testator, merely by releasing to the executor his claim to that debt; for, if the action fails, the estate will still be liable for the costs to the plaintiff's attorney, or to the executor. The witness must also release the residue of the estate; or, the estate must be released from all claim for the costs.[6]

§ 429. **Delivery of Release not necessary.** It is not necessary that the release be actually delivered by the releasor into the hands of the releasee. It may be deposited in Court, for the use of the absent party.[1] Or, it may be delivered to the wife, for the use of the husband.[2] But in such cases it has been held necessary that the delivery of the release to a third person should be known to the witness at the time of giving his testimony.[3] The objection of interest, as before remarked, proceeds on the presumption that it may bias the mind of the witness; but this presumption is taken away by proof of his having done all in his power to get rid of the interest.[4] It has even been held, that where the defendant has suffered an interested wit-

[2] Jacobson *v.* Fountain, 2 Johns. 170; Abby *v.* Goodrich, 3 Day, 433; *supra*, § 405.

[3] Radburn *v.* Morris, 4 Bing. 649.

[4] Leighton *v.* Perkins, 2 N. H. 427; Pile *v.* Benham, 3 Hayw. 176.

[5] Perryman *v.* Steggall, 8 Bing. 369.

[6] Baker *v.* Tyrwhitt, 4 Campb. 27.

[1] Perry *v.* Fleming, 2 N. C. Law Repos. 458; Lily *v.* Kitzmiller, 1 Yeates 30; Matthews *v.* Marchant, 3 Dev. & Bat. 40; Brown *v.* Brown, 5 Ala. 508. Or, it may be delivered to the attorney: Stevenson *v.* Mudgett, 10 N. H. 338.

[2] Van Deusen *v.* Frink, 15 Pick. 449; Peaceable *v.* Keep, 1 Yeates 576.

[3] Seymour *v.* Strong, 4 Hill 255. Whether the belief of the witness as to his interest, or the impression under which he testifies, can go further than to effect the credibility of his testimony, *quære;* and see *supra*, §§ 387, 388, 419.

[4] Goodtitle *v.* Welford, 1 Doug. 139, 141, per Ashhurst, J.

ness to be examined, on the undertaking of the plaintiff's attorney to execute a release to him after the trial, which, after a verdict for the plaintiff, he refused to execute, this was no sufficient cause for a new trial; for the witness had a remedy on the undertaking.[5] But the witness, in such cases, will not be permitted to proceed with his testimony, even while the attorney is preparing or amending the release, without the consent of the adverse party.[6]

§ 430. **Other Modes of Restoring Competency.** There are other modes, besides a release, in which the competency of an interested witness may be restored. Some of those modes, to be adopted by the witness himself, have already been adverted to;[1] namely, where he has assigned his own interest, or done all in his power to assign it; or, where he refuses to accept a release tendered to him by another. So, where, being a legatee or distributee, he has been fully paid.[2] An indorser is made a competent witness for the indorsee, by striking off his name from the back of the note or bill; but if the bill is drawn in sets, it must appear that his name is erased from each one of the set, even though one of them is missing and is supposed to be lost; for it may be in the hands of a *bona fide* holder.[3] A guarantor, also, is rendered a competent witness for the creditor, by delivering up the letter of guaranty, with permission to destroy it.[4] And this may be done by the attorney of the party, his relation as such and the possession of the paper being sufficient to justify a presumption of authority for that purpose.[5] The bail or surety of another may be rendered a competent witness for him, as we have already seen, by substituting another person in his stead; which, where the stipulation is entered into in any judicial proceeding, as in the case of bail, and the like, the Court will order upon motion. The same may be done by depositing in Court a sufficient sum of money; or, in the case of bail, by a surrender of the body of the principal.[6] So, where the liability, which would have rendered the witness incompetent, is discharged by the operation of law; as, for example, by the bankrupt or the insolvent laws, or by the statute of limitations.[7] Where, in trespass, several justifications are set up in bar, one of

[5] Hemming *v.* English, 1 Cr. M. & R. 568; s. c. 5 Tyrwh. 185.
[6] Doty *v.* Wilson, 14 Johns. 378.
[1] *Supra*, § 419.
[2] Clarke *v.* Gannon, Ry. & M. 31; Gebhart *v.* Shindle, 15 S. & R. 235.
[3] Steinmetz *v.* Currey, 1 Dall. 234.
[4] Merchants' Bank *v.* Spicer, 6 Wend. 443.
[5] Ibid.; Watson *v.* McLaren, 189 Wend. 557.
[6] *Supra*, § 392, n. (1); Bailey *v.* Hole, 3 C. & P. 560; s. c. 1 Mood. & M. 289; Leggett *v.* Boyd, 3 Wend. 376; Tompkins *v.* Curtis, 3 Cowen 251; Grey *v.* Young, 1 Harper 38; Allen *v.* Hawks, 13 Pick. 79; Beckley *v.* Freeman, 15 id. 468; Pearcey *v.* Fleming, 5 C. & P. 503; Lees *v.* Smith, 1 M. & Rob. 329; Comstock *v.* Paie, 3 Rob. La. 440; Fraser *v.* Harding, 3 Kerr 94.
[7] Murray *v.* Judah, 6 Cowen 484; Ludlow *v.* Union Ins. Co., 2 S. & R. 119; U. S. *v.* Smith, 4 Day, 121; Quimby *v.* Wroth, 3 H. & J. 249; Murray *v.* Marsh, Hayw. 290.

which is a prescriptive or customary right in all the inhabitants of a certain place, one of those inhabitants may be rendered a competent witness for the defendant, by his waiving that branch of the defence.[8] In trover by a bailee, he may render the bailor a competent witness for him, by agreeing to allow him, at all events, a certain sum for the goods lost.[9] The assignee of a chose in action, who, having commenced a suit upon it in the name of the assignor, has afterwards sold and transferred his own interest to a stranger, is thereby rendered a competent witness for the plaintiff.[10] But the interest which an informer has in a statute penalty is held not assignable for that purpose.[11] So, the interest of a legatee being assigned, he is thereby rendered competent to prove the will; though the payment is only secured to him by bond which is not yet due.[12] So, a stockholder in any money-corporation may be rendered a competent witness for the corporation, by a transfer of his stock, either to the company or to a stranger; even though he intends to repossess it, and has assigned it merely to qualify himself to testify; provided there is no agreement between him and the assignee or purchaser for a reconveyance.[13] Where a witness was liable to the plaintiff's attorney for the costs, and the attorney had prepared a release, in order to restore his competency in case it should be questioned, but, no objection being made to the witness, he was examined for the plaintiff without a release, this was considered as a gross imposition upon the Court; and in a subsequent action by the attorney against the witness, for his costs, he was nonsuited.[14] These examples are deemed sufficient for the purpose of illustrating this method of restoring the competency of a witness disqualified by interest.

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§ 433. **Direct Examination.** When a witness has been duly sworn, and his competency is settled, if objected to,[1] he is first examined by the party producing him; which is called his direct examination. He is afterwards examined to the same matters by the adverse party; which is called his cross-examination. These examinations are conducted orally in open Court, under the regulation and order of the

[8] Prewit *v.* Tilly, 1 C. & P. 140.
[9] Maine Stage Co. *v.* Longley, 2 Shepl. 444.
[10] Soulden *v.* Van Rensselaer, 9 Wend. 293.
[11] Com. *v.* Hargesheimer, 1 Ashm. 413.
[12] McIlroy *v.* McIlroy, 1 Rawle 433.
[13] Gilbert *v.* Manchester Iron Co., 11 Wend. 627; Utica Ins. Co. *v.* Cadwell, 3 id. 296; Stall *v.* Catskill Bank, 18 id. 466; Bank of Utica *v.* Smalley, 2 Cowen, 770; Bell *v.* Hull, &c. Railroad Co., 6 M. & W. 701; Illinois Ins. Co. *v.* Marseilles Co., 1 Gilm. 236; Union Bank *v.* Owen, 4 Humph. 338.
[14] Williams *v.* Goodwin, 11 Moore 342.

[1] The course in the Scotch Courts, after a witness is sworn, is, first, to examine him *in initialibus*, — namely, whether he has been instructed what to say, or has received or has been promised any good deed for what he is to say, or bears any ill-will to the adverse party, or has any interest in the cause or concern in conducting it; together with his age, and whether he is married or not, and the degree of his relationship to the party adducing him: Tait on Evid. 424.

judge, and in his presence and that of the jury, and of the parties and their counsel.

§ 434. . . . The witness, except in certain cases hereafter to be mentioned, is to be examined only to matters of fact within his own knowledge, whether they consist of words or actions; and to these matters he should in general be plainly, directly, and distinctly interrogated. Inferences or conclusions, which may be drawn from facts, are ordinarily to be drawn by the jury alone; except where the conclusion is an inference of skill and judgment; in which case it may be drawn by an expert, and testified by him to the jury.

. . . . . .

§ 436. **Refreshing Recollection.** Though a witness can testify only to such facts as are within his own knowledge and recollection, yet he is permitted to refresh and assist his memory, by the use of a written instrument, memorandum, or entry in a book, and may be compelled to do so, if the writing is present in Court.[1] It does not seem to be necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak to the facts from his own recollection.[2] So, also, where the witness recollects that he saw the paper while the facts were fresh in his memory, and remembers that he then knew that the particulars therein mentioned were correctly stated.[3] And it is not necessary that the writing thus used to refresh the memory should itself be admissible in evidence; for if inadmissible in itself, as for want of a stamp, it may still be referred to by the witness.[4] But where the witness neither recollects the fact, nor remembers to have recognized the written statement as true, and the writing was not made by him, his testimony, so far as it is founded upon the written paper, is but hearsay; and a witness can no more be permitted to give evidence of his inference from

[1] Reed *v.* Boardman, 20 Pick. 441.

[2] Doe *v.* Perkins, 3 T. R. 749, expounded in R. *v.* St. Martin's Leicester, 2 Ad. & El. 215; Burton *v.* Plummer, ib. 341; Burrough *v.* Martin, 2 Campb. 112; Duchess of Kingston's Case, 20 How. St. Tr. 619; Henry *v.* Lee, 2 Chitty, 124; Rambert *v.* Cohen, 4 Esp. 213. In Meagoe *v.* Simmons, 3 C. & P. 75, Lord Tenterden observed, that the usual course was not to permit the witness to refresh his memory from any paper not of his own writing. And so is the Scotch practice: Tait on Evid. 133. But a witness has been allowed to refresh his memory from the notes of his testimony, taken by counsel at a former trial: Lawes *v.* Reed, 2 Lewin Cr. Cas. 152. And from his deposition: Smith *v.* Morgan, 2 M. & Rob. 259. And from a printed copy of his report: Horne *v.* Mackenzie, 6 Cl. & Fin. 628. And from notes of another person's evidence, at a former trial, examined by him during that trial: R. *v.* Philpotts, Cox Cr. C. 329. Or, within two days afterwards: ib., per Erle, J. But the counsel for the prisoner, on cross-examining a witness for the prosecution, is not entitled to put the deposition of the witness into his hand, for the purpose of refreshing his memory, without giving it in evidence: R. *v.* Ford, ib. 184.

[3] Burrough *v.* Martin, 2 Campb. 112; Burton *v.* Plummer, 2 Ad. & El. 343, per Ld. Denman; Jacob *v.* Lindsay, 1 East 460; Downer *v.* Rowell, 24 Vt. 343. But see Butler *v.* Benson, 1 Barb. 526.

[4] Maugham *v.* Hubbard, 8 B. & C. 14; Kensington *v.* Inglis, 8 East 273; *supra*, §§ 90, 228 (and *post*, §§ 463–466).

what a third person has written, than from what a third person has said.[5]

§ 437. The cases in which writings are permitted to be used for this purpose may be divided into three classes. (1) Where the writing is used only for the purpose of assisting the memory of the witness. In this case, it does not seem necessary that the writing should be produced in Court,[1] though its absence may afford matter of observation to the jury; for the witness at last testifies from his own recollection. (2) Where the witness recollects having seen the writing before, and though he has now no independent recollection of the facts mentioned in it, yet he remembers that, at the time he saw it, he knew the contents to be correct. In this case, the writing itself must be produced in Court, in order that the other party may cross-examine; not that such writing is thereby made evidence of itself; but that the other party may have the benefit of the witness's refreshing his memory by every part.[2] And for the same reason, a witness is not permitted to refresh his memory by extracts made from other writings.[3] (3) Where the writing in question neither is recognized by the witness as one which he remembers to have before seen, nor awakens his memory to the recollection of anything contained in it; but, nevertheless, knowing the writing to be genuine, his mind is so convinced, that he is on that ground enabled to swear positively as to the fact. An example of this kind is, where a banker's clerk is shown a bill of exchange, which has his own writing upon it, from which he knows and is able to state positively that it passed through his hands. So, where an agent made a parol lease, and entered a memorandum of the terms in a book which was produced, but the agent stated that he had no memory of the transaction but from the book, without which he

[5] 2 Phil. Evid. 413.

[1] Kensington *v.* Inglis, 8 East 273; Burton *v.* Plummer, 2 Ad. & El. 341.

[2] *Supra*, §§ 115, 436; R. *v.* St. Martin's Leicester, 2 Ad. & El. 215, per Patteson, J.; Sinclair *v.* Stevenson, 1 C. & P. 582; s. c. 2 Bing. 516; s. c. 10 Moore 46; Loyd *v.* Freshfield, 2 C. & P. 325; s. c. 9 D. & R. 19. If the paper is shown to the witness, directly to prove the handwriting, it has been ruled that the other party has not, therefore, a right to use it: Sinclair *v.* Stevenson, *supra*. But the contrary has since been held, by Bosanquet, J., in Russell *v.* Rider, 6 C. & P. 416, and with good reason; for the adverse party has a right to cross-examine the witness as to the handwriting: 2 Phil. Evid. 400. But if the counsel, in cross-examination, puts a paper into a witness's hand, in order to refresh his memory, the opposite counsel has a right to look at it without being bound to read it in evidence; and may also ask the witness when it was written, without being bound to put it into the case: R. *v.* Ramsden, 2 C. & P. 603. The American Courts have sometimes carried the rule farther than it has been carried in England, by admitting the writing itself to go in evidence to the jury, in all cases where it was made by the witness at the time of the fact, for the purpose of preserving the memory of it, if at the time of testifying he can recollect nothing further than that he had accurately reduced the whole transaction to writing: Farmers' and Mechanics' Bank *v.* Boraef, 1 Rawle 152; Smith *v.* Lane, 12 S. & R. 84, per Gibson, J.; State *v.* Rawls, 2 Nott & McCord 331; Clark *v.* Vorce, 15 Wend. 193; Merrill *v.* Ithaca & Oswego Railroad Co., 16 id. 586, 596–598; Haven *v.* Wendell, 11 N. H. 112. But see Lightner *v.* Wike, 4 S. & R. 203; *infra*, § 466.

[3] Doe *v.* Perkins, 3 T. R. 749; 2 Ad. & El. 215.

should not, of his own knowledge, be able to speak to the fact, but on reading the entry he had no doubt that the fact really happened; it was held sufficient.[4] So, where a witness, called to prove the execution of a deed, sees his own signature to the attestation, and says, that he is therefore sure that he saw the party execute the deed; that is sufficient proof of the execution of a deed, though he adds that he has no recollection of the fact.[5] In these and the like cases, for the reason before given, the writing itself must be produced.[6]

§ 438. As to the time when the writing, thus used to restore the recollection of facts, should have been made, no precise rule seems to have been established. It is most frequently said, that the writing must have been made at the time of the fact in question, or recently afterwards.[1] At the farthest, it ought to have been made before such a period of time has elapsed, as to render it probable that the memory of the witness might have become deficient.[2] But the practice, in this respect, is governed very much by the circumstances of the particular case. In one case, to prove the date of an act of bankruptcy committed many years before, a witness was permitted to recur to his own deposition, made some time during the year in which the fact happened.[3] In another case, the witness was not permitted to refresh his memory with a copy of a paper, made by himself six months after he made the original, though the original was proved to have been so written over with figures as to have become unintelligible; the learned judge saying, that he could only look at the original memorandum, made near the time.[4] And in a

[4] 1 Stark. Evid. 154, 155; Alison's Practice, pp. 540, 541; Tait on Evid. 432.

[5] R. *v.* St. Martin's Leicester, 2 Ad. & El. 210. See also Haig *v.* Newton, 1 Mills Const. 423; Sharpe *v.* Bingley, ib. 373.

[6] Maugham *v.* Hubbard, 8 B. & C. 16, per Bailey, J.; Russell *v.* Coffin, 8 Pick. 143, 150; Den *v.* Downam, 1 Green 135, 142; Jackson *v.* Christman, 4 Wend. 277, 282; Merrill *v.* Ithaca, &c. Railroad Co., 16 Wend. 598; Patterson *v.* Tucker, 4 Halst. 322, 332, 333; Wheeler *v.* Hatch, 3 Fairf. 389; Pigott *v.* Holloway, 1 Binn. 436; Collins *v.* Lemasters, 2 Bail. 141.

[1] Tanner *v.* Taylor, cited by Buller, J., in Doe *v.* Perkins, 3 T. R. 754; Howard *v.* Canfield, 5 Dowl. P. C. 417; Dupuy *v.* Truman, 2 Y. & Col. 341. Where A was proven to have written a certain article in a newspaper, but the manuscript was lost, and A had no recollection of the fact of writing it, it was held that the newspaper might be used to refresh his memory, and that he might then be asked whether he had any doubt that the fact was as therein stated: Topham *v.* McGregor, 1 Car. & Kir. 320. So, where the transaction had faded from the memory of the witness, but he recollected, that while it was recent and fresh in his memory, he had stated the circumstances in his examination before commissioners of bankruptcy, which they had reduced to writing, and he had signed; he was allowed to look at his examination to refresh his memory: Wood *v.* Cooper, ib. 645.

[2] Jones *v.* Stroud, 2 C. & P. 196.

[3] Vaughan *v.* Martin, 1 Esp. 440.

[4] Jones *v.* Stroud, 2 C. & P. 196, per Best, C. J. In this case, the words in the copy and as sworn to by the witness were spoken *to* the plaintiff, but on producing the original, which, on further reflection, was confirmed by the witness, it appeared that they were spoken *of* him. The action was slander; and the words being laid according to the copy, for this variance the plaintiff was nonsuited.

still later case, where it was proposed to refer to a paper, which the witness had drawn up for the party who called him, after the cause was set down for trial, the learned judge refused it; observing that the rule must be confined to papers written contemporaneously with the transaction.[5] But where the witness had herself noted down the transactions from time to time as they occurred, but had requested the plaintiff's solicitor to digest her notes into the form of a deposition, which she afterwards had revised, corrected, and transcribed, the Lord Chancellor indignantly suppressed the deposition.[6]

§ 439. If a witness has *become blind*, a contemporaneous writing made by himself, though otherwise inadmissible, may yet be read over to him in order to excite his recollection.[1] So, where a receipt for goods was inadmissible for want of a stamp, it was permitted to be used to refresh the memory of a witness who heard it read over to the defendant, the latter at the same time admitting the receipt of the goods.[2]

§ 440. **Opinion Rule.** In general, though a witness must depose to such facts only as are within his own knowledge, yet there is no rule that requires him to speak with such expression of certainty as to exclude all doubt in his mind. If the fact is impressed on his memory, but his recollection does not rise to positive assurance, it is still admissible, to be weighed by the jury; but if the impression is not derived from recollection of the fact, and is so slight as to render it probable that it may have been derived from others, or may have been some unwarrantable deduction of the witness's own mind, it will be rejected.[1] And though the opinions of witnesses are in general not evidence, yet on certain subjects some classes of witnesses may deliver their own opinions, and on certain other subjects any competent witness may express his opinion or belief; and on any subject to which a witness may testify, if he has any recollection at all of the fact, he may express it as it lies in his memory, of which the jury will judge.[2] Thus, it is the constant practice to receive in evidence any witness's belief of the identity of a person, or that the handwriting in question is or is not the handwriting of a particular individual, provided he has any knowledge of the person or handwriting; and if he testifies falsely as to his belief, he may be convicted of perjury.[3] On questions of science, skill, or trade, or others of the like kind, persons of skill, sometimes called *experts*,[4] may not

[5] Steinkeller *v.* Newton, 9 C. & P. 313.

[6] Anon., cited by Lord Kenyon, in Doe *v.* Perkins, 3 T. R. 752. See also Sayer *v.* Wagstaff, 5 Beav. 462.

[1] Catt *v.* Howard, 3 Stark. 3.

[2] Jacob *v.* Lindsay, 1 East 460.

[1] Clark *v.* Bigelow, 4 Shepl. 246.

[2] Miller's Case, 3 Wils. 427, per Ld. Ch. Just. DeGrey; McNally's Evid. 262, 263. And see Carmalt *v.* Post, 8 Watts 411, per Gibson, C. J.

[3] R. *v.* Pedley, Leach Cr. Cas. 4th ed. 325, case 163.

[4] Experts, in the strict sense of the word, are "persons instructed by experience:"

only testify to facts, but are permitted to give their opinions in evidence. Thus, the opinions of medical men are constantly admitted as to the cause of disease, or of death, or the consequences of wounds, and as to the sane or insane state of a person's mind, as collected from a number of circumstances, and as to other subjects of professional skill.[5] And such opinions are admissible in evidence, though the witness founds them, not on his own personal observation, but on the case itself, as proved by other witnesses on the trial.[6] But where scientific men are called as witnesses, they cannot give their opinions as to the general merits of the cause, but only their opinions upon the facts proved.[7] And if the facts are doubtful, and remain to be found by the jury, it has been held improper to ask an expert who has heard the evidence, what is his opinion upon the case on trial, though he may be asked his opinion upon a similar case, hypothetically stated.[8] Nor is the opinion of a medical man admissible, that a particular act, for which a prisoner is tried, was an act of insanity.[9] So, the subscribing witnesses to a will may testify their opinions, in respect to the sanity of the testator at the time of executing the will, though other witnesses can speak only as to facts; for the law has placed the subscribing witnesses about the testator, to ascertain and judge of his capacity.[10] Seal engravers may be called to give their

1 Bouvier's Law Dict. *in verb.* But more generally speaking, the term includes all "men of science," as it was used by Ld. Mansfield in Folkes *v.* Chadd, 3 Doug. 157; or "persons professionally acquainted with the science or practice" in question: Strickland on Evid. p. 408; or "conversant with the subject-matter, on questions of science, skill, trade, and others of the like kind:" Best's Principles of Evidence, § 346. The rule on this subject is stated by Mr. Smith in his note to Carter *v.* Boehm, 1 Smith's Lead. Cas. 286: "On the one hand," he observes, "it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible, whenever 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; in other words, 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; see Folkes *v.* Chadd, 3 Doug. 157; R. *v.* Searle, 2 M. & M. 75; Thornton *v.* R. E. Assur. Co., Peake 25; Chaurand *v.* Angerstein, ib. 44; while, on the other hand, it does not seem to be contended that the opinions of witnesses can be received, 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." It has been held unnecessary that the witness should be engaged in the practice of his profession or science; it being sufficient that he has studied it. Thus, the fact that the witness, though he had studied medicine, was not then a practising physician, was held to go merely to his credit: Tullis *v.* Kidd, 12 Ala. 648.

5 Stark. Evid. 154; Phil. & Am. on Evid. 899; Tait on Evid. 433; Hathorn *v.* King, 8 Mass. 371; Hoge *v.* Fisher, 1 Pet. C. C. 163; Folkes *v.* Chadd, 3 Doug. 157; per Ld. Mansfield; McNally's Evid. 329–335, c. 30.

6 R. *v.* Wright, Russ. & Ry. 456; R. *v.* Searle, 1 M. & Rob. 75; McNaghten's Case, 10 Cl. & F. 200, 212; Paige *v.* Hazard, 5 Hill 603.

7 Jameson *v.* Drinkald, 12 Moore 148. But professional books, or books of science (*e. g.*, medical books), are not admissible in evidence; though professional witnesses may be asked the grounds of their judgment and opinion, which might in some degree be founded on these books as a part of their general knowledge: Collier *v.* Simpson, 5 C. & P. 73; *contra*, Bowman *v.* Woods, 1 Iowa 441.

8 Sills *v.* Brown, 9 C. & P. 601.

9 R. *v.* Wright, Russ. & R. 456.

10 Chase *v.* Lincoln, 3 Mass. 237; Poole *v.* Richardson, ib. 330; Rambler *v.* Tryon,

opinion upon an impression whether it was made from an original seal or from an impression.[11] So, the opinion of an artist in painting is evidence of the genuineness of a picture.[12] And it seems that the genuineness of a postmark may be proved by the opinion of one who has been in the habit of receiving letters with that mark.[13] In an action for breach of a promise to marry, a person accustomed to observe the mutual deportment of the parties may give in evidence his opinion upon the question, whether they were attached to each other.[14] A ship-builder may give his opinion as to the seaworthiness of a ship, even on facts stated by others.[15] A nautical person may testify his opinion whether, upon the facts proved by the plaintiff, the collision of two ships could have been avoided by proper care on the part of the defendant's servants.[16] Where the question was, whether a bank, which had been erected to prevent the overflowing of the sea, had caused the choking up of a harbor, the opinions of scientific engineers, as to the effect of such an embankment upon the harbor, were held admissible in evidence.[17] A secretary of a fire insurance company, accustomed to examine buildings with reference to the insurance of them, and who, as a county commissioner, had frequently estimated damages occasioned by the laying out of railroads and highways, has been held competent to testify his opinion, as to the effect of laying a railroad within a certain distance of a building, upon the value of the rent, and the increase of the rate of insurance against fire.[18] Persons accustomed to observe the habits of certain fish have been permitted to give in evidence their opinions as to the ability of the fish to overcome certain obstructions in the rivers

7 S. & R. 90, 92; Buckminster *v.* Perry, 4 Mass. 593; Grant *v.* Thompson, 4 Conn. 203. And see Sheafe *v.* Rowe, 2 Lee 415; Kinleside *v.* Harrison, 2 Phil. 523; Wogan *v.* Small, 11 S. & R. 141. But where the witness has had opportunities for knowing and observing the conversation, conduct, and manners of the person whose sanity is in question, it has been held, upon grave consideration, that the witness may depose, not only to particular facts, but to his opinion or belief as to the sanity of the party, formed from such actual observation: Clary *v.* Clary, 2 Ired. 78. Such evidence is also admitted in the ecclesiastical Courts: see Wheeler *v.* Alderson, 3 Hagg. Eccl. 574, 604, 605.

[11] Per Ld. Mansfield, in Folkes *v.* Chadd, 3 Doug. 157.

[12] Ibid.

[13] Abbey *v.* Lill, 5 Bing. 299, per Gaselee, J.

[14] McKee *v.* Nelson, 4 Cowen 355.

[15] Thornton *v.* Royal Exch. Assur. Co., 1 Peake 25; Chaurand *v.* Angerstein, ib. 43; Beckwith *v.* Sydebotham, 1 Campb. 117. So of nautical men, as to navigating a ship: Malton *v.* Nesbit, 1 C. & P. 70. Upon the question, whether certain implements were part of the necessary tools of a person's trade, the *opinions* of witness are not admissible; but the jury are to determine upon the facts proved: Whitmarsh *v.* Angle, 3 Am. Law Journ. N. S. 274.

[16] Fenwick *v.* Bell, 1 Car. & Kir. 312.

[17] Folkes *v.* Chadd, 3 Doug. 157.

[18] Webber *v.* Eastern Railroad Co., 2 Met. 147. Where a point involving questions of practical science is in dispute in chancery, the Court will advise a reference of it to an expert in that science, for his opinion upon the facts; which will be adopted by the Court as the ground of its order: Webb *v.* Manchester & Leeds Railw. Co., 4 My. & C. 116, 120; 1 Railw. Cas. 576.

which they were accustomed to ascend.[19] A person acquainted for many years with a certain stream, its rapidity of rise in times of freshet, and the volume and force of its waters in a certain place, may give his opinions as to the sufficiency of a dam erected in that place to resist the force of the flood.[20] A practical surveyor may express his opinion, whether the marks on trees, piles of stone, &c., were intended as monuments of boundaries;[21] but he cannot be asked whether, in his opinion, from the objects and appearances which he saw on the ground, the tract he surveyed was identical with the tract marked on a certain diagram.[22]

§ 440 *b*. In weighing the testimony of *biased* witnesses, however, a distinction is observed between matters of opinion and matters of fact. Such a witness, it is said, is to be distrusted when he speaks to matters of opinion; but in matters of *fact*, his testimony is to receive a degree of credit in proportion to the probability of the transaction, the absence or extent of contradictory proof, and the general tone of his evidence.[1]

§ 441. But witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which other persons would probably be influenced, if the parties acted in one way rather than in another.[1] Therefore the opinions of medical practitioners upon the question, whether a certain physician had honorably and faithfully discharged his duty to his medical brethren, have been rejected.[2] So the opinion of a person conversant with the business of insurance, upon the question, whether certain parts of a letter, which the broker of the insured had received, but which he suppressed when reading the letter to the underwriters, were or were

[19] Cottrill *v.* Myrick, 3 Fairf. 222.

[20] Porter *v.* Poquonoc Man. Co., 17 Conn. 249.

[21] Davis *v.* Mason, 4 Pick. 156.

[22] Farar *v.* Warfield, 8 Mart. N. s. 695, 696. So, the opinion of an experienced seaman has been received, as to the proper stowage of a cargo: Price *v.* Powell, 3 Comst. 322; and of a mason, as to the time requisite for the walls of a house to become so dry as to be safe for human habitation: Smith *v.* Gugerty, 4 Barb. 614; and of a master, engineer, and builder of steamboats, as to the manner of a collision, in view of the facts proved: The Clipper *v.* Logan, 18 Ohio 375. But mere opinions as to the amount of damages are not ordinarily to be received: Harger *v.* Edmonds, 4 Barb. 256; Gilles *v.* O'Toole, ib. 261. See also Walker *v.* Protection Ins. Co., 16 Shepl. 317. Nor are mere opinions admissible respecting the value of property in common use, such as horses and wagons, or lands, concerning which no particular study is required, or skill possessed: Robertson *v.* Stark, 15 id. 109; Rochester *v.* Chester, 3 id. 349; Peterborough *v.* Jaffrey, 6 id. 462. And see Whipple *v.* Walpole, 10 id. 130, where this rule is expounded.

[1] Lockwood *v.* Lockwood, 2 Curt. 281; Dillon *v.* Dillon, 3 Curt. 96, 102.

[1] Per Ld. Denman, C. J., in Campbell *v.* Rickards, 5 B. & Ad. 840; s. c. 2 N. & M. 542. But where a libel consisted in imputing to the plaintiff that he acted dishonorably, in withdrawing a horse which had been entered for a race; and he proved by a witness that the rules of the jockey club of which he was a member permitted owners to withdraw their horses before the race was run; it was held that the witness, on cross-examination, might be asked whether such conduct as he had described as lawful under those rules would not be regarded by him as dishonorable: Greville *v.* Chapman, 5 Q. B. 731.

[2] Ramadge *v.* Ryan, 9 Bing. 333.

not material to be communicated, has been held inadmissible;[3] for, whether a particular fact was material or not in the particular case is a question for the jury to decide under the circumstances.[4] Neither can a witness be asked, what would have been his own conduct in the particular case.[5] But in an action against a broker for negligence, in not procuring the needful alterations in a policy of insurance, it has been held, that other brokers might be called to say, looking at the policy, the invoices, and the letter of instructions, what alterations a skilful broker ought to have made.[6]

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§ 449. **Cross-examination.** . . . It is not irrelevant to inquire of the witness, whether he has not on some former occasion given a different account of the matter of fact, to which he has already testified, in order to lay a foundation for impeaching his testimony by contradicting him. The inquiry, however, in such cases, must be confined to matters of fact only; mere opinions which the witness may have formerly expressed being inadmissible, unless the case is such as to render evidence of opinions admissible and material.[1] Thus, if the witness should give, in evidence in chief, his opinion of the identity of a person, or of his handwriting, or of his sanity, or the like, he may be asked whether he has not formerly expressed

[3] Campbell *v.* Rickards, 5 B. & Ad. 840, in which the case of Rickards *v.* Murdock, 10 B. & C. 527, and certain other decisions to the contrary, are considered and overruled. See accordingly, Carter *v.* Boehm, 3 Burr. 1905, 1918; Durrell *v.* Bederley, 1 Holt's Cas. 283; Jefferson Ins. Co. *v.* Cotheal, 7 Wend. 72, 79.

[4] Rawlins *v.* Desborough, 1 M. & Rob. 329; Westbury *v.* Aberdein, 2 M. & W. 267.

[5] Berthon *v.* Loughman, 2 Stark. 258.

[6] Chapman *v.* Walton, 10 Bing. 57. Upon the question, whether the opinion of a person, conversant with the business of insurance, is admissible, to show that the rate of the premium would have been affected by the communication of particular facts, there has been much diversity of opinion among judges, and the cases are not easily reconciled. See Phil. & Am. on Evid. 899; 2 Stark. Evid. 886. But the later decisions are against the admissibility of the testimony, as a general rule. See Campbell *v.* Rickards, 5 B. & Ad. 840. Perhaps the following observations of Mr. Starkie, on this subject, will be found to indicate the true principle of discrimination among the cases which call for the application of the rule. "Whenever the fixing the fair price and value upon a contract to insure is matter of skill and judgment, acting according to certain general rules and principles of calculation, applied to the particular circumstances of each individual case, it seems to be matter of evidence to show whether the facts suppressed would have been noticed as a term in the particular calculation. It would not be difficult to propound instances, in which the materiality of the fact withheld would be a question of pure science; in other instances, it is very possible that mere common sense, independent of any peculiar skill or experience, would be sufficient to comprehend that the disclosure was material, and its suppression fraudulent, although not to understand to what extent the risk was increased by that fact. In intermediate cases, it seems to be difficult in principle wholly to exclude the evidence, although its importance may vary exceedingly according to circumstances." See 2 Stark. Evid. 887, 888 (3d London ed.), 649 (6th Am. ed.).

[1] Elton *v.* Larkins, 5 C. & P. 385; Daniels *v.* Conrad, 4 Leigh 401, 405. But a witness cannot be cross-examined as to what he has sworn in an affidavit, unless the affidavit is produced: Sainthill *v.* Bound, 4 Esp. 74; R. *v.* Edwards, 8 C. & P. 26; R. *v.* Taylor, ib. 726. If the witness does not recollect saying that which is imputed to him, evidence may be given that he did say it, provided it is relevant to the matter in issue: Crowley *v.* Page, 7 id. 789.

a different opinion upon the same subject; but if he has simply testified to a fact, his previous opinion of the merits of the case is inadmissible. Therefore, in an action upon a marine policy, where the broker, who effected the policy for the plaintiff, being called as a witness for the defendant, testified that he omitted to disclose a certain fact, now contended to be material to the risk, and being cross-examined whether he had not expressed his opinion that the underwriter had not a leg to stand upon in the defence, he denied that he had said so; this was deemed conclusive, and evidence to contradict him in this particular was rejected.[2]

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§ 457. **Cross-examination.** But, on the other hand, where the question involves the fact of a previous conviction, it ought not to be asked; because there is higher and better evidence which ought to be offered. If the inquiry is confined, in terms, to the fact of his having been *subjected to an ignominious punishment*, or to imprisonment alone, it is made, not for the purpose of showing that he was an innocent sufferer, but that he was guilty; and the only competent proof of this guilt is the record of his conviction. Proof of the same nature, namely, documentary evidence, may also be had of the cause of his commitment to prison, whether in execution of a sentence, or on a preliminary charge.[1]

§ 458. There is another class of questions, which do not seem to come within the reasons already stated in favor of permitting this extent of cross-examination; namely, questions, the answers to which, though they may disgrace the witness in other respects, yet will not affect the credit due to his testimony. For it is to be remembered, that the object of indulging parties in this latitude of inquiry is, that the jury may understand the character of the witness, whom they are asked to believe, in order that his evidence may not pass for more than it is worth. Inquiries, therefore, having no tendency to this end, are clearly impertinent. Such are the ques-

[2] Elton *v.* Larkins, 5 C. & P. 385.

[1] People *v.* Herrick, 13 Johns. 84, per Spencer, J.; Clement *v.* Brooks, 13 N. H. 92. In R. *v.* Lewis, 4 Esp. 225, the prosecutor, who was a common informer, was asked whether he had not been in the house of correction in Sussex; but Lord Ellenborough interposed and suppressed the question, partly on the old rule of rejecting all questions the object of which was to degrade the witness, but chiefly because of the injury to the adminstration of justice, if persons, who came to do their duty to the public, might be subjected to improper investigation. Inquiries of this nature have often been refused on the old ground alone: as in State *v.* Bailey, Pennington 415; Millman *v.* Tucker, 2 Peake 222; Stout *v.* Rassel, 2 Yeates 334. A witness is also privileged from answering respecting the commission of an offence, though he has received a pardon; "for," said North, C. J., "if he hath his pardon, it doth take away as well all calumny, as liableness to punishment, and sets him right against all objection:" R. *v.* Reading, 7 How. St. Tr. 296. It may also be observed, as a further reason for not interrogating a witness respecting his conviction and punishment for a crime, that he may not understand the legal character of the crime for which he was punished, and so may admit himself guilty of an offence which he never committed. In R. *v.* Edwards, 4 T. R. 440, the question was not asked of a witness, but of one who offered himself as bail for another, indicted of grand larceny.

tions frequently attempted to be put to the principal female witness, in trials for seduction *per quod servitium amisit*, and on indictments for rape, &c., whether she had not previously been criminal with other men, or with some particular person, which are generally suppressed.[1] So, on an indictment of a female prisoner, for stealing from the person, in a house, the prosecutor cannot be asked, whether at that house anything improper passed between him and the prisoner.[2]

§ 459. But where the question does not fall within either of the classes mentioned in the three preceding sections, and goes clearly to the credit of the witness for veracity, it is not easy to perceive why he should be privileged from answering, notwithstanding it may disgrace him. The examination being governed and kept within bounds by the discretion of the judge, all inquiries into transactions of a remote date will of course be suppressed; for the interests of justice do not require that the errors of any man's life, long since repented of and forgiven by the community, should be recalled to remembrance, and their memory be perpetuated in judicial documents, at the pleasure of any future litigant. The State has a deep interest in the inducements to reformation, held out by the protecting veil, which is thus cast over the past offences of the penitent. But where the inquiry relates to transactions comparatively recent, bearing directly upon the present character and moral principles of the witness, and therefore essential to the due estimation of his testimony by the jury, learned judges have of late been disposed to allow it.[1] Thus it has been held, that a witness called by one party may be asked, in cross-examination, whether he had not attempted to dissuade a witness for the other party from attending the trial.[2] So where one was indicted for larceny, and the principal witness for the prosecution was his servant-boy, the learned judge allowed the prisoner's counsel to ask the boy, whether he had not been charged with robbing his master, and whether he had not afterwards said he would be revenged of him, and would soon

[1] Dodd *v.* Norris, 3 Camp. 519; R. *v.* Hodgson, Russ. & Ry. 211; Vaughan *v.* Perrine, 2 Penningt. 534. But where the prosecution is under a bastardy act, the issue being upon the paternity of the child, this inquiry to its mother, if restricted to the proper time, is material, and she will be held to answer: Swift's Evid. p. 81; see also Macbride *v.* Macbride, 4 Esp. 242; Bate *v.* Hill, 1 C. P. 100. In R. *v.* Teal, 11 East 307, 311, which was an indictment for conspiring falsely to charge one with being the father of a bastard child, similar inquiries were permitted to be made of the mother, who was one of the conspirators, but was admitted a witness for the prosecution: People *v.* Blakeley, 4 Parker Cr. R. 176. See *post*, Vol. II, § 577.

[2] R. *v.* Pitcher, 1 C. & P. 85.

[1] This relaxation of the old rule was recognized, some years ago, by Lord Eldon. "It used to be said," he observed, "that a witness could not be called on to discredit himself; but there seems to be something like a departure from that; I mean, that in modern times, the Courts have permitted questions to show, from transactions not in issue, that the witness is of impeached character, and therefore not so credible." Parkhurst *v.* Lowten, 2 Swanst. 216.

[2] Harris *v.* Tippet, 2 Campb. 637.

fix him in jail.[3] Similar inquiries have been permitted in other cases.[4] . . .

§ 460. **Question allowable, though Answer Privileged.** Though there may be cases, in which a witness is not bound to answer a question which goes directly to disgrace him, yet the question may be asked, wherever the answer, if the witness should waive his privilege, would be received as evidence.[1] It has been said, that if the witness declines to answer, his refusal may well be urged against his credit with the jury.[2] But in several cases this inference has been repudiated by the Court; for it is the duty of the Court, as well as the object of the rule, to protect the witness from disgrace, even in the opinion of the jury and other persons present; and there would be an end of this protection, if a demurrer to the question were to be taken as an admission of the fact inquired into.[3]

§ 461. **Impeachment of Credit.** After a witness has been examined in chief, his credit may be impeached in various modes, besides that of exhibiting the improbabilities of a story by a cross-examination. (1) By disproving the facts stated by him, by the testimony of other witnesses. (2) By general evidence affecting his credit for veracity. But in impeaching the credit of a witness, the examination must be confined to his general reputation, and not be permitted as to particular facts; for every man is supposed to be capable of supporting the one, but it is not likely that he should be prepared to answer the other, without notice; and unless his general character and behavior be in issue, he has no notice.[1] This point has been much discussed, but may now be considered at rest.[2] The regular mode of examining into the general reputation is to inquire of the witness whether he knows the general reputation of the person in question among his neighbors; and what that reputation is. In the English Courts, the course is further to inquire whether, from such knowledge, the witness would believe that person, upon his oath.[3] In the American

[3] R. *v.* Yewin, cited 2 Campb. 638.

[4] R. *v.* Watson, 2 Stark. 116, 149; R. *v.* Teal *et al.*, 11 East 311; Cundell *v.* Pratt 1 M. & Malk. 108; R. *v.* Barnard, 1 C. & P. 86, n. (*a*); R. *v.* Gilroy, ib.; Frost *v.* Holloway, cited in 2 Phil. Evid. 425.

[1] 2 Phil. Evid. 423–428; Stark. Evid. 172; Southard *v.* Rexford, 6 Cohen 254.

[2] 1 Stark. Evid. 172; Rose *v.* Blakemore, Ry. & M. 382, per Brougham, arg.

[3] Rose *v.* Blakemore, Ry. & M. 382, per Abbott, Ld. Ch. J.; R. *v.* Watson, 2 Stark. 158, per Holroyd, J.; Lloyd *v.* Passingham, 16 Ves. 64; *supra*, § 451.

[1] Bull. N. P. 296, 297. The mischief of raising collateral issues is also adverted to as one of the reasons of this rule. "Look ye," said Holt, Ld. C. J., "you may bring witnesses to give an account of the general tenor of the witness's conversation; but you do not think, sure, that we will try, at this time, whether he be guilty of robbery:" R. *v.* Rookwood, 4 St. Tr. 681; s. c. 13 How. St. Tr. 211; 1 Stark. Evid. 182. It is competent, however, for the party against whom a witness has been called to show that he has been bribed to give his evidence: Attorney-General *v.* Hitchcock, 11 Jur. 478.

[2] Layer's Case, 16 How. St. Tr. 246, 286; Swift's Evid. 143.

[3] Phil. & Am. on Evid. 925; Mawson *v.* Hartsink, 4 Esp. 104, per Ld. Ellenborough; 1 Stark. Evid. 182; Carlos *v.* Brook, 10 Ves. 50.

Courts, the same course has been pursued;[4] but its propriety has of late been questioned, and perhaps the weight of authority is now against permitting the witness to testify as to his own opinion.[5] In answer to such evidence, the other party may cross-examine those witnesses as to their means of knowledge, and the grounds of their opinion; or may attack their general character, and by fresh evidence support the character of his own witness.[6] The inquiry must be made as to his general reputation, where he is best known. It is not enough that the impeaching witness professes merely to state what he has heard "others say;" for those others may be but few. He must be able to state what is generally said of the person, by those among whom he dwells, or with whom he is chiefly conversant; for it is this only that constitutes his general reputation or character.[7] And, ordinarily, the witness ought himself to come from the neighborhood of the person whose character is in question. If he is a stranger, sent thither by the adverse party to learn his character, he will not be allowed to testify as to the result of his inquiries; but otherwise, the Court will not undertake to determine, by a preliminary inquiry, whether the impeaching witness has sufficient knowledge of the fact to enable him to testify; but will leave the value of his testimony to be determined by the jury.[8]

[4] People *v.* Mather, 4 Wend. 257, 258; State *v.* Boswell, 2 Dev. 209, 211; Anon., 1 Hill S. C. 258; Ford *v.* Ford, 7 Humph. 92.

[5] Gass *v.* Stinson, 2 Sumn. 610, per Story, J.; Wood *v.* Mann, ib. 321; Kimmel *v.* Kimmel, 3 S. & R. 336–338; Wike *v.* Lightner, 11 S. & R. 198; Swift's Evid. 143; Phillips *v.* Kingfield, 1 Appleton 275; in this last case the subject was ably examined by Shepley, J. But *quære*, whether a witness to impeach reputation may not be asked, *in cross-examination*, if he would not believe the principal witness on oath.

[6] 2 Phil. Evid. 432; Mawson *v.* Hartsink, 4 Esp. 104, per Lord Ellenborough; 1 Stark. Evid. 182. It is not usual to cross-examine witnesses to character, unless there is some definite charge upon which to cross-examine them: R. *v.* Hodgkiss, 7 C. & P. 298. Nor can such witness be contradicted as to collateral facts: Lee's Case, 2 Lewin Cr. C. 154.

[7] Boynton *v.* Kellogg, 3 Mass. 189, per Parsons, C. J.; Wike *v.* Lightner, 11 S. & R. 198–200; Kimmel *v.* Kimmel, 3 S. & R. 337, 338; Phillips *v.* Kingfield, 1 Applet. 375. The impeaching witness may also be asked to name the persons whom he has heard speak against the character of the witness impeached: Bates *v.* Barber, 4 Cush. 107.

[8] Douglass *v.* Tousey, 2 Wend. 352; Bates *v.* Barber, 4 Cush. 107; Sleeper *v.* Van Middlesworth. 4 Den. 431. Whether this inquiry into the general reputation or character of the witness should be restricted to his reputation for truth and veracity, or may be made in general terms involving his entire moral character and estimation in society, is a point upon which the American practice is not uniform. All are agreed, that the true and primary inquiry is into his general character for truth and veracity, and to this point, in the Northern States, it is still confined. But in several of the other States greater latitude is allowed. In South Carolina, the true mode is said to be, first, to ask what is his general character, and if this is said to be bad, then to inquire whether the witness would believe him on oath; leaving the party who adduced him to inquire whether, notwithstanding his bad character in other respects, he has not preserved his character for truth: Anon., 1 Hill S. C. 251, 258, 259. In Kentucky, the same general range of inquiry is permitted: Hume *v.* Scott, 3 A. K. Marsh. 261, 262, per Mills, J. This decision has been cited and approved in North Carolina, where a similar course prevails: State *v.* Boswell, 2 Dev. Law 209, 210; see also People *v.* Mather, 4 Wend. 257, 258, per Marcy, J. See also 3 Am. Law Jour. N. S. 154–162, where all the cases on this point are collected and reviewed. Whether evidence of common prostitution is admissible to impeach a female witness, *quære;* see Com. *v.*

§ 462. **Contradicting a Witness.** . . . And this rule [that the witness's attention must first be called to the contradiction] is extended, not only to contradictory statements by the witness, but to other declarations, and to acts done by him, through the medium of verbal communications or correspondence, which are offered with the view either to contradict his testimony in chief, or to prove him a corrupt witness himself, or to have been guilty of attempting to corrupt others.[1]

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§ 469. **Corroboration by Similar Statements.** Where evidence of contradictory statements by a witness, or of other particular facts, as, for example, that he has been committed to the house of correction, is offered by way of impeaching his veracity, his general character for truth being thus in some sort put in issue, it has been deemed reasonable to admit general evidence, that he is a man of strict integrity, and scrupulous regard for truth.[1] But evidence, that he has on other occasions made statements, similar to what he has testified in the cause, is not admissible;[2] unless where a design to misrepresent is charged upon the witness, in consequence of his relation to the party, or to the cause; in which case, it seems, it may be proper to show that he made a similar statement before that relation existed.[3] So, if the character of a deceased attesting witness to a deed or will is impeached on the ground of fraud, evidence of his general good character is admissible.[4] But mere contradiction among witnesses examined in Court supplies no ground for admitting general evidence as to character.[5]

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§ 582. Where the sources of primary evidence of a written instrument are exhausted, secondary evidence, as we have elsewhere shown,

Murphy, 14 Mass. 387, 2 Stark. Evid. 869, n. (1), by Metcalf, that it is admissible; Spears *v.* Forrest, 15 Vt. 435, that it is not.

[1] See 2 Brod. & Bing. 300, 313; 1 Mood. & Malk. 473. If the witness does not recollect the conversation imputed to him, it may be proved by another witness, provided it is relevant to the matter in issue: Crowley *v.* Page, 7 C. & P. 789, per Parke, B. The contrary seems to have been ruled some years before, in Pain *v.* Beeston, 1 M. & Rob. 20, per Tindal, C. J. But if he is asked, upon cross-examination, if he will swear that he has not said so and so, and he answers that he will not swear that he has not, the party cannot be called to contradict him: Long *v.* Hitchcock, 9 C. & P. 619, *supra*, § 449. If he denies having made the contradictory statements inquired of, and a witness is called to prove that he did, the particular words must not be put, but the witness must be required to relate what passed: Hallett *v.* Cousens, 2 M. & Rob. 238. This contradiction may be made out by a series of documents: Jackson *v.* Thomason, 8 Jur. N. S. 134.

[1] Phil. & Am. on Evid. 944; R. *v.* Clarke, 2 Stark. 241. And see *supra*, §§ 54, 55; Paine *v.* Tilden, 5 Washb. 554; Hadjo *v.* Gooden, 13 Ala. 718; Sweet *v.* Sherman, 6 Washb. 23.

[2] Bull. N. P. 294.

[3] 2 Phil. Evid. 445, 446.

[4] Doe *v.* Stephenson, 3 Esp. 284; s. c. 4 id. 50, cited and approved by Ld. Ellenborough, in Bishop of Durham *v.* Beaumont, 1 Campb. 207–210, and in Provis *v.* Reed, 5 Bing. 435.

[5] Bishop of Durham *v.* Beaumont, 1 Campb. 207; 1 Stark. Evid. 186; Russell *v.* Coffin, 8 Pick. 143, 154; Starks *v.* People, 5 Denio 106.

is admissible; but whether, in this species of evidence, any degrees are recognized as of binding force, is not perfectly agreed; but the better opinion seems to be, that, generally speaking, there are none. But this rule, with its exceptions, having been previously discussed, it is not necessary here to pursue the subject any further.

§ 583. The effect of private writings, when offered in evidence, has been incidentally considered, under various heads, in the preceding pages, so far as it is established and governed by any rules of law. The rest belongs to the jury, into whose province it is not intended here to intrude.

APPENDIX III.

CONFESSIONS ON EXAMINATION BEFORE A MAGISTRATE OR IN OTHER LEGAL PROCEEDINGS.[1]

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§ A. **Orthodox Principle.** [The question here presented (*ante*, §§ 219, 224) is in effect: Is there anything in the fact of arrest, as such, or in the fact of presence before a magistrate, as such, or of examination on oath, as such, which tends to produce an untrue confession of guilt? It must be understood that we now assume the absence of any of the other kinds of inducements anywhere deemed fatal; we assume that no threats, promises, assurances, urgings, or other inducements sufficient in themselves to exclude, have been held out; we are to consider merely the effect of the above facts in themselves. Remembering this, and applying the test already indicated as the orthodox one (*ante*, §§ 219, 219 *a*), "Was the inducement such that there was any fair risk of a false confession?" there can be on principle but one answer, viz., no such risk exists, and the confession is admissible. For the circumstances of arrest and of presence before a magistrate, no argument can be necessary; and even for the extreme case of an answer under oath, it must be obvious that so far as any answer at all is thereby compellable, it is, according to the terms of the oath, to be a true answer; that is all that is demanded or compelled.[2] There is on principle not the vestige of an argument for excluding a confession merely because of such a circumstance; and, as a matter of history, such an exclusion was not thought of until the novel judicial attitude of the present century gave it a

[1] The following pages deal with the subject of §§ 224–226, *ante*, and attempt to examine more fully the history and present state of the decisions in this the most complicated and difficult part of the law of Confessions. This treatment is intended as a substitute for the sections above mentioned, but is too long for insertion in the text.

[2] 1838, Morton, J., in Faunce *v.* Gray, 21 Pick. 245: "The fact that it was made under oath cannot diminish its force or render its competency questionable. If it contain a true narrative of facts, justice requires that they should be admitted. And no man will be likely to make *false* admissions against himself, because he has been sworn to tell the truth;" Smith, C. J., in Wood *v.* Weld, Smith N. H. 367, referring to a similar examination on oath: "What hardship is it to be obliged to tell the truth? No means [were] used to produce anything but the truth;" and see R. *v.* Scott, § B, *post;* and U. S. *v.* Kirkwood, Utah, *post*, § K.

partial sanction and opened the way for that misuse of precedents by which extreme results have been reached in a few jurisdictions.

But we find also in use, and competing for recognition, certain other tests, which are all derived from the phrase "voluntary," but as applied and worked out for the situations now in hand have a meaning and effect very different from the ordinary one as expounded *ante*, § 219 *a*.]

§ B. **Principle of Voluntariness: Common Form.** [The common form, in the present application, consists in taking the phrase "voluntary," considering it without any reference to promises or threats, and erecting it into an absolute and final test, — in short, in translating it as "spontaneous." The notion is a broad one, and is in effect: Was the situation such that the person *had* to speak, felt obliged to speak, or was it a matter of pure choice with him to speak or not? The radical difference here, it will be observed, is that we no longer care whether his speaking involves a false avowal of guilt; the thing is that a speaking not voluntary cannot be received, and hence the speaking is excluded irrespective of the danger of falsity. If, then, we take the phrase "voluntary" and treat it as the final and self-sufficient test, and if thus we discard the fundamental theory of confessions (*ante*, § 219) — that our object is to exclude those which may be false — and conceive our purpose as being to exclude confessions as such (even though true) unless they are "voluntary," we thus have good reason to consider how far under such a canon the fact of arrest or of presence before a magistrate or of examination on oath may prevent the confession from being in the above sense "voluntary;" for it may at least be argued that either of these circumstances may in a given case make the confession practically compulsory. Now this is the form of principle which was unsuccessfully championed by many English judges during the first half of this century, and thus was introduced into our rulings; and it is under this form that the questions we are now to consider have been able to be raised. It is not the best principle; but it is at least superior to those we have later to examine, which to-day also compete for recognition. Different Courts apply the doctrine in differing spirits of strictness or liberality; the difference often practically shows itself in the circumstance whether the giving of a caution (or notice not to answer except voluntarily) is deemed to admit the answer; a Court of narrow tendencies will not even then admit it, since (it is said) the moral compulsion remains; but with most Courts a caution removes the reason for exclusion.

Types of the foregoing form of test and the arguments expounding it are found in the following passages: —

1852, Pollock, C. B., in *R.* v. *Baldry*, 2 Den. Cr. C. 441: "The true distinction between the present case and a case of that kind ['you had better tell

the truth '] is that [here] it is left to the prisoner a matter of perfect indifference whether he should open his mouth or not."

1864, Hayes, J., dissenting, in *R.* v. *Johnston*, 15 Ir. C. L. 60, 83: "All that the common law requires is that the confession *in pais* [meaning other than in court or before a magistrate] be voluntary. Upon this principle it is that . . . a confession will be rejected if it appears to have been extracted by the presumed pressure and obligation of an oath, or by pestering interrogatories, or if it have been made by the party to rid himself of importunity, or if, by subtle and ensnaring questions, as those which are framed so as to conceal their drift or object, he has been taken at a disadvantage and thus entrapped into a statement which, if left to himself, and in the full freedom of volition he would not have made. . . . I am not aware of any law which declares, as an abstract proposition, that a confession is undeserving of that character [of voluntariness] if it has been made in answer to questions fairly put, while the party has been left at full liberty to answer or not, as he may think right. These principles will apply to the confession *in pais*, whether it has been made by a person at liberty or under arrest. But it is manifest to every one's experience that from the moment a person feels himself in custody on a criminal charge, his mental condition undergoes a very remarkable change, and he naturally becomes much more accessible to every influence that addresses itself either to his hopes or fears. . . . [To counteract this influence a caution is customary; yet the presence or absence of a caution is not in itself decisive; it is merely a circumstance for the judge. But from the moment of *arrest*, the person must be assumed to be acting under pressure.] On the whole of the case now before us, I am of opinion that the statement to the constable, having been made at a time when the party neither was a prisoner nor felt or supposed herself to be a prisoner, and not appearing to have been obtained by any threat or promise or other undue or unfair means, was properly receivable in evidence. But on the other hand, I am of opinion that if the defendant had at the time of that conversation felt herself to be in custody on the criminal charge, then her statements in answer to the questions would not have been receivable, unless prefaced by a caution."

1862, Rice, J., in *State* v *Gilman*, 51 Me. 223: "Does it follow that because a statement is made upon oath in a proceeding where the circumstances of the commission of the crime are being investigated, and the person making such statements is a suspected or accused person, that it must necessarily be involuntarily made? . . . The argument is that the impressiveness of obligation and the solemnity of the occasion would have a tendency to wring from the party thus situated facts and circumstances which he is not bound to disclose, and therefore can in no just sense be said to be voluntary. As a general proposition this may be true, especially if the party is uninformed with regard to his rights. But when he is fully apprised of his rights and informed that he is under no legal obligation to disclose any facts prejudicial to himself, or to give evidence against himself, and then deliberately makes statements under oath, no good reason is perceived why such statements should not be given in evidence against him. . . . If it be said that, though a party in such a situation may be under no legal constraint, he may nevertheless feel under a degree of moral compulsion, and from that cause feel impelled to make self-incriminative statements, the answer is that this moral pressure bears with no greater force upon him when on the stand voluntarily than in other situations. A party who finds himself surrounded with circumstances calculated to cast sus-

picion on him will undoubtedly feel the necessity of making explanations. But such considerations have never been deemed good cause for excluding declarations which he may choose voluntarily to make."

1879, Chalmers, J., in *Jackson* v. *State*, 59 Miss. 312, rejecting an examination as witness after a caution: "The principle is that no statement made upon oath in a judicial investigation of a crime can ever be used against the party making it, in a prosecution of himself for the same crime; because the fact that he is under oath of itself operates as a compulsion upon him to tell the truth and the whole truth, and his statement, therefore, cannot be regarded as free and voluntary."

The first answer to this test is of course (1) that the fundamental question for confessions is whether there is any danger that they may be untrue (*ante*, § 219), and that there is nothing in the mere circumstance of compulsion to speak in general, or of the use of oath-compulsion in particular, which creates any risk of untruth.[1] (2) Another answer is that the privilege against self-crimination assumes that if the person chooses to give such testimony on the stand or in custody, it will be received, and there would have been no need for such a privilege if this rule had existed for confessions; that privilege assumes in its very existence that statements made without using it are admissible, and answers all the purposes which the above doctrine is aiming at.[2] (3) There is, however, a third way of dealing with this doctrine; and that is to accept its principle — *i. e.* that a statement not voluntary is to be excluded, irrespective of its truth or falsity, — but to deny that there can be any compulsion in the mere facts of custody or of examination upon oath, because the person is always at liberty to refuse to speak. This answer may still leave open to dispute the question whether at least a "caution" (or notification to the person of his privilege) is not essential; but the theory that the person must be supposed to know that he need not answer (as applied in *State* v.

[1] This answer is well set forth in the opinion of Lord Campbell, C. J., for four judges (Coleridge, J., dissenting on another ground), in R. *v.* Scott, 1 D. & B. 47 (1856): —

"We will consider the several grounds on which the defendant's counsel has argued that it [the examination] is not admissible. The first is that the examination of the defendant was taken after making a declaration tantamount to an oath, and that if on oath it would have been inadmissible. But in the case referred to in support of this objection [R. *v.* Britton, *supra*], the oath had been improperly administered without authority; and if the examination is taken under an oath administered by proper authority, there is no reason for saying that it is less likely to be true than if it had been without an oath or any similar solemnity. The next objection is that the examination was compulsory. It is a trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary; but this only means that it shall not be induced by improper threats or promises, because under such circumstances the party may have been influenced to say what is not true, and the supposed confession cannot be safely acted on. Such an objection cannot apply to . . . a lawful examination in the course of a judicial proceeding." See also the epigrammatic passages from Morton, J., in Fannce *v.* Gray, and Smith, C. J., in Wood *v.* Weld, quoted *ante*, § A.

[2] This argument is suggested in the following passage: 1878, Benedict, J., in U. S. *v.* Graff, 14 Blatch. 386: "The reason why a sworn witness is permitted to decline answering is because his answers under oath can be used as evidence against him."

Vaigneur, infra) would practically repudiate such a requirement. The passage below illustrates the form of this answer.[3]]

§ C. **Same: Modern English Form.** [In the last half century there has been a tendency on the part of English judges to revive this test in an altered form, for a certain class of cases at least. The notion is fundamentally the same, *i. e.* Was the situation such that the person *had* to speak? But it proceeds by a different test, viz. Was the speaking obtained by asking questions of a person while in custody? In other words, statements are deemed not voluntary and therefore inadadmissible when they have been made in answer to questions put while in custody. Moreover, it thus becomes immaterial whether the answers amount to a confession or not. The attitude is illustrated by the following passages: —

1885, A. L. Smith, J., in *R.* v. *Gavin*, 15 Cox Cr. C. 656: "When a prisoner is in custody, the police have no right to ask him questions. Reading a statement over, and then saying to him, 'What have you to say?' is cross-examining the prisoner, and therefore I shut it out. A prisoner's mouth is closed after he is once given in charge, and he ought not to be asked anything."

1864, L. C. J. Lefroy, dissenting, in *R.* v. *Johnston*, 15 Ir. C. L. 66: "The law of England, since the time of Judge Jeffreys, is against any kind of extraction of evidence from a prisoner, not only by torture, but by anything that could be calculated to excite the prisoner to confess; any answer given under such circumstances is not admissible. . . . Ought we not to say that the law of England does not allow evidence to be obtained by questioning a prisoner, except in the particular way prescribed by the statute? . . . There appears to have been a new current of opinion setting in after the passing of 14–15 Vict."

This attitude can by no means be taken as the prevailing one in modern English Courts; it is merely a tendency, though a marked one. It is doubtless partly due to a feeling (unfounded, as we shall see, in the law) that the statute of 1850 should be treated as in spirit excluding all evidence from accused persons in custody not obtained by the statute-sanctioned method. Partly, also, it is due, as the preceding form is, to a confusion of confession-law with the privilege against self-crimination; the privilege, of course, does not affect statements not made on the stand but made while in custody; and in applying the law of confessions to the latter situation, the judges have modified it

[3] 1852, Withers, J., in State *v.* Vaigneur, 5 Rich. L. 403 (after dealing with other objections): "There remains nothing but the supposed duress of an oath, administered by a power capable (as is said) of applying a sanction that shall exact an answer. Now in reality there is no power, in any tribunal known to the common law, to exact an answer that may implicate a witness in or tend to expose him to a criminal charge. . . . Mr. Joy . . . [assigns the reason] that one in his capacity of witness might refuse to answer a question that has a tendency to expose him to a criminal charge; hence an answer to such becomes a voluntary statement, since he might refuse to make any. This appears to be a sound legal theory. It cannot be met by the circumstance of a particular case that a witness may not know the extent of his personal security under the law, for ignorance of the law excuses no one."

by an infusion of the spirit of the above privilege; so that we find presented under the head of confession-law a notion excluding statements made merely in answer to questions by a custodian, — a result which would be natural enough as an extension of the privilege against self-crimination, but quite anomalous in the law of confessions.[1]]

§ D. **Selden's Principle of Mental Agitation.** Another form of test derived from the phrase "voluntary" is still broader in its excluding effect, and differs radically in one point from the preceding two. Like them, (1) it takes "voluntariness" as a final standard; but (2) it does not discard, but retains, the fundamental notion of confession-law that a probable untruth is that which we are seeking to reject; and furthermore (3) it includes, as the second does, under "confession" anything and everything said by the person, whether an avowal of guilt or an assertion intended to exculpate and to demonstrate innocence. Its peculiar different result arises from applying the idea (2) to the statements included in (3). Thus, it argues: Persons suspected wrongly of a crime, especially when officially charged with it and questioned about it, are apt, particularly when the circumstances are strongly inculpatory and demand explanation, to make the first explanation that occurs to them, to deny incriminating facts, and, in short, to assert and try to prove their innocence by inventing false stories, which if true would show their innocence; hence, statements so made cannot fairly be trusted, and should be rejected. The chief representative statements of this theory are found in the following passages: —

1854, Selden, J., dissenting, in *Hendrickson* v. *People*, 10 N. Y. 33: "The mental disturbance produced by a direct accusation, or even a consciousness of being suspected of crime, is always great, and in many cases incalculable. The foundation of all reliance upon human testimony is that moral sentiment which universally leads men, when not under some strong counteracting influence, to tell the truth. This sentiment is sufficiently powerful to resist a trifling motive, but will not withstand the fear of conviction for crime. Hence, the moment that fear seizes the mind, the basis of all reliance upon its manifestations is gone. . . . The mind, confused and agitated by the apprehension of danger, cannot reason with coolness, and it resorts to falsehood when truth would be safer, and is hurried into acknowledgments which the facts do not warrant. Neither false statements nor confessions, therefore, afford any certain evidence of guilt when made under the excitement of an impending prosecution for crime."

1864, Pigot, C. B., dissenting, with Lefroy, C. J., and O'Brien, J., in *R.* v. *Johnston*, 15 Ir. C. L. 60, 121: "It must be shown to the satisfaction of the judge that the statements have been purely *voluntary* statements of the prisoner. . . . The danger to be guarded against is not, in the far greatest num-

[1] This passage illustrates it: 1867, Kelly, C. B., in 10 Cox Cr. C. 576: "I have always felt that we ought to watch jealously any encroachment on the principle that no man is bound to criminate himself, and that we ought to see that no one is induced either by a threat or a promise to say anything of a criminatory character against himself;" an utter confusion of two things distinct in history and in principle.

ber of cases, that an innocent man will fabricate a statement of his own guilt, although instances of this have occurred, too well attested to be doubted. The danger is that an innocent person, suddenly arrested, and questioned by one having the power to detain or set free, will (when subjected to interrogatories, which *may* be administered in the mildest or *may* be administered in the harshest way, and to persons of the strongest and boldest or of the most feeble and nervous natures) make statements not consistent with truth, in order to escape from the pressure of the moment. . . . The process of questioning impresses on the greater part of mankind the belief that silence will be taken as an assent to what the questions imply. The very necessity which that impression suggests, of answering the question in *some* way, deprives the prisoner of his free agency, and impels him to answer from the fear of the consequences of declining to do so. Daily experience shows that witnesses, having deposed the strict truth, become on a severe or artful cross-examination involved in contradictions and excuses destructive of their credit and of their direct testimony. A prisoner is still more liable to make statements of that character under the pressure of interrogatories urged by the person who holds him in custody; and thus truth, the object of the evidence of admissions so elicited, is defeated by the very method ostensibly used to attain it. This relative position of the parties does not, therefore, tend to truth as the result of the inquiry. It does tend in the strongest way to make the statement of the prisoner the reverse of voluntary. . . . In my judgment, the relative positions of the constable who has custody of the prisoner and of the prisoner who is in custody of the constable negative the fact that the prisoner is a free agent. It rebuts any presumption that the prisoner's statement is voluntary, and furnishes the strongest presumption that it is not."

Now, (*a*) conceding this argument to be good so far as it goes, what it shows is that statements professing *innocence*, and calculated to prove it, are not trustworthy; it does not show that a plain avowal of *guilt* is untrustworthy; on the contrary, the whole underlying notion is that an innocent person will lie to prove his innocence and explain away apparent guilt. Therefore, when we find him *confessing* guilt, it is obvious that it cannot be under the influence of any such motive as the above, and is totally inconsistent with the presence of that motive.[1] Thus, by the Courts adopting this principle, a reason which applies exclusively to assertions of innocence is made to support a rule excluding confessions of guilt.[2] That is the first fallacy; and it must be clearly appreciated, because its insidious error is concealed in a triple process, viz., *first*, taking a principle fundamentally appropriate to the confession-rules (that they are excluded because of the risk of

[1] This answer is represented in the following passage: 1878, Benedict, J., in U. S. *v.* Graff, 14 Blatchf. 387: "To say that the administering of an oath to one under suspicion of crime will of necessity cause a mental disturbance that must render unreliable the sworn admission of the crime and raise the legal presumption that the statement is untrue, is going further than I can go, unless compelled by authority. I know of no authority binding upon the Courts of the United States, which compels the holding that an arrest, or a charge of crime, or being sworn, or all three combined, are sufficient to exclude a confession that otherwise appears to have been freely made, without the influence of threat or promise."

[2] See § 213, *ante*, "What is a Confession."

falsity), *secondly*, working out its reason for a totally different class of statements (assertions intended to show innocence), and *thirdly*, going back to confessions, and testing them according to the rule thus borrowed.

(*b*) The further answer to this principle is found in the denial that the principle has any validity even for the class of statements, viz., assertions of facts showing innocence, as to which it is worked out. In that department of evidence such a principle is without precedent, and is in conflict with all analogies. The conduct of a suspected person, in concealing or destroying incriminating evidence or in fleeing from justice, has always been admitted (subject to any innocent explanation that can be made) (*ante*, § 14 *p*, in the text, and § 195 *a*), and his false assertions of an *alibi* and other false explanations of conduct have always been admitted (*ante*, § 14 *r*); yet if the above principle were good, it would necessarily exclude all conduct and statements while under suspicion, and not merely while in custody or on the stand. Thus the principle is without precedent or analogy, and is unworkable in practice.[3]]

§ E. **The above Principles all applied to-day.** [The first of the above three principles is less recognized to-day, though it gains ground steadily. The second is that which prevails in most jurisdictions, though it is not uniformly nor consistently applied, and it rather loses ground. The third can hardly be said to prevail completely in any jurisdiction, its chief function having been to throw precedents and principles into confusion, to unsettle the course of decision, and to suggest confusing arguments while not commanding complete adherence. It was first judicially advanced by the eminent Mr. J. Selden,[1] in 1854, in the *Teachout Case* (*post*) in New York, at nearly the same

[3] This answer is represented in the following passage: 1869, Woodruff, J., in Teachout *v.* People, 41 N. Y. 11: "If the declarations made under consciousness of suspicion are for that reason unreliable, they must be unreliable whenever and wherever made . . . and equally when the suspected party encounters that suspicion while fully at large among third parties, as when called as a witness to state if he sees fit what he knows of the cause of the death. And if consciousness of suspicion renders proof of his declarations unreliable, so also should it render proof of his acts unreliable, and they should be equally excluded. And yet it has not, I think, been doubted that proof of the acts of the party under the very pressure of suspicion is competent. . . . [Flight, concealment, etc.] may be proved as some indication of conscious guilt, and yet it is consistent with innocence, and may be the mere result of fear, and the pressure of circumstances may lead the innocent man to resort to this as a measure of safety. This is quite as true as that suspicion will lead a man to false statements for the same purpose. There must be some limit to the rule excluding declarations, short of the test that they be made when he is under no consciousness that he is under suspicion; else the whole conduct of the party, from the moment he is apprised that he is suspected, must be declared to be too unreliable to be made the subject of any inference whatever."

[1] It had already been advanced, however, by the counsel, Dundas, in 1838, in Wheater's Case, *post*; and Mr. J. Selden probably found it there. But a spurious passage, much quoted, in Gilbert's Evidence and Hawkins's Pleas of the Crown also served as a source; this passage is examined in an article, by the present editor, on the history of confession-law, in 33 Amer. Law Rev. 376, May–June, 1899.

time that it was being repudiated by the English judges, in 1856, in *Scott's Case* (*post*); it was subsequently championed by the dissenting judges in the Irish case of *R.* v. *Johnston*, in 1864; but it has not obtained any further footing in England or Ireland, and had vogue as a determining doctrine in only a few American jurisdictions. Apart from its lack of precedent, the false basis of supposed principle by which it is reached, and its conflict with analogies, it is workable simply and consistently up to a certain point only, *i. e.* quite as far as Mr. J. Selden and the Irish judges wished to carry it. But it is radically different from and opposed to the other principles; and the unfortunate thing has been, for many Courts, that they have not seen this, that they have thought to recognize it partially, but not wholly, and in connection with other principles, — an unfortunate thing, because this test is not reconcilable in any degree with either of the other tests (except in part the last preceding one) and cannot coexist with them in the same body of law, and because the result of this laudable endeavor to carry water on both shoulders is that neither vessel maintains its equilibrium, to the confusion of the Courts and the law. The best interests of the law of confessions would be served by a clear recognition on the part of the Courts that one of those three principles must be selected and logically carried out and the other two be repudiated; thus we should have at least consistency, instead of a tangle of rulings guided now by one principle, now by another, and leaving the law in a state of desperate uncertainty.

Owing to the state of the decisions, it is necessary to consider them by jurisdictions; for this alone will furnish an opportunity for examining the state of the law with reference to the various competing principles; and the English precedents, as furnishing the original distinctions and illustrating the history of the theories, must first be taken by themselves.

In applying each of the principles, there are four kinds of situations, involving distinctions about which the controversy within each principle has chiefly turned. These four are: 1. Under arrest as accused; 2. Examined before a magistrate as accused, without oath; 3. Examined before a magistrate or on trial as accused, under oath; 4. Testifying on oath as a witness. Confessions made in these four different situations may be differently treated even under the same principle, and the course of the law must be examined separately for each.]

§ F. **History of English Practice: (1) Confessions while under Arrest.** [It was for a long time the clear and unquestioned law in England that the mere circumstance of arrest, even when combined with the circumstance that the confession was made in answer to questions put by the custodian, did not exclude the confession. This was taken for granted and expressly asserted as unquestioned by Grose, J., in 1791, delivering the opinion of the twelve judges in

Lambe's Case.[1] The next two landmarks of the rule are *Thornton's*[2] and *Gilham's*[3] *Cases*, also decisions *in banc*. These were followed, in the next ten years, by other rulings,[4] among which *Wild's Case*, a decision *in banc*, became the leading one. Such was the law at this period that Mr. Joy was able correctly to say, in 1842, —

Joy, Confessions, 38: "It may be proper that the police authorities should forbid the practice of questioning a prisoner by a constable, and it might reasonably induce caution, and perhaps suspicion, and a scrutinizing jealousy in jurors, in investigating the credit of a witness who obtains a confession through such means; but the cases before the twelve judges, both in England and Ireland, already cited, seem to establish that statements made in answer to questions put, without any caution and by a person who has no authority to question the prisoner, are admissible in evidence. . . . [46.] Such confession, if voluntary and free, is admissible, although it appears that he was not cautioned."

It is to be noticed (1) that from the point of view of the "threat or promise" test (*ante*, § 219 *a*) the result was a necessary one, because by hypothesis no threat or promise was employed; (2) that in the absence of a threat or a promise, the test of "voluntariness" was regarded as satisfied; (3) that no caution was required; and (4) that the rule was repeatedly affirmed *in banc*.

In the meantime, in Ireland, the same result had been reached in *Gibney's Case*, by all the judges.[5] But some twenty years afterwards came a series of Irish rulings by individual judges excluding

[1] 1791, Lambe's Case, 2 Leach Cr. C. 3d ed. 625; see the quotation, *post*, § G. So also before that time: 1722, R. *v.* Woodburne, 16 How. St. Tr. 62 (to police-officer); 1746, Berwick's Case, Foster's Cr. C. 10 (officers of a rebel garrison after capture, giving their rank to the official inspectors while in prison).

[2] 1824, R. *v.* Thornton, 1 Moody Cr. C. 27, 1 Lew. Cr. C. 49, by seven judges against two (the accused, fourteen years old, was in custody and severely questioned by the police; held admissible, because "no threat or promise had been used").

[3] 1828, R. *v.* Gilham, 1 Mood. Cr. C. 186, 191, before all the judges but one (in jail, to the jailer; admitted).

[4] 1831, R. *v.* Swatkins, 4 C. & P. 549, Patteson, J., *semble;* 1832, R. *v.* Richards, 5 id. 318, Bosanquet, J. (to a constable, in custody on the way to jail); 1883, R. *v.* Long, 6 id. 179, Gurney, B. (just after arrest, after hearing the charge); 1835, R. *v.* Wild, 1 Mood. Cr. C. 452 (in custody in an inn); 1837, R. *v.* Kerr, 8 C. & P. 177, Park, J. (to a policeman, searching the accused's room, questioning her and about to arrest her).

[5] 1822, R. *v.* Gibney, Jebb Cr. C. 15, by all the Irish judges (statements in answer to questions by a constable, while under arrest on the way to jail, with a crowd about him asking questions; no caution given. "They held the rule to be well established that a voluntary confession shall be received in evidence, but if hope has been excited, or threats or intimidation held out, it shall not," and admitted it here). This was followed in 1842: R. *v.* Hughes, quoted in Joy, Confessions, 39 (a statement had been made while in custody, in answer to a constable's questions); Crompton, J., "had frequently had occasion to decide this question, and all these [cases cited] had been before him. The confession of a man, to be admitted, is not to be extorted by fear nor educed by flattery; but where a prisoner voluntarily gives it, it may be received, whether the questions be put to him by an authorized or unauthorized person. Wherever the declaration is voluntary, he would receive it, and the doctrine in Wild's Case was the true one."

such confessions;[6] the reasons being variously given. The uncertainty of practice thus introduced was finally settled in 1864 by the great case of *R.* v. *Johnston*,[7] and the original and orthodox view was maintained by the majority, that confessions made under such circumstances were not in themselves inadmissible, and were to be tested, like other confessions, according to the presence or absence of some other and specific inducement in the way of a threat or a promise.

Meantime, in 1850, a statute (see *post*, § G) had prescribed a new method of examining accused persons for commitment, and in the opinion of Lefroy, C. J., its spirit had contributed to the opposing result reached by him in this case. But the supposed spirit of the statute had not affected the English judges, who continued to rule as before.[8] But about the same time as *R.* v. *Johnston* the form of test described *ante*, § C, made its appearance in England;[9] *i. e.*, any answers obtained by questions put by an officer to a person in custody were excluded. It has not yet been given a standing by a Court of appeal, but it certainly is a candidate for supremacy.]

§ G. **History of English Practice: (2) Confessions as Accused without Oath on Examination before a Magistrate.** [The examination of

[6] 1839, R. *v.* Hughes, 1 Cr. & D. 13, Doherty, C. J. (an authorized person visiting the accused in jail, and questioning him; excluded, on the ground that no caution was given, and that on magistrates' examinations a caution is always given); 1840, R. *v.* Doyle, ib. 396, Bushe, C. J. (a constable visiting the accused in jail, and questioning her, after a caution); 1841, R. *v.* Devlin, 2 id. 151, Burton, J., and Brady, C. B. (a police inspector questioning the accused in jail; excluded); 1856, R. *v.* Toole, 7 Cox Cr. C. 244; Pigot, C. B., and Richards, B. (statement in answer to a police-inspector while under arrest, after caution; excluded, the current difference of opinion among the judges being noted); 1861, R. *v.* Hassett, 8 id. 511, Christian, J. (similar facts; evidence requested to be withdrawn as doubtful); 1863, R. *v.* Bodkin, 8 Ir. Jur. N. S. 340, Pigot, C. B. (statement in answer to a question by a constable while under arrest, after caution; excluded, because constables "ought to abstain from asking questions").

[7] 1864, R. *v.* Johnston, 15 Ir. C. L. 60, before eleven Irish judges; the accused made statements in answer to the police, just after notice of the charge, but before arrest, no caution being given; Deasy, B., with whom concurred Hughes and Fitzgerald, BB., Monahan, C. J., and Fitzgerald, Ball, and Keogh, JJ., held the statement admissible because of the absence of threat or inducement; Ball, J. (109): "The general result of the foregoing cases appears to be that from the year 1822 down to the present time — that is, for a period of upwards of forty years — it has been recognized as the law of the land, both in England and Ireland, that admissions or statements obtained from prisoners through the instrumentality of questions from police constables, without any previous caution, are admissible in evidence against them; provided that such admissions or statements be the voluntary acts of the prisoners, not induced by either hope or threat operating upon their minds." The views of Hayes, J., and Lefroy, C. J., dissenting, represented the test of § C, *ante*, the view of Pigot, C. B., and O'Brien, J., dissenting, represented the test of § D, *ante*; see the quotations in those sections.

[8] 1853, R. *v.* Sleeman, 6 Cox Cr. C. 245 (in custody in a private house; admitted); 1862, R. *v.* Cheverton, 2 F. & F. 833, Erle, C. J., and Wightman, J. (statement to a police-superintendent, while under arrest, in answer to questions, without caution; admitted).

[9] 1863, R. *v.* Mick, 3 F. & F. 822, Mellor, J. (statements to the police, under arrest, answering a question, but after a caution; admitted, but the method disapproved); 1885, A. L. Smith. J., in R. *v.* Gavin, 15 Cox Cr. C. 656 (quoted *ante*, § C). No doubt such a decision is apt to be reached through the influence of other considerations; as where Cave, J., in 1893, 2 Q. B. 18, frankly expresses doubts as to the credibility of police-officers producing alleged confessions in doubtful cases.

an accused person before a magistrate, for preliminary investigation and for commitment if necessary, was of course at common law taken without putting the accused upon oath, because as accused he was not competent to testify. Furthermore, the proceeding was for some three centuries regulated by a statute (widely copied in this country) the material provisions of which are as follows: —

1554, St. 1–2 P. & M. c. 13, s. 4: "Justices of the peace . . . shall before any bailment or mainprise take the examination of the said prisoner and the information of them that bring him, . . . and the same, or as much as may be material thereof to prove the felony, shall be put in writing before they make the bailment; which said examination, together with the said bailment, the said justices shall certify at the next general gaol-delivery. . . ." St. 2–3 P. & M. c. 10: "The said justice, or justices, before he or they shall commit or send such prisoner to ward, shall take the like examination of the prisoner and the information of those who bring him, and shall put the same in writing within two days after the said examination, and the same shall certify," etc.

Now the propriety of receiving confessions made at such a time, never questioned (from the present point of view) until the end of the 1700s,[1] was then settled, both as a common-law question and under the statute, in a decision so clear and emphatic that its exposition must be quoted: —

1791, *Lambe's Case*, 2 Leach Cr. L. (3d ed.) 625; the accused was arrested and examined before a magistrate, and on having the written examination read over to him for signing, he said: "It is all true enough," but would not sign it. Whether it was admissible apart from the statute, was the first question; Grose, J., for the twelve Judges: "The general rule respecting this species of testimony is that a free and voluntary confession, made by a person accused of an offence, is receivable in evidence against him, whether such confession be made at the moment he is apprehended, while those who have him in custody are conducting him to the magistrate's, or even after he has entered the house of the magistrate for the purpose of undergoing his examination. But in the present case the confession of the prisoner was made not only in the presence of the magistrate, but while he was undergoing a judicial examination. . . . First, then, to consider this question as it is governed by the rules and principles of the common law. Confessions of guilt made by a prisoner, to any person, at any moment of time, and at any place, subsequent to the perpetration of the crime and previous to his examination before the magistrate, are at common law received in evidence as the highest and most satisfactory proof of guilt, because it is fairly presumed that no man would make such a confession against himself if the facts confessed were not true. It may, however, be said [in opposition] that this rule only applies to confessions by parol, and not to confession (as in the present case) reduced into writing and afterwards admitted by parol to be true. But surely if what a man says, though not reduced into writing, may be given in evidence against

[1] 1741, White's Trial, 17 How. St. Tr. 1085; Goodere's Trial, ib. 1054; and see other cases in 33 Amer. Law Rev. 376, May–June, 1899.

him, *a fortiori* what he says when reduced into writing is admissible, for the fact confessed being rendered less doubtful by being reduced into writing, it is of course entitled to greater credit, and it would be absurd to say that an instrument is invalidated by a circumstance from which it derives additional strength and authenticity. And for this reason it is clear that the present confession having been taken by a magistrate under a judicial examination can be no objection to receiving it in evidence, for it gains still greater credit in proportion to the solemnity under which it was made. . . . [He then points out that the statute methods were not intended to replace all others by exclusion, but merely to add a new and acceptable form, thus leaving all other proper ones still admissible, even though the statutory form could not be availed of.] "[The examination] is more authentic on account of the deliberate manner in which it is taken, and, when it contains a confession, is admitted, not by force of the statutes, but by the common law, as strong evidence of that fact; . . . and it is clear that what a prisoner confessed before a justice of the peace, previous to the reign of Philip and Mary, if not induced by hope or extorted by fear, whether reduced into writing or not; or if reduced into writing, whether signed or not, if admitted by the prisoner to be true; was and is as good evidence as if made in the adjoining room previous to his having been carried into the presence of the justice, or after he had left him, or in the same room before the magistrate comes, or after he quits it."

This ruling was emphasized in an opinion delivered a few years later: —

1794, *R.* v. *Thomas*, 2 Leach Cr. L. (3d ed.) 727; Grose, J. (the facts being similar to those of *Lambe's Case*, *supra*): "There can be no doubt but that these minutes may be read in evidence. . . . In *Lambe's Case*, which in its circumstances was precisely like the present, the judges were of opinion that if such written examination were to be adjudged not admissible, this monstrous proposition would follow, that whatever a prisoner says when not before a magistrate would be admissible, though depending on the faculty of memory; but that the moment a prisoner gets before a magistrate it would not be admissible, though taken down in writing under circumstances of the greatest solemnity."

It will thus be seen that confessions so made were declared to be equally admissible (1) at common law, (2) under the statute, and (3) when intended to be taken under the statute, but not successfully so taken. Furthermore, it will be observed, there is no intimation that it is of any consequence (1) whether the accused was cautioned or not, or (2) whether his statements were made spontaneously, or in answer to a general inquiry as to what he had to say, or in answer to repeated specific questions. Finally, it is clear that confessions made in such a situation were treated on exactly the same footing as any others, *i. e.* the only question would be as to the influence of some positive threat or promise; the mere situation did not affect the result or constitute an inducement.

The admissibility of such a confession was subsequently reiter

ated in a series of rulings extending through the next half-century ;[2] and Mr. Joy adds his authority as to the practice at the end of that time.[3] In the meantime, only one contrary ruling had appeared ;[4] but it served to keep alive the possibility of controversy. It will be noted that, in the cases confirming the orthodox doctrine (of which *R.* v. *Ellis* and *R.* v. *Gilham* are most frequently cited), some of the confessions received were given under a caution and some were made without questions preceding; but neither of these circumstances seems to have been treated as essential to their reception. The doctrine of *R.* v. *Wilson*,[4] however, came to the surface once again in 1850.[5] But in the preceding year a statute had entirely revised the method of conducting such examinations ;[6] the effect of which was to raise the question whether its methods were to exclude

[2] 1790, R. *v.* Hall, quoted in 2 Leach Cr. L. 3d ed. 635 ; 1799, R. *v.* Magill, McNally on Evid. 37, Chamberlain, J. (statement as accused before a magistrate ; no caution); 1826, R. *v.* Ellis, Ry. & Moo. 432, Littledale, J. (a statement as accused on examination before a magistrate, without threat or promise, but upon questioning and after refusal to allow counsel; following an unreported ruling of Holroyd, J., and disapproving Wilson's Case of 1817, in the next note but one); 1828, R. *v.* Gilham, 1 Mood. Cr. C. 186, 191, before all the judges but one (on examination before a magistrate after a caution ; admitted); 1830, Wright's Case, 1 Lew. Cr. C. 48 (on examination as accused before a magistrate ; admitted); 1831, R. *v.* Fagg, 4 C. & P. 566, Garrow, B. (examination as accused before magistrate ; disapproved because taken before all evidence for prosecution was in; but admitted); 1831, R. *v.* Bell, 5 id. 162, Gaselee, J., and Lord Tenterden, C. J. (statement as accused before magistrate, without questions ; admitted, and Garrow, B.'s objection, *supra*, disapproved); 1831 (?), Anon., ib., note, Lord Lyndhurst, C. B. (same point); 1832, R. *v.* Green, ib. 312, Gurney, B. (statements as accused before a magistrate, after a caution); 1836, R. *v.* Court, 7 id. 486, Littledale, J. (statement as accused before magistrate in answer to question); 1836, R. *v.* Rees, ib. 569, Lord Denman, C. J. (statement as accused before magistrate in answer to questions); 1837, R. *v.* Bartlett, ib. 832, Bolland, B. (same); 1838, R. *v.* Arnold, 8 id. 622, Lord Denman, C. J. (advising a caution; but omitting to say whether it is essential). There were also other rulings indicating clearly, though indirectly, an acceptance of this practice : 1833, R. *v.* Tubby, 5 C. & P. 530, Vaughan, B., *semble;* 1835, R. *v.* Rivers, 7 id. 177, Park, J., *semble;* 1838, R. *v.* Wheeley, 8 id. 250, Alderson, B., *semble.*

[3] 1842, Joy, Confessions, 40.

[4] 1817, R. *v.* Wilson, Holt N. P. 597, Richards, C. B. (a statement as accused on examination before a magistrate, without threats or promises, but without caution and upon questions ; "an examination of itself imposes an obligation to speak the truth ; if a prisoner will confess, let him do so voluntarily"). There is another and earlier, sometimes quoted to the same effect ; but it has no bearing : 1793, R. *v.* Bennet, 2 Leach Cr. L. 3d ed. 627 (where the accused had refused to sign the examination before the magistrate, though acknowledging his guilt ; this acknowledgment the Court rejected, because the prisoner had the right "to retract what he had said, and to say that it was false ;" yet here the accused did *not* say that it was false ; he admitted his guilt).

[5] 1850, R. *v.* Pettit, 4 Cox Cr. C. 164, Wilde, C. J. (examination as accused before magistrates, upon questioning; excluded, the decision being independent of the statute : "I reject it upon the general ground that magistrates have no right to put [such] questions to a prisoner. . . . The law is so extremely cautious in guarding against anything like torture that it extends a similar principle to every case where a man is not a free agent in meeting an inquiry ; . . . the accused might think himself bound to answer for fear of being sent to gaol.")

[6] 11-12 Vict., c. 42, s. 18 ; enacted for Ireland in 12-13 Vict., c. 69, s. 18, and again in 14-15 Vict., c. 93, s. 14. The statute of Philip and Mary had already been revised without materially affecting the portions concerned with the present question, in 7 G. IV. (1826), c. 64, ss. 2 and 3 (for Ireland in 9 G. IV., c. 54, ss. 2 and 3).

entirely and to forbid the common-law methods, and thus to leave an opportunity still to inquire judicially what methods were receivable at common law.[7] Of the various questions which have arisen in applying this statute,[8] three only need here concern us. (1) Did it exclude a confession before admissible at common law? That it does not, has been decided in England;[9] and very properly, since in the face of the language of the last clause any other interpretation would have left it impossible to believe that words can mean anything. (2) Was a caution necessary at common law? This also has been settled in the negative, and the orthodox doctrine already described has been affirmed and perpetuated.[10] (3) Finally, does it matter that the statement was called forth by specific questions put by the magistrate about the offence? This has not been authoritatively answered since the passing of the statute. It had already been settled at common law, as we have seen, that the putting of questions was immaterial; but some individual rulings since the statute[11] have excluded statements so obtained, on the principle

[7] The statute's peculiar features were: (1) It required two cautions to be given; and (2) it apparently sanctioned all confessions previously admissible: 1849, 11–12 Vict., c. 42, s. 18: "After the examination of all witnesses on the part of the prosecution, . . . the justice . . . shall say to the accused these words or words to the like effect: 'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence against you upon your trial;' . . . Provided always, that the said justice or justices, before such accused person shall make any statement, shall state to him and give him clearly to understand that he has nothing to hope from any promise of favor and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat; provided, nevertheless, that nothing herein enacted or contained shall prevent the prosecution in any case from giving in evidence any admission or confession or other statement of the person accused or charged made at any time, which by law would be admissible as evidence against such person."

[8] That the statute has presented some difficulties will hardly serve as a moral against statutory revision and codification; for, whether owing to the statute or to other reasons, it is certain that the proportion of rulings upon confession-law in that field after and before the statute is as one to ten.

[9] The statute is not exclusive; all confessions formerly admitted are still admissible: 1850, R. *v.* Sansome, 4 Cox Cr. C. 207, before five judges; disposing of the doubts of Coleridge and Cresswell, JJ., in R. *v.* Kimber, 3 Cox Cr. C. 223, and approving the ruling of Erle, J., in R. *v.* Steel, 13 Just. P. 606. A similar opinion was expressed by a majority in the Irish case of 1864, R. *v.* Johnston, 15 Ir. C. L. 82, 89, per Deasy, Hughes, Fitzgerald, BB., Fitzgerald and Keogh, JJ., against Hayes, O'Brien, and Ball, JJ.

[10] The question arises, it will be seen, when the statutory caution has been omitted, and thus the confession is not receivable under the statute; this was the case in R. *v.* Sansome, *supra*, the decision being as above; the same opinion was expressed by the majority in R. *v.* Johnston, *supra;* a subsequent English ruling confirms the result: 1856, R. *v.* Stripp, 7 Cox Cr. C. 97 (interpolated remarks, made before evidence ended). It may be added that *under the statute* it has been held that the omission of the *second* caution does not exclude the confession: 1850, R. *v.* Sansome, 4 Cox Cr. C. 207; 1850, R. *v.* Bond, ib. 231, 241, Alderson, B.

[11] 1854, R. *v.* Berriman, 6 Cox Cr. C. 388, Erle, J.; 1863, R. *v.* Mick, 3 F. & F. 822, Mellor, J., *semble.* In the Irish case this view was repudiated by the majority: 1864, R. *v.* Johnston, 15 Ir. C. L. 82, per Deasy, Hughes, and Fitzgerald, BB., and Fitzgerald and Keogh, JJ., against Lefroy, C. J., Pigot, C. B., O'Brien and Ball, JJ.

already described in § C, *ante*, that the very putting of questions is improper and involves a compulsion. It is apparent how little this view is sanctioned by precedent; and it is difficult to see how the argument of Lefroy, C. J., that "questioning is not allowed, except in the way prescribed by the statute," can be accepted, unless we believe (as he does) that the statute introduces an exclusive method; but this view is expressly repudiated, as we have seen, by the *Sansome* decision; and the deduction of such a view from the mere spirit of the statute amounts to nothing less than an overturning of the common law without any express authority.]

§ H. **History of English Practice: (3) Confessions as Accused, under Oath, on Examination before a Magistrate.** [Under the statutory provisions of the 1500s, the examinations of the witnesses were to be upon oath, but of the accused without oath. This was construed (and not improperly) as a practical prohibition against putting an oath to the accused.[1] It might well follow that, if an oath was put, his examination under it should not be received; and as a matter of practice such an examination was always rejected.[2] But the reason was, not that there was anything fatal in the oath as such (as we shall see in the next section), but simply that the statute forbade the administration of the oath, and by implication prevented the admission of statements obtained in the way thus specifically forbidden. It was thus not the oath, but the specific statutory illegality of its application, that prevented the admission; for there was no method of enforcing the prohibition except by rejecting the statement so obtained.[3] This it is essential to keep in mind; for in the

[1] 1767, Buller, Trials at Nisi Prius, 242: "But the examination of the prisoner shall be without oath, and of the others upon oath." This passage is often cited for the statement that an examination of the accused on oath is inadmissible; but that is not its purport.

[2] 1817, R. *v.* Wilson, Holt N. P. 597, Richards, C. B. (statement on oath as accused before a magistrate); 1830, R. *v.* Haworth, 4 C. & P. 256, Parke, J., *semble* (examination on oath as accused before magistrate); 1831, R. *v.* Webb, ib. 564, Garrow, B. (examination on oath as accused before magistrate, excluded); 1833, R. *v.* Tubby, 5 id. 530, Vaughan, B. (same); 1833, R. *v.* Lewis, 6 id. 162, Gurney, B., *semble* (same); 1835, R. *v.* Rivers, 7 id. 177, Park, J. (same); 1838, R. *v.* Wheeley, 8 id. 250, Alderson, B. (same); 1838, R. *v.* Wheater, 2 Moody Cr. C. 45, 2 Lew. Cr. C. 157, *semble* (same); 1842, Joy, Confessions, 62. There are few decisions, simply because the inadmissibility was conceded.

[3] That this was the reason is clearly shown by the language of Lord Campbell, C. J., delivering the judgment of the Court (Coleridge, J., dissenting on another ground) in R. *v.* Scott, 1 D. & B. 47 (1856): "The first [objection] is that the examination of the defendant was taken after making a declaration tantamount to an oath, and that if on oath it would have been inadmissible. But in the case referred to in support of this objection the oath had been improperly administered without authority; and if the examination is taken under an oath administered by proper authority, there is no reason for saying that it is less likely to be true than if it had been without an oath or any similar solemnity." This is the explanation accepted in the following ruling, and in other American cases *post*, § K; 1878, Benedict, J., in U. S. *v.* Graff, 14 Blatch. 387: "I am aware that statements taken under oath, by committing magistrates of this State, are not admitted in evidence. But the statute of the State forbids the taking of statements under oath by committing magistrates, and by implication the use of such

controversy (dealt with in the next section) which arose as to the use of a mere witness' statements on oath, the fact that the statements of an accused person before a magistrate were admissible, if mere unsworn statements of the ordinary sort (as noted in § G), but inadmissible if sworn, seemed to many to furnish a strong analogy, and led them to the deduction that it was the oath as such which produced the difference of results.[4] It was not, in truth; but this misleading circumstance undoubtedly helped to create the opinion (*i. e.* adverse to receiving witness' statements) which for a time (as we see in the next section) threatened to prevail.]

§ I. **History of English Practice: (4) Confessions by a Witness upon Oath.** [This case presents the most difficult situation of the four, because it involves not only the effect of the oath as involving compulsion, but also the necessity of distinguishing the different bearings of compulsion as disapproved by confession-law and of compulsion as opprobrious to the privilege against self-crimination. That conflicting and confused views were from time to time put forth is not unnatural.

Remembering the results already reached — that, at common law (practically unquestioned until the 1800s and repeatedly maintained during the first half of the 1800s), neither the fact of custody nor the fact of magisterial examination in custody and without caution excluded a confession, and that the exclusion of a sworn examination was due solely to the statutory prohibition, — it is natural enough to find the judges, at the opening of this century, treating the confessions of a witness upon oath as not in themselves objectionable. Down to 1816 we find no exclusion. Between that time and 1840 we find a long and tangled series of rulings, representing conflicting views and furnishing a fruitful source of later misunderstanding.[1]

illegal statements as evidence is forbidden." In Wheater's Case, Lord Abinger had gone even further, and thought even such a statement admissible on principle; but his language at least adds to the proof that it was the illegality, and not the oath, which excluded: 1838, R. *v.* Wheater, 2 Moody Cr. C. 45, 2 Lew. Cr. C. 157, before all the judges, except Park, J., and Gurney, B.; Starkie, for the prosecution, conceded that "a prisoner's examination taken on oath is inadmissible;" and Lord Abinger, C. B., said: "I understand, if a prisoner's examination be on oath it shall not be received in evidence, without reference to a duress or threat; I see no reason for it; in principle, the answer may be quite voluntary;" the other judges expressed no opinion.

[4] Mr. Starkie's language may serve as a specimen of the misunderstanding which grew up about this rule: 1822, Starkie Evid. II, 38: "The prisoner is not to be examined upon oath, for this would be a species of duress, and a violation of the maxim that no one is bound to criminate himself."

[1] 1803, Collett *v.* Lord Keith, 4 Esp. 212, Le Blanc, J. (defendant a witness in a former cause; objected to as not voluntary; admitted); 1806, R. *v.* Walker, 6 C. & P. 162, Lord Ellenborough, C. J. (affidavit in Ecclesiastical Court; admitted); 1807, Smith *v.* Beadnall, 1 Camp. 30, Lord Ellenborough, C. J. (examination as witness before bankruptcy commissioners, upon questions, without caution or counsel, but without objection by him; admitted; he "is like any other witness called to give evidence by virtue of a subpœna; he speaks at the peril of the examination being turned against himself;" here the privilege of self-crimination did not exclude the use of the answer, because no claim was made for it); 1814, Stockfleth *v.* De Tastet, 4 id. 10, Lord Ellenborough, C. J. (examination as witness before bankruptcy commissioners;

Certain things, however, appear definitely enough, upon a careful examination in chronological order.

(1) In a great number of the excluding rulings, *i. e.* those cases where the witness had been examined before a coroner while in custody or under suspicion, the simple reason for the exclusion was that the witness' position was thought to be assimilated to that of an accused person, and thus the case came within the statutory prohibition (treated in the preceding section) against examinations of accused persons taken under oath.[2] It was not the oath, but the statutory prohibition, that excluded them. These rulings were the supposed

"if he was imposed upon when he signed it, or was under duress, he will not be bound by it," or if the examination was not lawful; but here it was assumed to be lawfully taken); 1816, R. *v.* Smith, 1 Stark. N. P. 242, Le Blanc, J. (examination on oath as witness before magistrate; rejected because on oath); 1818, R. *v.* Merceron, 2 id. 366, Abbott, J. (examination as witness before Commons Committee; objected to as therefore not voluntary, but admitted; afterwards said by Abbott, J., in 1 Moo. Cr. C. 203, not to have been taken on oath, and to have been admitted for that reason only; the Commons afterward disapproved of the ruling in a Resolution quoted in 2 C. & K. 483, note); 1828, Tucker *v.* Barrow, 7 B. & C. 624, Littledale, J. (examination as witness before bankruptcy commissioners; "I am disposed to say that an admission obtained under compulsory examination is not evidence of an account stated"); 1828, Robson *v.* Alexander, 1 Moo. & P. 448, Common Pleas (examination as witness before bankruptcy commissioners, without caution; claimed to have been taken in excess of authority; admitted; Lord Ellenborough's language in Stockfleth *v.* De Tastet adopted); 1830, R. *v.* Haworth, 4 C. & P. 255, Parke, J. (examination as witness for prosecution before magistrate; admitted; "he might as a witness have objected to answer any questions which might have a tendency to expose him to a criminal charge, and not having done so, his deposition is evidence against him"); *ante* 1830, *Anon., ex rel.* reporter, ib., note, Park, J. (examination as witness, before suspicion, by coroner; rejected); 1833, R. *v.* Tubby, 5 id. 530, Vaughan, B. (statement upon oath as witness, not suspected; admitted, "as no suspicion attached to the party at the time; the question is, Is it the statement of a prisoner upon oath? Clearly it is not, for he was not a prisoner at the time when he made it"); 1833, R. *v.* Lewis, 6 id. 161, Gurney, B. (examination as witness by magistrate, before suspicion, but witness committed at end of examination; Tubby's Case approved, but, this being taken "at the same time as all the other depositions on which she was committed, and on the very same day on which she was committed, I think it is not receivable; I do not think this examination was perfectly voluntary"); 1833, R. *v.* Davis, ib. 178, Gurney, B. (examination as witness before magistrate; excluded; "if, after having been a witness you make her a prisoner, nothing of what was then said can be admitted as evidence"); 1833, R. *v.* Britton, 1 Moo. & R. 297, Patteson and Alderson, JJ. (balance-sheet of bankrupt in civil proceedings offered to prove the petitioning creditor's debt on an indictment for concealing effects, etc.; objected to as having been made on oath; excluded for other reasons, Patteson, J., explaining in 1 Moo. Cr. C. 51, that the above objection was not approved by him); 1838, R. *v.* Wheeley, 8 C. & P. 250, Alderson, B. (examination before coroner, as a witness, but under arrest; excluded); 1839, R. *v.* Owen, 9 id. 84, Williams, J. (examination as witness before coroner, but under arrest; on Wheeley's Case being cited, "since that, there has been a reaction in opinion (if I may be allowed the expression);" admitted); 1840, same case, postponed, ib. 238, before Gurney, B. ("I am not aware of any instance in which an examination on oath before a coroner or a magistrate has been admitted as evidence by the person making it; I have known depositions before magistrates, made by prisoners on oath, and they have been uniformly rejected;" after the *nisi prius* ruling in Wheater's Case, *post*, he admitted its conflict, but still excluded the evidence).

[2] Such is the explanation of the following cases: Lewis', Davis', Wheeley's, and perhaps Owen's before Gurney, B. In Tubby's Case and Owen's Case before Williams, J., the admission amounted to saying that the prohibition applied strictly to persons then charged as accused, and to no others.

foundation of the Selden theory of mental agitation (described *ante*, § D); but it will easily be seen, in the light of the law of the times, how far these judges were from proceeding upon any such far-fetched and unprecedented theory. It has no foundation whatever in these rulings; and the circumstance of suspicion or of custody was material in their minds merely as bringing the person within the statutory prohibition, and not as producing mental disturbance; as is also seen from the fact that these same judges were accepting at the same time the confessions of persons in custody or on examination without oath before a magistrate (*ante*, §§ F, G). The Selden theory, then (the third of the spurious forms, described *ante*, § D), has no support in the extremest rulings of this period.

(2) It is clear, secondly, that the second spurious form of theory (described *ante*, § C) had not then appeared at all; it is distinctly a modern notion, and is applied peculiarly to the case of an accused person questioned in custody.

(3) It appears, thirdly, that the first spurious form of test (described *ante*, § B, as the "common form") had made its appearance and gained some headway. The theory of this test — so far as any was offered — was that the oath involved a compulsion, and a compulsory disclosure was inadmissible. Now (*a*) this theory, in its broadest and most sweeping form, regards the oath as necessarily involving a compulsion, and ignores the choice which the witness has to use his privilege and decline to answer; by this theory, the mere fact of the administration of the oath, in spite of the giving of a caution, excludes his statements.[3] But (*b*) in this form it was disowned by the greater number of judges in these rulings;[4] for, as was pointed out, the witness had a choice between disclosing and keeping silent; in the words of Parke, J., "he might as a witness have objected to answer any questions which might have a tendency to expose him to a criminal charge; and not having done so," there was no compulsion. But the significance of this answer (*b*) is that it accepts the principle of (*a*), but denies the propriety of its application; *i. e.*, it concedes that an answer actually compelled from the witness would be inadmissible, but it denies that there is in truth any compulsion in such cases. Thus, of course, this theory (more liberal though it is than the first) contains within itself the germ of a further difference of opinion; *i. e.* (*b'*) one attitude prefers, as the test of compulsion, to ask whether there was *de facto* in the specific case a feeling of compulsion, — in other words, to take the subjective standard

[3] Such seems to be the notion in the following cases of the preceding list: Smith's (introducing the doctrine), Merceron's, Tucker *v.* Barrow, Anon., and perhaps Owen's before Gurney, B.; see its theory fully stated in the quotation from Jackson *v.* State, *ante*, § B.

[4] Such were the following cases: Collett *v.* Keith, Walker's, Smith *v.* Beadnall, Stockfleth *v.* De Tastet, Robson *v.* Alexander, Haworth's, Tubby's, Britton's, and Owen's before Williams, J.

of the witness; while (*b''*) the other prefers, as its test, to ask whether the law actually used compulsion, — in other words, to take an objective or external standard. The practical effect of the former attitude is seen in rulings which hold that unless the witness appears clearly to have known of his privilege he must be supposed to have thought himself compelled to answer;[5] while the practical effect of the latter attitude is seen in rulings which hold that his answer will be supposed to be voluntary unless it clearly appears that he was compelled to answer after a refusal under claim of privilege.[6] Now, reverting to the English rulings of Parke, J., and others just mentioned, it is clear that, so far as any of them go upon this principle (*b*) at all, they adopt the more liberal form just described as (*b''*). Thus, in none of them does it appear that a caution was given or that the witness was otherwise informed of his rights, while in *Smith* v. *Beadnall*, *Stockfleth* v. *De Tastet*, and *R.* v. *Haworth* it clearly appears that the Court thought he should have expressly claimed and been refused his right in order to make the answer really compulsory.[7]

The majority of these rulings, then, in this period (those named in note 4, *ante*), at least repudiate the principle (*a*) and adopt the more liberal one (*b''*). But a little reflection will show that they were not impossibly proceeding upon a still more liberal principle, which we may designate as (*c*), — in short, the orthodox one, already described in § A. This principle is that a compelled confession is not necessarily and *ipso facto* a false one, and that therefore, in the absence of any threat or promise tending to produce an untruth, the mere fact that the answer was compelled — *i. e.* in spite of his express refusal and wish not to answer — does not exclude it. Now it is impossible to tell, in these cases just dealt with (*Stockfleth* v. *De Tastet*, *Britton's*, *Haworth's*, and the others in that list), whether they proceed on this principle (*c*) or on the preceding one (*b''*); and the reason for this ambiguity is an important one; it is that, though it was conceded that answers ordered in spite of a claim of privilege against self-crimination would have been inadmissible, the violation

[5] This again offers further opportunity for distinctions; for some Courts are satisfied with nothing short of a caution from the judge, while others are satisfied if the witness was warned or presumably warned by counsel, — a distinction illustrated in the American cases *post*.

[6] In other words, the witness' ignorance of his choice either will not be assumed or will be treated as his own loss, — an attitude illustrated in State *v.* Vaigneur, quoted *ante*, § B, note.

[7] This was treated by Mr. Joy as the better and prevailing principle of his time: 1842, Joy, Confessions, 62: "A statement, not compulsory, made by a party not at the time a prisoner under a criminal charge, is admissible in evidence against him, although it is made upon oath. There are conflicting opinions of judges at *nisi prius* on this point, but the proposition appears to be established by high authority. The principle seems to be that the party in his capacity as witness might refuse to answer any question that has a tendency to expose him to a criminal charge; any statement, therefore, which he makes is a free and voluntary statement and is receivable in evidence."

of the privilege would be a sufficient ground for their rejection. An answer ordered in spite of a legitimate claim of privilege is rejected because that is the significance of the privilege, which otherwise would amount to nothing;[8] and this would amply suffice to justify such an exclusion without any reference to the law about confessions. It is thus obvious that, when we are trying to discover the principle on which the judges acted in such cases, there is just one situation which will inevitably disclose it, — one situation in which no lawful privilege against self-crimination is violated, and in which, therefore, if a confession is ordered after an expressed desire not to answer, the exclusion of that answer must mean the adoption of the confession-principle (*b*) above, while the admission of the answer must mean the rejection of that confession-principle and the adoption of the principle (*c*). That situation occurs when the privilege against self-crimination is abolished by the Legislature (as it may be in England) for a certain class of cases, and a witness is thus no longer entitled to refuse to answer; if then he is ordered, after protest, to answer a question involving an avowal of guilt, and that answer is offered against him in a subsequent case, a question is squarely presented which necessarily involves the adoption of either one or the other of the above principles for such confessions. But that peculiar situation had not at this time presented itself; and that is the significance of this period and this series of rulings; some things had apparently been settled — for instance, that principle (*b*) would prevail against principle (*a*), — but the important question whether principle (*c*) — *i. e.* the orthodox theory of confessions — should prevail over both the others had not been answered.

Nor did a clear answer come for nearly twenty years. The first opportunity presented itself in 1838, in *Wheater's Case;*[9] here the

[8] 1856, R. *v.* Scott, 1 D. & B. 47, before Lord Campbell, C. J., and four others; Lord Campbell, C. J.: "Where evidence is unlawfully obtained, and the witness objects, no doubt it cannot be admitted."

[9] 1838, R. *v.* Wheater, 2 Moo. Cr. C. 45, 2 Lew. Cr. C. 157, before all the judges except Park, J., and Gurney, B.; an examination before bankruptcy commissioners as to certain bills of exchange, after the committing magistrate had refused to hold him on a charge of forging them; the counsel had informed him of his privilege, and where he claimed it, an answer was not forced; other objections were overruled, and he was compelled to answer in those cases; Dundas, for the accused: "The evidence was inadmissible, inasmuch as it was a compulsory answer upon oath. . . . When therefore it is recollected that the prisoner himself considered that he was compelled to answer, and that his objections, however erroneous they might have been, had been overruled, can it be said that his examination was voluntary? It is submitted that he was under duress, his mind disturbed by the extraordinary situation in which he found himself placed, and called on in the midst of these trying circumstances to weigh and consider the nature of each question and the consequences of his answers; and if so, the law cannot estimate the exact degree of influence of the duress upon the human mind. . . . I submit, therefore, on these grounds, — first, that the examination was in its nature compulsory, and likely to operate so as to disturb the mind of the prisoner; and, secondly, that it was an examination upon oath, — that the evidence was inadmissible." "The judges present were all of opinion that the evidence was properly received, and the conviction was good, except Lord Abinger, C. B., and Littledale, J."

argument of counsel presented the question squarely enough; but, as no opinion was published, the exact principle of the decision remained undisclosed. One thing is clear from it, that the Selden theory of mental agitation (*ante*, § D; here advanced by the counsel Dundas) was again and permanently repudiated for England; but, though we may well infer that the principle (*c*), *supra*, was the controlling reason, yet principle (*b''*) would suffice on the facts to account for the admission, since the specific answers accepted had not been objected to on the score of privilege, *i. e.* as the witness had not chosen to refuse when he might have done so, the answers must be taken to have been voluntary. The next opportunity offered in 1847, in *Garbett's Case*;[10] but here the answer was obtained by an unlawful violation of privilege, and that alone would suffice to exclude it, and seems to have been the reason for exclusion; the only indication to the contrary being the use of the ambiguous word "compulsion" in the reporter's brief statement of the opinion. A third opportunity seemed to present itself in *R.* v. *Sloggett*, in 1856,[11] but here, too, the important question was not settled, since the witness (it was held) might have refused to answer, and, since he did not, was treated as acting voluntarily. But the ruling at least enforces the principle (*b''*) in its most liberal extent.

Meantime, in the same year, but by different judges (except one),

[10] 1847, R. *v.* Garbett, 2 C. & K. 474, 1 Den. Cr. C. 262, 2 Cox Cr. 448, before the fifteen judges; examination as witness in a civil suit, the Court having told him, after his declining to answer, that he must answer; Chambers, for the defence, argued that "in the present case, the impression on the mind of the witness was that he must answer, and that after trying to evade the questions and to exert his privilege, and finding both hopeless, he made the confession" under compulsion; Martin, for the prosecution, was asked by Parke, B.: "If a judge was clearly wrong, — as, if he said to a witness, 'Did you commit that murder?' and added, 'I will commit you if you do not answer,' and the witness then confessed it, — would that confession be afterwards receivable?" and answered: "I should say it would. . . . I submit that if the witness does answer, there is no rule to exclude what he says from being evidence afterwards;" nine of the judges were for excluding the evidence on the ground that, where a witness is obliged to answer, notwithstanding a lawful claim of privilege, "what he says must be considered to have been obtained by compulsion;" and six were for receiving it, on various grounds unspecified. Two other individual rulings had intervened between this and Wheater's Case; but these are explainable also on principle (*b''*) and are not conclusive for principle (*c*): 1841, R. *v.* Sandys, C. & Mar. 345, Erskine, J. (examination as witness before coroner; received, and question reserved, but never decided); 1844, R. *v.* Goldshede, 1 C. & K. 657, Lord Denman, C. J. (answer in Chancery on oath as defendant; objected to as compulsory and upon oath; both arguments rejected and the answer received).

[11] 1856, R. *v.* Sloggett, 7 Cox Cr. C. 139, before Jervis, C. J., Coleridge, J., Creswell and Erle, JJ., and Martin, B.; examination as bankrupt on oath before bankruptcy commissioners, without claim of privilege against incrimination; at a certain stage he was told to consider himself in custody, and the examination up to that point was offered; whether the privilege was destroyed by the Bankruptcy Act, and compulsion to answer would therefore have been lawful in any case, was disputed by counsel; the judges unanimously held that the matters were covered by the privilege and hence his answers made without claim of privilege were voluntary and admissible; but whether, if the matters had not been privileged and he had been lawfully compelled after objection to answer, the answers would be inadmissible as not voluntary, was left undetermined, and was the question in the ensuing case of R. *v.* Scott.

the important question was being decided. In *R.* v. *Scott*[12] there was the fullest acceptance[13] of the principle (*c*) as the controlling and orthodox principle. It is true that as no claim of privilege was in fact made by the witness, the decision might have been reached without this; but if we are looking for the reasons regarded by judges as indicating the law and actually controlling their rulings, a full and deliberate expression of those reasons must be the highest evidence, even though the ruling might by possibility be reached without such an expression.[14] The language is so direct and clear that it must be quoted:[15] —

> Lord Campbell, C. J. (after declaring that, as for the oath in itself, "there is no reason for saying that it [the answer] is less likely to be true than if it had been without an oath or any similar solemnity"): "The next objection is that the examination was compulsory. It is a trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary; but this only means that it shall not be induced by improper threats or promises, because under such circumstances the party may have been influenced to say what is not true, and the supposed confession cannot be safely acted on. Such an objection cannot apply to . . . a lawful examination in the course of a judicial proceeding."

In short, mere compulsion in itself is nothing, so far as any confession-principle is concerned; for *that* is taken care of by the rule against being compelled to criminate one's self; an objection on that score alone must invoke that privilege, and the question then arises whether that privilege covers the case in hand, — a question which in the opinion above the judges next addressed themselves to, and which they treated as entirely distinct from any confession-question. For a correct understanding of the total separation between the two, and an antidote to the confusing expressions of a few modern English judges (e. g. *ante*, § C), a perusal of this opinion may be recommended.

The result, then, of *Scott's* and *Wheater's Cases* in England was: (1) that the Dundas-Selden theory of mental agitation was entirely

[12] 1856, R. *v.* Scott, 1 D. & B. 47, before Lord Campbell, C. J., Alderson, Coleridge, Willes, and Bramwell, JJ.; examination as bankrupt before Bankruptcy Court; the magistrate secured answers by threatening to commit (as he had a right to do under the Bankruptcy Act) for failing to answer completely; but no claim of privilege was made; the Act had abrogated the privilege for bankrupt's examinations; admitted.

[13] It is true that Coleridge, J., dissented, but this was on the ground (denied by the others) that the Bankruptcy Act had *not* abrogated the privilege against self-incrimination, and hence the answers were obtained by a violation of the privilege. On the other question, his well-known views leave us no reason to doubt that he agreed with his colleagues.

[14] The case is strengthened by the circumstance (above noted) that the magistrate had threatened to commit the witness (as he might lawfully) if he persisted in his refusal; this was properly explained by Lord Campbell as "merely an explanation of the enactment of the legislature upon the subject."

[15] Quoted more fully *ante*, § B.

repudiated; (2) that as between the theories (*a*) and (*b*), *ante*, the former was equally repudiated, and the liberal form of (*b'*) was the only one that could by possibility be maintainable; (3) while by *Scott's Case* the orthodox theory (*c*) was given the deliberate sanction of at least one English Court.

Since that time (1856) *Scott's Case* has been repeatedly treated as law in England,[16] though no Court of last resort has affirmed it, and though (as might be expected from the tendency shown *ante*, § C) it is regarded as not satisfactory by some English judges.

The lessons to be drawn as to our own use of the English precedents are three: (1) that it is impossible to use them indiscriminately and measure them by mere numbers; they mean little apart from the principle controlling the Court or the judge that makes them; (2) that whatever principle is selected should be logically and consistently carried out; and (3) that all the doubts and confusion are of comparatively recent creation, and that the orthodox and settled practice of the early 1800s entertained no doubts upon any of the four classes of situations we have been considering, and treated them as amenable to exactly the same tests as confessions of any other sort, except that a statement on oath as accused before a magistrate was excluded because of the implied statutory prohibition.]

§ J. **Rulings in the United States: (1) Confessions made under Arrest.** [In this country, the orthodox English and Irish doctrine declining to consider the mere fact of arrest as sufficient to exclude a confession has been universally accepted.[1] It is to be noted that of course this result could not be reached under a strict and logical application of the Selden theory of mental agitation (and such confessions were thus expressly declared inadmissible by him in the *McMahon Case*, *post*, and by the dissenting Irish judges in *Johnston's Case*, *ante*); but to-day (as we shall see) that theory is nowhere allowed to have this natural and consistent effect.]

§ K. **Same: (2), (3), and (4); Confessions made as Accused before a Magistrate with or without Oath or as a Witness on the Stand.** [Owing to the confused application of the various competing princi-

[16] 1859, Skeen's Case, Bell Cr. C. 97, 127, 129 (R. *v.* Scott treated by the minority of the judges as perhaps not unimpeachable); 1867, R. *v.* Robinson, L. R. 1 Cr. C. R. 80 (examination as witness before bankruptcy commissioners; no caution and no claim of privilege; the answers were compellable and without privilege; three judges declared R. *v.* Scott to be the law, and two decided upon other grounds); 1872, R. *v.* Widdop, 2 id. 3 (same; R. *v.* Scott followed by all five judges, though the reasons of Kelly, C. B., were perhaps peculiar); 1896, R. *v.* Erdheim, 2 Q. B. 260, 267 (bankrupt's examination on oath, admissible; following R. *v.* Scott). The indications of its sanction in Ireland are doubtful; 1857, R. *v.* McHugh, 7 Cox Cr. 483 (information on oath as witness, while under arrest as a joint accused; the magistrate thought that the informant was to turn Crown witness; excluded, partly because the informant was not cautioned as an accused); 1866, R. *v.* Gillis, 11 id. 69 (statement as witness to magistrate; O'Hagan, J., all the judges agreeing or not dissenting: "I do not consider the fact of their being made on oath would render the informations inadmissible, provided they were made voluntarily and spontaneously").

[1] [Except by statute in Texas; see the authorities cited *ante*, § 220 *c*, note 3.]

ples, it is here useless to treat the several situations separately, and the rulings have therefore been arranged according to jurisdictions. Those of New York have been placed first and liberally quoted from, because the comparatively early promulgation there of the Selden theory in the *Hendrickson* and *McMahon Cases*, and its repudiation in the *Teachout Case*, greatly influenced the discussion in the other jurisdictions, in most of which the controversy is comparatively recent, — a further testimony, perhaps, to the unnaturalness and heterodoxy (shown by the early English practice) of any controversy at all. No attempt is made to label in detail or to comment upon the exact variety of principle which a given ruling represents, because a comparison of it with the preceding discussion of the English cases will show where it stands, — so far as that may be ascertainable.[1] It

[1] Where no oath is mentioned, it is understood that the statement was not on oath. The term "magistrate" means the committing judge, not including the coroner. The list of cases is, no doubt, not complete. *New York:* 1854, Hendrickson *v.* People, 10 N. Y. 13; examination as witness before coroner, not under suspicion or charge, but not cautioned; admitted; Parker, J.: "I do not see how, upon principle, the evidence of a witness, not in custody and not charged with crime, taken either on a coroner's inquest or before a committing magistrate, could be rejected. It ought not to be excluded on the ground that it was taken upon oath. The evidence is certainly none the less reliable because taken under the solemnity of an oath. . . . Nor can the exclusion of the evidence depend on the question whether there was any suspicion of the guilt of the witness lurking in the heart of any person at the time the testimony was taken; that would be the most dangerous of all tests, as well because of the readiness with which proof of such suspicion might be secured, as of the impossibility of refuting it. . . . The witness may refuse to answer, and his answers are to be deemed voluntary unless he is compelled to answer after having declined to do so; in the latter case only will they be deemed compulsory and excluded;" Selden, J. (language already quoted, *ante*, § D), dissented solely on the ground that the testimony was given under suspicion; Gardiner, C. J., thought that on the facts the examination had been purely in the character of a witness, but would have excluded his oath as unlawful, had he been substantially an accused person; the majority conceded that an examination on oath as accused before a magistrate would have been inadmissible, because the putting an oath to the accused was forbidden by the statute; 1857, People *v.* McMahon, 15 id. 384 (the Court's membership having almost entirely changed); examination as witness before coroner, but in custody without warrant, charged as the offender, rejected; Selden, J.: "[The word 'voluntary' in judicial examinations means] proceeding from the spontaneous suggestion of the party's own mind, free from the influence of any disturbing cause. . . . It is considered that a judicial oath, administered when the mind is disturbed and agitated by a criminal charge, may have that effect [of preventing free and voluntary mental action], and hence the exclusion. . . . [Hence, such an examination under oath is not to be rejected] unless that oath was administered in the course of some judicial inquiry in regard to the crime itself for which the prisoner is on trial; . . . [while it is also necessarily admissible] if at the time it was made the prisoner was not himself resting under any charge or suspicion of having committed the crime;" as for examinations of accused persons on oath, Selden, J., for the Court, adopts the theory "that the evidence is too uncertain to be safely relied upon," and rejects the theory that "a mere arbitrary rule, which prohibits magistrates from taking the examination of prisoners charged with crime upon oath, has been violated;" 1869, Teachout *v.* People, 41 id. 7; examination as witness before coroner, while under suspicion and after notice of probable arrest; a caution being given by the coroner, held by the majority, per Woodruff, J., that the single fact that the witness was under suspicion was not sufficient to exclude the testimony, expressly repudiating the reasoning of McMahon's Case and the dictum therein as to the effect of suspicion (language quoted *ante*, § D), but holding that "declarations made under the influence of a charge of guilt, under actual arrest or under examination with such a charge impending, should

will be noticed that, through the influence of the Selden theory, mere exculpative statements are often improperly treated as confessions; this fallacy has been already explained *ante*, § 213.]

be excluded, except where a careful obedience to the statutory precautions is observed;" thus adopting the English theory of statutory prohibition as the basis of that exclusion, though taking a liberal view of the cases coming within its application, like the rulings *ante* in § 1; Grover and Lott, JJ., dissenting, following McMahon's Case and its theory; 1878, Abbott *v.* People, 75 id. 602; schedules put in by the debtor in bankruptcy proceedings; admitted; 1883, People *v.* McGloin, 91 id. 242; examination under oath before a coroner while under arrest charged with the crime in question, the coroner having been summoned to the police station and not acting officially; the conflicting theories of the preceding rulings were mentioned, and it was held (1) that the fact of the oath having been administered was not illegal so as to exclude; since only examinations taken under the statute could be so objected to, and this was not under it, and (2) that the examination was not compulsory, the theory of McMahon's Case being thus impliedly repudiated; (3) that under the Code of Criminal Procedure of 1881, § 395, "a confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney that he shall not be prosecuted therefor," the confession was equally admissible; 1886, People *v.* Mondon, 103 id. 213; examination on oath before coroner, under arrest without a warrant, on suspicion of the crime in question; without counsel, not cautioned, excluded on the authority of McMahon's Case, and the Code provision above held (overturning McGloin's Case) "not to apply to any but voluntary confessions, nor to change the statutory rules relating to the examination of prisoners charged with crime;" "the mere fact that at the time of his examination he was aware that a crime was suspected, and that he was suspected of being the criminal, will not prevent his being regarded as a mere witness," and his testimony may be used; but "if he is in custody as the supposed criminal, he is not regarded merely as a witness, but as a party accused," and the examination is excluded, unless in conformity with the statute as to preliminary examinations; 1890, People *v.* Chapleau, 121 id. 266; examination at his own request, while in custody, before the coroner, after a caution; the preceding cases were reviewed and treated as harmonious, (!) and the examination admitted as being "in all respects and however viewed, the voluntary and uninfluenced statements of the individual;" no solution of the difficulties being offered, except, perhaps, that the voluntariness of the confession, in view of "their nature and the circumstances under which made," is to be the final test in each case; 1892, People *v.* Wright, 136 id. 625, 632, examination before coroner, received; following the Chapleau Case. As a result of this series of decisions it may be said: (1) that the theory of statutory prohibition as the reason for excluding the examination of accused persons on oath has been clearly recognized in all the cases except McMahon's; (2) that apart from this nothing has been clearly settled; (3) that by the Mondon decision a coach and four has been driven through the Penal Code, which was intended to settle the controversy and was so taken in the McGloin Case, and which (if properly and naturally interpreted) accepts fully the orthodox principle of Scott's Case in England; (4) that it is entirely impossible to tell what the next decision will be, not merely because the Court has changed its principles so often, but (more than all) because in the latest cases it ignores the irreconcilable conflict in its own precedents and treats them as harmonious, — a complaisant attitude which is found in no other Court dealing with them.

Alabama: 1852, Seaborn *v.* State, 20 Ala. 15, 17 (examination as accused before magistrate, without caution; admitted, because voluntary upon the facts); 1875, Sampson *v.* State, 54 id. 241, 243 (statement as accused on examination before magistrate, admitted); 1882, Kelly *v.* State, 72 id. 244 (statement on examination before magistrate, after questioning; inadmissible "unless a prisoner comprehends his rights fully, and is informed by the Court" that a refusal to answer is lawful and will not be taken against him; also partly because no questioning by the magistrate was expressly authorized by statute; preceding cases ignored); 1896, Wilson *v.* State, 110 id. 1 (sworn as witness before a coroner, not charged or arrested, but suspected; excluded, apparently on the theory that the oath involved compulsion); *California:* 1873, People *v.* Kelley, 47 Cal. 125 (examination under oath before magistrate as accused;

admitted, as voluntary; distinguishing People *v.* Gibbons, 43 id. 551 (1872), because under the statute at that time (since changed) such examinations upon oath were unlawful; "if his voluntary, unsworn statement may be proved against him as a confession, his voluntary testimony under oath, given in a proceeding in which he elects and is authorized to testify, ought to stand upon at least as favorable a footing"); 1881, People *v.* Taylor, 59 id. 650 (examination as accused before coroner, apparently on oath; admitted, since "T. could not have been compelled to testify; . . . the statement having been voluntary, the evidence was admissible, whether made in a judicial proceeding or any other"); 1893, People *v.* Weiger, 100 id. 352, 357 (defendant's examination on oath, when cited in his own voluntary proceedings in insolvency, admitted); *Colorado:* 1894, Torris *v.* People, 19 Colo. 438 (affidavits to procure witnesses, voluntarily made by defendant, received); *Florida:* 1892, Ortiz *v.* State, 30 Fla. 256, 283 (examination as accused on oath at trial by his own offer, admissible); 1895, Jenkins *v.* State, 35 id. 737 (before grand jury; the caution had been given as to his privilege, but he was told he was under suspicion; admitted); 1898, Green *v.* State, id., 24 So. 537 (plea of guilty before magistrate, after warning, admitted); *Georgia:* 1875, Cicero *v.* State, 54 Ga. 156 (examination as accused before magistrate; excluded, because the magistrate put questions to get contradictory statements); *Indiana:* 1866, Anderson *v.* State, 26 Ind. 89 (examination as witness in another cause; admitted as voluntary); 1893, Davidson *v.* State, 135 id. 254, 260 (statements "voluntarily" made and signed at inquest as witness, admitted); *Iowa:* 1886, State *v.* Briggs, 68 Ia. 416, 424 (plea of guilty on preliminary examination; admitted, even though not told by magistrate of his right to counsel); 1892, State *v.* Carroll, 85 id. 1 (testifying before grand jury as witness, while under arrest on the charge; caution by foreman; admitted); 1892, State *v.* Clifford, 86 id. 550, 551 (under arrest and examined on oath as accused before grand jury, without warning; excluded); 1897, State *v.* Van Tassel, 103 id. 6 (voluntary appearance at the inquest, admitted); *Kansas:* 1893, State *v.* Sorton, 52 Kan. 531, 539 (preliminary examiuation as defendant on oath, received); *Louisiana:* 1873, State *v.* Garvey, 25 La. An. 191 (examination as witness before coroner, while under arrest on a charge of the crime, but made at his own request; excluded, because made as an accused); *Maine:* 1862, State *v.* Gilman, 51 Me. 206 (examination as witness on oath before coroner, after knowledge of suspicion, but a caution was given; admitted, because the statements were voluntary, "the manifestation of his own free will;" quoted *ante*, § B); 1873, State *v.* Bowe, 62 id. 174 (plea of guilty before the lower Court; admitted, as not appearing to have been obtained "by threats or promises"); *Massachusetts:* 1838, Faunce *v.* Gray, 21 Pick. 245 (admissions by an administrator in a civil examination on oath, admitted; the fact that it was made on oath, held immaterial; quoted *ante*, § A); 1855, Judd *v.* Gibbs, 3 Gray 539, 543 (examination of an insolvent before commissioners, admitted; but his oath taken not as a part of the examination, excluded, apparently because it could not be used as against the preseut parties); 1857, Com. *v.* King, 8 id. 503 (examination as witness at fire inquest; no caution; admitted; whether caution was essential, was expressly not decided); 1866, Com. *v.* Lannan, 13 All. 563, 569 (special plea in bar, held bad by the Court below; not admitted, chiefly because drawn by the attorney, and thus inadmissible by statute); 1877, Com. *v.* Reynolds, 122 Mass. 455, 458 (examination as defendant at a former trial of the same charge; admitted, because "they were voluntary . . . and it is immaterial when or where they were made"); 1896, Com *v.* Wesley, 140 id. 248, 252 (testimony of the defendant at an inquest, sworn, but not summoned, and warned; admitted, as "appearing to have been made voluntarily, and not under threat or duress or in consequence of any inducement"); 1897, Com. *v.* Hunton, 168 id. 130 (testimony before an investigating committee at the City Hall, admitted); *Mississippi:* 1860, Josephine *v.* State, 39 Miss. 626, 650 (examination as witness on the trial of another person for the same charge; excluded); 1879, Jackson *v.* State, 56 id. 312 (examination as witness on the trial of another person jointly indicted for the same offence, after a caution; excluded, because the oath itself involves a compulsion); 1897, Ford *v.* State, id., 21 So. 524 (a thirteen-year old negro boy, sworn as defendant on a preliminary examination, without caution; excluded); *Missouri:* 1859, State *v.* Lamb, 28 Mo. 218, 228 (examination as accused before magistrate, after caution; admitted); 1893, State *v.* Young, 119 id. 495, 507, 517 (ignorant German boy, under suspicion, summoned as witness before coroner, and examined on oath without warning; excluded); 1894, State *v.* Wisdom, ib. 539, 546, 551 (accused under arrest, on oath, before the coroner, but of his own motion; admitted; the fact of oath is immaterial; the test is whether the statement was voluntary); 1895, State *v.* David, 131 id.

380 (the witness attended the inquest voluntarily and testified without subpœna ; admitted) ; 1896, State *v.* Punshon, 133 id. 44 (accused before the coroner on oath, after caution, but under a promise that the statements would not be used against him ; admitted) ; *Montana :* 1896, State *v.* O'Brien, 18 Mont. 1 (testimony before coroner, in what capacity does not appear, but without caution ; excluded) ; *New Hampshire :* 1814, Wood *v.* Weld, Smith N. H. 367 (answers on oath by the defendant to interrogatories put by an administrator in a Court of Probate on a complaint for concealing the intestate's goods, received in an action between the same parties for money had and received, covering the same concealment of goods ; notes of Smith, C. J. : "What hardship is it to be obliged to tell the truth ? No means used to produce anything but the truth") ; 1863, Carr *v.* Griffin, 44 N. H. 510 (deposition irregularly taken ; not inadmissible as involuntary) ; *New York :* see *supra*, at the beginning of the list ; *North Carolina :* 1846, State *v.* Broughton, 7 Ired. 96 (examination as witness before grand jury ; held inadmissible, if it had involved a confession, as within the spirit of the statutes against imposing oaths on accused persons, "because the statute intended to have the party free to admit or deny his guilt, and the oath deprives him of that freedom") ; 1847, State *v.* Cowan, ib. 239 (examination as accused before a magistrate, without oath, after a caution ; admitted, as "free and voluntary," though the magistrate warned him that he would be committed unless he accounted for his possession of the stolen property) ; 1873, State *v.* Patterson, 68 N. C. 292 (examination as accused before magistrate, without oath, but after caution, the caution not being as full as the statute prescribed ; admitted) ; 1893, State *v.* Rogers, 112 id. 874, 876 (accused on oath at preliminary examination, after warning, admitted ; warning need not be in words of statute ; shackling of the accused not in itself fatal) ; 1893, State *v.* De Graff, 113 id. 688, 693 (accused on oath before magistrate, after warning, admitted) ; 1897, State *v.* Melton, 120 id. 591 (accused at preliminary examination, after asking to testify and being cautioned ; admitted) ; *Oregon :* 1896, State *v.* Hatcher, 29 Or. 309 (defendant before magistrate, without caution ; excluded, because by statute, § 1958, the caution is required) ; 1897, State *v.* Robinson, id., 48 Pac. 357 (before the grand jury, in what capacity not stated, but voluntary ; admitted) ; *Pennsylvania :* 1846, Com. *v.* Harman, 4 Pa. St. 269 (examination upon oath as accused before magistrate, without caution, and under threats and promises ; excluded, as "a gross outrage upon the accused") ; 1857, Williams *v.* Com., 29 Pa. 102, 105 (examination as witness before coroner, not suspected nor charged ; admitted, because "he might have declined to testify," and it thus "was a voluntary statement") ; 1890, Com. *v.* Clark, 130 id. 641, 650 (examination on oath before magistrate (but not under the statute) after a caution, while under arrest on the charge ; the accused said "he was making it of his own free will ;" admitted, as a voluntary statement ; the fact of the oath being improperly administered was held immaterial) ; *South Carolina :* 1852, State *v.* Vaigneur, 5 Rich. L. 395, 402 (examination as witness before coroner, not arrested nor suspected, and not cautioned, but arrested after his testimony ; admitted, because he might have refused to answer ; quoted *ante*, § B) ; 1879, State *v.* Branham, 13 S. C. 389 (examination before magistrate as accused, without caution ; admitted) ; *Tennessee :* 1875, Beggarly *v.* State, 8 Baxt. 521, 525 (examination before magistrate, after caution ; admitted, because he was "not so intimidated as to prevent his acting freely") ; *Texas :* 1874, Alston *v.* State, 41 Tex. 40 (examination before magistrate on a charge against another person, not arrested and not cautioned, but knowing herself to be suspected ; admitted, because voluntary upon the facts) ; 1894, Bell *v.* State, 33 Tex. Cr. 163 (former testimony in a civil case, admitted) ; *United States Courts :* 1878, U. S. *v.* Graff, 14 Blatch. 381, 385 (examination under oath before a special agent of the Treasury Department, the witness having been notified that he was suspected and having consented to be examined ; admitted, on the grounds that (1) mere suspicion or charge of crime is not sufficient to exclude (repudiating McMahon's Case) ; (2) mere arrest is not sufficient ; (3) mere administration of an oath is not sufficient ; (4) all three together are not sufficient ; quoted *ante*, §§ B, D, F) ; 1896, Wilson *v.* U. S., 162 U. S. 613 (accused, without oath, but not warned nor furnished with counsel ; admitted ; the result being partly based on the distinction that the statements were not confessions of guilt, but exculpatory assertions) ; *Utah :* 1886, U. S. *v.* Kirkwood, 5 Utah 124, 127 (examination as witness before grand jury investigating the charge against him ; his appearance was voluntary, and he was cautioned ; admitted ; "if of his own choice, after being warned, he takes an oath which the law provides that he may take, and makes a confession, we are unable to understand why such a confession is not as voluntary as if made not under oath ; it certainly is as reliable, for the obligations of an oath are usually an incentive to speak the truth") ;

Virginia: 1830, Moore *v.* Com., 2 Leigh 702, 704 (examination as accused before magistrate; admitted, because no threats or promises were made); *Washington:* 1895, State *v.* Hopkins, 13 Wash. 5 (testimony at a civil trial as then defendant, admitted); *West Virginia:* 1893, State *v.* Hobbs, 37 W. Va. 812, 818 (statements to coroner before swearing witnesses, admitted); *Wisconsin:* 1854, Schoeffler *v.* State, 3 Wis. 823, 839 (examination before coroner as witness, while under suspicion, and without caution; admitted, because voluntary; (1) the oath not excluding, (2) the suspicion not excluding, (3) the absence of a caution not excluding, because "ignorance of the law is no excuse;" (4) a possible exception reserved for a witness so circumstanced that his position was "equivalent to an actual arrest;" (5) examination on oath as accused before magistrate conceded to be inadmissible); 1879, Dickerson *v.* State, 48 id. 288 (examination as witness before magistrate on a charge against another person, but while under arrest on suspicion of complicity; admitted, as voluntary).

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